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The Resource Management Act 1991 and Water in New Zealand: Impact and Implications

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A thesis submitted for the degree of
Master of Laws
at the
Faculty of Law
University of Otago
Dunedin, New Zealand

June 1995
Abstract

This thesis assesses the impact of the enactment of the Resource Management Act 1991 on the regulation of the management and allocation of water in New Zealand. The method of assessment used is one of comparison between the schemes and philosophies of the 1991 Act, and those of the law which previously regulated water use and control.

Part I describes the former water lores and laws. Chapter 2 covers the earliest Maori and common law controls over water use and management. Chapter 3 reviews the Acts of Parliament made to supplement, and eventually supplant, the common law from 1860 to 1987. Overall these laws are submitted to have developed according to four general trends. These four trends are those of: increasing scope and comprehensiveness, increasing formalization and distribution of planning, increasing incorporation of the dual aspects of the notion of integrated management, and increasing conservation consciousness. The four trends, which are defined in Chapter 1, are identified in the ultimate section of Chapter 3.

Part II begins with Chapter 4 which describes the process of law reform culminating in the enactment of the 1991 Act. The purpose, principles, schemes, and mechanisms of this Act which relate to the use and management of water in New Zealand are outlined in Chapter 5.

In Part III, Chapter 6 takes the four trends observed in the development of New Zealand's former water law and measures whether, and to what extent, they have been continued by the 1991 Act. Each of the trends is found to have been advanced by the Act, though section 5 of the Act is recognised to have the potential to further promote the trend of increasing conservation consciousness. This section proclaims the purpose of the Act as the promotion of the sustainable management of natural and physical resource. It has at least three potential interpretations, of which one is argued to be more conservation conscious than the others.

Chapter 7 advocates the adoption of this more conservation conscious interpretation by showing that it better maintains the relationship between New Zealand's water law, and both our environmental law and global environmental thinking generally.

Chapter 8 assesses the support for the more conservation conscious interpretation. Both considerable legal, and some practical, support for the adoption of this interpretation is found. Chapter 8 then considers the impact of section 5, interpreted in its more conservation conscious manner, for decision-making in respect of water.

Chapter 9 ends by concluding that the 1991 Act represents an potential improvement on its predecessors, but notes that whether or not this potential is recognised remains to be seen.
Acknowledgements

I would like to thank the following people, who all helped in different ways and at different times, with this thesis.

For their support and guidance, my original supervisor the Right Honourable Professor Sir Geoffrey Palmer, and subsequent co-supervisor Professor Bruce Harris. This thesis has been a long time coming, and since I began Sir Geoffrey has taken to legal practice, and Bruce Harris to a chair at Auckland University’s law school. I wish them both well.

Professor Stuart Anderson who gave me a hurry up, and read my draft and offered comments. Mr Ian Williams who read parts of earlier drafts, and also offered comments and corrections.

Mr Roy Somerville, Barrister, who gave advice and encouragement and with whom I have enjoyed teaching. From the Law Faculty Mr Grant Liddell, Mrs Nicola Peart, Professor John Smillie, and Mr John Dawson – all of whom answered questions, made suggestions, or gave advice. From the Geography Department Mr Kerry Grundy who was an apparently keen sounding board for ideas, and Mr Dave Murray who lent information on rivers. Professor Atholl Anderson formerly of the Department of Anthropology who shared his knowledge of Maori lore. Dr Bryan Bang, formerly of Rogers Nicholson Lawyers who answered questions, and was prepared to answer more.

Numerous kind people at regional and territorial councils around the country, who fielded questions or sent information – especially Mr Kevin Currie (formerly of the Otago Regional Council, now in Wellington), Mr Richard Mason and Mr Richard Pettinger (both of the Otago Regional Council), and Mr Nigel Harwood and Ms Lesley Jenkins (both of the Dunedin City Council).

For making time to see me, and to discuss my thesis with me, during a visit to Wellington in 1992: Mr Bob Zuur and Ms Bronwen Arthur from the Ministry for the Environment; Ms Joan Allin a partner at Chapman Tripp Sheffield Young; and the Parliamentary Commissioner for the Environment Mrs Helen Hughes.

The Law Library staff at Otago University, who were always patient in the face of continuing ignorance and who, I am convinced, re-shelve and re-catalogue mainly to torment.

Finally more personal thanks go to my friends and family, especially Ian, Tracey, my parents, my big sister Lyndsae and her man Alastair, Gill, Jill, and Margaret.
Summary of Contents

Abstract ii
Acknowledgments iii
Table of Contents v
Table of Statutes xi
Table of Cases xiv
Chapter 1 Introduction 1

PART I: THE FORMER WATER LORES AND LAWS

Chapter 2 Early New Zealand Water Management Systems and Laws 7
Chapter 3 Water Legislation to 1987 19

PART II: THE RESOURCE MANAGEMENT ACT 1991

Chapter 4 The Resource Management Law Reform Process 97
Chapter 5 The Resource Management Act 1991 and Water 116

PART III: INCREASING CONSERVATION CONSCIOUSNESS, WATER AND THE RESOURCE MANAGEMENT ACT

Chapter 6 The Resource Management Act: Continuing the Trends? 166
Chapter 7 Increased Conservation Consciousness in Context 177
Chapter 8 Section 5 and its Potential 200
Chapter 9 Conclusion 258
Bibliography 262
# Table of Contents

Abstract

Acknowledgments

Summary of Contents

Table of Statutes

Table of Cases

Chapter 1 Introduction

## PART I: THE FORMER WATER LORES AND LAWS

Chapter 2 Early New Zealand Water Management LOres and Laws

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Introductory Remarks</td>
<td>7</td>
</tr>
<tr>
<td>II</td>
<td>Traditional Maori Lore</td>
<td>7</td>
</tr>
<tr>
<td>III</td>
<td>The Importation of English Common Law</td>
<td>11</td>
</tr>
<tr>
<td>1</td>
<td>Tidal Water</td>
<td>12</td>
</tr>
<tr>
<td>2</td>
<td>Non-Tidal Water</td>
<td>13</td>
</tr>
<tr>
<td>a</td>
<td>Ownership of Water</td>
<td>13</td>
</tr>
<tr>
<td>b</td>
<td>Ownership of Land Under Water</td>
<td>13</td>
</tr>
<tr>
<td>i</td>
<td>Flowing Water</td>
<td>13</td>
</tr>
<tr>
<td>ii</td>
<td>Still Water</td>
<td>14</td>
</tr>
<tr>
<td>c</td>
<td>Incidental Rights to Use, Fish and Navigate</td>
<td>14</td>
</tr>
<tr>
<td>d</td>
<td>Acquired Rights</td>
<td>16</td>
</tr>
<tr>
<td>3</td>
<td>Accretion and Erosion</td>
<td>16</td>
</tr>
<tr>
<td>IV</td>
<td>Concluding Remarks</td>
<td>17</td>
</tr>
</tbody>
</table>

Chapter 3 Water Legislation to 1987

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Introductory Remarks</td>
<td>19</td>
</tr>
<tr>
<td>II</td>
<td>The New Zealand Local Government System and its Development</td>
<td>19</td>
</tr>
<tr>
<td>1</td>
<td>The Five Eras</td>
<td>19</td>
</tr>
<tr>
<td>a</td>
<td>The Era of Failed Attempts</td>
<td>19</td>
</tr>
<tr>
<td>b</td>
<td>The Era of the Provinces</td>
<td>21</td>
</tr>
<tr>
<td>c</td>
<td>The Era of Specialisation and Proliferation</td>
<td>22</td>
</tr>
<tr>
<td>d</td>
<td>The Era of Challenge</td>
<td>23</td>
</tr>
<tr>
<td>e</td>
<td>The Era of the Regions</td>
<td>25</td>
</tr>
<tr>
<td>III</td>
<td>The Water Laws</td>
<td>26</td>
</tr>
<tr>
<td>1</td>
<td>Land Drainage and Flood Control</td>
<td>27</td>
</tr>
<tr>
<td>a</td>
<td>Public Works, River Boards and Land Drainage Acts</td>
<td>27</td>
</tr>
</tbody>
</table>
i  The People's Initiative 27
ii  Land Drainage and Flood Control in the Era of Specialisation and Proliferation 27
iii  The Ad Hoc Boards Fail and Reform Approaches 30
b  The Soil Conservation and Rivers Control Act 1941 31
   i  Objectives and Structure 31
   ii  Problems Emerge 33
c  Land Drainage and Flood Control Since 1941 36
d  Concluding Remarks on Land Drainage and Flood Control 36

2  Taking, Using and Managing Water Before the Water and Soil Conservation Act 1967 37
a  The Needs of Settlements 37
   i  Domestic and Town Supply 38
   ii  Public Works: Provision and Protection 40
   iii  Sewerage and Drainage 41
   iv  Generating Electricity 42
b  The Needs of Industry 47
   i  Mining 47
   ii  Agriculture 52
   iii  Shipping 55
   iv  Timber Logging 56
   v  Big Business 57
c  The Pollution of Water 59
   i  Pollution and the Public Health 59
   ii  Pollution by Oil 62
   iii  The Waters Pollution Act 1953 64
   iv  Underground Water, Litter and Wildlife 66
d  Water Conservation 67
   i  Public Reserves, State Forests and National Parks 67
   ii  Thermal Springs Districts and Reserves 69
   iii  Four Special Acts 70

3  Taking, Using and Managing Water under the Water and Soil Conservation Act 1967 71
a  A New Administrative Structure 72
b  A Clean Sweep of (most) Water Rights 73
c  Authorising New Uses of Water 74
   i  Authorizations to Discharge 74
   ii  Water Rights 75
d  Water Quality Classification 79
e  The Water Conservation Regime 81
f  Minimum and Maximum Flows 83
g  Concluding Remarks on the 1967 Act 84

4  The Environment and Conservation Acts 85
a  The Environment Act 1986 85
b  The Conservation Act 1987 86
### IV Concluding Remarks: Trends in the Law’s Development

1. An Increase in Scope and Comprehensiveness
2. An Increase in the Formality, Extent, and Coordination of Management and Planning
3. An Enhanced Integration in Management
4. An Increase in Conservation Consciousness

### PART II: THE RESOURCE MANAGEMENT ACT 1991

#### Chapter 4 The Resource Management Law Reform Process

1. **Introduction**
2. **Phase One: Purposes, Objectives and Priorities**
   1. Directions for Change
   2. People, Environment and Decision-Making
3. **Phase Two: Consultation**
   1. People, Environment and Decision-Making
4. **Phase Three: The Resource Management Bill**
   1. Purpose and Principles
   2. The Role of Government
   3. Resource Allocation
   4. The Bill and Water
   5. The Bill and the Coastal Environment
5. **Phase Four: Review by a New Government, and Enactment**

#### Chapter 5 The Resource Management Act 1991 and Water

1. **Introduction**
2. **Purpose and Principles**
   1. Part II and Water: General Comments
   2. Section 5: Finer Details
      a. Paragraph (a)
      b. Paragraph (b)
      c. Paragraph (c)
      d. “While”
   3. Sections 6, 7 and 8
      a. Questions of Priority
      b. The Matters Therein
3. **The Planning System**
   1. Introduction
   2. National Environmental Standards
   3. A Hierarchical and Internally Consistent Structure
      a. The Test of Consistency
      b. Section 55
      c. The Nature and Purpose of Policy Statements and Plans
   4. Planning and Water: General Comments
   5. Planning, Water and Central Government
6 Planning, Water and Regional Government
   a Regional Policy Statements 133
   b Regional Plans and Regional Coastal Plans
      i Regional Plans 135
      ii Regional Coastal Plans 136
   c Regional Rules
      i Rules Prohibiting, Regulating, or Allowing Activities 137
      ii Rules Relating to Flow and Water Quality 138
      iii Rules Classifying Water 138
      iv Rules on Discharges and BPOs 139
   d Concluding Remarks on Regional Planning for Water 139

7 Planning, Water and Territorial Government 141

8 Miscellaneous Planning Matters 142

IV The Resource Allocation System 145

1 Duties and Restrictions 145

2 Resource Consents 147
   a Procedure 148
      i Applications for Water, Discharge and Coastal Permits
         (Excluding Applications for Restricted Coastal Activities) 148
      ii Applications for Coastal Permits in Respect of Restricted
         Coastal Activities 152
      iii Applications Concerning Proposals of National
         Significance 153
   b The Nature of Consents 154

3 Protecting Water Bodies: Heritage Orders, Esplanade Reserves and
   Water Conservation Orders 154
   a Esplanade Reserves 154
   b Heritage Orders 155
   c Water Conservation Orders 155

4 Arresting Pollution: Enforcement Orders and Abatement Notices 157

5 Concluding Remarks: the 1967 and 1991 Water Allocation Regimes
   Compared 159

PART III: INCREASING CONSERVATION CONSCIOUSNESS,
WATER AND THE RESOURCE MANAGEMENT ACT

Chapter 6 The Resource Management Act: Continuing the Trends? 166
   I An Increase in Scope and Comprehensiveness 166
   II An Increase in the Formality, Extent, and Coordination of
      Management and Planning 167
   III An Enhanced Integration in Management 169
      1 Integrating Economy, Society and Environment 169
Chapter 7 Increased Conservation Consciousness in Context

I Introduction

II Sources of Early Environmental Thinking
   1 Early Thinking and Early New Zealand Water Law

III Challenges to the Frontier Mentality
   1 God, Nature and the Romantics
   2 The New Sciences
   3 Two World Wars and a Duty to Future Generations

IV The Modern Environmental Movement
   1 Origins
   2 Action by the International Political Community
      a Paris, Stockholm, Nairobi, New York and Our Common Future
      b UNCED in Rio de Janeiro
   3 Reflections in Municipal Environmental Law

Chapter 8 Section 5 and its Potential

I Introductory Remarks

II The Meaning of “While”
   1 Interpreting “While” – Three Lines of Thought
   2 Evaluating the Support for Each Interpretation
      a Intrinsic Aids to Interpretation
         i Plain and Ordinary Meaning
         ii Context
         iii Effect
         iv Precedents
      b Extrinsic Aids to Interpretation: Parliamentary History of Section 5
         i Admissibility of Extrinsic Aids
         ii The Substance of the Extrinsic Aids
      c Concluding Remarks
   3 The Best Interpretation
      a Authority for Adopting the Best Interpretation
      b Why is the Subordinating Interpretation “Best”?
         i Consistency with Global Thinking and Action, Marking Progress in New Zealand Law
         ii The State of Natural Water in New Zealand
   4 Conclusion: The Correct and Best Interpretation of “While”
### III The Implications of Section 5 for the Management and Allocation of Water in New Zealand

1. **A Different Emphasis in Decision-Making**
   - a. Section 5(2)(a)
   - b. Section 5(2)(b)
   - c. Section 5(2)(c)
   - d. Concluding Remarks on Paragraphs (a) – (c)

2. **More Consistent Decision-Making**

3. **Concluding Remarks**

Chapter 9 Conclusion

Bibliography
# Table of Statutes

Acts Interpretation Act 1924  
Canterbury Rivers Act 1868, 1870  
Clean Air Act 1972  
Clutha Development (Clyde Dam Empowering) Act 1982  
Coal Mines Act 1925, 1979  
Conservation Act 1987  
Conservation Law Reform Act 1990  
Constitution Act 1846, 1852 (UK)  
Costs in Criminal Cases Act 1967  
Counties Act 1875, 1886, 1908, 1920, 1956  
Education Act 1964  
Electricity Act 1968  
English Laws Act 1858, 1908  
Environment Act 1986  
Fisheries Act 1983  
Foreshore and Seabed Endowment Revesting Act 1991  
Forests Act 1949  
Geothermal Energy Act 1953  
Geothermal Steam Act 1952  
Gold Fields Act 1862, 1866  
Gold Mining Districts Act 1871, 1873  
Harbours Act 1878, 1950  
Hauraki Plains Act 1926  
Hawkes Bay and Marlborough Rivers Act 1868  
Health Act 1956  
Highways and Watercourses Diversion Act 1858  
Immigration and Public Works Act 1870  
Imperial Laws Application Act 1988  
Income Tax Act 1975  
Irrigation Schemes Act 1990  
Judicature Amendment Act 1972  
Lake Pukaki Water Level Empowerment Act 1992  
Lake Wanaka Preservation Act 1973  
Land Drainage Act 1881, 1893, 1904, 1908, 1952  
Litter Act 1968, 1979  
Local Government Act 1974  
Local Government Commission Act 1946  
Manapouri-Te Anau Development Act 1963  
Maori Fisheries Act 1989  
Marine Boards Act 1862, 1891  
Marine Farming Act 1968, 1971
Marine Mammals Protection Act 1978
Marine Pollution 1974
Marine Reserves Act 1971
Maritime Transport Act 1994
Mines Act 1877
Mining Act 1886, 1891, 1898, 1908, 1926, 1929, 1971
Mining Acts Compilation Act 1905
Ministry of Energy Act 1977
Ministry of Energy Resources Act 1972
Ministry of Energy (Abolition) Act 1989
Ministry of Works Act 1943
Municipal Corporations Act 1867, 1872, 1876, 1886, 1900, 1908, 1920, 1933, 1954
Municipal Corporations Waterworks Act 1872
National Development Act 1979
National Parks Act 1952, 1980
Official Information Act 1982
Oil in Navigable Waters Act 1965
Oil in Territorial Waters Act 1926
Oyster Fisheries Act 1866
Public Health Act 1872, 1876, 1900, 1908, 1920
Public Reserves 1881
Public Works Act 1876, 1882, 1879, 1894, 1908, 1923, 1928, 1981
Public Works Acts Compilation Act 1905
Queen Elizabeth the Second National Trust Act 1977
Rangitaiki Land Drainage Act 1910
Reserves Act 1977
Reserves and Domains Act 1953
Reserves and Other Lands Disposal Act 1951
Resource Management Act 1991
River Boards Act 1884, 1908
Runanga Iwi Act 1990
Salmon and Trout Act 1867
Soil Conservation and Rivers Control Act 1941
State-Owned Enterprises Act 1986
Tasman Pulp and Paper Company Enabling Act 1954
Territorial Sea and Exclusive Economic Zone Act 1965
Thermal-springs Districts Act 1881, 1908
Timber-floating Act 1884, 1908
Tongariro National Park Act 1894
Tourist and Health Resort Control Act 1906, 1908
Town and Country Planning Act 1953, 1977
Town-planning Act 1926
Underground Water Act 1953
Salmon and Trout Act 1867
Scenery Preservation Act 1903
Swamp Drainage Act 1915
Synthetic Fuels Plant (Effluent Disposal) Empowering Act 1983
Waikato and Ohinemuri Rivers Improvement Act 1910
Waikato Valley Authority Act 1965
Water and Soil Conservation Act 1967
Water-Power Act 1903
Water-Supply Act 1891, 1908
Waters Pollution Act 1953
Wildlife Act 1953
Table of Cases

AFFCO New Zealand Ltd v Far North District Council [1994] NZRMA 224
Ahmad v Inner London Education Authority [1978] QB 36
An Appeal by Alliance Freezing Co (Southland) Ltd, Southland Frozen Meat and Product Export Co Ltd v Southland Catchment Board (1977) 6 NZTPA 247
Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc (1987) 12 NZTPA 289
Attorney-General v Findlay (1919) NZLR 513; (1919) GLR 207
Attorney-General v New Zealand Maori Council [1991] 2 NZLR 129
Attorney-General v Richards (1795) 145 ER 980
Attorney-General and Hutt River Board v Leighton [1955] NZLR 750
Auckland Acclimatisation Society Inc v Sutton Holdings (1984-5) 10 NZTPA 255
Auckland Acclimatisation Society v Waikato Valley Authority (1983) 9 NZTPA 299
Auckland Acclimatisation Society v Waikato Valley Authority (No 2) (1985) 11 NZTPA 168
Auckland City Council v Minister of Transport [1990] 1 NZLR 264
Batchelor v Tauranga District Council [1993] 2 NZLR 84; (1992) 2 NZRMA 137
Berkett v Tauranga District Court [1992] 3 NZLR 206
Bletchley Developments Ltd v Palmerston North City Council unreported, Planning Tribunal Wellington, 3 September 1992, W58/92
Bristow v Cormican (1877) 3 App Cas 641
Brown & Doherty Ltd v Whangarei County Council [1990] 2 NZLR 63
Brown v Langwoods Photo Stores Ltd [1991] 1 NZLR 173
Cook Island Community Centre Society (HB) Inc v Hastings District Council [1994] NZRMA 375
Commissioner of Inland Revenue v Alcan New Zealand Ltd unreported, Court of Appeal, 31 May 1994, CA 150/93
Commissioner of Police v Ombudsman [1988] 1 NZLR 385
Countdown Properties (Northlands) Ltd v Dunedin City Council [1994] NZRMA 145
CREEDNZ v Governor-General [1981] 1 NZLR 172
Daganayasi v Minister of Immigration [1980] 2 NZLR 130
Darroch v Whangarei District Council unreported, Planning Tribunal Auckland, 1 March 1993, A18/93
Davis v Letherbridge [1976] 1 NZLR 689
Electricity Corporation of New Zealand Ltd v Manawatu-Wanganui Regional Council, unreported Planning Tribunal Wellington and Wanganui, 29 October 1990, W70/90
Electricity Corporation of New Zealand Ltd v Manawatu-Wanganui Regional Council, unreported High Court Wellington, 3 June 1992, AP No 302/92
Embery v Owen (1851) 6 Exch 353; 155 ER 579
Foodstuffs (Otago Southland) Properties v Dunedin City Council (1993) 2 NZRMA 497
Foster v Wright (1878) 4 CPD 438
Foxley Engineering Ltd v Wellington City Council unreported, Planning Tribunal Wellington, 16 March 1994, W12/94
Gilmore v National Water and Soil Conservation Authority and Minister of Energy (1982) 3 NZTPA 298
GUS Properties Ltd v Marlborough District Council unreported, Planning Tribunal Wellington, 5 August 1994, W75/94
Hanton v Auckland City Council [1994] NZRMA 289
Harrison v Tasman District Council [1994] NZRMA 193
Hawken v Northland Regional Water Board (1983) 9 NZTPA 181
Haydon’s Case (1585) 3 Co Rep 7a
Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1941] AC 308
Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188
Humphrey v Burrell [1951] NZLR 262
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Keam v Minister of Works and Development [1982] 1 NZLR 319
Keepa v Inspector of Fisheries [1965] NZLR 322
Lakeman v North Canterbury Catchment Board (1989) 13 NZTPA 477
Machinery Movers Ltd v Auckland Regional Council (1993) 2 NZRMA 661
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unreported, Planning Tribunal Christchurch, 26 January 1989, C26/89
Metekingi v Rangitikei-Wanganui Regional Water Board [1975] 2 NZLR 150; 5 NZTPA 330
Minister of Conservation v Kapiti Borough Council [1994] NZRMA 385
M’Nab v Robertson (1897) AC 129
Mueller v Taupiri Coalmines Co Ltd (1900) 18 NZLR 89
New Zealand Maori Arts and Crafts Institute v National Water and Soil Conservation Authority (1980) 7 NZTPA 365
New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641
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Re Hall & Selby Railway (1939) 5 M & W 327; 151 ER 139
Real Estate House (Broadtop) Ltd v Real Estate Agents Licensing Board [1987] 2 NZLR 593
Reith v Ashburton District [1994] NZRMA 241
Rotorua District Council v Bay of Plenty Regional Water Board (No 2) (1983) 9 NZTPA 453
Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council (1978) 6 NZTPA 361
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Shell Oil New Zealand Ltd v Wellington City Council (1992) 2 NZRMA 80
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Southern Service Station (1968) Ltd v Invercargill City Council [1991] 1 NZLR 86
Sowman v Nelson Regional Water Board (1983) 9 NZTPA 161
Stewart v Kaneiri Gold Dredging Ltd [1983] 1 NZLR 329
Tamihana Korokai v Solicitor-General (1912) 32 NZLR 321
Taylor v Corporation of St Helens (1877) 6 Ch D 264
Te Aroha Air Quality Protection Appeal Group v Wellington Regional Council (No 2) (1993) 2 NZRMA 574
Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 680
Thorn v Grey District Council unreported, Planning Tribunal Greymouth, 13 December 1993, C95/93
Trafford v Thrower (1929) 45 TLR 502
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Wellington Acclimatisation Society v Manawatu-Wanganui Regional Council unreported, Planning Tribunal Palmerston North, 27 August 1990, W59/90
Wellington International Airport Ltd v Air New Zealand [1993] 1 NZLR 671
Wellington Rugby Football Club v Wellington City Council unreported, Planning Tribunal Wellington, 30 September 1993, W84/93
Williams v Booth (1910) 10 CLR 341
Wood v Waud (1849) 3 Exch 748; 154 ER 1047
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Chapter 1

Introduction

Heralding the introduction to Parliament of the Resource Management Bill in December 1989, the Ministry for the Environment announced that “[w]ith the ... Bill, a new era in environmental management has begun.”¹ The Ministry explained its assertion:²

[Our existing resource management laws, like those in other parts of the world, have evolved in a piecemeal fashion, resulting in a set of complex, overlapping, and sometimes conflicting rules. As a result, the outcomes for the environment are often inadequate. ...]

The Resource Management Bill proposes to change all this. In a world where concern for the environment grows stronger every day, New Zealand has recognised that the clean-up must begin at home.

This thesis is an investigation into the implications and impact of the enactment of the Resource Management Act 1991 for the management and allocation of New Zealand’s natural waters. When enacted the 1991 Act was promoted, by the Ministry and others, as an agent of change. The object here is to ascertain the extent to which this perception is true in so far as the regulation of the use and conservation of New Zealand’s inland and coastal waters is concerned. The method used here to assess the impact of the 1991 Act is one of comparison, the idea being to compare and contrast the provisions and principles of the 1991 Act which relate to the management and allocation of water against those of this Act’s predecessors. In this way, the degree to which the 1991 Act is merely a continuation of, or amounts to some kind of meaningful change in, New Zealand’s water law when viewed as a whole is revealed.

The first task thus became to obtain a complete picture of New Zealand’s former water laws. To be complete, this picture had to include the Maori customs and lores which exclusively regulated water use before the signing of the Treaty of Waitangi, the common laws which came with the Treaty, and the numerous Acts of Parliament enacted since. Collecting the necessary information for this description proved to be quite some task. Very little has been written on Maori regulation of water, and no secondary sources providing a comprehensive account of the statutes affecting water could be located. Relevant tikanga Maori was collected from a few sometimes piecemeal sources, and Chapter 3 (which describes the legislation made since 1840) was compiled almost exclusively be reference to the text of the Acts of Parliament themselves. It is because such a dearth of secondary writings on the Maori customs and the statutory laws

² Introducing the Resource Management Bill idem.
exists that Chapters 2 and 3 to follow are somewhat longer and more detailed than is strictly necessary. While the detail in Chapter 3 especially does not make for tremendously stimulating reading, these descriptions are offered as historical accounts in the hope that they may be of value to future researchers in the field.

Once synthesized and described, the history and development of New Zealand’s various water laws up to and including the Water and Soil Conservation Act 1967 is seen to have proceeded according to (at least) four major trends. It is not clear whether law-makers set about to consciously create law which followed this pattern; or whether the four trends simply developed naturally as the law changed over time. It is however apparent that, as is indicated in Chapter 7 below, at least one of the four trends seems to have developed along the same lines as general social perceptions and attitudes towards the environment. The four trends perceived as forming the pattern of development of New Zealand’s water laws over time are described in brief to follow, while the last section of Chapter 3 below identifies more precisely how and why these four trends are argued to have occurred.

First is a trend of increasing scope, and subsequently increasing comprehensiveness, in codification. The systems and laws established for the management and allocation of water resources move from a state of no-codification, through a state of incremental codification, to a state of complete codification. As time has passed, the statutory codes have broadened in ambit and scope, beginning with statutes of very specific effect (perhaps covering only one river) and directed at only one object (perhaps flooding), and ending with the Water and Soil Conservation Act 1967 which covered the use and conservation of all natural water in New Zealand.

Second is a trend of increasing formalization and distribution of planning. To begin with, little legal provision was made for future planning, but later this was included as an often informal role of local government. Under the Water and Soil Conservation Act, planning was an express function of regional government and, for a while, centralised coordination of planning was provided for.

Third is a trend of increasing incorporation of the dual aspects of the notion of integrated management. The term “integrated management” refers both to managing resources in a holistic sense (so that an ecologically sound approach is taken where resources and activities in the environment are not considered in isolation) and to integrating social, economic and environmental concerns in decision- and rule-making. Over time, New Zealand’s water laws
have progressed from a system of piecemeal management of individual water bodies to a system where the allocation and conservation of all natural water resources in New Zealand fell under one Act, the Water and Soil Conservation Act.

Fourth is a trend of increasing conservation consciousness. This trend overlaps considerably with each of the previous three trends since the conservation consciousness of a law (that is, the extent to which it shows an awareness of the need to protect the natural environment from harm) can be improved greatly by more comprehensive law, more integrated management, and better planning. Otherwise, conservation consciousness is generally improved by the inclusion of direct and indirect conservation mechanisms. Direct conservation mechanisms are those expressly aimed at protecting water (such as the water conservation order regime in the Water and Soil Conservation Act 1967). Indirect mechanisms achieve protection, but may not have been expressly so directed (for example, the minimum flow regime introduced into the 1967 Act in 1981). Overall, in New Zealand water law the shift is from a system where public utility issues were not really relevant, to a system defined by an Act which lists “conservation” in its Long Title, and which contained an independent conservation regime.

By the end of Chapter 3, the stage is set for an account and analysis of the themes and mechanisms of New Zealand’s newest water law: the Resource Management Act 1991. Chapters 4 and 5 together make up Part II of this thesis which provides a description of the events leading up to the enactment of the Resource Management Act, and of its purpose, principles, schemes and mechanisms. It is submitted that this account and analysis can be used as the basis for a comparison of the 1991 Act (in so far as it relates to water) against its legal background.

The task of comparison between the Resource Management Act and its water law background is the focus of Chapters 6, 7 and 8 which, with Chapter 9, comprise the final part of this thesis. The process of comparison begins with an assessment of whether, and if so how and to what extent, the 1991 Act continues the four trends identified as featuring throughout the history and development of New Zealand’s water law. To anticipate somewhat, Chapter 6 finds that all four trends have been continued by the Resource Management Act, and identifies how this has occurred. The fact that the trends are continued says, it is submitted, two quite different things about the Act. On the one hand, it says that the 1991 Act is little different from its predecessors in that it simply continues along the same lines of development evident in earlier laws. On the other hand, the fact that all four trends are furthered by the new Act implies that it has brought change to water law in this country. By continuing each of the four trends the Act represents

3 Both the water conservation order and the minimum flow regimes will be described in Chapter 3 below.
progress; it does not merely leave things as they were under the Water and Soil Conservation Act.

Set aside for further consideration at the close of Chapter 6 of this thesis are the fourth trend of increasing conservation consciousness and section 5 of the 1991 Act. Section 5 declares that the purpose of the Resource Management Act is to promote the sustainable management of New Zealand's natural and physical resources. This section is recognised as having the potential to significantly increase the extent to which the 1991 Act is more conservation conscious than its predecessors. Whether or not this potential is in fact realised depends, it is submitted, on how section 5 is interpreted. In essence, the choice is between one interpretation which promotes a balancing of current human wellbeing against future and ecological concerns, and another which accords greater priority to future and ecological concerns, allowing them to prevail even where significant current benefits can be obtained. Chapter 8 is focused on the issue of which of these two interpretations should be adopted and applied in practice, and also considers the implications of this choice.

Chapter 7 anticipates Chapter 8 in its argument that, should the 1991 Act further the trend of increasing conservation consciousness through its purpose (and the interpretation given to that purpose), then this would be consistent with the social and legal context of the Act. The shift to offering greater recognition to the need to account for and protect environmental values in rule- and decision-making is one which is apparent both in the broader context of New Zealand's environmental law and in the still wider context of global environmental thinking.

Returning to Chapter 8 which makes the principal submission of this thesis by arguing that the reading of section 5 which takes the trend of increasing conservation consciousness the furthest is the best and most correct interpretation for that section. This justification is based on the ordinary principles of statutory interpretation and such judicial, extra-judicial and pre-enactment legislative comments as currently exist.

Before proceeding to Part I where the Maori customs, English common laws, and New Zealand statutes which governed the management and allocation of natural water in New Zealand prior to the enactment of the Resource Management Act are described, two brief comments must be made.

The first comment goes to the meaning of the terms "instrumental value" and "intrinsic value." These two terms, which are familiar to most involved in environmental issues, are used
throughout this thesis. In each case, the term "instrumental value" is used to mean the contribution which a part of the natural world makes to the satisfaction of human needs and interests. Thus, the instrumental value of water might include its value for supply, its value as a repository of waste, its value for recreation, and its value as an object of beauty. "Intrinsic value" is value independent of capacity to provide for other things including human wellbeing. Thus, intrinsic value includes the inherent value possessed by every living thing by virtue solely of its existence. Some would also include "ecological value" (that is, the measure of the contribution which any aspect of the natural world makes to the overall healthy functioning of the biosphere) in their definition of "intrinsic value." For the purposes of this thesis, however, intrinsic and ecological values are generally kept distinct.

The second comment which must be made is simply that the law in this thesis is stated as on 31 December 1994.
PART I

THE FORMER WATER LORES AND LAWS

In this part the history and development of New Zealand's water laws as they existed prior to the resource management law reform process of the late 1980s is described.

Chapter 2 describes the earliest law and lore, beginning with traditional Maori regulation of the use of water, and then moving to the common law riparian system.

Chapter 3 details the statutory supplementations and alterations superimposed on the common law background from the mid-1800s. In order to explain some of the features of this statutory history, a brief account of the development of local government in New Zealand is also provided. Events in the statutory history (such as a period of complexity where similar powers in relation to water were exercisable simultaneously by various public bodies, and the later conferral of most water management and allocation powers on regional government) clearly reflect events in the development of local government.

Having described the water statutes up to and including the Water and Soil Conservation Act 1967, the Environment Act 1986 and the Conservation Act 1987, Chapter 3 culminates with a general overview of New Zealand's water law. Four trends in the development of the law are observed in this overview.
Chapter 2

Early New Zealand Water Management
Lores and Laws

I. Introductory Remarks

The earliest systems for water management and allocation in New Zealand were products of custom and common law. As such, the lores and laws were developed in a piecemeal way, the system being constructed over time from a series of individual actions and cases. While the traditional Maori regime provided both for the use and protection of water bodies and the resources which they supported, the English common law which replaced the indigenous regime was really only concerned with allocating ownership and use rights. This was done according to a complicated set of common law rules which had as their basis the notion of riparian entitlements. As Williams notes, “[c]onsiderations of social utility, while not wholly absent, were taken into account only indirectly” by this common law regime and, furthermore, the only social utilities really recognised were those relating to public use and access to water bodies. No need for rules relating to conservation or protection seems to have even been perceived. There follows a brief description of these earliest lores and laws.

II. Traditional Maori Lore

Traditional Maori control over water and the benefits it offered (rights of passage, fisheries—both coastal and inland—and pounamu) occurred at two levels. The first is represented by the general control associated with ownership. Traditional ownership rights were communal and spread over whole territories, including both land and water. Ownership

2 The inland fisheries of concern were mainly those offering whitebait and eels.
3 McHugh records that land (which, for present purposes, can be seen as “territory” making it capable of including water bodies in or on the land - see n 4 below) was “... held by the tribe ...” and that “[w]ithin the tribe, the principle unit of landholding was the hapu, or kin-group.” He explains: “[t]he tribal lands were divided among the hapu of kin-groups, which would acquire a lesser form of take [right] to those lands .... The tribe retained those uncultivated lands [and unused waters?] not subject to the take of any hapu, though a hapu might obtain rights in such land (the right: to ... place an eel weir ... in a certain place, for example).” P G McHugh The Maori Magna Carta (1991) 74-75.
4 Tribal proprietary interests in water have been recognised—see Muriwhenua Fishing Report (Wai-22, 1988) 35-36, where the Waitangi Tribunal noted that “[t]he tribal property was made up of the lands of the various hapu, the lakes, rivers, swamps and streams within them and the adjacent mudflats, rocks, reefs and open sea”), Kaituna River Report (Wai-4, 1984) 35 and 37, where Te Irirangi Te Pou O Uruika Tiakiawa,
was a product of occupation (in respect of land) and use. The concept of ahi ka explains how rights, acquired by succession, gift or conquest, were maintained. Rights to use the resources offered by water were exclusive, exercised consistently both with the hapu’s roles as rangatira and kaitaki and with the need to preserve the mauri of the water body. All of this occurred (and so is best understood) within the context of the Maori world view. Put simply, this focuses on:

having recited the history of Ngati Pikiao, stated that he had “... mentioned ... this historical background to establish that we are the owners of these lakes [Rotorua and Rotoiti] and the [Kaituna] river ...” and that he “... hope[d] that these points will substantiate that we own this river, we have always owned it, we have never really surrendered ownership ...”) and Finding of the Waitangi Tribunal on the Manukau Claim ((1985) 20 and 48, for example). Attempts to enforce legal ownership over river and lake beds have been made by Maori in the ordinary courts, see for example: Tamihana Korokai v Solicitor-General (1912) 32 NZLR 321, in Re the Ninety Mile Beach [1960] NZLR 673 (SC) and [1963] NZLR 461 (CA), R v Morison [1950] NZLR 247 and in Re the Bed of the Wanganui River [1955] NZLR 419 (CA) and [1962] NZLR 600. For a discussion of these and other cases, see E J Haughey “Maori Claims to Lakes, River Beds and the Foreshore” [1966] NZULR 29. More recently, claims in respect of rivers, lakes and their beds have been made to the Waitangi Tribunal see, for example, the Tribunal’s Mohaka River Report (Wai-i19, 1992).

‘Burning fire.’ McHugh (supra n 3, 74) explains that “[a] Maori who left the tribe ... would loose all claim to the land after three generations. Figuratively, his fire became cold. ... During those three generations, however, while the fire was unstable or wandering ... the fire could be rekindled by a descendant returning to claim the land or to exercise some right of ownership. provided the tribe raised no objection. ... [A] flame could be reit after three generations upon the invitation of the tribe as a whole.”

McHugh ibid 75-76.

For example, the exclusive nature of hapu rights in fishing grounds has been recognised by the Waitangi Tribunal in the Murihwenna Fishing Report (supra n 4, 36), by the New Zealand Law Commission in its Preliminary Paper No 9: The Treaty of Waitangi and Maori Fisheries (1989) 27-32 and, albeit cautiously, by the High Court, where Williamson J accepted that the fishing right contended for was “... limited to the Ngai Tahu tribe and its authorised relatives ...” (Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 680, 692). (The Judge’s caution at 690 can be explained by his need to distinguish Keapa v Inspector of Fisheries [1965] NZLR 322 and Waiapapakura v Hempton (1914) 33 NZLR 1065.) Raymond Firth, in Economics of the New Zealand Maori (1972) 379, records that “Nicholas in 1815 remarked on the existence of sharply defined fishing rights at Kawakawa, the limits being marked out by stakes driven into the water. He observed several rows of these stakes belonging to the different [hapu], each having their prescribed boundaries ...”

A “rangatira” is a “master or mistress” (H W Williams A Dictionary of the Maori Language (1985)) and a “kaitiaki” is a guardian (hence “kaitiakitanga” means “the exercise of guardianship” – Resource Management Act 1991, s 2). These roles are still recognised and exercised – thus, for example, some of the claimants in the Manukau Claim, called “Te Kaitiaki Whanau o Manukau” (“the Guardian families of the Manukau”), indicated (supra n 4, 48) that they had in the past exercised and were still committed to exercising their “... guardianship role ... to protect [the Harbour's] natural resources.” Note also the affidavit supporting the Whanganui River Maori Trust Board’s application for authorisation to appear in the Electricity Corporation’s then pending appeals against the Planning Tribunal’s Water and Soil Conservation Act 1967 s 203 decision where Whanganui iwi are described as “rangatira and kaitaki” of the River and state that they “... will continue to protect and care for their River” – Electricity Corporation of New Zealand Ltd v Manawatu-Wanganui Regional Council unreported High Court Wellington, 3 June 1992, AP No 302/90, 3.

“Immanent within all creation is ‘mauri’ - the life-force which generates, regenerates and upholds creation. ... A synonym for Mauri in certain contexts is ‘hau’ (breath). ‘Hau-ora’ - ‘the Breath of Life’ is the agent or source by and from which mauri (life-principle) is mediated to objects both animate and inanimate. ... Mauri without the qualifying adjective ‘Ora’ (life) is applied to inanimate objects; whilst hau is applied only to animate life.” Ministry for the Environment Resource Management Law Reform Working Paper No 29: The Natural World and Natural Resources: Maori Value Systems and Perspectives ... (1989) 20 and 21.

the family based (interrelated) nature of the universe. The concept is a holistic one. It firmly binds a [person] as a special but junior member of the natural family to his[her] older siblings or other natural phenomena.

The Maori approach brings with it a sense of human closeness and connectedness in terms of mutual well-being – [people] and environment, tangata and whenua.

The second level of control occurred within the confines of that offered generally by ownership. It relates to specific regulatory measures exercisable by the hapu holding use and/or ownership rights. Thus, control over the use of a given resource such as a water body (and the fish, birds, vegetation and pounamu it supports or supplies) and the means of exploiting it was, and often still is, exercised through the use and observation of tapu, makutu, rahui and the “laws of Tangaroa (God of the fish).”

The Waitangi Tribunal has noted that:

[The laws of Tangaroa ... are still observed by many. ...] Incantations must be offered to Tangaroa before going out to fish. Only certain days are suitable for fishing, according to the Maori calendar, and only if approved by the tohunga (experts or priests). ...

Some rules ... were basically directed to the maintenance of clear waters and balanced fish habitats. It is forbidden to gut fish in the open seas, or to dispose of small fish, excess bait, food or rubbish. ... It was thought by some that the disposal of waste advantaged mainly predators and upset the natural balance of species at particular grounds.

11 The fact that these specific forms of control were exercisable and effective (with, perhaps the exception of rahui) within the tribe only is made clear in the Kaituna Report (supra n 4). The Tribunal notes “... a real inconsistency ...” between Ngati Pikiao’s claim that, if effluent were discharged into the Kaituna River, it would have to be declared tapu [see n 22 below] and the fact that “... effluent is now being pumped indirectly into Lake Rotorua, yet no tapu has been declared ... [and] Ngati Pikiao ... now fish [there] ...”. Having questioned the claimants, the Tribunal notes the tribe’s explanation that “... Ngati Pikiao do not have any authority over Lake Rotorua [which] is not solely within their territory ... . Tapu, they said, is a matter of territorial responsibility.”

12 See nn 20, 21 and 22 below and accompanying text.

13 Described by Firth (supra n 7, 272) as “black magic,” makutu seems to involve passing spells for various purposes including prohibiting resource use.

14 Rahui is explained at nn 23 and 24 below and accompanying text. Further, it should be noted that the Maori language “... portrays a ... range of [additional] protection mechanisms including ... tiaki [“guard, keep”], taurima [“treat with care, tend”], tohu [“preserve, save alive, spare”], atawhai [“foster”], manaaki [“show respect to”] and wahi tapu [sacred place].” Kati Huirapa Runanga K, Puketeraki supra n 10. Note that all definitions (save that for “wahi tapu”) were drawn from Williams (supra n 8).

15 Waitangi Tribunal Muriwhenua Fishing Report supra n 4, 24. Note that these four methods of control are not distinct - the Tribunal’s notes make it clear that the laws of Tangaroa, for example, may incorporate the idea that any place where someone has drowned becomes tapu and fishing there is prohibited “... until Tangaroa returns the dead. [Since] ‘... only then can the tapu be lifted’ ... .” In the Manukau Report (supra n 4, 54), the Tribunal was told of “... the maintenance of the laws of the sea through tapu and rahui ...” and of the Manukau Harbour’s own “guardian spirit,” Kawaihere.

16 Muriwhenua Fishing Report supra n 4, 24 and 25.

17 The claimants in the Manukau claim (supra n 4, 54) also spoke of rules prescribing quietness at sea; prohibiting the opening of shellfish, the lighting of fires, and cooking on the shoreline; bathing in certain waters (at certain times) and urinating in water (at all times).
There are particularly strict rules for the maintenance of habitats, feeding and breeding areas. Nets and lines must not drag on the seabed.18 ... The underwater contours and characteristics of some grounds are well known and must be maintained and the waters should not be muddied.19 ...

[T]hese rules showed the degree of care taken for essential renewable resources, and the extent of the ... people’s reliance upon the bounty of the sea.

Something is tapu ‘... when it is under the influence of atuas [gods, or the supernatural].’20 Thus, anything which is or has become tapu can only be touched or used (if at all) ‘... with caution, and under certain rigidly defined conditions. Otherwise harm [is] believed to occur.’21 Since tapu can spread through contact, the use of water (or the resources it contains) might be prohibited if it touches or is touched by something tapu.22 Use can be resumed only when the tapu has been lifted.

Rahui23 is probably the best known aspect of the traditional Maori conservation ethic. It was and is instituted:24

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18 Rules that no one must drag their kit over shellfish beds or dig other than with their hands also exist; see the Manukau Report idem.
19 Also, upturned rocks had to be replaced and things generally left as they were found; see the Manukau Report supra n 4, 54.
20 Hanson F A and Hanson L Counterpoint in Maori Culture (1983) 50.
21 Firth supra n 7, 246. The Waitangi Tribunal, in the Manukau Claim (supra n 4, 54) notes that whaka hawea [to despise] and maori mate [death, illness, suffering] were the ‘self imposed punishments’ associated with tapu and rahui. The definitions are based on those offered by Williams (supra n 8) and P M Ryan The Revised Dictionary of Modern Maori (1983).
22 Since birth, illness and death are all regarded as tapu states (Hanson and Hanson supra n 20, 50), anything associated with them is also affected – for example: the corpse. Any water touched, directly or indirectly, by all or part of a corpse is exposed to the influence of atuas – consider: (i) the discussion at n 15 above and (ii) the following event, said to have occurred at Ruatoki. A dog ‘... burrow[ed] into the grave of a man ... recently ... buried. [T]he dog, having gnawed or the cadaver, was rendered tapu. The people ..., discovering what the animal was doing, set off in hot pursuit. The dog attempted to escape by swimming across the Whakatane River, but was overtaken and killed in midstream. The damage, however, was done: because he had been swimming in it, the dog’s tapu permeated the entire river. Its water could not be used for any purpose until ... the tapu [had been removed]’ (Hanson and Hanson, supra n 20, 54). Human waste (probably because it is the product of a tapu process) can also, by contact, render water tapu. In the Kaituna River Report (supra n 4, 9) the Tribunal notes the claimants’ concerns that ‘... if the [proposed] pipeline is built [Ngati Pikiao] will have to declare the [Kaituna] river tapu so long as the sewage effluent discharge continues. Such a declaration would make it impossible for any food to be gathered from those waters ... . [And] also affect any vegetation that had contact at any time with the water, [meaning] not only vegetation that would be splashed by water at normal levels but anything that was covered by flood levels.” In the Mangonui Sewerage Report (Wai-17, 1988, 38) the Tribunal noted that “[t]he right to discharge waste into natural water is assumed [under current legislation] provided prescribed ... standards ... can be maintained ... . This is anathema to many Maori for whom waste can never be discharged into waters that support food. There is a biological base for the view but for Maori it is manifest as a spiritual belief.”
23 The rahui is instituted under human mana or authority (and so a rangatira – or chief – declares it) and the area is often marked by the setting up of a pou rahui (post) – Kati Huirapa Runanga Ki Puketeraki supra n 10.
For the purpose of conserving or replenishing a resource – [for example] fish... – a rahui was imposed upon the area affected, a river / forest / lake / harbour which banned people from utilising the resources within the prohibited area. The area was monitored and when it was considered that the resource had regenerated itself sufficiently, the tapu was lifted in accordance with the appropriate kawa and the resource restored to general use.

III. The Importation of English Common Law

When the Treaty of Waitangi was signed in 1840, Maori chiefs25 ceded kawanatanga26 to the British Crown but retained (at least in theory) the right to exercise “... rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.”27 The events at Waitangi were followed by Britain’s proclamation of sovereignty and, from this time at least,28 New Zealand apparently became subject to the laws of England.29 Thus, early national water law (including that regulating the ownership of land under water, and those setting out rights to use water, to fish and to navigation) “... consisted primarily of principles laid down by the English Courts.”30

This “... special branch of the law of property”31 made a broad distinction between ownership...

25 Article I of the Treaty involves both those Chiefs already part of, and those who had not entered the Confederation of United Tribes which signed the 1835 Declaration of the Independence of New Zealand.

26 Article I of the text in Maori. The English text uses the phrase “... all the rights and powers of Sovereignty ...,” but I H Kawharu (Waitangi - Maori and Pakeha Perspectives of the Treaty of Waitangi (1989) 319) translates “kawanatanga” as “government,” noting that “[t]here could be no possibility of the Maori signatories having any understanding of government in the sense of 'sovereignty' ... .”

27 Article 11 of the text in Maori, translated by Kawharu (supra n 26, 319-320) as “... chieftainship over their lands over their villages and over their treasures all.” The English text arguably promised something less – “the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties ... .”

28 It may be that English common law was brought to New Zealand much earlier – when the settlers arrived. This suggestion is justified by the doctrine, generally attributed to Blackstone, that wherever they went, English settlers took with them their birthright of English common law. In volume I of his Commentaries on the Laws of England (15th edn, 1908) 107 Blackstone notes that “[t]hat hath been held, that an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force.” The application of this doctrine to the settlement of New Zealand has, however, been criticised by N J Jamieson (“English Law but British Justice” (1980) 4 Otago LR 488-489) for two reasons: “[i]n one sense the application of the doctrine is self-referential: the existence of English common law in New Zealand is to be explained itself by English common law. In another sense the doctrine is quite inadequate for it ignores those British people whose birthright is other than that of English common law [and a great many of whom settled in New Zealand].”

29 Any doubts were removed in 1858, when the New Zealand parliament “... provid[ed] in the English Laws Act that the laws of England, so far as they were applicable to the circumstances of the colony, should be deemed to have been in force in the colony since January 14, 1840” – J L Robson New Zealand - the Development of its Laws and Constitution (2nd edn, 1967) 5. Note that the same provision was repeated in the English Laws Act 1908 and that, according to the Imperial Laws Application Act 1988 (ss 3, 4 and 5), parts of England’s common and statutory law still apply here. That the acquisition of sovereignty occurred with the making of Hobson’s proclamations (and not necessarily with the signing of the Treaty) has been judicially confirmed in New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641, per Richardson and Somers JJ 671 and 690 respectively, and Berkett v Tauranga District Court [1992] 3 NZLR 206, per Fisher J 210-211.

30 Williams supra n 1, 2.

31 Williams idem.
and use rights concerned with tidal waters (tidal rivers, estuaries and arms or parts of the sea) and those associated with non-tidal waters (rivers, streams and most lakes not influenced by the ebb and flow of the tide).

The following description of the early common law is intended as an overview only; sufficient to illustrate its general themes and trends.

1. **Tidal Water**

Under the common law, the bed of all tidal waters was, prima facie, vested in the Crown. The outer boundary of this entitlement lay at the mean or ordinary high water mark and the inner boundary – in the case of the ocean – fell at the mean or ordinary low water mark. There were two noteworthy limits to this entitlement. First, it was subject to public right to fish in and navigate through the waters flowing above the land. Second, the registered

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32 Hinde G W, McMorland D W and Sim P B A *Land Law* (1979) paras 2.219 (rivers) and 2.221 (the foreshore). Note that the Crown’s title to the foreshore was confirmed in *Attorney-General v Richards* (1795) 145 ER 980. For a detailed discussion of the ownership of both tidal and non-tidal riverbeds, see M R G Christensen *Ownership of Riverbeds and the Concept of Navigability* unpublished LLB(Hons) (Otago) thesis (1986). The reader should note the current position in respect of title to the beds of tidal waters. The Crown’s common law title to the bed of tidal rivers was apparently confirmed by the legislature in 1925, following the Court of Appeal’s decision in *Mueller v Taupiri Coalmines Co Ltd* (1900) 18 NZLR 89 which had suggested that the Crown’s claim might be limited to public, navigable rivers. Section 206(1) of the Coal Mines Act 1925 declared that the beds (defined in s 206(2) as “... the space of land which the waters of the river cover at its fullest flow without overflowing its banks ...”) of navigable rivers (defined in s 206(2) as “... a river of sufficient width and depth ... to be used for the purpose of navigation by boats, barges, punts, or rafts”) “... shall remain and shall be deemed to have always been vested in the Crown ...” This provision which (according to the Property Law and Equity Reform Committee *Background Paper on the Ownership of Riverbeds* (1991)) was most probably directed at “... the preservation for the Crown of minerals [happening to lie under the water] rather than the retention of title to the subsoil of riverbeds as such, caused many difficulties. Amendment was recommended by the Property Law and Equity Reform Committee, but instead s 261 was simply repealed in 1991 (see the Crown Minerals Act 1991, First Schedule). The new Crown Minerals Act 1991 (which focuses instead on ownership and use of the minerals, rather than the land in which they happen to be embedded) contains no parallel provision and so the common law presumably still applies to determine ownership of land under tidal rivers. In so far as the foreshore is concerned, it appears that this too remains in Crown ownership in New Zealand. Until recently, the Harbours Act 1950, s 150 enabled the Crown to transfer ownership of the foreshore to harbour boards by specific enactment. Section 362 of the Resource Management Act 1991 would appear to have removed this power; while the Foreshore and Seabed Endowment Revesting Act 1991, s 5 provides that “[a]ll of the original vestings of land to which this Act applies [these are defined in s 4] are hereby revoked” and, furthermore, that all such land “... is hereby revested in the Crown as if it had never been alienated from the Crown.” Note that this 1991 Act provides that “[a]ll persons exercising functions and powers under [it] shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).”

33 Note that where water forms the boundary of a landowner’s title, the boundary will not be fixed but will be subject to the processes of accretion and erosion. The common law on this point is outlined in text to follow.

34 Thus, Hinde, McMorland and Sim (supra n 32 para 2.221) describe the foreshore as “… the land between high and low water mark …” and cite the New Zealand case *Attorney-General v Findlay* [1919] NZLR 513; [1919] GLR 207 as supporting this proposition.

35 Gordon R I *Land Adjacent to Water - Public and Private Rights and Restrictions* unpublished LLM (Otago) thesis (1978) 33 (rights to fish) and 26 (navigation rights). Note that “... all tidal waters on which navigation is possible are deemed at common law to be navigable and are accordingly subject to [the] public right ...” (Property Law and Equity Reform Committee supra n 32 para C(a)). Note further that these

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proprietor of the land through or along which a tidal river flowed could obtain title to part of the
river bed through the concept of adverse possession.36

2. Non-Tidal Water

a. Ownership of Water

At common law, water itself (as compared to the land beneath it) was not “... the subject of
property or capable of being granted to anybody.”37 Nevertheless, private rights to own the
land beneath the water and to receive and use the water itself, and the resources it offered, were
recognised.

b. Ownership of Land Under Water

i. Flowing Water

In so far as flowing water (rivers and streams), is concerned, the common law presumption is
that the registered proprietor of the land adjacent to the water also owns the bed of the river or
stream as far as the centre line.38 This is known as the *ad medium filum aquae* presumption, which presumption is both39

a rule of construction evidencing title to land ... and a prima facie
presumption of fact that the ownership of the bed of a non-tidal river is
divided between the subjacent riparian owners by the middle line of the
river measured bank to bank.

As with most presumptions, *ad medium filum aquae*40
can be rebutted but the exclusion must be evidenced by the terms of the
grant or by attendant circumstances, and if not so evidenced the

38 Hinde, McMorland and Sim supra n 32 para 2.219, citing Gresson Pin Re the Bed of the Wanganui
River [1962] NZLR 600, 609 (where the President said that “[t]he common law rule that where a non-tidal
river is the boundary of land conveyed it is presumed that the grantee takes the bed of the river to the middle
line is part of the law of New Zealand ...”).
39 Property Law and Equity Reform Committee supra n 32 para C(b). If one person owns the land on both
sides of a river, their title will presumably stretch from each bank, joining at the middle line. This owner
would then, since such rights are rights of property, have the sole right (for example) to fish “... in that
part of the river between his lands ...” – see Gordon supra n 35, 48-49. Note that the application of the *ad
medium filum aquae* principle does not mean that the “owner” of the river or lake bed has or had an
indefeasible title to that land. In 1955, the Court of Appeal held (in Attorney-General and Hutt River
Board v Leighton [1955] NZLR 750) that “... a District Land Registrar cannot issue a certificate of title
for land submerged by water ...” and, thus, “... the ownership of a riverbed derives from the common law
legal estate only” (Property Law and Equity Reform Committee para D).
40 In Re the Bed of the Wanganui River supra n 38, 609 per Gresson J.
presumption will apply.

ii. Still Water

Hinde, McMorland and Sim state that

[w]here a lake is situated wholly within the boundaries of a particular parcel of land the bed of that lake is vested in the registered proprietor of the land unless the lake is excluded from [the] certificate of title.

Where the land abutting a lake belongs to more than one proprietor the law as to the ownership of the bed of the lake remains uncertain:41 there is no authoritative decision which settles the question of the ownership of lakes in general.42

Though the general question of the ownership of lake beds has never been authoritatively determined in New Zealand, English courts have held that "... the Crown was not of common law entitled to the soil or waters of an inland non-tidal lake ..."43

c. Incidental Rights: to Receive, Use, Fish and Navigate

Under the common law riparian owners in New Zealand were entitled to both "... have the water of the stream ... flow down as it has been accustomed to flow down to [their properties] ..."44 and "... to the use of it as it passes along for the enjoyment of [their properties] ... ."45

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41 Halsbury's Laws of England (supra n 37, 219) however, makes the presumption that the bed of the lake will be vested in private individuals according to the ad medium filum principle, noting that "[w]here the boundary passes along a pool it is taken to coincide with the medium filum of the pool, even if it is proved expressly to have some other direction."

42 Hinde, McMorland and Sim supra n 32 para 2.220, citing 39 Halsbury's Laws of England (3rd edn, 1962) 513 (on the first and second propositions - that the bed of a lake wholly within the boundaries of one title is included in that title and that there is uncertainty as to title where the land abutting a lake belongs to more than one person) and noting, on the point that there are no authoritative decisions on the question of the ownership of lakes in general, "Cf Tamihana Korokai v Solicitor-General [supra n 4]; and see the account of Maori claims ... in Haughey [supra n 4]. Because of this uncertainty special legislation is sometimes necessary: see eg the Reserves and Other Lands Disposal Act 1951, s 26, vesting the bed of lake Waiaatarua in the Auckland City Corporation." Note that the contrary view - that the "... property under any large sheet of water ... was in the Crown as the universal occupant," per Zelling J in Southern Centre of Theosophy Inc v South Australia (1979) 21 SASR 399, 412 - won some support from the decision of the Judicial Committee of the Privy Council in the same case [[1982] 1 All ER 283], and from the New Zealand decisions Tamihana Korokai v Solicitor-General and Nireaha Tamaki v Baker (1901) AC 561. These three judgments are discussed by FM Brookfield (in two articles: "Wind, Sand and Water Accretion and Ownership of the Lake Bed" [1981] NZLJ 365 and "Accretion and the Privy Council" [1982] NZLJ 173) who notes, in reference to the Privy Council case, that their Lordships' "... expressions seem to be consistent with the view developed by Zelling J ... that, in general, the beds of inland lakes do remain the allodial property of the Crown" ((1982), 174) and, in reference to Tamihana Korokai's case, that "... the existence of Maori customary title to a lake bed could be a matter of investigation quite separate from the title to the pieces of land abutting the lake" ((1981), 367).

43 Haughey supra n 4, 32 citing Bristow v Cormican (1877) 3 App Cas 641.


45 Glenmark Homestead Ltd v North Canterbury Catchment Board [1975] 2 NZLR 71, 81 per Macarthur J, who cited Wood v Waud (1849) 3 Exch 748; 154 ER 1047 and Embrey v Owen (1851) 6 Exch 353;
The extent of riparian owners' common law rights to use water flowing through their land depends on whether the use is "ordinary" or "extraordinary." As Lord Macnaghten said in *McCartney v Londonderry & Lough Swilly Railway Co*,[47] in the ordinary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character.

Thus, it is clear both that "... no right exists at all to use water for purposes unconnected with the land or to use water on non-riparian land"[48] and that the right to have water "... flow down as it has been accustomed to flow down ..." is subject to both ordinary and extraordinary (so long as they are reasonable) uses of the water by riparian owners back upstream.[49] What this latter right does is offer a riparian owner a remedy where damage has been suffered because the flow or character of the water has been altered (in quality or quantity) through...

[155 ER 579. Note that these rules have been developed in relation to water in "streams." In *Taylor v Corporation of St Helens* (1877) 6 Ch D 264 Jessel MR (at 273) said "[a] stream of water, in law, is water which runs in a defined course, so as to be capable of diversion ..." and in *M'Nab v Robertson* [1897] AC 129 Lord Shand stated that "... the term "streams" necessarily means flowing water, ... unless water flows more or less in a channel, and continuously, it cannot be described as water that flows in "streams" ...". Thus, D A R Williams (*Environmental Law in New Zealand* (1980) 89) notes "[t]he riparian doctrines relating to the use, flow, and purity of water also apply to underground water which is flowing in a known and defined channel. But different principles apply to the water percolating over or through land ['groundwater']. At common law an owner may abstract [groundwater] on or under his land, without regard to the effect this may have on the supply of water to springs or other wells or boreholes. He possesses a corresponding right of action against another landowner who pollutes such [groundwater]."

[46] *Glenmark Homestead* idem. Macarthur J notes that "... the cases have distinguished between (i) ordinary or domestic purposes connected with the riparian tenement (such as drinking and culinary purposes, cleaning and washing, feeding and supplying the ordinary quantity of cattle on the owner's land, and (ii) extraordinary or secondary purposes connected with the riparian tenement (such as irrigation, manufacturing purpose, and trade purposes such as carrying on a tannery or a dye-works)."


[48] Williams supra n 45, 86.


[50] Newsom (ibid 384-385) discusses the remedies available in the context of damage caused by pollution. They are (i) damages (note that unless "... in its passage over the plaintiff's land, an effluent deposits a coating of alien solid matter on the bed or banks of a river," these will be assessed according to damage actually suffered since the action is based on the infringement of proprietary rights. If a "... coating of alien solid ..." is deposited, the action becomes one for trespass and damages are assessed according to the "... so-called wayleave principle..." which reflects the amount "... one would reasonably charge for a licence to enable a stream of sewage to pass through one's garden ...") and (ii) injunction (where the damage is caused by continuous pollution of the water. Newsom says (at 384) "... the resultant tort is therefore a continuing tort. The normal remedy for a continuing tort is an injunction, and the polluter therefore faces the prospect of imprisonment for contempt of court if he does not cease committing the tort").
unreasonable upstream use.51

In addition to these rights to use and receive water, common law riparian owners also acquired exclusive rights to remove shingle and minerals from the river or lake bed and to navigate along52 and fish in the water.53

Finally, for the sake of completeness, the position of the common law in relation to discharge rights and surface water should be noted. Thus, land owners had two general rights:54

(1) To discharge surface water on one's own land; and
(2) To the benefit of a natural drainage servitude ... under which lower land of one owner had to receive surface water naturally flowing or discharged from higher land of another, ... in the natural use of the higher land.

3. Acquired Rights

All the incidental rights described to use water, to the flow of water, to discharge water, to navigate through or fish in waters, and to drainage were attached to land ownership. But, of course, the holders of the rights were entitled to transfer them be way of an easement to non-riparian owners, or to other riparian owners. Thus, in the first situation a right to use water running over or past land could be acquired independently of the land. In the second situation, "... a higher owner [might] acquire rights against the lower owners, for example to pollute water ..., to divert or to exhaust water for extraordinary ... purposes."55

4. Accretion and Erosion

Where a boundary to land title is marked by the sea or a river,56 that boundary is movable and

51 Newsom supra n 44, 698.
52 Note that there was no public right of navigation since "... waters above the influence of the tide even though navigable in fact, are deemed not navigable at law" (Property Law and Equity Reform Committee supra n 32 para C(a)).
53 Property Law and Equity Reform Committee ibid, para D. And see n 35 on what has happened to the common law rights to fish since.
54 Hinde G W, McMorland D Wand Sim P Introduction to Land Law (1986) 557. Williams (supra n 45, 89-90 citing Mahon J in Davis v Lethbridge [1976] 1 NZLR 689, 695) notes the three principal limitations on this right, being where (i) "... the lower tenement is not obliged to accept 'foreign water' meaning thereby water arriving on the upper tenement from esewhere by means of active collection by the occupier ..." (ii) the "... artificial structure' exception ... whereby the superior occupier will be liable if by artificial means, including the erection of buildings or raising of soil level, he causes natural surface water to pass on to the lower tenement in a way different from before and causes damage which was absent when the lower tenement received the surface water by natural flow" and (iii) the user of the superior tenement is held to be not natural because "... the result is to discharge surface water on to the lower land with an altered concentration or velocity, causing damage which did not occur when the lower tenement received the surface water by natural flow."
subject to the forces of accretion and erosion. The doctrine of accretion provides that where new land is created through accretion it belongs to the owner of the land to which it was added; and that "... the owner of [a] parcel of land which is being eroded loses that part of [the] land which has been washed away." In New Zealand, it seems that certificates of title can be amended, on the initiative of the land-owner, to take account of such changes.

