Investment certainty under the Resource Management Act 1991

A DISCUSSION PAPER

March 1994

MINISTRY FOR THE ENVIRONMENT
MANATŪ MŌ TE TAIAO

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Foreword

The Resource Management Act 1991 came into force on 1 October 1991. It consolidated many existing laws related to natural and physical resources and introduced the over-arching principle of the promotion of sustainable management in New Zealand.

The Act requires local authorities to have regard to the costs of environmental protection and to the efficiency and effectiveness of the methods they use. The Government is concerned to see that this is carried through into practice, as it has the potential to provide greater certainty for investors than was the case with the previous legislation.

During 1993 the issue of certainty for investment under the Resource Management Act was raised from several quarters. The Ministry for the Environment has responded to these issues as they have arisen. Meetings have been held separately with representatives from the Aquaculture Federation, the forestry industry, Federated Farmers and others to discuss their concerns.

The Ministry considered it would be useful to commission an independent report on the opportunities and constraints that the Act offers for investors. It sought a view on what issues required a response either by way of statutory amendment or by way of advice. Bell Gully Buddle Weir, Barristers and Solicitors was chosen to undertake this review because of its client base and its experience of the Act.

The report "Toward Investment Certainty" (on pages 9–35) is a legal analysis only. It covers some, but by no means all, of the Resource Management Act related investment issues. The Government believes that this report will be of interest to investors and other users of the Resource Management Act. Local government will also find the issues of relevance when drafting its plans.

Investment certainty is part of the ongoing monitoring work of the Ministry. The report should be seen as part of this work. Feedback is welcomed on the issues and the recommendations contained in the report. The Ministry is interested in the range of experience users are having with the Act and, not least, the smaller investor.

Any comments on the issues covered in the report or any other investment issues under the Resource Management Act should be sent to the Manager, Resource Management Directorate, Ministry for the Environment, PO Box 10362, Wellington, by 31 May 1994.

Improvements in practice, rather than legislative change, are also important. To this end, the Ministry has prepared the checklists on pages 6–8 which summarise the main messages that have emerged from the work to date on investment certainty.

Checklist for the Ministry for the Environment

- Monitor the implementation of the Act to ensure that it does not give rise to unnecessary costs or uncertainty for investors.
- Continue the peer review, educative and statutory involvement in the development of plans and policy statements.
- Monitor and assess the need for regional rules to override existing use rights.
- Consider the need for an amendment to the Act to require the consideration of existing capital investment and infrastructure of any renewal consent.
- Consider a possible amendment to the Act to ensure that present consent holders have the first option to apply for a new consent.
- Monitor the practice of councils in terms of the number of conditions required.
- Continue to advocate matters of national significance.
- Continue the development of national environmental standards.
- Continue to monitor section 36 charges, including producing a discussion paper, and look at the need to provide an appeal provision.
- Investigate the information requirements of councils and provide guidance as to the range of information required.
- Monitor the practice of councils toward non-notification.
- Monitor any applications for enforcement orders or abatement notices made against "innocent" landowners.
- Continue to meet with user groups such as the New Zealand Forest Owners Association, marine farmers, Federated Farmers, ECNZ etc. to discuss any perceived problems in the law or practice.

Checklist for councils

- Consider if the objectives and policies developed in the plan are clear and provide sufficient certainty for investors.
- Have regard to the costs of environmental protection and to the efficiency and effectiveness of the methods used.
- Be aware of the areas of functional overlaps between regional and territorial authorities and indicate, where possible, how these shared responsibilities will be managed.
- Where councils have broad powers of discretion, provide, where possible, policies on how these discretions will be exercised.
- Councils need to be mindful and willing to consider alternatives to regulation when looking at methods to implement policies.
- Regional, district and city councils should consider including rules in plans permitting activities which are minor, trivial or of no general public concern.
- Councils are encouraged to look at what certainty they can practically give to long-term investors.
- In dealing with resource consents that have expired, continue to have regard to the existing capital investment and infrastructure and consider if this needs to be made explicit in policies and plans.
- Continue to recognise regional and national networks and make provision for these in plans.
- Councils need to provide guidance on the assessment of environmental effects and use the plans as a means of focusing applicants on the issues that need to be addressed.

Checklist for industry

- Be actively involved in the development of plans and policy statements to ensure that their concerns are adequately reflected.
- Network operators should seek a standardised framework for their networks among regional and district councils.
- Develop forms of self-regulation and codes of practice and discuss with the councils how these can be incorporated into plans.
- Continue a constructive dialogue with both local authorities and the Ministry for the Environment about perceived problem areas with the Act.

Toward Investment Certainty

A report to the Ministry for the Environment

B.I.J.Cowper

October 1993

Contents

1 Introduction

1.1 The Resource Management Act 1991 (RMA) came into force on 1 October 1991. It identified itself as an Act "to restate and reform the law relating to the use of land, air, and water." In doing so, it repealed some 59 pieces of legislation, and amended numerous others.

1.2 RMA is the most recent reform in a period of active social restructuring. Not only has government been reorganised comprehensively at local and regional levels, but the business activities of national government have undergone major transformation. Many previously regulated activities have been deregulated, and controls simplified or removed.

1.3 At the same time, there has been a great increase in international investment in New Zealand, and a growth of overseas ownership and involvement in New Zealand businesses. This process has heightened the need for certainty in the investment climate, as overseas investors have examined the risks and their responsibilities in New Zealand.

1.4 Thus RMA is not only the most recent of New Zealand's reforms, but it is also at the forefront of determining risk and responsibility for investors. In that it provides for two tiers of regulation (one level of which is explicit in the Act, but the other which will be established by plans to be drafted under the Act), it introduces room for some uncertainty for investment which only time (and the publication of those plans) can reduce.

1.5 Nevertheless, a number of concerns have been expressed relating to uncertainty for investment with respect to the provisions of the Resource Management Act 1991. Some of these issues relate to general provisions in the Act; others are specific to certain types of activity, for instance, forestry and marine farming.

1.6 Whilst some of the uncertainties are no doubt due to the transitional provisions in the Act, others may have implications for the on-going operation of the Act and should be addressed in order to canvas whether the issues require a response, whether by way of statutory amendment, or by way of practice direction. Others may be a result of misunderstanding of the Resource Management Act, or of the previous legislation.

1.7 Some of the issues which have been raised since the introduction of the Act are as follows:

(a) The duration of resource consents and the provision for a review of consent conditions.

(b) The imposition and impact of new regional rules on existing uses.

(c) The extent to which existing capital investment and infrastructure can be taken into account when considering an application for the "renewal" of resource consents.

(d) The scope of activities requiring a resource consent and the scope and number of conditions attaching to those resource consents.

(e) Taking into account national issues in the consideration of applications to regional and district councils.

(f) The charges relating to resource consent applications and the costs imposed by the Resource Management Act generally.

(g) The relevant circumstances for determining whether applications for resource consent will be notified, and the limited scope for seeking review of that decision.

(h) Excessive information requirements.

(i) The scope of enforcement orders in relation to "innocent" land owners and/or third parties.

(j) Coastal permits for marine farming in respect of raising finance against the security of the resource consent.

1.8 This report provides a commentary on the perceived problems with the Act from the point of view of investors, and discusses the opportunities for overcoming these problems.

2 Methodology

2.1 Bell Gully Buddle Weir was commissioned to report to the Ministry for the Environment, based on the experience of the firm and its clients. This report is based upon that experience, and therefore does not purport to be a comprehensive analysis of the legislation, and practices under it.

2.2 Rather, selected personnel and clients have been interviewed, to obtain a perspective on the legislation, and problems experienced under it. Those interviews have been conducted on a confidential basis, and on the understanding that there is no commitment by the Ministry to act upon this report, nor to produce any public report or issues paper as a result of it.

2.3 Most of the issues raised in this report have also been identified by staff of the Ministry for the Environment, and it may be that action has already been prepared by way of response. This report does not propose comment upon any such action. The personnel and clients interviewed have covered a broad range of the firm's activities. To some extent, the problems themselves indicate the source of the expressions of concern. However particular attention has been given to clients in the following spheres of activity:

- banking
- forestry
- waste disposal
- telecommunications
- transport
- energy supply
- manufacturing industry
- primary industry; and
- regional government.

2.4 In the sections which follow, the following general format is adopted:

(a) Identification of issue.

(b) Relevant provisions of Resource Management Act 1991 (RMA).

(c) Any relevant previous statutory provisions.

(d) Commentary.

(e) Recommendations.

2.5 The issues are addressed in a random sequence. The importance of individual issues differs markedly, and no attempt has been made to rank them in any order.

3 The issues

3.1 The duration of resource consents and the provisions for a review of consent conditions

3.1.1 The concern

The relatively short term nature of resource consents granted is seen by some parties as a constraint on future investment, particularly in situations where any investment has a significant capital input, and a long pay-back period. A particular illustration is with a hydro dam, but the concern has also been expressed in relation to geothermal power stations, industries reliant upon a supply of water either from a river or from groundwater, and industries discharging solvents to the atmosphere.

3.1.2 Relevant statutory provisions

The duration of any consent to dam a river, take water, or discharge a contaminant is fixed by section 123 RMA at a maximum of 35 years.

During the term of any consent, provision is made for a Consent Authority to conduct a review of the conditions of that consent – section 128. A review may be at any time specified for that purpose in the consent, or for any of the following purposes:

(a) To deal with any adverse effect on the environment;

(b) To require a discharge permit holder to adopt the best practicable option to remove or reduce any adverse effect on the environment; or

(c) Any other purpose that is specified in the consent.

The review procedure follows a similar path to that of a normal application for consent, involving public notification, an opportunity for submissions, and a hearing by the Consent Authority – section 130. Any decision on a review may be the subject of an appeal to the Planning Tribunal – section 132.

The Act specifies the matters that are to be considered in any review of conditions, and it is important to note that the relevant factors include whether the activity allowed by the consent "will continue to be viable after the change" – section 131(1)(a). Similarly, before adding a condition requiring a holder of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 to adopt the best practicable option to remove or reduce any adverse effect on the environment, a Consent Authority is required to be satisfied that the condition is the most efficient and effective means of removing or reducing an adverse effect, having regard to "the financial implications for the applicant of including that condition" – section 131(2)(b).

3.1.3 Previous statutory provisions

Under the Water and Soil Conservation Act 1967, there was no maximum term specified for water rights. In practice, rights were granted for a finite term, which tended to be relatively short, because of the absence of any power to review conditions otherwise. Even when *Mahuta* conditions were inserted, the term of water rights still tended to be quite short. (*Mahuta v. NWSCA* (1973) 5 NZTPA 73).

This position contrasts with the situation that pertained prior to 1967. Many of the discharge consents that were given before that time under general statutory provisions, were granted in perpetuity, but the Clyde Dam water rights were granted for a period of 21 years : Clutha Development (Clyde Dam) Empowering Act 1982.

Once granted, water rights could only be reviewed if a Mahuta clause had been inserted in the original consent. There was no power under the Water and Soil Conservation Act itself for such review (except by the holder – section 24B), although there were limited powers to impose restrictions on the exercise of rights (refer section 24D) and even more constrained powers to require the cessation of the exercise of rights (refer section 24G). In practice, these rights were rarely exercised.

It should be remembered also that there were different procedures whereby water right standards were in effect reviewed. Upon classification, all existing water rights lapsed, and further rights could only be granted which reflected the standards set in the classification: sections 26K and 21(3A) Water and Soil Conservation Act 1967.

3.1.4 Commentary

The 35 year period specified as a maximum by section 123 is significantly longer than the length of water rights granted pursuant to the Water and Soil Conservation Act 1967, in practice. It remains to be seen what length or for what term rights are granted in terms of the Resource Management Act. However, any decision to fix a term is open to appeal to the Planning Tribunal, at which stage the investment factors would be relevant.

The complaint that the limited term of 35 years would hinder major investment and construction work is hard to accept, when consents granted since 1967 have regularly been for specified periods of less than that length, and have been considered acceptable. If the limitation of terms were considered a problem under the Resource Management Act, they should have been seen as a far greater problem in terms of the practice under the Water and Soil Conservation Act.

It is too early to reach any firm conclusion on the degree of uncertainty introduced by the power to review resource consent conditions. At the time of the drafting of the legislation, the power to review was treated as a corollary of the longer term of resource consent contemplated, in the expectation that consents would be issued for longer periods, with powers to review during the course of that period. Greater certainty would be given by the longer term, while changing expectations could be addressed by the review of conditions during the term. That certainly appears to have been the approach taken by industry representatives at the time. If the alternative was to delete the review provisions, and to then have shorter terms of resource consents, the balance seems to have favoured certainty through the longer term of consent.

3.1.5 Recommendations

No recommendation is made for any change to the provisions of the Act, at least until such time as experience shows consents being granted for unreasonably short periods, and those consents being upheld by the Planning Tribunal on appeal. The Resource Management Act is not seen as having changed the investment climate.

3.2 The imposition and impact of new regional rules on existing uses

3.2.1 The concern

There are no adequate existing use rights in respect of activities covered by regional plans. Thus when a regional plan is introduced, an activity which was lawful may become unlawful, and have to cease.

3.2.2 The statutory provisions

Section 9(3) RMA provides that no person may use any land in a manner that contravenes a rule in a regional plan or a proposed regional plan unless that activity is either expressly allowed by a resource consent granted by the Regional Council responsible for the plan, or allowed by section 20.

In turn, section 20 provides that an activity may continue in certain circumstances until the rule in a proposed plan becomes operative. However, once the proposed plan becomes operative, the permitted activity may only continue to be carried on for a period long enough to enable a resource consent application

to be determined. If the resource consent is granted, then the activity may continue, but only in terms of that resource consent. If the resource consent is declined, then the activity becomes unlawful.

A similar provision was inserted by the Resource Management Amendment Act 1993 in relation to certain existing uses of the surface of water in lakes and rivers. Section 10A now provides that when a district plan becomes operative or a rule in a proposed plan is notified, an activity on the surface of a lake or river which was lawful may have to cease if it fails in obtaining a resource consent.

The position of lawful activities in relation to regional plans may be contrasted with the remaining position in relation to district plans. There, section 10 permits an otherwise lawful activity to continue after a rule in a district plan or proposed district plan is adopted, provided the use was lawfully established in the first place, and the effects of the use are the same or similar in character, intensity and scale to those which existed before the rule became operative or the proposed plan was notified. In those circumstances, there is no need to seek a resource consent for the activity, since it does not infringe against section 9(1).