IV. Concluding Remarks

As an oral culture, tikanga Maori contained no written rules; but did feature well known and apparently nationally consistent rules regulating and/or restricting access to the resources contained in or nurtured by water, and other rules relating to the use of water generally. Maori lore did not provide for formal future planning, but the idea of rahui especially indicates an appreciation of the limits on resource exploitation. As one illustration of the conservation element of the Maori customary regime, rahui shows that this element was and is holistic, emphasizing the role of people was stewards of the physical and metaphysical aspects of the environment.

The existence of such qualities as holism and integration at the beginning of this legal history does not however disprove the theory that such features developed over time. The Maori customary system is hardly the starting point of the current regime: it is more accurately seen as merely that which preceded the current laws.

In common with the Maori customary regime, the riparian system was not codified (but was...
written) and provided for exclusive water-use rights, attached on the whole to ownership of adjacent land. The centralised state in which the common law developed made itself felt in this legal regime – with the Crown claiming title to the beds of, and the public claiming fishery and navigation interests in, tidal waters. The common law riparian systems appears as a complex set of rules governing entitlements to the water itself, to the land under water, and to its use. The common law made little to no provision for conservation interests; courts were even willing to recognise the rights of riparian owners to completely exhaust water supplies.

The organizing principle of the common law system, the hook upon which it all hangs, is title to land. To the courts, rights to use water and the resources it offers were contingent upon ownership of the land surrounding or under the water. As the legislature intervenes in the law this feature is discontinued, and the conferral of rights and duties to use and manage the water independent of title to land occurs.

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61 Though water itself could not be owned, the reader will recall (see n 44 above and accompanying text) that riparian owners are entitled to the customary flow of waters passing through their properties.

62 Conservation interests might, where they coincided either with an invasion of an individuals’ interest in the use and enjoyment of land or with some other sufferance of personal injury or loss, have won some support from the law of nuisance (see J C Fleming *The Law of Torts* (1983) 378–410). Also note (see n 44 above and accompanying text) that the courts did protect the rights of individuals to receive the customary flow of water.

63 This so long as the riparian owners were acting in the course of the “ordinary” use of their land - see the quote from *McCartney v Londonderry & Lough Swilly Railway Co* at n 47 above and accompanying text.
Chapter 3

Water Legislation to 1987

I. Introductory Remarks

From the mid-1800s, the common law riparian principles determining rights and duties to receive, control, use and take water from rivers, lakes and coastal sources were frequently "... supplemented or altered by statute, but perhaps only in a piecemeal way necessary to implement the particular statute."¹ These piecemeal supplementations and alterations derived from numerous sources which overlapped extensively, reflecting the complicated, overcrowded and often ineffectual local government systems variously operating until 1974. Because there is such a clear relationship between developments in local government, and developments in water law, a brief explanation of the former follows.² Then the water laws are detailed.

Despite their complicated and superimposing tendency, when viewed as a whole the piecemeal legislative supplementations reveal the development of distinct trends. Thus, an increasing codification of the law, an increasing integration of management and planning, and a gradual expansion of the law so as to provide for more integration as between different resources including water, may be observed as the law develops over time. Conservation as an object of the management and allocation of water – as distinct from land or soil – does not appear in any meaningful way until the mid-1900s.

II. The New Zealand Local Government System and its Development

For a history only 150 or so years old, the history of local government in New Zealand is surprisingly complicated. In overview, it comprises five eras.

1. The Five Eras

a. The Era of Failed Attempts

This era begins with Hobson's Instructions, counselling him to³

¹ Davis B H "New Control over Natural Water" [1968] NZLJ 105, 105.
divide [New Zealand] into ‘districts, counties, towns, townships and parishes’ and to promote the establishment of local bodies which would oversee such matters as drainage, bye-roads, police and the erecting of prisons and courthouses.

The policy drawn up to guide the European settlement of New Zealand was inevitably influenced by events in British local government. There, recent reform had seen the traditional methods of local government adapted to the democratic ideal that rulers are elected. From this there had developed a strong sense that local government should be practised for the benefit of the governed and that local communities should be self-reliant; looking after and paying for their own needs. Despite the fact that “[t]he circumstances of the motherland and her latest offspring were at opposite poles,” Hobson’s inclination “... to wait until there were sufficient numbers and wealth” to enable self-reliance were overridden.4 The Municipal Corporations Ordinance5 was passed by the Legislative Council in 1842, but disallowed by Westminster soon after.

Governor Fitzroy, who succeeded Hobson,

did not welcome his financially-straited administration becoming permanently responsible for the upkeep of local facilities and services. At the first opportunity he disinterred the 1842 Ordinance, cut away its illegal clauses, made it permissive and had the Legislative Council re-enact it as the 1844 Municipal Corporations Ordinance. It was hailed by nobody, least of all by the Crown, whose assent was needed to make the legislation operative. As the Royal Assent was never given, it remained forever in limbo.6

Meanwhile, the colony was growing and the need for some form of administration to deal with matters such as roading was pressing. The few piecemeal Ordinances which were passed to meet the practical needs of the settlement and its inhabitants,7 have come to represent “... the first instalment of practical local government in New Zealand ...”8 Soon Westminster made a fresh attempt to introduce effective local government to the colony; in 1846 a new Constitution Act was enacted, and a new era in this history had begun.

3 Bush ibid, 11.
4 Bush supra n 2, 11 and 12.
5 Bush (idem) describes the Ordinance as providing for the proclamation of boroughs “... complete with a radical franchise, a council with the power to rate, and the obligation to provide roading, wells, sewers and goals, as well as preventing fires and nuisances.”
6 Bush supra n 2, 13.
7 Both Sutch and Bush cite the 1845 Public Roads and Works Ordinance as an example, but the Harbours Regulations Ordinance 1842 would also do.
8 Bush supra n 2, 14.
b. The Era of the Provinces

The Constitution Act 1846 (UK) did two things. It divided New Zealand up into two provinces – New Ulster and New Munster9 – and gave each its own Legislative Council. Then the Act mandated that, where New Zealand had been settled by Europeans, it should be divided into boroughs, and could be administered by municipal corporations.10 Greeted with a "... barrage of condemnation,"11 the Act's multi-tier, complex constitutional structure ... was inapt for a colony of fewer than 13,000 ... The constitution was 'inexpedient, absurd and premature.' [The new Governor, George] Grey secured a Suspending Act which gave him discretion as to the timing of introducing provisions, and in fact, the New Ulster Provincial Council never met and the New Munster Council met just once.12

But the loss of these two provinces did not prove fatal to the provincial concept in general. In 1852 a new Constitution Act was enacted by the Imperial Parliament and the concept of provincial councils, interposed between central and local government and invested with legislative powers, was continued and expanded.13

This second era in the history of New Zealand's local government features throughout a three-tier structure of central government, provinces and, below, various municipalities and other agents of local government.14 Towards the end of the era the powers of the provincial councils ebbed, and the lowest tier of government became increasingly confused, with little national consistency as to its powers and duties. In "... an effort to promote uniformity of powers and duties, the ... Municipal Corporations Act 1867 was enacted with provision for adoption by existing boroughs and towns."15

The provinces were abolished in 1875, but even before then events in the colony had set in

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9 Sutch (supra n 2, 15) notes that New Ulster "... was roughly the area north of Wellington Province."
10 Sutch (ibid 16) explains that the Queen was "empowered" to set up municipal corporations, while Bush (supra n 2, 14) records the words of W E Gladstone, the then Colonial Secretary, that the municipalities would be assigned "... as considerable a share in number and weight of governing functions, as they may be found capable of of sustaining."
11 Bush idem.
12 Bush supra n 2, 14.
13 This time there were six provinces: Auckland, Canterbury, Nelson, New Plymouth, Otago and Wellington, and they were "... given the power to 'make and ordain all ... laws ... required for the peace, order and good government' of the provinces. Among these general powers was that of local government which included the setting up of town and country authorities" – see Sutch (supra n 2, 18), who also points out that central government at the time also had the power to legislate for local government "... and subsequently did enact several statutes." By the time the provinces were abolished, they had grown in number to nine, by now including Hawke's Bay, Marlborough and Westland.
14 The most numerous of these agents being the road boards – most numerous simply because "... roading was the paramount need ..." (Sutch ibid 19).
place a feature which would come to form the basis of the third era in the development of New Zealand's local government. These events concerned soil conservation and land productivity. Flooding of land by rivers, increasing competition for productive agricultural land, and the advent of rabbits as major pests led directly to the creation of districts, with administrative boards invested with specific powers. The first River Board was established in Canterbury in 1868, the Land Drainage Act was enacted in 1893\textsuperscript{16} and rabbit boards were introduced in 1886. These dates mark the onset of the third era in this history, which is dominated by the proliferation of special purpose authorities.

c. The Era of Specialisation and Proliferation

Bush describes the 1875 abolition of the provinces as the "... most momentous constitutional change in the history of the country," save for the granting of independence.\textsuperscript{17} Both the act of abolition, and the events which followed it, resulted in the system of local government which dominated New Zealand for a century from 1875. This system has been described as one of "variegated fragmentation,"\textsuperscript{18} where "... most provincial powers [were] handed to Lilliputian local authorities with the centre assuming responsibility for the very minimum."\textsuperscript{19}

In the same year as the provinces were abolished, the Premier Sir Julius Vogel introduced and saw passed the Counties Bill. As introduced, the Bill aimed to consolidate local government by merging the 314 existing road boards into 41 counties, but this number was increased to 63 before the Bill was passed. In fact, many more counties were ultimately created. Road boards were prepared to become counties, but not to merge and increase their land area of jurisdiction.\textsuperscript{20} Fragmentation of local government snowballed; the proliferation of special-purpose bodies, with its "... parochial and inadequate nature ...,"\textsuperscript{21} kept failing to meet its tasks and more and more local authorities were established to bridge the gaps. By now there were the old land drainage and rabbit control boards, plus new health, harbour, hospital, and education boards.

From the 1890s, the system of variegated fragmentation was subjected to constant challenge by central government, always keen to achieve better economy in local government. Mostly, this

\textsuperscript{16} This Act provided for the establishment of boards of trustees empowered to drain land for agricultural purposes, see nn 70-72 below and accompanying text.

\textsuperscript{17} Bush supra n 2, 19.

\textsuperscript{18} Bush ibid 20.

\textsuperscript{19} Sutch supra n 2, 22.

\textsuperscript{20} Sutch (ibid 24) suggests that road boards were willing to transform for two reasons. First, wider powers were offered to counties. Second, counties were entitled to government loans double those available to road boards. Sutch also suggests that funding was the cause of counties remaining as small as road boards, since "... a maximum on the government subsidy on rates was set for each county ... and it was possible for an area to receive a much larger amount from the government by splitting into smaller counties, each of which would be eligible for the maximum subsidy."

\textsuperscript{21} Sutch supra n 2, 25.
challenge was ineffectual, but Bush identifies its constance as one of the four central features of local government in New Zealand between 1900 and 1918.\textsuperscript{22}

d. The Era of Challenge

Richard John Seddon mounted the first meaningful challenge\textsuperscript{23} to local bodies in 1895. His “formidable” proposal involved creating eight permanent commissions and empowering them to determine the jurisdiction of a reduced number of counties and boroughs.\textsuperscript{24} Seddon’s enormous Bill\textsuperscript{25} received a mixed reception in the House and was lost even without serious debate.\textsuperscript{26}

A “... most visionary, daring and concerted plan for structural reorganisation ...”\textsuperscript{27} was unveiled by Seddon’s successor, Sir Joseph Ward, in 1912. A Local Government Board was to be established to “... ‘supervise, control and administer’ ...”\textsuperscript{28} local government in a New Zealand divided into 24 provinces, each made up of counties and boroughs. Road boards and districts would be abolished. The Bill won little support from local bodies and was “emasculated”\textsuperscript{29} before being introduced, and then left to die by Parliament.

According to Bush,\textsuperscript{30}

\texttt{[t]he lesson of 1912 for central Government – heeded for two decades – was not to tamper with the right to life which single unit of local government conceived to be its vital interest.}

With the Government chastened, restrain on fragmentation, already worn ragged, lost all effectiveness. Boroughs, counties and town districts proliferated and further classes of ad hoc boards emerged.\textsuperscript{31}

About the only compensation was the steady melting away of the road boards. ...

\texttt{Ad hocacy was by the 20th century on an unstoppable binge – New}

\textsuperscript{22} Bush (supra n 2, 28) identifies “… the intervention of party groups in the political process; … the further advance of ad hocacy; [and] the primacy seized by the towns” as the other three features distinguishing local government evolution in this period.

\textsuperscript{23} There had been earlier attempts – for example in 1889 and 1890 parliamentary committees of investigation had been established and had found in favour of fewer and larger local bodies. Bush (ibid 29) comments that the threat posed by these committees was so “… puny [that] … local bodies did not even deign to notice.”

\textsuperscript{24} Bush idem.

\textsuperscript{25} It was 582 clauses long.

\textsuperscript{26} The same fate befell two subsequent Bills, making similar proposals, in 1896 and 1897.

\textsuperscript{27} Bush (supra n 2, 30) made this assertion in 1980.

\textsuperscript{28} Sutch supra n 2, 30.

\textsuperscript{29} Sutch (ibid 31) describes the Bill in this way, largely because the proposal for provincial councils had been dropped, and despite the fact that it nevertheless proposed a reduction in the number of counties and the abolition of road, river and drainage boards.

\textsuperscript{30} Bush supra n 2, 31-32.

\textsuperscript{31} For example, power boards, which were set up in 1918 to manage the reticulation of rural areas and the sale of state-produced electricity.
Zealand was on the verge of being a hopeless addict.

Apart from the enactment of the Soil Conservation and Rivers Control Act in 1941, there was no structural reform until after World War II, despite the establishment in 1931 of a departmental committee to study reorganisation, and the consolidation in 1933 of municipal corporations. After the war, reform initiated by the new Labour Minister of Internal Affairs generated the Local Government Commission Act 1946. The Commission established thereunder to reorganise local government was, however, “hamstrung” when local authorities won their fight to include in the Act a power of veto exercisable by electors and ratepayers. The Commission was further weakened in 1953, electric and hospital boards were excluded from its jurisdiction, the power of veto was extended, the Commission’s decisions were made subject to appeal, and its right to initiate schemes for reorganisation was removed.

The 1950s was an “expansionary” era; Walter Nash led the reformist Labour Party in its re-occupation of the treasury benches. The Local Bills Committee, headed by Henry May, was charged with reviewing the “… structural aptness, the allocation of functions and coordination among relevant government agencies.” The Committee’s 1960 Report found, like its 1945 predecessor, that while “… the basic structure was essentially sound, … the tendency towards forming ad hoc bodies was undesirable ….” The Committee proposed that local authorities be consolidated and strengthened, and that the Local Government Commission provide for a council to supervise the function of the catchment boards.

Although the committee drew up an order of reference for the establishment of a commission, this was never acted upon.

The reform was initiated by Parry’s Local Government (Amalgamation Schemes) Bill which was introduced in 1937. This Bill proposed reducing the number of counties by two-thirds, merging smaller bodies, and establishing a commission to review functions and jurisdictions. Bush (supra n 2, 37) describes Parry as “… comment(jing) ruefully that while there was universal backing for reform, in all his travels around the county explaining his policy, he had not been able to discover a single local body or councillor who accepted that amalgamation should apply to them.” Despite this, Parry continued, and in 1938 a select committee heard submissions from some 450 local bodies. Parry apparently intended to reintroduce the Bill in 1939, but proceedings were interrupted by World War II. After the war, Labour returned to its reform plans (Bush – at 37 – described this as a government with a “… mandate for innovation …”) and appointed a select committee of the House of Representatives “… to inquire into and report upon all phases of the local government system of the Dominion …” (Sutch supra n 2, 34). The Committee reported back in 1945, recommending generally the reorganisation and merger of existing local bodies, and the establishment of a commission to review local body areas and functions. Parliament’s response was to enact the Local Government Commission Act 1946 (see text to follow). For further detail on these events, see Sutch 35-37, and Bush 37-38.

If the Commission proposed the abolition of any territorial local authority, 20% of electors could petition for a poll of ratepayers which, by simple majority, could reject the proposal (Sutch idem).

The original requirement that 20% of electors vote to petition for a poll of ratepayers was reduced so that a mere 5% of the vote sufficed.

Stimulus was also provided by the publication of papers from the 1956 convention of the Institute of Public Administration, and a report made by the Royal Commission on Local Authority Finance in 1958.

Bush supra n 2, 42.
Commission be re-empowered to initiate reorganisation schemes among all ad hoc boards. But, when Labour was defeated at the polls, and National’s return ended the “... ardour for reform ...”\textsuperscript{41} commitment to the Committee’s proposals waned. The Commission’s power to initiate reorganisation was restored, but rabbit and hospital boards remained beyond its jurisdiction. Impatient with events, “[d]isciples of a radical assault on the bastions of the status quo started rallying under the flag of regionalism.”\textsuperscript{42}

e. The Era of the Regions

The advent of regionalism was foreshadowed as early as 1956 but, despite strong support from the Department of Internal Affairs,\textsuperscript{43} regionalism did not actually emerge until 1963. The Auckland Regional Authority was established as existing local bodies came under increasing pressure throughout the country and the notion of regions became generally more attractive.

In 1963 the Local Government Commission “... disclosed that it proposed to have New Zealand cut into some 20 regions, the ultimate intention being to establish directly elected authorities which would make redundant the ad hoc boards.”\textsuperscript{44} The Commission was directed to prepare area schemes for the country in 1967 and these were finalised in 1972. While work had begun on the legislative reform needed to introduce regionalism into local government as a whole, an Act was enacted which “... br[oke] with tradition and impose[d] almost for the first time in New Zealand a precedent of multi-tiered central control over local bodies.”\textsuperscript{45} The Water and Soil Conservation Act 1967 established a tier of administration; [with,] at the base [,] the [local authorities] with their own particular “water functions” subject to the overriding control of the National Water and Soil Conservation Authority either directly or indirectly through one or more of the [Soil Conservation and Rivers Control, Pollution Advisory, or Water Allocation Councils].\textsuperscript{46}

This Act also increased the powers of the regionally-based catchment boards established in 1941. Regional government was slowly winning influence. Overall change became inevitable on the return of the Labour Government in 1972. Henry May was appointed Minister of Local Government and introduced the Local Government Bill in 1973, amid comment that “... ‘no more radical constitutional measure had ever been presented to Parliament.’”\textsuperscript{47} Despite much

\begin{itemize}
  \item \textsuperscript{41} Bush supra n 2, 43.
  \item \textsuperscript{42} Bush idem.
  \item \textsuperscript{43} Bush (supra n 2, 44) describes the Department as (unsuccessfully but) “... vigorous[ly] urging ...” the development of a “... regional-type upper-tier of government ...” before the May enquiry, whose report was released in 1960.
  \item \textsuperscript{44} Bush idem.
  \item \textsuperscript{45} Davis supra n 1, 105.
  \item \textsuperscript{46} Davis ibid 106.
\end{itemize}
objection, the Bill was enacted more or less as originally introduced.

Of "... monumental stature, the greatest advance in a century of frustrated reform," the Local Government Act was "[a]bove all ... a charter for regionalism." It strengthened the powers of the Local Government Commission and established the basis for the current local government structure. This structure comprises two major, and two perhaps less significant, types of body. The first is regional councils (which have assumed many of the functions of such ad hoc bodies as catchment boards), and the second is district councils. Also provided for are unitary authorities (which may assume the powers of both regional and district councils simultaneously) and community boards.

III. The Water Laws

The statutory supplementations and alterations which were made to the common law generally occurred for one of two basic reasons. First, there were (and still are) those designed to provide "... a legal and administrative base for the drainage of land and the control of flooding ... " Then there were (and, again, still are) those effectuated to "... establish[] and subsequent[ly] consolidat[e] ... a legal and administrative base for controlling the taking and use of water." Originally dealt with as two distinct issues, the aims of land drainage and flood control, and taking and use have, to a significant but not complete extent, been merged and tackled in a more comprehensive way over time. In a real sense, however, the two aims provided independent stimuli for the development of a discernible body of law.

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47 Bush supra n 2, 51.
48 Bush idem.
49 Section 37L(1) of the Local Government Act 1974 (as amended) provides for the structure of local government, stating that "... every part of New Zealand ... that is within the district of a territorial authority [defined in s 2 as a city or district council] shall also be within the region of one or more regional councils." The functions of regional councils are set out in s 37S(1); see especially para (d).
50 Territorial authorities are either city councils (see s 37M and the First Schedule of the 1974 Act) or district councils. Their functions are set out in s 37T.
51 Unitary authorities are essentially territorial authorities which, pursuant to s 37N of the 1974 Act, can exercise the functions of regional councils as well as their own.
52 Section 101ZP provides that for every community there "shall" be a community board. Communities may be constituted pursuant to s 101ZG, following a petition of electors in a district with a population exceeding 1,500 persons (s 101ZI).
54 Environmental Policy and Management in New Zealand idem. Note that this background paper describes these two objects (land drainage and flood control, and taking and use of water) as "phases" through which the law "passed." This, however, is perceived as misleading (since it suggests that these objects no longer feature in the law, and because it does not make clear that the two objects each generated the development of a body of law. Instead, it seems to suggest that the one body of law passed through two subsequent stages in its development) and so the term "phases" has been avoided in this thesis.
1. Land Drainage and Flood Control

a. Public Works, River Boards and Land Drainage Acts

i. The People's Initiative

A former New Zealand Minister for the Environment once noted that "[t]he first steps in water management were taken when local people banded together to protect their property from floods." The initiative came from the people—there was, at the time, no effective local government to rely upon—and they were concerned not with the water itself, but rather with the land which water was damaging and so removing from productive use. Soon the legislature was expressly providing for the constitution of "(boards of) conservators," who were charged with constructing and maintaining works so as to prevent or reduce flood damage to land. Thus began a long period during which the functions of land drainage and flood control were devolved upon, and distributed between, a myriad of local bodies.

ii. Land Drainage and Flood Control in the Era of Specialisation and Proliferation

In a series of Acts, the conservators were given jurisdiction over all rivers and streams in their respective regions and were usually empowered to levy both general and special rates to cover the costs of constructing and maintaining works to prevent or reduce flooding. At the same time, the legislature first became concerned with land drainage and, in the Public Works Act 1882, it charged central government and county councils with constructing and maintaining public drains.61

55 The Right Honourable Geoffrey Palmer (as he then was), from a speech given to the Institution of Professional Engineers and Royal Society of New Zealand Conference (17 August 1988) 3.
56 See, for example the Hawkes Bay and Marlborough Rivers Act 1868, s 17 and the Canterbury Rivers Act 1868, s 26 (and s 27 of the latter's 1870 successor). From 1882, boards of conservators were able to take land for the purpose of constructing works to protect land and reduce flooding, and all works (already completed or yet to be undertaken) could be deemed to be public works by Proclamation (see the Public Works Act 1882, ss 124 and 126). Note that the Counties Acts Amendment Act 1883 enabled the Governor to declare any county council to be the board of conservators in any given district (see ss 51-53).
57 Under the Hawkes Bay and Marlborough Rivers Act 1868, the Board had jurisdiction over all rivers and streams (navigable or not) in its region (s 16). The Canterbury Rivers Act 1868, s 7 allowed its appointed conservators to work on all rivers (navigable or not, tidal or non-tidal), streams, sewers and watercourses in the districts as proclaimed under s 2.
58 See the Hawkes Bay and Marlborough Rivers Act 1868, ss 20-38; the Canterbury Rivers Act 1868, ss 8 and 9; and the Canterbury Rivers Act 1870, ss 20 and 21.
59 The drainage of swamps was not specifically provided for until 1915, when the Minister of Lands was empowered to construct and carry on "... such works as he thinks fit for the drainage, reclamation, and roading of any ... drainage area [constituted by Order in Council under s 2], or otherwise rendering the same fit for settlement" (Swamp Drainage Act 1915, s 3).
60 In 1889 road boards were vested with the same powers and duties.
61 See generally the Public Works Act 1882, ss 184-195. It is important to note that, throughout the period from 1882 to present day, county councils and other local authorities have remained heavily involved in land drainage. The current powers and responsibilities of these and similar bodies are set out in the Public Works Act 1981 (s 194) and the Local Government Act 1974 (Parts XXVI, XXVII and XXIX). These provisions were once stated to have been subject to the Soil Conservation and Rivers Control Act 1941 and
In 1884 some integration of the piecemeal attempts to control flooding by local Acts occurred when the River Boards Act was enacted to "... consolidate the Laws relating to the Constitution of River Boards and the construction of River Works."\(^{62}\) This Act continued the policies of the former local Acts, providing for the establishment of river districts\(^{63}\) and the election, constitution and empowerment of river boards\(^{64}\) (including the vesting of powers to undertake works to control rivers and prevent flooding\(^{65}\) and to levy rates and borrow money to cover costs\(^{66}\)). The prima facie consolidation which occurred with this 1884 Act was, however, severely limited; "[b]ecause of their small size and fragmentation [river boards] were unable to tackle the task of flood prevention. In fact their works often just transferred flood problems to downstream users."\(^{67}\)

In 1893 attempts to control flooding, and the trend of increasing integration (in the sense of promoting a more holistic attitude to water management), were advanced by the enactment of the Land Drainage Act.\(^{68}\) This Act "... made a connection between flood mitigation and land drainage, [recognising that] the same water was involved."\(^{69}\) The Act set up a similar regime to that established under the River Boards Act; each district of New Zealand had its own board of trustees,\(^{70}\) which could do work to drain agricultural and pastoral lands in the district,\(^{71}\) including "... deepen[ing], widen[ing], straighten[ing], divert[ing], or otherwise improv[ing] any existing watercourse ... ."\(^{72}\)

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\(^{62}\) Long Title.

\(^{63}\) See ss 5-14.

\(^{64}\) On the election of boards, see ss 17-43; on the constitution of boards, see s 15; and on the powers of boards, see generally ss 68-130. Note that the Act named 16 pre-existing river boards as automatically coming under its provisions.

\(^{65}\) See s 78 (as originally enacted) and ss 3 and 4 of the River Boards Act 1884 Amendment Act 1885. Note that s 75 of the 1884 Act incorporates Parts II-IV of the Public Works Act 1882.

\(^{66}\) See ss 88-119.

\(^{67}\) Palmer supra n 55, 4.

\(^{68}\) Note that this Act repealed the Land Drainage Act 1881 and certain sections of the Counties Act 1886.

\(^{69}\) Palmer supra n 55, 5.

\(^{70}\) See ss 5 and 9.

\(^{71}\) See ss 19-29 and the Long Title. Note that from 1894 these powers could be conferred on organisations other than drainage boards or boards of trustees (see the Land Drainage Amendment Act 1894, s 9 and the Land Drainage Amendment Act 1898, s 4 both of which allowed these powers to be vested in "local authorities," which were defined in 1898 as including drainage boards, borough or county councils, and town or road or harbour or river boards).

\(^{72}\) Section 19(2). "Watercourse" is defined as including "... all rivers, streams, and passages through which water flows" (s 2). From 1894, boards (and from 1898, local authorities) were also empowered to order owners or occupiers of land to remove obstructions from drains (Land Drainage Amendment Act 1894, s 9). Note also that from 1980 drainage boards have been required to keep all watercourses so "... as not to be a nuisance or injurious to health, and to be properly cleared and cleansed, and maintained in proper order" (Land Drainage Amendment Act 1980, s 3).
The chances of necessary works actually being completed and requisite maintenance being done were increased by two factors. First, powers similar to those conferred on boards of trustees and river boards had been and continued to be given to other agents of local government, principally county councils. Second, the River Boards Act 1884 and the Land Drainage Act 1893 combined to provide for "... an interchange of functions" between river and drainage boards.

The Land Drainage Act was first consolidated in 1904 and again, this time with the River Boards Act, in 1908. Neither 1908 Act changed the focus or structures introduced by their predecessors; in fact, the general structures for dealing with land drainage and flood control (involving the creation of districts, under the control of boards which were empowered to deal with the construction, maintenance and funding of requisite works), and the focus of controlling water so as to reduce its impact on land both continue to appear at the present day. Despite the persistent appointment and election of drainage and river boards, and although each was able to adopt or be given the functions and powers of the other, boards were unable in many cases to meet their statutory duties due to shortfalls in resources and administration. Although the theory was control at a district level, in practice much needed work was often simply not done or was undertaken and funded by central government.

73 See the Counties Act 1886, ss 268 (empowering councils to make and maintain drainage works), 269 (empowering councils to declare land drainage districts), 272 (empowering councils to make water-races for the district and conferring upon councils consequential powers to divert and so on watercourses), and 284 (empowering councils to make relevant bye-laws); the Public Works Act 1894, ss 241, 242, 246 and 254 (the latter providing that nothing in the Act was to repeal or alter any provisions of the Land Drainage Act 1894 or the River Boards Act 1884); the Public Works Acts Compilation Act 1905, ss 229, 230, 234 and 242 (the latter making the same saving as was made by s 254 of the 1894 Act); and the Counties Act 1920, ss 167, 168 and 170.

74 Acheson A R River Control and Drainage in New Zealand (1968) 17.

75 River boards were empowered to undertake drainage works (see Part III of the Land Drainage Act 1893) while drainage boards could end up with some of the powers and duties of river boards (see the Land Drainage Act Amendment Act 1922, s 21). Note also the cross-over in functions with county and other local councils - see n 71 above.

76 See the Land Drainage Act 1908, s 3; and the River Boards Act 1908, s 6.

77 See the Land Drainage Act 1908, s 4; and the River Boards Act 1908, ss 8 and 15.

78 See the Land Drainage Act 1908, s 17; and the River Boards Act 1908, s 73.

79 See the Land Drainage Act 1908, ss 31 and 38; and the River Boards Act 1908, ss 87 and 107.

80 This is despite the enactment of the Soil Conservation and Rivers Control Act 1941. Palmer (supra n 55, 5) notes that "[i]n lieu of further planning and coordination, successive governments passed numerous amendments and new Acts to deal with specific cases" and that "[t]he Soil Conservation and Rivers Control Act of 1941 was superimposed on this hotchpotch." Examples of the special Acts enacted to "deal with specific cases" are the Swamp Drainage Act 1915, the Waihou and Ohinemuri Rivers Improvement Act 1910, the Hauraki Plains Act 1926 and the Rangitaiki Land Drainage Act 1910 (see Acheson supra n 74, 17-18).

81 See n 75 above and accompanying text.

82 This is especially true for land drainage works although some boards have managed to complete sound and extensive work, but "... the effectiveness of boards has varied greatly depending on their size and problems," Acheson supra n 74, 16.

83 This is especially true for works done to control flooding, see Palmer (supra n 55, 5) and Acheson (ibid, 15).
iii. The Ad Hoc Boards Fail and Reform Approaches

The failure of both central government and river and drainage boards to complete and maintain adequate works, plus the continuing disregard of catchment conditions (deterioration was occurring due to changes in land use patterns which implied substantial deforestation), meant that large areas of New Zealand were suffering increasing river channel and erosion damage.\(^{84}\) From 1908 – 1930 concern with these issues was met by the establishment of a series of river commissions and, in 1919, a Royal Commission.\(^{85}\) The reports of these commissions were:\(^{86}\)

usually followed by legislation to establish new river boards or trusts, to enlarge the powers and responsibility of existing authorities or to amalgamate existing smaller boards into a stronger authority. All too frequently recommendations ... were not fully implemented due to the inadequate resources of local authorities both technical and financial.

However, by the late 1930s real change a: last became inevitable, fuelled by the recommendations of two groups of investigative committees\(^{87}\) and the disastrous Esk floods on the East Coast of the North Island.\(^{88}\) Central government’s plans to enact new Acts to deal with river control and soil erosion independently were abandoned\(^{89}\) and a policy to deal at both national and regional levels with soil conservation, river control and land drainage in an integrated way was adopted.\(^{90}\) That part of this policy which aimed to manage flooding and erosion at both the national and regional levels was consistent with the overall desire of central government to inject some cohesion into local government generally in New Zealand.\(^{91}\) As it happens, the Soil Conservation and Rivers Control Act was the only practical manifestation of this policy able to be achieved until 1946 when the Local Government Commission Act was enacted.

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84 Acheson supra n 74, 18.
85 Acheson (ibid 18-19) describes the composition and terms of reference of the Commission, commenting that “... some emphasis was placed on siltation and aggradation of channels and in the reports particular reference was made to the effects of mining and dredging and effects of changed land use. Reports were prepared on the following rivers: lower Clutha, Aparima, Taieri, Orari, Rangitata, Waimakariri, Ashley, Waihi, Waiau-ua, Wairau, Maerewhenua and Waithou.”
86 Acheson supra n 74, 19.
87 Acheson (ibid 19) notes that the first group of committees was set up in 1937 “... to investigate flood control and allied problems,” and that the second comprised of “... scientists and specialists in land use problems ...” and was established in 1938 to “... report on measures necessary for the preservation of vegetation in New Zealand with special reference to the incidence, control and prevention of land erosion.”
88 Palmer supra n 55, 6.
89 Acheson supra n 74, 19.
90 Environmental Policy and Management in New Zealand supra n 53, 31.
91 This “... overall desire ...” was part of the Era of Challenge in the history of the development of local government in New Zealand, as described above.
b. The Soil Conservation and Rivers Control Act 1941

i. Objectives and Structure

The Soil Conservation and Rivers Control Act, which was enacted in 1941 for the stated purpose of making provision for the conservation of soil resources and for the prevention of damage by erosion, and ... making better provision with respect to the protection of property from damage by floods had the effect of shifting the emphasis from damage control to flood prevention. The Act established objectives and structures for water management and flood prevention on a national level by providing for the constitution and empowerment of the Soil Conservation and Rivers Control Council and for the establishment and management of soil-conservation districts. The Council was variously obliged and empowered to perform a wide range of functions, from investigating soil erosion and conservation through co-ordinating the "... policies and activities of Government departments, local authorities and other public bodies ..." to maintaining, improving and creating watercourses and defences against flooding. It had an important supervisory function and was also able to recommend the designation of, and subsequently to manage and control, areas as soil-conservation reserves. Its objects in exercising these functions were, generally, to promote soil

92 Long Title.
93 Palmer supra n 55, 7.
94 Section 3 provides for the establishment and membership of the Council.
95 See nn 97-103 below and accompanying text.
96 Sections 13 and 14 of the 1941 Act allowed the Governor-General, by Order in Council, to constitute and regulate soil-conservation districts. In these areas, the lighting of fires, the destruction of vegetation and general land use could be controlled by regulation.
97 See s 11(1)(a)-(d) and (l).
98 Section 11(1)(l).
99 The Act defines "watercourse" as including "... every river, stream, passage, and channel on or under the ground, whether natural or not, through which water flows, whether continuously or intermittently" (s 2(1)).
100 Section 22(1). The Council was also charged with the functions set out in ss 11, 26 and 30, which included taking preventative and remedial action against flooding and erosion; disseminating information on soil erosion and conservation and floods; supervising the activities of Catchment Boards; taking over the functions and duties of any Catchment or Drainage Board not properly discharging its functions and supplying the financial means for persons undertaking works to promote soil conservation (s 30).
101 The Council supervised and controlled the activities of catchment boards (ss 11(1)(k) and 26, and see s 4(3) of the Soil Conservation and Rivers Control Amendment Act 1958 which inserted a new s 11(5) into the principal Act) and was itself subject to supervision by Parliament (it was obliged to report annually to the Minister of Public Works, who was required to table the report within one month (s 33)). See also n 113 below and accompanying text.
102 Section 16. Note that when, in 1983, the Soil Conservation and Rivers Control Council was dissolved these two functions were transferred to the National Water and Soil Conservation Authority and then (when the Authority was itself dissolved in 1988) the function of recommending the designation of soil conservation reserves was transferred to catchment boards while the Department of Scientific and Industrial Research was empowered to manage established reserves (see nn 135-138 below and accompanying text, s 7 of the 1983 Amendment Act, and s 6 of the 1988 Amendment Act). In 1991, with the enactment of the Resource Management Act, all provisions relating to soil conservation reserves were repealed (see the Act’s Eighth Schedule, Part I).
conservation and to prevent and mitigate soil erosion and damage by floods.\textsuperscript{103}

The Act then allowed for contemporaneous \textit{regional} management of soil erosion and flooding by providing for the election and appointment\textsuperscript{104} of catchment boards which were charged with the principal function of "... minimiz[ing] and prevent[ing] damage within [their catchment] district(s)\textsuperscript{105} by floods and erosion."\textsuperscript{106} In order to facilitate the performance of this function, boards were specifically empowered to construct and maintain works\textsuperscript{107} for controlling or regulating water flows to, from and in watercourses and for preventing or lessening the damage (or likelihood of damage) by flood or erosion;\textsuperscript{108} to keep hydrological records;\textsuperscript{109} to levy rates (on both uniform and graduated scales)\textsuperscript{110} and raise loans;\textsuperscript{111} to make by-laws;\textsuperscript{112} and to prepare general schemes for preventing or minimizing damage by flood or erosion.\textsuperscript{113} At least some of these functions overlap with the earlier described, more restricted functions of drainage boards, river boards and other local authorities. This overlap was addressed in the 1941 Act with the general effect being that catchment boards were given a supervisory role in respect of the functions of the other boards and authorities.\textsuperscript{114}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{103} Section 10. When the Council was dissolved in 1983, these objects were applied to the National Water and Soil Conservation Authority (see s 5 of the 1983 Amendment Act) and in 1988 (when the Authority was dissolved), they became the general objects of the Act (see s 3 of the 1988 Amendment Act). In 1991, a new s 10A was inserted, relating to the relationship between the 1941 Act and the Resource Management Act (the latter acquiring the dominant role, see the Resource Management Act 1991, Eighth Schedule, Part I).
\item \textsuperscript{104} See ss 41 and 44.
\item \textsuperscript{105} Catchment districts were constituted and declared by the Governor-General, acting on a recommendation of the Soil Conservation and Rivers Control Council, by Order in Council (s 34).
\item \textsuperscript{106} Section 126. This principal function was reduced to "a" function under the Resource Management Act 1991 (see the Eighth Schedule, Part I).
\item \textsuperscript{107} Section 133(1) empowered the boards to clean, repair, maintain, raise, widen or otherwise improve banks and other defences against water; to deepen, widen, straighten, divert or otherwise improve watercourses; to remove obstructions from watercourses; to make new watercourses; to divert, impound or take water from watercourses and generally to carry out works for the purpose of controlling or preventing damage by flooding.
\item \textsuperscript{108} Section 126(2).
\item \textsuperscript{109} Section 127 (repealed by the Resource Management Act 1991, see the Eighth Schedule, Part I).
\item \textsuperscript{110} The Act allowed boards to levy general rates (to cover the costs of carrying into effect the purposes of the Act, s 85), separate rates (to be applied to any special purpose defined by the board, s 86), special works rates (to cover the costs of work unable to be paid for with general or separate rates, s 87; or to pay loans raised by the board, s 90) and rates to cover administration costs (s 84). Only the last type of rates was levied on a uniform basis (see s 84, which was repealed in the 1987 Amendment Act), all other types were levied on a graduated scale of land classification determined according to "... the degree of benefit received or likely to be received from works carried out by the Board" (see ss 101(1) and 102(2)).
\item \textsuperscript{111} Section 107(1).
\item \textsuperscript{112} By-laws were to be made by special order (s 152(1)(a)), for the purposes set out in ss 149 and 150 (the former providing for the making of by-laws to protect watercourses and defences against water). Both ss 149 and 150(1) and (2) were repealed by the Resource Management Act 1991, see the Eighth Schedule, Part I.
\item \textsuperscript{113} Section 128. Note that boards were obliged to submit their schemes to the Soil Conservation and Rivers Control Council and the Minister of Works, who were in turn empowered to require that a scheme be altered, added to or adopted (s 128(1) and (2)). Before carrying out any work pursuant to their schemes, boards were also obliged to submit plans to the Minister and the Council for approval, without which they could not proceed (s 128(4)).
\item \textsuperscript{114} The interrelationship between catchment boards and other local authorities (including river and drainage
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ii. Problems Emerge

Two main areas of difficulty emerged under the 1941 Act. The first was administrative, and reflected the general dissatisfaction with local government felt by the public and by central government at the time.\textsuperscript{115} As\textsuperscript{116}

Later proposals for the establishment of catchment districts met with some opposition from internal local authorities and individuals, mainly because of the wide powers of catchment boards, particularly in regard to land utilization,\textsuperscript{117} ... the extent and incidence of the administrative rate,\textsuperscript{118} and difficulties with classification.

the government at first responded with only piecemeal evasive action.\textsuperscript{119} But, as opposition continued through the late 1940s and early 1950s, the government appointed in 1956 a Parliamentary Select Committee to review and report on the Act. The Committee’s report recommended little change in respect of administrative rates and the land classification system,\textsuperscript{120} but led to the removal from catchment boards of land utilization powers\textsuperscript{121} and the introduction of a new regime centred around catchment areas and commissions.\textsuperscript{122}

boards) in respect of watercourses was addressed in ss 130, 133 and 141-144 of the 1941 Act (note that ss 130 and 144 were repealed in the Resource Management Act 1991, Eighth Schedule, Part I). Acheson (supra n 74, 23) notes the effect of these sections in practice as being that “... river boards ... became largely redundant in catchment districts. In general, local opinion ... favoured the retention of efficient internal drainage districts, particularly in regard to purely drainage work, with any river control function being taken over by catchment boards.”

\textsuperscript{115} Refer back to the “Era of Challenge” above.

\textsuperscript{116} Acheson supra n 74, 21-22.

\textsuperscript{117} This relates to the boards’ ability to make by-laws under s 150 - see n 112 above.

\textsuperscript{118} See n 110 above.

\textsuperscript{119} Acheson (supra n 74, 26-28) notes that from 1947, proposals for new catchment districts were referred to the Local Government Commission, giving people an opportunity to take part in a public hearing and raise objections. In one particular case, there was sufficient local objection to stimulate government-sponsored legislation (the Waikato Valley Authority Act 1956, repealed by the Soil Conservation and Rivers Control Amendment Act 1988, s 42) establishing an independent catchment authority, the Waikato Valley Authority.

\textsuperscript{120} The ceiling on the administrative rates was reduced from one-eighth to one-twelfth of a penny (Soil Conservation and Rivers Control Amendment Act 1559, s 15); the classification system was left intact, the Committee having found it to be “generally satisfactory” (Acheson ibid 26).

\textsuperscript{121} While Acheson (idem) talks about the “removal” of these powers from boards, reference to the text of the 1959 Amendment Act suggests that the ability to designate appropriate land uses was rather distributed between boards and the Council (although the practice may have been that the powers were in fact exercised by the latter body), and was directly regulated under the principal Act (where previously regulation was indirect and achieved by by-laws, see n 112 above), see the Soil Conservation and Rivers Control Amendment Act 1959, ss 33-38. Note that in 1988 the principal Act was further amended and land utilization powers were again re-vested exclusively in catchment boards (see ss 48-50 of the 1988 Amendment Act).

\textsuperscript{122} The provisions relating to catchment territories and commissions were introduced in response to the Committee’s recommendation that while “... there was a need for a complete coverage of the country by soil conservation and river control authorities ... an alternative form of authority was desirable for those areas where problems and financial resources were not sufficient to warrant setting up of a catchment board with full administrative and technical staff” (Acheson supra n 74, 26). While commissions were driven by the same legislative objects as applied to boards, their functions were more restricted, see ss 5(10) and 7 of the 1959 Amendment Act.
Arguably a more serious difficulty which developed was that associated with the underlying policies and philosophies of the public bodies charged with the 1941 Act’s administration. Palmer observes that despite the Act’s preventive aims, it was generally implemented in a way which placed the emphasis [on] engineering works to control water flows.

This was true for most development at that time. Engineering was seen as the key to progress and development. The aim was to control and harness the natural environment for the benefit of humankind.

Similar criticisms were made as early as 1964 by Dr Donald Williams of the United States Soil Conservation Service in a report he prepared on the 1941 Act for the New Zealand Government. Dr Williams studied the existing organisational and administrative arrangements for the administration of the Act, criticising the Soil Conservation and Rivers Control Council for failing to achieve a "... proper balance between soil conservation ... and rivers control works," the Ministry of Works for "... overemphasis[ing] engineering and rivers control to the detriment of soil conservation," and catchment authorities for giving "... insufficient emphasis ... to the conservation treatment of catchment areas ...." Among his recommendations Dr Williams advocated the establishment of a Minister of Conservation "... to give the needed recognition and prestige to conservation," this reflecting his observation that there was an urgent need in New Zealand for soil and water conservation in addition to and as a key element of river control. ... This will result only from an informed public, the development of a conservation consciousness in and out of Government, and aggressive conservation leadership and action.

Dr William’s Report argued that "... the concept of “use without abuse” [should] be a cornerstone of conservation policy ...” in New Zealand.

Some of these philosophical criticisms may have been mitigated by structural amendments

123 See nn 92 and 93 above and accompanying text.
124 Supra n 55, 8-9.
126 Williams ibid 10.
127 Williams idem.
128 Williams supra n 125, 13.
129 Williams ibid 15.
130 Williams supra n 125, 9, original emphasis.
131 Williams ibid 9.
made to the Act in 1967, 1983, and 1988. In 1967, the Water and Soil Conservation Act was enacted, providing for the establishment of the National Water and Soil Conservation Authority\(^{132}\) and for the apportionment of its functions between three Councils including the Soil Conservation and Rivers Control Council.\(^{133}\) It certainly appears from a reading of the 1967 Act that the existence of the Authority was meant to aid the coordination of water control, and to promote future planning. Listed among the Authority’s functions were those of making plans, advising the Minister and local authorities, reviewing the performance of other bodies, coordinating “... all matters ...,” guiding administration and research, resolving conflicts, and keeping records.\(^{134}\)

In 1983 the Soil Conservation and Rivers Control Council was dissolved,\(^{135}\) its functions being first transferred to the National Water and Soil Conservation Authority\(^{136}\) and subsequently, in 1988 and upon the abolition of the Authority,\(^{137}\) being shared between the Minister for the Environment, the Minister of Local Government and catchment boards.\(^{138}\)

Involving the Minister and Ministry for the Environment in the administrative structure

\(^{132}\) See the Water and Soil Conservation Act 1967, s 5 as to the constitution of the Authority.

\(^{133}\) The Authority’s functions were set out in s 14 of the 1967 Act, and these included all the functions of the Soil Conservation and Rivers Control Council, the Water Allocation Council and the Pollution Advisory Council. See nn 400-403 below and accompanying text as to the relevant empowering Acts, and as to the fate of the Water Allocation and Pollution Advisory Councils. Under s 15 of the Act, the Authority was then obliged to delegate relevant powers back to the three Councils. Note also that the Soil Conservation and Rivers Control Council had its constitution re-defined in s 6 of the same Act.

\(^{134}\) The Authority was charged with making plans concerning water allocation, conservation and quality, erosion, flow and flood control, demand, and methods of control (see s 14(3)(a)). As to its functions of advising the Minister and local authorities, see s 14(3)(b) and (h) and (4)(e), (f), (m), and (t); and, as to reviewing performances, see s 14(3)(c). Section 14(3)(d) required the Authority to “... co-ordinate all matters relating to natural water so as to ensure that this national asset is available to meet as many demands as possible and is used to the best advantage of both the country and the region in which it exists in the course of nature ...”. The Authority’s functions of guiding administration and research appeared, for example, in s 14(3)(j) and (k), and (4)(j), (k), and (o); while its function of keeping records was set out in s 14(3)(i) and (4)(a). Under s 14(4)(b) the Authority had to “... supervise and guide, as to it seems best in the public interest, the settlement of competing demands in respect of natural water ...” and under (4)(s) it had to “... investigate conflicts of interest that have arisen or may arise between different [users] in respect of the maintenance or improvement of the quality of natural water, and to recommend the resolution of any such conflicts ...”. The Authority had other functions, including some relating to water and soil conservation (s 14(3)(l)); and others relating to the promotion of the “... best uses ...” (s(3)(m)), and “... adequacy ...” (s(4)(c)) of natural water and the relevancy of “... the present and future needs of ... industry, ... suppl[y], recreation, ... scenic and natural features [and] fisheries and wildlife habitats ...” (s(4)(l)).

\(^{135}\) Section 2 of the 1983 Soil Conservation and Rivers Control Amendment Act.

\(^{136}\) Sections 6 and 7 of the 1983 Soil Conservation and Rivers Control Amendment Act. Note also that the objects for which the Council was originally empowered to exercise its functions (set out in s 10 of the principal Act, see n 103 above and accompanying text) were also applied to the Authority in 1983 (s 5).

\(^{137}\) Water and Soil Conservation Amendment Act 1988, s 3.

\(^{138}\) The Minister for the Environment acquired the greatest number of former Council functions (including those functions described in ss 26, 30, 34 and 35 of the principal Act and relating, respectively, to: the exercise in default of catchment board functions, granting loans, and recommending the constitution or unification of catchment districts, see ss 13, 14 and 23 of the 1988 Amendment Act), while catchment boards became responsible for most of the works-related functions (see s 29 of the Amendment Act, which amends s 126 of the principal Act by including most of the functions previously attached to the Council under s 11(1) of the principal Act in the list of functions of catchment boards). The Minister of Local Government acquired those functions described in ss 141 and 144 of the principal Act, see ss 34 of the 1988 Act.
surrounding the Soil Conservation and Rivers Control Act should have increased the "... conservation consciousness ..." of the Act, at least in so far as it was implemented. Both the Minister and Ministry were established under the Environment Act 1986, an Act which set out to\textsuperscript{139} ensure that, in the management of natural and physical resources, full and balanced account is taken of—

(i) The intrinsic values of ecosystems; and
(ii) All values which are placed by individuals and groups on the quality of the environment; and
(iii) The principles of the Treaty of Waitangi; and
(iv) The sustainability of natural and physical resources; and
(v) The needs of future generations.

c. Land Drainage and Flood Control Law Since 1941

Although amendments to the Soil Conservation and Rivers Control Act 1941 have brought change to the upper reaches of the structural organisation charged with managing land drainage and flood control, the law still provides for the constitution of land drainage and river districts, and for the appointment of boards.\textsuperscript{140} Boards of trustees and river boards still hold most of the powers conferred upon them when the 1908 Acts were enacted, but these powers have since been made subject first to the Water and Soil Conservation Act 1967,\textsuperscript{141} and then to the Resource Management Act 1991.\textsuperscript{142} These two Acts will be described in text to follow after the early taking, use and management law has been described. The functions of catchment boards have been transferred to regional councils under the Local Government Act 1974.\textsuperscript{143}

d. Concluding Remarks on Land Drainage and Flood Control

In summary, the legislation on land drainage and flood control clearly exhibits the pattern of piecemeal legislative encroachment into unregulated, or judicially-regulated areas. This pattern also features in the evolution of the body of law developed to provide for the taking and use of water. As well, the land drainage and flood control legislation displays the first attempts to manage water in a more integrated way. The earliest example of an attempt to adopt a more

\textsuperscript{139} Long Title. It is not clear whether, in the exercise of functions provided for under the Soil Conservation and Rivers Control Act, the Minister and Ministry for the Environment would also be required to have regard to the matters set out in s 17 of the Environment Act 1986. If so, this would serve to strengthen the argument that the involvement of the Minister and Ministry should have added to the "... conservation consciousness ..." of the 1941 Act.

\textsuperscript{140} Both 1908 Acts remain in force.

\textsuperscript{141} Local Government Act 1974, s 37S(1)(d).

\textsuperscript{142} See the River Boards Act 1908, s 76(d) and (f) and the Land Drainage Act 1908, s 2A.

\textsuperscript{143} See s 37S(1)(d) and Part XXIX of the Local Government Act 1974. Part XXIX (which was expressly declared to be subject to the Soil Conservation and Rivers Control Act 1941, and has since been declared to be subject to the Resource Management Act 1991) empowers territorial authorities to declare land drainage areas (s 504), to construct channels and works (for which purpose authorities could alter the course or level of any stream or river, s 509), and to make bylaws to protect drainage works by prohibiting the deepening or widening of drainage channels and the releasing of water into watercourses or drainage channels (s 517).
integrated approach is the 1893 Land Drainage Act, which recognised the link between flood mitigation and land drainage. Later examples include the Soil Conservation and Rivers Control Act 1941, which introduced a more co-ordinated system (involving both national and regional input) for the management of rivers and the control of damage by flooding and erosion. Water conservation and future planning are, however, issues with which the legislation aimed at land drainage and flood control did not adequately deal.

Like the legislative supplementations made to the common law to provide for land drainage and flood control, the enactments created to provide for the taking, use and management of water occurred over time incrementally and in response to specific needs. Also as with the flooding and land drainage laws, the taking and use laws suffered major co-ordination prior to the enactment of the Resource Management Act 1991. This time, though, the coordinating Act was the Water and Soil Conservation Act 1967.

2. Taking, Using and Managing Water before the Water and Soil Conservation Act 1967

a. The Needs of Settlements
The need to provide for the health and convenience of people in towns was first addressed by the Legislative Council in 1842. The Municipal Corporations Ordinances of that year, and its 1844 successor, both pursued an idea prevalent in British local government at the time: that the needs of communities were best met (and paid for) by the inhabitants of those communities.144 These two Ordinances both aimed to establish boroughs, with councils empowered to construct and maintain "... wells waterworks conduits sewers and other like works ..."145 Both failed in this object, the first Ordinance being retrospectively disallowed and the second never obtaining the Royal Assent.146

From this point on, the legislative initiatives made to empower local bodies to meet the needs of the inhabitants of towns and other settlements tend to fall into four categories: those made in relation to the supply of water to towns; those made in relation to public works; those made in relation to the removal of sewage and stormwater from settlements; and those made in relation to the generation of electricity. A fifth category (those made in respect of the protection of public health against water-bourne disease) is considered under the ambit of water pollution, though it clearly also relates to the needs of settlements.

144 The preamble to the 1842 Ordinance (repeated in 1844) recognised that the inhabitants of settlements were "... best qualified, by their more intimate knowledge of local affairs ..." and by "... their more direct investment therein ..." to provide for their own needs.
145 See cl 5 of the 1842 Ordinance.
146 See nn 5 and 6 above and accompanying text.
i. Domestic and Town Supply

Perhaps frustrated with its failed attempts to establish some kind of formal and cohesive (even if basic) form of local government for the colony, the Legislative Council in 1867 enacted the Municipal Corporations Act. This Act imposed on the only existing local body, the borough council, a duty to “... cause all public reservoirs ... wells ... and other works used for the gratuitous supply of water to the inhabitants within the borough ... to be ... supplied with water.”147 In an effort to protect the supply water, the Act also provided for offences in respect of its pollution, or wilful or negligent wasting.148

By 1872, a more complex system had been put in place for the supply of water to boroughs. The system, established by the Municipal Corporations Act of that year and continued in the seven Municipal Corporations Acts which followed it in 1876, 1886, 1900, 1908, 1920, 1933 and 1954, featured powers given councils to construct works for water supply,149 to take water from streams,150 to levy rates from those to whom water was supplied,151 to pay compensation to those suffering consequentially,152 and to protect the waterworks and waters used for supply.153 From the 1900 Act on, the sources available for supply were extended to include underground waters154 and in 1956 parallel powers were conferred upon county councils.155 These powers to provide for the water supply of settlements were eventually,

147 Section 326.
148 See s 186 and Part II of the Act’s Thirteenth Schedule in respect of both offences. These kinds of provisions are continued by the 1867 Act’s successors, though those relating to pollution will be more carefully described below under The Pollution of Water.
149 For example, see s 3 of the 1872 Act; s 244 of the 1876 Act; s 316 of the 1886 Act; s 245 of the 1933 Act; and s 240 of the 1954 Act.
150 This is implied in the earlier Acts, but appears specifically in, for example, s 316(3) of the 1886 Act; s 245(1)(a) of the 1933 Act; and s 240(1)(a) of the 1954 Act.
151 See s 35 of the 1872 Act; s 253 of the 1876 Act; and s 325 of the 1886 Act.
152 By implication this would include those deprived of a riparian interest in the water taken – see s 9 of the 1872 Act; and s 245 of the 1876 Act.
153 The protection was against loss of both quantity and quality in the supply waters (so that offences of diminishing, polluting or wasting supply waters were prescribed) – see ss 14, 45, 52 and 71 of the 1872 Act; ss 259, 260 and 262 of the 1876 Act; ss 332, 333, 335 and 422 of the 1886 Act; ss 257-260 of the 1933 Act; and ss 252-255 of the 1954 Act. In 1933 the council was empowered “... in time of flood or other emergency to lead any surplus water from any waterworks vested in the Council into any natural stream with a view to the protection of the waterworks” (s 261 of the 1933 Act; and see s 256 of the 1954 Act). As from 1882, county councils (first established in 1876) were also empowered to protect works and waters used for town supply, see the Counties Act 1876 Amendment Act 1882, s 61.
154 Section 290(4) empowered councils to do “... all things necessary ...” to supply water to the inhabitants of boroughs, including prospecting for water by boring.
155 The Counties Act 1956, s 267 provides for the council to construct waterworks, and to take water from “... any river, stream, lake, or pool ...” while ss 279-282 provide for councils to protect the water in waterworks from abstraction and pollution, and s 283 lets councils protect waterworks by diverting surplus floodwaters to “... any natural stream.” Under the Municipal Corporations Acts, borough councils were engaged in the supply of water to the inhabitants of boroughs, but under the Counties Act 1956, county councils were concerned to provide water for persons in “water supply areas.” These areas could be declared as such by the council under s 266.
upon the demise of county and borough councils, vested in territorial authorities under the Local Government Act 1974 (as amended in 1979), but were expressly declared to be subject to the Soil Conservation and Rivers Control Act 1941 and the Water and Soil Conservation Act 1967.

Running alongside the Municipal Corporations Acts’s domestic supply regime were the mining provisions. From the Gold Fields Act 1866 to the Mining Act 1926, the legislature authorised the taking, diversion, and use of water for the purpose of domestic supply in mining districts. Early on, these powers could be acquired under licence by holders of miner’s rights. Later, they had be won under a water-race licence.

An attempt to introduce elements of cohesion and future planning into the provision of water supplies for towns was made when the Town-planning Act was enacted in 1926. This Act required all councils from boroughs with a population of more than 1,000 inhabitants to submit town-planning schemes. These schemes were to be prepared “... having regard to the present and future requirements of the borough, mak[ing] provision for ...” such matters as the systems of water supply in the borough. Schemes were then submitted to the Town-planning Board which, after notifying them, hearing objections from ratepayers, and perhaps requiring modifications, could finally approve schemes. Once approved, schemes had to be observed and enforced by the councils. When this Act was replaced with the Town and

156 Section 377 of the 1974 Local Government Act (as amended) confers on territorial authorities (defined in s 2 as meaning city and district councils) the power to declare water supply areas, within which the authorities can construct waterworks (s 379(1)(a)) and take water from “... any river, stream, lake, or bore ...” for supply (s 379(1)(d)). Reflecting the two-tier structure of local government set up by the 1974 Act (involving districts or cities, and regions), s 400 allows regional councils to enter into agreements to supply water to district and/or city councils, while s 401 empowers regional councils to construct waterworks and take water to supply those works. Whichever local body is concerned, the 1974 Act also, like its predecessors, provides for the protection of supply water and waterworks from pollution, diminishment in quantity and damage by floods (see ss 391-395 and 407-411).


158 The Gold Fields Act 1866, s 6, authorised the holders of miner’s rights under the Act to take or divert and use water from any spring, lake, pool, or stream on or flowing through Crown lands for domestic purposes. Under s 190 of the Mining Act 1926 “water-race licence” is described as entitling its holder to construct water-races, and to take, divert and use water from any watercourse for domestic purposes. See also s 12 of the Mines Act 1877, s 99 of the Mining Act 1886, s 103 of the Mining Act 1891, s 92 of the Mining Act 1898, and s 106 of the Mining Acts Compilation Act 1905.

159 This attempt was not altogether successful: the original plan was that schemes should be submitted to the Board by 1 January 1930. Bush notes that “[a] handful of councils ... strove valiantly to comply with unattainable deadlines, which were postponed first to 1932, and then to 1937. The Government’s intentions were remarkably progressive, with notions of the conservation of natural resources, the co-ordination of public amenities, and optional regional schemes. ... By the mid 1930s several schemes had been deposited, and the first – apart from an emergency scheme for Napier in the wake of the 1931 earthquake – was finally approved in 1937. For the vast majority of local bodies the legislation was a dead letter, the extingencies of the depression and war persuading the Government that it was futile to try to enforce compliance” (supra n 2, 36).

160 Section 13(1).

161 Section 15 and the Schedule to the Act.

162 See ss 17, 19, 20 and 21.
Country Planning Act 1953, planning for water supply became an issue to be addressed in both regional plans and district schemes. This arrangement was apparently continued when the Act was revised in 1977.

ii. Public Works: Provision and Protection

Much of the early concern with water focused on its potential to do damage to land and public works, such as roads, bridges and dams. The law made in response to this concern therefore provided, in the main, for the diversion or other control of water. The first example of such law is the Highways and Watercourses Diversion Act 1858, which empowered the superintendents of the provincial councils, established in 1852, to “... divert or stop up ...” any river, stream or creek and to undertake other public works, such as building dams and bridges.

By 1876 the first in a long series of Public Works Acts had been enacted. This first Act, enacted in the wake of the abolition of the provincial councils in 1875, placed county councils in control of all “drains” in their district. The Act, like its successors, then empowered the councils to “… impound, divert, or take water …” and to “… widen, deepen, straighten, or otherwise alter the course of level of any drain” in order to protect public works. County councils, like other local bodies of their time, were apparently generally ineffectual in carrying out their functions and in response, the Governor was empowered to require the diversion of rivers, streams and watercourses so as to provide for the use and enjoyment of public works.

163 Section 22.
164 “Water supply” is listed in both the First (regional plans) and Second (district schemes) Schedules to the 1953 Act. Section 3 of the Act states that regional planning was to occur for the “... general purposes ...” of “… the conservation and economic development of the region ...” and the coordination of public improvements and services. As for district schemes, their aim was to provide for the “… development of the area ... in such a way as will most effectively tend to promote and safeguard the health, safety and convenience, and the economic and general welfare of [the district’s] inhabitants, and the amenities of the area” (s 18).
165 Under 1977 regime, the matters which were to be provided for in district schemes are listed in the Second Schedule, and include (in cl 1) “amenities,” while the topics listed for consideration in regional schemes more specifically include “water supply” (see the First Schedule, cl 5).
166 See the above discussion on the law relating to land drainage and flood control.
167 See n 13 above and accompanying text.
168 Section 1.
169 Section 166. Note that “public drain” was defined in s 165 as any drain [itself defined as “… every passage or channel on or under ground through which water flows, except a navigable river”] made by central or local government, or made on Crown land, “… and every natural watercourse, stream, and river not navigable ... .” In 1905 (see the Public Works Act Compilation Act, s 229), “... lake outlets and other water bodies without a navigable communication with the sea or any navigable river ...” were added to the definition of “drain.”
170 Section 175. See also the Public Works Act 1882, s 236; and the Public Works Act Compilation Act 1905, ss 230 and 234.
171 See n 21 above and accompanying text.
172 See the Public Works Act 1879, s 16; the Public Works Act 1882, s 126; the Public Works Act 1894, s
Aside from providing for the diversion of water threatening to damage public works, the legislature was also concerned to ensure that water could, as necessary, be taken to supply public works and services. Thus, in the Public Works Act 1882 Amendment Act (No 2) 1885, provision was made for the Minister of Public Works to impound, divert or take any water from any stream or running water, [and for the Minister to] purchase or acquire any right or interest therein, for the purpose of supplying water to the use of any railway and the engines or machinery used thereon ...

During this period, when local government featured a proliferation of specialised bodies, municipal councils were also enabled to construct works and take and use water for the purposes of supplying railways, public baths, breweries and manufacturing industries.

iii. Sewerage and Drainage

The provision of facilities for carrying away sewage and other waste or stormwater was, from 1867 until 1956, the responsibility of municipal corporations (mainly borough councils). The Municipal Corporations Acts of 1867, 1886, 1900, 1908, 1920, 1933 and 1954 all conferred powers on municipal and borough councils in relation to the provision of sewerage systems, the discharge of sewage and other surface or storm water, and the enclosure and cleansing of offensive drains, streams and watercourses. These powers were apparently transferred

164; the Public Works Acts Compilation Act 1905, s 183; the Public Works Act 1908, s 183; and the Public Works Act 1928, s 207.