3.2.3 Previous statutory provisions

It should not be assumed that a regional planning scheme under the Town & Country Planning Act is the equivalent of a regional plan under the Resource Management Act. The purpose of a regional plan is to assist a regional council to carry out any of its functions in order to achieve the purpose of the Act – section 63(1). As a guide, section 65(3) suggests the implementation of a regional plan whenever any of the following circumstances or considerations arise or are likely to arise:

(a) any significant conflict between the use, development, or protection of natural and physical resources or the avoidance or mitigation of such conflict;

(b) any significant need or demand for the protection of natural and physical resources or of any site, feature, place, or area of regional significance;

(c) any threat from natural hazards or any actual or potential adverse effects of the storage, use, disposal, or transportation of hazardous substances which may be avoided or mitigated;

(d) any forseeable demand for or on natural and physical resources;

(e) any significant concerns of tangata whenua for their cultural heritage in relation to natural and physical resources;

(f) the restoration or enhancement of any natural and physical resources in a deteriorated state or the avoidance or mitigation of any such deterioration;

(g) the implementation of a National Policy Statement or New Zealand Coastal Policy Statement;

(h) any use of land or water that has actual or potential adverse effects on soil conservation or air quality or water quality;

(i) any other significant issue relating to any function of the regional council under this Act.

By contrast, a regional planning scheme had a broader framework of including a statement of the objectives and policies for the future development of the region and of the means by which they can be implemented, having regard to national, regional, and local interests, and to the resources available – section 15(2)(a) Town & Country Planning Act 1977. In some measure, a scheme was more akin to a regional policy statement under the Resource Management Act.

In addition, a regional planning scheme was directed to make provision for a wide range of issues under the following general headings:

(a) Social

(b) Economic

(c) Natural resources and environment

(d) Type and general location of development

(e) Public works, utilities and facilities

(f) Recreation

(g) Communications and transport

(h) Community facilities

(i) Cultural facilities and amenities

(j) Regional programming

(k) Implementation

A regional planning scheme did not have an immediate impact on a land owner, as section 26 Town & Country Planning Act required that the Crown and every local authority and public authority only should adhere to the provisions of an approved planning scheme. However, if the scheme contained sufficient detail of the direction of future development in a district, the local authority would be bound to implement the scheme, thereby affecting private property.

The provisions of the Town & Country Planning Act were comparable to the provisions of section 9 and 10 RMA in relation to the effect of district schemes and plans; an existing lawful activity could continue, notwithstanding the change in the district scheme – section 90 Town & Country Planning Act.

In relation to matters other than land use, the situation has not changed much. For water, section 26K Water & Soil Conservation Act 1967 provided that all existing rights to discharge waste into natural water should terminate three months after the date of a final water classification, although a Regional Water Board had the power to allow a continuation of a discharge pending the obtaining of a new water right. However it should be noted that in granting any such water right, the Regional Water Board was directed to impose such terms and conditions as might be necessary to implement the terms of the classification standards – section 21(3A) Water & Soil Conservation Act.

The absolute effect of section 26K has been weakened in RMA. By virtue of section 68(7) a regional council is given a discretion as to whether any new minimum standards of water quality or water flows should affect existing resource consent holders. It is specifically contemplated that a regional plan may provide that the holders of resource consents may comply with the terms of the new rules in stages or over specified periods, thus ameliorating the harsher impact of section 26K under the old regime.

This situation may be contrasted with the provisions that followed the making of a national water conservation order. Existing water rights were not affected by any such order – section 20D(7) Water & Soil Conservation Act, although any new water rights had to be made subject to a Water Conservation Order – section 21(3F) Water & Soil Conservation Act. In considering the effect of these provisions, it must be remembered that most water rights were issued for a finite term, so that an existing right could not be "renewed", if it were in conflict with the Water Conservation Order. (Because of this difficulty, some of the Water Conservation Orders contained provisions expressly permitting the "renewal" of existing rights – see for example Clause 5(3) National Water Conservation (Lake Wairarapa) Order 1989).

In much the same way, controls on forest clearance could be imposed, with immediate effect. Section 34 of the Soil Conservation & Rivers Control Amendment Act 1959 required the occupier of any land to comply with any public notification by a Catchment Board of any prohibition against land clearance works.

3.2.4 Commentary

The concern relates primarily to the impact of regional rules on land uses. Given the previous situation relating to water, there has been little change (if anything, an improvement) with the impact of regional rules on uses of water.

It is clear that section 20 RMA makes unlawful activities which were previously lawful. The transitional provisions within it, allowing time for an affected owner to seek a resource consent, and to continue activities in the interim, is of limited value, since the new resource consent would inevitably need to take into account the provisions of the newly operative regional plan.

There does not appear to be any direction that in considering a resource consent for an existing activity that has become unlawful, the consent authority should give any weight to the existing investment in land, buildings or plant, or the existing commitment of human or natural resources, in the existing activity.

The purpose of the RMA is the sustainable management of natural and physical resources. This is a goal which every local authority must work towards, and it contemplates movement over a period of time from non sustainable use of some resources to the sustainable management of those resources. In some areas, councils will wish to move to more stringent rules faster than in some others, where environmental problems may be less extreme, or where the impact of a rapid shift would cause unreasonable hardship. However, the Act provides a different regime for district councils from that applicable to regional councils. There is no apparent rationale for the distinction. It presumably stems from an assumption that matters of regional significance are of greater importance, and should therefore override an individual's interests, whereas issues contained in the district plan are not of such pressing public interest. This is partly borne out by those provisions in section 30 RMA, relating to the functions of regional councils, in relation to land use. They indicate that regional council functions relate to control of the use of land for the purpose of:

(a) soil conservation;

(b) the maintenance and enhancement of the quality of water in water bodies and coastal water;

(c) the maintenance of the quantity of water in water bodies and coastal water;

(d) the avoidance or mitigation of natural hazards; and

(e) the prevention or mitigation of any adverse effects of the storage, use, disposal or transportation of hazardous substances.

To some extent, those purposes are similar to the old section 34 notices, and water classification matters, where initiatives from regional councils have traditionally overridden private rights or individual rights. The extension of those powers to the avoidance of natural hazards and preventing adverse effects of hazardous substances, may be seen as a small extension, warranting a limitation on the rights of the individual in the broader public interest.

Allowing regional councils to have such power might be seen as more acceptable, if there were adequate provisions for compensation. Provided a property owner were compensated for restrictions considered desirable in the broader public interest, a sense of balance and fairness could be felt. However, section 85 RMA, which deals with the matter, allows an objection to a proposed provision in a plan only where the provision would:

(i) render the land incapable of reasonable use, and

(ii) place an unfair and unreasonable burden on any person having an interest in the land.

Reasonable use is defined as including "the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person other than the applicant would not be significant".

The difficulty with section 85 lies in the concept of reasonable use. The definition is an inclusive one, but is used in conjunction with a negative. An objection must therefore demonstrate that the land can not possibly be used for any activity that is of minor environmental significance. If one postulated passive recreation as an activity that would come within the definition of 'reasonable use', then the section requires a land owner to demonstrate that a provision in a plan renders the land incapable of use for passive recreation. It is unlikely that there would be many provisions that would meet that test.

The rather doubtful compensation provision tends to suggest that some other change to the legal position is warranted. While it may be the case that the position under the RMA differs little from the position that applied previously, there can be seen to be inequality in the treatment between district and regional plans. The existing rights of individual land owners should be treated consistently, if that can be achieved without intolerable harm to the achievement of the purpose of the Act.

However, some degree of further analysis will be required to consider more carefully the range of situations in which regional plans may impose controls on existing activities, and to identify where such controls may be warranted in the public interest, at the expense of the individual property owner.

3.2.5 **Recommendations**

It is recommended that there be further assessment of the need for regional land use rules to override existing use rights. A study should analyse the circumstances in which such situations could occur, and assess the need for the rules to have immediate effect.

3.3 The extent to which existing capital investment and infrastructure can be taken into account when considering an application for the "renewal" of a resource consent

3.3.1 **The concern**

There is no specific provision in the Resource Management Act for the "renewal" of a resource consent. When the term of one consent expires, an application must be made for a fresh consent. On considering that application, the same considerations apply as applied to the original consent, and no allowance is made for the existing capital investment and infrastructure.

3.3.2 **Relevant provisions**

Resource consents for a land use are unlimited, whereas consents for the use of water or discharge of contaminants are limited to a maximum period of 35 years – section 123 RMA. The Act provides only that such consents then lapse, and contains no special procedures for renewal.

There is a limited provision extending the term of a consent, while a fresh application is made – section 124.

In the consideration of the fresh application, the considerations are the same for a "renewal" as they are for the original application – see section 104.

3.3.3 **Previous statutory provisions**

Under the Water and Soil Conservation Act, water rights expired, and there was no provision for "renewal" as such. A fresh water right application was required. There was no statutory provision in that Act which required attention to any existing investment, when water rights were "renewed".

The Water and Soil Conservation Act did not even specify the relevant considerations on considering an application for fresh water rights. The relevant considerations were distilled by the Courts, and pronounced through a succession of cases, starting with the *Keam* decision. The tests for granting a water right amounted to a balancing of the benefit and detriment that flowed from the right in question.

3.3.4 **Commentary**

Resource consents should be issued in the first place for a term that is reasonable, bearing in mind the particular activity concerned. The term of the right should reflect the investment involved, and the expected life of the activity. With the availability of review conditions, there should be no reason to impose a time limit shorter than the reasonable life of the activity itself.

The only constraint in this regard is the absolute limit of 35 years for any resource consent to discharge contaminants etc – section 123. It is reasonable to expect that the investment and environmental climate in 35 years time will be significantly different from that pertaining at present. Furthermore, it would be reasonable to expect that the original capital investment has been significantly amortised over that period.

There will, however, be cases where an activity continues on, beyond the term of the original consent. It may be hoped that this may become more common, indicating a measure of stability in business activity and continuity in investment.

In circumstances where a land use continues, there being no time limit on any land use consent unless otherwise specified (section 123(b)), it would seem reasonable to allow for other resource consents to have regard to the existing capital investment and infrastructure.

It is possible that the Act as presently drafted would allow these considerations to be taken into account. Section 104(1) directs the consent authority to have regard to any actual and potential effects on the environment of allowing the activity. The environment is given a wide definition, as including ecosystems and their constituent parts, including people and communities, natural and physical resources, and amenity values, together with the social, economic, aesthetic, and cultural conditions which affect them or are affected by them. This may be taken to include the economic factors, ie investment, involved in the existing physical resources of the activity.

A further base for this argument is found in section 5, defining the purpose of the Act as the promotion of "the sustainable management of natural and physical resources". With the expanded definition in section 5(2) allowing reference to the development and the protection of physical resources in a way which enables people to provide for their economic wellbeing, the ability to consider the economic infrastructure is enhanced.

Based upon these considerations, it would be possible for district and regional councils to include in their plans provisions establishing particular consideration of existing investment in the granting of any resource consents by way of "renewal".

On balance, it is considered that there is a sufficient degree of uncertainty concerning "renewal" consents, that it would be unreasonable to wait for district and regional plans (or policy statements). It should be accepted by the Ministry that existing investment is a relevant consideration, and in that case there should be no objection to including specific provision for it in an appropriate portion of the Act.

3.3.5 Recommendations

It is accordingly recommended that section 104 be amended to allow for the consideration of existing capital investment and infrastructure in the assessment of any "renewed" resource consent. Alternatively a separate procedure might be introduced to make express provision for the 'renewal' of any existing consent.

3.4 The scope of activities requiring a resource consent and the scope and number of the conditions attaching to those resource consents

3.4.1 The concern

Some developments appear to require an unusual number of separate consents, each of which results in the imposition of a number of conditions. Some of the matters covered by those rights, and the conditions, may appear, at times, to be somewhat trivial. For example, the Clyde Dam on the Clutha required nine different water rights, and, more recently, the new Waste Management landfill at Redvale in Auckland required a total of nine water rights containing 89 special conditions.

3.4.2 Relevant provisions

The issue stems from the absolute language used in the duties and restrictions imposed by RMA. Although section 9 provides that any activity is permitted unless specifically controlled, it contemplates that rules in District Plans may prevent certain activities. Section 12 sets out absolute prohibitions in the coastal marine area unless the activity is expressly allowed for. Section 13 prevents activity on the bed of any lake or river unless expressly allowed for. Section 14 prohibits the taking, use, damming or diverting of any water etc unless the use is expressly allowed for. Finally, section 15 prevents any discharge of any contaminants that is not expressly authorised.

3.4.3 Previous statutory provisions

The provisions of the Resource Management Act simply continue the approach taken in previous legislation. Section 92 Town & Country Planning Act prohibited the use of any land or building in a manner that is not or that was not in conformity with a district scheme; and section 34 Water and Soil Conservation Act prohibited the damming of any river or stream, the diversion, the taking or use of any natural water, or discharges of waste etc unless authorised by or under the Act.

3.4.4 Commentary

The problem is inherently one that arises from a regulatory regime. In order to provide the framework for the routine management of land and water resources, the legislation needed to establish a range of activities that were prohibited, unless properly authorised. That then provided the driving force for the controls that would be applied, when authorisation was sought.

In large measure, the growing complexity and number of conditions imposed may be seen as a reflection of the growing awareness of environmental issues among the regulatory bodies and the population at large. Early consents certainly did not tend to have the numerous conditions attached to them that are more common today, but in many cases, the result of those consents was less than satisfactory. A consent holder could not be relied upon to attend to the full range of matters that might be of concern to a local community, unless specific conditions addressed those matters, and established the community's requirements.

The complexity of conditions, and their appropriateness, are matters that are open for argument before the Planning Tribunal, on appeal from territorial local authorities. If any consent holder considers that too many unnecessary conditions have been imposed, it always remains open to take the matter to the Planning Tribunal, and to have the matter addressed there. If the issue were of sufficient substance, more such arguments could be expected. The experience to date suggests the contrary. (A consent holder would not normally want to appeal conditions, for fear of delaying a project, but such an appeal might be expected when there were appeals to be dealt with by objecting parties).

The Court of Appeal has suggested in several cases that the de minimis principle may be applicable in resource matters. In *Stewart v Kanieri Gold Dredging Limited* [1982] 1 NZLR 329, the Court indicated that "a minimal change of course of a normal channel of natural water could no doubt be treated as outside the purview" of the Water and Soil Conservation Act. Similarly, in *Keam v MWD* [1982] 1 NZLR 319, the Court ruled that a weighing of advantages and disadvantages would not be required if there were no significant disadvantages.

It is unfortunate that the Court of Appeal should have expressed itself in this way. The prohibitions contained in the legislation are absolute, and do not permit application of the *de minimis* principle. What the Court of Appeal more probably intended to indicate was that there are circumstances in which the full rigours of the rules need not be pursued. Consents may be required to carry out activities that are otherwise prohibited, but a rigorous analysis of advantages and disadvantages, or benefits and costs, is not required in some very clear cases.

In any event, the increased penalties under RMA, including the potential for company directors to face personal charges with the prospect of imprisonment, means that no resource user can afford to rely upon a *de minimis* approach. If an activity is prohibited by RMA, then the appropriate consents should be sought.