173 Section 16(1). See also the Public Works Act 1908, s 13(1); and the Public Works Act 1928, s 14(1). Note that the functions of the Minister of Public Works were later transferred to the Minister of Works (Minister of Works Act 1943) and, subsequently, to the Minister of Works and Development (Public Works Amendment Act 1973).

174 Municipal Corporations Act 1900, s 290.

175 See, for example, the Municipal Corporations Act 1867, s 320 (empowering councils to provide for sewerage systems, and to cause sewers to "... communicate with and empty into the sea"); the Municipal Corporations Act 1886, s 279 (empowering borough councils to make drains "... for the purpose of carrying off the sewage matter ... into the sea or into any tidal river ..."); the Municipal Corporations Act 1920, s 230 (empowering councils to make drains as necessary to carry off sewage or surface water into the sea, any lagoon, river or to any place for collection and utilisation for agricultural purposes).

176 See, for example, the Municipal Corporations Acts of 1908, 1920, 1933 and 1954 (ss 214, 222, 226, and 221 respectively), all of which empowered councils to lead "... any surface water into any stream or watercourse ...". In no case, unless by consent, were the councils to discharge refuse or silt into waters under the control of Harbour Boards (see the 1886 Act, s 280; the 1900 Act, s 283; the 1908 Act, 225; the 1920 Act, s 235; the 1933 Act, s 241; and the 1954 Act, s 236). Nothing in section 221 of the 1954 Act was to derogate from the provisions of the Soil Conservation and Rivers Control Act 1941.

177 The 1867 Act, s 278 empowered councils to "... scour cleanse and keep open all ditches and gutters drains or watercourses ..." in or running through public streets. The 1900 Act empowered councils to enclose streams and watercourses which "... by reason of sewage or other offensive matter therein ..." had become nuisances or dangers to public health, and for such purposes to divert such streams and watercourses (s 270), and to build dams and reservoirs so as to collect or hold water to flush and cleanse public drains (s 273). These provisions from the 1900 Act were essentially repeated in the 1908 Act (ss 212 and 215), the 1920 Act (ss 220 and 223), the 1933 Act (s 224), and the 1954 Act (ss 219 and 222 - but note that nothing in these sections was to derogate from the provisions of the Soil Conservation and Rivers Control Act 1941).
to county councils in 1956, \(^{178}\) and then to territorial authorities in 1974. \(^{179}\) The exercise of the powers was declared to be subject to each of the Soil Conservation and Rivers Control Act 1941, the Water and Soil Conservation Act 1967, and the Resource Management Act 1991 in turn, as it was enacted. \(^{180}\)

The Public Health Act 1872 suggests that municipal corporations and borough councils may not have been meeting their functions as well as was possible. Section 28 of this Act provided for local boards of health to manage sewers and drains, and enabled them to “... cause all or any of such sewers to communicate with and be emptied into such places as they may deem fit or necessary.”

As with the supply of water for settlements, coordination and future planning in respect of sewerage and drainage systems was facilitated by the enactment of the Town-planning Act 1926, and its 1953 and 1977 successors. \(^{181}\)

iv. Generating Electricity

The first statutory laws on using water to generate electricity related to lighting in streets and other public places. The Municipal Corporations Act Amendment Act 1887 gave borough councils the power to use water to produce electricity for lighting and, generally, “... for supplying the inhabitants with electricity for lighting ...” \(^{182}\) These powers were continued in...
the Municipal Corporations Act 1900,183 which also empowered borough councils to sell surplus supply water to private individuals so as to enable them to generate motive power.184 Under the Local Government Act 1974, territorial authorities retain the power to use water “... supplied by any waterworks belonging to the[m] ...” in connection with the generation of electricity, although this power is no longer limited to meeting the lighting needs of district and cities.185

The rights held by borough councils, being derived from statute, would have been preserved as existing rights on the enactment of the Water-Power Act 1903 and its successors. The 1903 Act imposed, in respect of the use of water for electricity generation, a regime later applied to all uses of water by the Water and Soil Conservation Act 1967. The sole right to use water from “... lakes, falls, rivers, [and] streams ...” for the purpose of generating or storing electricity was vested in the Crown.186 The Governor, and the Minister of Public Works, were then empowered to delegate to local authorities, or grant to other persons or companies, various rights to use water in relation to electric power production.187 Soon, the legislature was enacting provisions enabling the Governor to authorise the Minister of Public Works to exercise the Crown right,188 and to “... acquire as for a public work any existing rights ...
Having vested in itself the sole right to use water for electricity generation, the Crown was free to enter into agreements to transfer specific rights to third parties in the interests of development. The Manapouri-Te Anau Development Act 1963 was enacted to validate just such an agreement in relation to the "... water resources of Lakes Manapouri and Te Anau and ... of the Waiau and Mararoa Rivers and all tributaries thereof ... and of all other rivers flowing into the said lakes and their tributaries." [W]ith a view to facilitating the early establishment of large-scale industry in Southland ..., the Act authorised the Minister of Energy to construct works, to use water power from the water resources as defined, to generate and supply electricity, and to raise or lower the levels of specified lakes and rivers so as to satisfy the Government's agreement with Consolidated Zinc Proprietary Limited.

The 1963 Act's real importance lies, however, less in the fact that it conferred these powers on the Minister and more in its concessions to the demands of conservation. The proposal to use the rivers and lakes as resources for power generation brought controversy; the ensuing protests are today regarded as marking the onset of the conservation movement in New Zealand. In the result, Guardians were appointed for Lakes Manapouri and Te Anau, a minimum levels regime was introduced, and provision was made for the preservation of the natural scenery and fishery associated with the lakes.

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189 Public Works Act 1908, s 267(2).
190 See s 2's definition of "[t]he said water resources."
191 These words are drawn from the Agreement between the Crown and the Company, see the Schedule to the Act.
192 These powers and others were conferred by s 4. Note that the powers were transferred to the Electricity Corporation of New Zealand Limited in 1987.
193 For a discussion on the action which led to the recognition of the need to offer some protection to Lake Manapouri, see N Peat Manapouri Saved! New Zealand's First Great Conservation Story (1994/5).
194 Today, the appointment of Guardians is provided for by the Conservation Act 1987, s 6X (as inserted by the Conservation Law Reform Act 1990, s 5). Section 6X also details the functions of the Guardians, requiring them to make recommendations to the Minister "... on any matters arising from the environmental, ecological, and social effects of the operation of the Manapouri-Te Anau electric power scheme on the townships of Manapouri and Te Anau, Lakes Manapouri and Te Anau and their shorelines, and on the river flowing in and out of those lakes ..." to make similar recommendations in respect of the Monowai Power Scheme and Lake Monowai and to make recommendations as to the operating guidelines for the levels of Lakes Manapouri and Te Anau (see n 195 below and accompanying text).
195 Section 4A(1) provides for the promulgation by the Minister of Conservation (originally, the Governor) of "... operating guidelines ... for the levels of [Lakes Manapouri and Te Anau] aimed to protect the existing patterns, ecological stability, and recreational values of their vulnerable shorelines and to optimise the energy output of the Manapouri power station." The guidelines must be based on the recommendations of the Guardians of Lakes Manapouri and Te Anau. Section 4A(2) imposes a limit on the powers conferred under s 4 (see n 192 above and accompanying text), providing that "... anything operated, used, constructed, or provided pursuant to that section shall, except in exceptional natural circumstances or where life or structures are endangered, comply with the operating guidelines promulgated by the Minister under subsection (1) of this section."
196 Section 5, which requires the Electricity Corporation (formerly, the Minister), before exercising any power conferred under s 4 within the Fiordland National PArk, to consult the Minister of Conservation (formerly
Meanwhile, in 1952, the legislature had applied the regime used in the Water-Power Act 1903 to geothermal steam. The Geothermal Steam Act 1952, s 3 vested the sole right to take, use and apply geothermal steam\(^{197}\) for the purpose of generating electricity in the Crown.\(^ {198} \) In the exercise of this right, the Minister was empowered to take and use geothermal steam from “... any bore on any land ...” and to construct works “... in connection with the taking, use, and application of geothermal steam for the purpose of generating electricity.”\(^ {199} \) Further, the Governor could grant licences to “... any person ...” to take and use geothermal steam for the same purpose,\(^ {200} \) and could declare geothermal steam areas within which the sinking or use of any bore without Ministerial consent was prohibited.\(^ {201} \)

The essence of the regimes established in 1903 and 1952 in respect of the use of water (geothermal and ordinary) for electricity generation was taken up and applied to all uses of water by the Water and Soil Conservation Act 1967. Under this later Act even the Crown was required to obtain rights before using natural water.\(^ {202} \) Thus, while the Electricity Act 1968 empowered the Minister of Electricity\(^ {203} \) to construct works, to “[a]lter the level or condition of any lake, river, or stream and impound or divert the waters thereof, [and to] alter the condition of the sea ...” for the purpose of generating electricity,\(^ {204} \) it also required that these powers be exercised “... in accordance with rights obtained or existing under the Water and Soil Conservation Act 1967 ...”\(^ {205} \) Any other person wanting to use water to generate electrical power was required to obtain both a right under the 1967 Act, and the consent of the Minister under this 1968 Act.\(^ {206} \)

the Ministers of Lands and Internal Affairs) “... on the measures to be taken with a view to preserving natural scenery that may be affected ...” and “... on measures to be taken to minimise any adverse effects on the trout fishery in Lakes Manapouri and Te Anau that may result from the exercise of the power.”

197 “Geothermal steam” was defined in s 2 as including steam, water and water vapour. The similar definition contained in s 2 of the Geothermal Energy Act 1953 was amended in 1967 so as to exclude water “... heated by such energy to a temperature not exceeding 70°c.”

198 And see s 3 of the Geothermal Energy Act 1953.

199 Section 4(1)(a) and (b). Section 4(2) further empowered the Minister to exercise the powers contained in Part XIII of the Public Works Act 1928, in relation to the use of water power for the generation, transmission, use, supply, and sale of electrical energy.

200 Section 7. The Governor could attach such conditions as he thought fit to such licenses.

201 Section 8(1) allowed for the declaration of geothermal steam areas over land which was, or which was believed to be, a source of geothermal steam. Section 8(2) stated that, “[n]otwithstanding anything to the contrary in any Act ... or rule of law no person shall sink or use any bore in a geothermal steam area without the prior written consent of the Minister” whereas subs (3) allowed the Minister to grant consents and impose conditions. Section 9 provided for the compensation of persons whose estate or interest in land had been injuriously affected by the provisions of s 8. See also ss 4 and 9 and 15 of the Geothermal Energy Act 1953.

202 Section 3 of the 1967 Act provided for the Act to bind the Crown.

203 From 1977, all references to the Minister of Electricity were changed to references to the Minister of Energy — see the Ministry of Energy Act 1977.

204 Section 11.

205 Idem.

206 Section 25(1). And note s 25(2), which provided that an application under the 1967 Act for a water right to
In 1982, however, the Crown proved that the need for it to obtain rights before using water to generate electricity was no real obstacle. The Clutha Development (Clyde Dam Empowering) Act 1982 granted to the Minister of Energy rights to use water for the generation of electricity,\(^{207}\) despite suggestions that such rights might be refused under the Water and Soil Conservation Act 1967.\(^{208}\) The 1982 Act is thus notorious as an example of retrospective legislation, and is variously argued to constitute a breach of the rule of law, a breach of constitutional convention and an improper interference with the independence of the judiciary.\(^{209}\)

use water for electricity generation was deemed to constitute an application under the 1968 Act for Ministerial consent. Thus, the authority to which the application was made under the 1967 Act was required to refer such application to the Minister under the 1968 Act, who could, if he thought fit, consent to it. From 1976 (see the Electricity Amendment Act (No 2) the Minister was empowered to impose both a rental for the use of water to generate electricity (the quantum of which was to be set taking into account "... the cost of equivalent alternative sources of energy") and conditions.

207 The rights granted were set out in s 3, and include rights to dam, divert and discharge (including the "... whole flow ..."), and discharge water into the Clutha River; and to take and divert water from, and to discharge water into, the "... lake formed by the said dam ...". All rights were granted for one of the following purposes: "... hydro-electric power generation ..."; "... allowing excess water to pass the dam ..."; or "... allowing water to pass that dam in situations of emergency ...". Each right was granted subject to certain conditions which were specified in the Act's Schedule and included setting maximum and minimum levels for the new lake; providing for future recreational uses of the lake; requiring a reduction in the take of water so as to provide water for rights for irrigation, rural supply and frost fighting; and requiring the keeping of various records.

208 Unlike the powers conferred on the Minister in the Electricity Act 1968 (which could, pursuant to s 11(c), only be exercised "... in accordance with rights obtained or existing under the Water and Soil Conservation Act 1967 or any specific authority ... under any other Act relating to natural water ..."), the rights described in s 3 of the 1982 Act were granted "[n]otwithstanding anything in the Water and Soil Conservation Act 1967 or in any other enactment ...".

209 Accepting these three arguments means first accepting that this was in fact retrospective legislation. The 1982 Act was enacted to grant water rights which, it seemed, may not be won by the government following the decision of the High Court in Gilmore v National Water and Soil Conservation Authority and Minister of Energy (1982) 3 NZTPA 298. This case was an appeal against the decision of the Authority to grant the requisite rights to build and operate the hydro-electric dam which today stands at Clyde. The High Court held, quite simply, that the end use to which the power generated by the then proposed dam would be put was a relevant consideration in the decision as to whether the rights should be granted. The Court ordered that the matter should go back to the Planning Tribunal for decision. F M Brookfield ("High Courts, High Dam, High Policy: The Clutha River and the Constitution" [1983] Rec L 62, 63) comments that "... the Government ... irked and frustrated by the objectors' success ..." responded by introducing the legislation. Since the High Court had not actually refused the Crown's application — it had merely corrected the Tribunal's error of law — it could be argued that the Act was in fact prospective of the law as yet to be laid down by the courts. Retrospective legislation is argued to breach that part of the rule of law which, as defined by A V Dicey (in his Introduction to the Study of the Law of the Constitution (10th edn, 1959) 188), provides that "... no [person] ... can be lawfully made to suffer in body or goods except for a distinct breach of law ... .". For the argument relating to a breach of constitutional convention, see Brookfield's article, which considers two possible conventions: the first providing that "... it is generally wrong for Parliament to reverse any judgment or decision arrived at by judicial ... process ..." and the second stipulating that retrospective legislative intervention is wrong where, having been "... initiated by the Crown, [it] is directed against the Crown's own adversaries in a particular case." The notion of judicial independence itself also suggests that the legislature should not retrospectively overturn specific decisions of a court, as opposed to merely amend an Act for the purposes of future decisions.
Nationwide coordination of energy issues was provided for in the Electricity Act 1968, the Ministry of Energy Resources Act 1972 and the Ministry of Energy Act 1977.

The 1968 Act listed, as one of the principal functions of the Department of Electricity, the organisation, co-ordination and maintenance of the "... production of electricity ...". This function, and others, were subsequently transferred to the Ministry of Energy under the 1977 Act. This Act, which repealed the Ministry of Energy Resources Act 1972 – an Act which had itself also empowered Crown agencies to further the coordination of energy policies and production in New Zealand –, established and empowered the Ministry and Minister of Energy. Under its provisions, the Ministry was required to advise the Minister "... on the formulation, implementation, co-ordination, and review of effective and efficient policies for New Zealand relating to energy", to assess and formulate policies to influence "... patterns of demand ... for energy ..."; to promote the provision of "... adequate sources of supply of energy ..."; to promote "... efficient and economical uses of energy ..."; and to work to promote energy conservation. In relation more specifically to electricity, the Act included "... initiat[ing], organis[ing], co-ordinat[ing] ... and maintain[ing] the production ... and supply of electricity ..." and "... encourag[ing] the development ... of systems of supply of electricity ..." as principal functions of the Ministry.

b. The Needs of Industry

In the early days of colonisation, New Zealand’s primary industries were mining (mainly for gold) and farming. Water was, and is, needed for the operation of both of these industries.

i. Mining

The proliferation of statutes regulating mining (and the use of water for mining purposes) made since 1862 is a reflection of the importance of this industry to the New Zealand economy. The Gold Fields Act 1862 introduced the style of regulation which was to continue until 1971. The Act empowered the Governor to "... demise to any person ...," for up to 15 years, "... any ..."
auriferous Crown land for mining purposes and also to grant water rights and other easements for such purposes.\textsuperscript{216} The concept of land set aside for mining, with miners (and others) empowered to take and use water in respect of mining activities within that area, has featured throughout the history of water and mining law but with increasing complexity. By 1967, when the Water and Soil Conservation Act was enacted, five different types of licence relating to the use of water were available.

Under the 1862 and 1866 Gold Fields Acts, the 1871 and 1873 Gold Mining Districts Acts, the 1877 Mines Act, and the 1886 and 1891 Mining Acts, the Governor or a warden of a mining district could grant mining rights or licenses in respect of water. The holders of miner’s rights were empowered to cut and construct water-races,\textsuperscript{217} and to take or divert and use the water in water-races for mining purposes.\textsuperscript{218} Licenses could variously empower individuals to construct dams, reservoirs\textsuperscript{219} and water-races; and to take, divert and use water from springs, lakes, pools or streams.\textsuperscript{220} From 1882, conditions and restrictions relating to water flows, the

\textsuperscript{216} Section 32.
\textsuperscript{217} “Water-race” was originally defined as including artificial channels and any “... natural bed of any creek or gully through which water is diverted for mining purposes” (Gold Fields Act 1866, s 2). Later, the word “river” was inserted before “creek” (see s 5 of the Mines Act 1877). In 1886 (Mining Act, s 11) the definition was expanded so as to include “... any natural as well as any artificial channel or ditch or tail-race for the conveyance of water, or water and refuse, and also the natural bed of any river, creek or gully through or into which water or water and refuse is diverted or conveyed, ... for mining purposes ...”

\textsuperscript{218} “Miner’s rights” are first mentioned in the Gold Fields Amendment Act 1865, s 18 where the Crown is empowered to grant such rights. Miner’s rights authorised their holder to construct and use water-races on Crown lands and private lands (where these were included in a “gold field”), and to divert and use any water which the Crown might lawfully use for mining purposes. In order to exercise this power, the holder of the miner’s right was required to seek a licence. Compensations were payable to the owners and occupiers of land affected. Under the Gold Fields Act 1866, miner’s rights were distinguished according to whether or not they had been issued in respect of Crown land, or in respect of any private land included in a gold field. On Crown land, holders of rights were enabled to construct water-races, dams and reservoirs; and to take or divert and use water from any spring, lake, pool or stream (s 6). On private lands, water-races could again be constructed, but only such water as the Crown might itself lawfully divert and use was available for the use of the right holder (s 21). In 1877, miner’s rights became more restricted (by now authorising the holder to “... take or divert water from any spring, lake, pool, or stream situate upon or flowing through ... Crown lands and to use such water for mining ... purposes ...”), but not to construct water-races (see s 12 of the Mines Act 1877; s 99 of the Mining Act 1886; and s 103 of the Mining Act 1891).

\textsuperscript{219} Both “dams” and “reservoirs” included both natural and artificial examples; see, for example, the Gold Fields Act 1862, s2; and the Mines Act 1877, s 5.

\textsuperscript{220} In 1866, the legislature provided that, for the holder of a miner’s right to exercise the s 21 powers in relation to water (see n 218 above), a licence was required. Such licenses could be sold or otherwise disposed of, or revoked where the Governor was of the opinion that the water concerned was needed for settlements (ss 25 and 26). The Gold Mining Districts Acts of 1871 and 1873 both enabled individuals to seek, within any mining district, a licence to construct a water-race, dam or reservoir and to divert and use water in respect of which the race, dam or reservoir was constructed (see ss 4 and 32 of the 1871 Act, and ss 8, 79, and 86 of the 1873 Act). From 1877, the warden of a given mining district could issue licenses to “... cut, construct, and use any dam, reservoir, or water-race through and upon Crown lands and private lands and to take, divert, and use water from any spring, lake, pool, or stream situate upon or flowing through or adjoining Crown lands in order to supply water for the purpose of mining ...” (s 31(1)). Such licenses entitled their holder to deepen and widen water-races, and to sell water diverted or stored pursuant to their exercise (s 31(1)). Licences were deemed to confer chattel interests, and could be assigned or transferred accordingly (s 31(4)). A similar regime persisted under the 1886 Mining Act (see ss 141, 142, 145, 146, and 147) and the Mining Act 1891 (see ss 104, 105, 110, and 111).
rights of licence holders, the reservation of water for domestic use, and the charging of fees also appeared.221

In 1898, under the Mining Act, the warden was empowered to grant water-race, tail-race, main tail-race, dam, and drainage-area licenses.222 These five licenses continued to be available under the two compilation Acts of 1905 and 1908223 and the Mining Act 1926.224 All the licenses combined provided for the construction of, and the use of natural channels as, water races;225 the taking, diversion, and use of water from watercourses;226 the use of water and water-races to carry off waste-water, sludge, tailings and other refuse from mining operations;227 the construction of dams;228 and the collection and storage of water naturally lying within, falling upon, or percolating through, specified land.229 Like their more general predecessors, the licences available from 1898 were made the subject of some statutory restrictions and conditions.230

221 Pursuant to the Mines Act Amendment Act 1882 all holders of water rights under the principal Act of 1877 were required to comply with an order made by the district warden under s 6. That section enabled any owner of lands adjacent to the water the subject of the right to apply for an order that a "... quantity not exceeding two Government sluice-heads of water shall be allowed to flow in the natural bed of [the] stream or watercourse for general use ...." This restriction was continued in s 143 of the 1886 Act, and supplemented by further restrictions on licenses: one prescribing the annual fee payable for licenses; one providing that no licence entitled the holder to use water as against any domestic user; one providing that, if the warden or a riparian landowner so required, at least two sluice-heads of water should be allowed to flow in the stream for general use; and one requiring the holders of licenses to cease using water from a creek or river where, because flows were insufficient to supply all races connected to the stream, the holder of a superior right was being deprived of his/her entitlement (s 142). All of these restrictions were repeated in the Mining Act 1891, ss 105 and 108 (though "two sluice-heads" was reduced to "one"). The Mining Act 1891 Amendment Act 1892 further stated (in s 14) that while the holder of a water-race licence was not to have any claim for pollution damage caused by the mining operations or deposit of tailings from any registered tail-race in the relevant watercourse, this did not give tail-race licence holders carte blanche. They too were required to observe restrictions (not to stop the flow of water in watercourses, and not to pollute water being used as a supply for a city or town, for example).

222 Section 91.
223 Mining Acts Compilation Act 1905, s 105; Mining Act 1908, s 104.
224 Section 108.
225 See the descriptions of "water-race licence" (in s 92 of the 1898 Act, s 106 of the 1905 Act, s 105 of the 1908 Act, and s 109 of the 1926 Act); and "main tail-race licence" (in s 108 of the 1905 Act, s 107 of the 1908 Act, and s 112 of the 1926 Act).
226 See the descriptions of "water-race licence" (in s 92 of the 1898 Act, s 106 of the 1905 Act, s 105 of the 1908 Act, and s 109 of the 1926 Act).
227 See the descriptions of "tail-race licence" (in s 93 of the 1898 Act, s 107 of the 1905 Act, s 106 of the 1908 Act, and s 111 of the 1926 Act).
228 See the descriptions of "dam licence" (in s 95 of the 1898 Act, s 109 of the 1905 Act, s 108 of the 1908 Act, and s 113 of the 1926 Act).
229 See the descriptions of "drainage-area licence" (in s 96 of the 1898 Act, s 110 of the 1905 Act, s 109 of the 1908 Act, and s 114 of the 1926 Act).
230 The condition set out in s 143 of the 1886 Act (see n 221 above and accompanying text) appeared again in s 117 of the 1905 Act. Section 101 of the 1898 Act repeated some of the provisions of s 142 of the 1886 Act, and added new conditions, such as one providing for the imposition of restrictions as to the quantity and time of use of water; one reserving water surplus to the reasonable requirements of a licence for use by other users and one providing for the revocation of licences where water was required for settlers - see also s 116 of the 1905 Act, s 115 of the 1908 Act, and s 121 of the 1926 Act. In 1894 (Mining Act 1891 Amendment Act 1894, s 10) a restriction was introduced prohibiting those constructing tail-races from discharging tailings or debris into a watercourse at a point closer than 5 chains to a bridge and in such a way
Not only were all these licenses available to the sovereign from 1882, but they also became available to county councils in 1885, borough councils in 1886, and local authorities generally in 1898.\textsuperscript{231}

As well as establishing these licensing regimes, the various Gold Fields, Gold Districts, Mines and Mining Acts provided for discharges and the making of regulations. In the last quarter of the 1800s, the Acts enabled the Governor to set aside watercourses for the discharge of tailings and other mining debris;\textsuperscript{232} and also allowed similar discharges to be made into water-races and the watercourses feeding them.\textsuperscript{233} From 1892, the Governor could make regulations as to damage the bridge. This was repeated in s 105 of the 1898 Act, s 122 of the 1905 Act, and s 121 of the 1908 Act. Also, note s 30 of the 1899 Mining Act Amendment Act, which stated that holders of mining privileges were not entitled to prevent other privilege holders from discharging tailings and other mining debris into watercourses within their privilege. This was repeated in s 119 of the 1905 Act, 118 of the 1908 Act, and s 124 of the 1926 Act. Last but not least, the 1926 Act, s 109 introduced new restrictions as to the availability of water-race licenses; stating that they should not authorise the taking of more than 10 sluice-heads of water, for example. Note the extension made to this provision by s 10 of the Mining Amendment Act 1937.

\textsuperscript{231} Section 219 of the Public Works Act 1882 enabled the Queen to apply for and hold in any mining district, a licence to use any water-race, dam or reservoir for purposes authorised in the Gold Mining District Act 1873 or the Mines Act 1877. This provision only came into play where it was inexpedient to apply the Public Works Act 1882, or where water rights relating to mining were already held by or on behalf of the sovereign. Section 11 of the Mines Act 1877 Amendment Act 1885 empowered county councils, in any mining district, to apply for and hold "... any licence to use any water-race ... dam, [or] reservoir ..." again in cases where it was not expedient to apply the 1882 Public Works Act or where rights to use water in relation to mining had been acquired by the councils under that Act. This provision was repeated in s 149 of the 1898 Act (and see ss 115 and 118 of the 1891 Act), and a similar empowerment invested upon borough councils by s 150 of the same Act. In 1898, local authorities were empowered to purchase or acquire and hold any licence in respect of water; were invested with the same rights, powers, remedies and liabilities as a private person holding such a licence; and were empowered to charge others for water supplied pursuant to the exercise of their respective licenses (s 106, and see s 124 of the 1905 Act, s 123 of the 1908 Act, and s 129 of the 1926 Act).

\textsuperscript{232} The Gold Fields Acts Amendment Act 1875, s 2 empowered the Governor to declare any watercourse to be one into which "... tailings mining debris and waste waters of every kind used in or upon or discharged from any claim shall be suffered to flow or be discharged ..." Watercourse was defined as "... any river stream creek pool, or any portion thereof, or any tributary thereof ..." Section 3 further empowered the Governor to control the mode and times of such discharges by regulation, while s 4 provided for the compensation of riparian owners injuriously affected by such proclamation. See also ss 154 and 155 of the 1886 Act, ss 152 and 153 of the 1891 Act, ss 108 and 112 of the 1898 Act, ss 126 and 130 of the 1905 Act, ss 126 and 130 of the 1908 Act, and ss 132 and 137 of the 1926 Act. From 1899 (see the Mining Act Amendment Act, s 22) such watercourses were deemed to have been set aside "... for the carrying on of mining operations ..." generally (and see s 135 of the 1908 Act). Since this regime involved the compensation of land-owners injuriously affected by such reservations, the legislature soon began to limit its future liability. It did so by providing for the incremental withholding of rights or titles associated with watercourses running through or upon Crown lands, when the lands were transferred – see the Mining Act Amendment Act (No 2) 1887, s 3; ss 155 and 156 of the Mining Act 1891; s 132 of the 1905 Compilation Act; and s 139 of the Mining Act 1926.

\textsuperscript{233} See ss 103 and 104 of the Mining Act 1898, repeated in ss 120 and 121 of the 1905 Act, ss 119 and 120 of the 1908 Act, and ss 125 and 126 of the 1926 Act. Section 103 authorised the discharge of tailings, debris and waste water into certain water-races and the watercourses connected to them. Such discharges were not to occur within 5 chains of the head of the race, and could not prevent the flow of water, or otherwise directly damage the race other than by pollution. Section 104 restricted s 103 in that it provided that no such discharges could be made into water-races or watercourses held by any local authority for the purposes of town supply unless the race or watercourse had been duly proclaimed to be one set aside for discharges...
controlling the granting and exercising of powers under licenses, and controlling the use of water.\(^{234}\)

Should it ever have been that, despite the availability of all these licenses and rights, sufficient quantities of water were not being supplied to gold fields and mining districts, the Public Works Acts could have been used.

The first of these Acts, the Immigration and Public Works Act 1870, empowered the Governor to cause works to be constructed and employed to supply water to gold fields, following a request from the Superintendent or Council of a province.\(^ {235}\) In order to complete this task, the Governor was empowered to divert and impound water from specified streams,\(^ {236}\) and to impose charges for, and conditions on, the receipt and use of any water so supplied.\(^ {237}\)

In 1876 a rather more sophisticated regime was introduced, and involved the transfer of some of the Governor's powers to the Minister of Public Works. Thus, the Public Works Act 1876 empowered the Governor to proclaim land to be a water-race,\(^ {238}\) and to declare any stream to be taken for the purposes of supplying water to mining districts.\(^ {239}\) The Governor could alter the course of streams,\(^ {240}\) while the Minister was empowered to take, impound or divert water in a stream proclaimed to be a water-race, or supplying a water-race.\(^ {241}\) Water-races could be vested in county councils.\(^ {242}\)

This regime was repeated in the Public Works Act 1882, the Public Works Act 1894, the Public Works Acts Compilation Act 1905, the Public Works Act 1908, and the Public Works (see n 232 above), or unless the discharge was made from a tail race into the watercourse below its point of connection with the race.

\(^{234}\) Under the 1892 Act, s 33, the Governor could make regulations controlling the granting of leases, and the terms and conditions thereof. Section 11 of the Gold Fields Act 1866 extended these powers to cover the regulation of the construction of water-races, and the manner of use of water taken or diverted; the prevention of the pollution or wasting of water used for domestic purposes; and the prescription of the terms and conditions of diversion. For examples of similar powers, see s 51 of the Mines Act 1877, s 302 of the 1898 Act, and s 392 of the 1908 Act.

\(^{235}\) Section 26.

\(^{236}\) Section 82.

\(^{237}\) Section 88. The supply waters were protected by s 90, which made it an offence to take or divert water from "... water supplying or flowing into ..." any stream taken under s 26 (see n 235 above and accompanying text) and to fail to restore the water on request. See also ss 209 of the Public Works Act 1876, s 265 of the Public Works Act 1894, s 254 of the Public Works Acts Compilation Act 1905, s 254 of the Public Works Act 1908, and s 293 of the Public Works Act 1928.

\(^{238}\) "Water-race" was defined in s 199 of the 1876 Act as the land occupied by a natural or artificial channel for the supply of water; or by any sludge channel or drain for the removal of wash or refuse from gold mining claims.

\(^{239}\) Section 200.

\(^{240}\) Section 202.

\(^{241}\) Section 206.

\(^{242}\) Section 217.
Act 1928 (though the Minister’s powers were extended under both of the 1894 and 1905 Acts).243

In 1967 when the Water and Soil Conservation Act was enacted, those parts of the Mining Act 1926 and the Public Works Act 1928 which related to privileges in respect of water and the supply of water to mining districts, were repealed.244 It was no longer possible to apply for new rights to use water for mining (and many other) purposes other than in accordance with the 1967 Act.245

ii. Agriculture

In so far as the business of farming is concerned, the most pressing demand for water supply is associated with the need to irrigate land. This is a need which has been addressed by the New Zealand legislature since 1883.246

During the era of the proliferation and specialisation of local government, no less than three public authorities were involved in providing water for irrigation; these bodies were county councils, water-supply boards and the Minister of Public Works.

County councils (and, from 1891, water-supply boards)247 were empowered by the Counties Acts Amendment Act 1883, the Counties Act 1886, the Water-Supply Acts 1891 and 1908, the

243 See ss 255, 256, 262, and 274-278 of the 1894 Act; ss 243, 244, 250, 251, 253, and 262 of the 1905 Act; ss 243, 244, 250, 251, 253 and 262 of the 1908 Act; and ss 282, 283, 289, 290, and 291 of the 1928 Act. The Minister’s powers were extended in 1894, so that s/he was by then empowered to make water-races across any stream or river; alter the level or course of any stream or river; take, impound or divert water from any specified stream or river; and dam any stream within or beyond the limits of the water-race (s 262). In 1905 the Minister was further empowered to make regulations prescribing conditions for the use of water-races and channels (s 253).

244 See s 35 and the Schedule to the 1967 Act.

245 Though most existing uses (including those “... authorised under the Mining Act 1926 ... after the 9th day of September 1966, or as ... authorised under any other Act ... during the period ... 9th day of September 1966 and ... 31st day of December 1968 ...”) were preserved: see s 21 of the 1967 Act. And, in respect of the continuation in force of privileges granted under the Mining Act 1926, see the Water and Soil Conservation Amendment Act 1971, s 3. Note that: the entitlements of the holders of water-race, dam, drainage-area, tail-race and main tail-race licences which had been continued in force were detailed in ss 4-8 of the 1971 Amendment Act, which also repeated such provisions as s 104 of the Mining Act 1898 (see n 233 above), and parts of s 142 and s 143 of the 1886 Mining Act (see n 221 above).

246 It has, at times, been difficult without the aid of secondary sources to distinguish laws relating to the supply of water for irrigation from those relating to water supply for towns and other settlements. In the main, the distinction has been made by reference to the purposes for which water was to be supplied where this was stated. Thus, where a statute has provided for water to be supplied for the use of people, or the inhabitants of settlements, then such statute was discussed above, under “The Needs of Settlements.” Where, instead, a statute has provided for water to be supplied for use on land, or for irrigation, agriculture, farming or horticulture, then it has been held over for discussion under this part.

247 Water-supply boards were first mentioned in the Water-Supply Act 1891, s 60. They consisted of two or more road boards, and were invested with the same powers as were held by county councils under the Act. Both the 1898 Water-Supply Amendment Act, s 11 and the Water-Supply Act 1908, s 48 provided that, in the case of dispute between a county council and a water-supply board as to the user of the waters of a stream of river, arbitration should be sought.
Water-Supply Act Amendment Acts 1894 and 1898, and the Counties Amendment Act 1961 to perform functions relating to the supply of water for irrigation. Councils and boards were generally enabled to construct water-races\(^{248}\) (and so to divert, alter the levels of, dam, or take and impound water from rivers and streams\(^{249}\)); to acquire water rights;\(^{250}\) to provide for the protection of water-races\(^{251}\) and the protection of land from water-races;\(^{252}\) to control the use of water drawn from such races;\(^{253}\) and to declare water-supply districts\(^{254}\) and water-races.\(^{255}\) Councils could levy rates for the supply of irrigation water,\(^{256}\) and the owners and occupiers of land able to be supplied by water-races, and who had paid their rates, were generally entitled to be so supplied.\(^ {257}\) In 1979, following the enactment of the Local Government Act 1974 and the setting up of the new agents of local government, the irrigation powers of county councils and water-supply boards were invested upon territorial authorities.\(^{258}\)

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248 "Water-race" was first defined in the 1883 Amendment Act as "... land occupied by any channel, natural or artificial, for the supply of water ..." which had been proclaimed to be such. By 1961, the definition had been adjusted, so as to include land occupied by channels used "... for the supply of water to be used principally for farming, agricultural, or horticultural purposes ..." (s 46). County councils and, later, water-supply boards were empowered to construct, enlarge and alter water-races by s 33 of the 1883 Amendment Act; s 268 of the 1886 Act; s 12 of the 1891 Act; s 12 of the 1908 Act; and s 50 of the 1961 Amendment Act.

249 See s 37 of the 1883 Amendment Act; s 272 of the 1886 Act; s 23 of the 1891 Act; s 23 of the 1908 Act; and s 50 of the 1961 Amendment Act. Note that the powers to divert, dam, and take or impound water from any river or stream granted by s 50 of the 1961 Amendment Act were only to be exercised with the prior consent of the relevant catchment board.

250 See s 272(4) of the 1886 Act; s 12 of the 1891 Act; and s 12 of the 1908 Act. Such rights could be acquired in perpetuity, or for a fixed term.

251 All of the relevant Acts create offences of polluting or diminishing the quantity of water in water-races, of unlawfully taking or supplying water from water-races, and of widening or deepening water-races – see ss 41-43 and 47 of the 1883 Amendment Act; ss 278-281 and 284 of the 1886 Act; ss 49-51 and 53-55 of the 1891 Act; ss 57-59 and 61-63 of the 1908 Act; and ss 65, 66 and 70 of the 1961 Amendment Act.

252 The Water-Supply Act 1908, s 23(2) provided that "... every water-race shall, where necessary to prevent damage to any land, have an outfall into the sea, or to some river, creek, lake, lagoon, or public drain." This provision was repeated in s 50(3), Counties Amendment Act 1961.

253 See s 42 of the 1891 Act; s 46 of the 1908 Act; and s 50 of the 1961 Amendment Act, all of which provide for councils to stop or reduce the flow of water in water-races so as to allow for such races to be repaired, or so as to provide for a fair or appropriate supply of water.

254 This power was introduced in 1886 – see s 269 of the Counties Act, and s 8 of the 1891 Act; s 6 of the 1908 Act; and s 47 of the 1961 Amendment Act. Districts were simply declared to be such "... for the purpose of the construction of irrigation works ..."

255 Section 32 of the Counties Act enabled the Governor, by Proclamation, to declare any land to be a water-race "... and any stream ... to be taken for the purpose of supplying water to a water-race." This provision was repeated in s 267 of the 1886 Act. From 1891, natural water channels could be put forward as prospective water-races by a petition supported by at least two-thirds of the owners and occupiers of the lands through which the channel ran. The consent of all such land owners and occupiers was required before the declaration could actually be made (s 18(1)). See also s 50 of the 1908 Act; and s 62 of the 1961 Amendment Act.

256 See the 1883 Amendment Act, s 36; s 283 of the 1886 Act; and ss 35-37 of the 1891 Act.

257 See the 1883 Amendment Act, s 45, and the 1886 Act, s 282.

258 See the Local Government Act 1974 (as amended), ss 423 (enabling territorial authorities to declare water-race districts), 426 (setting out the powers of territorial authorities in respects of the construction of water-races), 429 (natural channels able to be declared as water-races), and 437-439 (offences and regulations in relation to water-races).
A separate system applied to mining districts. Where works needed to be constructed, or water taken, diverted and used from sources flowing through, or on, land in mining districts the mining legislation became relevant. The Mines Act 1877 first introduced licenses to construct dams and reservoirs, and to take, divert and use water for irrigation purposes. In 1898, these licenses came to be known as "water-race licenses" and remained available until 1967.

During the period 1875 to 1960 local government was frequently found wanting in the performance of its functions. This perhaps explains why central government was also vested with powers in relation to the supply of water for irrigation in 1910. Like county councils, the Minister of Public Works was empowered by the Public Works Amendment Act 1910 (and, later, by the Public Works Act 1928 and the Public Works Amendment Act 1960) to construct water-races and declare irrigation districts. In 1981, the Public Works Act transferred these powers to the Minister of Works and Development, and in 1988 they were further transferred to the Minister of Agriculture. In fact, the number of works to which these provisions will apply today will have been reduced as a consequence of the enactment of the Irrigation Schemes Act 1990. This Act authorised the Crown to dispose of irrigation schemes (and the water rights attached thereto), and amended the Public Works Act 1981 so that it applies only to works owned by, or under construction by, the Crown.

Over time, the exercise of any powers involving the taking, using, damming or diverting of water for the construction and maintenance of water-races was made subject to the Soil Conservation and Rivers Control Act 1941, the Water and Soil Conservation Act 1967 and, eventually, the Resource Management Act 1991.

Though strictly aqua- as opposed to agri-culture, marine farming seems a relevant industry to mention at this point. In 1968, the legislature empowered the Minister of Marine to lease any

259 Section 31(1).
260 See the Mining Act 1898, s 92; the Mining Acts Compilation Act 1905, s 106; the Mining Act 1908, s 105; and the Mining Act 1926, s 109.
261 See s 2 of the 1910 Amendment Act; s 274 of the 1928 Act; and s 197 of the 1981 Act. In order to perform this function, the Minister was then vested with all the same powers as were held by county councils (and water-supply boards) in respect of water-races, streams and rivers (see s 3 of the 1910 Amendment Act; s 275 of the 1928 Act; and s 197 of the 1981 Act).
262 These powers were introduced in 1960, and the Minister was empowered to declare irrigation districts if, in his opinion, the construction of waterworks was "... warranted ..." If the Minister's proposal did not receive the support of at least 60% of ratepayers in the district, then it would not go ahead (see ss 3, 5, 6 and 11 of the 1960 Amendment Act).
263 See ss 3 and 7 of the 1990 Act.
264 The powers of county councils under s 50 of the 1961 Amendment Act (relating to the diversion and damming of, and the taking of water from, rivers and streams) were only to be exercised with the consent of the relevant catchment boards; all of the 1974 Local Government Act's relevant powers were declared to be subject first to the 1941 and 1967 Act and, subsequently, to the 1991 Act (see s 421).
“area” to any person for the purpose of the establishment of a marine farm. Such “areas” included water and, if granted, a lease conferred on its holder the “exclusive right to farm [any specified] species of fish or marine vegetation” for a maximum term of 14 years. From 1971, offences of depositing “in a leased area any rubbish or any deleterious matter” and farming “any area that is not a leased area” were prescribed.

iii. Shipping

The history of water law touches on shipping via its regulation of the taking-in and discharging of ballasting, and its control over obstructions and hazards to navigation.

Since 1842, regulations and/or by-laws have been able to be made to regulate the taking-in and discharging of ballasting from and into harbours. This power was first vested in the Governor, was subsequently adopted by marine boards, and then harbour boards. A more general power to “regulate the supply of ballast and water to shipping” was also once conferred on marine boards and provincial superintendents.

The Harbours Act 1878 was the first Act to make it an offence to “cast or cause to fall any ballast, rock, stone, slate, shingle, gravel, sand, earth, cinders,

265 The Marine Farming Act 1968, s 3. Under the Marine Farming Act 1971, s 3 this power was assumed by harbours boards or other local authorities.
266 “Area” is defined in s 2 as meaning any part of the sea bed below any part of the surface of New Zealand’s territorial sea or internal waters, or any part of the foreshore being vested in the Crown, and “includes any water at any material time upon or vertically above any such part.” Note that what constitutes New Zealand’s territorial sea and inland waters is set out in ss 3 and 4 (respectively) of the Territorial Sea and Exclusive Economic Zone Act 1965. See also s 2 of the Marine Farming Act 1971 (and s 2 of the Marine Reserves Act 1971).
267 Sections 3 and 4 of the 1968 Act, and ss 3-7 of the Marine Farming Act 1971.
268 See s 4(2) of the Marine Farming Act 1971 and s 2 of the Marine Farming Amendment Act 1976 (the latter adding a new s 4A to the principal Act of 1971).
269 It is not clear from the legislation whether ballasting consisted, in whole or part, of water (as it does today), or of earth and gravel (certainly such materials were sometimes used).
270 The Harbours Regulation Ordinance 1842, s 7 empowered the Governor in Council to make regulations “for the watering and ballasting and discharging of ballast of or from vessels” in order to secure the safety of shipping. The current Harbours Act 1950 empowers harbour boards to make by-laws to “regulate the discharge into the harbour of the contents of ballast tanks on vessels” (s 232(36)).
271 The power was the Governor’s under s 7 of the 1842 Ordinance (see n 270 above), s 45 of the Marine Boards Act 1862, s 33 of the Marine Boards Act 1863, s 42 of the Marine Act 1866, and s 10 of the Marine Act 1867. Under s 215 of the Harbours Act 1878, harbour boards were empowered to make by-laws regulating the “times, places, order, and mode of the taking in and delivery of ballast” – and see s 207 of the Harbours Act 1908, s 226 of the Harbours Amendment Act 1925, and s 232 of the Harbours Act 1950 (again, see n 270 above). Note that the Harbour Boards Amendment Act 1961, s 6 enabled “public bodies” to exercise the powers of harbour boards where there were none, and that the Harbours Amendment Act 1962, s 2 extended this to any incorporated society. The Harbours Amendment Act 1977, s 5(2) identified as public bodies: local authorities, domain boards, regional water boards, national parks authorities and boards, scenic boards, administrative bodies under the Reserves and Domains Act 1953, and “any persons acting as trustees for the inhabitants of any locality.”
272 This more general power was conferred on marine boards under the Marine Boards Act 1862, s 40 and on provincial superintendents under the Marine Boards Act 1896, s 29.
rubbish, or other substance or thing . . ." from any ship or land either directly or indirectly into "... any harbour or tidal water, or into the sea below low-water mark . . ." where this was, or tended to be, to the injury of navigation.273 Also forbidden for the same reason was placing or leaving “... any ship or boat . . . neglected as unfit for sea service, any floating timber, or any other thing, . . . in any harbour or tidal waters, or in the sea . . .”.274 These offences were repeated in 1908, 1923 and 1950275 and extended to cover situations where ballast, rocks and so on were cast, or allowed to fall, into “... any navigable lake or navigable river” in 1964.276

Also perhaps to protect navigation in harbours, borough councils had from 1886 been prohibited from exercising their drainage functions in such a way as would result in the discharge of silt or refuse into harbours, unless with the prior agreement of the relevant harbour board.277

As for the protection of navigation beyond harbours see the prohibitions against marine pollution which used to fall under the Marine Pollution Act 1974, but are today prescribed by the Maritime Transport Act 1994.278

iv. Timber Logging

Logging has always been, and still is, an important industry in New Zealand. In the early days of colonisation the focus was on logging indigenous forests, but today exotic plantations supply most of the industry.

In 1884 the Timber-floating Act was enacted, establishing a regime for the use of rivers, streams and tidal creeks for transporting logs, lumber, timber, firewood, posts, rails and other materials by rafting, floating or driving them down or along the course of such waters.279

The regime was simple: the Governor was empowered to notify which rivers, streams and tidal

273 Section 217(1) and (2). Subsection (1) concerned situations where such substances were cast or allowed to fall directly into the harbour, tidal waters, or sea; while subs (2) dealt with situations where the substances were cast or allowed to fall onto land “... in a position where [they] may be liable to fall or descend or be carried or washed down by ordinary or high tides, or by any stream or flow of water, or by any storm or flood, or otherwise, into any harbour or tidal water, or into the sea . . .”
274 Section 217(3).
275 See s 209 of the Harbours Act 1908, s 236 of the Harbours Act 1923, and s 242 of the Harbours Act 1950.
276 See the Harbours Amendment Act 1964, s 16. Also, in 1968, the Act was amended to specify that where these events occurred from a vessel, then the master and owner of the vessel and the owner’s agent, would all have committed an offence (see s 19 of the Harbours Amendment Act 1968).
277 See n 176 above and accompanying text as to these functions, and their limits. Note that the relevant provisions do not specify the purpose of this limit on the drainage powers of borough councils.
278 See text to follow, under “Pollution by Oil.”
279 See s 5 of the 1884 Act, which defined the nature of the licences available under the Act. This Act was consolidated in the Timber-floating Act 1908.
creeks were available for such purposes, and prospective users were invited to apply for a licence. No licence was to be granted until the prospective licensee had entered into a bond with the Crown, against which any damages could be recovered. The licensee was prohibited, in the exercise of the licence, from causing damage to "... the ordinary navigation of any such river, stream or tidal creek ..." and from injuring, any more than necessary, the "... lands on the banks or along the course of any such river, stream, or tidal creek." It became an offence to raft, float or drive logs and so on down or along the course of rivers, streams and tidal creeks without a licence.

v. Big Business

The New Zealand Parliament, no doubt like most legislatures worldwide, has generally been willing to intervene in existing legal regimes so as to provide for some kind of extraordinary situation perceived to be in the public interest. Thus, in New Zealand, Parliament has intervened in the legal regime controlling rights to use water at various times so as to promote big business (bringing with it major investment and employment opportunities) and so as to avoid situations of social hardship.

The Tasman Pulp and Paper Company Enabling Act 1954 intervened into the common law riparian system by providing for specific statutory rights to take water, and to discharge effluent into water. The Act authorised the Tasman Pulp and Paper Company Limited to "... take from the [Tarawera River] such quantity of water as it may require ..." and to discharge "... all trade wastes ..." into the river.

Even after the enactment of the Water and Soil Conservation Act 1967 and the Resource Management Act 1991, the legislature was not deterred from its willingness to avoid the limitations of the existent legal regime by special enactment.

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280 See s 2 of both the 1884 and 1908 Acts.
281 See s 3 of both the 1884 and 1908 Acts.
282 See s 4 of both the 1884 and 1908 Acts.
283 See s 6 of both the 1884 and 1908 Acts.
284 See s 15 of the 1908 Act.
285 Section 3(1) authorised the taking of water, and imposed a maximum take of either 50 cubic feet per second, or such greater amount as the Minister of Works might from time to time authorise. Section 3(2) enabled the Minister to specify the points from which such water was to be taken.
286 "Trade wastes" was defined in s 2 as meaning "... any liquid, with or without matter in suspension or solution therein, which is or may be discharged from the premises of the company ... in the course of any trade or industrial process or operation carried on by the company; and includes any effluent remaining after the treatment of domestic sewage discharged from those premises." Section 4(1) required the company to discharge such waste into the river, subs (2) thereof enabling the Minister to determine the points of discharge, and subs (3) requiring the company to "... take such steps as may be necessary to ensure that trade wastes discharged ... are discharged in such manner and are of such a nature as to comply with any conditions imposed by the [Pollution Advisory Council established by the Waters Pollution Act 1953] ... ."
287 The legal regimes established by the Acts of 1967 and 1991 will, of course, be described in text to follow.
The Clutha Development (Clyde Dam) Enabling Act 1982 has already been noted, as has the fact that when the rights described thereunder were granted, this occurred “...notwithstanding anything to the contrary in the Water and Soil Conservation Act 1967...” Similarly, the rights granted in 1983 to the New Zealand Synthetic Fuels Corporation to discharge plant effluent into the Tasman Sea and, in emergencies, the Waitara River were granted despite the 1967 Act.

In 1992 the Lake Pukaki Water Level Empowering Act was enacted. This Act effectively allowed the Electricity Corporation of New Zealand to take water from Lake Pukaki beyond the minimum levels set by the relevant water right. The Corporation had, under the rights as originally granted under the 1967 Act, the authority to take and use water from the Lake to a minimum level of 518 m above mean sea level. Under the Act, it was enabled to take and use water between the levels of 518 m and a new minimum of 513 m “...notwithstanding anything in the rights as originally conferred.” This was done to allow the generation of some 300 gigawatt hours of electricity “... to meet the extremely serious electricity shortage ...” then being suffered as a consequence of the “... extremely serious water shortage ...” in the Corporation’s hydro reserves. The Act was never actually used, and expired on 31 January 1993.

Even more recently, the Watercare Services Limited (Auckland Emergency Water Supply) Bill proposed granting authorisations for the company to build a pipeline to convey water from the Waikato River to the its water mains “... for the purposes of augmenting Auckland’s water supply.” Had the Bill been passed, this authorisation would have been granted “... without the need to obtain any other consent ...” under the Resource Management Act 1991, and as if all requisite consents had, in fact, been obtained. The fear, apparently, was that having to participate in the usual consents process would delay proceedings at the peril of Auckland’s water supplies. In the end, rain came and the Bill was never needed.

Finally, mention should be made of the National Development Act 1979. This Act, which will

288 See nn 207 and 208 above and accompanying text.
289 See the Synthetic Fuels Plant (Effluent Disposal) Empowering Act 1983, ss 3 and 5. Note that the reference in both of these two sections to the 1967 Act was amended to refer to the Resource Management Act 1991 by the Eighth Schedule to the 1991 Act.
290 See s 3 of the 1992 Act.
291 See the preamble to the Act.
292 Section 8.
293 The proposed project is described in detail in the Second Schedule to the Act.
294 See the Long Title.
295 Clause 4.
296 Clause 5.
be described in text to follow, provides the most extensive example of the New Zealand Parliament providing a means for big business to avoid the prescriptions and restrictions of the prevailing legal regime for the allocation of rights to use water.

c. The Pollution of Water

i. Pollution and the Public Health

Perhaps unsurprisingly, the "... earliest water [pollution] legislation in New Zealand related to the prevention of water-bourne disease." The protection of domestic and town supplies from discharges including tailings, "... unwholesome or improper water ...", and "... foul liquid ...", has been a major legislative concern since 1866. All the Acts which have, over time, provided for the supply of water for domestic use have included provisions concerning the protection of those supplies from pollution. This includes the various mining Acts, the Municipal Corporations Acts, later Counties Acts, and, ultimately, the Local Government Act 1974.

297 This section describes law providing for the protection of water from pollution, not law relating either to water conservation generally, or to the authorisation of discharges into water.

298 Williams D A R Environmental Law (1980) 91. Williams does not confine his assertion to water pollution, but it is perhaps more correct to do so.

299 These words were used, for example, in the Municipal Corporations Act 1867, see n 302 below and accompanying text.

300 These words were used, for example, in the Municipal Corporations Act 1876, see n 302 below and accompanying text.

301 The first of these Acts was the Gold Fields Act 1866, s 11 which empowered the Governor to make regulations to prevent the "... defiling ... of water used for domestic purposes and for determining whether any and what spring stream or other depository of water or any portion thereof shall be reserved for domestic purposes ... ." A similar provision appeared in the Mines Act 1877, s 51. Section 14 of the Mining Act 1891 Amendment Act 1892 introduced the provisions later to continue as ss 103 and 104 of the Mining Act 1898, ss 120 and 121 of the Mining Acts Compilation Act 1905, ss 119 and 120 of the Mining Act 1908, and ss 125 and 126 of the Mining Act 1926 (and see n 233 above).

302 The Municipal Corporations Act 1867, s 186 empowered borough councils to make by-laws providing for offences of washing; cleaning animals; and disposing of animals, rubbish and filth in water belonging to or under the management of the council; and of allowing "... filthy unwholesome or improper water ..." to run into such water. Similar offences were prescribed by s 71 of the Municipal Corporations Waterworks Act 1872, s 262 of the Municipal Corporations Act 1875, s 335 of the Municipal Corporations Act 1886 (but by now allowing gas or "... foul liquid ..." to escape into water had been added), and ss 304, 246, 252, 258 and 253 of the Municipal Corporations Acts of 1900, 1908, 1920, 1933 and 1934 respectively. Section 52 of the Municipal Corporations Waterworks Act 1872 made it an offence to allow substances to flow into a council's waterworks or water races, if the waters would thereby become "fouled." In 1876 this offence was confined to "... foul liquid ..." flowing from any "... manufactory ..." (see s 260 of the 1876 Municipal Corporations Act), and from 1886 "... gasworks ..." and "... other works ..." had been added to the list (see ss 333, 305, 253, 259, and 254 of the Municipal Corporations Acts of 1886, 1900, 1920, 1933, and 1934 respectively). Note also that in 1900, the offence was expanded to cover the watershed, and not just the actual water, feeding the council's supply. Further: powers were provided by ss 212 (enabling borough councils to enclose and cover over streams or watercourses which, "... by reason of sewage or other offensive matter therein ha[d] or [could have] become a nuisance or dangerous to the public health), 284 (establishing that any natural stream or watercourse which was in such a state as to constitute a nuisance or a danger to public health was deemed to be a "nuisance" under the Act, and prescribing that it was an offence to allow a nuisance to arise or continue), and 285 (empowering councils to abate nuisances) of the Municipal Corporations Act 1908. All of these provisions were continued in later Acts, see, for example, s 220 of the 1920 Act, s 224 of the 1933 Act, and ss 284 and 294 (and also s 386) of the 1954 Act.

303 Sections 280, 281, 311 and 312 of the Counties Act: 1956 more or less repeated ss 253, 254, 284 and 294 (respectively) of the Municipal Corporations Act 1954.
In addition to such provisions, there was (and is) the public health regime. The Public Health Act 1876 aimed to ensure that polluted watercourses on or near the boundary between two or more districts, or such as were constituting a nuisance, or a danger to public health, were cleaned. Later health Acts added to this, enabling health officers to require the purification of, and the prohibition of certain discharges from, certain water; prescribing offences relating to water pollution; establishing a system to involve local authorities in pollution prevention and abatement; and empowering the Governor-General to make regulations relating to water pollution.

304 The Local Government Act 1974 (as amended) sets out the following offences in respect of water supply by territorial authorities: directly or indirectly polluting or causing to be polluted supply water (or the watershed used to supply such water) so as to make it a danger to human health, or so as to make it offensive (s 392); bathing, washing clothing, throwing any animal (or refuse, litter, or debris) in water being part of the district’s waterworks (s 395). Similar offences are prescribed in relation to regional water supply (see ss 408 and 409).

305 The Public Health Act 1876 provided that where any watercourse, near to or on the boundary between health districts, was "... foul and offensive, so as injuriously to affect the districts ..." a board of health representing one or other of the districts involved could apply to the resident magistrate for an order requiring the cleansing of the watercourse (s 53, and see s 63 of the Public Health Act 1908). The "nuisance" regime established in 1876 comprised: ss 56 (defining a "nuisance" as including "[a]ny pool ditch ... watercourse ... so foul or in such a state as to be a nuisance or injurious to health ..."), 57 (imposing on local boards of health a duty to inspect for, and to enforce the Act so as to abate, nuisances), 58 (empowering persons aggrieved to report nuisances to the board), and 59-61 (setting out the abatement enforcement procedure). This regime was continued in later Acts, see, for example, the Public Health Act 1908, ss 72-77 (note especially s 76, which with s 28 enabled immediate action to be taken where a nuisance might lead to the outbreak of infectious disease). Subsequently, nuisances came to be dealt with more simply: they were defined (see s 26 of the Public Health Act 1920 and s 29 of the Health Act 1956, both of which added wells and other sources of water supply to the definition), and prohibited (s 27 of the 1920 Act making it an offence to create, allow or suffer a nuisance to arise or continue – see also s 30 of the 1956 Act).

306 See the Public Health Act 1900, s 19; the Public Health Act 1908, s 18; and s 76 of the Public Health Act 1920 (by this time, medical officers of health had assumed this function of local boards). The waters of concern were those used for water-supply purposes.

307 Offences of defiling or polluting watercourses, streams, lakes and reservoirs forming part of any district’s water-supply (s 61(1) of the 1900 Act, s 64(a) of the 1908 Act, s 61(1) of the 1920 Act, and s 60(1) of the 1956 Act); of directly or indirectly polluting any watercourse passing through a town borough, whether or not it formed a part of any water-supply (unless such pollution was neither dangerous nor offensive (s 61(2) of the 1920 Act, and s 60(2) of the 1956 Act); of allowing defiling or polluting refuse or drainage waters to flow into any watercourse or stream forming part of any water-supply (s 64(b) of the 1908 Act); and of allowing defiling or polluting refuse or drainage waters to flow into any watercourse or stream flowing through a borough, whether or not it formed a part of any water-supply (s 61(2) of the 1900 Act, and s 64(c) of the 1908 Act) were prescribed.

308 Local authorities could be placed in sole control of any specified watercourse, stream or lake (or part thereof), where the Governor deemed this necessary in the interests of public health (s 62 of the 1900 Act, s 65 of the 1908 Act, s 62 of the 1920 Act, and s 61 of the 1956 Act). The local authority was then empowered to make by-laws to enforce the cleansing or prevent the defiling of the watercourse, stream or lake (s 64 of the 1900 Act, s 67 of the 1908 Act, and s 67 of the 1920 Act – note that by 1908 the authority could in fact fall under a duty to make such by-laws, if the district health officer so recommended). The suggestion that local authorities might have been continuing to use polluted waters as part of their supply is made by the appearance in 1920 of a provision prohibiting them from doing just that, and from permitting such water to be used for domestic purposes (s 63 of the 1920 Act, and s 62 of the 1956 Act). The Governor-General was empowered to use all necessary means to prevent the use of water from a polluted source in the face of an authority’s failure to comply with this prohibition (s 64 of the 1920 Act, and s 63 of the 1956 Act).

309 In 1920 the Governor-General was empowered to make regulations to prevent the pollution (so as to be
In 1956, the threat to human health caused by the pollution of harbours was first addressed. The Health Act 1956 gave all harbours boards\(^{310}\) all the powers and duties of ... local authorities in respect of ... [t]he prevention and abatement of nuisances, ... the removal of any condition likely to be injurious to health of offensive ... [and] [t]he disposal of refuse ... from ... waters ... in the harbour ...

In 1965 the prohibitions against the casting of "... ballast, rock, ... earth, cinders, [and] rubbish ..." into harbours in the Harbours Act 1950 were expanded to cover situations where a "nuisance" could be, or had been, created.\(^{311}\) The Act defined a "nuisance" as occurring where "... the substance or thing is offensive or injurious to health or fouls tidal lands or introduces insect or other pests or any fungus, bacterium, or virus that may be injurious to or cause an unhealthy condition in trees or plants."\(^{312}\)

Also important since the early days have been the concerns of protecting works from damage, protecting water supplies for irrigation and mining from contamination or obstruction, and securing the safe passage of navigation. The legislature generally sought to meet the first two concerns by including provisions aimed at preventing damage and pollution in the same Acts as authorised the construction of the works and the taking of water to supply them.\(^{313}\)

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\(^{310}\) Section 69. As to the powers and duties of local authorities, see n 302 above and accompanying text.

\(^{311}\) Section 11 of the 1965 Act amended s 242 of the Harbours Act 1950; see nn 273-275 above and accompanying text.

\(^{312}\) In 1977 (see s 72(4) of the Harbours Amendment Act) this definition was amended by replacing the words "... or injurious to health ..." with "... or is a hazard to health or is likely to cause bodily injury ..."; and by adding animals and fish to "... trees or plants ...

\(^{313}\) As to the protection of works from damage, see the Mining Act 1891’s prohibition against the discharge of tailings and other mining debris into watercourses within 5 chains of a bridge (which is being used by the public, a railway, or as a public work) in such manner as to directly injure the bridge (as inserted by the Mining Act 1891 Amendment Act 1894, s 10; and see s 105 of the Mining Act 1898, s 122 of the Mining Acts Compilation Act 1905, and s 121 of the Mining Act 1908). As to the protection of water for irrigation and mining from contamination, see s 42 of the Counties Acts Amendment Act 1883 (prescribing an offence of allowing "... foul liquid or matter..." to flow into any water in a water-race); s 281 of the Counties Act 1886 (rendering it an offence to do, or cause or suffer something to be done "... whereby the water in a water-race shall or may be fouled or polluted or rendered unfit for use ..."); and see ss 61 of the Water-Supply Act 1908, and s 438 of the Local Government Act 1974). Other offences relating to the pollution of supply water were prescribed by ss 50 and 54 of the Water-Supply Act 1891, ss 58 and 62 of the Water-Supply Act 1908, and s 437 of the Local Government Act 1974. Section 47 of the Counties Acts Amendment Act 1883 empowered the council to make by-laws to prevent the pollution of water in water-races, and this provision was repeated in ss 284 of the Counties Act 1886, s 55 of the Water-Supply Act 1891, s 107 of the Counties Act 1908, s 63 of the Water-Supply Act 1908, and s 70 of the Counties Act 1956. Finally, as to the protection of water-races and watercourses used to supply water for mining and irrigation from obstruction, see s 33 of the Public Works Act 1876 Amendment Act 1878 (which made it an offence to knowingly or wilfully allow water, tailings or sludge to flow into public drains) and s 14 of the Mining Act 1891 Amendment Act 1892 (prohibiting the pollution of any stream used as supply by
As for securing the safe passage of navigation, the legislature has taken two approaches—both previously mentioned. First, the various Marine Boards and Harbours Acts have empowered the Governor, provincial superintendents, and marine and harbour boards to control ballasting. Second, offences relating to the injury of navigation have been prescribed.

At first glance, the Salmon and Trout Act 1867 and the Harbours Amendment Act 1910 appear to be exceptions to the general rule that water pollution was, in the early days at least, of most concern when it threatened human health or interests. Section 2 of the 1867 Act empowered the Governor to make regulations to prevent lime or any other matter or liquid deleterious to fish being put thrown or caused or allowed to flow into any river or stream in which young salmon salmon fry or spawn or young trout trout fry or spawn is deposited or place ...

The 1910 Amendment Act introduced an offence of casting or throwing “... any sawdust or sawmill or flax-mill refuse ...” into any harbour. While the intentions of this provision are not made clear, it at least seems likely that bathing and fishing waters were at issue. More clear is the motivation behind the 1867 Act, which expressly aims to protect salmon and trout fisheries.

ii. Pollution by Oil

As time passed the pollution of water by oil became a major concern. To begin with, small steps were taken through the medium of the harbours legislation. In 1925 a new provision was inserted into the the Harbours Act 1923 which enabled harbour boards to make by-laws prohibiting “... the discharge or flow into the harbour from any tank, store-ship, pipe-line, barge, ... or vessel of any oil, or tar, or of any water containing or mixed with any such material ... ”. Although this empowerment was subsequently repeated, a much more comprehensive effort to deal with pollution by oil was made in 1926.

The Oil in Territorial Waters Act 1926 covered the pollution of bays, gulfs, harbours, rivers, and lakes by the discharge of oil. The Act made it an offence to discharge, or allow the
escape of, oil from any ship, place on land, or apparatus used to transfer oil from or to any ship into territorial waters. A good defence was allowed where the discharge or escape was due to or caused by a collision or other damage. The essence of this Act was continued, but expanded upon, by its successors.

The Oil in Navigable Waters Act 1965 prescribed more offences, including discharging oil, or allowing it to escape, from either a New Zealand ship into a prohibited sea area, or anywhere at sea; or from any ship, place on land or apparatus into the territorial sea, or into New Zealand’s internal waters; or from any pipe-line, or other part of any operations set up to explore the sea-bed, into the sea or New Zealand’s internal waters. This Act also provided for regulations to be made requiring New Zealand ships to be fitted with “equipment” for the purpose of “... preventing or reducing discharges of oil ... into the sea ....”

Most of these provisions reappeared in the Marine Pollution Act 1974. The offences were set out in ss 3, 4, and 5, and extended to cover discharging pollutants as well as oil and storing toxic or hazardous waste in New Zealand waters. Also extended were the powers to make regulations requiring the carrying of equipment to prevent or remove pollution; under the 1974 Act these could apply to New Zealand ships, pipelines, places on land and offshore installations. Further, the 1974 Act imposed notification duties where ships were carrying oil or pollutants in bulk, where oil was to be transferred, or where a discharge had occurred.

New provisions prohibited the dumping of waste into New Zealand waters (and other parts of

319 “Oil” was defined in s 2 of both Acts so as to include any spirit produced from oil, and oil mixed with water. Section 6 further provided that where liquid, which had been stored in tanks which had previously contained oil, escaped then such liquid was deemed to be oil under the Act.
320 Section 3(1).
321 Section 3(2).
322 Sections 3 and 9. Prohibited sea areas could be designated pursuant to ss 4 and 5. “Sea” was defined in s 2 as including “... any estuary or arm of the sea ....”
323 Section 6. Section 2 defined “territorial sea” by reference to the Territorial Sea and Exclusive Economic Zone Act 1965 (see ss 3, 5 and 6, which collectively define the territorial sea as being the area from low water mark to a line 3 nautical miles out to sea from low water mark); and “internal waters” as including harbours, estuaries, “... other areas of the sea that are on the landward side of [low water mark] ....,” rivers and “... other inland waters of New Zealand that are navigable by vessels ....”
324 Section 10. Defences against the offences described in ss 3, 6 and 9 were available under s 7 and included situations were oil was discharged to secure the safety of any ship, to prevent damage to any ship, or to prevent loss of life.
325 For a detailed description of the provisions of this Act, see Williams supra n 298, Chapter V.
326 “Oil” and “pollutant” are defined in s 2. Note that although the s 4 offences were expanded in 1974 (see the Marine Pollution Amendment Act 1974, s 3) to cover discharges and escapes from floating platforms in connection with the exploration of the sea-bed, the Act never applied to the discharge of substances other than oil from foreign ships.
327 See s 21C: this offence applies to New Zealand waters (see the s 2 definition), and waters above the continental shelf of New Zealand.
328 Sections 8 and 9. Note also s 13 relating to directions to harbour boards in respect of the provision of substances for cleaning up pollution.
329 See ss 15, 14, and 16, respectively. In each case, the duty is owed to the relevant harbourmaster.

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the sea) from ships, aircraft, offshore installations or floating platforms;\textsuperscript{330} empowered the
Minister of Transport to act where there had been a "... shipping casualty ..." and it had
become necessary to prevent or reduce pollution;\textsuperscript{331} and provided for the civil liability of the
owner and occupier of any ship, place on land, apparatus, or pipeline who had committed an
offence under the Act.\textsuperscript{332}

The Marine Pollution Act was repealed with the enactment of the Maritime Transport Act 1994.
Like its predecessor, this new Act includes\textsuperscript{333}

controls over the dumping of waste at sea, civil liability for pollution
damage, and intervention powers for the prevention of pollution from
maritime accidents.

Complementing these ... measures are new provisions that will enable
New Zealand to adopt the International Convention for the Prevention
of Pollution from Ships 1973 ... . Adoption of this convention will
mean that the foreign-owned shipping that dominated our maritime
trades will no longer be entitled to discharge substances other than oil
into our waters with impunity.

So far, all the pollution Acts described have been substantively confined – applying to waters
used for supply, domestic or fisheries purposes, navigation, or mining, or to discharges of
pollution from ships or shipping facilities. Intended to be much more comprehensive was the
Waters Pollution Act 1953, which Williams describes as "... the first water pollution statute ...
\"\textsuperscript{334}

iii. The Waters Pollution Act 1953

When the Waters Pollution Bill was before Parliament, it was pointed
out that, although there was already in existence several Acts dealing
with the pollution of waters, those Acts were concerned with specific
matters[,] ... that there was no general legislation preserving the rights

\textsuperscript{330} The Act was amended in 1980 to include, with the prohibitions against the unlicensed dumping of waste
from certain ships and aircraft, or of a ship or aircraft, into New Zealand waters, and the unlicensed dumping
of an offshore installation into the sea, offences relating to incineration. Thus prohibited, unless a permit
had been obtained, was taking waste on board a ship or aircraft for the purpose of dumping or incinerating
it, or incinerating waste on any marine facility in New Zealand waters. "Waste" is defined in s 2; the ships
and aircraft covered are specified in s 20; the offences are set out in s 22, and the Minister is empowered to
grant permits under s 22B. Note that regulations can be made prohibiting the issue of permits (s 22A) and
that defences are available under s 23.

\textsuperscript{331} Sections 25-29. "Shipping casualty" is defined in s 2.

\textsuperscript{332} See Part IV of the Act.

\textsuperscript{333} (1994) New Zealand Parliamentary Debates 4571 (8 November 1994), per Hon Maurice Williamson who
said (at 4597) that previously "[c]ontrols over foreign ships [had been] left to the Marine Pollution Act but
in practice that Act restrict[ed] only the discharge of oil. This left foreign ships free to discharge with
impunity untreated sewage, garbage, and chemical effluent anywhere in our waters." In respect of waters
beyond New Zealand's territorial sea this anomaly has been remedied by the Maritime Transport Act 1994,
and in respect of waters within the territorial sea it has been remedied by the Resource Management
Amendment Act 1994 (see Chapter 5 nn 128 and 172-178).

\textsuperscript{334} Williams supra n 298, 91.
of the public to the enjoyment of waters free from pollution, or general legislation providing adequately for the reduction of pollution by encouraging diversion of trade wastes to sewers of local authorities. The Waters Pollution Act, 1953, supplies this general legislation.\(^{335}\)

Enacted following an Interdepartmental Report in 1952\(^{336}\) and the failure of two earlier pollution bills\(^{337}\) the Act sought to address the pollution of New Zealand waters\(^{338}\) by three means. First, it established the Pollution Advisory Council\(^{339}\) and charged it with recommending action to prevent or mitigate pollution;\(^{340}\) with investigating the causes, nature and extent of pollution;\(^{341}\) and with generating and disseminating information on pollution.\(^{342}\) Second, the Act prescribed offences of causing or knowingly permitting poisonous or noxious pollutants, substances, refuse, and debris to enter any waters.\(^{343}\) Third, the Act included provisions empowering the Governor-General to make regulations, and local authorities to make by-laws, relating to water pollution.\(^{344}\)

The Governor-General’s regulation-making power was put to use in 1963, with the making of the Waters Pollution Regulations 1963. These regulations are significant in that they mark the introduction of a water quality classification scheme to the general body of New Zealand water law.\(^{345}\) Such a scheme was also incorporated into the Water and Soil Conservation Act 1967.


\(^{336}\) Interdepartmental Committee Report on the Pollution of Waters in New Zealand (1952).

\(^{337}\) The Pollution of Water Bill 1912 and the River Pollution Prevention Bill 1937.

\(^{338}\) “Waters” was defined in s 2 as meaning any “… river, stream, lake, natural or artificial watercourse, bay, gulf, harbour, or other waters within the territorial limits of New Zealand; and includes underground or artesian waters.”

\(^{339}\) Section 3.

\(^{340}\) The Council was charged with the “principal” function of “… inquir[ing] into and mak[ing] reports and recommendations to the Minister on such ways of preventing or reducing the pollution of waters and of co­ordinating the functions of persons or bodies charged with the duty of preventing or reducing the pollution of waters as from time to time appear practicable …” (s 14(1)).

\(^{341}\) Section 14(2).

\(^{342}\) The Council was charged with encouraging research into water pollution, and with publishing information on pollution prevention and reduction (s 14(2)).

\(^{343}\) The Act made it an offence to cause or knowingly permit to enter any water “[a]ny pollutant of a poisonous or noxious nature; or … [a]ny refuse …, debris, or other matter which directly or in combination with similar acts … endangers the lives, safety, health, property, or welfare of the public or which obstructs the public in the exercise or enjoyment of any right …” (s 15(1)). Section 2 defines “pollutant,” while s 15(2) explains what was meant by causing matter to enter water: “… plac[ing] it or caus[ing] it to be placed in a position where it is liable to fall, or descend, or be washed, or to percolate into waters.” Section 15(3) mitigates subs (1) of the same section by exempting discharges of matter from sewers by local authorities, and discharges from trade premises occurring for the first two years of the Act’s life from the offence provisions. So that they could deal with the discharges of trade wastes to be consequentially diverted to their sewers, local authorities were empowered to make by-laws regulating the mode and make-up of discharges—see s 19.

\(^{344}\) See s 16 in relation to the Governor-General’s power to regulate standards, conditions and rules in relation to discharges, and, in relation to the powers of local authorities, see s 19.

\(^{345}\) The regulations provide for the Council to investigate the extent, cause and nature of pollution in any particular waters (reg 3); the classifying of inland waters into one of four classes (water-supply in a controlled catchment, water-supply in an uncontrolled catchment, waters used for public bathing, and others) (reg 3); the procedure of classification (regs 6-8) and the consequences of classification (regs 5 and 9-11). In
Despite expectations, the 1953 Act "...was soon perceived to be a relatively unsophisticated and unrealistic statute."\textsuperscript{347} The main difficulty was that the Act did not treat "... pollution control ... [as] an integral aspect of water management."\textsuperscript{348} This problem was not remedied until the Water and Soil Conservation Act was amended in 1971. Added to this, the Act was not comprehensive in its coverage; other Acts (both old and new) were still needed to control pollution. The pollution-abatement provisions in the Health Acts for example were kept, and new Acts meaning to prevent or reduce particular kinds of pollution continued to be made.

\textbf{iv. Underground Water, Litter and Wildlife}

Underground waters were made the subject of special legislative attention in 1953. The Underground Water Act provided for the constitution of underground water areas,\textsuperscript{349} within which authorities\textsuperscript{350} could make by-laws to control, regulate, limit, or prohibit the taking and use of underground water (and some surface water), and the discharge onto land of "... anything which is liable to affect detrimentally the purity of underground water ..."; to prevent "... uneconomic or wasteful methods of extraction and ... utilization of underground water ..."; and to "[p]rotect[] the purity of underground water ... for domestic, farming, and industrial uses ... ."\textsuperscript{351} Each authority could also undertake works as necessary to "... conser[v]e, replenish[], or purify[] the underground water in its area ... or maintain[] the purity of that underground water."\textsuperscript{352}

The two Litter Acts of 1968 and 1979 provide effectively for four offences: depositing litter in a public place; depositing dangerous litter in a public place; leaving litter, once deposited, in a public place; and leaving dangerous litter in a public place.\textsuperscript{353} Both Acts include the Litter Acts of 1968 and 1979 provide effectively for four offences: depositing litter in a public place; depositing dangerous litter in a public place; leaving litter, once deposited, in a public place; and leaving dangerous litter in a public place.\textsuperscript{353} Both Acts include waters "... to essence, once waters were classified, all existing outfalls had to be registered, and no new outfalls were permitted unless the consent of the Council had been obtained (reg 9 and 11). The Council was empowered to refuse applications for consent, or to impose terms and conditions on applications granted (reg 12). Such terms and conditions would be imposed in order to maintain the water quality requirements specified by the classification (reg 12; the requirements were set out in the Schedules to the Regulations). The regulations were used: by 1971 around 20 final classifications had been issued, but this "... by no means provided national coverage" (\textit{Environmental Policy and Management in New Zealand} supra n 53, 32).

\textsuperscript{346} By the Water and Soil Conservation Amendment Act (No 2) 1971, which also repealed the Waters Pollution Act 1953, and revoked the 1963 regulations.

\textsuperscript{347} Williams supra n 298, 91.

\textsuperscript{348} Palmer supra n 55, 10.

\textsuperscript{349} Sections 3-5.

\textsuperscript{350} Section 6.

\textsuperscript{351} Section 8 – these were only some of the purposes listed.

\textsuperscript{352} Section 24. When the Water and Soil Conservation Act was enacted, the taking and use groundwater fell under its provisions though the Water and Soil Conservation Amendment Act 1973 vested in regional water boards the power to make by-laws for many of the purposes previously the concern of authorities (see s 4 of the Amendment Act, which also abolished authorities (s 10).

\textsuperscript{353} All four offences are set out in s 4 of the 1968 Act and s 15 of the 1979 Act. In the earlier Act, the two
which the public traditionally has access ...” in their section 2 definitions of “public place.”

Wildlife sanctuaries, management reserves and refuges can be set up under the Wildlife Act 1953 “... to protect wildlife and their habitat.”354 Since water often forms part or all of wildlife habitats, it seems at least probable that water conservation would be promoted in such areas.355 More specifically, since 1972, the Act has empowered the Governor-General to make, in respect of such areas, regulations:356

preventing the pollution of any waters357 by casting or throwing into, or discharging or causing to be put or discharged into ... any sawdust or sawmill refuse, lime ..., sheep dip, flax mill refuse, oil, chlorinated hydrocarbon pesticide, or any other substance poisonous or injurious to wildlife, the habitat of wildlife, or the food of wildlife.

d. Water Conservation

Until the Water and Soil Conservation Act 1967 was amended in 1981 so as to provide for the making of national water conservation orders and regional water conservation notices,358 water conservation was an issue dealt with almost incidentally. In general, water conservation occurred as part of the overall management of lands set aside as reserves, forests and national parks. Otherwise, water conservation was an issue dealt with by the enactment of special Acts with restricted effect.

i. Public Reserves, State Forests and National Parks

The Public Reserves Act 1881 introduced the notion of reserving land in the interests of water conservation.359 Under the current Reserves Act 1977 land can still be reserved; but now at two levels. First, land can be declared to be a reserve by a local authority.360 Second, the

kinds of litter described are “offensive” and “dangerous,” but in the 1979 Act, there is just ordinary “litter” and litter “... of such nature as is likely to endanger any person or to cause physical injury or disease or infection to any person coming into contact with it ...” The 1979 Act defines (again in s 2) “litter” as including refuse, rubbish, animal remains, glass, metal, debris, dirt, filth, rubble, stones and earth.

354 Milne CA (ed) *Handbook of Environmental Law* (1992) 210, and see ss 9, 10, 14 and 14A of the Act. Note that “wildlife” is defined as “... any animal that is living in a wild state ...,” and that “animal” includes any mammal, bird, reptile, or amphibian.

355 Especially since they are managed by the Department of Conservation, which can made statements of general policy, conservation management strategies, and conservation management plans for the areas so protected (see nn 368 and 369 below).

356 Section 72.

357 “Waters” is defined in s 2 as including any river, stream, lake, lagoon, pond, estuary, swamp, and other natural or artificial waters.

358 See the Water and Soil Conservation Amendment Act 1981.

359 Section 2 authorised the reservation of land for such purposes as were specified in the First Schedule; which included: the “... improvement and protection of rivers ...”.

360 Section 14. Note that since the enactment of the Resource Management Act 1991, reservation under the 1977 Act is not necessary where the relevant district plan has already made provision for such (see the Eighth Schedule to the 1991 Act).
Minister can set aside New Zealand Reserves – for the purpose of “... protecting values of national or international significance ...”\(^{361}\) In either case, the reserved land should be classified and managed according to its principal or primary purpose (recreational, scenic, natural, or scientific)\(^{362}\) and its “... value as a soil, water and forest conservation area shall be maintained.”\(^{363}\)

A similar enjoiner to manage areas of land consistently with their value as water conservation areas has appeared in the Forests Act 1949, and the National Parks Act of 1952 and 1980. The Forests Act 1949 charged the New Zealand forest service with the management and control of all state forests for various purposes, including “... the protection of land with a view to water conservation or soil stabilisation ...”\(^{364}\) More importantly, the National Parks Act 1952, which was enacted for the purpose of\(^{365}\)

preserving in perpetuity ..., for the benefit and enjoyment of the public, areas of New Zealand that contain scenery of such distinctive quality or natural features of such distinctive quality or ..., so beautiful or unique that their preservation is in the national interest

required that national parks be “... administered and maintained ...” so as to maintain “[t]heir value as soil, water, and forest conservation areas.”\(^{366}\)

When the Conservation Law Reform Act was enacted in 1990, a management planning scheme with a conservation theme was introduced into both the Reserves Act 1977 and the National Parks Act 1980.\(^{367}\) The scheme entails general statements of policy prepared by the Director-General of Conservation and approved by the Minister of Conservation, and conservation management strategies and plans.\(^{368}\) Since statements, strategies and plans are prepared and

\(^{361}\) Section 13; note that s 3 of the Reserves Amendment Act 1979 re-named these reserves “National Reserves.”
\(^{362}\) Sections 17, 19, 20, and 21, but note that these are just some of the purposes listed.
\(^{363}\) This provision appears in each of the sections defining a purpose. So, for example, it appears in s 17(2)(d) in relation to reserves set aside for recreational purposes, and in s 19(2)(e) in respect of reserves set aside for scenic purposes.
\(^{364}\) Section 14, which was repealed by the State-Owned Enterprises Act 1986.
\(^{365}\) Section 3(1). Section 4(1) of the 1980 Act contains a similar statement, but adds “... for their intrinsic worth ...” to “... the benefit, use and enjoyment of the public ...” as a new purpose for which national parks are to be preserved; and “... ecological systems ...” and scientific importance to the list of features (distinctive scenery, beautiful features and so on) which might justify such preservation.
\(^{366}\) Section 3(2); and see s 4(2) of the 1980 Act.
\(^{367}\) See Parts IV and VI of the 1990 Law Reform Act. Both Acts were placed under the administration of the Department of Conservation in 1987, see the First Schedule to the Conservation Act 1987.
\(^{368}\) Statements provide “... general statement[s] of policy for any area ... of ... water, or for any natural resources, managed by the Department ... (s 17C). Strategies address the implementation of general policies, and “... establish objectives for the integrated management of natural ... resources ... managed by the Department ... for recreation, tourism, and other conservation purposes” (s 17D). Plans must implement strategies, and “... establish detailed objectives for the integrated management of natural ... resources ... [managed by the Department] ... for recreation, tourism, and other conservation purposes” (s 17E).
approved under the Conservation Act 1987, it is inevitable that they will promote conservation in reserves and national parks.\textsuperscript{369}

\subsection*{ii. Thermal Springs Districts and Reserves}

Thermal springs and waters have been the object of special legislative attention since 1881. European settlement in areas where "... natural mineral springs and thermal waters exist ..." was seen as both "... advantageous to the colony, and beneficial to the Maori owners of the land,"\textsuperscript{370} and was provided for in the Thermal-Springs Districts Act 1881. To promote settlement, the Act and its 1908 successor, empowered the Governor to proclaim thermal springs districts,\textsuperscript{371} and to make arrangements for the making available of such land for settlement with its Maori owners.\textsuperscript{372} Amongst the powers thus conferred on the Governor, were powers to treat with Maori for the "...use and enjoyment by the public of all mineral or other springs, lakes, rivers, and waters ...";\textsuperscript{373} and to "... manage and control the use of all mineral springs, hot springs, ngawha, waiakiri, lakes, rivers, and waters ... ."\textsuperscript{374} While neither of these Acts refer specifically to conservation, it is assumed that the destruction or deterioration of thermal springs would, at least, not promote their aims.

The Scenery Preservation Act 1903 was, however, more overtly conservative. Also concerned with land on which there were thermal springs, the Act established and empowered a Commission to inspect such land, and perhaps recommend its reservation as a thermal reserve.\textsuperscript{375} If a recommendation was accepted, and a reserve proclaimed,\textsuperscript{376} the land could be fenced in and preserved intact "... as and for an inalienable patrimony of the people of New Zealand."\textsuperscript{377} From 1953, the setting aside of land featuring thermal springs and activity was authorised under the Reserves and Domains Act.\textsuperscript{378}

\begin{itemize}
\item\textsuperscript{369} That conservation is the principal aim of the Act is clear from s 6 (which sets out the functions of the Department) and the Long Title which describes the Act as one "... to promote the conservation of New Zealand's natural ... resources ... ."
\item\textsuperscript{370} See the Preamble to the Act.
\item\textsuperscript{371} See s 2 of the 1881 Act, and s 2 of the 1908 Act.
\item\textsuperscript{372} See s 4 of the 1881 Act, and s 5 of the 1908 Act.
\item\textsuperscript{373} See s 4(3) of the 1881 Act, and s 5(c) of the 1908 Act.
\item\textsuperscript{374} See s 6(7) of the 1881 Act, and s 7(g) of the 1908 Act. Section 7(a) of the 1908 Act also authorised the Governor to set aside land in thermal-springs districts as a park or domain.
\item\textsuperscript{375} Section 3. From 1906 (see the Scenery Preservation Amendment Act 1906, s 3) the Commission's functions were adopted by the Scenery Preservation Board. The Board's powers to inspect and recommend were set out in s 5 of the 1906 Act, and also in s 5 of the Scenery Preservation Act 1908.
\item\textsuperscript{376} The Governor was empowered to make such proclamations, see s 4 of the 1903 Act, and s 6 of the 1908 Act.
\item\textsuperscript{377} These words are from s 4 of the 1903 Act. No like words are contained in the 1908 Act, although s 10 thereof did empower the Minister to "... take such steps as he thinks fit for the fencing and maintenance of any reserve."
\item\textsuperscript{378} If reserved, such land would become a scenic reserve; see ss 56 and 57.
\end{itemize}
Note that from 1906, thermal-springs reserves could be brought under the Tourist and Health Resort Control Acts 1906 and 1908. These Acts empowered the Minister to grant "... the exclusive use of any reserve, or part thereof ..., to any person ... for the purpose of particular sports, games, or other recreation ...," and to make regulations for the "... proper administration of any such reserve."

iii. Four Special Acts

In 1973 the Lake Wanaka Preservation Act was enacted to "... make provision for the preservation of the normal water levels and shoreline of Lake Wanaka, and the maintenance and improvement of its water quality." The Act provides for the appointment of Guardians, who are charged with advising and reporting on matters concerning the lake, and declaring states of emergency when "... the lake water appears likely to attain such a level as to cause loss or damage to human life, livestock, or property by flooding." More importantly, the Act prohibits any person from impoudning or controlling the water in the lake, and from constructing works to increase or decrease the "... rate of flow of lake water between the outlet ... which forms the source of the Clutha River and the confluence of that river and the Cardrona River." Regional Councils must also consult with the lake's Guardians before allowing any activities in relation to its bed or waters to proceed.

The Queen Elizabeth the Second National Trust Act 1977 established a scheme for the "... provision, protection, and enhancement of open space for the benefit and enjoyment of the people of New Zealand." The Act defines "open space" as including "... any ... body of water that serves to preserve or facilitate the preservation of any landscape of aesthetic, cultural, recreational, scenic, scientific, or social interest or value" and establishes a Trust empowered to advise the Minister, formulate policies, and undertake reviews and research in relation to the provision and protection of such spaces.

Related, though not expressly, to the topic of water conservation is the Marine Mammals Protection Act 1978 which empowers the Minister of Conservation to "... define any place and declare it to be a marine mammal sanctuary ...." While the rationale behind the creation of

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379 See s 6 of the 1906 Act, and s 9(a) of the 1908 Act.
380 See s 9(d) of the 1908 Act.
381 Long Title.
382 Section 5.
383 Section 6. These prohibitions apply "[n]otwithstanding anything to the contrary in the Public Works Act 1981, the Resource Management Act 1991, the Electricity Act 1968, or any other Act ...."
384 Section 11 (as inserted by the Resource Management Act 1991, Eighth Schedule).
385 Long Title.
386 Section 2.
387 The Trust is established under s 3, and empowered under s 20.
388 Section 22. "Place" is defined in s 2 as including "... any waters ...."
sanctuaries is the protection of marine mammals as opposed to marine waters, any deterioration
in water quality in sanctuaries would clearly be at odds with the interests of the mammals.
Considering that sanctuaries are managed by the Department of Conservation, water
conservation in such areas seems a likely outcome of the operation of the 1978 Act.389

Areas of the sea may also be set aside under the Marine Reserves Act 1971, but this time for the
purpose of preserving the areas themselves “... in their natural state as the habitat of marine life
for scientific study.”390 This Act expressly covers water, including “... any water at any
material time upon or vertically above ...” any part of the seabed under the territorial sea or
internal waters of New Zealand, and any part of the foreshore of New Zealand, in its definition
of “area.”391 The Governor-General is empowered to declare any area to be a marine reserve
and, as such, it is then to be “...preserved as far as possible in its natural state ...”392 As a
whole, the Act aims to preserve areas393

that contain underwater scenery, natural features, or marine life, of
such distinctive quality, or so typical, or beautiful, or unique, that their
continued preservation is in the national interest.

As with the Marine Mammals Protection Act, the conservation bias of this Act is emphasised
through the role of the Department of Conservation in the management of areas.394

3. Taking, Use and Management under the Water and Soil Conservation Act
1967

Once regarded as “... the pinnacle of the water control pyramid ...”395 the Water and Soil
Conservation Act 1967 was enacted to meet the failure of existing legislation to deal with two
issues of increasing public concern: water pollution and (increasing) competing demand for

389 Since the Conservation Act 1987 was enacted, the Marine Mammals Protection Act has been among the
Acts administered by the Department of Conservation (see the First Schedule to the 1987 Act). The
Conservation Law Reform Act 1990 amended the Marine Mammals Protection Act by providing for the
approval of statements of general policy, and the making of conservation management strategies and
conservation management plans for reserves (see Part V of the 1990 Act). Part IIIA of the Conservation
Act 1987 (also as inserted by the 1990 Act, s 13) deals with such statements, strategies and plans. For a
description of statements, strategies and plans; and for an explanation as to why the involvement of the
Department of Conservation suggests more water conservation, see nn 368 and 369 above.

390 Long Title.
391 Section 2.
392 Section 3(2).
393 Section 3(1).
394 Since the Conservation Act 1987 was enacted, the Marine Reserves Act has been among the Acts
administered by the Department of Conservation (see the First Schedule to the 1987 Act). Further, the
Marine Reserves Act was amended by the Conservation Law Reform Act 1990, s 53 to enable the approval
and making of statements of general policy, conservation management strategies, and conservation
management plans for areas. See nn 368 and 369 above.
395 Davis supra n 1, 105.
water for abstraction.

The Act sought to implement its aims of promoting a national policy in respect of natural water, and making better provision for the conservation, allocation, use, and quality of natural water, and promoting soil conservation and preventing damage by flood and erosion, and promoting and controlling multiple uses of natural water and the drainage of land, and ensuring that adequate account is taken of the needs of primary and secondary industry, water supplies of local authorities, fisheries, wildlife habitats, and all recreational uses of natural water by two means. It introduced a new administrative structure to oversee and co-ordinate existing water controls, and a new scheme controlling rights to use, divert, take, or make discharges into natural water, and to dam any river or stream.

a. A New Administrative Structure

The Act's administrative structure involved old and new bodies, which were together formed into a comprehensive hierarchy. Already existing catchment boards were made into regional water boards and then, along with many other local bodies, instructed to exercise their functions and powers consistently with the Act. Twenty water regions were established, and the new regional water boards were largely responsible for implementing the Act within them. The middle-tier of the administrative structure comprised three bodies: the Pollution Advisory Council, the Soil Conservation and Rivers Control Council and the new Water Allocation Council, while the upper tier consisted of the National Water and Soil Conservation Authority. Under ss 14 and 15 of the Act, the Authority was first empowered to exercise, and then compelled to share, all the powers, functions and duties of the three Councils.

396 The Long Title, as originally enacted.
397 Section 19 (as originally enacted) declared that catchment boards and commissions constituted under the Soil Conservation and Rivers Control Act 1941 were, for the purposes of the Act, to be regional water boards. This is not to say that the catchment boards ceased to hold all their rights, functions, powers and duties under the Soil Conservation and Rivers Control Act 1941: rather, the overall effect was that "... regional responsibilities originally arising under the [1941 Act] were enlarged to also include responsibilities under the Water and Soil Conservation Act" (Environmental Policy and Management in New Zealand supra n 53, 33). As to the obligation on local bodies to "... [act] under and be guided by the provisions of th[e] Act ...", see s 4.
398 Environmental Policy and Management in New Zealand idem.
399 They were empowered to determine, at first instance, applications for water rights. See text to follow.
400 The Soil Conservation and Rivers Control Council was constituted and empowered by the Soil Conservation and Rivers Control Act 1941, see nn 94, 95, and 97-103 above and accompanying text. The Pollution Advisory Council was constituted and empowered under the Waters Pollution Act 1953, see nn 339-342 above and accompanying text. The Water Allocation Council was constituted under s 8 of the 1967 Act, as originally enacted.
401 The Authority was constituted under s 5 of the Act.
402 Section 14 gave the Authority all the "... functions, rights, powers, and duties ..." of the three Councils.
Amendments to the Act brought changes to this administrative structure: the Pollution Advisory and Water Allocation Councils were amalgamated into the Water Resources Council in 1971; regional councils assumed the powers, functions and duties of regional water boards on the enactment of the Local Government Act in 1974; and the Authority itself was abolished in 1988 and its functions shared between the Minister for the Environment and regional water boards.

More important than the new administrative structure, however, was how "... water management was transformed" by the extinguishment of common law rights, and their replacement, where appropriate, with statutory rights.

b. A Clean Sweep of (most) Water Rights

Section 21 of the Water and Soil Conservation Act was once described as "... a sort of conduit leading from the old to the new." It made "... all [that the Act did] possible ..." by declaring that, with certain statutory exceptions,

(subs (1)), and of regional water boards (subs (2)). Section 15 the provided for the compulsory delegation of rights, powers, duties and functions relating to "... [m]atters of water and soil conservation and river control ..." to the Soil Conservation and Rivers Control Council; "... [m]atters of pollution and quality of natural water and other waters ..." to the Pollution Advisory Council; and "... [m]atters of allocation of natural water, matters of co-operation with and between local authorities and suppliers of water in solving problems of distribution, and economy of use of natural water ..." to the Water Allocation Council (Davis supra n 1, 106).

403 See the Water and Soil Conservation Amendment Act (No 2), and see ss 5 and 8 of the Amendment Act in reference to the constitution and empowerment of the Water Resources Council.

404 See the Water and Soil Conservation Amendment Act 1988, ss 3 (repealing s 5 of the principal Act, see n 401 above), 5 (inserting a new s 14 into the principal Act, and thereby empowering the Minister to make grants of money for the purposes of the Act, and to exercise, in default, the powers, functions and duties of regional water boards under the Act), and s 10 (inserting a new s 20 into the principal Act, and charging regional water boards with the following functions: all those of catchment boards under "... any enactment ..." (s 20(1)); all those conferred by Order in Council (s 20(2)); all those previously conferred on the National Water and Soil Conservation Authority by s 14(3) and (4) of the 1967 Act as originally enacted, see n 134 above and accompanying text); collecting and keeping data (s 20(3)(c) and (d)); monitoring the effect of water use (s 20(3)(c)); supplying water (s 20(4)); cooperating and consulting with other public authorities (s 20(3)(e) and (6)); planning and promoting works to promote the protection of water supplies, and the conservation and best uses of water (s 20(3)(a)); undertaking "... measures ..." to safeguard water from discharges (s 20(3)(b); and having "... due regard ..." to industrial and recreational needs, and to the safeguarding of scenic and natural features, fisheries, and wildlife habitats (s20(6)). See also n 138 above and accompanying text as to the effect of the Authority's abolition on the distribution of functions under the Soil Conservation and Rivers Control Act 1941.

405 Palmer supra n 55, 11.

406 Glenmark Homestead Ltd v North Canterbury Catchment Board [1978] 1 NZLR 407, 412-413 per Woodhouse J.

407 Idem.

408 As to the precise effect of s 21 on (i) specific pre-existing common law rights, see Davis supra n 1 and Williams supra n 298, 94; and (ii) statutory rights granted or acquired by the Crown both before and after the enactment of the 1967 Act, see Davis B H "Water and Soil Conservation Act 1967 – Some Further Observations" [1968] NZLJ 357.
the sole right to dam any river or stream or to divert or take natural water,409 or to discharge natural water or waste410 into any natural water [or to discharge natural water containing waste on to land or into the ground in circumstances which result in that waste, or other waste emanating as a result of natural processes from that waste, entering natural water,] or to use natural water, is hereby vested in the Crown...

The first two provisos to s 21 excluded rights to divert, take or use sea water,411 and rights to take and use natural water for domestic purposes, from the ambit of the Act.412 Existing uses, authorised either by statute or by the common law, were preserved under s 21(1) and (2).413 Any new use of water had to be authorised by and under the provisions of the Act.

c. Authorising New Uses of Water

The Act prescribed two means by which new uses of natural water might lawfully be made. The first means involved the making of authorisations by water boards (or, later, regional councils) and the second involved the acquisition of a right.

i. Authorisations to Discharge

Regional water boards were empowered under s 22 to authorise, generally and by public notice, certain uses of water. These uses included discharging water or waste into, or diverting, taking or using water from, any river, stream, drain, lake or underground source; discharging water containing waste onto land or into the ground; discharging stormwater into the sea; and damming any river or stream. Authorisations could only be made once the

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409 “Natural water” was defined by s 2 (as amended by s 4(1) of the Water and Soil Conservation Amendment Act 1981) as meaning “... all forms of water (including fresh water, ground water, artesian water, sea water, water vapour, ice, snow, and water or steam or vapour heated by geothermal energy ... that are within the outer limits of the territorial sea of New Zealand; but does not include water in any form while in any reservoir (not being an aquifer) under the control of a public authority and used mainly for the water supply purposes of that public authority, or while in any pipes, tank, or cistern ....”

410 “Waste” was defined by s 2 (as amended by s 2(1) of the Water and Soil Conservation Amendment Act (No 2) 1971) as including “... any matters that, when added to or mixed with any natural water, will contaminate the water so as to change the physical or chemical condition thereof in such manner as to ...” make it “... unclean, noxious, or impure ..., “... detrimental to the health, safety, or welfare ...” of people, “... undrinkable to farm animals ...,” or “... poisonous or harmful to animals, birds, or fish ....”

411 The first proviso to s 21 declared that “... nothing in this section shall restrict the right to divert, take, or use sea water ....”

412 The second proviso to s 21 declared: “... it shall be lawful for any person to take or use any natural water that is reasonably required for his domestic needs and the needs of animals for which he had any responsibility and for or in connection with fire-fighting purposes.” This proviso caused Davis (supra n 1, 108) to note that section 21 “... only applies to extraordinary ... uses ...” of water (and see Ch 2 n 46-47 and accompanying text).

413 Section 21(1) exempted authorisations obtained pursuant to mining privileges granted under the Mining Act 1929 after 9 September 1966, or pursuant to a right granted under any other Act between 9 September 1966 and 31 December 1968, or pursuant to any express authorisation made in any Act whether before or after the passing of the 1967 Act. Section 21(2) exempted any damming of a river or stream which lawfully existed as at 9 September 1966; or any diversion, taking, or use of natural water, or any discharge of natural water or waste into natural water which had been lawfully happening at some time between 9 September 1963 and 9 September 1966 and which was notified to the regional water board prior to 1 April 1970.
Minister of Lands (subsequently of Conservation) and, in some cases, relevant public authorities had been consulted.\textsuperscript{414} Authorisations could be casual or permanent and were subject to cancellation “... at any time ... if and whenever the public interest so requires.”

ii. Water Rights

Section 21(3) empowered regional water boards (or, later, regional councils), on application and payment of the prescribed fee, to grant rights to dam any river or stream, to divert, take, or use natural water, to discharge natural water or water into any natural water, or to discharge water containing waste onto land. Such applications could be made by any of the three original constituent councils of the Authority (or, later, by the Authority itself) or regional water boards, public authorities and other persons.\textsuperscript{415} A procedure involving notification, the making and hearing of objections, the giving of reasons, and rights to appeal was prescribed for the determination of application.\textsuperscript{416}

Applications for Crown rights could also be made by any Minister in respect of Crown developments, or by other persons in respect of water declared to be of “... national importance ...” under s 23.\textsuperscript{417} Such applications were directed to the Minister, who then referred them on to the Authority either for the making of recommendations, or for consideration and determination.\textsuperscript{418} Boards were required to contribute to the decision-making process,\textsuperscript{419} and,

\textsuperscript{414} The Minister of Lands/Conservation had to be consulted in respect of all authorisations “... where he may be interested ...”; public authorities also had to be consulted where interested, though never in the case of authorisations to dam.

\textsuperscript{415} Section 24(1), which was amended by the Water and Soil Conservation Amendment Act 1983 so as to substitute “The Authority” for “any Council.”

\textsuperscript{416} Section 24(3) required the Board to notify its receipt, and the nature of, the application. As originally enacted, s 24(4) enabled any person, one of the three Councils, boards and public authorities to object. In 1983, on the abolition of Councils, the Authority was empowered to object and, in 1988 on the abolition of the Authority, any Minister of the Crown was empowered to object. Objections could only be made on the grounds that the “... application would prejudice [the] interests [of the objector] or the interests of the public generally.” Section 24(6) ensured that the applicant and every objector wishing to be heard, was heard, and empowered the board to require the attendance of the applicant, any objector, or any other person “... whose evidence might assist the Board ...”. If there was no need to hold a hearing, the board was authorised to simply proceed and determine the applications (s 24(6)). Once made, the decision was to be made known to the applicant and all objectors (s 24(10). If the decision was to decline the application, then the reasons for the rejection were to be explained to the applicant; and if the decision involved disallowing objections, the reasons for the disallowance were to be explained (s 24(10)). Appeal was available to the Planning Tribunal (s 25).

\textsuperscript{417} Section 23(1) empowered “[a]ny Minister of the Crown ... in respect of any development by the Crown ...” to apply for a right. Section 23(7) authorised the Governor-General to make Orders in Council declaring “... any natural water to be of national importance ...,“ and provided that, in such cases, subs (1) and (2) of s 23 should apply.

\textsuperscript{418} Applications by Ministers in respect of Crown developments were to be considered and determined by the Authority, whereas applications in respect of water declared to be of “... national importance ...” (see n 417 above) would simply be considered by the Authority, which would then make recommendations, leaving the final decision for the Governor-General in Council (see s 23(1) and (7)).

\textsuperscript{419} Section 23(2) – boards were required to “... consider the matter and forward to the Authority [their] report and recommendations.”
once made, decisions could be appealed to the Planning Tribunal.\textsuperscript{420}

Once granted, water rights could be transferred;\textsuperscript{421} varied;\textsuperscript{422} or suspended or restricted either to maintain levels, flows and quality standards, or in times of "... serious temporary ..." water shortage.\textsuperscript{423}

The Act did not expressly state how applications for water rights should be determined; it contained no list of relevant considerations or statements of principle. Water boards, regional councils, the Planning Tribunal, and the ordinary courts were left to interpret the Act and construct a test to be applied to determine applications in the face of competing demands. The most authoritative statement of the test so developed is to be found in \textit{Keam v Minister of Works and Development}.\textsuperscript{424} The facts of the case were simple: the Minister had applied for a right to take geothermal water for testing from an underground reservoir at Rerewhakaaitu. The Authority granted the application, "... but Dr Keam, an associate professor of physics at the University of Auckland, who had spent some years studying the Waimangu geothermal field, appealed to the Planning Tribunal."\textsuperscript{425} The Tribunal upheld the appeal, cancelling the right, and the Minister then appealed to the High Court. The decision of the High Court found mostly in the Minister’s favour and matters were remitted to the Tribunal for determination. Keam successfully sought leave to appeal to the Court of Appeal. Explaining and answering the issue to be addressed, Cooke J said:\textsuperscript{426}

\begin{quote}
[a]s to the criteria to be applied on an application, the 1967 Act ... does not specify any list of relevant considerations ... . Parliament has pointedly refrained from tying the hands of the administering tribunal by hard and fast requirements. Clearly it would be wrong for the Courts to do so. But to give effect to the broad purposes of the legislation, general working guidelines can be evolved ...

It is as a useful general test of that kind that I understand the Planning Tribunal’s proposition ... that any proposed use of natural water should be a beneficial use, and that the loss which might follow from the taking of the water should be weighed against the benefit which will result from its use.
\end{quote}

\textsuperscript{420} Section 23(4); with a right to appeal being held by any board, public authority, or person "... which or who claims to be detrimentally affected by the decision of the Authority."

\textsuperscript{421} Section 24A (as inserted by the Water and Soil Conservation Amendment Act 1969) provided for transfer from the holder to "... any succeeding owner or occupier of the land in respect of which the right is granted or authorised."

\textsuperscript{422} Section 24B enabled the holder of a right to apply for variation of that right, or of any "... provision, restriction, or condition of the right."

\textsuperscript{423} Section 24D empowered the Authority or the board to require the holder of a right to suspend or restrict its exercise so as to "... maintain minimum levels, minimum flows, and minimum standards of quality of natural water ... " Section 24E, which related to times of water shortage, empowered boards to issue orders requiring the taking or use of natural water to be "... apportioned, restricted, or suspended ... " for up to 14 days.

\textsuperscript{424} [1982] 1 NZLR 319.
\textsuperscript{425} Ibid 320.
\textsuperscript{426} \textit{Keam supra n} 424, 322-323.
Cooke J further noted that "... there may be cases where the Tribunal’s broad test will be inappropriate ...," such as where "... there are no significant disadvantages." There is little point in applying a test which is in essence a cost-benefit analysis in circumstances where there are no actual or foreseeable costs.

In principle, the balancing test set out in *Keam* accorded equal priority to all relevant considerations. All factors relevant to the balancing of interests had to be considered, but no one factor was given precedence over others. In fact, however, some priority may have been both implied by the wording and effect of the Act, and produced as a simple consequence of the application of the test.

Williams once argued that environmental interests are often defeated because the balancing test usually favours developmental interests which can often be quantified in economic terms whereas it is difficult to put “numbers” on the values of natural ecosystems.

If this is correct, then a priority will inevitably be created in favour of exploitation. A different priority was thought to have been suggested by the legislature in *Auckland Acclimatisation Society v Waikato Valley Authority*. In this case the Tribunal, having studied the Long Title to the Act, and having noted that while the word “promoting” preceded “... soil conservation ...,” “... preventing damage by flood ...” and “... the drainage of land ...” it was not used elsewhere in the provision. The interests of fisheries and wildlife had instead to be given “... adequate account... .” Thus, said the Tribunal, the legislature had

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427 *Keam* ibid 322-323. Hence Milne’s point that “... the beneficial use test, only applies where on the facts there is a situation of “competing demand””; “... where on the totality of the evidence ... there is no foreseeable competing demand ... and the water right is for some legitimate purpose, which the applicant considers is of benefit to him then it is not necessary to apply the balancing test” (Milne P “Water Resource Allocation and Management in New Zealand: Recent Developments” (1985) 11 NZULR 245, 256).

428 Note that competing claims could be existing, or foreseeable – Hawken v Northland Regional Water Board (1983) 9 NZTPA 181, Jordan v Marlborough Regional Water Board (1982) 9 NZTPA 129.  
429 “It is implicit in the balancing test that as a matter of law no one factor has precedence over another” Williams supra n 298, 120.


431 Williams made his argument following a discussion of *Royal Forest and Bird Protection Society v Bay of Plenty Regional Council* (1978) 6 NZTPA 361, where recreational, fishing, and wildlife interests were defeated by the benefit of hydro-electric generation to be obtained from damming and diverting the Rangitaiki and Wheao Rivers (and see Chapter 8 nn 209-220). Against this might go a case such as *New Zealand Maori Arts and Crafts Institute v NWSCA* (1980) 7 NZTPA 365, where a right to take water from the Rotorua geothermal field was refused on the ground that the natural and scenic features of the field had “... such a value to the community, that safeguarding them outweighs the advantages to the community of using geothermal water for heating [the] College” (at 373).

indicated that "... the safeguarding of fisheries and wildlife habitats is not to be overlooked, but that promoting soil conservation and ... the drainage of land are to be given greater importance."\textsuperscript{433}

Also, the mere granting of a water right to one person might mean a denial or restriction of future applications, implying some kind of priority for prior grantees of rights over future grantees.\textsuperscript{434} Despite holding this priority-in-time, prior grantees otherwise held their rights subject to subsequent grants to other users.\textsuperscript{435} All that could be done was to object to subsequent applications, and argue that the adverse effect of the exercise of any new right on rights already granted outweighed the benefit to be obtained by allowing the new right.

Despite the theoretical difficulties inherent in applying cost:benefit analysis to situations of environmental management, and despite the fact that both old and new right holders might have their interests compromised in the future,\textsuperscript{436} the balancing test was retained as a flexible and open approach to the resolution of the competing claims which inevitably arose as the Act aimed to promote and control multiple uses of water.\textsuperscript{437}

In 1971 another scheme of apparent simplicity but actual complexity was inserted into the 1967 Act. The water quality classification system was a derivative of that established by the Waters Pollution Act 1953 and Regulations 1963.\textsuperscript{438} When that Act was repealed (and the Regulations

\textsuperscript{433} Auckland Acclimatisation Society ibid 311.

\textsuperscript{434} If, for example, a right to discharge is granted, then "... the exercise of [the] right ... means that any other applicant for a right must necessarily take or use water of the quality which results from the discharge" (Rotorua District Council v Bay of Plenty Regional Water Board (No 2) (1983) 9 NZTPA 453, 455) per Judge Turner. Again, see Milne supra n 427, 254-255.

\textsuperscript{435} Milne ibid 254

\textsuperscript{436} Apart from the facts that a current right holder might diminish the quality or quantity of water available for use by any subsequent right seeker, and that any current right holder might suffer diminution in quality or quantity of water available to exercise his or her right as a consequence of the activities of a subsequent right holder, there were also ss 24D and 24E – see n 423 above.

\textsuperscript{437} The test is clearly flexible in that it can be applied to any situation of competing interest. The test is open in that all relevant considerations must be considered (including foreseeable future uses – see n 428 above – and "... detriment[s] ... seen merely as possible – but [which] if [they] occurred the damage would be severe" – Keam supra n 424, 327 per Somers J), and because it appears to be value-free (but see the point made by Williams, see n 430 above and accompanying text).

\textsuperscript{438} The difference between the classification scheme as established under the 1953 Act, and that as set out in the 1967 Act as amended was emphasised by the No 1 Town and Country Planning Appeal Board in Southland Acclimatisation Society and Southland Skindivers Club Inc v Water Resources Council. Note that while the principal part of this case is reported at (1974) 5 NZTPA 251, the passages under current reference are not. To find these, the unreported judgement of 26 July 1974 or the article by Williams ("Water Quality and the Water and Soil Conservation Act 1967 [1975] NZLJ 650, 655-656) should be consulted. In essence, the Appeal Board found that while, under the 1953 Act, "... classifications were based on the actual use being made of the water and were directed only toward the prevention or mitigation of pollution of water," under the 1967 Act, classification was "... essentially a declaration of a minimum desired water quality ..." and thereby functioned both as "... an aid to the preservation of ... waters ... so that [they] may be used to the best advantage; and ... a guide to the suitability of waters for particular purposes ..." (see Williams at 655 and 656).
consequentially revoked) classification, a system whose process bristle[d] with difficulties ... because of the way in which it [was] expected satisfactorily to reconcile the many conflicting claims relating to the use of natural water

became part of the water and soil conservation regime.

d. Water Quality Classification

The classification of natural waters was undertaken using a process involving investigations, the preparation of a preliminary classification, the hearing of objections, the making of a final classification, and, in some cases, appeal to the Planning Tribunal.

Natural water could be classified according to the nine classes set out in the Schedules to the Act. Of the nine classes, five were available for coastal waters (classes SA, SB, SC, SD and X), and four were available for waters other than open coastal waters (classes A, B, C and D). In determining which class to use, boards were directed by the Supreme Court which held, in Water Resources Council v Southland Skindivers Club Inc., that

a classification should not be lower than existing water quality save for good reason; and ... a classification should set higher standards than those existing if they are reasonably needed and reasonably attainable.

Since classification was “... a declaration of the minimum standards of quality at which the natural water so classified [was to be] maintained in order to promote in the public interest the conservation and best use of that water,” it was seen as both an “... aid to the preservation

439 Williams supra n 298, 107.
440 Section 26A of the Act empowered first the Water Resources Council, and subsequently the Authority and boards (later, just boards) to carry out investigations into: the source, extent, effect, cause and nature of discharges into any natural water; the actual and likely future uses of water into which waste was being, or was likely to be, discharged; and the extent to which discharges needed to be controlled or abated. The Council/Authority/board was then empowered to make and publicly notify a preliminary classification (s 26D) and to hear objections and prepare a final classification (s 26E). Once made, classifications had to be notified as soon as possible (s 26F), and any body or person “... claiming to be affected ...” could appeal to the Planning Tribunal (s 26G). Classifications could be cancelled, or waters re-classified (ss 26IA and 26I, respectively).

441 The standards for each classification are described in the Act’s nine Schedules. Williams (supra n 298, 427-428, and citing Gunn Water Pollution Control (1976)) described the “probable,” though not specified, water use in respect of each class as: class A – controlled catchment for water supply; class B – water supply source; class C – primary contact recreation; class D – general recreation, agriculture and general industrial water supply; class SA – shell fish beds; class SB – primary contact recreation; class SC – harbours, enclosed bays, estuaries; class SD – open coastal general recreation and fishing; class SE – ocean areas remote from public use. Under s 26C(1), the board could “... by adding the symbol X to the classification, indicate that the area of water in respect of which the symbol is added is sensitive to enrichment.”

442 (1975) 5 NZTPA 239, 247; [1976] 1 NZLR 1. This is the appeal from the Skindivers Case referred to in n 438 above.
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\textsuperscript{442} (1975) 5 NZTPA 239, 247; [1976] 1 NZLR 1. This is the appeal from the Skindivers Case referred to in n 438 above.
of water, and a "... guide to the suitability of waters for particular purposes." Once waters were classified, all actual discharges being made into the waters had to be notified and could be terminated if not positively continued by the board, and no new rights to discharge could be granted for two years, unless by the special consent of the Authority. If any new rights to discharge into classified waters were granted, then terms and conditions had to be imposed to ensure that the classification standards were maintained.447

Despite the classification regime, levels of dissatisfaction with the Act – particularly among conservationists – rose during the 1970s. The Act seemed to favour exploitation; it preserved existing uses, promoted the multiple use of water ("... which was likened to incremental degradation ..."), and although conservation was written in to its Long Title, it provided no positive means by which water bodies could be protected.449

Palmer records that

[T]ension mounted between developers on one hand and the growing conservation lobby and in-stream users on the other. The Tongariro Power Scheme brought things to a head.

Conservationists called for the natural values of our rivers, lakes and streams to be accorded permanent protection. They were concerned at the gradual loss of what came to be known as our "wild and scenic rivers."

In 1978 the Commission for the Environment released a discussion paper "... addressing the need for some river areas to be maintained in a natural state "for the scenic or recreational benefit of future generations." Submissions were taken, and a supplementary document published. Eventually, submissions were made to government and, "... after many twists and
turns ...”

The Water and Soil Conservation Amendment Act 1981 was enacted.

e. The Water Conservation Regime

The water conservation regime introduced by the 1981 Amendment Act provided for the making of national water conservation orders and local water conservation notices. Orders and notices were distinguished by function and process.

Local water conservation orders could be made by regional water boards to preserve “... as far as possible in its natural state ...” any river, stream, lake, or part thereof, or to protect “... the wild, scenic, or other natural characteristics, or the recreational, fisheries, wildlife habitats, scientific, or other feature of [any] river, stream, or lake, or part thereof ...” National orders, on the other hand, could be made by Order in Council to preserve rivers, streams, or lakes in their natural state, or to protect the same characteristics or features of such water bodies as could be protected by notices – but only where these were “... outstanding ...”

Once either an order or a notice had been made, any application for a water right could be

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452 Williams idem.
453 The process of making local water conservation notices was set out in ss 20F-20H of the Act, as amended. Applications went to regional water boards, which were required to give public notice thereof, and to consider and hear the application and all submissions and objections made thereon (s 20F, subs (3) of which identified who could make objections or submissions, and subs (5) of which identified who was entitled to be heard by the board). The relevant considerations for the board were expressly set out in s 20F(7). At the conclusion of the hearing, the board was instructed to prepare and publicly notify a draft notice, or to make a recommendation that the application be considered under the national water conservation order provisions, or to decline the application (s 20F(8)). The board’s decision to make a draft notice, or to decline the application could be appealed to the Planning Tribunal (s 20G), which could then confirm, modify or cancel the draft, or confirm or overrule the board’s decision to decline the application.
454 Section 20H(2). In order to achieve these ends, notices could provide for the retention “... in its natural state ...” of the quantity, flow, or level of water; or for the retention of other specified quantities, flows or levels; or for the protection of parts of water bodies from damming, or the effects of damming; or for maximum and minimum levels for any river, stream or lake or maximum or minimum flows for any river or stream (s 20H(3)).
455 The process of making national water conservation orders was set out in ss 20A-20E of the Act, as amended. Applications went to the Minister, who was, prior to 1988, required to forward them to the Authority (s 20A). The Authority would then determine whether each application should be dealt with as one for a national order or as one for a local notice (s 20A(3)). After 1988 this determination was to be made directly by the Minister. If the latter course was taken, then the application was referred to the board and the process outlined in n 453 above set in motion. If, instead, the former course was taken, then the application was to be publicly notified, and submissions and objections called for and heard (s 20B, subs (2) of which identified who could make objections or submissions). The relevant considerations for the Minister were expressly set out in s 20B(6). At the conclusion of the hearing, the Minister was empowered to prepare and publicly notify a draft order, or to refer the application to the board for consideration under the local water conservation notice provisions, or to decline the application (s 20B(7)). Submissions or objections on the draft order, or the decision to decline the application, could then be made to the Planning Tribunal (s 20C), which did not have the final say, but which could make reports and recommendations to the Minister (subs (6)). Orders were made on the advice of the Minister under s 20D.
456 Section 20D(2). To attain these ends, orders could include the same provisions relating to the quantity, level and flow of water as could be made in notices (see s 454 above). The word “outstanding” was generally equated to “of national significance” by the Authority (Ministry for the Environment internal communication, 14 June 1988).
granted "... only if the combined effect of the grant and of existing rights [was] such that the provisions of the ... order [or notice could] remain without change or variation."457 Boards were obliged to attach such terms and conditions to rights granted as were necessary to maintain the provisions of any relevant order or notice.458

The first application made under the scheme – to protect the "... whole stretch of the [Motu] river, from the falls to the sea ..."459 – was successful and an order was made. In the process, however, the Planning Tribunal identified perhaps the main environmental failing of the regime: that orders were confined to water and could not be extended to protect any of the surrounding landscape.460 The regime’s failings were, however, not its most striking feature. More significant, in the context of New Zealand water law as a whole, was the conservation bias which the Amendment Act was held to imply.

In 1987 the Court of Appeal was asked to consider a report and recommendation of the Planning Tribunal on a draft order for the Rakaia River. The most significant parts of the President Cooke J’s judgment in Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc461 relate to the object and standards of the 1981 Amendment Act.

Counsel for Federated Farmers and for the catchment board had argued that applications for national water conservation orders should be determined using a Keam-like balancing test.462 Counsel argued that, by simply listing all the relevant considerations in s 20B(6),463 the legislation indicated "... no in-built preference for conservation interests."464 Cooke P accepted that, "[i]f s 20B(6) ... had been enacted without [any] accompanying guideline ..." then this may have been correct.465 In fact, however, parliament had "... tak[en] the unusual...

457 Section 21(3F).
458 Idem.
459 Williams supra n 430, 4; the decision in the Planning Tribunal is reported as Re National Water Conservation (Motu River) Order 1983 (1984) 10 NZTPA 7.
460 Williams (ibid 4-5) raises this problem, noting that although s 20D(9) required all regional and unit~ed councils and other local authorities to "... take into account the contents of any order [or notice] made ... when preparing, reviewing, and administering regional, district, or maritime planning schemes under ... the Town and Country Planning Act 1977," "... in many cases such local authorities would not have the legal or financial ability to actually designate or acquire the adjacent land." Williams (at 5-6) also identified other problems with the water conservation regime: being its unduly "wieldy" procedural aspects, and that "... after an order is made there is no particular body or organisation which is given the statutory responsibility to monitor or manage the protected river.”
462 Ibid 298, and see n 424-426 above and accompanying text.
463 Section 20B(6) (like s 20F(7), which related to water conservation notices as opposed to orders) required the Minister to "... take into account- (a) All forms of water-based recreation, fisheries, and wildlife habitats; (b) The wild, scenic, or other natural characteristics of the river, stream, or lake; (c) The needs of primary and secondary industry, and of the community; and (d) The provisions of any relevant ... planning scheme ...
464 Ashburton Acclimatisation Society supra n 461, 298.
465 Ashburton Acclimatisation Society ibid 299.
step of declaring a special object for the 1981 ... Act: [being] ... to recognise and sustain the amenity offered by waters in their natural state."466 This provision was not to be ignored: "... to treat [it] as surplusage or irrelevant or mere window-dressing would be ... cynical and unacceptable ... "467 Instead, the Court was duty-bound to "... attach significance to and obtain help from this prominent and unusual feature of the Parliamentary enactment."468 When so considered, the provision pointed to469 

an emphasis on sustaining the natural state, that is to say conservation. Although certainly not to be pursued at all costs, it has been laid down as the primary goal; and this must never be lost sight of. On an application for an national water conservation order, the matters listed in s 20B(6) are to be weighed, but ... this [must] be done bearing in mind that the primary object is conservation .... In particular cases the needs of industry or [the] community ... may demonstrably outweigh the goal of conservation. But as a general working rule ... preservation of the natural state ... is to be aimed at unless clear and clearly sufficient reason is shown to the contrary. ... The presumption is in favour of conservation. A strong, really compelling case is needed to displace it.

A kind of conservation bias was later found to apply also to the minimum flow regime introduced into the 1967 Act in 1988.

f. Minimum and Maximum Flows

Section 20J of the Act, as amended in 1988, empowered boards to fix

maximum and minimum levels, and minimum standards of quality to be sought or permitted for the natural water in lakes, ... and the minimum acceptable flow and minimum standard of quality of the natural water of any river or stream, and; ... the maximum range of flow ... 

In its first consideration of s 20J,470 the Planning Tribunal was asked to consider whether the balancing test from Keam should be applied to decisions to fix minimum flows, and to grant water rights inconsistent with those flows. In reply, the Tribunal held that counsel for the respondent was correct in his submission that "... in considering the fixing of minimum flows ... there is a bias towards in-stream uses."471 The Tribunal added:472

[This does not mean that competing out-of-stream demands do not need to be considered and weighed. Obviously they do. ... [But] there

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466 ASHURTON ACCLIMATISATION SOCIETY supra n 461, 299.
467 ASHURTON ACCLIMATISATION SOCIETY idem.
468 ASHURTON ACCLIMATISATION SOCIETY idem.
469 ASHURTON ACCLIMATISATION SOCIETY supra n 461, 300.
471 LAKEMAN ibid 481 and 482.
472 LAKEMAN supra n 470, 482-483.
seems little point in considering fixing minimum acceptable flows, ... ie flows to be retained in a river, if the in-stream values are not to have some weighting in the event of irreconcilable conflict arising.

g. Concluding Remarks on the 1967 Act

In summary, the outstanding features of the Water and Soil Conservation Act were that it established a scheme to promote the multiple use of water, and to determine the competing claims which inevitably arose. The claims were decided by balancing the actual and foreseeable benefits and costs of the proposed use of natural water. Public interest and in-stream values were recognised in the classification provisions and even accorded some priority within the confines of the conservation, and minimum and maximum flow regimes.

The Act set up an open and regionally-based procedure for allocating rights to use water, though this was, by implication, perceived to be undesirable in some situations by the Sir Robert Muldoon-led National government of the 1970s. In 1979 this government, engaged in a policy commonly known as “Think Big” which promoted the development and building of large-scale industries in New Zealand, enacted the National Development Act.

The aim of the 1979 Act was simple: to “... provide for the prompt consideration of works of national importance ...” At the time, the law regulating the use of resources, including water, was highly fragmented – to undertake any kind of major work, multiple consents were required under a number of Acts all employing different procedures and based on different principles. Thus, the Act established a single procedure whereby such works (often of the “Think Big” type) could be referred directly to the Planning Tribunal for consideration (thus avoiding the usual consideration at first instance by regional water boards or the National Water and Soil Conservation Authority), and then authorised by the Governor-General in Council.

473 See nn 415-423 above and accompanying text.
474 Long Title. Whether or not a work was likely to be in the national interest was a question to be determined by the Governor-General in Council under s 3 of the Act. If the work was thought to be such a work, and if the Governor-General in Council considered that the work was essential (in terms of the “orderly” development of New Zealand's resources and self-sufficiency in energy, the “... major expansion of exports or of import substitution ...” or the development of employment opportunities) and that it was “... essential that a decision be made promptly as to whether or not the consents [required to undertake the work] should be granted ...” then the Act could be applied to that work. The effect of so applying the Act was that the consents procedure prescribed therein would be used, as opposed to the consents procedure prescribed in the Act (including the Water and Soil Conservation Act 1967 – see the 1979 Act’s Schedule and s 3) usually governing applications for such consents. The question of whether or not a work was actually of national importance was not finally resolved until after the Planning Tribunal had made its report and recommendation on the granting of consents (see n 475 below). Then the Governor-General in Council, after considering the Tribunal's report and the criteria set out in s 3 (and described above), was empowered to declare the work to be of national importance (s 11).
475 The procedure was that, following the initial decision to apply the Act (made under s 3, see n 474 above), the application to undertake the work was referred to the Planning Tribunal, and notified both publicly and to relevant public authorities (s 4). Meanwhile, an environmental impact report on the proposed work would have been sent to and considered by the Commissioner for the Environment (s 5).
The usual procedures were effectively circumvented and a more streamlined, and arguably more political,476 process instead employed.

Before moving on to offer some concluding remarks on the legislature’s efforts to control the taking, use and management of water and to describe the latest efforts (which culminated in the enactment of the Resource Management Act 1991), it is necessary to mention the Environment and Conservation Acts of 1986 and 1987. Like many of the Acts described above, these two impact on the use and management of water indirectly, but they are more significant than the others in terms of recent developments in environmental law as a whole.477

4. The Environment and Conservation Acts

a. The Environment Act 1986

The Environment Act 1986 is a coordinating measure. It provides for the establishment of the Ministry for the Environment (under the control of the Minister),478 and for the appointment of the Secretary479 and Parliamentary Commissioner for the Environment.480

The Parliamentary Commissioner for the Environment has an investigative and reporting role. Her functions include481 reviewing "... the ... agencies and processes established ... to manage the allocation, use, and preservation of natural and physical resources ...",482

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Commissioner’s audit, and the recommendations of the statutory authorities "... which would normally grant any consent [applied for] ..." as to whether or not the consents should be granted, and any submissions made by persons entitled to be heard would be made available to the Tribunal in the conduct of its inquiry (see ss 5-8). Inquiries were to be held in public (s 7), and the Tribunal was required to "... take[] into account, recognise[], and provide[] for ... those matters that would have been taken into account, recognised, and provided for if the applicant had applied in the normal way for the consents ..." (s 9). The Tribunal would then forward its report and recommendation to the Minister of Works and Development (s 10). After considering the report, and the matters set out in s 3, the Governor-General was then able to declare the work to be of national importance, grant "... each consent for such term ... as he thinks fit; and ... impose such conditions, restrictions and prohibitions as [were] normally required and ... as he thinks fit in respect of each consent ..." (s 11). Note that proceedings in the Planning Tribunal could be challenged in the Court of Appeal by way of judicial review, but there was to be no challenge at first instance in the High Court, and no appeal on to the Judicial Committee of the Privy Council (s 17).