That however is not the end of the matter. All of the sections in Part III contemplate that an activity may be authorised either by a specific consent, or by a district or regional plan. Where activities are indeed minor, or trivial and of no general public concern, then it would be appropriate for the district or regional council to include a rule in its plan permitting the activity without any further formality. Regional councils have always had this power under section 22 of the Water and Soil Conservation Act, and district councils likewise have

routinely provided for numerous minor activities as permitted (predominant) in their schemes. (Note that such a rule would only be required for a land use consent if another rule establishes a broad prohibition of the activity – section 9(1)).

Any resource user concerned that such minor matters may require resource consents should take the opportunity to ensure that provision is included in district and regional plans for such matters.

To some extent, the concern could be seen as a transitional problem. If the concern was of real significance, submissions could ensure that district and regional plans contained rules expressly allowing for a full range of minor matters, so that specific consents would not be required for them.

3.4.5 **Recommendations**

This concern does not warrant any legislative response. The opportunity exists for district and regional plans to make appropriate provision for minor or trivial matters. A growing degree of detail is otherwise to be expected (and even welcomed) in a complex society containing a well-informed populace.

3.5 Taking into account national issues and the consideration of applications to regional councils

3.5.1 **The concern**

The regulatory framework administered by regional councils cannot achieve a balance between national and inter-regional issues and local perspectives. Regional councils weigh up the interests of local users, without being able to consider properly the national implications of those decisions. The concern is particularly felt by those involved in electricity generation, but is also of concern to operators of telecommunication networks, and transportation networks such as rail.

3.5.2 **Relevant provisions**

This issue does not direct itself particularly at individual sections of RMA. Rather, the concern is with the decision making framework established to administer the Act.

3.5.3 **Previous statutory provisions**

In large measure, the previous regime was very similar to the regime established under RMA. In both cases, district schemes were administered at district level, and water usage was determined at regional level. There was special provision made for the Crown by section 23 Water and Soil Conservation Act, at least until its repeal in 1988.

3.5.4 **Commentary**

The concern expressed is not a product of the Resource Management Act. If anything, RMA has ameliorated the position, but clearly has not resolved matters.

Whereas the Water and Soil Conservation Act contained no direction on matters of national significance, and section 3 of Town & Country Planning Act gave a limited range of matters of "national importance", neither of the previous pieces of legislation gave the broad philosophical and statutory directives that are contained in RMA. Not only does RMA contain an explicit statement of its purpose in section 5, and an outline of matters of national importance in section 6, and of general importance in sections 7 and 8, but RMA also goes on to make better provision for planning in relation to matters of national interest.

The vacuum of planning at national level that existed under the Town and Country Planning Act has now been filled by the provisions in RMA for the setting of regulations and National Environmental Standards (sections 43 to 45), the making of National Policy Statements (sections 45 to 52) and the issuing of a New Zealand Coastal Policy Statement (section 56 to 58). In addition, special provision is made for the making of Water Conservation Orders, which explicitly declare the national value of certain waterways (sections 199 to 217).

All of these mechanisms are intended to provide for direction to be given at national level to resource management issues generally. National Policy Statements, in particular, are designed to state policies on matters of national significance that are relevant to achieving the purpose of the Act. It should be noted that the Act also establishes procedures for public input to the development of any of these national mechanisms. Once adopted, these statements of national significance are required to be observed by all lower levels of government.

In so far as any regional or district council may be seen as an inappropriate body to rule on a matter of national significance, section 140 provides a procedure for that proposal to be transferred to the Minister for consideration and decision making in the first instance. The intent of this procedure is for accountability: central rather than local government should have responsibility for decision making on proposals that have an impact on the nation as a whole.

Whether this procedure will prove at all popular with resource users remains to be seen, as it appears to offer little advantage in either speed, or ultimate decision making (appeals still are directed to the Planning Tribunal, which has the final decision making power).

Nevertheless, the procedure may allow a national perspective to be given on resource consent applications that involve national issues.

It is inevitable that the operators of national networks will have a greater focus on the needs of their network than on any localised impact that their operations may cause. Equally, it is understandable that local communities will see only the impact in their local area. In dealing with consents on an individual basis, attention must inevitably focus on the individual impacts of each consent sought. Such a result seems unavoidable, and justifiable.

There is no evidence that the Planning Tribunal to date has been unable to take into account the broader concerns of the national network, in addressing site specific issues. As an illustration, the decision relating to the minimum flows on the Wanganui River shows that the Tribunal carefully weighed the effects on the national electricity network against the needs of the river for greater flows. The conclusion from that case seems that too great a quantity of water had been diverted from the river in the first place, and the complaints about the "loss" of water for the electricity operator should more probably be acknowledged as a judgment of its excessive abstraction in the past.

The difficulty remains for operators of telecommunication, transport, energy and other networks to obtain a standardised framework for the dealings of regional and district councils with their networks. The recent experience of the telecommunication industry under the Town and Country Planning Act, in obtaining standardised provisions for cellular phone facilities does not give rise to great optimism that standardised procedures can be achieved. However that was a position that arose under the Town and Country Planning Act, and renewed efforts will need to be made in relation to RMA.

3.5.5 Recommendations

At this stage of development of RMA, no recommendations are made to change the present system. The concerns do not arise from RMA, but from its continuation of a previous regulatory regime, and there have been a number of procedures instituted in RMA that may improve the position.

Until such time as there has been some experience with planning at the national level, and some attempts are made to standardise provisions in regional and district plans, it is too early to conclude that the system cannot adequately cater for matters of national significance. In the meantime, there is a need to encourage network operators to work together to assist councils to act consistently across local authority boundaries.

Great assistance would be given to the regional and local councils by the Ministry for the Environment, if it were to adopt a more positive advocacy role on such matters. There does not appear to have been any great involvement by the Ministry in the early stages of implementing the Act, and all levels of the community would benefit from having a more active involvement in the development of plans and policy statements by the Ministry.

3.6 The charges relating to resource consent applications and the costs imposed by the Resource Management Act generally

3.6.1 The concern

Many resource users have criticised the administrative charges being imposed by some councils: the philosophy of cost recovery by territorial local authorities is giving rise to very large charges, where none were charged under previous legislation.

3.6.2 Relevant provisions

The power to recover costs is given by section 36 RMA. The section authorizes the fixing of charges for a number of functions of a local authority, including in particular the processing of applications for resource consents.

The sole purpose of a charge is to recover the reasonable costs incurred by the local authority (section 36(4)(a)) and where a charge fixed is inadequate to enable a local authority to recover its actual and reasonable costs, the local authority may require the consent holder to pay an additional charge to the local authority (section 36(3)).

3.6.3 Previous statutory provisions

Under the Water and Soil Conservation Act, a more limited power was afforded by section 24K, which enabled costs to be recovered only "for the purposes of defraying" the costs of the administration of water rights. While some significant charges were authorised and were fixed under this legislation, some of the larger ones were challenged, and found invalid: *ECNZ v Waikato Catchment Board* (6/7/90 – High Court Hamilton, CP223/88).

Under the Town and Country Planning Act, territorial local authorities could recover the costs of considering an application but up to a maximum of only $200 – and the costs of public notification – Regulation 36, but could recover their expenses. Only the Planning Tribunal had power to make awards of costs in respect of hearings – section 147 Town & Country Planning Act 1977.

The Clean Air Act 1972 also provided for some cost recovery. The Clean Air (Licensing) Regulations 1973 originally provided for fees up to $60 for a Part A process, but the scale was progressively raised, and related to the value of the work involved – the 1987 Amendment provided for fees of up to $30,000 for the largest works.