476 More political because, subject to a challenge being brought in the Court of Appeal (see n 475 above), the final decision-making power as to the granting of consents is vested in the Governor-General in Council (and not in the regional water board or Planning Tribunal, or in a superior court as would normally be the case), and is based on a series of criteria which are essentially political in nature. These criteria were set out in s 3 of the Act and are described in n 474 above. That these criteria were in essence political was emphasised in the judgment of the Court of Appeal in CREEDNZ v Governor-General [1981] 1 NZLR 172 (see, especially, Cooke P’s judgement on the relevancy of considerations issue at 180-185).

477 The two Acts represent an important part of a general trend towards conservation in New Zealand’s environmental law – see Chapter 7 below.

478 Section 28.

479 Section 29.

480 Section 4.

481 The office is currently held by Helen Hughes, and all her functions are set out in s 16 of the Act.

482 "Natural and physical resources" are defined in s 2 as including water.
investigating the "... effectiveness ..." of environmental planning and management as carried out by public authorities and any other "... matter in respect of which ... the environment\textsuperscript{483} may be or has been adversely affected ...," reporting on petitions and Bills whose "... subject-matter ... may have a significant effect of the environment ...," and encouraging "... preventive measures and remedial actions for the protection of the environment." In all her reviewing, investigative and inquiring functions the Commissioner is required to report back to the House of Representatives.

The Ministry's role is advisory and mediatory. Generally, it must advise the Minister and Government on policies and legislation with environmental application,\textsuperscript{484} and "... facilitate and encourage the resolution of conflict in relation to policies and proposals which may affect the environment."\textsuperscript{485}

Both the Commissioner and the Ministry would, of course, be expected to exercise their functions consistently with the purpose of the Act.\textsuperscript{486} Also, the Commissioner may, and the Ministry must, have regard to a series of seven matters, including the "... maintenance and restoration of ecosystems of importance ..."; areas of aesthetic, cultural, recreational, scenic or scientific value; water included in the "... heritage of the tangata whenua ..."; the likelihood that proposals and policies will lead to or increase pollution, will have environmental effects worthy of further investigation, or may result in unsustainable resource allocation and depletion; and the reasonably foreseeable effects of proposals on the environment.\textsuperscript{487}

\textit{b. The Conservation Act 1987}

Also largely a coordinating measure, the Conservation Act 1987 establishes an administrative structure, a planning regime, and a system of reservation "... to promote the conservation of New Zealand's natural ... resources ... ."\textsuperscript{488}

The Act establishes and empowers the Minister and the Department of Conservation, the New

\textsuperscript{483} The Act (s 2) defines the "environment" as including "... [e]cosystems and their constituent parts; and ... [a]ll natural and physical resources; and ... [t]he social, economic, aesthetic, and cultural conditions which affect the environment or which are affected by changes to the environment." Section 2 also defines "ecosystem" as meaning "... any system of interacting ... aquatic organisms within their natural and physical environment."

\textsuperscript{484} Note that the relevant legislation is listed in the Act's Schedule, and includes the Forests Act 1949, the Geothermal Energy Act 1953, the Harbours Act 1950, the Health Act 1956, the Local Government Act 1974, the Marine Farming Act 1971, the Marine Mammals Protection Act 1978, the Marine Pollution Act 1974, the Marine Reserves Act 1971, the Reserves Act 1977, the Soil Conservation and Rivers Control Act 1941, the Water and Soil Conservation Act 1967, and the Wildlife Act 1953.

\textsuperscript{485} The Ministry's functions are listed in s 31.

\textsuperscript{486} The objectives of the Act appear in its Long Title, which is set out in text accompanying n 139 above.

\textsuperscript{487} All of these matters are set on in s 17 of the Act.

\textsuperscript{488} Long Title.
Zealand Conservation Authority, conservation boards, the New Zealand Fish and Game Council and fish and game councils.489

The Department has the functions of administering conservation legislation,490 advocating conservation,491 advising the Minister,492 and managing the conservation estate “... for conservation purposes ...” and in accordance with general policies, strategies and plans.493 The Authority can investigate “… any nature conservation or other conservation matters ... of national importance ...,” and advise the Minister.494 Like boards, however, its most important function probably relates to conservation management planning.495 The Fish and Game Council and councils are concerned with the management, maintenance and enhancement of sports fish and game; with the Council operating at the national level, and supervising the activities of the councils.496

Conservation management planning applies to conservation areas set aside either under the Conservation Act, or under the Wildlife Act 1953, the Marine Reserves Act 1971, the Reserves Act 1977, the Marine Mammals Protection Act 1978, or the National Parks Act 1980.497 There is a three-tier hierarchy, made up of statements of general policy, conservation management strategies, and conservation management plans.498 According to Milne, statements of general policy are “… intended to address policy issues of general application throughout New Zealand …,” while strategies are “… designed to implement general policies ... [and to] cover the broad

489 The Department “... under the control of the Minister ...” is established in s 5, the Authority is established in s 6A, the boards in s 6L, the Fish and Game Council in s 26B, and the councils in s 26P.
491 The Department is required to “… preserve so far as is practicable all indigenous freshwater fisheries, and protect all recreational freshwater fisheries and freshwater fish habitats: ... [t]o advocate the conservation of natural ... resources generally: ... [t]o promote the benefits to present and future generations of— (i) [t]he conservation of natural ... resources ...; and ... (iii) [i]nternational cooperation on matters relating to conservation: ... [t]o prepare, provide, disseminate, promote, and publicise educational and promotional material relating to conservation: ... [and,] [t]o the extent that the use of any natural ... resource for recreation or tourism is not inconsistent with its conservation, to foster the use of natural ... resources for recreation, and to allow their use for tourism ...” (s 6(ab)-(e)).
492 Section 6(f).
493 Section 6(a) charges the Department with managing “… for conservation purposes, all land, and all other natural ... resources, for the time being held under this Act, and all other land and natural ... resources whose owner agrees with the Minister that they should be managed by the Department ...,” while s 17A provides that the Department “… shall administer and manage all conservation areas and natural ... resources in accordance with ...” statements of general policy, conservation management strategies, conservation management plans, and freshwater fisheries management plans. These statements, strategies and plans are described (save for freshwater fisheries management plans) in n 368 above.
494 The Authority’s functions are set out in s 6B.
495 Boards, which are also to provide advice to the Authority, have their functions specified in s 6M.
496 See ss 26C and 26Q.
497 See the s 2 definition of “conservation management plan,” s 17A and nn 355, 367-369, 389, and 394 above and accompanying text.
498 See n 368 above.
objectives of an area ...,” leaving plans to provide the details necessary to “... implement ... strategies and establish detailed objectives for the management of conservation assets.”

Thus, there should be structured and comprehensive planning for all conservation areas whether they were created under the 1987 Act itself, or under any of the other Acts administered by the Department. Conservation parks, wilderness areas, ecological areas, watercourse areas, and marginal strips can be created under the 1987 Act. It seems inevitable that at least some of these conservation areas, and therefore at least some of the conservation management planning undertaken, will cover water bodies.

**IV. Concluding Remarks: Trends in the Law’s Development**

In conclusion, it is submitted that at least four trends emerge from this account of the developments in New Zealand’s water legislation. It is contended that since the legislature first began supplementing and intervening into the common law system, the legislation made has, over time:

- increased in scope, or coverage, and comprehensiveness,
- increased the formality, extent, and coordination of management and planning,
- enhanced integration in the management of water resources, and
- become increasingly conservation conscious.

Though each of these four trends can be individually discerned and described, there is overlap. For example, since integrated management is today generally accepted as a critical component of sound environmental management, improvements in integration would also bring more

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499 Milne supra n 354, 215 and 218.

500 Conservation parks are to be managed so as both to protect their natural resources, and to “... facilitate public recreation and enjoyment ...” (s 19). Wilderness areas provide for the preservation of indigenous natural resources, and no buildings or work are permitted therein (s 20). Ecological areas are to “... be managed so as to protect the value for which it is held” (s 21) – Milne describes them as offering protection to representative ecosystems (ibid 221). Indigenous plants and animals are to be preserved “... in their natural state ...” in sanctuary areas (s 22). Watercourse areas are designed to provide protection for land which adjoins any river, stream or lake protected by a water conservation order and which “... has, when considered with the river, lake, or stream, outstanding wild, scenic, or other natural or recreational characteristics ...” (s 23). Marginal strips are reservations of land, 20 metres wide, “... extending along and abutting the landward margin of ... [a]ny foreshore; or ... [t]he normal level of any lake ... ; or ... [t]he bed of any river ...” made when Crown land is sold (s 24).

501 Watercourse areas and marginal strips by definition exclude water bodies, but it would appear that water bodies (or at least the land under them) could be included in the other areas. Even where a water body is not actually included in a conservation area, but instead adjoins it, the water will probably benefit from the land management practices applied in the area.

502 For a description of the intended meaning each of these four trends, see Chapter 1 above.
conservation consciousness. Conversely, the failure to achieve significant levels of integration will detract, overall, from the conservation consciousness of laws despite their growing references to individual conservation issues.

1. An Increase in Scope and Comprehensiveness

In general, the shift has been from many specific empowerments, aimed at providing for defined needs, to fewer statutes with broader scope.

Flood control was at first addressed with regionally-specific Acts, each setting up boards of conservators charged with doing work to control rivers. In 1884 the first River Boards Act was enacted, and had national effect. Land drainage was dealt with as a distinct issue, until 1941 when the Soil Conservation and Rivers Control Act included both the conservation of soil resources, and the protection of land from flooding, in its ambit.

The early taking and use legislation was scattered and specific. Contained in a large number of Acts, it authorised the taking, use, diversion or damming of water and water bodies for narrow and defined purposes. Thus, there were separate provisions for each of the purposes of town supply, irrigation, electricity generation, public works, sewage and stormwater removal, mining, pollution of supply waters, obstruction of navigation, and pollution of harbours by oil. There were even two sets of laws for some of these purposes, depending on whether the taking or use of water was to occur within or beyond mining districts.

From 1903, some Acts began to appear which were less specific. While they still tended to focus on just one use of water, they had broadened to cover all rights to use water for that given purpose. Thus, we see the enactment of the Water-Power Act 1903 (which covered all rights to use surface water for electricity generation), the Geothermal Steam Act 1952 (covering all rights to use geothermal steam for electricity generation), the Oil in Territorial Waters Act 1926 (covering the pollution by oil of all bays, gulfs, harbours, rivers and lakes), and the Waters Pollution Act 1953 (which covered all forms of pollution and all of New Zealand's territorial waters). This trend probably peaks with the enactment of the Water and Soil Conservation Act in 1967, which controlled all rights to dam any river or stream, and all rights to divert, take, use, or discharge water or waste into any natural water.
2. An Increase in the Formality, Extent, and Coordination of Management and Planning

Originally, the legislation was piecemeal and fragmented. Different public authorities, and other persons, were empowered under many different Acts to perform functions in relation to water. River boards, land drainage boards and county councils were all given functions and powers in relation to land drainage and flood control. Borough councils, county councils, and licence holders under the Mining Acts could all take and use water for domestic or town supply, and for mining purposes. Borough councils, county councils and health boards were all concerned with the removal of sewage from settlements. County councils, water-supply boards and the Minister of Public Works could all construct works, and divert and take water for irrigation supply. Frequently, these functions overlapped and there was little to no coordination as between them – the confusion reflecting the proliferation and specialisation which was such a prominent feature of local government at the time.

Some coordination of functions in the land drainage and flood control areas was provided by the Soil Conservation and Rivers Control Act 1941. The Soil Conservation and Rivers Control Council coordinated policies and activities on a nationwide basis, and supervised the catchment boards which in turn supervised the river and land drainage boards.

Coordination in the area of taking and use did not occur in any real sense until the Water and Soil Conservation Act was enacted in 1967, though the creation of the Pollution Advisory Council in 1953 and the making of the Waters Pollution Regulations in 1963 did introduce some order and cohesion into pollution control. The 1967 Act of course imposed a new three-tiered management structure on the rights to take and use water identified in s 21. Regional water boards administered the Act (and the Soil Conservation and Rivers Control Act 1941) on a catchment basis, with the three Councils controlling soil conservation and rivers control, water pollution, and water allocation under the general supervision of the National Water and Soil Conservation Authority.

Not only was there, in the early days, almost no coordination between the bodies and functions involved in and relating to the use and control of water, but very little attention was given to long-term planning. Town supplies, and sewerage systems, could be included in town-planning schemes under the Town-planning Act 1926, but very little planning in fact occurred at least until the 1950s. Further, the lack of provision for planning in general was apparently not rectified by the establishment of either the Soil Conservation and Rivers Control Council (it having been criticised in this respect in 1964) or the Pollution Advisory Council (it did have
coordinating functions, but seems to have been most concerned with the actual, as opposed to
the most desirable, uses of water).

In 1968 the Electricity Act was enacted and brought both coordination and planning to the areas
of electricity production. These positive features of the 1968 Act were continued in the
Ministry of Energy Resources Act 1972 and the Ministry of Energy Act 1977, but, like their
predecessor, these Acts only covered management and planning in the specific area of energy.
Provision for planning across the board was not made until the National Water and Soil
Conservation Authority was established and given extensive advisory and planning functions.

Better coordination of the structures and systems in place to manage the allocation, use and
protection of water is an issue of concern for the Parliamentary Commissioner for the
Environment, and a more organised approach should have resulted from the involvement of
both the Commissioner and the Ministry for the Environment in the administration of Acts
impacting on water. The Conservation Act 1987 has also promoted planning and orderly
management – but this time only in respect of conservation areas, none of which serve
specifically to conserve water, but rather to conserve either land around water or the habitat
provided by water.

3. An Enhanced Integration in Management

There are two aspects of integrated management to consider. First, there is the issue of
integrating economy, society and environment; this suggests that all decision- and rule-making
should occur in a context where development, use and conservation are all considered.
Conservation interests should, for example, be integrated into all rule- and decision-making
concerning the allocation of water resources. Second, there is the issue of integration as
between resources. Modern science tells us that no part of the natural world can be considered
in isolation, that everything impacts on everything else and that a holistic approach is to be
preferred.503

Throughout the history of the development of water legislation in New Zealand, water
resources have generally been considered in isolation. There has been virtually no integration
in the management of various resources, little attempt to manage the environment as a whole.
This is partly a product of the lack of comprehensive future planning, and partly a product of
the failure to adopt an ecological approach to resource management. Until recently, each

503 This is a consequence of the application of the teachings of ecology and the laws of thermodynamics (these
are both briefly explained in Chapter 7 below).
resource, or part of nature, was controlled and managed under its own statutory regime. There was a statutory regime for water, one for land, one for forests and so on. It was this fragmentation which prompted the government to introduce the streamlined consents process under the National Development Act in 1979. While other resources could be considered as decisions to allocate water were made under the Water and Soil Conservation Act 1967 (for example, the benefit of increasing productive land area was relevant to decisions to drain swamps, and the cost of losing productive land was considered when decisions were made to dam rivers and create new lakes), this did not imply a comprehensive and holistic approach where resources were managed in an integrated fashion.

Similarly, there has been a general failure to include conservation interests in all decision- and rule-making on the use and development of water. While soil conservation was an issue which was integrated into the management of water bodies early on, water conservation was left for later years. Certainly the early sewage and drainage, town supply, health, mining and harbour statutes attempted to arrest, or at least reduce, pollution and other discharges, but the issue was less the protection of water and more the protection of human activities depending on water (such as health and navigation).

True conservation (as opposed to protecting use and development issues) was addressed in a series of Acts including the Oil in Territorial Waters Act 1926, the Oil in Navigable Waters Act 1965, the Litter Acts 1968 and 1979, the Queen Elizabeth the Second National Trust Act 1977, and the Waters Pollution Act 1953. In each case, however, the Act was focused on conservation exclusively, the conservation issues had been addressed in isolation and not integrated into pre-existing statutes controlling use and development. This failure to treat pollution and conservation as integral aspects of the general management and control of water was specifically identified as one of the central failings of the Waters Pollution Act. While other Acts in general providing for the protection of land or animals (such as the Reserves, National Parks, Thermal Springs, Marine Mammals Protection and Marine Reserves Acts) did imply water conservation, this was not specifically integrated into them, but rather achieved as an incidental by-product. Better examples of legislation integrating conservation were the Manapouri-Te Anau Development Act and the Underground Waters Act 1953. Both, however, were of restricted ambit.

No doubt the Water and Soil Conservation Act represent an advance in this regard. Conservation interests, along with use and development interests, were included in the Act’s

504 See, for example, *Metekingi v Rangitikei-Wanganui Regional Water Board* [1975] 2 NZLR 150, 5 NZTPA 330 and *Auckland Acclimatisation Society v Waikato Valley Authority* (1983) 9 NZTPA 299.
Long Title and were therefore suggested as relevant considerations in rule- and decision-making under the Act. It is at least arguable, however, that water (as opposed to soil) conservation interests were not intended to carry the same weight in the allocation of water as were other concerns, and that, in fact, they did not. Had they been applied on a nationwide basis the classification and minimum flow regimes might have provided an avenue for the integration of conservation interests in all future allocation decisions, but this did not eventuate. Though conservation interests were advanced with the introduction of the water conservation regime in 1981, it is worth noting that this was limited. The response was to establish a distinct conservation regime, rather than to improve the consideration given to conservation interests throughout the general management and allocation of water. Thus, while a means for conserving specific bodies of water was provided, conservation was not better integrated into the Act as a whole.

As with coordination in planning and management, the relevance of conservation interests in the general management of water resources should have been furthered by the enactment of the Environment Act 1986 (but not necessarily by the Conservation Act 1987 since the Department established thereunder was not charged with administering the Water and Soil Conservation Act).

4. An Increase in Conservation Consciousness

The issue of water conservation and protection was never directly addressed in the legislation relating to land drainage and flood control. Once the National Water and Soil Conservation Authority, and then the Ministry for the Environment had been incorporated into the administrative structure surrounding the Soil Conservation and Rivers Control Act water conservation may, however, have become at least indirectly relevant, since it features in the purposes of the Environment Act 1986 and the Water and Soil Conservation Act 1967.

Water conservation does appear, on the other hand, at various points through the development of the law on the taking and use of water. Almost every time it appears, however, it does so to protect either the value of land, or the users and uses of water. The laws providing for the taking and use of water for supply (for irrigation or domestic use) and for mining purposes, and those relating to the powers of harbour boards all included sections aiming to protect the quality or quantity of water available to meet those needs. The Salmon and Trout Act 1867 was there to protect the fishery; the Underground Water Act 1953 aimed to protect groundwater for domestic, farming, and industrial use; the Manapouri-Te Anau Development Act 1963 enabled
the setting minimum levels to protect the natural scenery and the fishery; the Litter Acts appear more concerned with protecting the public, rather than water bodies, from litter; the Reserves, Forests and National Parks Acts were enacted to protect certain tracts of land and the Queen Elizabeth the Second National Trust Act to enable the protection of water bodies which serve to preserve landscapes; and the thermal springs and scenery preservation legislation sought to protect the human enjoyment in certain water bodies.

Exceptions to this rule might be argued to appear in the Waters Pollution Act 1953, the Wildlife Act 1953, and the Oil in Territorial Waters Act 1926 and its successors. Certainly these Acts represent the growing concern which pollution had become by the early-mid 1900s. The oil pollution Acts are notable in their breadth of coverage and the Wildlife Act in that it seeks to protect water as a habitat. The Waters Pollution Act provided a well-intentioned, but short-sighted remedy for the discharge of wastes into water. While it prohibited certain discharges, it also facilitated alternative discharges into public sewers. The idea was to clean up rivers, and transfer discharges into drains. Drains, of course, must all ultimately reach their own point of discharge and this is where the Act fell short of true conservation consciousness.

The conservation of water was written into the Long Title of the Water and Soil Conservation Act 1967. The significance of this measure lies mainly in the degree of integration of conservation interests into general use and allocation decisions thus achieved. The conservation consciousness of the Act was first improved when the classification regime was transplanted into it from the Waters Pollution Act. As transplanted, the regime could lead to improvements in water quality as the most desired and best uses of water, as opposed merely to the actual uses of water, now formed the basis of the classification. Conservation consciousness was again improved when the water conservation order regime was introduced in 1981, but it is worth noting that the matters to be addressed by the body charged with considering applications for conservation orders or notices seem to focus on instrumental values in water.505 The continuing inclination to see water purely as a resource was also evident in the minimum flow regime. Again an aid to the Act’s conservation consciousness, the minimum flow regime was interpreted as biased towards in-stream uses of water, though the potential for out-of-stream uses to prevail was maintained.

As with the other three trends, the trend of increasing conservation consciousness in the legislation controlling the taking and use of water should have been at least indirectly furthered the enactment of the Environment and Conservation Acts of 1986 and 1987.

505 See n 463 above.
The next stage in the development of New Zealand’s water law began with the election of the fourth Labour Government in 1984. The new Government’s pre-election manifesto included an undertaking to review the country’s entire body of resource management laws, and this was started in 1987. The following two chapters describe the reform process, the Act with which it culminated, and how this Act deals with the use, management and conservation of inland and coastal water. The accounts in Chapters 4 and 5 (which together made up Part II of this thesis) will then be used as a basis for Part III’s consideration of how this new water Act fits into its historical context. This consideration is made in Chapter 6 below, and the principal ground for comparison will be the extent to which the new Act represents a break with the past, or instead builds on its past by furthering the four trends apparent in the history and development of New Zealand’s water law.
PART II

THE RESOURCE MANAGEMENT ACT 1991

This Part describes the resource management law reform process of the 1980s (Chapter 4), and the Resource Management Act 1991 with which this process culminated (Chapter 5). The Act is described with special reference to water.

Together, the accounts in Chapters 4 and 5 (the latter especially) are used as a basis for the analysis and comparison set out in Part III to follow. This analysis and comparison begins with Chapter 6 which asks whether, and if so to what extent and how, the Resource Management Act continues the four trends apparent in the history and development of New Zealand’s former water law.
Chapter 4

Resource Management Law Reform

I. Introduction

The resource management law reform process, which culminated in the enactment of the Resource Management Act 1991 was a direct "... response to the perceived inadequacies of the preceding legislation which had grown over the years without a clear and consistent guiding philosophy."¹ The old law had been challenged from all fronts, and criticised as anti-development, anti-environment, and anti-Maori.²

Despite these criticisms, it is, as Palmer notes, "... very doubtful that anything very comprehensive would have been attempted in relation to New Zealand’s resource management laws"³ were it not for political developments during the late 1970s. Palmer writes:⁴

[j]aving won the 1978 election quite narrowly the National Government set about developing a political strategy in 1979 to boost New Zealand’s economic development and provide employment. It began with the idea that New Zealand should be self-sufficient in energy. A number of large development projects ... were to be undertaken to develop New Zealand’s natural resources. ... This developmental strategy became known as the “Think Big” programme. ...

The developers and the government discovered [a] problem[] which posed an obstacle to the achievement of their goal – the myriad of laws under which consents of one sort or another were required before any development could proceed.

The government decided to overcome th[is] problem[] by passing a piece of legislation which would fast-track through all these laws. Normal procedures would be suspended. ... When the National Development Bill was introduced into the House of Representatives in October 1979 there was widespread opposition. Environmentalists argued that it was a recipe for environmental disaster ... . Constitutionalists argued that this method of suspending the laws was inherently undesirable and dictatorial. Public meetings were held up and down New Zealand. The hearings in front of the Select Committee of Parliament on the bill were extensively covered and there were hundreds of submissions. The bill was extensively changed as a result of the protests but it was eventually passed, although it was only

⁴ Palmer ibid 410-411.
actually used once.

The Labour opposition had something of a field day with this issue. The bill was vigorously opposed. If the resource laws were as defective as the Government said why did they not reform those laws properly the Opposition asked. ... The Opposition pledged to repeal the National Development Act 1979 and also made an accompanying promise to reform the planning laws upon gaining the Treasury benches.

The principles upon which its promised reform would be based were set out by the Labour party in its manifesto, devised for the 1984 general election. These principles were:

1 ... that the fundamental purpose of a sound environment policy is to ensure the management of the human use of the biosphere to yield the greatest sustainable benefit to present generations while maintaining the potential to meet the needs and aspirations of future generations.

2 ... [to] implement a strategy to integrate conservation and development so that:
(a) we move to a sustainable economic base by shifting from the use of non-renewable to renewable resources
(b) those resources are used to achieve the ends of social justice;
(c) our trusteeship responsibilities for future generations are recognised; and
(d) our remaining endangered species and ecosystems and representative examples of our full range of plants, animals and landscapes are protected.

This policy has been described as having two "... essential objectives ...: to enable adequate consideration of environmental values in the public policy process at all levels of government; and related to this, devolution of decision-making to a stronger tier of regional government."^5

Reform of resource laws, however, did not begin in earnest until Labour was re-elected for a second term in 1987.^6 Meanwhile, debate on other areas of reform which had occurred during 1984-1987 served to increase the pressure for change. Furthermore, the change sought was more radical than had been proposed by the Task Group set up in 1984 to provide advice on the implementation of the government's environmental strategy. The Task Group had merely proposed that there should be a review of existing planning laws (specifically the Town and Country Planning Act 1977), but reform in the areas of local government and economic

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5 Memon supra n 1, 182.
6 Some action was taken: the National Development Act 1979 was repealed and the Environment and Conservation Acts 1986 and 1987 (respectively) were enacted. Palmer (supra n 3, 411) comments that the "... Fourth Labour Government was too busy with other issues in its first three year term 1984 to 1987 to do a great deal on the resource law reform front ..." while Memon (supra n 1, 182) argues that it was external pressure which caused the delay. He notes that Treasury and environmental groups combined to "redefine" the reform debate from one addressing the planning processes to one focusing on the restructuring of the central government environmental bureaucracy; these groups, he says, wanted the government to "... address first concerns relating to the activities of central government agencies as managers of natural resources."
strategy,\textsuperscript{7} and the enactment of the Environment and Conservation Acts in 1986 and 1987, led to calls for a “... more comprehensive and fundamental review of environmental legislation ... ”\textsuperscript{8}

Early debate on reform during Labour’s first term was dogged by three areas of policy dispute. Major differences arose within Cabinet, and between various sectors of the community and government, as to the status to be given to environmental impact assessment,\textsuperscript{9} whether decision-making on environmental planning should be devolved to regional government,\textsuperscript{10} and what role (if any) local government should play in land use planning.\textsuperscript{11} Unfortunately,

\begin{itemize}
\item \textsuperscript{7} Labour’s economic strategy came to be known as “Rogernomics” after Minister of Finance Roger Douglas. The reference here is to those aspects of the strategy which sought to reduce the role of central government in New Zealand society. One very obvious manifestation of this was in the corporatisation of state assets, such as the coal, electricity, land and petroleum, the Post Office Bank and New Zealand Post; see the State-Owned Enterprises Act 1986.
\item \textsuperscript{8} Memon (supra n 1, 182-3), who also notes: “[t]he pressure for a more comprehensive and fundamental review of environmental legislation, compared to what may have been envisaged by the Task Group, also became clearly manifest during negotiations on environmental administration restructuring. Underpinning this was a desire to ensure compliance of the resource statutes with the rapidly changing direction of the relationship between the state and the New Zealand society. Thus, in many respects, a need for a radical review gathered significant momentum from the debate on state sector restructuring during 1984 to 1986, and more particularly, the policy decisions relating to the provisions of the proposed Environment Act and the Conservation Act, as well as unresolved policy questions arising from the proposals by the Task Group to review the [Town and Country] Planning Act.”
\item \textsuperscript{9} At loggerheads on this issue were Treasury, the Ministry of Works and Development, the Ministry for the Environment, the Commission for the Environment and other environmental groups. Memon (ibid 183) notes: “[t]he Environment Minister, supported by the Commission for the Environment and the environmental groups, was a strong advocate within the Cabinet to give statutory recognition to [environmental impact assessment] procedures within the framework of the proposed Environment Act. ... But major impediments to Cabinet acceptance of these recommendations ensued from the Treasury and a number of other government departments, including the Ministry of Works and Development. ... At the most fundamental level, the appropriateness of EIA procedures as a form of central government intervention in a market led economy was questioned, as well as the [proposed] role of the [Ministry for the Environment] in administering these procedures. ... Related to this, the justification for environmental assessment procedures, as an additional requirement to the statutory planning process, was also debated. ... The officials were unable to resolve these differences within the given time frame. Consequently, the proposed procedures were omitted from the Environment Act 1986.”
\item \textsuperscript{10} The debate here was between Treasury, on the one hand, and Cabinet and the Task Group, on the other. Again, quoting from Memon (supra n 1, 183-4): “... it became apparent that before the [policy of devolution, envisaged by Labour’s 1984 election manifesto] could be implemented, a number of unresolved issues associated with regional government and the regional planning process needed to be adequately addressed. ... Treasury had earlier questioned the benefits of the planning function of regional councils, which it regarded as complex, lengthy and an impediment to economic change. Also unclear was the role of the Crown, particularly the extent to which it could be bound by regional scheme policies and its participation in regional planning in a deregulated economic environment. Cabinet needed to consider the appropriate relationship between central and sub-national government, as a precursor to devolving decision-making to regions.”
\item \textsuperscript{11} “This debate related to intervention by local government, through the planning process, into an area viewed by some Cabinet members, officials and powerful pressure groups in the private sector, as more efficiently dealt with by private choice through the mechanisms of private property rights. Critics of the relative costs and benefits of statutory planning had become increasingly more vocal ... . Developers, Cabinet Ministers with development portfolios, and the Economic Development Commission complained about the delays, inflexibility and costs imposed by statutory planning and the alleged detrimental implications for economic growth and job creation ... . The advice of the officials to the Cabinet was polarised. In contrast the [Ministry of Works and Development] officials (reflecting the views of planning and legal professionals), who saw local government planning as a participatory and facilitative approach towards resolving land use
the government was unable to resolve or achieve consensus on these issues and it was forced to defer substantive review until after the 1987 general election.

Once begun reform was completed within a relatively short period. Speed was facilitated by the commitment of the new Prime Minister and Minister for the Environment (the Right Honourable Geoffrey Palmer), the elevated status of the Ministry for the Environment under the Environment Act 1986 and its success in obtaining the support of Treasury, the abolition of the Ministry of Works and Development, and the use of a Core Group instead of the usual interdepartmental committee.12

The abolition of the Ministry of Works and Development ("... old and big and good at defending its bureaucratic territory"13) was achieved as part of the government's general programme to corporatise and privatise state functions. Once dissolved, the Ministry’s "... construction ... functions went to a commercially orientated state-owned enterprise ... [while other functions, of a] ... non-contestable public nature ..."14 were transferred to the Ministry for the Environment. The reward was two-fold: first, a strong political opponent to reform was removed15 and second, funding for the reform process was freed up.16

A core group was used because17

so many different statutes administered by different government departments [were] involved in the review [making it] necessary to guard against the jealous defence of bureaucratic territory and a plethora of conflicting advice that would bog the project down and prevent it getting anywhere. ...

The advantages of this process were substantial. While it did not eliminate end runs by Departments going to their own ministers when they lost it did minimise that behaviour. It also ensured there was a rigorous filter on the advice before it was tendered to ministers for the making of decisions. That had the tendency of making the decision making more orderly.

The resource management law reform process proceeded in four phases, beginning with one concerned with "... analyz[ing] at the purposes, objectives and priorities of the reform ..."18


12 Memon supra n 1, 185.
13 Palmer supra n 3, 412.
14 Palmer idem.
15 Memon supra n 1, 185.
16 Memon idem, and Palmer supra n 3, 412.
17 Palmer idem.
18 Palmer supra n 3, 414.
II: Phase One: Purposes, Objectives and Priorities

The Government aimed to enact any new legislation before the 1990 general election, and began by establishing two guidelines for reform. These guidelines provided that: 19

1. The primary goal for Government ... is to produce an enhanced quality of life, both for individuals and the community as a whole, through the allocation and management of natural and physical resources.

2. Resource management legislation should have regard to the following, sometimes conflicting, objectives:
   a. to distribute rights to resources in a just manner, taking into account the rights of existing rightholders and the obligations of the Crown. The legislation should also give practical effect to the principles of the Treaty of Waitangi;
   b. to ensure that resources provide the greatest benefit to society. This requires that rights to use or conserve resources are able to move over time to uses in which they are valued most highly, and that the least cost way is adopted to achieve this transfer;
   c. to ensure good environmental management (as specified in the World Conservation Strategy and proposed New Zealand Conservation Strategy), which includes considering issues related to the needs of future generations, the intrinsic values of ecosystems, and sustainability;
   d. to be practical.

Phase one of the reform process ended in August 1988 with the publication of Directions for Change, 20 but before then the core group had adopted two approaches which it maintained throughout the reform process: it made "... extensive use of consultants and task groups ..." 21 and it encouraged public participation in policy generation. 22 Three other features of the reform process to emerge during phase one were the importance of the role of the Ministry for the Environment, 23 and of external pressure groups, 24 and the diminished impact of the

19 Palmer ibid 413-414.
21 Memon supra n 1, 186.
22 Palmer supra n 3, 414 notes: "[t]hroughout the course of the policy generation process the Ministry for the Environment published Viewfinder, a professionally produced newsletter containing information and discussion about the reform process and providing opportunity for participation in the process. Details of the numerous working papers developed were publicized by this medium, and interested people were given the opportunity to secure these documents. In the life of the project, thirty two substantial working papers were published and made available. At the beginning a freephone was organized for the public from all over New Zealand to express their views on the content of the reform. Advertisements were placed in newspapers, providing a means to distribute [resource management law reform] kits. Commercials on radio also drew attention to the project."
23 Memon supra n 1, 186 comments: "[t]he role of [the Ministry for the Environment] as a lead agency, and its close working relationship with Ministers, were crucial to the success of the [resource management law reform]. The Treasury was particularly powerful and would have captured the [resource management law reform] process totally if a less influential agency had been the lead agency."
24 Memon ibid 187-8 describes the role of pressure groups in detail. He notes that not only was the core group subject to "... considerable lobbying ..." but it also "... made a considerable effort to seek a wider
III: Phase Two: Consultation

1. Directions for Change

Directions for Change is a wide-ranging policy document designed to stimulate debate. The document restated the need for change and the government’s commitment to its initial guidelines. Intrinsic values and the needs of future generations were identified as concerns which had public support, and the Treaty of Waitangi as an issue of “... special significance...” The core group recognised that decisions should be made at the level of government most “... appropriate to the community of interest affected...” but saw issues of “... national interest ...” as for central government. All levels of government were seen public input into the review process.” “[E]nvironmental groups ...,” he says, “... played an influential role throughout the review process...,” operating in “... a very dedicated and organised fashion, especially in their relations with Cabinet Ministers. ... [B]y the stage of preparing the draft Bill and, subsequently, its consideration by the Select Committee, a small group of influential environmental advocates had developed a close working relationship with the Ministers of Environment and Conservation as well as, to a lesser extent, Treasury officials.” “By comparison, there was less incentive for the representatives of the corporate sector, such as the Business Round Table, to be involved in a positive fashion during the earlier stages of the review. They marshalled their forces later, when the draft Bill was taking shape, and they became aware of the extent of political commitment to it.”

“Treasury’s over-riding objective throughout the exercise was to limit the scope of the proposed Act as a means of controlling externalities by providing clear property rights to natural resources. It was critical of the broader purposes of the proposed legislation, such as sustainability and the needs of future generations, which it regarded as being based on vague values and which could eventually lead to arbitrary decisions by the Planning Tribunal. Contrary to [the Ministry for the Environment], Treasury was determined to resist any presumption in favour of environmental control and was opposed to the notion that economic activity should be constrained in order to promote sustainable development. Treasury argued that such a presumption was inconsistent with economic efficiency and that protection of the environment should take its place alongside other objectives and should be given no special status. ... Fortunately for the [Ministry for the Environment], during the second term of the fourth Labour government, the advocates of the Treasury viewpoint in the Cabinet were not as politically influential as before.” Memon supra n 1, 186-7.

This lies mainly in perceived problems with the old law: its complexity (and hence high cost), its restriction of individual rights and its failure to meet community needs and the needs of future generations are all identified as failings with the law generally; while the lack of integration in the management of water across land and water boundaries, the incomprehensiveness of relevant criteria in allocation and other use decisions and inadequate enforcement and pollution controls were all targeted in relation to water and soil legislation specifically, Directions for Change supra n 20, 9.

Directions for Change ibid 11; the initial guidelines are set out at n 19 above and accompanying text.

Directions for Change supra n 20, 10-1.

Directions for Change ibid 14. Despite this, the core group accepted the government’s agreement to further consider the issue of “... how the evolving principles of the Treaty should be incorporated in a reformed system for the management of natural resources ...” as sufficient for the time being, refusing to enter into the resource ownership debate. The group described the resource management law reform process as “... not the appropriate place to resolve ownership grievances ...” and satisfied itself with giving its support to “... the establishment of a process to enable the Crown and Maoridom to resolve ownership conflicts through negotiation” (ibid 14-15).

Directions for Change supra n 20, 22; the “... community of interest ...” point was taken to most favour the involvement of local government in decision- and policy-making.

Directions for Change ibid 23. The core group notes public submissions suggesting that any new law should provide for more control over central government in its role as decision-maker, and for greater public
to have a role in “... establishing the broad objectives for resource management and the priorities for resource uses” and controlling the “... spillover effects ...” of resource use.32

Directions for Change advocated new legislation providing for the integrated management of land, air and water,33 the management of environmental externalities,34 and public participation in decisions allocating resources.35

In so far as water is concerned the document supported the government view that the allocation of water rights should continue as a responsibility of regional government,36 recognising that “... catchment-wide administration systems have generally allowed for recognition of the wider effects of decisions ...”37 The group was critical that under the Water and Soil Conservation Act “... “instream” uses and values such as recreational interests [were] often not recognised explicitly” unless a water conservation order was involved.38 The document contains some discussion on the advantages and disadvantages of tradeable and transferable water rights which were deferred for consideration later during the reform process.39 No special mention was made of coastal water as it had only just been integrated into the resource management law reform process by the government.40

Directions for Change concluded by offering four models for the new legislation, “... to stimulate discussion and invite feedback.”41 The extensive consultation which followed on its policies and proposals, and on those put forward by the later document People, Environment, and Decision-Making,42 is the central feature of this second phase in the law reform process.43

32 Directions for Change supra n 20, 13. “Spillover effects” were defined (at 37) as existing “... when effects are imposed on others who are not involved in the decision making or transaction ...”; thus, they may also be termed “externalities.”
33 Directions for Change ibid 26.
34 Directions for Change idem.
35 Directions for Change supra n 20, 26.
36 Directions for Change ibid 17.
37 Directions for Change supra n 20, 17-8.
38 The group continued that this meant that such interests could “… be provided for only indirectly through the terms and conditions on rights held by other water users [making it] difficult for people to know what was provided for, so the issues [had to] be presented and considered each time a water right [was] applied for” (idem).
39 Directions for Change supra n 20, 18.
40 Directions for Change ibid 19.
41 Directions for Change supra n 20, 32. The four models are described in Palmer supra n 3, 415.
43 Palmer (supra n 3, 10-11) notes, in respect of Directions for Change, that “[e]xtensive consultation proceeded on this document, and public meetings were held all over New Zealand, together with extensive working meetings with interested and affected groups. Seminars were provided for the media. Despite the fact that the process was so open and the consultation extensive, [resource management law reform] never took off as a political issue. It was a holistic reform which concerned matters of considerable complexity,
2. People, Environment, and Decision Making

*People, Environment, and Decision Making* envisaged one law (the “Resource Management Planning Act”) to cover functions at the time falling under the Town and Country Planning Act, the Water and Soil Conservation Act, the Soil Conservation and Rivers Control Act and various pieces of mining legislation.\(^{44}\) It was proposed that this new Act refer to the Treaty of Waitangi\(^ {45}\) and that it “... recognise that costs as well as benefits should be considered and that no one value should be overriding in the planning process.”\(^ {46}\) Environmental quality, ecosystem values, the needs of future generations and sustainable development were accepted as values whose possible inclusion should be further considered.\(^ {47}\) It was suggested that the Ministry for the Environment be given overall responsibility for administering the Act.\(^ {48}\)

Proposals as to the appropriate roles of the different levels of government were made,\(^ {49}\) and regional government was identified as potentially responsible for water, soil and geothermal resources; natural hazards mitigation; regional aspects of hazardous substances management; pollution control; and, importantly, the development of integrated policies for the management of land, water and air resources and for pollution control. Different responsibilities were suggested for territorial government, though it was emphasised that this fragmentation of functions should not lead to fragmented resource management, since regional and territorial authorities would be required to take an integrated approach to resource management.\(^ {50}\)

\(^{44}\) *People, Environment, and Decision Making* supra 42, 18.

\(^{45}\) Note the general discussion on the need for government to take a more active stance on Treaty issues, for there to be more active involvement of iwi in decision-making and for legislation to protect Maori cultural and spiritual values, *People, Environment, and Decision Making* ibid 23-4.

\(^{46}\) *People, Environment, and Decision Making* supra n 42, 18.

\(^{47}\) *People, Environment, and Decision Making* ibid 18. Note the two definitions for “sustainable development” put forward at 19: “... the use of resources and the environment for the greatest economic and social benefits today, without damaging the prospects for their use by future generations ...” and “... recognising ecological limits and using the environment in such a way that it can continue to support us now and in the future.”

\(^{48}\) *People, Environment, and Decision Making* supra n 42, 21-2.

\(^{49}\) *People, Environment, and Decision Making* ibid 23-25.

\(^{50}\) *People, Environment, and Decision Making* supra n 42, 25.
Aiming to achieve a better level of integration in resource management, the document’s authors proposed a network of policy statements and plans, to be made by all levels of government.51

*People, Environment, and Decision Making* also proposed that the new water and soil management regime (in fact very much like the regime established under the Water and Soil Conservation Act) should be designed “... to achieve the greatest benefit to society in respect of water resource allocation (to conservation and development) and water quality.”52 Thus, it was thought that the old ideas of use permits, water conservation orders and quality classification should be continued,53 but that water management should be better integrated with other aspects of resource management,54 and that more protection should be offered to instream values and “... the special interests of the tangata whenua in water ....”55

Because coastal waters had been integrated into the resource management law reform process only shortly before the release of *Directions for Change*, the proposals for reform in this area remain underdeveloped in *People, Environment and Decision Making*. Still open to the possibility of enacting separate coastal legislation,56 the government emphasised the strong public interest in New Zealand’s coastal environment, and the corresponding need to retain at least some central government involvement in its management.57

51 *People, Environment, and Decision Making* ibid 28-32. These proposals culminated in Part V of the Resource Management Act. Note that regional government was envisaged as having a duty to develop broad policy statements, under the ambit of which it could then develop and implement more specific discretionary plans for regional resource management (at 30). Territorial government would make mandatory plans for management issues at the district level (also at 30).

52 *People, Environment, and Decision Making* supra n 42, 36.

53 *People, Environment, and Decision Making* ibid 38-40. The use of the term “permits” was deliberate and in contrast to the terms “rights” as employed in the 1967 Act – “permit” was seen as “... more accurately reflect[ing] the status of these consents. They grant well-defined privileges rather than permanent rights ...” (at 38). It was proposed that such permits should be transferrable in defined circumstances and only if the transfer “... would affect water management values (including instream values) in a positive way” (also at 38). The proposed conservation orders would be identical to National Water Conservation Orders under the 1967 Act – that is, they would serve to protect waters with nationally significant values (at 39). Classification standards would be incorporated into the regional resource management planning scheme proposed.

54 *People, Environment, and Decision Making* supra n 42, 36. Better integration between water management, and land use and pollution control was especially sought, and was to be achieved through planning. It was therefore suggested that a new system of water and soil management planning should be introduced, and that the resulting plans would be “... an integral part of the [proposed] mandatory regional resource management policy statement ...” and could “… contain appropriate statements of regional objectives and standards ... [and] could ... apply the water classification process and describe where national standards are to be applied within the region” (at 37).

55 *People, Environment, and Decision Making* idem. Thus, it was agreed that permits should be available for instream uses (at 37), and that permits should not be granted in perpetuity (this allowing for the future recognition of Maori ownership. While the government did not agree to resolve ownership conflicts, it did agree (at 36) that “… until Treaty of Waitangi claims to water resources have been addressed, the Act should specify that water rights in perpetuity should not be granted.”

56 *People, Environment, and Decision Making* supra n 42, 44.

57 *People, Environment, and Decision Making* idem. In an effort to find a balance between central and local government involvement in coastal management, the document puts forward three models for law reform. The first had central government responsible both for allocating Crown-owned foreshore and seabed
The second phase in the law reform process ended with the publication of *Public Submissions on “People, Environment, and Decision-Making”* in April 1989.  

**IV. Phase Three: The Resource Management Bill**

Phase three was the drafting phase, and ended when the Resource Management Bill (a huge 314 pages long) was introduced into Parliament in December 1989. “[A]ccompanied by an unusually detailed explanatory note and an extensive kit of information,” the Bill was divided into 15 parts and covered land, air, water and Crown owned mineral resources.

1. **Purpose and Principles**

The Bill’s purpose was to “... promote the sustainable management of natural and physical resources.” “Sustainable management” was defined as “... managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people to meet their needs now without compromising the ability of future generations to meet their own needs ... .” Included in the concept of sustainable management were seven considerations:

(a) The efficient management of natural and physical resources:
(b) The maintenance and enhancement of the life-supporting capacity of the environment:
(c) The use, development, or protection of natural and physical resources in a way which provides for the social, economic, and resources, and for controlling the spillover effects from development. The advantage of this option would be a more integrated approach to coastal management, and the disadvantages would be that “... it might not deal so well with the linkages between coastal management and other aspects such as land use and water and soil planning ...” and that “[t]his option might be seen to run counter to the rationale behind local and regional government reform, that decisions should be made by accountable and directly elected bodies, close to the community affected by decisions” (at 46). The second option left central government with only the first of these functions; regional and territorial government would manage spillover effects (again at 46). Under the third option regional government would manage both aspects of coastal management (but “... subject to national policies that might be set down in legislation or defined by central government by other means,” again at 46).

59 Palmer supra n 3, 416.
60 Crown owned minerals were subsequently removed and made the subject of separate legislation (the Crown Minerals Act 1991).
61 The Select Committee on the Bill described this as the “... overriding purpose ...” of the Bill – (1991) *New Zealand Parliamentary Debates* 3425 (14 August 1991) – and as representing a commitment to “... a long-term and holistic approach to resource management,” see the *Report of the Committee on the Resource Management Bill* (August 1990) I.24A, 7. Note that the term used is “sustainable management” and that the decision to avoid the term “sustainable development” (as used in *Directions for Change and People, Environment, and Decision Making*) was apparently deliberate and may be taken to reflect an attempt to avoid any pro-development bias in the Bill (this according to a comment make by the Rt Hon Professor Sir Geoffrey Palmer at a lecture he delivered, entitled *The Resource Management Act and Sustainability*, at the University of Otago on 27 July 1992).
cultural needs and opportunities of the present and future inhabitants of a community:
(d) Where the environment is modified by human action, the adverse effects of irreversible change are fully recognised and avoided or mitigated to the extent practicable:
(e) The use, development, or protection of renewable natural and physical resources so that their ability to yield long term benefits is not endangered:
(f) The use or development of non-renewable natural and physical resources in a way that sees an orderly and practical transition to adequate substitutes including renewable resources:
(g) The exercise of kaitiakitanga which includes an ethic of stewardship.

Thus, the Bill reaffirmed the government’s commitment to the concepts of sustainability and integrated resource management.62 The phrase “... without compromising the ability of future generations to meet their own needs ...” was drawn from international documents,63 which also may have encouraged the adoption of the precautionary approach through the focusing on the effects of activities on the environment. Missing from the Bill in its original form was any mention of intrinsic values – but this was rectified at the select committee stage.64

Immediately following this statement of purpose, the Bill listed nine principles for consideration by all persons exercising functions and powers under the Act. These principles included: the “... maintenance and enhancement ...” of environmental quality;65 the “... actual or potential ...” effects of activities on “... the whole of the environment ...” on people, communities, ecosystems, ecological processes, and on the the “... ability of future generations to meet their needs ...;” the potential costs and benefits of proposals and policies;66 the

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62 Conservation and development are integrated through the frequent and simultaneous use of the three terms “... use, development, or protection ...” and social, economic and environment considerations may be seen as integrated due to the fact that all three kinds of concerns appear in the list of considerations.

63 This phrase comes from the World Commission on Environment and Development Our Common Future (1987) (“the Brundtland Report”) 43. It was, however, considered to be “... too restrictive ...” by the Select Committee, which substituted the phrase “... without unduly compromising the ability of future generations ...” was inserted, see the Committee’s Report supra n 61, 8.

64 The Select Committee, chaired by the Hon Philip Woolastton, received 1,325 submissions (329 oral and 996 written) and “... heard 120 hours of evidence at more than 23 meetings, and ... spent 31 hours in consideration of the Bill” – (1991) New Zealand Parliamentary Debates supra n 61. The Select Committee made three changes to clause 4 (the purpose clause). First, it replaced paras (a) and (b) with a new paragraph reading “... [the maintenance and enhancement of the quality of the environment, including the life-supporting capacity of the environment and its intrinsic values.” Second, it inserted the words “without unduly” in place of the words “now without” in the opening part of sub-clause (2). Finally, the Committee replaced the words “... opportunities of the present and future inhabitants of a community ...” in paragraph (c) with “... opportunities of people and communities...”

65 This paragraph was struck out by the Select Committee, but note that “environment” was widely defined in cl 2 so as to include: “... (a) Ecosystems and their constituent parts including people and communities; and (b) All natural and physical resources; and (c) Those qualities and characteristics of an area which contribute to its pleasantness, harmony, coherence, convenience, and sense of community, and any persons’ reasonable enjoyment of those qualities and characteristics; and (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.”

66 The phrase “... costs and benefits ...” was replaced with “... advantages and disadvantages ...” by the Select Committee to show that non-economic concerns were relevant.
maintenance of New Zealand's special features; the "... relationship of Maori ... with their ancestral lands, waters, sites, and other taonga ...;" "... the potential of ... resources to contribute to the wellbeing of the community ...;" "... the importance of [maintaining] the natural character of the coast[...];" and "... the special relationship between the Crown and te iwi Maori as embodied in the Treaty of Waitangi." While this list tends to emphasise instrumental values it nevertheless incorporates an ecological and precautionary approach.

2. The Role of Government

Under the Bill, all three levels of government (central, regional and territorial) were given planning and allocation functions. Regional government was to bear the primary

67 These features were identified as the "... natural, physical, and cultural features which give New Zealand its character ...," including "... the natural character of the coastal environment and the margins of lakes and rivers ...," "... natural landforms and vegetation ...," and "... heritage values including historic places and waahi tapu ...." Note that the select committee added the words "... and enhancement ..." after "maintenance," and added wetlands, rivers, lakes and landscapes to this list.

68 Clause 6 (as adjusted by the Select Committee). Note also that two more principles were added by the select committee, being: "... [t]he efficient and effective management of natural and physical resources ..." and "... [t]he maintenance and enhancement of public access to and along the public estate, including the coastal marine area, lakes and rivers ...".

69 Instrumental values are recognised, for example, in the references to "... the maintenance and enhancement of the quality of the environment ...," the effects of activities on people and communities, and on the "... ability of future generations to meet their needs ...," "... the relationship of Maori ... with their ancestral lands, waters, sites, and other taonga ...," the "... potential of ... resources to contribute to the wellbeing of the community ...," and the "... maintenance and enhancement of public access to and along the public estate, including the coastal marine area, lakes and rivers ..." (the last as inserted by the Select Committee see n 68 above).

70 Thus, these principles appreciate nature as an organism, and natural processes as interconnected (see the references to the "... whole of the environment ...," ecosystems and ecological processes, and the effects of activities).

71 In so far as planning was concerned, the Bill established two hierarchies of plans. The non-coastal hierarchy was made up of statements of government, regional policy statements, regional plans, and district plans. The coastal hierarchy consisted of New Zealand coastal policy statements, regional policy statements, and regional plans. In general, central government was given "... an overview and monitoring [role], with some areas of direct resource management responsibility ..." (see the explanatory note, and cls 22-25 setting out the functions of the Ministers for the Environment, of Conservation, and of Energy). The Minister for the Environment was to be involved in planning via the discretionary making and issue of statements of government policy, which were to focus on matters of national significance (see cl 41(2) for the identification of situations where the making of a statement was seen as appropriate). The Minister of Conservation was to be responsible for the preparation and implementation of New Zealand coastal policy statements (see cls 46-8), while the Minister of Energy was to prepare minerals programmes (cl 25(2)). "Regional government [was to] have a pivotal role in the new resource management administration [with each region having] to prepare a regional policy statement [setting] out the objectives for managing all resources of the region in an integrated manner" (see the explanatory note and cls 27, and 49-52). Regional government was to be required to make coastal plans, and was to have the power to make other plans (cls 53-7). Territorial government’s functions were described in cl 28 and included making district plans (cls 62-66A). Note also that the Bill empowered the Governor-General to make Orders in Council "[p]rescribing the technical standards relating to use of natural and physical resources and any other technical standards relating to the quality of the environment, or the methods of determining those standards" (cl 390(1)(d)). All references herein relate to the clauses in the Bill after it was returned from the Select Committee.

72 In so far as the allocation of resources was concerned, both regional and territorial authorities were defined as
responsibility for water, soil and geothermal resources and for pollution control,73 and territorial government that for land management and noise control.74 All resource users were to fall under a general duty to “... avoid, remedy, or mitigate any adverse effect on the environment arising from ...” their activities75 and, where those activities involved the discharge of contaminants into the environment, the resource users were also required to adopt the “... best practicable option to prevent or minimise any actual or likely adverse effect on the environment of the discharge ....”76

3. Resource Allocation

The consents system envisaged by the Bill was integrated,77 based on a classification of activities as permitted, discretionary, controlled, non-complying, or prohibited,78 and incorporated environmental impact assessment.79

“consent authorities,” while the Minister for the Environment was empowered to “call-in” and consider applications to use resources in situations of national significance (cl 121), and to recommend the making of water conservation orders (cl 178). The Minister of Conservation was empowered to allow or disallow proposals for activities in the coastal environment (cl 98), and the Minister of Energy was empowered to allocate rights in relation to crown-owned minerals. Note that references herein relate to the clauses in the Bill after it was returned from the Select Committee.

73 Regional government’s special responsibility for water was indicated by cl 27.
74 See cl 28(a)-(d).
75 Clause 16, as amended by the select committee. Note that this duty was to be unenforceable other than by way of an enforcement order or abatement notice. Such orders and notices were not to be obtained against the Crown (cl 3(2)).
76 Clause 13, as amended by the select committee. Note that, in contrast with the general duty under cl 16 (supra n 75) there was nothing in the Bill to indicate that this duty was unenforceable. “Best practicable option” was defined in cl 2 and, in its form as inserted by the select committee, the definition was intended to “... refer more directly to achieving particular outcomes by managing effects rather than regulating the process or equipment employed to meet those outcomes” (see the Committee’s Report supra n 61, 9).
77 Integration was to be achieved by requiring any applicant for a resource consent to furnish a statement “... specifying all other resource consents that ... may [be] require[d] ... in respect of the activity to which the application relates” (cl 75(4)(d)), by allowing consent authorities to hear applications for more than one consent at the same time (cl 88) and by having one consent procedure for all resources covered by the Bill.
78 Classifications were to be made by local authorities in regional and district plans (see cls 58 and 66). Permitted activities were those permitted as of right by a plan, discretionary activities were those which could proceed at the discretion of the consent authority exercised following a public hearing, controlled activities were those with minor effects which could proceed only with approval, non-complying activities were those not provided for in a plan, and prohibited activities were those expressly prohibited in plans. Note that the controlled activities class was inserted by the select committee to cover “... activities ... of minor environmental effect ... appropriate to determine without public involvement,” see the Committee’s Report supra n 61, 14 and cl 80 of the Bill. A further class of “restricted coastal activities” was also available, covering discretionary or non-complying activities which could only proceed with the consent of the Minister of Conservation.
79 The Bill provided that any person who applied for a resource consent should include an assessment of the actual or potential effects on the environment of the proposed activity (cl 75(4)(b)); that, when considering applications, consent authorities should “... have regard to the potential effects of allowing the activity to be undertaken ...” (cl 89(1)); and that no consent would be granted for non-complying activities where this would be contrary to the integrity of the relevant regional or district plans unless the authority was satisfied that “... any actual or potential effects on the environment will be of a minor nature ...” (cl 89(3)(b)).
4. The Bill and Water

Much of the Bill’s water management and allocation scheme was drawn from the Water and Soil Conservation Act although the procedures were made more open, and the relevant principles were extended. Planning in respect of water was to occur predominantly at the national and regional levels, with central government making general statements of policy, and regional government providing overviews, and more detailed plans, aimed at achieving the integrated and sustainable management of water resources. In their plans, regional councils could address the taking, use, damming, or diversion of water; water levels and flows; the discharge of contaminants or water into water; the use of land to maintain and enhance the quality, or to maintain the quantity, of water in water bodies; and activities “... in relation to the surface of water in rivers and lakes ...” Further, rules classifying activities involving water as permitted, controlled, discretionary, non-complying or prohibited, or prescribing that certain waters should be managed for any of the purposes described in the Third Schedule to the Bill, could be included as rules in plans.

Water resources allocation was addressed through clauses 11 and 12, the resource consents regime, and water conservation orders. Clauses 11 and 12 prohibited the taking, use, damming, or diversion of water or heat or energy from water, and the discharge of contaminants or water into water, by any person other than as expressly allowed by a regional plan or a resource consent. Domestic, cultural and fire fighting uses were exempted from this prohibition. If obtained, water permits could be transferred between users and sites in specified circumstances – this was expected to result in a more flexible system. The Bill’s

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80 The Bill did provide for some limited planning by territorial authorities – they were empowered to include “... any matter related to the management of the use, development, or protection of land and any associated natural and physical resources ... including the control of ... [the] actual or potential effects of any use of land ... including ... the control of activities in relation to the surface water in rivers and lakes” (cl 65(1) and the Second Schedule, Part II).
81 Clauses 49 and 53 (and see cl 57 on the contents of regional plans).
82 Second Schedule, Part II, cl 1 (as amended by the Select Committee). Note that the textual reference to “water levels and flows” relates to what was the old “minimum flows” regime from the Water and Soil Conservation Act. As adopted by the Bill, the regime could include “... [the] setting of any maximum or minimum levels or flows of water: ... [and] the control of the range of change, of levels or flows of water ...” - Second Schedule, Part II, cl 1(b).
83 See n 78 above and accompanying text.
84 This is the classification regime which formerly appeared in the Water and Soil Conservation Act. The Third Schedule to the Bill lists eleven purposes for which water can be managed, including aquatic ecosystem, fishery, contact recreation, aesthetic, and cultural purposes. There was also a class for water being managed in its natural state.
85 Clause 11(3) set out the exemptions, including those for “... an individual’s reasonable domestic needs ..., “... [the] reasonable needs of an individual’s animals for drinking water ...” and where the taking or use was in accordance with tikanga Maori.
86 This intention was outlined in the Bill’s explanatory note (at xii). Note that “water permits” were defined in cl 74(d) and their transfer was addressed in cl 117.
procedure for obtaining water permits was intended to be more open and less adversarial,\textsuperscript{88} and the consent authority was expected to consider a much broader range of matters when determining applications.\textsuperscript{89}

Under the Bill, water conservation orders could be made on application by “... any person ...,” and for a wider range of purposes and water bodies than under the Water and Soil Conservation Act 1967.\textsuperscript{90}

5. The Bill and the Coastal Environment

The Bill “...provided for major changes in coastal management, involving rationalisation of existing legislation [, and] aim[ing] to allow for integrated management of the coast in a way that recognises the particular characteristics of coastal environments.”\textsuperscript{91} Responsibilities for the coast were to be shared between the Minister of Conservation and regional councils.\textsuperscript{92} The Minister would be required to make New Zealand coastal policy statements, setting the framework for coastal management,\textsuperscript{93} and regional councils were to prepare regional coastal plans.\textsuperscript{94} In their plans, regional councils would be able to provide for the use, taking, damming and diversion of coastal water;\textsuperscript{95} for the use of the coastal marine area;\textsuperscript{96} and for

\textsuperscript{88} The Bill’s explanatory note (at viii) comments that the new procedure was intended to “... provide[] greater encouragement for mediation approaches.”

\textsuperscript{89} While clause 89 (“matters to be considered”) did not itself list the relevant values and principles (it simply required consent authorities to address relevant policy statements, plans and orders) it seems obvious that authorities were intended to act consistently with the purpose and principles of the Bill as specified in cls 4, 5 and 6 (see nn 61-70 above and accompanying text) and would therefore have had to consider “... a whole range of rather subjective matters such as wild, scenic, and natural characteristics; Maori historical, spiritual, and cultural values; and recreational use ...” (in the words of the Hon John Luxton on the occasion of the reporting back of the Bill by the Select Committee, \textit{New Zealand Parliamentary Debates} supra n 61, 3434).

\textsuperscript{90} Clause 165 allowed “... any person ...” to make an application (recall that under s 20A of the 1967 Act applications could be made only by public or local authorities, statutory bodies or Ministers). Under the Bill, any applications made were to be either rejected outright by the Minister or considered, at first instance, by a special tribunal (cl 166); under s 20B of the 1967 Act only the Minister considered applications for national water conservation orders. The range of purposes for which orders could be made were set out in cls 162A, 171 and 176 of the Bill. The most significant inclusions being the references to “... spiritual, or cultural ...” values, and to characteristics of “... outstanding significance in accordance with tikanga Maori.” The explanatory note to the Bill notes (at xii) that “[t]he ... application of water conservation orders is extended to cover cold and geothermal aquifers and wetlands.” Certainly, the cl 2 definition of “water” is very wide.

\textsuperscript{91} See the Bill’s explanatory note (at xv), and note that cl 5 (setting out the Bill’s “principles”) referred to “[t]he preservation of the natural character of the coastal environment ...” while cls 46 and 53(2) (which prescribed the purposes of New Zealand coastal policy statements and regional coastal plans) referred to the “maintenance” and the “preservation”of the “... natural character [of the coastal environment], without precluding appropriate use and development.”

\textsuperscript{92} Note that “coastal water” was defined in cl 2 as meaning “... seawater within the outer limits of the territorial sea and includ[ing]– (a) Seawater with a substantial fresh water component; and (b) Seawater in estuaries, fiords, inlets, harbours, or embayments ...” (as amended by the Select Committee).

\textsuperscript{93} New Zealand coastal policy statements were compulsory under cl 47 of the Bill.

\textsuperscript{94} Again, these were compulsory under the Bill (see cl 54(1)), and had to be approved by the Minister of Conservation (see First Schedule, Part I, cls 18, 19 and 20).
the discharge of contaminants or water into coastal water.\textsuperscript{97} Rules designating certain uses for
certain waters,\textsuperscript{98} and specifying activities as permitted, controlled, discretionary, non-
complying, prohibited or restricted coastal\textsuperscript{99} could also be included in plans.

The Bill proposed that coastal resources be allocated in much the same way as other water
resources,\textsuperscript{100} but with one significant difference. Where a regional plan designated an activity
as restricted coastal, applications for a coastal permits in respect of that activity were to be
addressed by the Minister of Conservation.\textsuperscript{101}

V. Phase Four: Review by a New Government and Enactment

The Resource Management Bill was reported back to the House by the Select Committee on 14
August 1990. A general election was scheduled for October and, as Palmer notes,\textsuperscript{102}

\[\text{[t]here simply was not time to pass the Bill before Parliament stopped}
\text{in September ... But the Bill was well advanced; the Select Committee}\]

\textsuperscript{95} Second Schedule, Part I, cl 2(b). Note that the term “use” appeared twice in cl 2 of the Second Schedule,
Part I. First it appeared in para (a) in relation to the restrictions in cl 10 (see n 100 below), where it was
described as including recreation, conservation, aquaculture and “... other forms of development ... .” It
appeared again in para (b), in relation to the restrictions in cl 11 (again, see n 100 below) and alongside “... taking, damming, [and] diversion... .”

\textsuperscript{96} The “coastal marine area” was defined in cl 2 (as amended by the Select Committee) as “... that area of the
foreshore or seabed [between] ... the outer limits of the territorial sea ... [and] the line of mean high water
springs.” For present purposes, the most relevant uses described related to “[s]oil conservation and its
relation to maintenance and enhancement of the quality of coastal water... ,” Second Schedule, Part I, cl
2(c)(i).

\textsuperscript{97} Second Schedule, Part I, cl 2(d); this relates to the restrictions in cl 12 (see n 100 below).

\textsuperscript{98} This is the classification regime (see n 85 above), which could be applied to coastal as well as inland water.

\textsuperscript{99} As with inland water (see n 78 above), but note that the designation of “restricted coastal activity” was to
apply only to activities involving coastal water which would have or were likely to have “... significant or
irreversible adverse effects on a coastal marine area; or [which] occur[ed] or [were] likely to occur in an area
having significant conservation value ...” (cl 58(3)). Under the Bill, this designation would have been made
in regional coastal plans at the command of the Minister of Conservation (cl 58(2) and (3)).

\textsuperscript{100} Clauses 10, 11 and 12 would provide the starting point by restricting the uses to which coastal resources
could be put to those allowed by regional plans, resource consents or regulations. Clause 10 restricted the
use of the foreshore and seabed, of land in the coastal marine area, and of the coastal marine area and its
natural and physical resources generally. Clause 11 restricted the use of coastal water (defined in cl 2, see n
92 above) and open coastal water (defined in cl 2 as water “... that is remote from estuaries, fiords, inlets,
harbours, and embayments ...”), and prohibited any person from taking, using, damming, or diverting water
(other than open coastal water), and heat or energy from water other than by the express consent of a
regional plan or resource consent. Exempted from the prohibition were domestic and recreational uses
which were unlikely to have an adverse environmental effect. Further, cl 11 prohibited the taking, use,
damming, or diversion of open coastal water; and the taking or use of heat or energy from open coastal
water where these activities would contravene a rule in a regional plan, and unless a resource consent was
obtained. Clause 12 related to the discharge of contaminants and water into water.

\textsuperscript{101} “Coastal permit” was the term applied to resource consents for the coastal marine area (see cl 74(c)).
Applications for coastal permits were to go the Minister under cl 25(1)(c), and once decided could not be
appealed. The finality of the Minister’s decision was supported by the Select Committee (see its Report
supra n 61, 10) as “... in this situation the Minister [would be] making decisions not only on
environmental effects of proposals but also on use of the Crown estate.”

\textsuperscript{102} Supra n 3, 418.
had made extensive amendments to it .... [It] was read a second time and had reached the Committee of the Whole stage before Parliament went into recess. There was some political manoeuvering about which party should bear the responsibility for not having passed the Bill. The National Party Opposition was not prepared to cooperate in its passage by keeping the parliamentary time taken to reasonable proportions. It said that the Bill needed change. The government sought to blame the Opposition for holding up a carefully worked out and much needed reform. The Bill was held over by resolution of Parliament prior to the election and remained in front of the House of Representatives.

In the general election the Labour government was defeated and the National Party formed the government. The new Minister for the Environment, the Hon. Simon Upton, was a supporter of the general thrust of the [reform] project. He quickly appointed a group of five people chosen for their expertise to review the Bill and make recommendations relating to it ....

The Review Group thus appointed published a discussion paper to stimulate public comment on the Bill in December 1990. In particular, the Group was concerned to find a more certain and workable definition for sustainable management; to place more emphasis on the control of the effects of resource use; to better define intrinsic values; and to address the overlapping functions given to regional and territorial councils in the Bill, the best use of environmental standards and best practicable options, and the appropriateness of letting the

Review Group on the Resource Management Bill Discussion Paper on the Resource Management Bill (December 1990). The Group’s Terms of Reference were: “[t]o review the ... Bill and make recommendations to the Minister for the Environment ..., including draft amendments to the Bill, which ... secure greater certainty as to the Bill’s effect consistent with retaining wide opportunities for public participation and ensuring that resources are used and managed in a sustainable way; ... ensure the Bill provides a suitable framework for the future introduction of economic instruments for resource management; ... are workable.” 160 submissions were received in response.

The Review Group was committed to retaining sustainable management as the “... cornerstone of the Bill...,” but proposed redrafting its definition to “... [s]trik[e] a reasonable balance between present and future requirements for the use, development and protection of natural and physical resources ... [and d]efin[e] the relationship between biophysical and socio-economic considerations.” See the Discussion Paper ibid 4-7.

The Review Group noted (supra n 103, 4) that while “[t]he second major thrust of the Bill [was] to move away from existing statutory requirements calling for “the direction and control” of development and the generally prescriptive pattern of controls affecting land use in particular ... [to] the control of effects on the environment ... this was not reflected in clause 4 as a purpose of the Bill.” The Group proposed that “... the promotion of effective methods to reduce or avoid the adverse effects of activities on the environment ... become the second principal purpose of the Bill.”

The Review Group (ibid 9-10) pointed to cl 5(1)(c) (as inserted by the Select Committee – see n 64 above and accompanying text) which referred to the intrinsic values of the “environment,” and commented that “[g]iven the very broad definition of environment [see n 65 above] we have encountered some difficulties in ascertaining precisely what the intrinsic values referred to might be.” The Group proposed two alternative remedies: (i) to delete cl 5(1)(c), and (ii) to replace the reference to the intrinsic values of the environment with a reference to the intrinsic values of ecosystems. This latter phrase would then be defined as “... ecosystems and their constituent parts that are of substantially natural origin having value in their own right and includ[ing] (a) their biological and genetic diversity; (b) the essential characteristics that determine an ecosystem’s integrity, form, functional and regenerative ability; and (c) mauri.”

The Review Group identified three areas of overlap; the most relevant for present purposes being that in the jurisdiction to control activities in relation to the surface water in rivers and lakes – see supra n 103, 14.

The Bill proposed the use of “best practicable options” in relation to discharges (see n 76 above and accompanying text) and that environmental standards (briefly described at the close of n 71 above) be set by way of regulation. As noted by the Review Group, the best practicable option strategy is one of two means
Minister of Conservation make final decisions in respect of restricted coastal activities. 109

The Review Group's Report was published in February 1991. Significant changes in the areas of purpose and principles, national policy statements, national environmental standards and best practicable options, and Crown-owned minerals allocation were proposed. In relation to the management of the coastal environment, the Group proposed "... that the status quo should remain under the Bill for the present," as any changes "... should be the subject of public debate ... ." 110

In summary, the Review Group advocated that minerals allocation be transferred from the Bill to its own Crown Minerals Bill; 111 and that statements of government policy (to be re-named "national policy statements") 112 should only be made following a public inquiry 113 and that their status relative to regional and district planning documents should be clarified. 114 The Group was concerned about the lack of public process implicit in the Bill's proposal that

used to control environmental quality on a site- or resource-specific basis. The other means comprises environmental standards. The two crucial differences between these two strategies are that while "... BPO could restrict the choice [sic] by the [resource] owner of methods to achieve desired outcomes ... standard setting leaves this choice [sic] available ... ," and that "... BPO involves ... managing ... conflicting objectives by requiring a balance between the financial interests of a developer against the community's environmental quality objectives[, whereas t]he use of standards ... involves only one objective, that of achieving a desired standard of environmental quality which is applicable to all discharges" (ibid at 20). The Review Group also noted (at 18-9) that using while regulations might provide an "... efficient means of standard setting ... ," it also precluded opportunities for public input. It was therefore suggested that a "... requirement that the Minister initiate a full public consultation procedure before making regulations prescribing national standards ... " be inserted into the Bill, or that standards be set in national policy statements (formerly called "statements of government policy") although this "... seem[ed] to fall outside the purpose of [these] statements which [otherwise concentrated] on issues of policy rather than prescriptive regulations." The Review Group (at 22) recognised the benefits and disadvantages of the best practicable option strategy and was concerned to examine the need for, and the best means of implementing, this strategy.

109 See n 101 above and accompanying text. In contrast to the Select Committee, the Review Group was uncomfortable with this feature of the Bill, describing criticism of it as "significant" and commenting that final decision-making powers in relation to resource allocation were "... generally given to the Planning Tribunal under the Bill ... ." The Group was concerned that the "... Minister of Conservation should have such a role, given the Minister's other role as an advocate for conservation under ... the Conservation Act" (Discussion Paper on the Resource Management Bill supra n 103, 35-6).

112 The term "national policy statements" had been used in the Bill as originally drafted, it was replaced with "statements of government policy" by the Select Committee.
113 Report of the Review Group supra n 110, 40 and 152. Thus the Group proposed the insertion of a new clause 42, retaining the old requirements that the Minister "... establish a process that-- (a) He or she considers gives the public adequate opportunity to make submissions on the issue; and (b) Requires a report and recommendation to be made to the Minister..." but also requiring that the Minister appoint a board of inquiry "... to inquire into and report on the proposed national policy statement."

114 As originally, drafted, the Bill did not "... positively require[] [regional and territorial authorities] to give effect to statements of national policy, nor to implement them." The Select Committee had already changed this so that "... every local authority [was required] to consider whether any inconsistency exists between the statement and, if so, to initiate all necessary changes to the relevant regional policy statement or plan" and the Review Group proposed further changes so that "... local authorities ... [would be] required to recognise national policy statements in a more effective manner" (Report of the Review Group ibid 39-40).
environmental standards be set in regulations, and so it suggested a new procedure.115 Also, because it thought that the “... actual and potential disruption [that would be] created by ongoing [best practicable option] duties [was] likely to have a detrimental impact on investment patterns without achieving environmental benefits ...” it advocated that best practicable options “... should not be applied as a general obligation, except in relation to noise.”116 Perhaps most significantly, the Review Group proposed that the Bill’s purpose and principles clauses be re-drafted so that their inter-relationship was clear, and so that concepts appearing therein were better defined.

Almost all of the changes proposed by the Review Group were written into a supplementary order paper117 which was introduced to the House by the Minister for the Environment, the Honourable Simon Upton, on 9 May 1991.118 Once debated, this paper was referred on to the Planning and Development Committee for consideration and further public input. This committee produced yet another Report119 discussing and making recommendations on the findings of the Review Group. The Resource Management Bill was written up into a new supplementary order paper.120 Following debate in the House, the Resource Management Bill was given its third reading on 4 July 1991 and was finally enacted on 22 July 1991. The Act’s purposes and principles, structures and mechanisms are described especially in so far as they relate to water in Chapter 5 to follow.

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115 In New Zealand, parliamentary ratification of regulations is not generally required, and so public scrutiny is not commonly forthcoming. The only exception to this would occur where the Regulations Review Committee, either of its own initiative or following a compliant, conducts an inquiry into particular regulations – in this case, parliamentary (and hence public) attention may be drawn to those regulations. The Review Group proposed (Report of the Review Group supra n 110, 151) first that the Governor General be empowered under the Bill to make Orders in Council “… [p]rescribing ... technical standards relating to the use, development or protection of natural and physical resources including standards relating to…[n]oise emission; …[w]ater quality, level or flow; …[s]oil quality in relation to the discharge of contaminants; … [and s]oil quality in relation to the discharge of contaminants … [and] … [p]rescribing the methods of implementing such standards.” Then the Group suggested that this power should be made subject to a new cl 40C, providing that “[t]he Minister shall not recommend to the Governor General the making of any [such] regulations … unless the Minister has … [e]stablished a process that … [h]e or she considers gives the public adequate time and opportunity to comment on the proposed subject-matter of the regulations; and … [that r]equires a report and recommendation to be made to the Minister on those comments and the proposed subject-matter of the regulations … .” Public notification of the report and recommendation would also be required.

116 See the Report of the Review Group ibid 33. Note also that the “ongoing nature” of the best practicable option originally proposed was created by cl 109(a)(ii), which allowed consent authorities to review the conditions of discharge permits where “… the consent holder can adopt the best practicable option to remove or reduce an adverse effect on the environment which has arisen or is likely to arise from the exercise of the permit, whether or not such effect was foreseen at the time of granting … of the permit.”


118 Prior to introducing the supplementary order paper, the government had “... announced its decisions on the Resource Management Bill in more than 30 pages of press release and explanatory material,” Palmer supra n 3, 419.

119 Report of the Planning and Development Committee on Supplementary Order Paper No 22 (1991) I. 11B.

120 Supplementary Order Paper No 40 (2 July 1991).
Chapter 5
The Resource Management Act 1991 and Water

I. Introduction

The resource management law reform process which began in earnest in 1987 culminated with the enactment of the Resource Management Act 1991. The themes and mechanisms of this Act, as they apply to the management and allocation of inland and coastal water, will be described in this chapter. Chapter 6 will then assess the extent to which the themes which have pervaded the entire history of the development of water law in New Zealand (and which were described in the last part of Chapter 3 above) have been continued by the 1991 Act.

While there may be some argument as to whether or not the 1991 Act is any more conservation conscious or integrated than its predecessors, there is less doubt that the 1991 Act "... has major implications for the ... management of fresh [water,] geothermal water resources ..." and coastal water; not only does it apply new planning mechanisms to water, it also introduces changes to those old planning and allocation mechanisms which are retained. Most importantly, however, the 1991 Act introduces a new purpose and new principles to decision-making and planning for water.

II. Purpose and Principles

The Long Title of the Resource Management Act 1991 provides that it is "[a]n Act to restate and reform the law relating to the use ..." not only of water, but also of land and air. The Act repeals a total of 59 Acts formerly dealing with land, air and water and establishes new and integrated systems for the management and allocation of these three resources. Elsewhere,

1 Section 2(1) of the Resource Management Act 1991 defines "water" as meaning "... water in all its physical forms whether flowing or not and whether over or under the ground ..." and as including "... fresh water, coastal water, and geothermal water ..." "Fresh water is defined as "... all water except coastal water and geothermal water ..."; "coastal water" as "... seawater within the outer limits of the territorial sea ... includ[ing] ... [s]eawater with a substantial fresh water component; and ... [s]eawater in estuaries, fiords, inlets, harbours, or embayments ..."; and "geothermal water" as "... water heated within the earth by natural phenomena to a temperature of 30 degrees Celcius or more; and includ[ing] all steam, water, and water vapour, and every mixture of all or any of them that has been heated by natural phenomena ...".


3 The enactments repealed are listed in the Sixth Schedule and those amended in the Eighth Schedule to the Act. The Seventh Schedule lists the Regulations and Orders revoked by the Act.

4 Integrated resource management was one of the aims of the law reform process discussed in Chapter 4 above – see Chapter 4 nn 50, 51, 54, and 62 for example and accompanying text.
the Act refers to all "... natural and physical resources ..." thus extending its application, for certain purposes, beyond land, air and water. The Act, with some specific exceptions, binds the Crown.

Part II contains what are probably the most significant provisions in the Act. Sections 5, 6, 7 and 8 set out the purpose and principles of the Act. As the Act's planning and allocation mechanisms are described to follow, the fact that all of these mechanisms are linked back to the purpose and principles provisions of Part II will be revealed. These linkages suggest that the concerns and values set out in Part II should provide the focus, and basis, of almost all water management. Part II is so important to this and later discussion that it has been set out in full:

5. **Purpose**— (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
   (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
   (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
   (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems;
   (c) Avoiding, remedying, or mitigating any adverse effects of

5 Section 5, for example, extends the purpose of the Act to all "... natural and physical resources ..." Note that this phrase is defined in s 2 as including "... land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures ... ."

6 Section 4. The exceptions are set out in subs (2)-(5) and the most important is probably that in subs (5) which provides that "[n]o enforcement order, abatement notice, excessive noise direction or information shall be issued against the Crown." Enforcement orders and so on will be described in text to follow.

7 Part II is listed, for example, among the relevant considerations for those making plans and policy statements (see nn 63-71, 99, 109, 116, and 156 below and accompanying text) and for those deciding applications for resource consents (see 201 below and accompanying text). Harris notes, however, that "[t]here is one notable exception to the tying of rule-making and decision-making under the Act to its stated purpose. Water conservation orders, which are provided for in Part IX of the Act, are given their own purpose in the Act "[n]otwithstanding anything to the contrary in Part II" [s 199(1)]. ... However, a close look at the two sections which provide the criteria for the issuing of water conservation orders reveals that these criteria are not significantly different from those provided by section 5 and the remainder of Part II of the Act" B V Harris "Sustainable Management as an Express Purpose of Environmental Legislation: the New Zealand Attempt" (1993) 8 Otago LR 51, 55.

8 As noted in n 7 above, Part II will not (at least directly) form the basis and focus of the exercise of powers and functions under Part IX of the Act, which relates to water conservation orders.

9 Randerson Tin the New Zealand Law Society Seminar Resource Management Act 1991 (1991), 8 notes that "[t]he expression "ecosystems" is not defined but is used in other legislation such as the Environment Act 1986 and the Conservation Act 1987. It will include not only the "invisible" parts of the natural world but also larger flora and fauna such as trees, fish and birds."

10 "Effect" is given its own definition in s 3 of the Act and is said to include "... [a]ny positive or adverse effect; ... [a]ny temporary or permanent effect; ... [a]ny past, present, or future effect; ... [a]ny cumulative effect which arises over time or in combination with other effects— regardless of the scale, intensity, duration, or frequency of the effect, and also includes— [a]ny potential effect of high probability; and ... [a]ny potential effect of low probability which has a high potential impact." Of course, s 5(2)(c) excludes part of this definition be referring only to *adverse* effects.
activities on the environment.¹¹

6. Matters of national importance—In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

(a) The preservation of the natural character of the coastal environment (including the coastal marine area),¹² wetlands,¹³ and lakes¹⁴ and rivers¹⁵ and their margins, and the protection of them from inappropriate subdivision, use, and development:

(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

(e) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

7. Other matters—In achieving the purpose of this Act, all persons exercising powers and functions under it, in relation to the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) Kaitiakitanga:¹⁶

(b) The efficient use and development of natural and physical resources:

(c) The maintenance and enhancement of amenity values:¹⁷

(d) Intrinsic values of ecosystems:¹⁸

(e) Recognition and protection of the heritage values of sites, buildings, places, or areas:

(f) Maintenance and enhancement of the quality of the environment:

¹¹ As with the Resource Management Bill, the Act defines "environment" very widely, and as including: "...
(a) Ecosystems and their constituent parts, including people and communities; and (b) All natural and physical resources; and (c) Amenity values; and (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters" (s 2(1)).

¹² The "coastal marine area" is defined as "... the foreshore, seabed, coastal water, and the air space above the water ..." between "... the outer limits of the territorial sea ... [and] mean high water springs ..." (s 2(1), as amended).

¹³ Section 2(1) provides that "wetland" includes: "... permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions ..."

¹⁴ Section 2(1) defines "lake" as "... a body of fresh water which is entirely or nearly surrounded by land ..."

¹⁵ As defined in s2(1) (as amended), "river" "... means a continually or intermittently flowing body of fresh water, and includes a stream and modified watercourse but does not include any artificial watercourse (including an irrigation canal, water supply race, canal for the supply of water for electricity power generation, and farm drainage canal) ..."

¹⁶ "Kaitiakitanga" is defined in s 2(1) as "... the exercise of guardianship; and, in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself ..."

¹⁷ Amenity values are stated to be "... those natural or physical qualities and characteristics of an area that contribute to people’s appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes" and are therefore an instrumental value of nature.

¹⁸ "Intrinsic values" is defined, in relation to ecosystems, as "... those aspects of ecosystems and their constituent parts which have value in their own right, including—(a) Their biological and genetic diversity; and (b) The essential characteristics that determine an ecosystem’s integrity, form, functioning, and resilience ..." (s 2(1)).
Any finite characteristics of natural and physical resources: 
(h) The protection of the habitat of trout and salmon.

8. Treaty of Waitangi—In achieving the purpose of this Act, all persons exercising powers and functions under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Before addressing the finer details of these provisions, it is appropriate to make some general points about Part II as a whole, and its significance for the management and allocation of water.

1. Part II and Water: General Comments

There are several remarkable aspects of Part II’s purpose and principles provisions when it comes to water. First, the express listing of relevant considerations for decision-making is itself remarkable. While the Water and Soil Conservation Act was “... profuse in its long title ... [it did] not specify any list of relevant considerations for deciding applications [for rights to use water] ...,” or for many of the other decisions which could or had to be made under that Act. Part II leaves little doubt as to what is relevant: any matters specifically listed at the point of empowering the decision-making and the matters contained in Part II. The most important of these matters is, of course, sustainable management. This is now the purpose which must be promoted in almost all decision-making about water.

Also, the matters in sections 6 and 7 must, respectively, be “... recognise[d] and provide[d] for ...” and taken into “... particular regard ...” by decision-makers. It is to be noted that these matters include the “... [i]ntrinsic values ...” of ecosystems – this being a value unrecognised by the 1967 Act. Sections 6(e), 7(a) and 8 ensure that, for the first time, Maori values and the principles of the Treaty of Waitangi are also relevant at the express direction of the legislature.

19 The express listing being referred to is that contained in Part II, but of course additional mandatory relevant considerations for the Act’s various decision- and rule-making functions are often prescribed.

20 Keam v Minister of Works and Development [1982] 1 NZLR 319, 322 per Cooke J. Not that this was necessarily a bad thing, Cooke J pointing out the flexibility which this implied.

21 The Long Title of the 1967 Act focused on instrumental values even when it came to conservation – see Chapter 3 nn 396 and 505 above and accompanying text.

22 The Water and Soil Conservation Act 1967 made no express reference to the Treaty of Waitangi, its principles, or Maori values in general. This failing was taken rather literally by the Planning Tribunal, whose refusal to consider Maori spiritual values in water was challenged in the High Court in Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188. In that case, Chilwell J was asked whether the phrase “... the interests of the public generally ...” in s 24(4) of the Act could be read as including such spiritual values. The Judge held that, in fact, such values could not be excluded, having been rendered relevant by the 1967 Act’s connection with the Town and Country Planning Act 1977 (the two were described as being part of the same statutory scheme) which made express reference to the relationship of Maori with their ancestral land, and by the general context against which the statute had to be interpreted (the Treaty being described as “... part of the fabric ...” of New Zealand society). In this
2. Section 5: Finer Details

The purpose of the Act is to “promote” sustainable management. To some, the word “promote” implies a “... positive statement requiring action to be taken” but to others it is something of a sidestep, suggesting that “... sustainable management is an ideal, or goal, that the Act aspires to, but that its achievement is not mandatory at all costs.”

Section 5(2), which defines “sustainable management” for the purposes of the Act, breaks down into at least two parts. This first part (which Fisher describes as “the management function”) is delineated by the phrase “... managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people to provide for their social, economic, and cultural wellbeing and for their health and safety ... .” These words reveal a legislative intent to promote the integrated management of natural and physical resources so as to meet current human needs and interests. Fisher argues that:

It is particularly significant that these activities [use, development, and protection] are linked by the word “and.” This means quite simply that natural and physical resources are to be used, developed, and protected simultaneously. ... Neither use nor development nor protection is given priority over the other. Each is equally important and the activity of resource management is directed towards simultaneous management of each of these three objects.

This simple proposition is however qualified by the words beginning “in a way or at a rate.” The references to “people and communities” restricts the activity of management to the achievement of human purposes: in other words it is an anthropocentric function. The further qualification is the reference to “social, economic, and cultural well-being” and “health and safety.” The use of the word “their” clearly refers back to the humans who are the centre of this activity. ... Thus, environmental and ecological considerations form no part of the objectives to be achieved by engaging in this activity of managing the use, development, and protection of resources. This is understandable in the context of ... “use” and “development” [but so far as “protection” is concerned, it means .. that resources are protected not for their own sake but for the sake of their potential use and development by people and communities.

This anthropocentric bias which directs the first part of section 5(2) is seemingly balanced

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24 Harris supra n 7, 17. This is an issue which will be re-addressed in Chapter 8 to follow.
25 Fisher supra n 23, 11-12.
26 Both the needs and interests of people now are to be facilitated; compare this with s 5(2)(a), which relates only to the needs of people in the future.
27 Fisher supra n 23, 12.
28 The matters in paragraphs (a)-(c) at least balance against those in the first part of s 5(2) – see Chapter 8.
by paragraphs (a), (b) and (c) which contain both eco- and anthropocentric concerns. A few preliminary comments on each of these three paragraphs are made to follow, though the main discussion on their meaning and application is contained in Chapter 8 below.

a. Paragraph (a)
According to paragraph (a), sustainable management implies that the “potential of ... resources to meet the reasonably foreseeable needs of future generations ...” should be “[s]ustain[ed].” In so far as renewable resources (such as water) are concerned, this probably means that the resources may be used but only at a rate which permits regeneration. Non-renewable resources (which on a steadfastly literal interpretation cannot be both used and sustained) will probably be able to be exploited – subject to the development of a “... depletion policy ... [which] sets out the decisions society makes over whether to use the resource, and if so over what time frame and at what rate of depletion. The transition to other materials ... should also be covered.”

It is important to note that paragraph (a) was restricted by the Review Group to the “... reasonably foreseeable needs of future generations ... .” According to the Group, this test32 is intended to place some limit on the extent to which consideration of the needs of future generations will be required. That limit will be based on a reasonable assessment of the anticipated needs of future generations for natural and physical resources having regard to the current state of knowledge and projected future requirements. There is no reason why this should not include prudent provision for unforeseen factors and the importance of retaining options for future generations. ... The test is likely to be applied in a way which will have regard not only to probable consequences, but also to possibilities or contingencies which should be allowed for in making the required assessment. ... The use of the reasonable foreseeability test will allow decision makers to apply the principle of sustainable management in a flexible manner depending on the subject matter while maintaining a practical limit on the extent of consideration of the needs of future generations. This should enable a reasonable and balanced assessment of inter-generational needs without imposing serious evidentiary

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29 Paragraph (a) almost certainly means “... the reasonable foreseeable needs of future [human] generations ...” and thus has an anthropocentric bias. Paragraph (b) probably covers both anthropo- and ecocentric considerations, though this ultimately depends on which lives (human, or all) air, water, soil, and ecosystems must be safeguarded to support. The range of concerns covered by paragraph (c) is determined by the definition of “environment,” and therefore would seem to cover both eco and anthropocentric values (see n 11 above).


31 Again, see Cronin idem. This notion seems consistent with Randerson’s rather more vague argument that para (a) “... will be assessed in a reasonably broad way to ensure that as far as practicable, ... non-renewable resources are not used in such a way as to compromise the ability of future generations to meet their own needs ...” (idem).

difficulties in the conduct of litigation.

b. Paragraph (b)
Like paragraph (a), paragraph (b) must be interpreted in a realistic, and not overly literal, fashion. Obviously, the legislature did not intend that paragraph (b)’s enjoinder to “... safeguard the life-supporting capacity of air, water, soil, and ecosystems ...” be interpreted so that “... draining a puddle ...” or “... squirt[ing] .. fly-spray ...” into a room would breach section 5. Instead, paragraph (b) should be interpreted more broadly; Randerson’s approach seems more balanced:

It is submitted that ... [paragraph (b)] does not mean that a development would be unable to proceed in the event that there was some reduction of the life supporting capacity of air or water in the immediate vicinity, or even that some flora or fauna were destroyed as a result of a development. It is likely to be interpreted as requiring a broad assessment of life supporting capacity generally. For example, if a development caused some localised disturbance to water quality in the coastal zone and also resulted in the destruction of certain benthic biota in the vicinity, the question is likely to be whether there is any general reduction in the life supporting capacity of the water or ecosystems as a result of the development.

c. Paragraph (c)
This paragraph represents the 1991 Act’s commitment to an approach commonly referred to as the “precautionary” approach. The essence of this approach is that resource management and allocation should focus on the effects of activities on the environment. This concern with the effects of activities was thought to be so important by the Review Group that it initially proposed that it comprise the second principal purpose of the Act.

According to paragraph (c), the adverse effect of activities on the environment should be “... avoid[ed], remed[ied], or mitigat[ed] ...” Clearly, this “... implies that activity may be permitted even though it has an adverse effect ... on the environment.” There are, however, limits to this. Even though under paragraph (c) activities with adverse environmental effects will probably be able to proceed, it is submitted that if an activity has effects which breach paragraphs (a) and (b) then these will not be tolerated. The three paragraphs are cumulative, having been joined with the word “and.” Further, it seems logical that, where practicable, adverse effects should be avoided, as opposed to merely mitigated or remedied. Only where

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33 These two activities are used by Harris (supra n 7, 23) to support his argument on the interpretation of the word “while” which connects the first and second parts of s 5(2). With respect, they fail to support that argument principally because they miss the point and meaning of para (b). For more on the “while” argument, see text to follow in this chapter, and in Chapter 8.
34 Randerson supra n 9, 6-9.
35 See Chapter 4 n 105 and accompanying text.
36 Randerson supra n 9, 6-9.
avoidance is not possible or practicable should the mitigation or remedy of effects suffice.

An important issue remains in the extent to which adverse effects will have to be avoided, remedied, or mitigated. Randerson suggests that the judiciary might "... place a "practicability" test on this provision or a test of "reasonableness ...," adding that "... an inability to mitigate adverse effects to an acceptable level is likely to result in [a refusal to allow the activity to proceed]."37

d. "While"
As yet unaddressed, the word "while" which joins the first and second parts of section 5(2), has been the subject of much legal debate.38 At issue is the relationship between managing resources so as to provide for human needs and managing resources so as to meet ecological constraints. As Harris explains, interpreted one way, "while" will direct that "... developmental interests in the first part [of section 5(2)] may in some circumstances override the sustainability interests in the second part ..." but interpreted differently, "while" will ensure that "... the use, development and protection provided for in the first part of s[ection] 5(2) may only take place if the environmental parameters (a), (b) and (c) are satisfied."39 Since the interpretation given to "while" will therefore inevitably affect the extent to which the ecological factors provided for in paragraphs (a)-(c) are recognised, it impacts on the "conservation consciousness" of the 1991 Act as a whole. This issue is the subject of Chapter 8.

The last word on the interpretation of section 5 (subject, of course, to Chapter 8) goes to Palmer40

[The inevitable complexity of the sustainable management definition is likely to require numerous judicial interpretations, mostly related to particular facts. The nature of the concept almost defies any simplification of the standard or objectives which have been enacted.

3. Sections 6, 7 and 8

a. Questions of Priority
The "... procedural and deliberative ..."41 duties imposed by sections 6, 7, and 8 fall on "...
all persons exercising functions and powers under [the Act], in relation to the use, development, and protection of natural and physical resources.”

The extent of the obligation varies from section to section: the matters in section 6 must be “... recognise[d] and provide[d] for ...”; the matters in section 7 given “... particular regard ...”; and the matters in section 8 “... take[n] into account ...”. These words tend to suggest a certain priority as between the three sections. Of least priority are the matters in s 7, and, while it is clear that the matters in both section 6 and section 8 are of greater priority, it is not clear which, out of these latter two, carries more weight. The Waitangi Tribunal recently found that the priority given to s 8 is insufficient, and recommended that it be amended so as to read:

“... in achieving the purpose of the Act all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi.”

The matters contained in all three of sections 6, 7, and 8 are all “... subservient ...” and “... ancillary ...” to the purpose of sustainable management. This is made clear by the legislative statement that the matters in each of the three sections are to be considered “[i]n achieving the purpose of this Act ...”. This emphasises that “... [these] sections are to be interpreted and applied as an integral part of achieving the overall statutory purpose defined by

42 That the matters in s 7 have less priority that those in s 8 is supported the judgment of Somers J in R v CD [1976] 1 NZLR 436 at 437. Addressing the words “... shall have regard to ...” (as contained in s 5 of the Costs in Criminal Cases Act 1967) the Judge said: “I do not think [the words “shall have regard to”] are synonymous with “shall take into account.” If the appropriate matters had to be taken into account, they must necessarily in my view affect the discretion of the decision-maker but it is clear ... that the matters to be regarded are not to limit or affect that discretion. I think the legislative intent is that the decision-maker has complete discretion but that the ... matters, or as many as are appropriate, are to be considered.” These words appear applicable to ss 7 and 8 of the 1991 Act, despite the inclusion of the word “particular” in s 7. This word simply affects the extent to which the s 7 matters must be considered, and not the issue of whether or not, once considered, they must necessarily affect the exercise of discretion by the decision-maker. As for the priority between ss 6 and 7, this can be supported by a plain reading of the two phrases “... shall recognise and provide for ...” (which, like “... shall take into account ...” would seem to require that the decision-maker’s discretion be “affect[ed]”), and “... shall have particular regard to ...”. That, on a plain reading, “... shall recognise and provide for ...” is stronger than “... shall have regard to ...”, is affirmed by McMullin J in Environmental Defence Society v Mangonui County Council [1989] 3 NZLR 257; (1989) 13 NZTPA 197, 216. The priority as between ss 6 and 7 is also supported by the former’s internal reference to “... matters of national importance ...”. Section 7 contains no reference to the national interest. Also note that the marginal note to s 6 describes it as being about “[m]atters of national importance,” while that to s 7 refers to “[o]ther matters.” While, as a general rule, marginal notes are not part of an Act (see the Acts Interpretation Act 1924, s 5(g)), they may sometimes be used to support “... a description of the subject of a section, ... which would naturally occur to a reader without the aid of a marginal notes” (Daganayasi v Minister of Immigration [1980] 2 NZLR 130, 141 per Cooke J).

43 The sufficiency of the priority given to s 8 was measured according to its consistency with the principles of the Treaty, see Waitangi Tribunal Ngawha Geothermal Resource Report (Wai-304, 1993) 147.

44 Randerson supra n 9, 10.

45 Fisher supra n 23, 13.
s[ection] 5."

The priority as between the matters listed within each of sections 6 and 7 is, on the other hand, not addressed by the legislature. These, therefore, "... may compete among themselves ... ."

b. The Matters Therein

Both section 6 and section 7 reflect a range of values: instrumental, ecological and intrinsic. Environmental use is addressed in sections 6(d) and 7(b), and environmental protection in sections 6(a), (b), (c), and 7 (c), (e), (f) and (h). Tikanga Maori underlies sections 6(e) and 7(a) and the significance of section 7(d) (which refers to the "[i]ntrinsic

47 Per Cooke P in Environmental Defence Society supra n 42, 203 in relation to ss 3 and 4 of the Town and Country Planning Act 1977, but seemingly applicable here.
48 Section 7(b) refers to the "... efficient use and development of natural and physical resources ... ." Fisher (supra n 23, 15) compares the phrase "... use and development ..." from s 7(b) with the phrase "... use, development, and protection ..." from s 5, noting that "[t]he absence of the word “protection” and the incorporation of the adjective “efficient” place a quite different perspective upon the values identified in s 7 compared with the statement of purpose in s 5."
49 This section speaks of the "... preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development ... ." Randerson (supra n 9, 11) comments that this paragraph, "... has strong parallels to section 3(l)(c) [of the Town and Country Planning Act 1977]. The significant and regrettable change made by the legislature has been the abandoning of the [word] “unnecessary[”] ... and its replacement with the word “inappropriate.” ... [T]his change ... undoubtedly weakens the current coastal protection provisions. Difficulty will arise in the assessment of whether a subdivision use or development will or will not be appropriate in any given circumstances. Some guidance will be obtained from the reference to the preservation of the natural character of the coastal environment. Clearly, a development which does not preserve the natural character of the coastal environment may well be inappropriate. Moreover, any such development would be required to meet the overall purposes of the Act as expressed in section 5. However, the need to justify the necessity for a development in the coastal zone now appears to have been abandoned" (emphasis added). Note also the inclusion of wetlands.
50 This section, which refers to the "... protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development ..." has been called the "Remarkables" clause; see Randerson idem.
51 This rather surprising reference was included in the Act as a direct result of the "Herculean" efforts of acclimatisation societies – the Right Honourable Geoffrey Palmer (as he then was), from a speech given to the Institution of Professional Engineers and Royal Society of New Zealand Conference (17 August 1988).
52 This section, which refers to the "... relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga ..." builds on s 3(g) of the Town and Country Planning Act 1977 (which referred only to ancestral lands). In the leading case on s 3(g) (Environmental Defence Society, supra n 42, 203-204, per Cooke P) the Court of Appeal adopted the ruling of Holland J in Royal Forest and Bird Protection Society v W A Habgood Ltd (1987) 12 NZTPA 76 to the effect that "... [l]and which was the original home of a Maori tribe ... may still be ancestral land although it has been sold to Europeans." In the Court of Appeal case, Cooke P continued: "[I]f, even after sale, some special Maori relationship with the land has continued down the generations, that is a factor to be weighed ... . The weight to be given to it may well vary greatly according to the facts. ... But the Courts must of course not allow the Maori safeguard to become a dead letter." The application of this case to s 6(e) of the 1991 Act is supported by its expansion to include, especially, water (there being no possibility that any water would today remain in the legal possession of any person, Maori or pakeha). Note also that the Waitangi Tribunal has repeatedly stated that “taonga” includes both physical and metaphysical treasures – see, for example, Report of the Waitangi Tribunal on the Orakei Claim (Wai-9, 1987) 134, the Kaituna
values of ecosystems ...”) has already been indicated.\textsuperscript{54} Section 7(g)’s reference to the “... finite characteristics of natural and physical resources ...” is ecologically appropriate, but perhaps not entirely necessary in light of section 5(2)(a) and (b).

The significance of section 8 in so far as water law is concerned has already been noted.\textsuperscript{55} Its reference to the “... principles of the Treaty of Waitangi ...” is not, however, new in the general context of New Zealand law\textsuperscript{56} and some useful case law exists as to the meaning and application of the term.\textsuperscript{57}

The residue of the Act may be described as composed principally of two inter-related systems: the planning system and the resource allocation system. The planning system determines how, why, and when planning should occur in respect of New Zealand’s natural and physical resources, including inland and coastal water. The resource allocation system establishes mechanisms to distribute resources to those who wish to use, develop or protect them. A description of these two systems.

III. The Planning System

1. Introduction

The planning system originally proposed in the Resource Management Bill was, in the main, enacted. In essence it consists of two hierarchies (coastal and non-coastal) of policy statements and plans made by the three levels of government. Detached from these two hierarchies, but still provided for in Part V of the Act, are national environmental standards.

2. National Environmental Standards

Section 43 of the 1991 Act empowers the Governor-General to make Orders in Council “[p]rescribing technical standards relating to the use, development, and protection of natural


\textsuperscript{53} See n 16 above and accompanying text.

\textsuperscript{54} See n 21 above and accompanying text.

\textsuperscript{55} See n 22 above and accompanying text.

\textsuperscript{56} The first such reference was made in the \textit{State Owned Enterprises Act} 1986, s 9. Subsequently, Acts including the \textit{Environment Act} 1986, Long Title; the \textit{Runanaga Iwi Act} 1990, s 4; the \textit{Conservation Act} 1987, s 4; the \textit{Education Act} 1964, s 178 (as amended in 1990); the \textit{Foreshore and Seabed Endowment Revesting Act} 1991, s 3; and the \textit{Crown Minerals Act} 1991, s 4 have also employed the term.

\textsuperscript{57} Such cases and reports as \textit{New Zealand Maori Council v Attorney-General} [1987] 1 NZLR 641; \textit{Attorney-General v New Zealand Maori Council} [1991] 2 NZLR 129; \textit{New Zealand Maori Council v Attorney-General} [1992] 2 NZLR 576; and the \textit{Orakei Report} (supra n 52) should prove helpful.
and physical resources, including standards relating to ... [c]ontaminants ... [and w]ater quality, level, or flow ... .” Although simply a type of regulation, these standards cannot be set other than by an open and public process. National environmental standards may be applied nationally or regionally, generally or specifically.

3. A Hierarchical and Internally Consistent Structure

At the top of the non-coastal hierarchy of policy statements and plans are national policy statements. Below are regional policy statements, regional plans (which may contain regional rules) and then district plans (which may contain district rules). At the top of the coastal hierarchy are New Zealand coastal policy statements. Below are regional policy statements and then regional coastal plans (which may contain rules). The relationship between all of these planning mechanisms is prescribed, both expressly and impliedly, in the Act. The so-called “test of consistency” and section 55 both directly address the relationship between the planning mechanisms.

a. The Test of Consistency

This test comprises a series of sections, and provides that

a district plan shall not be inconsistent inter alia with a relevant regional plan, regional policy statement, coastal policy statement, or national policy statement...; a regional plan not inconsistent inter alia with a relevant regional policy statement, coastal policy statement or national policy statement...; and a regional policy statement not inconsistent inter alia with a coastal policy statement or a national policy statement...

Any disputes whether there is any such inconsistency are resolved by the Planning Tribunal under s 82.

b. Section 55

Section 55 “... contains the prescriptive requirements for local authority recognition of national

58 Section 43(1) defines national environmental standards as “regulations” and Fisher addresses the significance of this definition, supra n 23, 7-8. Fisher says that “[t]his means that they are directly enforceable as a matter of law in accordance with any of the enforcement mechanisms available under the legislation.” The procedural requirements associated with national environmental standards are set out in s 44, which provides that “[t]he Minister shall not recommend to the Governor-General the making of any regulations under s 43 unless the Minister has—(a) Established a process that—(i) The Minister considers gives the public adequate time and opportunity to comment on the proposed subject-matter of the regulations; and (ii) Requires a report and recommendation to be made to the Minister on those comments and the proposed subject-matter of the regulations; and (b) Publicly notified that report and recommendation.” Section 43 is stated to be subject to s 44. Thus, s 44 reflects the concerns of the Review Group discussed in Chapter 4 n 115 and accompanying text.

59 Section 360(2) (which applies by virtue of s 43(2)) provides that regulations may apply “... generally or ... from time to time ..., within any specified district or region ... or within any specified part of New Zealand, or to any specified class or classes of persons.”

60 This is the term used by Fisher supra n 23, 9.

61 Fisher idem, and see ss 75(2)(a) and (c), 67(2)(a) and (c), and 62(2).
policy statements” and “... amounts in practical terms to an obligation upon the local authority to implement any national policy statement in the preparation of their policy and planning instruments.”

c. The Nature and Purpose of Policy Statements and Plans

The hierarchy of the various statements and plans is also apparent from their purposes. National policy statements are “... to state policies on matters of national significance that are relevant to achieving the purpose of [the] Act.”

New Zealand coastal policy statements also have general purpose with national application: “... to state policies in order to achieve the purpose of this Act in relation to the coastal environment of New Zealand.”

The ambit of regional policy statements is reduced, but their purpose remains general – they aim to “... achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.” Regional plans and regional coastal plans have more specific purposes: regional plans are to “... assist a regional council to carry out any of its functions in order to achieve the purpose of this Act” and regional coastal plans are to “... assist a regional council, in conjunction with the Minister of Conservation, to achieve the purpose of this Act in relation to the coastal marine area of that region.”

District plans have a similar purpose to their regional counterparts, and both district and regional plans can contain detailed rules. The trend is from general policy statements with national application to detailed plans with local effect.

There is another highly significant point to note in relation to the purposes of plans and policy statements, and the structure of the Act’s planning system: all expressly refer to the purpose of the Act. These references, and those contained in the sections which set out the matters which the Ministers and local authorities must consider when preparing policy statements and

62 Fisher supra n 23, 9. Subsection (1) provides that, when a local authority receives either a new or amended national policy statement or notice that a statement has been revoked, it must (in so far as the statement “... deals with any matter relevant to the exercise of a local authority’s functions, powers, or duties under [the] Act ...”) initiate “... all necessary changes ...” to its own policy statements and plans so as to remove any inconsistencies or conflicts which may have arisen with the new, amended, or revoked national policy statement; and “... take all such other action as may be necessary in order to implement the national policy statement as so issued or changed ....” The local authority is also required to give public notice of its decision in relation to the statement, amendment or revocation, and of the reasons for its decision (s 55(2)).

63 Section 45(1).
64 Section 56.
65 Section 59, emphasis added.
66 Section 63(1).
67 Section 63(2).
68 See s 72.
69 Regional plans may contain detailed rules prohibiting, regulating and allowing activities (s 68(1)(b)), relating to water quality (s 69), or to the discharge of contaminants into water, or onto land in circumstances which may result in a contaminant entering water (s 70).
plans, serve to emphasise the place of Part II of the Act at the pinnacle of the planning hierarchies. Thus, Fisher asserts that:

[t]he structural pattern that emerges from ... the relationship between Part II of the Act, the statement of purpose in particular, and the other resource management instruments provided by the legislation is important. The purpose of the Act as directly enacted by Parliament plays an articulated role in the preparation of all policy, planning and regulatory instruments. ... The relationships among the range of resource management instruments ... are themselves described clearly and precisely. There is an unambiguous hierarchy. At the apex of the system is the purpose of the Act. Every other instrument is dependent upon it, driven by it, prescribed by it, or otherwise founded upon it. This is unique.

4. Planning and Water: General Comments

Under the 1991 Act, management planning for inland and coastal water will occur predominantly at national and regional levels of government, with territorial government being concerned mainly with land.

The water management planning system set up under the Resource Management Act is both more comprehensive, and more prescriptive than that formerly provided for by the Water and Soil Conservation Act 1967. Under the old Act, as originally enacted, planning could be undertaken by the National Water and Soil Conservation Authority, and by regional water boards. With the abolition of the Authority in 1983, planning at the national level ceased. The 1991 Act re-introduced this feature in its efforts to achieve better integration in resource management. Since regional and district planning must be consistent with that of central government, greater cohesion in management planning for water should be attainable on a nationwide basis. Furthermore, by placing management planning for coastal water under the

70 In relation to: national policy statements, see s 51(1); New Zealand coastal policy statements, see ss 57(1) and 51(1); regional policy statements, see s 61(1); regional plans (and regional coastal plans), see s 66(1); and district plans, see s 74(1).

71 Fisher supra n 23, 10-1. Note that this passage covers all of the Act's "resource management instruments," as derived from both the planning and the resource allocation systems. The relationship between the resource allocation system and Part II has not yet been addressed, but will be in text to follow.

72 This becomes clear on a comparison of ss 30 and 31 of the 1991 Act, and the two parts to the Act's Second Schedule. Section 30 sets out the functions of regional councils under the Act, and makes specific reference to controlling the use of both coastal and inland water (see paras (d)-(f)); s 31 (which prescribes the functions of territorial authorities) refers only to the "... surface of water in rivers and lakes ...," and the "... natural and physical resources ..." generally (see paras (a) and (e)). The Act's Second Schedule lists the matters which may be provided for in regional policy statements and plans (Part I) and district plans (Part II). Part I contains frequent references to water, but Part II, like s 31, mentions only the "surface" of water bodies and "... natural and physical ..." resources generally.

73 See s 14(1) and (2)(a) (as originally enacted).

74 See s 20(3)(a) and (7) (as amended).

75 Section 14 (as substituted in 1988), which prescribed the functions of the Minister for the Environment under the 1967 Act, and which makes no reference to planning.
exclusive authority of the Department of Conservation, the 1991 Act instills a heavy conservation bias into the management of this area.76

While many of the things which can be achieved by, or included in, regional planning under the 1991 Act appeared in the 1967 Act,77 others are new.78 Even those which appeared before have now been increased in scope, effect, or impact.79

5. Planning, Water, and Central Government

a. National Policy Statements
The Act offers the Minister for the Environment the discretion to instigate the making of national policy statements.80 In exercising this discretion the Minister may "... have regard to ..." several matters, including the "... effects of the use, development, or protection ... of water; "... New Zealand's interests and obligations ...;" "[a]nything" with national impact or significance; and "[a]ny thing which is significant in terms of section 8 (Treaty of Waitangi) ... ."81 Once the Minister has determined that it would be desirable to make a policy statement, he or she must initiate the public process prescribed by sections 46-52 and 54.82 As has been

76 Established under the Conservation Act 1987, the Department operates according to the conservation bias apparent in the principles therein – see Chapter 3 nn 369, 490, and 491 above.
77 Such as minimum levels and flows, water quality classification, and policies as to the allocation of water, the control of erosion, conservation, and competing demands (see ss 20J, 26A-26KA, and 20(7)(a) of the Water and Soil Conservation Act, and the discussion of the 1991 Act's regional planning provisions in text to follow).
78 Such as the ability of regional councils to insert rules requiring the adoption of the best practicable option to prevent or minimise the adverse effect of discharges into water – see n 134 and 135 below and accompanying text.
79 For example, the 1991 Act increases the number of water quality classes available, it extends the minimum flow regime, and it makes better provision for the recognition and enforcement of policy statements and plans. See nn 138-154 below and accompanying text.
80 The process of making national policy statements is initiated by the Minister under s 46. Section 53 provides that the procedure for changing, reviewing, or revoking existing national policy statements is to be the same as that for making new statements.
81 Section 45(2) lists the 10 matters which the Minister "... may have regard to ..." in considering "... whether it is desirable to prepare a national policy statement ... ." Presumably, the exercise of the Minister's discretion in determining whether or not to initiate proceedings under s 46 would be amenable judicial review under Judicature Amendment Act 1972, with the challenge based "... on jurisdictional grounds: ie, is the matter at issue properly the subject of a national policy statement?" (Randerson supra n 46, 454).
82 To initiate the process, the Minister may "... define the issue to be considered and give public notice of his or her intention to prepare a proposed national policy statement on that issue ..." (s 46(a)). Next, the Minister must publicly notify the proposed statement, and appoint a board of inquiry "... to inquire into and report ..." on the proposed statement (s 46(b) and (c)). The board of inquiry (whose constitution is defined in s 47) must then give notice of its impending inquiry, and call for submissions from "any person" (s 48). Section 49 defines who may make submissions, and how, while s 50 requires the board to prepare and notify a summary of submissions received and to receive further submissions "... in support of or in opposition to ..." any earlier submissions. The board's hearing must be held in public, and according to a procedure which "... is appropriate and fair in the circumstances ..." (s 39(1), applicable by way of s 50(4). Note that s 39(2) guides boards in their determination of an appropriate and fair procedure). Any person who made a submission may be heard at the hearing, and the board can make orders to protect

130
previously noted, national policy statements, once approved, must be recognised by regional and territorial authorities.  

b. New Zealand Coastal Policy Statements  
Like national policy statements, New Zealand coastal policy statements must be made pursuant to a public process and lie at the top of a hierarchy of planning mechanisms for water. This time, however, the hierarchy applies to coastal, as opposed to inland water. Under section 57 of the 1991 Act, there "... shall at all times be at least one New Zealand coastal policy statement prepared and recommended by the Minister of Conservation..." Such statements can address issues including "[n]ational priorities for the preservation of the natural character of the coastal environment ..., including protection from inappropriate ... use, and development: ... [t]he protection of the characteristics of the coastal environment of special value to the tangata whenua: ... [a]ctivities involving the ... use, or development of ... the coastal environment: ... [t]he matters to be included in ... regional coastal plans in regard to the preservation of the natural character of the coastal environment: ... [a]ctivities involving... protection from inappropriate... use, or development of...".  

sensitive information disclosed at hearings (s 42, again applicable by way of s 50(4)). Further, the board can be provided with reports from a local authority, or "... any consultant or other person employed for the purpose..." at the hearing (s 42A, via s 50(4)). Other than such reports, the board must consider Part II of the Act, the proposed statement, "... all submissions, and such other matters as [it] thinks fit ..." at the hearing (s 51(1)). After the hearing, the board must report to the Minister (s 51(2), who, after considering it, may change the proposed statement "... as he or she thinks fit ..." (s 52(1)). The Minister may then recommend the approval of the national policy statement (s 52(2)). Once approved the statement must be issues, tabled and published (ss 52(3) and 54).  

83 See nn 61 and 62 above and accompanying text.  
84 Section 57, which applies ss 46-52 and 53-55 to New Zealand coastal policy statements as if they were national policy statements, and see n 82 above.  
85 The purpose of New Zealand coastal policy statements is "... to state policies in order to achieve the purpose of this Act in relation to the coastal environment of New Zealand ...." The Act does not define the term "coastal environment," but it does define "environment" (as including ecosystems, people and communities, all natural and physical resources, amenity values and social, economic, aesthetic, and cultural conditions – see n 11 above). It seems logical to suppose that the "coastal environment" is that part of the "environment" which is located on or attributable to the coast.  
86 Note that New Zealand coastal policy statements are mandatory, whereas national policy statements are discretionary (see n 80-81 above and accompanying text). This distinction may, in part, reflect the high value accorded to the preservation of the coastal environment in New Zealand (as previously reflected in, for example, s 3(1)(c) of the Town and Country Planning Act 1977 and as now also specifically recognised in s 6(a) of the Resource Management Act). Memcn notes that "[c]oastal planning is given particular prominence in the Act. These apparently anomalous provisions are a product of a deliberate political decision, as a reflection of a strong national interest in the conservation values of the coast, and use of the Crown conservation estate" (Memon P A Keeping New Zealand Green: Recent Environmental Reforms (1993), 195)  
87 This particular matter is stated to include directions as to "... the specific circumstances in which the Minister of Conservation will decide resource consent applications relating to—(i) Types of activities which have or are likely to have a significant or irreversible adverse effect on the coastal marine areas; or (ii) Areas in the coastal marine area that have significant conservation value ..." (s 58(e)). Such areas would probably have been identified as "restricted coastal activities" – see n 125 below and accompanying text.  
88 Section 58.  

131
The first New Zealand coastal policy statement was issued on 5 May 1994. In the statement, five national priorities for the preservation of the natural character of the coastal environment are identified, along with the Department's policies in relation to: the protection of characteristics of the coastal environment of special value to the tangata whenua; activities involving subdivision, use and development; the Crown's interest in land in the coastal marine area; the matters to be included in regional coastal plans; and the procedures and methods for review. The statement also defines "... the specific circumstances in which the Minister of Conservation will decide on resource consent applications," and includes situations where "[a]ny discharge of human sewage to the coastal marine area, except from vessels, which has not passed through soil or wetland ..."; and any discharge of water or 

89 The five policies outline how such preservation is to be achieved; for example, by protecting areas of significant indigenous vegetation by avoiding adverse effects in "... areas containing nationally vulnerable species ..." (policy 1.1.2(1)(ii)); and by protecting the "... integrity, functioning, and resilience of the coastal environment in terms of: ... the dynamic processes and features arising from the natural movement of ... water ...; natural water ... quality: ... [and] intrinsic values of ecosystems" (policy 1.1.4(a), (d) and (f)).

90 Three policies are developed in relation to this objective: one promoting the identification "... of the characteristics of the coastal environment of special value to the tangata whenua ..."; one promoting protection of these characteristics "... in accordance with tikanga Maori ..."; and the last requiring local authorities to consider transferring or delegating functions to iwi authorities (policies 2.1.1, 2.1.2 and 2.1.3, respectively).

91 Twenty five policies are developed under this objective, including policies aiming to maintain and enhance amenity values (policies 3.1.1-3.1.3); policies aiming to ensure that subdivision, use and development in the coastal environment is appropriate (policies 3.2.1-3.2.10); and policies promoting the adoption of the precautionary approach to activities "... with unknown but potentially significant adverse effects ..." (policies 3.3.1-3.3.2).

92 Six policies are developed under the banner of maintaining the Crown's interest in Crown land in the coastal marine area (policies 4.1.1-4.1.6), and two policies are developed to ensure that the principles of the Treaty of Waitangi are taken into account (policies 4.2.1 and 4.2.2).

93 Under this objective, the Department of Conservation has developed several policies of relevance to coastal water. These policies are: (i) that "[r]ules should be made... [to] enhance[e] water quality ... where that is desirable ... in achieving the purpose of the Act, and in particular where ..." there is a high public interest in, or a particular tangata whenua interest in, or a particular value to be maintained in, or a direct discharge containing human sewage into, the water (policy 5.1.1); (ii) that rules in regional coastal plans "... should provide that a discharge of human sewage direct into water ... may only occur where ... it better meets the purpose of the Act than disposal onto land; ... there has been consultation with the tangata whenua ... and due weight has been given to sections 6, 7 and 8 of the Act; and ... there has been consultation with the community generally" (policy 5.1.2); (iii) that rules should "... provide that, after reasonable mixing, no discharge ... may give rise to any significant adverse effects on habitats, feeding grounds or ecosystems" (policy 5.1.3); (iv) that policy statements and plans should provide for the review of all permits to discharge contaminants into coastal water (policy 5.1.4); (v) that that "[c]onsideration should be given to reducing any contamination of [coastal] water ... caused by trade wastes" (policy 5.1.5); (vi) that "[c]onsideration should be given to reducing contamination of [coastal] water ... from non-point sources" (policy 5.1.6); (vii) that there be some way of ensuring that the public receive adequate warning about unsafe water (policy 5.1.7); (viii) that "... adequate and convenient rubbish disposal facilities in ports ..." be required (policy 5.2.1); (ix) that new ports and marinas be required to provide "... convenient facilities to collect sewage from boats ..." (policy 5.2.2); (x) that those in charge of vessels be required to discharge sewage and rubbish into the facilities provided (policy 5.2.3); and (xi) that regional councils should consider prohibiting the discharge of sewage from vessels within a certain distance off-shore, and the discharge of non-biodegradable rubbish into the sea (policy 5.2.4).

94 Three policies on this point are set out in Chapter 7 of the Statement.

95 That is, which activities are to be classified as restricted coastal activities in regional coastal plans (see nn 125, and 218-223 below and accompanying text).
contaminants to the coastal marine area which may produce certain adverse effects, but which may be allowed in "... exceptional circumstances ...".97

6. Planning, Water, and Regional Government

a. Regional Policy Statements

Sections 60 and 61 of the Resource Management Act provide that “[t]here shall at all times be for each region one regional policy statement ...”, to be prepared by regional councils in accordance with their functions,98 Part II of the Act,99 section 32,100 and any relevant regulations.101 In preparing their statements, regional councils are also bound to “... have regard to ...” planning documents prepared under other Acts, under the 1991 Act, or such as are recognised by regional iwi authorities.102

The procedure for making or changing regional policy statements is set out in the First Schedule to the Act and includes detailed consultation, wide authority to make submissions, an open hearing, and the opportunity to refer matters to the Planning Tribunal.103

96 The effects at issue are those described in s 107(1) of the Act, see n 97 below.
97 See the Statement’s Schedule, and note that the second situation (discharges which may produce certain adverse effects, but which may be allowed in “... exceptional circumstances ...”) is described as one where “... the applicant may desire to rely on section 107(2)(a) ...”. Section 107(1) provides that no consents shall be granted to discharge contaminants or water directly or indirectly into water where oil or grease films, scums or foams, floatable or suspended material, conspicuous changes in colour or visual clarity, emissions of objectionable odour, or significant effects on aquatic life are likely to result (see n 206 below). Section 107(2) sets out the circumstances in which s 107(1) may be avoided, and para (a) refers to the existence of “... exceptional circumstances justifying the granting of the [consent].”
98 The functions of regional councils are set out in s 30 and, aside from those relating exclusively to planning (see subs (1)(a) and (b)), include controlling the use of water (see subs (1)(d),(e), and (f)), and land (see subs (1)(c),(d), and (g)) in the region. Such control over the use of land and water will be achieved both through planning, and through the regional council’s role in the resource allocation system, see text to follow.
99 Thus the relationship with Part II is maintained.
100 Section 32 sets out the duties to consider alternatives, benefits and costs and will be addressed in text to follow (see nn 161-165 below and accompanying text).
101 Section 61(1).
102 Section 61(2) charges regional councils to have regard to “[m]anagement plans and strategies prepared under other Acts; ... [any r]elevant planning document recognised by an iwi authority affected ...; [any r]elevant entry in the Historic Places Register; ... [r]egulations relating to the conservation or management of taiapure or fisheries; ... [r]egulations made under this Act, including [national environmental standards]; and ... [t]he extent to which the regional policy statement needs to be consistent with the policy statements and plans of adjacent regional councils.” Further, note s 62(2) which provides that “[a] regional policy statement shall not be inconsistent with any national policy statement, New Zealand coastal policy statement, or water conservation order.”
103 See s 60. The First Schedule falls into two parts. Part I prescribes the procedure for preparing and changing regional policy statements. Part II applies where a Minister, or territorial authority has requested that a change be made to an existing regional policy statement, and details how the request should be made (cl 22), and the powers and duties of regional councils on receipt of a request for change (cls 23-27). If the regional council accepts the request, it can proceed under either cl 26 or cl 29. Clause 29 applies the procedure set out in Part I. Part I applies where a regional council has itself initiated the preparation or change of a regional policy statement, or where it has adopted a request for change under cl 29 of Part II. In cases where a regional policy statement is being prepared, the process begins at cl 2 with the regional council’s preparation of a proposed statement. Clauses 2 and 3 require the regional council to consult
In their policy statements, regional councils must "...make provision for such of the matters set out in ... the Second Schedule ... that are appropriate to the circumstances of the region ..." and state the "... significant resource management issue of the region; ... [t]he objectives sought to be achieved by the statement; ... [t]he policies [to be adopted] in regard to those issues and objectives ...; ... [t]he methods ... to be used to implement the policies; ... [t]he ... reasons for adopting the objectives, policies, and methods ...; ... [t]he environmental results anticipated from [the] implementation of those policies and methods; ... [t]he processes to be used to deal with issues which cross local authority boundaries ...; and [t]he procedures to be used to review the [objectives, policies and methods], and to monitor the effectiveness of the statement as a means of achieving its objectives and policies ...". The matters listed in the Second Schedule are more specific, and include those "... relating to "... the use, development, or protection of any natural and physical resources ..." including water,105 and to "... the management of any actual or potential effects of any use, development or protection ..." of those natural or physical resources on the community, other resources, and heritage sites and values.106

widely when preparing a proposed statement. Once prepared, the proposed plan must be publicly notified and sent to people who are likely to be affected, the Minister for the Environment, constituent territorial authorities and the region's tangata whenua (cl 5). Clause 6 provides that "any person" may make submissions on a proposed policy statement, while cl 7 requires the council to prepare and publicly notify a summary of all submissions received. Under cl 8, further submissions "... in support of or in opposition to ..." the original submissions can be made. Unless cl 8C applies, the council must hold a hearing on the proposed statement (cl 8B). After hearing the submissions, the council must give (cl 10) and publicly notify (cl 11) its decision, and its reasons for accepting or rejecting submissions. Any person who made a submission on the proposed statement may refer any provision in that statement, or any matter excluded from it, to the Planning Tribunal within 15 working days of the public notification under cl 11 (cl 14). The Tribunal must hold a public hearing (deemed to be an appeal) on the referral, and may "... confirm, or direct the [council] to modify, delete, or insert, any provision which is referred to it ..." (cl 15). Clause 16 directs the council to give effect to the Tribunal's decision, and cl 17 provides for councils to approve statements (or parts thereof) once they have been amended. The statement becomes operative either on the day on which it was approved, or from any later date specified therein (cl 20). This date must be publicly notified and copies of the now operative statement must be supplied to the Minister for the Environment, the Ministry's regional manager, constituent local authorities and adjacent regional councils and the tangata whenua of the area (cl 20). Note s 83, which provides that policy statements held out by local authorities as "... shall be deemed to have been prepared and approved in accordance with the First Schedule and shall not be challenged except by an application for an enforcement order ... ."

104 Section 62(1). Note that the first matter (the "... significant resource management issue of the region ...") is based on both paras (a) and (b) of s 62(1). Paragraph (a) refers to issues of general significance, while para (b) refers to issues of significance to iwi authorities.
105 Second Schedule Part I cl 1, which includes "... the control of-(a) Taking, using, damming, or diverting of ... water ...; (b) The quantity, level, and flow of water in any water body, including--(i) The setting of any maximum or minimum levels or flows of water; (ii) The control of the range, or rate of change, of levels or flows of water; (c) Discharges of contaminants into ... water, and discharges of water into water; (d) Setting objectives and policies for any actual or potential ... effects of any use, development, or protection of land described in section 9 which are of regional significance: (e) Use of land for the purpose of-- (ii) The maintenance and enhancement of the quality of water in water bodies and coastal water: (iii) The maintenance of the quantity of water in water bodies and coastal water: ... ."
106 Second Schedule Part I cl 4.
Most regional councils have by now proceeded some way towards developing policy statements for their regions. For example, initial hearings have been held on the Proposed Otago Regional Policy Statement (1993), and final decisions (subject to appeal) should be made by the end of August 1995.

b. Regional Plans and Regional Coastal Plans

Apart from their policy statements, regional councils must implement regional coastal plans and may also develop one or more regional plans.107

i. Regional Plans

Regional plans may be made to address "... any aspect of any function for which the regional council is responsible ..." and can apply to all, or any part of, a region.108 As with policy statements, plans must be prepared "... in accordance with [the] functions [of regional councils] under section 30, the provisions of Part II, ... section 32, and any regulations."109 When preparing plans, regional councils must consider other proposed and existing planning documents,110 and relevant regulations.111 They should "... make provision for such of the matters set out in Part I of the Second Schedule as are appropriate ...,"112 and must state and justify the "... issues to be addressed in the plan; ... [t]he objectives sought to be achieved; ... [t]he policies [and methods to be used] in regard to the issues and objectives ...; ... [t]he information to be submitted with an application for a resource consent ...; ... [t]he environmental results anticipated from the implementation of these policies and methods; and ... [t]he procedures to be used to review the [issues, objectives, policies and methods] and to monitor the effectiveness of the plans ... ."113 Perhaps most importantly, regional councils can

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107 Regional plans (but not regional coastal plans) are discretionary – see s 65(1), and compare with s 64(1). The discretion of councils in determining whether or not to make plans is directed (but not limited) by s 65(3). Randerson (supra n 9, 40) notes that "[i]n practice, it is unlikely that a region will not have a regional plan." This is partly because plans house rules (the significance of which will become apparent in text to follow) and partly because regional coastal plans can be included as part of more general regional plans – s 64(2).