By contrast, the Marine Farming Act 1971 authorised rent and an annual licence fee, but left the amount of each to be determined by the controlling authority – section 10.

3.6.4 Commentary

The procedure for implementing a schedule of charges requires public notice to be given, with opportunity for objections to be lodged with the local authority concerned. However, once the scale of charges is established, there is no right of appeal in respect of any individual assessment of charges pursuant to the scale. The position is different where the local authority uses the 'top up' provisions of section 36(3), in which case there is a right of appeal pursuant to section 36(6).

For major resource users, the cost recovery philosophy is a significant change in approach. The regulatory regime requires the making of consent applications, thereby triggering a process which inevitably leads to costs on the part of the local authority.

On matters of environmental significance, or great public interest, the costs incurred by the local authority may be significant, and there is little opportunity for the applicant to restrict the activities of the local authority.

There is a widespread concern that employees of local authorities lack the commercial discipline of business enterprises, and have no significant pressure to keep their costs to a minimum. If anything, the clamour from local objectors can add to the pressure on local authorities to embark upon broader investigations and assessments than might otherwise be considered necessary.

The absence of a specific right to appeal any award of costs fixed pursuant to a scale is surprising. There would be few resource users who would be in a position to argue with the establishment of a fixed scale of charges, years in advance of any particular application. In those circumstances, charges fixed pursuant to the scale should be open to analysis, and challenge in appropriate cases. It should be remembered that the earlier legislation allowed appeals against awards of costs, although only a few such challenges were made.

3.6.5 Recommendations

It is accordingly recommended that section 36 be amended, to provide for an appeal to the Planning Tribunal against any assessment of costs. Subsection (6) should be amended to read:

> *"Sections 357 and 358 (which deal with rights of objection and appeal against certain decisions) shall apply in respect of the requirement by a local authority to pay a charge fixed under subsection (1) or (3)."*

3.7 The relevant circumstances for determining whether applications for resource consent will be notified and the limited scope for seeking review of that decision

3.7.1 The concern

The question of notification of applications for resource consent is of immense significance, both to applicants and to persons who think that they may be affected. If an application is notified, persons may object. If an application is not notified, there are no rights of objection by way of submission, nor subsequent appeal. The general discretion given to local authorities to determine the question of notification is seen as too broad, and unsatisfactory in the way in which it works in practice.

3.7.2 Relevant provisions

The prime requirement of the Act is contained in section 93, and provides that a consent authority is to ensure that notice of every application is to be given, inviting submissions by interested parties. Provision is then made in section 94 for certain applications not to be notified. The most common ground is that relating to discretionary or non-complying activities, where:

(a) the consent authority is satisfied that any adverse effect on the environment of the activity for which consent is sought will be minor; and

(b) written approval has been obtained from affected persons.

There is an overriding discretion contained in section 94(5) enabling a consent authority, if it considers special circumstances exist in relation to any application, to require public notification, even if a relevant plan expressly provides that it need not be so notified.

There is no right for any body or person to make a submission in respect of a non-notified application, and there is no right of appeal from the decision by a council to treat an application for a resource consent as a non-notified application: see *Aro Valley Community Council Inc v Wellington City Council* (1992) 1 NZRMA 221.

The Tribunal has held that there must be "good and sufficient reason" to require notification, and the exercise of the discretion to do so is not to be applied only in exceptional cases. The fact that a proposed activity is contrary to the policies and objectives of a district plan may be good and sufficient reason to require notification: *Foodstuffs (South Island) Limited v Christchurch City Council* (1992) 2 NZRMA 154.

This decision may now be no longer good law, since the introduction in the Resource Management Amendment Act 1993 of a requirement that "special circumstances exist in relation to any such application". However, it is thought that the policies and objectives of a district plan will continue to provide special circumstances, justifying notification.

3.7.3 **Previous statutory provisions**

The Town and Country Planning Act provided for notice to be given of every application, unless the district scheme provided otherwise: section 65. A proviso enabled a council to require an application to be made with notice, in any particular case, if the council thought fit. However, the Act required that conditional uses and specified departures (now discretionary and non-complying activities respectively) should be the subject of notified applications.

3.7.4 **Commentary**

Experience of section 94 around the country has been varied. Even within individual local authorities, practice has varied, with the pendulum swinging between an initial enthusiasm for enabling applications to proceed without public notification, through to a more restricted and conservative approach of notifying almost all applications.

That there should be such a range of experience on a matter of such critical importance to the definition of public rights to lodge submissions is a matter of real concern. Whilst it must be acknowledged that the intent of the new legislation was to expedite the processing of applications, and to facilitate those where there were no major public interest, the variety of experience from different local authorities does indicate that there is a need for some greater uniformity.

At this stage, it may be fair to reflect that local authorities are still learning in the operation of the Act, and to allow a little more time for experience to stabilise. After all, the essential structure of the Act is to provide for applications only to be non-notified in circumstances where there are only minor effects on the environment, and anyone affected has given consent. Those tests are considered to be reasonable tests for determining when applications may go without notification, while the residual discretion errs in favour of public notification.

Furthermore, the procedure for non-notification is a feature of the Act designed to assist the broader objective of speedier decision-making, and it is too early to conclude that the procedure is unsatisfactory.

3.7.5 **Recommendations**

It is recommended that further operation of section 94 be monitored, but that no change be made to it at present.

3.8 Excessive information requirements

3.8.1 **The concern**

When lodging an application for a resource consent, an applicant must provide an assessment of the effects of the proposed activity. Consent authorities may require applicants to provide further information relating to the application, and there is concern that some councils have imposed excessive information requirements.

3.8.2 **Relevant provisions**

The information that is required to be lodged with a council with an application for resource consent is required to be prepared in accordance with the Fourth Schedule of the Act, and to be in such detail as corresponds with the scale and significance of the actual or potential effects that the activity may have on the environment: section 88(6) RMA.

The Fourth Schedule details a wide ranging assessment of effects on the environment, including a description of any possible alternative locations or methods for undertaking the activity, and assessment of any risks to the environment from the use of hazardous substances and installations, a description of the sensitivity of any proposed receiving environment, and a description of any mitigation measures to be undertaken (Fourth Schedule, Clause 1).

When preparing the assessment, Clause 2 of the Fourth Schedule directs attention to the following matters:

(a) Any effect on those in the neighbourhood and the wider community including any socio-economic and cultural effects.

(b) Any physical effect on the locality, including any landscape and visual effects.

(c) Any effect on ecosystems.

(d) Any effect on natural and physical resources having particular values for present or future generations.

(e) Any discharge of contaminants.

(f) Any risk to the neighbourhood, the wider community, or the environment through natural hazards or the use of hazardous substances.

Once an application is lodged, a consent authority is able to require an applicant to provide further information relating to the application: section 92(1). If the consent authority considers that any significant adverse effect on the environment may result from an activity, the authority may require an explanation of any possible alternative locations or methods for undertaking the activity, and may commission a report on any matters raised in relation to the application: section 92(2).

There is a limitation imposed by section 92(4), that further information may be required only if the information "is necessary to enable the consent authority to better understand the nature of the activity in respect of which the application for resource consent is made, the effect it will have on the environment, or the ways in which any adverse effects may be mitigated".

Finally, it should be noted that the Fourth Schedule requirements are made expressly subject to the provisions of any policy statement or plan. This therefore enables local authorities to establish in their plans any more limited range of information that may be required for any particular type of application.

3.8.3 Previous statutory provisions

The Town and Country Planning Act itself did not contain any requirement for the provision of information with applications, leaving the matter to be dealt with in the Regulations. They provided a very basic form of application, but allowed a council the power to require an applicant to supply such further details or plans as in the council's opinion might be necessary for a reasonable understanding of the application, "including a report setting out the reasons for the selection of the site and the likely economic, social, and environment effects": Regulation 37(2), Town and Country Planning Regulations 1978.

Similarly, the Water and Soil Conservation Act 1967 contemplated a form of application prescribed by regulation, duly provided by the Water and Soil Conservation Regulations 1984. Regulation 4(2) also enabled a request for further information, plans and specifications.

Similar procedures were provided for by section 23(6) Clean Air Act 1972 for the establishment of any scheduled process discharging air contaminants.

3.8.4 Commentary

Under the earlier planning legislation, although the power was available, there did not develop any general practice for councils to require full reports with background information. The information provided with applications was generally sparse, and was supplemented by planning officers informing themselves by informal questioning of an applicant.

With the passage of RMA, many councils have taken advantage of the new powers, and sought a great deal of further information.

As was noted in the section 24 Monitoring Report issued by the Ministry for the Environment in February 1993, "feedback from industry groups and users indicates that local government is taking a conservative approach, and is not focussing information needs on potential adverse effects".

Councils have also used section 92 to obtain a wider range of information than applicants have considered appropriate, particularly in the forestry area. This has stemmed from difficulties as to the proper scope of applications under transitional arrangements, discussed below in section 3.11.

The principle, contained in section 88(6)(a), that information is to be in such detail as corresponds with the scale and significance of the actual or potential effects that the activity may have on the environment, provides for a subjective assessment of those issues, to be performed by an applicant. It can reasonably be anticipated that an applicant will have a more benign view of the effects that its activity may have on the environment than may be shared by the council.

At this stage of experience with RMA, it is not surprising that there are differences of judgment as to the range of information required. (See *McFarland v Napier City* (1993) 2 NZRMA 440, where the Planning Tribunal commented that an applicant is not required to become a devil's advocate to destroy his or her own application before it has started).

It has been hard to identify any particular cases where excessive information has been unreasonably demanded, that might provide some assistance in considering the seriousness of this concern. In the absence of such information, it is reasonable to expect the situation to settle down, as councils, council officers, and applicants all become more familiar with the provisions of the Act.

3.8.5 **Recommendations**

It is recommended that the Ministry for the Environment continue to monitor practice in this area, and to ensure that regional and district plans establish clear guidelines as to the range of information required with applications, with a view to establishing some greater clarity in relation to such matters.

3.9 The scope of enforcement orders in relation to "innocent" land owners and/or third parties

3.9.1 **The concern**

The owner of land may be faced with an abatement notice, or an enforcement order, requiring the owner to clean the site of contamination that was caused by another party, most commonly a predecessor in title. Such notices and orders may be made, notwithstanding that the present owner has had nothing to do with the contamination that exists on sites. The orders may also be made against a mortgagee, exercising its security against the land.

3.9.2 **Relevant provisions**

An abatement notice may be issued against any person by an enforcement officer, requiring that person to do something that, in the opinion of the enforcement officer, is necessary to ensure compliance by or on behalf of that person with the Act, any regulations, a rule in a plan or a proposed plan, or a resource consent, and also necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment relating to any land of which the person is the owner or occupier: section 322(1)(b)(ii).

Since the passage of the Resource Management Amendment Act 1993, an enforcement order may also now be made requiring a person to do something that, in the opinion of the Tribunal, is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment relating to any land of which the person is the owner or occupier: section 314(1)(da).

It is significant, in relation to both abatement notices and enforcement orders, that the recipient may simply be the person who is the current owner or occupier of the property, and is not necessarily the person who caused or contributed to the problems that arise in relation to that land. There is no requirement that the person have knowledge of the existence of the problems.

3.9.3 **Previous statutory provisions**

There are some comparable provisions of previous legislation, which could also require an innocent land owner to clean up contamination caused by another party.

Regional Water Boards were given the power to seek from a District Court an order that a person do specific work to prevent a further contravention of, or non-compliance with, any requirement, rule or provision in the Water and Soil Conservation Act or any term or condition of a right granted under that Act:

section 34B. Such an order could have been made if the present occupier was discharging water or waste into another body of natural water: section 34(1)(b). An order could also have been made where the occupier of any land caused or permitted any waste, which emanated as a result of natural processes from matter previously placed on or discharged on to the land or into the ground, to enter natural water: section 34(1)(f). There was nothing in this provision which suggested that the occupier had to have been responsible for placing or discharging the matter on to the land or into the ground in the first place.

Again, an occupier of any land who caused or permitted waste to enter natural water could be charged with the costs of neutralising the effects of any discharge from that persons' land of any waste, which emanated as a result of natural processes from matter previously placed on or discharged onto the land into natural water: section 34C(c) Water and Soil Conservation Act.

These provisions are good examples of a situation where a person may have had to take responsibility for the earlier acts of someone else. However in each case, liability only arose if the occupier could be shown to have 'discharged' any waste, or 'caused or permitted' waste to enter natural water. The High Court has recently held that 'discharge' and 'allow to escape' connote at least the elements of awareness of the circumstances in which a contaminant might escape, an ability to prevent it occurring, and a neglect to take steps to prevent it: *McKnight v. NZ Biogas Industries* (1993) 2 NZRMA 681. It remains to be seen how this decision will affect the liability of 'innocent' owners or occupiers.

Under the Town and Country Planning Act, there was a general duty imposed to keep objectionable elements in connection with the use of land to a minimum: section 77 Town & Country Planning Act. Where any use of any land or building gave rise to any objectionable element, the council could give notice, requiring the person making use of the land or building to cease that use, or to remove or reduce the objectionable element to a specified extent: section 77(4) Town & Country Planning Act. There appears to be no link between the current owner and user of the land or building, and the origin of the objectionable element: an innocent occupier who disturbed chemicals in the soil left by a previous occupier could be required to prevent the escape of those chemicals.

3.9.4 Commentary

Although the powers may have existed under the Water and Soil Conservation Act and Town & Country Planning Act, there does not appear to have been any general use of the powers against innocent land owners. Indeed, it should also be commented that there has not yet been any reported use of RMA against innocent land owners.

To some extent, the judgment of regional and district councils could be relied upon in the past to see that such claims were not made against innocent land owners. However RMA now allows any person, including neighbours and trade competitors, to seek an enforcement order, (section 314(1)(da)), and it is therefore likely that there will be less restraint in issuing such proceedings.

It still falls for a decision by the Planning Tribunal as to whether or not it will make an enforcement order against an innocent land owner or mortgagee in possession, and a body of case law could possibly develop which gave some protection to the innocent occupier.

When the time comes, there appear to be broad matters of general public policy that will need to be clarified;

(i) The relevance of the Limitation Act 1950.

(ii) The extent to which the "innocent" land owner had knowledge of the position prior to taking possession of the property.

(iii) The desirability of imposing liability on "innocent" land owners, with a view to ensuring that provision is made in the future for the appropriate division of responsibility on the purchase of the property, or the undertaking of exposure by way of mortgage.

(iv) The balancing of the public interest in having a particular problem dealt with, and the availability of the public purse to achieve that result.

(v) The extent to which the original contamination was caused by practices (or omissions) that were lawful, accepted by, and of benefit to the community of the time, with the result that the community today should accept the responsibility for the contamination.

It can be seen that the issues involved are extremely complex, and raise broad issues of community responsibility for previous activity. The debate in such issues is not confined to New Zealand, but there does not appear to have been any universally accepted solution to the problems.