108 Section 65(2), and recall that the functions of regional councils are set out in s 30, see n 72 above.

109 Section 66(1) and see n 99 above.

110 Section 66(2) requires the council to have regard to "... (a) Any proposed regional policy statement in respect of the region; and ... (c) Any– (i) Management plans and strategies prepared under other Acts; and (ii) Relevant planning document recognised by an iwi authority affected by the regional plan ...; and (d) The extent to which the regional plan needs to be consistent with the regional policy statements and plans, or proposed regional policy statements and plans, of adjacent regional councils." Section 67(2) provides that a regional plan "shall not be inconsistent with– (a) Any national policy statement or New Zealand coastal policy statement; or ... (c) The regional policy statement or any other regional plan of the region concerned."

111 Section 66(2)(c)(iii) and (iv) and s 67(2)(b) (water conservation orders).

112 See n 105 above.

113 Section 67(1), the requirements of which clearly mirror those of s 62(1) (see n 104 above and accompanying text), but with one noteworthy addition. The addition in question is that relating to the "... information to be submitted with an application for a resource consent ...," which reflects the role of regional councils as consent authorities, see text to follow on the Resource Allocation System.
also include rules in their plans – these will be addressed in text to follow.

The procedure for making (or changing) regional plans is set out in the Act’s First Schedule and parallels that prescribed for regional policy statements.114

ii. Regional Coastal Plans

Section 64(1) provides that “[t]here shall at all times be, for all the coastal marine area of a region, one or more regional coastal plan prepared in the manner set out in the First Schedule.”115 Regional coastal plans must, as with regional policy statements and regional plans, be prepared (or changed) in accordance with the functions of regional councils, Part II of the Act, section 32, and any regulations, and having regard to other proposed and existing planning documents.116 They may address all the matters which can be provided for in regional plans, plus “... any matter relating to the use, development, or protection of the coastal marine area ...” and “... any matters necessary for the implementation of any policy stated in a New Zealand Coastal policy statement in respect of the Crown’s interests in land of the Crown in the coastal marine area.”117

As with regional policy statements, most regional coastal plans are currently in the process of development. The Proposed Otago Regional Plan: Coast (1994), for example, has been published, and submissions have been heard.

114 See n 103 above and accompanying text. Note that where regional plans are concerned, Part II comes into play where a request to prepare or make a plan has been made by any person (recall that plans are discretionary). Part I applies, as with regional policy statements, to situations where the regional councils has itself instigated the preparation or change of a plan, or where it has adopted a request made under Part II.

115 See n 12 above for the Act’s definition of “coastal marine area,” and n 103 above for a description of the procedure prescribed in the First Schedule, as it relates to the making of regional policy statements. Note that the procedure described in n 103 differs in some respects when applied to regional coastal plans: thus, proposed regional coastal plans must be prepared “... in consultation with ...” the Minister of Conservation and regional iwi authorities (cl 2(2)); regional councils must consult more widely when preparing coastal plans than when preparing other plans and policy statements (see cl 3(1), (2), and (3)); copies of proposed and operative coastal plans must be sent to the Minister of Conservation and the regional conservator for the Department of Conservation as well as the other bodies listed in cls 5(4) and 20(4); where matters proceed to the Planning Tribunal, its hearing is an inquiry (not an appeal) and the power to confirm is lost (cl 15(3)); and councils cannot approve coastal plans – they must be adopted for reference to the Minister of Conservation, who may then require changes (which are not inconsistent with the directions of the Tribunal “... unless the Minister made a submission on the provision concerned when [it] was referred to the Tribunal ...”) and approve the plan (cls 18 and 19).

116 See nn 98-102 above and accompanying text.

117 Section 67(1) (see n 113 above and accompanying text) which refers on to Part I of the Second Schedule. The two extra matters are set out in cls 2 and 3 (respectively) of this Schedule. The matter prescribed in cl 2 includes “... the control of— (a) Use of the coastal marine area described in section 12 including, where appropriate, the protection of conservation values, the recognition of opportunities for recreation, aquaculture, and other forms of development: (b) Actual or potential effects of the use, development, or protection of the land ...: (c) Occupation of space on lands of the Crown or lands vested in the regional council, and the extraction of sand, shingle, and other natural material from those lands: (d) Activities in relation to the surface of the water: (e) Discharges of contaminants into ... water, and discharges of water into water: (f) Taking, using, damming, or diverting of the water: ... ”
c. Regional Rules

Both types of regional plan may contain rules of four kinds. 118

i. Rules Prohibiting, Regulating, or Allowing Activities

The first kind or type of regional rules may, on the basis of the "... actual or potential effects on the environment ...," prohibit, regulate, or allow activities. 119 Thus, activities may be classified as permitted, 120 controlled, 121 discretionary, 122 non-complying, 123 prohibited, 124

118 See ss 68(1) and (7), 69, and 70(2) noting that the inclusion of rules is discretionary.
119 Section 68(1) and (3).
120 Section 2 defines a "permitted activity" as "... an activity that is allowed by a plan without a resource consent if it complies in all respects with any conditions ... specified in the plan." Section 70 restricts the circumstances in which the discharge of contaminants or water into water, or onto land in circumstances "... which may result in that contaminant ... entering water ...," may be classified as a permitted activity to situations where the regional council is "... satisfied that ... after reasonable mixing ... [t]he production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials: ... [a]ny conspicuous change in the colour or visual clarity: ... [a]ny emission of objectionable odour: ... [t]he rendering of fresh water unsuitable for consumption by farm animals: ... [or a]ny significant adverse effects on aquatic life ..." are not likely to arise in the receiving waters. As an example of a use of water which has been classified as "permitted" see the Proposed Regional Plan: Coast for Otago (1994) which provides that the discharge of ballast water "... necessary for the safe operation of a vessel ..." is a permitted activity at 85).
121 Section 2 defines a "controlled activity" as "... an activity which--(a) Is provided for, as a controlled activity, by a rule in a plan or proposed plan; and (b) Complies with standards and terms specified in a plan or a proposed plan for such activities: and (c) Is assessed according to matters the consent authority has reserved control over in the plan or proposed plan; and (d) Is allowed only if a resource consent is obtained in respect of that activity ... ." Section 68(3A) therefore ensures that any rule which classifies an activity as controlled also states the standards and terms with which it must comply, and the matters over which the regional council (the consent authority in such cases) has reserved control. The rule must also state whether or not applications for resource consents for the activity may or may not be non-notified (see nn 191-192 below and accompanying text). The class of controlled activities was introduced by the Select Committee on the Resource Management Bill to cover "... activities which are of minor environmental effect ... and [which may be] appropriate to determine without public involvement" (Report of the Committee on the Resource Management Bill (August 1990) 1.24A, 14). As an example of a use of water which has been classified as "controlled" see the Proposed Regional Plan: Coast for Otago (1994) 86 which provides that the discharge of stormwater into the coastal marine area is a controlled activity where it leads to contamination from sewage or waste, discharges are not well flushed, and the contaminant or water discharged produces the kinds of effects set out in s 107 of the 1991 Act (see n 97 above).
122 Section 2 defines a "discretionary activity" as "... an activity--(a) Which is provided for, as a discretionary activity, by a rule in a plan or proposed plan; and (b) Which is allowed only if a resource consent is obtained in respect of that activity; and (c) Which may have standards and terms specified in a plan or proposed plan; and (d) In respect of which the consent authority may restrict the exercise of its discretion to those matters specified in a plan or proposed plan for that activity ... ." Section 68(3B) therefore empowers the regional council to state the standards and terms with which the activity must comply, the matters to which the council has restricted the exercise of its discretion, and whether or not applications for resource consents for the activity may or may not be non-notified (see nn 191-192 below and accompanying text). As an example of a use of water which has been classified as "discretionary" see the Proposed Regional Plan: Coast for Otago (1994) 87 which provides that the storage of hazardous substances in the coastal marine area is a discretionary activity.
123 Section 2 defines a "non-complying activity" as "... an activity (not being a prohibited activity) which--(a) Contravenes a rule in a plan or proposed plan; and (b) Is allowed only if a resource consent is obtained in respect of that activity ... ." 124 Section 2 defines a "prohibited activity" as "... an activity which a plan expressly provides and describes as an activity for which no resource consent shall be granted ... ." As an example of a use of water which has been classified as "prohibited" see the Proposed Regional Plan: Coast for Otago (1994) 84 which provides that the discharge of "... litter, and non-biodegradable material within the coastal environment is a prohibited activity.
or restricted coastal.\textsuperscript{125} Such rules may have general or restricted application,\textsuperscript{126} and, once made, rules have the force of regulations.\textsuperscript{127}

Rules indentifying the dumping of waste, any ship, aircraft or offshore installation; or the incineration of waste in the coastal marine area may also be included in regional coastal plans by the Governor-General in Council.\textsuperscript{128}

\textbf{ii. Rules Relating to Flow and Water Quality}

The second type of rules \textldquointer relate\textrdquo{} to maximum or minimum levels or flow or rates of use of water, or minimum standards of water quality ..., or ranges of temperature or pressure of geothermal water ... \\textsuperscript{129} If such rules have been included in plans, regional councils can require existing consent holders to comply with them.\textsuperscript{130}

\textbf{iii. Rules Classifying Water}

Third, rules may classify waters according to their quality and use. In a scheme based on the classification regime included in the Water and Soil Conservation Act 1967, section 69 implies that rules can be set providing \textldquo{...that certain waters are to be managed for any purpose described in respect of any of the classes specified in the Third Schedule ...}\textrdquo{} to the Act.\textsuperscript{131}

\textsuperscript{125} \textldquo{Restricted coastal activity}\textrdquo{} is defined in s 2 as \textldquo{... any discretionary activity or non-complying activity-- (a) Which, in accordance with section 68, is stated by a regional coastal plan to be a restricted coastal activity; and (b) For which the Minister of Conservation is the consent authority.\textrdquo{} Note that an activity may only be so classified where: (i) the rule is contained in a regional coastal plan and (ii) the Minister has required that be so classified because it has or is likely to have \textldquo{... significant or irreversible adverse effects on a coastal marine area; or ... [o]ccurs or is likely to occur in an area having significant conservation value\textrdquo{} (s 68(4)). On 1 October 1991 the Minister of Conservation issued a directive under s 372, one of the Act's transitional provisions, designating certain activities (for example, discharges of sewage or products of sewage which have not passed through soil or wetlands and which are contrary to the Treaty of Waitangi, and have significant adverse effects on Maori and the health and safety of the general public) as restricted coastal activities. The entire directive is set out in \textit{Resource Management} (pub ed) A Shields supra n 23, A5-21. This directive has been presumably since superceded by the New Zealand Coastal Policy Statement, which sets out restricted coastal activities today, see nn 95-97 above and accompanying text.

\textsuperscript{126} Section 68(5) provides that rules may apply \textldquo{... throughout the region or a part of the region ..., differently in different parts of the region, \ldots{} all the time or for stated periods ..., or may be \ldots{} specific or general in their application ...}.\textsuperscript{127} Section 68(2), which applies unless the rule is \textldquo{... inconsistent with any [other regulation in force under the Act that other] regulation shall prevail.\textrdquo{} Even though the rules are not deemed to be regulations, it seems that this must mean that they are both legally enforceable and susceptible to judicial and parliamentary control in the same way as ordinary regulations.

\textsuperscript{128} This is according to s 360(1)(ha) as inserted by the Resource Management Amendment Act 1994 (not yet in force). This section empowers the making of regulations \textldquo{deeming\textrdquo{} such rules to be included in any regional coastal plan(s).

\textsuperscript{129} Section 68(7) implies that the matters set out in cl 1 of the first part to the Act's Second Schedule may take the form of rules in plans.

\textsuperscript{130} Section 67(7)(a) and (b).

\textsuperscript{131} The Third Schedule sets out 11 water quality classes. Each class is based on the purpose for which the water is to be managed (such as aquatic ecosystem, fishery, contact recreation, water supply, aesthetic, cultural, and industrial abstraction purposes) and includes specific standards which must be maintained.
Once classified, users of the water must observe the standards of the classification.132 Regional councils must classify waters so that there is no reduction in water quality, unless that would be consistent with the purpose of the Act.133

iv. Rules on Discharges and BPOs
Finally, there are rules which can require the “... adoption of the best practicable option to prevent or minimise any actual or likely adverse effect[s] on the environment of any discharge of a contaminant ...” into water or onto land in circumstances which may result in the contaminant entering water.134 Before including such rules in their plans, regional councils must be satisfied that the best practicable option presents “... the most efficient and effective means of preventing or minimising those adverse effects ...”135

d. Concluding Remarks on Regional Planning for Water
As previously noted, the 1991 Act’s provisions in respect of regional planning for water is both more comprehensive, and more prescriptive than that formerly provided for by the Water and Soil Conservation Act 1967. Under the 1967 Act regional councils were simply empowered to plan “... for ...the conservation of natural water ...”136 and to make plans in respect of “[t]he allocation and quality of natural water: ... [t]he control of erosion ... and the control of flow and flooding ...: ... [t]he needs of primary and secondary industry and of the community: ... [a]ll forms of water-based recreation, fisheries, and wildlife habitats, and the preservation and protection of the wild, scenic, and other natural characteristics of rivers, streams, and lakes ... .”137 The 1991 Act’s provisions relating to the making and contents of regional policy statements, regional plans (coastal and general), and regional rules contain more detail and clearly set up a more comprehensive planning regime.

132 Section 69(1). Note that where the council is of the view that the standards specified in the Third Schedule “... are not adequate or appropriate in respect of those waters ...” then it can state “... standards which are more stringent or specific ...” or entire “... new classes and standards ...” (s 69(1) and (2)).
133 Section 69(3) provides that “... [s]ubject to the need to allow for reasonable mixing of a discharged contaminant or water, a regional council shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters at the time of the public notification of the proposed plan unless it is consistent with the purpose of this Act to do so.”
134 “Best practicable option” is defined, in relation to discharges of contaminants, as “... the best method for preventing or minimising the adverse effects on the environment, having regard, among other things, to—(a) The nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and (b) The financial implications, and the effects on the environment, of that option when compared with other options; and (c) The current state of technical knowledge and the likelihood that the option can be successfully applied.”
135 This requirement probably reflects the kinds of concerns expressed by the Review Group, see Chapter 4 n 108 above.
136 Sections 20(3) and 20(7) of the 1967 Act.
137 Section 20(7) of the 1967 Act.
More specifically, the 1967 Act's provisions relating to the inclusion of statements as to levels and flows of water have been extended by the 1991 Act. Where previously, councils could only fix "... maximum and minimum levels, and minimum standards of quality ..." for lakes, and "... minimum acceptable flow[s] and minimum standards of quality ... and ... the maximum range of flow ..." for rivers and streams,138 regional councils can today make prescriptions relating to maximum and minimum levels, maximum and minimum flows, the range of levels and flows, the rate of change in levels or flows of water, and the use of land for the purpose of maintaining and enhancing water quality and quantity.139

Also expanded by the 1991 Act is the water quality classification regime. Under the 1991 Act, classifications are to be included in regional plans (classification was an independent process under the 1967 Act) and eleven pre-defined classes are available to regional councils.140 If none of these classes are appropriate, councils may develop their own new classes, or increase the stringency or specificity of the standards required under a pre-defined class.141 An exhaustive list of nine classes were available under the 1967 Act.142 The so-called principle of qualified non-degradation developed under the 1967 Act143 has been expressly retained by the 1991 Act.144

Even more important, perhaps, than the increase in detail and prescription provided by the 1991 Act are the provisions relating to the enforcement of policy statements and plans. Under Water and Soil Conservation Act 1967, the general provisions145 of plans made by regional water boards could not be directly enforced, or appealed against.146 Such provisions were "... indicative only ..."147 and because "... management plan[s could] only be implemented through the exercise of other powers [possessed by Regional Water Boards,] ... [a]t best, the

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139 See the Second Schedule Part I cl 1(b) and (e).
140 See n 131 above.
141 See n 132 above.
142 The nine classes were set out in s 26C of the 1967 Act.
143 The term "... qualified policy of non-degradation ..." is used by Williams D A R Environmental Law in New Zealand (1980), 112 and derives from Cooke J's interpretation of the 1967 Act's classification provisions, which he said indicated "... that Parliament has no intention of permitting a reduction in water quality unless this can be justified in the public interest" (Water Resources Council v Southland Skindivers Club Inc (1975) 5 NZTPA 239, 249, and see Chapter 3 n 442-444 and accompanying text).
144 See s 69(3) of the 1991 Act, and n 133 above. Note that the "public interest" qualification used under the 1967 Act (see n 143 above) is replaced by the requirement that any degradation in quality must be consistent with the purpose of the 1991 Act.
145 This phrase is used to denote those provisions in plans not relating to the setting of minimum flows. Note that under the 1967 Act, minimum flows could either be included in management plans or independently set. Classification was always independent of management plans.
146 See Mclntosh Farms Ltd v North Canterbury Catchment Board and Regional Water Board unreported, Planning Tribunal Christchurch, 26 January 1989, C26/89, 8. In this case Judge Skelton held that there was no right to appeal against most provisions of a management plan. Only those provisions inserted under s 20J of the 1967 Act (which relate to the minimum flows regime) could be appealed under s 25(1B).
147 Sowman v Nelson Regional Water Board (1983) 9 NZTPA 161, 162.
relevant provisions of the management plan[s were] matters to take into account when considering applications for water rights ...”

Under the 1991 Act, the general provisions in regional policy statements and plans are enforceable, both directly and indirectly. Policy statements and plans are enforced indirectly through the test of consistency and section 55, and through sections 14, 15 and 105. Direct enforcement is available through declarations, enforcement orders and abatement notices. Additionally, all parts of regional policy statements and plans may be challenged, before they become operative, in the Planning Tribunal, and, once operative, changes to plans and policy statements can be made on application or where, as a result of any proceeding, the Planning Tribunal so directs.

7. Planning, Water and Territorial Government

Territorial authorities (district and city councils) are involved with water only to a limited extent. They must make district plans (using the procedure prescribed by the First Schedule) in accordance with their functions, Part II and section 32 of the Act, and any regulations.

When preparing or changing plans, territorial authorities must have regard to other policy

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148 McIntosh Farms Ltd supra n 146, 8.
149 See nn 61 and 62 above and accompanying text.
150 Sections 14, 15 and 105 will be described in text to follow under the Resource Allocation Regime.
151 Declarations may be made by the Planning Tribunal and may declare “whether or not an act or omission ... contravenes or is likely to contravene ... a rule in a plan ...” (s 310(c)). Enforcement orders may be made by the Planning Tribunal to “[r]equire a person to cease, or prohibit a person from commencing, anything done or to be done ... that ... [c]ontravenes or is likely to contravene ... a rule in a plan ...; ... [r]equire a person to do something that ... is necessary in order to ... [e]nsure compliance ... with ... a rule in a plan ...; ... [r]equire any person to pay money to or reimburse any other person for an actual and reasonable costs ... incurred ... in avoiding, remedying, or mitigating any adverse effect on the environment, where the person against whom the order is sought fails to comply with ... [a] rule in a plan ... (s 314(1)(a), (b) and (d)). Abatement notices may be served by enforcement officers (this is defined in s 2) and may require a person to cease doing anything which contravenes a rule in a plan, or to do what is necessary to ensure compliance with a rule in a plan (s 322(1)(a), and (b), and (2)).
152 First Schedule Part I cl 14.
153 See the First Schedule Part II cl 21, and ss 60(2), 65(4), and 73(2).
154 Section 292.
155 See n 72 above and accompanying text.
156 See ss 73(1) and 74. Note that s 32 will be addressed in text to follow, that the functions of territorial authorities are set out in s 31, and that the reference to Part II serves to maintain the link between the purpose and principles of the Act, and the planning regime. See n 103 above for a description of the procedure prescribed in the First Schedule, as it relates to the making of regional policy statements, and note that, in so far as district plans are concerned: Part II of the Schedule applies to requests to change district plans; the preparation of plans is initiated and carried out by territorial authorities; territorial authorities fall under special notification requirements prescribed in cl 5(1A) and (1B); there are special provisions relating to the procedure of incorporating designations into district plans - see cls 4 (relating to the inclusion of designations in plans prior to notification), 9 (relating to the territorial authority’s recommendations in respect of the designations) and 13 (relating to the requiring authority’s determination on the territorial authority’s recommendations). Designations will be addressed in text to follow, under the Resource Allocation Regime.
statements and plans, regulations, and the need for consistency with the plans of adjacent territorial authorities.157 District plans must, like regional plans, state issues, objectives, policies, methods of implementation, reasons, environmental results anticipated, processes for review and "... the information to be submitted with an application for a resource consent ... ."158 and they must provide for "... such of the matters set out in Part II of the Second Schedule as are appropriate to the circumstances of the district ... ."159

Like regional plans, district plans may contain rules prohibiting, regulating, or allowing activities, or relating to esplanade reserves.160

Most territorial authorities in New Zealand have either recently notified, or will soon notify, their district plans. In Dunedin, the City Council is still using its transitional plan but will notify its new plan on 22 July 1995.

8. Miscellaneous Planning Matters

Before leaving this discussion on planning, sections 32, 79, 80 and 83 of the 1991 Act should be noted.

Section 32 imposes a noteworthy duty on the Minister for the Environment (when publicly notifying any proposed national policy statement, or when recommending the approval of any national policy statement or the making of any national environmental standard), the Minister of Conservation (when publicly notifying any proposed New Zealand coastal policy statement or when recommending the approval of any New Zealand coastal policy statement) and local authorities (when publicly notifying, or making decisions on, any proposed policy statement or plan).161 This duty involves three distinct elements. First these persons and bodies must have

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157 Section 74(2), and see s 75(2) which provides that the district plans must not be inconsistent with any national policy statement or New Zealand coastal policy statement; any water conservation order, or the relevant regional policy statement or plan.
158 Section 75, and see n 113 above and accompanying text.
159 Section 75, note that the Second Schedule Part II includes: "[a]ny matter relating to the management of the use, development, or protection of land and any associated natural and physical resources ..., including the control of ... (d) Any actual or potential effects of activities in relation to the surface of water in rivers and lakes" (cl 1); and: "[a]ny matter relating to the management of any actual or potential effects of any use, development, or protection described in clause 1 ... including [effects] on-- (a) The community ...(b) Other natural and physical resources: (c) Natural, physical, or cultural heritage sites and values ..." (cl 2).
160 Section 76 and 77. Note that the decision as to whether to classify an activity as permitted, controlled, discretionary, non-complying or prohibited is to be based on the actual or potential effects of the activity. Further note that esplanade reserves will be addressed in text to follow.
161 Section 32(2), which was amended by the Resource Management Amendment Act (No 2) 1994, s 2 and which now confirms, at least in part, the decision of the High Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145. In this case, the Court was asked to consider the meaning of the words "before adopting" in s 32(1) (which indicate that the s 32 duties must be carried out before any objective, policy, or other method is adopted). The Court held that where a plan or
regard to: 162

(i) The extent ... to which [the] objective, policy, rule, or other method is necessary in achieving the purpose of th[e] Act; and
(ii) Other means in addition to or in place of such objective, policy, rule, or other method which ... may be used in achieving the purpose of th[e] Act ...; and
(iii) The reasons for and against adopting the proposed objective, policy, rules, or other method and the principal alternative means available, or of taking no action where th[e] Act does not require otherwise ...

Second, they must evaluate the "... likely benefits and costs of the principal alternative means including ... the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs ... ". 163 Finally, they must "... [b]e satisfied that [the] objective, policy, rule or other method ... (i) Is necessary in achieving the purpose of th[e] Act; and (ii) Is the most appropriate means of exercising the function having regard to its efficiency and effectiveness relative to other means." 164

Thus, section 32 involves the makers of policy statements and plans in a critical assessment of the objective, policies and rules which they intend to implement. They must address the necessity of taking any action, they will be forced to consider using means other than those traditionally employed, and they must engage in a process of explicit reasoning as to the advantages and disadvantages of all the available alternative means of achieving their objectives.

In Foodstuffs (Otago Southland) Properties v Dunedin City Council, 164A the Planning Tribunal held that a section 32 analysis should be a: 164B

systematic and rigorous process of decision making ... calculated to restrain implementation of instruments which may not be soundly conceived or clearly expressed. Failures to perform the s 32 duties in substance which are material to the outcome should not be excused.

There seems, however, to be some dispute as to the exact nature of the section 32 duties. In
GUS Properties Ltd v Marlborough District Council\textsuperscript{165A} the Tribunal held that section 32 is concerned with methodology, and not with the substance of the activities themselves. In apparent contrast to this is Imrie Family Trust v Whangarei District Council\textsuperscript{165B} where the Tribunal was asked to consider the Council’s decision declining to change its transitional district plan. The Trust had requested that the plan be changed so as to extend a commercial shopping zone at Tikipunga, near Whangarei. Having held that the Council was required to apply section 32 before adopting the plan change, the Tribunal went on to consider the nature of the Council’s duties under this section.

The first duty of the Council was to have regard to “... the extent (if any) to which the proposed measure is necessary in achieving the purpose of the Act.”\textsuperscript{165C} The Tribunal held that, in its judgment, “... the evidence does show that a need exists for more shopping opportunities ... that is not being met by the ... transitional district plan.”\textsuperscript{165D} In this assessment at least it seems that the Tribunal was more concerned to inquire into the necessity of extended shopping, as opposed to the necessity of introducing a plan change so as to extend shopping.\textsuperscript{165E} In this respect, the analysis seems to go to substantive, and not just procedural, issues.

Challenges to the objectives, policies, rules, and other methods to be implemented by policy statements and plans may be made on the grounds that section 32 was not complied with – but only through the medium of submissions on proposed policy statements and plans.\textsuperscript{165}

Section 79 provides for the compulsory review of policy statements and plans by local authorities. Regional policy statements, regional plans and district plans must be fully reviewed by regional councils “... not later than 10 years after the statement or plan became operative.” Where review reveals a need to change a policy statement or plan, the Act requires that such change shall proceed.\textsuperscript{166}

Section 80 allows two or more local authorities to join in the preparation, implementation and

\textsuperscript{165A} Unreported, Planning Tribunal Wellington, 5 August 1994, W75/94.
\textsuperscript{165B} [1994] NZRMA 453.
\textsuperscript{165C} Imrie ibid 467.
\textsuperscript{165D} Imrie supra n 164D 468.
\textsuperscript{165E} This is the duty where the focus on substance is more apparent. The rest of the Tribunal’s analysis is set out at Imrie ibid 468-471.
\textsuperscript{165} Section 32(2) provides that challenges “... may be made only in a submission made under ...” one of ss 49 or 50, or the First Schedule to the Act (see nn 82 and 103 above).
\textsuperscript{166} Section 79(3)(a) (note that para (b) provides that where the statement or plan “... can remain without change or replacement, it shall [be publicly notified] as if it were a proposed policy statement or plan... .” Any changes and public notifications under subs (3) must proceed in accordance with the First Schedule to the Act.
administration of plans. Undoubtedly, this will further the Act's aim of integrating resource management in New Zealand.

Finally, note s 84 which imposes an obligation on local authorities to observe and enforce their policy statements and plans.

IV. The Resource Allocation System

1. Duties and Restrictions

The Resource Management Act’s principal water allocation scheme begins with sections 14, 15, 15A, 15B, and 15C. Section 14(1) and (3) prohibit the taking, use, damming, and diversion of water (excluding open coastal water), or heat or energy from water or the material surrounding any geothermal water, unless by the express authority of a rule in a regional plan or a resource consent, or unless the taking or use does not (and is not likely to) have an adverse environmental effect and is occurring for domestic, recreational or firefighting purposes, or in accordance with tikanga Maori. In so far as open coastal water is concerned, section 14(2) prohibits its taking, use, damming, or diversion “... in a manner that contravenes a rule in a regional plan ... unless expressly allowed by a resource consent.”

Section 15(1) prohibits the discharge of any contaminant or water into water, or of any...

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167 Thus, s 80(1) provides for two or more territorial authorities to “... jointly prepare, implement, and administer a combined district plan for the whole or any part of their combined districts ...”, subs (2) for two or more regional councils to “... jointly prepare, implement, and administer a combined regional plan for the whole or any part of their combined regions ...”, subs (3) for one or more regional councils or territorial authorities to “... jointly prepare, implement, and administer a combined regional and district plan for the whole or any part of their respective regions or districts ...”, and subs (4) for any unitary local authority (that is, one which is both a regional council and a territorial authority) to “... prepare, implement, and administer a combined regional and district plan for the whole or any part of its region or district.” Local authorities are required to consider joint planning where “... significant cross-boundary issues relating to the use, development, or protection of natural and physical resources arise or are likely to arise” (subs (5)).

168 Section 14(3)(b) exempts the taking or use of fresh water (or the heat or energy from such water) for an individual’s “... reasonable domestic needs; or ... [the reasonable needs of an individual’s animals for drinking water ...” from the s 14(1) prohibition, unless such taking or use has, or is likely to have, an adverse effect on the environment. Section 14(3)(d) exempts the taking, use, or diversion of coastal water (or the heat or energy from that water) for “... an individual’s domestic needs or recreational needs ...” from the s 14(1) prohibition, unless such taking, use, or diversion has, or is likely to have, an adverse effect on the environment. Section 14(3)(e) exempts the taking of water for firefighting purposes from the s 14(1) prohibition.

169 Section 14(3)(c) exempts the taking or use of geothermal water (or the heat or energy from such water) “... in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area ...” from the s 14(1) prohibition, unless such taking or use has an adverse effect on the environment.

170 “Open coastal water” is defined in s 2 as “... coastal water that is remote from estuaries, fiords, inlets, harbours, and embayments.”

171 “Contaminant” is defined in s 2 to include “... any substance (including gases, liquids, solids, and microorganisms) or energy (excluding noise) or heat, that either by itself or in combination with the same,
contaminant onto land "... in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water ..." unless by the express authority of a rule in a regional plan, a resource consent, or regulations.

Sections 15A-15C all relate to activities in the coastal marine area. Section 15A prohibits the dumping of any waste from any ship, aircraft, or offshore installation; the dumping of any ship, aircraft or offshore installation in the coastal marine area; and the incineration of waste in any marine incineration facility except by the express allowance of a resource consent. Section 15B prohibits the discharge from any ship or offshore installation of any harmful substance or contaminant, or of water, into water in the coastal marine area unless by the express allowance of regulations. Section 15C absolutely prohibits the dumping of any radioactive waste or other radioactive matter in the coastal marine area; and the storing of any radioactive, or toxic or hazardous waste in any water in the coastal marine area. There are no exceptions to this prohibition.

Sections 15A-15C were introduced when the Marine Pollution Act 1974 was repealed in 1994 in an effort to "... consolidate discharge controls for the coastal marine area under the umbrella of a single piece of legislation." Sections 15A-15C allow for the control and prohibition of discharges from New Zealand or foreign ships within New Zealand's territorial sea; "... equivalent controls over waters outside the territorial sea ..." are provided for in the new Maritime Transport Act 1994.

Therefore, the taking, use, damming, or diversion of water, or the discharge of water or contaminants into water is prohibited unless it is expressly allowed by the relevant regional plan, regulations, or a resource consent. Taking, using, damming, or diverting open coastal water is permitted unless it contravenes the regional plan, in which case it cannot proceed without a resource consent. By using regional plans as a means of allowing otherwise similar, or other substances, energy, or heat—(a) When discharged into water, changes or is likely to change the physical, chemical, or biological condition of water ...

172 These three sections were all introduced in 1994, but are not yet in force (see the Resource Management Amendment Act 1994, s 1(2)).
173 "Dumping," "waste," and "incineration" are all defined in s 2 of the 1991 Act, as amended.
174 See s 360(1)(h) of the 1991 Act, as inserted in 1994.
175 The 1974 Act was repealed by the Maritime Transport Act 1994, see Chapter 3 above.
177 The only ships not covered are identified in the new s 4A of the Resource Management Act. The 1991 Act's controls apply only within the territorial sea by virtue of the Act's definition of "coastal marine area."
179 Unless the use is an existing use protected under s 20(2).
180 Unless the use is an existing use protected under s 20(1).
prohibited activities and as a means of prohibiting otherwise allowed activities, sections 14 and 15 provide the first link between 1991 Act’s planning and resource allocation schemes – further links appear later in the resource allocation regime.

The connection between planning and resource allocation is not so direct when it comes to the dumping or incineration of waste, and other harmful substances, into the coastal marine area. Sections 15A-15C generally prohibit such activities, regardless of the contents of plans.\(^{181}\)

Even if an activity involving water occurs in accordance with the relevant local authority plan or a resource consent, the person carrying on the activity does so subject to the duty imposed by section 17. This duty requires “... [e]very person ... to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of that person ...” and, although the duty is not “... of itself ...” enforceable, compliance with it may be achieved through enforcement orders and/or abatement notices.\(^{182}\)

### 2. Resource Consents

Part VI of the Act aims to create a faster, simpler, more comprehensive and better integrated system for allocating resource consents.\(^{183}\) Simplification and integration are, at least in part, achieved by replacing the “... multiple “permissions” required for resource use under the previous law [with the] five consent types under the [1991] Act.”\(^{184}\) Consents are also now required for various activities (such are activities in the coastal marine area and the discharge of

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181 Although rules in plans can be made classifying activities set out in s 15A, such rules are made by regulation by the Governor-General in Council, see n 128 above and accompanying text.

182 The duty is set out in s 17(1). Section 17(2) provides that s 17(1) is not directly enforceable, and s 17(3) authorises the use of enforcement orders and abatement notices to “[r]equire a person to cease, or prohibit a person from commencing anything that, in the opinion of the Planning Tribunal or an enforcement officer, is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment; or [to r]equire a person to do something that, in the opinion of the Planning Tribunal or an enforcement officer, is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by, or on behalf of, that person.” Enforcement orders are made by the Planning Tribunal under s 319 and failure to comply with an order is a s 338 offence (s 315). Abatement notices, which are served by enforcement officers (a right to appeal against them to the Planning Tribunal is conferred by s 325), must also be complied with under s 323.

183 Since the enactment of the 1991 Act, the Ministry for the Environment has monitored the “... implementation of the Act to assess whether the new procedures are leading to more streamlined and cost-effective processing of applications. In some cases consent processing times have been longer than under previous legislation; in other cases, shorter. The main variable is whether local government is taking up the opportunities under the Act, such as ... non-notification procedures. The ability to use non-notification of consents ... has greatly reduced notification, saving cost and time. The consultation, prehearing and alternative dispute resolution provisions in the Act are proving popular. Cases now coming through the system show that time put into early consultation saves money once the statutory processes begin.” (Ministry for the Environment 32 Environment Update (April 1993) 2).

184 Ministry for the Environment Resource Consents Information Sheet 4 October 1991. Combined and joint hearings (see ss 102 and 103, and text to follow) should also contribute to the increased speed and integration of proceedings under the 1991 Act.
contaminants onto land) which could formerly proceed without special permission.185

Of the five types of resource consent provided for in the Act, three are relevant to activities involving water: coastal permits, water permits, and discharge permits.186 Unless they are of national significance, applications for water, discharge, and coastal permits not relating to activities identified as restricted coastal activities in the relevant regional plan will be considered and determined at first instance by regional councils,187 and applications for coastal permits in relation to restricted coastal activities will be determined by the Minister of Conservation, following a recommendation by a committee of the relevant regional council.188

a. Procedure
i. Applications for Water, Discharge and Coastal Permits (Excluding Applications for Restricted Coastal Activities)

The procedure for processing most applications for resource consents begins with the making of an application in the prescribed form.189 Applications should include "[a] description of the [proposed] activity ... and its location; ... [a]n assessment of any actual or potential effects that the activity may have on the environment, and the ways in which any adverse effects may be mitigated; ... [a]ny information required to be included ... by a plan or regulations; and ... [a] statement specifying all other resource consents that ... may [be] require[d] ... in respect of the activity ... ."190

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185 Randerson supra n 9, 5.
186 Section 87(c) (as amended) defines a "coastal permit" as "[a] consent to do something in a coastal marine area that otherwise would contravene any of sections ... 14, 15, and 15A ..."; s 87(d) defines a "water permit" as "[a] consent to do something (other than in a coastal marine area) that otherwise would contravene section 14 ..."; and s 87(e) defines a "discharge permit" as "[a] consent to do something (other than in a coastal marine area) that otherwise would contravene section 15 ...."
187 This is inferred from the functions of regional councils, as set out in s 30 (and see n 72 above). Applications of national significance may be "called-in" by the Minister for the Environment, see text to follow.
188 See the definition of "restricted coastal activity" in s 2, ss 117-119, and text to follow.
189 Section 88(1) provides that applications may be made by "any person" to "the relevant local authority."
190 Section 88(4). Note that the "... assessment of any actual or potential effects ..." should 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; and ... [p]repared in accordance with the Fourth Schedule" (s 88(6)). The Fourth Schedule details the requirements of environmental impact assessments. Note further that the "... statement specifying all other resource consents ..." is needed to to allow for the calling of joint (s 102) or combined hearings (s 103). Finally, note that further information may be required by the consent authority under s 92. Where the authority is "... of the opinion that any significant adverse effect on the environment may result from [the proposed] activity ... [it] may-- (a) [r]equire an explanation of ... possible alternative locations or methods for undertaking the activity ...; and ... [(t)he consultation undertaken by the applicant; and (b) [(w)here the application is for a discharge permit or a coastal permit to do something that would otherwise contravene section 15 ..., require an explanation of-- [(t)he nature of the discharge and the sensitivity of the proposed receiving environment ..., and ... [a]ny possible alternative methods of discharge, including discharge into any other receiving environment; and (c) [(o)mission a report on any matters raised by the application ... ."]
Once in receipt of an application, the consent authority must determine if the application requires notification. Under section 94, this determination will be based on the kind of activity which has been proposed and its anticipated effects, and the degree of consultation already undertaken by the applicant. Where notification is required, it must occur within 10 days.

Any person may make written submissions on a notified application, and can thereby either support, or oppose, the application.

Consistent with the Act's aim to provide greater flexibility and informality in decision-making, is section 99 with its provision for pre-hearing meetings to "... clarify[], mediat[e], or facilitat[e] resolution of any matter or issue ... ." Following any pre-hearing meeting, the consent authority holds a public hearing. Hearings are regulated by sections 39-42A and, aside from being in public, must be conducted according to a "... procedure that is appropriate and fair in the circumstances ... ." The applicant, and any person who made a submission and indicated a desire to be heard is entitled to be heard, and sensitive information may be protected at hearings.

191 Section 93(1) describes who must be notified (this includes both specified individuals and groups, and the general public). Section 93(2) describes the necessary substance of notifications.
192 Section 94 describes which applications do not require notification (though the final discretion is retained by the consent authority, see s 94(5)). Milne comments that "[t]he effect of an activity on the environment determines largely what consent-issuing procedure is applied. This is in keeping with the general intention of the Act to control environmental effects rather than the activities themselves. Activities that affect a wide range of people or have significant environmental effects should be publicly notified and a hearing held" (Milne supra n 2, 69). Thus, s 94 prescribes that controlled activities will often not require notification (recall that the category of controlled activities in intended to include "... activities which are of minor environmental effect ... and appropriate to determine without public involvement ..." – see n 121 above) and that discretionary and non-complying activities need not be notified if their anticipated environmental impact will be minor.
193 Section 95. This time restriction is one of many in the resource consents procedure; together, these (and the provisions for joint and combined hearings, to be discussed in text to follow) are designed to encourage a "... faster, smoother consent process ..." (Ministry for the Environment Introducing the Resource Management Bill (December 1989) 5). Note also s 90 which provides for the distribution of applications to other local authorities, and the Ministers.
194 Section 96 which also specifies the information which must be included in submissions, and provides for the service of submissions on the applicant for the resource consent (and see s 98). Section 97 imposes a 20 day time limit on the making of submissions to keep proceedings running quickly – see n 193 above.
195 Section 100 provides that a hearing need not be held unless the authority considers it "necessary," or the applicant or a person who made a submission requested to be heard. If a hearing is to be held, the date must be fixed and notified under s 101.
196 Section 39(1). Section 39(2) provides that "[i]n determining an appropriate and fair procedure ... the authority shall– (a) Avoid unnecessary formality; and (b) Recognise tikanga Maori where appropriate, and receive evidence written or spoken in Maori ...; and (c) Not permit any person other than the chairperson or other member of the hearing body to question any party or witness; and (d) Not permit cross-examination."
197 Section 40.
198 Section 42. The authority can make an order providing either that all or part of a hearing shall be held with the public excluded or "... prohibiting or restricting the publication or communication ..." of any information supplied to it "... where it is satisfied that [such] an order is necessary– (a) To avoid serious offence to tikanga Maori or to avoid the disclosure of the location of waahi tapu; or (b) To avoid the disclosure of a trade secret or unreasonable prejudice to the commercial position of the person who
In order to promote integrated resource management and the speedy determination of consent applications, the Act provides for joint and combined hearings. Where applications for resource consents associated with the same proposal are made to two or more consent authorities, then they must be heard jointly.199 Where two or more applications for resource consents associated with the same proposal have been made to the one consent authority, they must be heard together at a combined hearing under section 103.200

Perhaps the most important of the Act’s provisions relating to resource consents, section 104 sets out the matters which must be considered at any hearing. All of the matters listed are to be given regard subject to Part II of the Act.201 Included as relevant considerations are: the “... actual and potential effects on the environment of allowing the activity;202 [a]ny relevant regulations[,] ... national policy statement, New Zealand coastal policy statement, regional policy statement,... and ... plan ...; and [a]ny relevant water conservation order or ... designations ... ”203 Where applications for coastal permits in relation to the activities in s 15A(1) are being considered, the consent authority must also have regard to the nature of the discharge involved, the sensitivity of the receiving environment, and any alternative methods of supplied, or is the subject of, the information.” Orders made to protect commercial information and positions expire at the conclusion of the hearing, other orders may continue indefinitely.

199 Unless “[a]ll the consent authorities agree that the applications are sufficiently unrelated that a joint hearing is unnecessary; and ... [t]he applicant agrees that a joint hearing need not be held” (s 102(1)). Section 102(3) provides that where there is a joint hearing, there shall be a joint decision unless the application relates to a restricted coastal activity or any of the authorities involved considers a joint decision inappropriate. Note that consent authorities may defer hearing an application where they consider, on reasonable grounds, that the proposal will require further consents and that, in order to promote a “... better understanding of the nature of the proposal...” it would be better to wait until applications for these other consents are received (s 91).

200 Unless the authority considers that the applications “... are sufficiently unrelated so that it is unnecessary to hear and decide the applications together; and ... the applicant agrees that a combined hearing need not be held.” Again, note s 91 (see n 199 above).

201 This is the formulation used in the amended version of s 104. The words “subject to” have been addressed by the courts, both in relation to s 104 and in respect of other statutory provisions. In relation specifically to s 104, see Winston Gardener v Tasman District Council unreported, Planning Tribunal Nelson, 3 August 1991, W64/94, where Judge Treadwell said that the words “subject to” show that “... the purpose and principles of the Act are an overriding guide when construing consent provisions ..” (at 7); and Reith v Ashburton District [1994] NZRMA 241, 252 where the Tribunal accepted the respondent’s submission that “... the words “subject to” ... are to be given the same meaning that the Court of Appeal gave them in Environmental Defence Society [supra n 42], namely, a “standard drafting method of making clear that the other provisions referred to are to prevail in the event of conflict” ...”. Environmental Defence Society was a decision, in part on the relationship between ss 3 and 4 of the Town and Country Planning Act 1977. Section 4 had been declared to be “subject to” s 3 in that Act.

202 Recall that “effect” is given a wide definition in s 3, see n 10 above and note also s 104(3), which reads: “[w]here an application is for a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants), the consent authority shall, in having regard to the actual and potential effects of allowing the activity, have regard to– (a) The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects and the applicant’s reasons for making the proposed choice; and (b) Any possible alternative methods of discharge, including discharge into any other receiving environment.”

203 Section 104(1), and note s 104(4) in relation to applications for a coastal permits.
When it comes to the determination of applications under section 105, three different degrees of evidential onus may apply. First, for a controlled activity the consent authority is bound to grant the application, but may include conditions (which should not effectively negate the granting of the consent). Secondly, no presumption applies for or against the grant of an application for a discretionary activity. Thirdly, a consent for a non-complying activity should not be granted unless the authority is satisfied the effect on the environment will be minor, or in the alternative, granting the consent will not be contrary to the objectives and policies of the plan or the proposed plan.

Clearly, no consents may be granted for prohibited activities.

The Act confers wide powers on consent authorities to attach conditions to resource consents. Section 108 allows for the making of any conditions that the consent authority “... considers appropriate,” including conditions requiring the payment of financial contributions or administrative charges; conditions requiring that covenants or bonds be entered into; conditions requiring the consent holder to supply information “... relating to the exercise of the consent ...” to the consent authority; and conditions requiring the adoption of the “... best practicable option to prevent or minimise any actual or likely adverse effect on the environment ...” in relation to discharge or coastal permits to undertake activities which would otherwise contravene s 15 or s 15A. Section 112(2) implies a condition into any water permit.

204 Section 138A(1) of the 1991 Act, as inserted in 1994.
205 Palmer supra n 40, 407. Note that since the authority retains no discretion as to whether or not to grant a consent for a controlled activity, the matters listed in s 104 become relevant only in determining which, if any, conditions should be attached.
206 See s 105(2)(c) and (d). Note also that subs (2)(a) provides that no consents shall be granted in breach of ss 107 (relating to discharge permits and coastal permits where a discharge of water or contaminants into water, or onto land in circumstances which may result in a contaminant entering water, would, after reasonable mixing, be likely to give rise to the “... production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials: ... any conspicuous change in the colour or visual clarity: ... any emission of objectionable odour: ... the rendering of fresh water unsuitable for consumption by farm animals: ... any significant adverse effects on aquatic life”), 217 (subs (2) of which provides that where a water conservation order is operative, no water, coastal, or discharge permit shall be granted in breach of any “... restriction or prohibition or any other provisions of the order ...,” or unless “... the combined effect of the grant of any such permit and of existing water permits and discharge permits and existing lawful discharges into the water or taking, use, damming, or diversion of the water is such that the provisions of the water conservation order can remain without change or variation”), or any regulations.
207 Section 108(2).
208 Section 108(1)(a). And see s 108(9) which defines “financial contribution,” and ss 110 and 111.
209 Section 108(1)(d); these may only be required in accordance with s 36.
210 See s 108(1)(b) (bonds – and see subs (6) on what a bond can require, and s 109) and (c) (covenants).
211 Section 108(3) and (4).
212 Sections 108(1)(e) and 138A(2). Note that “best practicable option” is defined in s 2(1), see n 134 above. Before imposing a best practicable option condition, the consent authority is required, having regard to “... (a) The nature of the discharge and the receiving environment; and (b) Other alternatives, including any...
authorising the use of geothermal water. Conditions may be subsequently changed or cancelled by the consent authority on application by the consent holder, or following a review by the authority initiated at its own motion.

Once made, copies of the consent authority's decision must be served on the applicant, all persons who made submissions, and any other person or authority as is appropriate. Further, the decision may be publicly notified. Decisions to grant or refuse applications for resource consents, or to change the conditions attached to consents, are all subject to appeal in the Planning Tribunal.

ii. Applications for Coastal Permits in Respect of Restricted Coastal Activities

Any application for a coastal permit to carry out a restricted coastal activity should be made to the relevant regional council, which is then required to forward a copy of the application to the Minister of Conservation. The regional council then proceeds with the application as if it were any other, although there is no allowance for non-notification, and the application will eventually be considered by a special hearings committee which must include one member appointed by the Minister of Conservation. At the conclusion of its hearing, the committee must make (and justify) a recommendation on the application to the Minister of Conservation. The committee’s recommendation can be subjected to an inquiry before the Planning Tribunal, which must report to the Minister of Conservation. The final decision on the application is to be made by the Minister of Conservation, who is obliged to consider the condition requiring the observance of minimum standards of quality of the receiving environment, to be satisfied that "... the inclusion of that condition is the most efficient and effective means of preventing or minimising any actual or likely adverse effect on the environment" (s 108(8)).

This condition provides for the payment to the relevant regional council of sums of money as required by regulations made under s 360.

See ss 127 (which empowers the holder of a consent to apply for the change or cancellation of conditions), and 128-132 (which relates to reviews by consent authorities). Note that s 128 delineates when a consent authority can move to review the conditions of a resource consent, and includes: any specified time for the purpose of dealing with any adverse environmental effects which may have arisen from the exercise of the consents, or of requiring the adoption of the best practicable option to remove or reduce adverse environmental effects; and any time when a regional plan which includes rules setting maximum or minimum water flows or levels, minimum standards of water quality, or ranges of temperature or pressure for geothermal water.

Section 113 provides that decisions must be written and must state: "... (a) The reasons for the decision; and (b) In a case where a resource consent is granted for a shorter duration than specified in the application, the reasons for deciding on the shorter duration." Section 114 provides for the service of copies of the decision. Note that there is a time limit on the notification of decisions, s 115.

Section 114(3). Note that there is a time limit on the notification of decisions, s 115.

Section 120. Any person who applied for a change to the conditions attached to a consent, the consent holder, and any person who made submissions on the application for, or review of the consent, may appeal to the Tribunal.

Section 117(1).

Section 117(2)-(6).

Sections 117(6)(b) and 118(1). Note also s 118(2)-(5) in relation to the notification and service of the committee’s recommendation.

Section 118(6).
iii. Applications Concerning Proposals of National Significance

As previously noted, the Minister for the Environment may call in (or indicate an intention to call in) applications for resource consents relating to proposals of "... national significance ...". The significance of a proposal may be assessed by the Minister having regard to the public interest thereby aroused; the extent of the use of natural and physical resources; the effects of the proposal on features or places of national significance, on New Zealand’s international obligations, and on the environment (including the global environment); and the significance of the proposal in terms of the principles of the Treaty of Waitangi.

Applications are called in from consent authorities, and submissions on them are received, by the Minister. The application and submissions must then be referred to a board of inquiry for consideration "... without delay ...". The board of inquiry must hold a hearing within 25 days of the closing date for submissions, at which it must have regard to the matters in section 104, relevant matters from section 140(2), and the Minister’s reasons for calling the application in. The board must then furnish the Minister with a written report, and the Minister must then determine the application having regard to both the report, and the matters in section 104. The Minister’s decision is subject to appeal before the Planning Tribunal.

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222 Section 119 – note that the Minister can refer matters back to the committee or the Tribunal if s/he considers it appropriate.
223 Section 119(6), and see n 206 above for a description of these provisions.
224 Section 140(1).
225 Section 140(2).
226 Applications are called in by direction of the Minister (s 140(1)). As to the form and notification of directions, see ss 141(1) and 144, respectively; and, as to the effect of directions, see ss 141(2) and 143.
227 Submissions may be made by any person (s 145). The board of inquiry must be appointed "... as soon as reasonably practicable after receiving the application ..." (s 146), and provided with the application and submissions "... without delay ..." (s 147).
228 This time limit is set in s 101, which applies to boards of inquiry by virtue of s 147(3).
229 The matters in s 104 were described at nn 201-203 above and accompanying text, and the matters in s 140 in nn 224 and 225 above and accompanying text. The Minister is required to give a statement of her or his reasons for making the direction by s 141(1)(b).
230 Section 148. Such a report must include "... recommendations and reasons ..." (subs (1)) and shall state the "... principal issues and findings of fact; and ... how the board considers the Minister should decide the application; and ... may recommend the issue, change, or repeal of a national policy statement or a New Zealand coastal policy statement ... or changes to any plan or regional policy statement" (subs (2)). The Minister must ensure that this report is published, publicly notified and that copies are sent to the applicant(s), the relevant local authorities and all persons who made submissions.
231 Section 149, which also imposes a 20 day time limit on the Minister.
232 Section 149(3) provides that ss 120 and 121 (which relate to appeals) apply. Sections 127-132 (which relate to the changing and review of conditions attached to consents) also apply to called in applications, see s 150.
b. The Nature of Consents

Resource consents are not generally to be regarded as the real or personal property of the holder\(^{233}\) and most may endure for a maximum period of 35 years.\(^{234}\) Coastal, water, and discharge permits are all transferrable.\(^{235}\)

3. Protecting Water Bodies: Heritage Orders, Esplanade Reserves and Water Conservation Orders

Aside from the resource consents regime which establishes a general structure for the allocation of water, the 1991 Act contains some more specialised mechanisms providing for the allocation of water to conservation interests, or for the allocation of other resources for purposes which relate to the protection of water. These include esplanade reserves, heritage orders, and water conservation orders.

a. Esplanade Reserves

Esplanade reserves are reserves\(^{236}\) which, subject to some restrictions, must be set aside when land adjacent to the sea, or any river or lake is subdivided,\(^{237}\) or which may be created by agreement between the land owner and the relevant local authority.\(^{238}\) Once created, esplanade reserves vest in and are administered by the local authority.\(^{239}\) The purpose of any esplanade reserve is to "... contribute to the protection of conservation values by ... [m]aintaining or enhancing the natural functioning of the adjacent sea, river, or lake; or ... water quality; or ... aquatic habitats; or ... [t]o enable public access to or along any sea, river, or lake; or ... [t]o enable public recreational use of the esplanade reserve ... and adjacent sea, river, or lake, where the use is compatible with conservation values."\(^{240}\)

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233 Section 122. Consents may, however, in some cases be treated as though they were real or personal property (see s 122(2)(3) and (4)).
234 Section 123; although disused consents may lapse or be cancelled (see ss 125 and 126, respectively), and the holders of consents are able to surrender them, in whole or part (s 138).
235 The holder of a coastal permit may transfer, in whole or part, his or her interest in that permit to "... any other person ..." but not to another site, unless the permit, or a rule in the regional plan, expressly provides otherwise (s 135). The holder of a water permit to dam or divert may transfer, in whole or part, his or her interest in that permit to "... any owner or occupier of the site in respect of which the permit [was] granted ...," but not otherwise (s 136(1)). The holder of a water permit other than to dam or divert may transfer, in whole or part, his or her interest in that permit to "... any owner or occupier of the site in respect of which the permit [was] granted, or ... [t]o another persons on another site, if both sites are in the same catchment ..., aquifer or geothermal field, and the transfer ... [has been] expressly allowed by a regional plan; or [h]as been approved by the consent authority that granted the permit ..." (s 136(2)). The holder of a discharge permit may not generally transfer his or her interest in that permit to "... any person other than an owner or occupier of the site in respect of which the permit [was] granted or to a local authority; or [f]rom site to site ..." (s 137).
236 See s 231.
237 Section 230.
238 Section 236.
239 Section 231(1)(b).
240 Section 229(2).
b. Heritage Orders

Although not directly providing for the protection of water bodies, heritage orders, which are “... provision[s] made in ... district plan[s] to give effect to a requirement made by a heritage protection authority ...” may indirectly afford such protection. Requirements may be made for the purpose of protecting a “... place of ... special interest, character, intrinsic or amenity value or visual appeal, or of special significance to the tangata whenua for spiritual, cultural, or historical reasons ...” Once a requirement is made notice of it is given to the relevant territorial authority which must then publicly notify, receive submissions upon, and hold a hearing in respect of, the requirement. The issue to be addressed is whether or not the requirement should be included in the relevant district plan, and, when considering this issue, the territorial authority should have regard, subject to Part II, to the reasons supporting the requirement, how it will affect the lawful use of the place it aims to protect, whether in fact the place warrants protection, whether a requirement is “reasonably necessary” to protect the place, and all relevant planning documents. The territorial authority must then recommend the confirmation, modification, or withdrawal of the requirement, and the requiring authority is empowered to accept or reject that recommendation. A confirmed requirement must be included in the relevant district plan and, once included, means that “... regardless of the provisions of any plan or resource consent, no person may, without the prior written consent of the relevant heritage protection authority ... do anything ... that would wholly or partly nullify the effect of the heritage order.”

c. Water Conservation Orders

Water conservation orders focus exclusively on protection. They are made to “... recognise and sustain ...” the “... outstanding amenity or intrinsic values ...” afforded by waters whether

241 Section 187, which defines a heritage protection authority as any Minister, a local authority, the New Zealand Historic Places Trust or “[a] body corporate that is approved as a heritage protection authority under section 188.” Section 188 allows “[a]ny body corporate having an interest in the protection of any place” to apply to the Minister for the Environment for approval as a heritage protection authority. Once the Minister has undertaken such inquiry as s/he considers necessary, s/he may recommend the making of an Order in Council approving the body as a heritage protection authority. No such recommendation can be made unless the Minister is satisfied as to the matters set out in subs (5).

242 This will depend on whether or not water bodies are included in the “place” (see s 188(2)) to which the order relates. It is relevant to note that the Royal Forest and Bird Protection Society has been approved as a heritage protection authority in respect of Northland’s Kaimaumau wetlands.

243 Section 189(1). Note that s 189(2) provides that “[f]or the purposes of this section, a place may be of special interest by having special cultural, architectural, historical, scientific, ecological, or other interest.”

244 See ss 189 and 190.

245 See s 191(1).

246 Section 191(2).

247 Section 172(1), which applies by virtue of s 192(a).

248 Section 175 (which applies by virtue of s 192(d)) provides that a requirement, once confirmed, must be included in the district plan “as if it were a rule.”

249 Section 193.
or not they remain in their natural state and, to this end, may provide for “[t]he preservation as far as possible in its natural state of any water body that is considered to be outstanding: ... [t]he protection of characteristics which any water body has or contributes to, and which are considered to be outstanding, ... [a]s a habitat for terrestrial or aquatic organisms: ... [a]s a fishery: ... [f]or its wild, scenic, or other natural characteristics: ... [f]or scientific and ecological values: ... [f]or recreational, historical, spiritual, or cultural purposes: ...[or t]he protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Maori.”

This purpose applies “[n]otwithstanding anything to the contrary in Part II ...” of the Act. Once made, water conservation orders impose restrictions and prohibitions on the allocation and management of water resources generally.

Any person may apply for a water conservation order and, on receipt of an application, the Minister for the Environment must make a preliminary determination to reject the application, or to appoint a special tribunal to hear and report on it. If appointed, the special tribunal’s first functions are to publicly notify and receive submissions on the application. It may then hold a pre-hearing meeting and/or a public hearing at a place near to the water body in question. Whether or not a hearing is held, the tribunal must consider and report on the application.

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250 Section 199.
251 See n 7 above.
252 Thus, s 200 defines a water conservation order as an order “... that imposes restrictions or prohibitions on the exercise of a regional councils’ powers under paragraphs (e) and (f) of section 30(1) [which relate to the control of the taking, use, damming and diversion of water; of the quantity, level, and flow of water; and of the discharge of water or contaminants into water] ... including, in particular, restrictions or prohibitions relating to— (a) The quantity, quality, rate of flow, or level of the water body; and (b) The maximum and minimum levels or flow or range of levels or flows, or the rate of change of levels or flows to be sought or permitted for the water body; and (c) The maximum allocation for abstraction or maximum contaminant loading consistent with the purposes of the order; and (c) The ranges of temperature and pressure in a water body.
253 Section 201, which provides that applications must identify the water body, offer reasons supporting the making of an order and describe those provisions which the applicant feels should be included in any order made (subs (2)). Further information may be required by the Minister for the Environment (subs (3)).
254 Section 202. Before appointing persons to the tribunal, the Minister shall, where appropriate, consult with the Minister for Maori Affairs and Conservation (s 202(2)). See also s 203.
255 See ss 204 and 205.
256 See ss 99 (in relation to pre-hearing meetings), 100 (allowing the tribunal the discretion to determine the necessity of holding a hearing), and 101 (ensuring that adequate notice of any intended hearing is given). Sections 39-42 (see nn 196-198 above and accompanying text) apply to hearings by virtue of s 206. Section 206(4) provides that the inquiry should be held “... in public at a place ... near to the water body to which the application relates.”
257 See ss 207 and 208. The application should be considered having particular regard to the purpose of water conservation orders, and the matters contained in s 199 (see n 250 above and accompanying text), and having regard to the application, all submissions, “... the needs of primary and secondary industry, and of the community ..., and relevant planning documents (including national policy statements, New Zealand coastal policy statements, regional policy statements and regional and district plans). The tribunal is required to prepare and notify a report which must either “... include a draft water conservation order, or state that the tribunal recommends that the application be declined; and ... [s]tate the reasons for the tribunal’s conclusion.”
The whole or any part of the special tribunal’s report may be challenged in the Planning Tribunal. The Minister must then finally determine whether or not to recommend the making of an order by the Governor-General by Order in Council.259 Once made, orders, which have the effect of restricting the granting of future water and discharge permits in respect of the water body to be protected,260 may be revoked or varied.261

4. Arresting Pollution: Enforcement Orders and Abatement Notices

The Resource Management Act, according to Lynch, “… contains significantly more effective enforcement and abatement provisions than [its predecessors].”262

Abatement notices, which can be served by enforcement officers, may require a person to “… cease, or prohibit that person from commencing…” anything which “… [i]s or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment.”263 Even if the adverse environmental effects have already been caused, an abatement notice can require their remedy or mitigation.264 “The simplicity of this procedure, and the very short time of only seven days for lodging appeals, will make abatement notices very effective.”265

258 See ss 209-213.
259 The Minister may only recommend the making of a water conservation order “… in accordance with …” the report of the special tribunal (where there has been no subsequent inquiry by the Planning Tribunal) or the report of the Planning Tribunal (s 214(2)). If either of the two tribunals recommend making an order, but the Minister decides that one should not be made, s/he must, “[w]ithin 20 sitting days … lay before the House of Representatives a written statement setting out the reasons for his or her decision; and … [w]ithin 20 working days … serve on the applicant and every person who made a submission to the special tribunal or the Planning Tribunal, such a written statement” (s 215). Once recommended, orders are made pursuant to s 214(1).
260 Section 217.
261 Section 216.
262 Lynch J “Penalty Corner” Terra Nova (June 1992) 51.
263 Abatement notices are served by enforcement officers (s 322). Section 38(1) provides for local authorities to authorise any of their officers, or any officers from any other local authority, the Ministry of Agriculture and Fisheries or the Department of Conservation to carry out the functions and powers of enforcement officers, while s 38(3) provides for the Minister of Conservation to authorise any of its officers, or any officers of any local authority to to carry out the functions and powers of enforcement officers in relation to areas of the coastal marine area with significant conservation value.
264 But apparently only where there has also been a breach of the Act, any regulations, a rule in any plan, or a resource consent: s 322(1)(b) provides that notices can require a person to “… do something that, in the opinion of the enforcement officer, is necessary to ensure compliance … with the Act, any regulations, a rule in a plan …, or a resource consent, and also necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment …” (emphasis added). Section 323 states that abatement notices must be complied with within the period specified by their terms (unless a notice of appeal has been lodged – s 325(3)) and that the persons on whom they are served must meet all costs of compliance.
265 Lynch supra n 262, 51. Note that the only procedural requirements seem to be as to service (that this be by an enforcement officer), conditions (these may be attached as the enforcement officer thinks fit, s 322(3)), and form and content (s 324); and that the 7 day time limit is provided by s 325, which relates to appeals generally.
Anyone can apply to the Planning Tribunal for an enforcement order. Enforcement orders can require a person to stop (or prohibit them from commencing) "... anything ... that ... is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:" or can require a person to "... do something that ... is necessary ... to [a]void, remedy, or mitigate any actual or likely adverse effect on the environment ..." or can require the payment of money to reimburse another person who has incurred clean-up costs as a result of the creation of adverse environmental effects. Enforcement orders may also require "... the restoration of any natural and physical resource to the state it was in before the adverse effect occurred."

As enforcement orders can only be made following a hearing by the Planning Tribunal, the Act provides for interim enforcement orders. These can be made without any notification or hearing where the Planning Judge considers this necessary. Interim orders are designed for "... urgent problems need[ing] immediate action ... [they] are for serious cases, and will be strictly limited to circumstances where significant environmental damage is occurring or is imminent."

It is an offence to contravene any abatement notice or enforcement order.

The Act extends liability for offences by companies to managers and directors.... [and] continues the trend towards stronger penalties. ... These penalties are not "soft" when measured in the context of New Zealand’s criminal law – and that is the only appropriate measure.

Section 316(1) empowers "... any person ... at any time ..." to apply for an enforcement order of a kind specified in s 314(1)(a)-(d) (see n 267 below and accompanying text). Once made in the prescribed form, applications must be served on all persons directly affected (s 317(1)), and will then be heard by the planning Tribunal. At the Tribunal’s hearing, the applicant and the person against whom the order is sought should be heard (s 318). The Tribunal cannot make an order under either of s 314(1)(a)(ii) or (b)(ii) (see n 267 below and accompanying text) if that person is acting in compliance with a rule in a plan or proposed plan or with a resource consent that it approved the plan, or notified the proposed plan, or granted the resource consent" (s 319(2)). Any person directly affected by an enforcement order may at any time apply to the Tribunal to change or cancel the order (s 321).

Section 314(1). Paragraph (a) provides for the making of orders to stop or prohibit the creation of adverse effects; paras (b) and (c) for the making of orders requiring action to avoid, remedy, or mitigate adverse effects; and para (d) provides for the making of orders to recover clean-up costs. Section 315 demands compliance with enforcement orders. Failure to comply (which is an offence) enables others, with the consent of the Tribunal, to undertake action (including entering land and recovering costs) to ensure compliance.