In the USA, the Comprehensive Environmental Response, Compensation and Liability Act 1980 (CERCLA) established retrospective strict liability, but so widened the scope of persons who may be required to contribute to a clean up that most action there has been between parties arguing about their respective liabilities to contribute.

While the United Kingdom assigns responsibility to the current owner or occupier, each of the States in Australia has different environmental legislation, although it is all broadly similar in directing liability at both polluters and subsequent owners or occupiers.

On the other hand, New South Wales has established a fund to tackle sites polluted by a now disappeared polluter, with the money sourced largely from discharge levies by the Water Board. Sweden also operates a reserve account funded out of general government revenues for cleaning up contaminated sites. Similar arrangements apply in Holland and Austria.

It appears that banks in New Zealand have moved promptly to recognise the liabilities contained in RMA, and many have amended their lending policies accordingly. A "due-diligence" exercise is now more common before the purchase of any potentially contaminated land, and before banks advance money to assist in such purchases. Inevitably, there are stories of "hard luck" situations, where a bank has lost significant sums of money because of a contaminated site that is security for a loan.

To some degree, it is essential that there be some power for contaminated sites to be cleaned up. The person who presently owns or occupies that site is the obvious first target for any form of clean up requirement. The ability of that person to recover the cost of doing so from any other party may be determined by the person's contractual relationship with the vendor of the property and a host of other factors.

Until there is a body of evidence that suggests that innocent owners and occupiers are being unfairly treated by the Planning Tribunal, and until there is a clear commitment by Government to the clean up of contaminated sites, it is felt that the present provisions impose a reasonable provision.

3.9.5 **Recommendations**

It is recommended that the Ministry for the Environment monitor closely any applications for enforcement orders against innocent land owners. The Ministry should maintain a watching brief on all such applications.

3.10 Coastal permits for marine farming in respect of raising finance against the security of the resource consent

3.10.1 **The concern**

Banks will not lend on the security of marine farms alone, primarily because of the lack of security of tenure. There are three perceived problems. The first relates to the ability to raise loan capital, the second to the length of tenure, and the third to the absence of any 'renewal' consents. (In respect of this latter issue, refer to para 3.3 above).

3.10.2 **Relevant provisions**

Resource consents are not considered to be real or personal property: section 122(1) RMA. However provision is made for the holder of the resource consent to grant a charge over the consent as if it were personal property and the

provisions of the Chattels Transfer Act 1924 and Part IV of the Companies Act 1955 are applied to the resource consent as if it were a chattel.

Marine farms require a coastal permit, which have a maximum life of 35 years: section 123 RMA.

3.10.3 **Previous statutory provisions**

The Marine Farming Act 1971 made quite comprehensive provision for leases and licenses for marine farming. Not only did the lease vest a leasehold estate in the lessee (section 11) but there was a register of leases at Wellington, that could be treated as if it were a register under the Land Transfer Act 1952: section 15.

The maximum term for a marine farming lease was 14 years with the potential for a right of renewal for one or more terms: section 3. Where a right of renewal was not granted with the original licence, there was a special preference given to the renewal of a lease, ahead of other applicants: section 22.

3.10.4 **Commentary**

Although marine farms are no longer interests in the land, treated as if they were titles under the Land Transfer Act, the leases are available as security in a similar manner to charges against chattels. There may be a perception that this is not as satisfactory as if the lease were an interest in land, but such arrangements have widely been held to be sufficient security for the advancement of funds.

The extra length of tenure from 14 years to 35 years maximum should be seen as making better provision for security than was available under the Marine Farming Act. There are very few investments that involve a payback period anywhere near a 35 year term, and the different arrangements available under the RMA should not be seen as major problems for lending in this area.

In general terms, marine farms are established on public land, and Parliament has made a policy decision that any use of such public land should not be granted in perpetuity. A 35 year term can be seen as a reasonable balance between the needs of an individual to exploit the public estate, and the needs of the community to reconsider the arrangement, and provide for better standards or new activities in relation to that area. However the finite term may contribute to a degree of "blight" toward the end of the term, particularly where there is no certainty as to renewal of the consent.

3.10.5 **Recommendations**

No changes to the legislation are recommended in respect of the security aspect, nor in relation to the length of tenure.

However, it is recommended that provision be made for some form of priority to be given to existing marine farmers for the renewal of their consents. With the change of legislative approach, it may no longer be appropriate to use the formula contained in section 22 Marine Farming Act 1971, but section 77(2) Mining Act 1971, which provided for a similar preference on the renewal of a mining licence, may be seen as suitable.

3.11 Forestry

3.11.1 **The concern**

Apart from the concerns already addressed, one theme common in comments from the forestry industry concerns a measure of uncertainty as to whether any given forestry crop may be harvested. All of the forestry investment is incurred at the time of planting, or during the growth cycle, but with harvesting some 30 years in the future, there is uncertainty as to whether unforeseen controls might be imposed.

3.11.2 **Commentary**

District Plans have a lifetime of only ten years: section 79. Similarly, Regional Plans or Policy Statements also have the same limited life. The provisions which will apply to the harvesting of a tree are not known at the date of planting it, hence the concern in relation to this issue.

However, this concern is not generated by the provisions of RMA. The trees that are presently being harvested were planted not only before RMA, but also before the enactment of the Town & Country Planning Act 1977. Even RMA may no longer apply in 30 years time, when trees presently being planted are due for harvest.

There has never been any guarantee of logging: the possibility of section 34 notices, bylaws, etc, has always generated a measure of uncertainty concerning logging, although the system appears to have worked acceptably for investment purposes. Furthermore, there has always been the potential for zoning controls, and the need for water rights, and at any stage, harvesting could have been restricted.

At first impression, RMA may provide a solution that has not previously been available. Under section 116, it is possible to defer the commencement of any resource consent for any appropriate purpose. There seems no reason in law why, at the time of planting a forest, a forest owner could not obtain resource consents to harvest that forest, with the consents not to come into effect for 30 years. That would enable the conditions of harvesting to be determined prior to the commitment of any funds by way of investment.

While strictly a legal possibility, section 116 is not seen as a satisfactory solution to this measure of uncertainty. It is very unlikely that such an application would be granted, because of the very real problems of assessing effects so far into the future, before the surrounding pattern of development is established.

To some extent, RMA can be used to minimise areas of uncertainty. An application phrased as seeking consent to establish a commercial forest will be more useful than one seeking consent to plant trees. Rules in appropriate plans may provide for forestry operations using the restricted discretion provided for by the Resource Management Amendment Act 1993. Furthermore the opportunity can be taken to specify in plans the precise range of information required to be lodged with applications for consent.

3.11.3 Recommendations

In view of the foregoing, no changes to the legislation are considered necessary.

4 Conclusions

4.1 A number of issues of concern have been expressed in relation to RMA, and have been considered in this report. The issues have been raised by a wide range of people involved in activities which require RMA consents, or are the subject of RMA controls.

4.2 There are few instances where RMA has caused or contributed to any fresh basis of uncertainty for investment. In those few cases, changes are possible which will improve the climate of certainty for investment.

4.3 In the greater majority of cases, however, the degree of uncertainty has either pre-existed RMA, or has arisen through the nature of the activities, rather than from the legislation. Even in some of those cases, it is possible to improve the position through changes to RMA.

4.4 Recommendations have identified a need for some changes to the Act in some areas, and ongoing monitoring of practice in other areas. In most cases, experience with the Act, and the development of policy statements and plans should improve the investment climate by creating more certainty.