Section 314(4).

See n 266 above for a description of the procedure involved.

Section 320.

Introducing the Resource Management Bill supra n 193, 11.

Section 338(1).

Lynch supra n 262, 51. See s 340 as to the liability of principals for the acts of agents, and s 339 as to penalties. Offences involving a contravention of enforcement orders and abatement notices are punishable by a maximum of two years imprisonment or a fine of up to $200,000 and, if the offence is a continuing one, an additional fine of $10,000 for each day during which it continues.

Structurally, the general systems prescribed for the allocation of water resources under the 1967 and 1991 Acts are similar. Both begin with the restriction of general rights to use, take, dam and divert inland and coastal water, and of rights to discharge waste, or contaminants into water. Both Acts exempt certain uses of water from their restrictions, and provide for the obtaining of express permission to use water despite the restrictions.

There are, however, differences between the Acts. The uses of water which were expressly provided to be exempt from the general restriction contained in section 21 of the 1967, have been simultaneously expanded and reduced under the 1991 Act. Further, under the 1991 Act, a wider range of discharges are restricted.

274 “Natural water,” like “water” in s 2 of the 1991 Act, was defined very widely in s 2. Both definitions seem to include all the same forms of water, but the 1967 Act expressly excluded “... water in any form while in any reservoir ... under the control of a public authority and used mainly for the water supply purposes of that public authority ...” while the 1991 Act does not.

275 The second proviso to s 21(1) of the 1967 Act exempts the “... tak[ing] or use [of] any natural water that is reasonably required for [the] domestic needs [of any person] and the needs of animals for which he has any responsibility[,] and for or in connection with fire-fighting purposes” from the s 21(1) restriction. Section 14(3) of the 1991 is both broader, and more restrictive. It too exempts the taking and use of fresh water for domestic needs, but only those of an “individual,” or of “... an individual's animals for drinking ....,” and only when there would be no adverse environmental effects. Thus, the 1991 Act is more restrictive: “individual” is usually perceived as narrower than “person,” which often includes bodies of persons, and corporations sole; and there is the added requirement about environmental effects. The 1991 Act is broader than its predecessor in that it exempts the taking and use of geothermal water in accordance with tikanga Maori, and the taking, use or diversion of coastal water for “... an individual’s reasonable .... recreational needs ...” from the s 14(1) prohibition. In both cases, the impact of the extension is mitigated by a requirement that the taking, or use, or diversion not have adverse environmental effects.

276 Under the 1967 Act, this could be done by way of general authorisations (s 22, and see Chapter 3 above), and by way of water rights (ss 21(3) and 24(1), and see Chapter 3 above). Under the 1991 Act, this can be done by way of regional plans, or resource consents (see s 14(2) and (3)(a), and s 15(1)).

277 See n 275 above.

278 When s 21(1) of the 1967 Act (which vests the sole right to discharge water or waste into water or onto land “... in circumstances which result in that waste or any other waste emanating as a result of natural processes from that waste, entering natural water ...” in the Crown) and s 15(1) of the 1991 Act (which provides that “... no person may discharge any- (a) Contaminant or water into water; or (b) Contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water ...”) are compared, the 1991 Act’s restrictions appear wider for two reasons. First, they cover discharges of contaminants onto land in circumstances which may result in the contaminant entering water – thus no actual entry into water is required, as it would have been under the 1967 Act. Second, the definition of “waste” in s 2 of the 1967 Act appears more restrictive than the replacement definition for “contaminant” set out in s 2 of the 1991 Act (see n 171 above). This is because (i) the 1991 definition includes “... gases, liquids, solids, and micro-organisms ... or energy ... or heat ...” while the old Act covered only “matter” – which arguably excludes at least heat and energy –, substances which are contaminants only once combined with “... the same, similar, or other substances, energy, or heat ...”, substances which are only likely to change the condition of the water (the 1967 Act is more demanding, looking for discharges which will contaminate the water), and substances which change the biological (as well as the physical or chemical) condition of...
Likewise, the procedures for obtaining water, coastal, and discharge permits under the 1991 Act reflect closely those prescribed in respect of water rights under the Water and Soil Conservation Act,279 but with some notable differences. First, the new procedure has the potential, and is intended, to be both quicker280 and more accessible.281 Second, and no doubt more importantly, the 1991 Act has brought change to the process by including section 104.282 The mere expression of relevant considerations is new to water allocation,283 as is the inclusion of sustainable management and intrinsic values on the list.284

Both Acts restrict the granting of permits or rights (although there appear to be more restrictions in the 1991 Act)285 and both allow or allowed for the imposition of conditions on permits or rights granted (though the 1991 Act is more specific as to the kinds of conditions which may be attached286 and it introduces the notion of requirements to adopt the best practicable option to water; and (ii) because, under the 1967 Act, to be “waste,” the matter had to change the condition of the water so as to render it “… unclean, noxious, or impure; or … detrimental to the health, safety, or welfare of persons using the water; or … undrinkable to farm animals; or … poisonous or harmful to animals, birds, or fish around or in the water.” No similar restriction appears in the 1991 Act.

279 See Chapter 3 n 416 above and accompanying text.

280 The new procedure is certainly intended to be quicker: thus, new time limits are introduced (for example, the 1991 Act requires the consent authority to publicly notify an application for a water or discharge permit within 10 days of receiving it, see s 95; no time limit is prescribed in s 24(3) of the 1967 Act), old time limits are reduced (for example, under the Water and Soil Conservation Act, there was a 28 day time limit on making objections to applications for water rights. This has been reduced to 20 days in the 1991 Act, see s 97); and there is new provision for the non-notification of some applications (see nn 191 and 192 above and accompanying text) and for pre-hearing meetings (see s 99). There is also, in the 1991 Act, provision for combined and joint hearings, see nn 199-200 above and accompanying text.

281 Thus, the 1991 requires that, if there is to be a hearing on an application, it must be public (see n 195 above and accompanying text) and it also empowers people to simply make submissions (and not just objections) on applications for water or discharge permits (see n 194 above and accompanying text).

282 See nn 201-203 above and accompanying text.

283 The 1967 Act was largely silent in this respect – see nn 19 and 20 above and accompanying text.

284 The test employed under the 1967 required a balancing of benefits against losses, with the relevance of values and interests being limited by the purposes of the Act, which were usually defined by reference to the Long Title which, as has been previously noted (see n 21 above and accompanying text), focused on the instrumental values of water. Part II of the 1991 Act (to which the whole of s 104 is subject – see n 201 above and accompanying text) makes express reference to sustainable management (s 5) and intrinsic values (s 7(d)).

285 The 1967 Act restricted the granting of water rights where the effect of the grant would be to breach any provision in or condition attached to any national water conservation order (s 21(2B)), or where the combined effect of the grant and of existing rights would mean that the provisions of any national water conservation order could not be maintained in their current form (s 21(3F)). Also, the 1967 Act required that such conditions be attached to water rights granted in respect of classified water as were necessary to ensure that the terms of that classification were maintained (s 21(3A)). All of these restrictions also appear in the 1991 Act alongside some new restrictions (such as those forbidding or restricting the granting of a resource consent for an activity which has been classified as a prohibited activity, see s 105(2)(c); or the granting of a discharge permit the operation of which might lead to the effects described in s 107, see n 206 above).

286 The 1967 Act provided simply that regional council/soil boards could grant applications for water rights “... on such terms as [they] might specify ...” (s 21(3)). All manner of conditions were imposed under this provision, including, for example, performance bonds (providing that the right holders must forfeit specified sums of money to the relevant regional water board/council should the proposal in respect of which the rights were acquired be abandoned and ensuring, should the right holders fail to comply with any
prevent or minimise the environmental effects of discharges of contaminants.\textsuperscript{287}

Notable also is the point that while, under the Water and Soil Conservation Act, one could acquire a \textit{right} to use water in some way, today the most one can obtain is a \textit{permit}. This change in terminology was deliberately made and is intended to convey "... more accurately ... the status of [resource] consents."\textsuperscript{288} The idea that a confined allowance to use water is being conferred, rather than an entitlement being claimed, is backed up by section 122, and by other sections limiting the duration and absoluteness of water and discharge permits, in the 1991 Act.\textsuperscript{289} The transferability of resource consents has also been affected by the new Act – under the 1967 Act, all water rights could be transferred, by the holder, to the succeeding owner or occupier of the land in respect of which the right was granted. Under the 1991 Act, water permits may be transferred either to the succeeding owner or occupier of the site in respect of which the permit was granted, or to any other person on any other site in the same catchment, aquifer or geothermal field; coastal permits may be transferred to "... any other person ..." but not usually to another site; and discharge permits may be transferred to the owner or occupier of the site in respect of which the permit was granted or to a local authority.\textsuperscript{290}

other conditions of the rights, that the costs of remedial work would be covered by the holders) and annual monitoring bonds (ensuring that the costs of annual water quality monitoring were covered by the rights holder). Both of these two types of bond were attached, for example, as conditions to the water rights granted by the Otago Regional Council to BHP Gold Mines (NZ) Ltd in relation to the mining venture at Macraes Flat in 1989. The 1991 Act is much more express about the kinds of conditions which can be attached to water or discharge permits – thus, s 108(1) lists four specific types of conditions which may be attached to water permits, and five types (including, most notably one requiring the adoption of the best practicable option, see nn 134 and 212 above and accompanying text) which may be attached to coastal or discharge permits, while s 108(2) provides that the subs (1) list "... does not limit the conditions upon which a resource consent may be granted, and, ... a resource consent may be granted on any other condition that the consent authority considers appropriate."

\textsuperscript{287} See nn 134 and 212 above.

\textsuperscript{288} Ministry for the Environment \textit{People, Environment, and Decision Making: the Government’s Proposals for Resource Management Law Reform} (1988) 38, which also comments that the term "permit" was used in the Resource Management Act to convey the idea that "... well-defined privileges rather than permanent rights ..." were being granted). The nature of water rights under the Water and Soil Conservation Act was briefly addressed by the Town and Country Planning Appeal Board in \textit{An Appeal by Alliance Freezing Co (Southland) Ltd, Southland Frozen Meat and Produce Export Co Ltd v Southland Catchment Board} (1977) 6 NZTPA 247, where it was noted (at 256) that "[a] “right” if granted imports a legal concept whereby the holder thereof may do a certain thing “as of right.”"

\textsuperscript{289} Section 122 provides that resource consents do not comprise either real or personal property. As to the duration of consents, note the under the 1967 Act, most rights were granted on a fixed term basis even though the Act does not set out any maximum terms. The 1991 Act, on the other hand does provide an express maximum term (see s 123). Also, the 1991 Act provides that water and discharge permits will automatically lapse if they are not given effect within 2 years of being granted and that they may be cancelled if, following a period of exercise, they then fall into disuse for a continuous period of 2 years (see ss 125 and 126). Under the 1967 Act, no provision was made for the lapse or cancellation of rights – regional water boards / councils being empowered only to require the cessation of the \textit{exercise} of rights where the holder had failed to comply with their provisions, obligations, conditions or directions (s 24G). Recall that the conditions of permits granted under the Resource Management Act may be reviewed by, and at the instigation of, the consent authority which granted them (see n 214 above and accompanying text).

\textsuperscript{290} See s 24A of the 1967 Act; and n 235 above, which describes in detail the 1991 Act’s provisions relating to the transfer of coastal, water and discharge permits.
The Resource Management Act retains water conservation orders as the main avenue for the direct conservation of water bodies. The most obvious change from the 1967 Act's provisions in this respect lies in the replacement of its dual system of national water conservation orders and local water conservation notices with a single system of water conservation orders. Apart from this structural change, the 1991 Act introduces some substantive and procedural changes to the water conservation regime carried over from the Water and Soil Conservation Act.

Substantively, the 1991 Act has extended both the range of water bodies which may be protected by way of a water conservation order and the range of values which can justify the making of a water conservation order. The Act provides better guidance as to the weight to

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291 See Chapter 3 for a description of the 1967 Act's dual system of national water conservation orders and local water conservation notices. The difference between national orders and local notices is illustrated by Planning Tribunal's comments in the two cases Re National Water Conservation (Motu River) Order 1983 (1984) 10 NZTPA 7 and Wellington Acclimatisation Society v Manawatu-Wanganui Regional Council unreported, Planning Tribunal Palmerston North, 27 August 1990, W59/90. In the Motu River case, the Tribunal stated (at 11) that "... the general purpose of [the national water conservation order regime was] to identify waters of national importance ...," while in the latter case it pointed out (at 4) that, in order to justify the making of a local water conservation notice, "... the features must be of at least regional importance and probably of significant regional importance." Part IX of the 1991 Act provides only for "water conservation orders," being orders made to "... recognise and sustain ... the "outstanding" values afforded by waters in, or no longer in, their natural state (s 199, and see n 250 above and accompanying text). There is no express indication as to whether the values must be nationally outstanding, but this is perhaps implied from the fact that orders will be made by the Governor-General on the advice of the Minister for the Environment (see n 259 above).

292 While s 199(1) of the 1991 Act (which describes the purpose of water conservation orders) refers simply to the protection of "waters" (which term is defined very widely in s 2, see supra n 1), most other sections in Part IX use the term "water body" (this term is also defined in s 2, and means "... fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof, that is not located in the coastal marine area"). The 1967 Act covered only rivers, lakes and streams (and parts thereof); thus the 1991 Act extends the ambit of protection to include ponds, wetlands and aquifers. The inclusion of wetlands is perhaps most significant since it constitutes an express change from the 1967 Act's regime (in Auckland Acclimatisation Society Inc v Sutton Holdings (1984-5) 10 NZTPA 225 it was held, following the Planning Tribunal's holding in the Motu River case – supra n 291, 13 – that conservation orders "... must be restricted to the water itself ...," and that conservation orders cannot be made for wetlands). Because wetlands, aquifers and geothermal waters generally may now be protected by way of a water conservation order, the restrictions which can be imposed by the terms of orders have also had to be broadened: now restrictions and prohibitions relating to the "... ranges of temperature and pressure in a water body ..." may also be imposed, as well as the more traditional restrictions relating to levels, flows, quality and quantity (compare s 200 of the 1991 Act with ss 20D(3) and 20H(3) of the 1967 Act).

293 The values could be protected by the making of orders and notices under the 1967 Act may be ascertained by reviewing ss 20D(2) and 20H(2) (which described the contents of orders and notices and referred to "... wild, scenic, or other natural ..." characteristics (this phrase also appeared into the Act's Long Title) and to "... recreational, fisheries, wildlife habitats, scientific or other ..." features; and 20B(6) and 20P(6) (which specified the matters to be taken into account when considering applications for water conservation orders or notices and included "(a) All forms of water-based recreation, fisheries, and wildlife habitats; (b) The wild, scenic, or other natural characteristics of the river, stream or lake; (c) The needs of primary and secondary industry, and of the community." All of these values are instrumental, and this is confirmed by reference to s 2 of the 1981 Amendment Act, stating that it was an Act "... to recognise and sustain the amenity offered by waters in their natural state." The 1991 Act's regime, on the other hand, can be utilised to protect both instrumental and intrinsic values: see s 199, as described in n 250 above and accompanying text. The widening of values able to be protected is also noteworthy in that it now encompasses instrumental values focused exclusively upon Maori.

162
be given to the criteria material to decision-making, and it seems probable that the bias in favour of conservation, as applied to decision-making under the Water and Soil Conservation Act’s water conservation regime, will be continued under the Resource Management Act.

The 1991 Act also provides for the protection of land surrounding any water body subject to a conservation order.

Procedurally, the 1991 Act makes better provision for public participation in water conservation and for the faster and fairer determination of applications for conservation orders.

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294 Apart from adding new matters (see n 293 above), the 1991 Act imposes a hierarchy upon the list of relevant criteria (ss 207 and 212 provides that the Special Tribunal and the Planning Tribunal — respectively — must "... have particular regard to the purpose of a water conservation order and the matters set out in s 199 ..." and must also "... have regard ..." to the matters listed in paras (a)-(c)).

295 This "conservation bias" was held to apply in Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc (1987) 12 NZTPA 289 (see Chapter 3 nn 461-469 and accompanying text). The submission that this presumption should be retained under the 1991 Act is based on the points that protection and preservation are clearly still the objects of the water conservation order regime (see s 199) and that such bias is presumably allowed by virtue of the words "[n]otwithstanding anything to the contrary in Part II ..." which open s 199(1).

296 Prior to the enactment of the Resource Management Act, the protection of contiguous land could only be achieved through watercourse areas under the Conservation Act 1987 (see Chapter 3 n 500 above). National water conservation areas could only apply to water (see the Motu River case supra n 292). Unlike the Water and Soil Conservation Act, the Resource Management Act offers a means of protecting contiguous land — though this is not provided by water conservation orders themselves. Rather, the most obvious option, where the contiguous land has its own value, lies in heritage orders (see nn 241-249 above and accompanying text).

297 Thus, "any person" may apply for an order (s 201, note that under the 1967 Act, only a public, local or statutory authority or Minister who or which had "... any function, power, or duty which relate[d] to, or which could [have] be[en] affected by any aspect of, water conservation or soil conservation ..." could apply, see s 20A), or make submissions on an application (s 205(1), compare with s 20B(2) of 1967 Act). Public participation is also encouraged in the 1991 Act via ss 96(2), 204, and 205(3). Section 204 sets out, in specific terms, the requirements of public notification by providing a list of accessible publications which should carry notices, by specifying who should be individually notified, and by setting out what information should be contained in notices; this section should be compared with s 20B(1) of the 1967 Act. Section 96(2) applies by virtue of s 205(2) and describes what people who want to make submissions must do and include in their submissions. This avoids the problem that participation is often discouraged where agendas are hidden. Section 205(3) encourages participation by adopting a positive approach by enabling those who generally support conservation, but think that an application relates to the wrong water body, or the wrong features or values, to make a submission on an application putting forward their alternative views. Under the 1967 Act, such a person would be able only to make an objection — thus they would be set up in a negative role, which may discourage their participation.

298 Speedier processes may result from the application of ss 200(2) (which describes in detail what information should accompany an application — s 20A(2) of the 1967 Act, by comparison, simply stated that applications "... shall be supplemented by such particulars and information as the Minister notifies the applicant he considers necessary... "), 99 and 100 (which allow for the calling of pre-hearing meetings and for the complete avoidance of any public hearing where the Special Tribunal considers such unnecessary), and 216(3) (which allows those applications for changes to orders which the Minister thinks raise only minor amendments to avoid the procedural rigours of ss 201-215. Note that the Minister’s thoughts here must be confirmed by the relevant regional council). Procedures under the 1991 Act may be fairer because of ss 200(2) (see above), 39 and 40 (which apply via s 206(3), and which are described in nn 196-197 above and accompanying text), 208(2)(b) (requiring the Special Tribunal to offer reasons for its decisions), and 214(2) and 215 (s 214(2) prevents the making of an order unless this is in accordance with the recommendations of the Special, or Planning, Tribunal — thus, it ensure that orders will not be made without the opportunities for public comment and participation provided for by the Tribunal hearings and
that these hearings will be meaningful; s 215 limits the circumstances in which the Minister can decide, contrary to the Tribunal’s recommendations, not to recommend the making of an order and, importantly, ensures that the Minister’s reasons here are served on the parties concerned).
PART III

INCREASING CONSERVATION CONSCIOUSNESS, WATER AND THE RESOURCE MANAGEMENT ACT

Having described, in Parts I and II of this thesis, the former and current New Zealand water laws, this Part moves to measure the latter against the former. The object of this comparison is to assess the extent to which the Resource Management Act 1991 represents a break with, or a continuation of, its past.

The comparison begins in Chapter 6 which ascertains whether, and if so to what extent and how, the four trends which were observed in the history and development of New Zealand's former water laws (and which were described at the close of Chapter 3 above) have been continued by the 1991 Act. Chapter 6 ends by setting aside section 5 of the Resource Management Act for more analysis as an agent for furthering the trend of increasing conservation consciousness. It is submitted that section 5 has the potential to promote some issues of environmental and future concern to a point where they can no longer be outweighed by more immediate (human) benefits. Whether or not this potential is recognised depends, in the first instance at least, on the interpretation given to section 5 by the tribunal and the courts.

The question for Chapters 7 and 8 below is: should section 5 be interpreted so that this potential is realised? Chapter 7 shows that if, by interpreting section 5 in a given way a more conservation conscious meaning may be attributed to the section, then this would help keep the Act abreast with global thinking and New Zealand's general body of environmental law. Chapter 8 then moves directly to address the legal argument as to the interpretation of section 5. Having ascertained the best and most correct interpretation of section 5, Chapter 8 ends with an evaluation of the implications of section 5 for the use, management, and conservation of water in New Zealand.
Chapter 6

The Resource Management Act: Continuing the Trends?

The question for this chapter is: does the Resource Management Act 1991 further the four trends which featured in the history and development of New Zealand's water law up to and including the Water and Soil Conservation Act 1967? If so, how and to what extent?

The four trends are identified and justified in Chapter 3 above, and are an increase in scope and comprehensiveness; an increase in the formality, extent, and coordination of management and planning; an enhanced integration in management; and an increase in conservation consciousness.

I. An Increase in Scope and Comprehensiveness

Both in so far as it covers "... all natural and physical resources ..." and provides expressly for the allocation of land, air and water; and in so far as it relates specifically to water, the Resource Management Act is wider in scope than its 1967 predecessor.

Prior to the enactment of the Resource Management Act, such planning and allocation mechanisms as existed for land, air and water appeared in different Acts.¹ It is perhaps the single-most important feature of the 1991 Act that it includes detailed schemes for the management and allocation of all three of these major resources, and then that it also provides for planning in respect of all "... natural and physical resources... ."

In relation specifically to water, the Resource Management Act applies to more water, and to more activities involving water, than did the Water and Soil Conservation Act. No longer excluded from "water" the subject of legislative control is water under the control of local authorities for water supply purposes.² Also now subject to control are discharges of contaminants onto land which may enter water, and a wider range of potentially contaminating discharges.³ Water being taken and used for domestic purposes is, as it was under the 1967

¹ Land was covered mainly by the Town and Country Planning Act 1977, air by the Clean Air Act 1972, and water by the Water and Soil Conservation Act 1967.
² See Chapter 5 n 274 and compare the definitions of "natural water" and "water" as included in s 2 of the 1967 and 1991 Acts, respectively.
³ See Chapter 5 n 278.
Act, generally exempted from the Resource Management Act’s restrictions and prohibitions. Today, however, only those domestic uses which relate to an individual’s needs, as opposed to a person’s needs, are exempted. As against this, the 1991 Act exempts the taking and use of geothermal water in accordance with tikanga Maori, and the taking, use and diversion of coastal water to meet recreational needs, from its general restrictions and prohibitions. These exemptions did not appear in the 1967 Act.

Since 1994, the 1991 Act has increased further in scope. It now controls or prohibits the dumping, incineration, discharge, or storage of waste, contaminants and radioactive matter in the coastal marine area. Thus the Act now covers much of the ground previously falling under the Marine Pollution Act 1974. It is, however, wider than the 1974 Act, since it applies to discharges of substances other than oil within New Zealand’s territorial waters, and from New Zealand or foreign ships.

Although perhaps not technically a matter to do which the scope of the 1991 Act, the fact that it contains express lists of relevant considerations for planners and consent authorities is significant. As has been previously noted, the closest thing to Part II and section 104 of the 1991 Act in the Water and Soil Conservation Act was the Long Title.

II. An Increase in the Formality, Extent, and Coordination of Management and Planning

This is a trend very much continued by the Resource Management Act. The planning scheme established by the 1991 Act in respect of water is much more comprehensive than that prescribed by the 1967 Act. Planning today is the function of central and local government, and occurs under a structured and internally consistent hierarchy.

Planning has been expanded under the 1991 Act in four basic ways. First, the Act sees a return of central government to planning for the management and allocation of water. The Minister for the Environment is empowered to make National Policy Statements, and the Minister of Conservation is required to make New Zealand Coastal Policy Statements. Once made, these policy statements must be implemented in the policy statements and plans of local government, and there can be no inconsistency between local and central government planning.

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4 See Chapter 5 n 168.
5 See ss 15A-15C, and Chapter 5 nn 172-178 and accompanying text.
6 As described in Chapter 3 above.
7 The 1974 Act apparently “... in practice ... restricted only the discharge of oil” (1994) New Zealand Parliamentary Debates 4597 (8 November 1994), per Hon Maurice Williamson. The Resource Management Act now covers both substances other than oil, and foreign ships – see ss 4A and 15A-15C.
Second, planning at the regional level has been expanded, structurally speaking. The 1991 Act provides for two tiers of regional planning where the 1967 Act impliedly provided just for one. Now, overviews can be set out in policy statements, and the finer and more detailed provisions contained in plans and rules. Planning for the effects of the use, development and protection of natural and physical resources on the surface of water in rivers and lakes is a function of territorial government.

Third, the 1991 contains much more detail as to the contents of policy statements and plans, and as to the procedure to be employed in making policy statements and plans. Not only does the First Schedule to the Act specify, in detail, the plan and policy making procedure, but it also includes extensive provision for consultation during the process of developing policy statements and plans, for public participation during the making of policy statements and plans, and for inquiries into and appeals against policy statements and plans. Under the Water and Soil Conservation Act, no procedure was specified (this by implication being an issue for regional water boards and councils), and there was no room to challenge plans in the Planning Tribunal. As for the contents of policy statements and plans, the Resource Management Act describes in some detail the issues which policy statements and plans should address, and the matters which they may include. The Water and Soil Conservation Act made but a few references to content.

Finally, planning under the Resource Management Act is directly connected to the allocation of water resources. Where previously, management plans for water were “... indicative only ....,” and “... at best, ... matters to be taken into account when considering applications for water rights ....,” under the Resource Management Act policy statements and plans are express mandatory relevant considerations in decisions on applications for resource consents, and can themselves directly restrict and influence the granting of applications and the imposition of conditions on such consents as are granted. This is achieved first by the inclusion of policy statements and plans in section 104, and second by the 1991 Act’s provisions relating to regional rules. By classifying activities as permitted, controlled, non-complying, discretionary, prohibited, or restricted coastal, regional councils can exert considerable influence over the granting of future consents in respect of those activities. Rules setting maximum and minimum flows and levels, or setting water quality classifications for water might similarly tell against the

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8 See Chapter 5 n 146, and compare with Chapter 5 n 152.
9 See Chapter 5 nn 136-137.
10 Sowman v Nelson Regional Water Board (1983) 9 NZTPA 161, 162; McIntosh Farms v North Canterbury Catchment Board and Regional Water Board unreported, Planning Tribunal Christchurch, 26 January 1989 C29/89, 8; and see Chapter 5 nn 147 and 148 and accompanying text.
granting of applications. Alternatively such rules, like those requiring the adoption of the best practicable option to stop or reduce the adverse environmental effects of any discharge of contaminants, could impose direct controls over how, and to what extent activities involving water can be undertaken.

III. An Enhanced Integration in Management

1. Integrating Economy, Society and Environment

This is another trend in the history and development of New Zealand’s water law which is furthered by the Resource Management; though perhaps not as much as it could be. Conservation interests were not well represented in the Water and Soil Conservation Act until 1981 and, even then, the environment was given less recognition than were economy and society, and environment tended to be valued only instrumentally. Thus, social and economic concerns are mentioned some eight or nine times in the 1967 Act’s Long Title, while environmental concerns appear just once or twice. Social and economic issues were arguably of greater priority. The equivalent provisions of the Resource Management Act are sections 5-8. Like the Long Title of the Water and Soil Conservation Act, they include social, economic and environmental concerns. The first part of section 5(2) focuses on social and economic factors, while the second part includes references to all three areas of concern.

Sections 6-8 emphasise social issues – these are mentioned at least six (and at most eleven) times, while developmental interests are listed just once, and environmental issues at least two (and at most seven) times. Both Acts include all three aspects of resource management,

11 The one purely environmental issue listed in the Long Title was “wildlife habitats.” The eight social or developmental interests were: “... soil conservation ... damage by flood and erosion, ... multiple uses ... drainage of land ... the needs of primary and secondary industry, community water supplies, all forms of water-based recreation, and fisheries ...” One matter ("... the wild, scenic, and other natural characteristics of rivers, stream, and lakes ...") is mostly environmental, but is coloured by the reference to “scenic ... characteristics,” which tends to suggest that the values at stake are instrumental, as opposed to ecological or intrinsic. This is therefore counted as both a social and an environmental issue, leading to the two sets of totals.

12 Partly because they appeared in lesser numbers, but also because the two environmental concerns (“... wildlife habitats, and ... the wild, scenic, and other natural characteristics of rivers, streams, and lakes ...") are both matters to be given “... adequate account ...,” while some of the social and developmental interests had to be “promoted” (see Chapter 3 nn 432 and 433).

13 The second part of s 5(2) is made up of the three issues: “[s]ustaining the potential of natural and physical resources (...) to meet the reasonably foreseeable needs of future generations; and [s]afeguarding the life-supporting capacity of air, water, soil, and ecosystems; and [a]voiding, remedying, or mitigating any adverse effects of activities on the environment.” Paragraph (a) promotes social concerns, and paragraph (b) promotes environmental concerns. Paragraphs (c)’s classification depends on the meaning of “environment,” and this is defined in s 2 (see Chapter 5 n 11), and includes ecosystems; natural and physical resources; amenity values; and the “... social, economic, aesthetic, and cultural conditions ... affect[ing] ...” them. This definition includes both social and environmental issues, but social concerns dominate (they feature more often, and the reference to “[e]cosystems” is, it is submitted, weighted by its context: “[e]cosystems ..., including people and communities ...”

14 The one reference to developmental issues is in s 7(b) (“[t]he efficient use and development of ...
though the later Act makes more of environmental issues.

Integrated management is expressly promoted by the 1991 Act’s frequent use of the phrase “... use, development, and protection ...” Though the Long Title to the 1967 Act opened with the object of making “... better provision for the conservation, allocation, use, and quality of natural water ...,” these words do not have the same impact in terms of implementing integrated management as do “... use, development, and protection ...” in the Resource Management Act. In both cases, the use of the conjunction “and” accords the other words equal priority, but only in the 1991 Act do the words actively serve to direct the exercise of functions. As it appears in the context of the 1967 Act’s Long Title, the phrase “... conservation, allocation, use, and quality ...” simply describes the object of four of the mechanisms provided for in the body of the Act. As used in the Resource Management Act, the phrase “... use, development, and protection ...” refers to three functions to be pursued simultaneously, as opposed to three mechanisms included in the Act. The words have a functional, or directive, as opposed to merely descriptive, meaning.

It is submitted that the Resource Management Act does nothing to change one particular way in which the Water and Soil Conservation Act failed to provide for integrated management. Under the 1967 Act, it was held that an application for a water right to “[c]ertain creeks leading into Lake Alexandrina] for fishery enhancement and management purposes ...” was “misconceived.” 15 It was noted that, since there was “... no intention of using in any way other than the present natural state ...” this did not constitute a “use” of natural water under the 1967 Act. 16 “Use” was accepted as necessitating some “... interference, of a measurable or significant kind, with rivers, streams or natural water” and the application was described as “[i]n reality [seeking] a right ... to manage these three creeks. It is not seeking to use natural water. What it seeks to do is obtain control by way or management, over the use of the named creeks.” 17

16 South Canterbury Acclimatisation Society ibid 2 and 8-12.
under the 1967 Act’s general allocation system. Many, if not most, in-stream uses are directed towards recreational, or environmental, needs and the interpretation given to the 1967 Act meant that allocations for such needs could only be made using the water conservation regime. Under this regime, the uses had to be “outstanding” on a national or regional level to warrant protection. In the result, many ordinary in-stream environmental, recreational or amenity interests were unable to secure access to the water resource in the same way as could active out-of-stream uses (generally generated by social or developmental interests). There is no indication that the Resource Management Act will be interpreted any differently since it uses the same terminology in section 14 as was used in section 21 of the 1967 Act.

2. Integration Between Resources

This aspect of integrated management did not feature at all in New Zealand’s water law until the Water and Soil Conservation Act was enacted in 1967. Even then, the implications of activities involving water for other parts of the natural environment were just impliedly relevant under the balancing of advantages and disadvantages test approved and applied in Keam v Minister of Works and Development. It is, therefore, hard to argue that increasing integration between resources is a “trend” in the history and development of New Zealand’s water law, unless trends starting in 1967 may be considered. Certainly, the Resource Management Act represents an improvement on its predecessor in this regard. A more holistic approach is undoubtedly one of its aims.

Thus, the purpose and principles of the Act, and the comprehensive planning scheme which it introduced, apply across the board to all “... natural and physical resources ...” The 1991 Act establishes one allocation system for activities with or on land, air and water; and applications for resource consents in respect of proposals involving more than one of these three resources may be heard at combined or joint hearings. Section 104 ensures that, as each application is considered, the impact of it on other resources will be considered. 

18 [1982] 1 NZLR 319; and see Chapter 3 nn 424-426 and accompanying text.
19 And note ss 30(1)(a), 31(1) and 59. Section 30(1)(a) lists as one of the functions of regional councils the “... establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region.” Section 31(a) charges territorial authorities with the “... establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district.” Section 59 relates to regional policy statements, and defines their purpose as: “... to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.”
20 See Chapter 5 nn 199 and 200 and accompanying text.
21 Section 104(1)(a) refers to the effects on the “environment,” and “environment” includes all natural and...
It seems that a more integrated approach to management for conservation purposes may also have been established by the Act. By providing for heritage orders, the Act offers the means by which land with heritage value whether contiguous to, or including, water bodies may be protected. Under the previous legal regime, land contiguous to water bodies protected by water conservation orders could be protected using watercourse areas, but this meant resorting to another Act, perhaps administered by a different department according to different principles.22

IV. An Increase in Conservation Consciousness

The Resource Management Act furthers the trend of increasing conservation consciousness in two, sometimes overlapping, ways. There is an increase in the opportunity for, and relevance of, the conservation or protection of water; and there is the adoption of values and approaches from a more ecologically-inspired system of water management and allocation.

1. The Adoption of Values and Approaches from a more Ecologically-Inspired System

The starting point here must be section 5. The promotion of “sustainable management” is now the purpose behind all planning and decision-making in respect of New Zealand’s inland and coastal water. Sustainability is the cornerstone of most current global environmental aspirations.23 It is not entirely new to New Zealand’s legislation (having appeared in the Fisheries Act 1983, the Environment Act 1986, and the Conservation Act 1987)24 but it is new to the statutory scheme covering water. An important aspect of the sustainability notion is commonly called the “precautionary approach.” This involves focusing on the effects of activities on the environment, and adopting conservative tactics in cases where those effects are unknown or unknowable. The precautionary approach features strongly in the Resource Management Act; it is there, for example, in sections 5(2)(c), 14(3), 17(1), 45(2)(a), 68(3) and 104(1)(a);25 and it was judicially recognised in Batchelor v Tauranga District Council (No
The Resource Management Act was described by the High Court in *Machinery Movers Ltd v Auckland Regional Council* as "... informed by a wholly different environmental philosophy ..." than the Water and Soil Conservation Act. This philosophy, evidenced by sections 3 and 5 and the definition of "environment," "... places far greater emphasis on environmental protection and introduces a much more stringent regime of penalties and punishment that did the 1967 Act." In so far as the 1991 Act's "... regime of penalties and punishment ..." is concerned, the High Court emphasised the introduction of the penalty of imprisonment, and of "... separate criminal liability for company directors and managers of corporations subject to proof of lack of due diligence ..." the increase of the maximum fine by one third from $150,000 to $200,000; and the "... wide powers given to the sentencing court by section 314(1)(b), (c) and (d) ..." as evidencing the "... more stringent regulatory regime under the new Act ..." In the High Court's view, sentencing under the Resource Management Act should "... seek[] not only to punish offenders but also to achieve economic and educative

... arising from any activity, even if allowed by a plan or resource consent. Section 45(2)(a) sets out relevant considerations to guide the Minister's discretion in determining whether to prepare a national policy statement, and refers to the "... actual or potential effects of the use, development, or protection of natural and physical resources ..." Section 68(3) relates to the classification, by rules in regional plans, of activities as permitted, controlled, non-complying, discretionary and prohibited and provides that this classification is to be made according to the "... actual or potential effect on the environment ..." of the activity. Section 104(1)(a) sets out the mandatory relevant considerations for resource consent authorities, and refers expressly to the "... actual and potential effects on the environment of allowing the activity ..."

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26 [1993] 2 NZLR 84, 86; (1992) 2 NZRMA 136, 139, where the High Court said: "[t]he Resource Management Act imposes a significantly different regime for the regulation of land use by territorial authorities. Commentators have said that the Act moves away from the concept of direction and control of development, ... towards a more permissive system of management of resources, focused on control of the adverse effects of land use activities on the environment (see, for example, A P Randerson, "The Exercise of Discretionary Powers under the Resource Management Act 1991" (1990) NZ Recent Law Review 445)." Note that these observations were held to be "... broadly applicable in relation to water resources ..." by the High Court in *Machinery Movers Ltd v Auckland Regional Council* (see n 27 below, 668).


28 *Machinery Movers* ibid 666-667; the High Court compared ss 3 and 5 and the definition of "environment" with the Long Title to the 1967 Act, which it described as giving "... limited protection to environmental interests." "The contrast with s 5 of the R[esource] M[anagement] A[ct] ..." was described as "obvious."

29 *Machinery Movers* supra n 27, 668. In reply to counsel's argument that "... undue significance should not be given to the change in maximum penalty ... [as] although an increase of one third ... was certainly a significant increase, it was not so great as to justify a complete alteration of sentencing practice" the Court replied that "... this understates the true position ..." pointing out both that such reasoning "... ignores the fact that the maximum fine, even at its increased level is no longer the maximum penalty. The maximum is now two year's imprisonment," and that the change in maximum fine should not be considered in isolation. Once the combined effect of the increase, plus the inclusion of the penalty of imprisonment, and the addition of director's liability is considered, "... an evident legislative dissatisfaction with the level of penalties imposed under the 1967 Act ..." is signified (see 668-669). Note that the new fines are prescribed, and the sentence of imprisonment is made available, under s 339(1); the "... separate criminal liability for company directors and managers of corporations subject to proof of lack of due diligence ..." is set out in s 340; and that the "... wide powers given to the sentencing court by s 314(1)(b), (c) and (d) ..." relate to powers to make enforcement orders to require positive action to avoid adverse environmental effects, to remedy or mitigate adverse environmental effects, or to reimburse costs incurred by another person in avoiding, remedying or mitigating adverse environmental effects.
goals."\(^{30}\)

Moving on to sections 6 and 7, the directions to "... recognise and provide for ... [t]he preservation of the natural character of ..., wetlands, lakes and rivers and their margins ...," and the "... protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna ...," and to "... have particular regard to ... the "... [i]ntrinsic values of ecosystems ..." and the "... finite characteristics of natural and physical resources ..." should be noted. All of these are new mandatory relevant considerations in rule- and decision-making regarding water. The last two matters especially tie in with the recognition given to the teachings of ecology by the 1991 Act. Also a product of the ecological approach is the whole concept of integrated resource management which features prominently in the Act.

The fact that the Resource Management Act provides for more integrated management than did its predecessors has already been noted, as has the improved facility for coherent management planning established by the Act. Both of these features improve the conservation consciousness of the Act, as does the fact that by integrating conservation into the Act’s planning scheme, the legislature has made it an issue of equivalent planning concern as use and development. Of special note is the integration of conservation into the purpose for which national environmental standards can be made. Under the Resource Management Act these regulations can provide for water conservation by prescribing standards relating to quality, level, and flow.\(^{31}\)

2. An Increase in the Opportunity for, and Relevance of, Conservation or Protection

Beginning with the more specific increases in opportunities for, and relevance of, conservation, note first that the range of discharges moving directly or indirectly into water which are subject to legislative control has been increased by the Resource Management Act.  

\(^{30}\) The economic goal in question was the internalisation of external costs (see Machinery Movers ibid 670-671). Note further that, in considering the appropriate sentencing principles under the 1991 Act, the High Court cited with approval R v Bata Industries Ltd (1992) 9 OR 93d 329 (liability); (1992) 7 CELR (NS) 293 (sentencing). In that case, the Ontario Court (Provincial Division) listed four matters to be considered when assessing sentence severity ("... [t]he nature of the environment affected; [t]he extent of the damage inflicted; [t]he deliberateness of the offence; [a]nd [t]he attitude of the accused ..."), and five matters to be considered when sentencing corporations ("... [t]he size, wealth, nature of operations and power of the corporation; [t]he extent of attempts to comply; [r]emorse; [p]rofits realised by the offence; [a]nd [c]riminal record or other evidence of good character ..."). To the first list, the New Zealand High Court added any "... clean-up and other costs ..." which the offender has already had to pay, and to the second list it added "... the extent to which a corporation has sought to comply, the adoption of appropriate in-house corporate environmental principles and the existence of an internal environmental compliance programme ..." (see 669-675).

\(^{31}\) See Chapter 5 nn 58 and 59 and accompanying text on national environmental standards.
This is both because discharges which, having been made onto land, may reach water are subject to control, as well as those actually do; and because the definition of "contaminant" offered by the Resource Management expands upon that given to "waste" by the 1967 Act. Further, note that amendments made to the 1991 Act in 1994 prohibit, unless by express consent, the dumping or incineration of waste in the coastal marine area, and the discharge of "... harmful substance[s] and contaminant[s] ..." into water in the coastal marine area. The dumping of radioactive waste or matter, and the storing of "... radioactive matter or toxic or hazardous waste ..." in the coastal marine area is absolutely prohibited. There were no similar restrictions and prohibitions in the Water and Soil Conservation Act.

The water conservation order regime has been expanded under the Resource Management Act: more water bodies may be subjected to orders, a wider range of values can be protected by orders, and now anyone can apply for the making of an order. Also now available for the protection of water from "... noxious, dangerous, offensive, or objectionable ..." activities are enforcement orders and abatement notices. This two mechanisms are new to New Zealand's water law. In addition to introducing enforcement orders and abatement notices, the Resource Management Act's enforcement provisions also increase the conservation consciousness of New Zealand's water law by prescribing hefty penalties, including imprisonment, for breaches of the Act, or resource consents, or for the doing of "... noxious, dangerous, offensive, or objectionable ..." things.

Then there is section 5. The mere presence of this section has already been noted in so far as it represents the introduction of a more ecologically-inspired approach to the law relating to water management and allocation. Since Part II is the relevant consideration of highest priority in the allocation of water resources under the 1991 Act, and since section 5 forms the apex of the hierarchy of purpose and principles set out in Part II, the question must be asked: how conservation conscious is section 5? Does section 5 set up what is in essence a balancing test, akin to the Keam test used to allocate water under the Water and Soil Conservation Act? Or does section 5 go further by ensuring that activities generating certain (environmental) disadvantages, or costs, will not be permitted despite their (social and/or economic) advantages?

32 Compare s 21(1) of the 1967 Act and s 15(1) of the 1991 Act. The former refers only to discharges of water or waste onto land "... in circumstances which result in that waste, or any other waste emanating as a result of natural processes from that waste, entering natural water ...," the latter includes "... discharge[s] of any ... [c]ontaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water ... ." As to the differences between the definitions of "waste" and "contaminant," see Chapter 5 n 278.

33 Though there were the offences relating to discharges in the Marine Pollution Act 1974 (see Chapter 3 above). These, however, were in practice only applied to oil (see n 7 above).

34 See Chapter 5 nn 292-294 and 297.


36 See n 18 above and accompanying text.
and benefits? This is the question to be addressed in the next two chapters which, with a conclusions chapter (Chapter 9), make up the last part of this thesis. Chapter 7 proves that, if section 5 does go further and is more conservation conscious than the 1967 balancing approach (by placing some absolute limits on the pursuit of human wellbeing), then this would not be inconsistent with general trends in New Zealand's environmental law as a whole, and in global environmental thinking. Chapter 8 addresses the precise question of the proper meaning of section 5 in legal terms.
Chapter 7

Increased Conservation Consciousness in Context

I. Introduction

At the close of Chapter 3 above, four trends were recognised in the history of the development of New Zealand's water law. Chapter 6 isolated most of the means by which each of the four trends is submitted to have been continued by the Resource Management Act 1991, at least in so far as it relates to water. Chapter 6 also identified section 5 of the 1991 Act as the potential source of a further and most significant progression in the trend of increasing conservation consciousness. It was asserted that the realisation of this potential is dependant on the interpretation given to section 5.

It is the first contention of this chapter than a more conservation conscious interpretation of section 5 of the Resource Management Act can be conceptually supported by the Act's global ethical and political context. It is submitted that New Zealand's environmental law, including its statutory water law, cannot be divorced from events and thinking in the rest of the world. The two - global thinking and action, and New Zealand's environmental (including water) law - are argued to reflect each other. For present purposes it matters little whether this reflection is the result of a conscious adoption by the legislature of international values, or whether, because international values have quietly influenced the way New Zealanders (including the New Zealand legislature) think, those values have more indirectly infiltrated our law. What matters most is that there is an apparent connection.

Next, it is assumed that a continuation of this connection through the Resource Management Act, whether intended or not, would be a desirable (or at least not an undesirable) outcome. As developments in global thinking and action on the environment are briefly described to follow, it should become apparent that an overall shift in thinking in favour of nature and the environment has occurred. This shift had begun by the turn of the nineteenth century, was greatly accelerated by the onset of the modern environmental movement, and has continued right through to the present day. This, it is submitted, says something about how section 5 of the Resource Management Act should be interpreted. In essence, it says that faced with a choice between, on the one hand, a less conservation conscious interpretation and, on the other, a more conservation conscious interpretation, then the latter could be more consistent
with the Act’s international context. This point is further supported by the 1991 Act’s municipal law context, that is by the general body of New Zealand’s environmental law beyond its water law. Alongside global thinking and action, this law has become increasingly conservation conscious over time. To keep New Zealand’s water law up with both its global philosophical and political, and its municipal legal, context it seems logical to interpret the 1991 Act in a way which lets it be more conservation conscious than its 1967 predecessor.

The purpose of this chapter is to trace and describe developments in international thinking and action on the environment, and to show how these have been reflected both in New Zealand’s water laws and in other municipal environmental laws over time.

II. Sources of Early Environmental Thinking

Many modern commentators blame traditional Judeo-Christian dogma for the current ecological problems of the Western nations. It is argued that many of these problems have been caused by attitudes which view nature only in terms of its resource value, and which promote economic and technological advancement as social goods by definition. Thus, the first book of Moses tells that in the beginning God created heaven and earth, and then light, darkness, water, land, plants, the sun, the moon, the stars, and all living creatures. Finally, God created people. God said:

Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.

So God created man in his own image, in the image of God created he him; male and female created he them.

1 See, for example, E B White in “The Historical Roots of our Ecological Crisis” (1967) 155 Science 1203, 1204-7 (reproduced in R B Stewart and J E Krier Environmental Law and Policy (2nd edn, 1978) 84) who argues that the central premises of the ethics which, in his view, permitted the current levels global environmental degradation are not to be found in pre-Christian pagan beliefs. It is also arguable that these premises are absent from non-Western cultures which developed without the early influence of Christianity. The most relevant example must be Maori culture. To Maori there was (and is) no exemption of humans from nature for two reasons. First: human beings are themselves descended from the natural world. “The central concept underlying the Maori relationship with the natural environment is whanaungatanga – being related to the natural world. Maori ancestry is genealogically traced back to the primal parents Ranginui, the Sky Father, and Papatuanuku, the Earth Mother” (J T Bains et al “Sustainability and its Significance for the Resource Management Law Reform” Resource Values Resource Management Law Reform Working Paper no 10 (1988) 5). Second: all things in the natural world (this includes people) possess the life force mauri. This belief both engenders a sense of unification with all other things also possessing mauri, and it forms the basis of a series of controls exercised over resource exploitation. “Through mauri, all things cohered in Nature. ... Preservation of the mauri was all important. Because in everyday life use was made of the environment, there was a constant risk of limiting or affecting the mauri. To guard against this a set of rules governing conduct and behaviour ... had to be followed” (Bains et al, again at 5).

2 King James Version I:26-8. Though frequently moved to change this and many of the quotes to follow into gender neutral language, the volume of quotes and instances of non-neutral language necessitated the use of so many square brackets as to detract from the readability of the text.
And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

The environmental thinking which is argued to have been generated by passages such as this has two central features: human separateness from and dominance over nature, and human multiplication and affluence. In respect of the first of these, White explains:

[m]an named all the animals, thus establishing his dominance over them. God planned all this explicitly for man's benefit and rule: no item in the physical creation had any purpose save to serve man’s purposes. And though man’s body is made of clay, he is not simply part of nature: he is made in God’s image.

This, of course, does not necessarily mean that Christianity taught people to degrade the environment. Humankind could have chosen to exercise its dominance by preserving nature; the point is simply that the choice was seen as being for us to make. Passmore compares early Christianity with its contemporary middle Eastern religions, and describes it as lacking any sense of nature as divine. According to the early Christians,

[m]an's dealings with nature were sharply separated from his dealings with God. And it was his relationship with God which really mattered. “Man,” ... “remained outside nature, exploiting it for a livelihood, offering its first fruits as a sacrifice to Jahweh, using its imagery for the expression of his moods, but never sharing its mysterious life.”

Passmore accepts Christianity’s responsibility for promoting the perception of humans as apart from nature, but not that that Christianity is the source of this idea. He argues instead that this thinking “… originate[d] with the Greeks,” pointing out that after the Greek Enlightenment ... [o]ne ... finds it explicitly maintained that animal life exists purely and simply for man’s sake. Aristotle argues in his Politics that “plants are created for the sake of animals, and the animals for the sake of men; the tame for our use and provision; the wild, at least for the greater part, for our provision also, or for some other advantageous purpose, as furnishing us with clothes, and

3 This is sometimes called “human exemptionalism” – see Bains et al supra n 1, 6.
4 White supra n 1, 86.
6 See, for example, John Passmore’s observations that “[t]he Egyptian-Jewish Saadia, writing in the tenth century A.D., committed himself very firmly to the view that “the entire universe was created on account of man.” The greatest Jewish orthodox philosopher, Maimonides, at first took the same view in his early commentary on the Mishnah. “All things in the sublunary world,” he there writes, “exist only for the sake of man.” But he later rejected that view as in essence profoundly non-Jewish. Genesis makes it perfectly clear, he then argues, that the world was good before man was created: “It should not be believed,” he concludes, “that all beings exist for the sake of the existence of man. On the contrary, all other beings, too, have been intended for their own sakes and not for the sake of something else.” And this is the more typically Jewish attitude” (ibid 12-14).
7 Passmore supra n 5, 14.
the like.” He takes this conclusion to follow necessarily from the premise that “nature makes nothing either imperfect or in vain” – as indeed it does follow if the test of a thing’s “perfection” and “usefulness” is first presumed to be its suitability for man’s purpose.

The “enlightened,” Greeks considered that humankind’s rational capabilities distinguished it from Earth’s other creatures.8

The two possible sources for the human/nature dichotomy were merged by “… thinkers as different from one another as Thomas Aquinas and Rene Descartes …” in the the late medieval and early modern periods. “Thus the [hu]man/nature in each augmented the other.”9 This synthesis of secular and religious served to strengthen the authority both of the dichotomy itself, and of its two principal corollaries (that nature has only instrumental value, and that nature is for people to manage and control), in popular thinking. This authority was so strong that these ideas still enjoy wide acceptance today.10

Combined with the second main feature of the values at least promoted by traditional Judeo-Christian dogma, the human/nature dichotomy and its corollaries formed the matrix within which the western scientific tradition developed. This second feature promoted reproduction of the human species (this is very apparent in the previously quoted passage from Genesis) and affluence (since this was the end result of pursuing “… the virtues of hard work, thrift, and ingenuity”).11 The western scientific tradition was one which, despite the limits to knowledge which existed in fact, placed much emphasis on certainty in science and on the ability of science and technology to meet human needs. At this time, science saw nature as essentially mechanistic – and therefore potentially controllable.12 Altogether, the human/nature

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9 Callicott idem.
10 Callicott notes that, even though many “… hard-nosed scientists continued to hew pretty faithfully …” to the idea that nature is “… a raw material, valuable only as a pool of commodities for human use …” after the turn of this century, some were “[t]ouched by the Romantic revolt against the Enlightenment …”. Thus, “… twentieth-century environmentalists in the tradition of Thoreau and Muir granted a modicum of consciousness to animals and celebrated the qualitative richness and diversity of the natural world. Though few doubted that beauty is in the eye of the beholder, nevertheless they argued that the nonconsumptive aesthetic experience afforded people by nature could equal or surpass that occasioned by works of art. But the sense that nature is radically other than [hu]man was too deeply ingrained for them to reject altogether” (supra n 8, 17).
12 According to Callicott “Descartes and his early modern contemporaries believed the material realm to consist, in the last analysis, of stripped-down atomic particles moving in Euclidean space. All natural phenomena, they believed, could be reductively explained in terms of these elemental bodies, with their “primary” (read quantifiable) properties and their mechanical interactions. The mechanistic project that Descartes and Galileo had begun was completed by Isaac Newton at the end of the seventeenth century. During the eighteenth century – the self-congratulatory Age of Enlightenment – nature was generally believed to be a perfectly intelligible clockwork, thanks to Newton’s intellectual triumph. And all nature’s moving parts were automata or mechanisms in miniature. In this respect man was no different, but in man’s case, the purely mechanistic human body was temporarily inhabited by a conscious, rational soul”
dichotomy, the goals of reproduction and affluence, the faith in science, and the perception of nature as a machine led to a system which Boulding described as dominated by "frontier" economics. Under this system, production and consumption are regarded as desirable, the measures of wealth; and nature exists as a series of endless frontiers. It is both safe and right to exhaust resources at each frontier because nature's purpose is to provide for people, and it is safe because in mechanistic nature each frontier is distinct and unaffected by events (including environmental degradation) elsewhere.

I. Early Thinking and Early New Zealand Water Law

All the main features of this early environmental thinking were around long enough (some of them still prevail in the minds of many) to make their way into the early New Zealand water laws.

First, consider the two corollaries of the human/nature dichotomy: that nature is for people to control and use, and that nature has only instrumental value. The first corollary is manifest in the land drainage and flood control laws. These laws were (and continue to be through the maintenance in force of the Land Drainage and Rivers Boards Acts 1908), generally focused on the provision of works to control rivers. In keeping with the Western scientific tradition, the approach was to control nature through science and technology rather than to adopt some less interventionist policy such as keeping settlement away from flood-prone areas and reducing catchment deforestation.

The emphasis on instrumental values is also apparent in the early water law, and continues as a feature of current law although other values have now also crept into recognition. The clearest example of the emphasis on instrumental values lies with the water pollution statutes. In the early days, pollution was an issue of legislative concern only where it posed a threat to human health, safety, or interests.

The mechanistic perception of nature was apparent in the piecemeal approach of the early statutes. Consider how land drainage and flood control were dealt with under different, though linked regimes; how the drainage and flooding laws focused, at first, on individual river

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13 Boulding K E "The Economics of the Coming Spaceship Earth" Environmental Quality in a Growing Economy 1971, 3-14 and reproduced in Stewart and Krier supra n 1, 92.

14 Boulding ibid, 93.

15 Based on the same philosophies, and administered by the same bodies, as the Soil Conservation Act 1941 which was criticised for just this point, see Chapter 3 nn 123-131 below.

16 See Chapter 3 nn 298-315.
systems, with national control being introduced only in 1941; how water was allocated to
different uses, under different Acts, with no overall assessment of cumulative effects; and how
the Waters Pollution Act 1953 approached pollution by simply diverting it from rivers to
sewers, as if its eventual passage into the sea was of no consequence. These methods could
surely only be justified by a mechanistic perception of the natural world.

III. Challenges to the Frontier Mentality

1. God, Nature and the Romantics

The true impact of the "frontier mentality" really began to be felt once technology had
progressed sufficiently to empower people to exact widespread and significant environmental
change. In Europe, this occurred most dramatically as the industrial revolution took place, and
eventually brought massive urbanisation (and a corresponding separation of ordinary people
from land, and nature) and increasing pollution.

Though the working classes were more and more removed from nature (at least until railways
opened up to popular travel during the first half of the nineteenth century), the late 1700s and
early 1800s saw something of a return to nature by Europe’s middle classes. Privileged
enough to free themselves from the ordinary grind of manual labour, middle class liberals
began "... react[ing] to the outdoors with religious arousal between 1780 and 1830 or so."\textsuperscript{17}
Artists such as Constable and Turner, and poets including Shelley, Byron and Keats are
frequently associated with this movement, by which nature was appreciated as God’s work and
inspiration drawn from it. The importance of this period in terms of the larger context of
environmental thinking is two-fold. First, it led generally to a desire to protect natural places
and, second, it caused an explosion in popular interest in natural science and phenomena.

The originally middle and upper class desire to preserve natural places was manifested
specifically in England by the establishment of the Commons Preservation Society which "... fought to
preserve open spaces in and around London and ... all over the South of
England."\textsuperscript{18} In New Zealand, early desires to protect open spaces led to the establishment in
1881 of a land reservation system which remains operative today. The Public Reserves Act
1881 provided, and the Reserves Act 1977 today provides, for the setting aside of land as a
scenic, nature, scientific, or recreational reserve.

\textsuperscript{17} Offer A Property and Politics 1870-1914 (1981) 329.
\textsuperscript{18} Offer ibid 338, who cites Wimbledon and Wandsworth Commons, Hampstead Heath, and Epping Forests as
"... among the assets saved by the Society for the public."
The interest in natural science and phenomena which the Romantic movement also stimulated occurred as a matter of course as the middle and upper classes walked the Lake District and mountaineered in the Swiss Alps, making observations about the world around them. Botany, entomology, ornithology, and geology soon became popular.

This (European) popular interest in natural science and phenomena manifested itself in New Zealand with the tremendous interest shown in the central North Island’s volcanic and geothermal fields as they were opened up following the Maori Land Wars. This interest focused on the Pink and White Terraces prior to the eruption of Tarawera in 1881 and, subsequently, on the eruption’s aftermath and the region’s numerous thermal springs and hot lakes. The settlers’ interest in the use and enjoyment of thermal springs and lakes was promoted in the Thermal-Springs Districts Act 1881, and their interest in the protection of the springs and lakes was recognised in the Scenery Preservation Act 1903.

Perhaps the most important study which the growth in natural sciences generated was that which resulted in the 1859 publication of Charles Darwin’s *Origin of the Species*. Darwin’s work was more than just a “... rude shock to the Christian naturalist ....”19 it in fact posed a real “... threat [both] to religion itself20 and to the long held belief in humans as apart from nature.

2. *The New Sciences*

By elaborately argu[ing that] there is a seamless continuity between gradually evolved [hu]man[s] and our fellow voyagers in the odyssey of evolution[, that] we are animals ourselves, large omnivorous primates, very precocious to be sure, but just big monkeys, nevertheless [and that w]e are therefore a part of nature21

the theory of evolution dealt a savage blow to the human/nature dichotomy. Somewhat shocked, people comforted themselves (and continue to do so) with the thought that since we comprise the only rational part of nature, that must make us the most evolved part of nature. Forcing people to accept themselves as rational and evolved “... big monkeys ...” connected us more closely with the natural world; but other aspects of Darwinism had a more negative impact. When pursued, Darwinism weakened the sense of responsibility for nature felt by

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19 Offer supra n 17, 343.
20 Offer idem.
21 Callicott supra n 8, 17-18.
those who believed that it had been divinely-created for their benefit. Without a creator; there was no “higher life” to which to owe responsibility. If given species could not survive the onslaught of Western consumption and production, then its demise was a natural consequence of evolution. If people were to be considered a part of nature then, by implication, people (and everything they did) must be natural.22

Apart from the theory of evolution, the nineteenth century witnessed the birth, if not the development, of two scientific disciplines with major implications for environmental thinking. These two disciplines, which developed independently and did not have any real impact for around a century, eventually merged to form the basis of recent calls for better integration in resource management.

The new discipline in natural science was the study of ecology. By focusing on relationships in, and the interdependence of, the biophysical world ecology developed an “... integrative and synthesizing characteristic[... ]”23 which put it at odds with established science which was generally reductionist in nature. Thus, the proponents of the prevailing mechanistic theories of nature, who broke “... all nature’s moving parts [down into] automata or mechanisms in miniature ...” resisted the introduction of this new “subversive” science.24 Ecology, having originated in the 1860s, was effectively marginalised for a century.25

In the physical sciences, Carnot’s 1824 work on heat engines,26 and Joules’s 1847 lectures on the conversion of kinetic into heat energy27 were taken up by Clausius and Thomson (later Lord Kelvin) and developed into the study of thermodynamics.28 Today, the first law of thermodynamics underpins the scientific logic demonstrating the need for integrated resource

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22 This is an idea discussed by Callicott ibid 18-19.
24 Callicott supra n 8, 17; and Caldwell in Grundy idem.
25 Hoban and Brooks cite George Perkin Marsh’s 1864 work Man and Nature as “... perhaps the first modern ecological treatise ...,” while Grundy observes that “[t]he interconnectedness of the living world had long been recognised intuitively, but not until the twentieth century did standard terminology to designate the specific, systematic interconnectedness of the natural world come into general use. In 1867, Ernest Haeckel put forward the word ‘ecology’ to designate the study of living systems in relation to their environment.” See T M Hoban and R O Brooks Green Justice – the Environment and the Courts (1987) 2, and Grundy supra n 23, 16.
27 Parkinson (ibid, 332) describes James Joules’s lectures as “... assert[ing] that the “living force” (kinetic energy) of a volume can be converted from or to heat but cannot be destroyed.”
28 Parkinson (supra n 26, 336) asserts that, in his work Ueber die Bewegende Kraft der Warme, Rudolf Calusius reconciled the earlier work of Carnot and Joules and “... beg[an] to develop the subject of thermodynamics ... ” She also describes (at 338) William Thomson (later Lord Kelvin) as “... further develop[ing] the emerging study of thermodynamics” in his paper On the Dynamical Theory of Heat.
management. The first law of thermodynamics (otherwise known as the law of conservation of matter) has been described as the principle that “... everything must go somewhere ...”29 Describing its implications, Miller notes:30

[w]e talk about consuming or using up material resources, but actually we don’t consume any matter. We only borrow some of the earth’s resources for a while – taking materials from the earth, carrying them to another part of the globe, processing them, using them, and then discarding, reusing, or recycling them. In the process of using matter we may change it to another form, but in every case we neither create nor destroy any measurable amount of matter. This circumstance is expressed in the law of conservation of matter: In any physical or chemical change, matter is neither created nor destroyed but merely changed from one form to another. This law tells us that there is no “away.” Everything we think we have thrown away is still here with us, in one form or another. We can collect dust and soot from the smokestacks of industrial plants, but these solid wastes must then go somewhere. We can collect garbage and remove solid sludge from sewage, but these substances must either be burned (perhaps causing air pollution), dumped into rivers, lakes, and oceans (perhaps causing water pollution), or deposited on the land (perhaps causing soil pollution and water pollution).

3. Two World Wars and A Duty to Future Generations

The first half of the twentieth century was dominated by the two World Wars, which had three main implications for environmental thinking. First, there was a surge in technological development (which continued after this period and throughout the ensuing cold war), and an increased belief in the capacity of science and technology to provide for people’s needs. Second, the desire to preserve parts of nature grew. This occurred essentially because each war was followed, at least initially, by a period of economic growth during which the middle and working classes again travelled out (first by train, later by car) to enjoy the countryside. Third, the multi-national war efforts had the effect of developing a new sense of commonality especially between western nations.31 As environmental degradation came to be appreciated as a global problem, environmental health became an issue of concern for the new international community.

The desire to preserve parts of nature marked the re-emergence of the concept of stewardship, which had been temporarily lost to Darwinism. This time, however, the responsibility was seen as owed not to God, but to future human generations. The concept of stewardship is quite

30 Miller idem.
31 The League of Nations first met following the First World War in 1920, and was wound up after the end of the Second World War in 1946. This followed the signing of the United Nations Charter on 26 June 1945 in San Francisco.
clearly behind New Zealand legislation such as the Wildlife Act 1953 and the National Parks Act 1952.\textsuperscript{32} The latter Act was expressly directed at the preservation "... in perpetuity ..., for the benefit and enjoyment of the public ..." areas of outstanding natural beauty or interest in New Zealand.\textsuperscript{33} Like this Act, the 1953 Wildlife Act and the various Reserves Acts, were "... concerned fundamentally with protecting while at the same time affording a degree of public access to elements of the environment."\textsuperscript{34} The effect of the Waters Pollution Act 1953 was, at least in part, to meet the general need to preserve public rights of enjoyment in unpolluted waters. In promoting these interests this Act too seems to reflect a general concern to conserve aspects of the natural world.

The concept of a duty owed to Earth’s future human inhabitants is widely accepted today\textsuperscript{35} and features on the international political agenda. It is important to recall though that the concept first emerged in an world dominated, even more so than now, by the western scientific tradition, and which had recently experienced tremendous scientific and technological development. The achievements of science and technology this century have been so impressive as to secure a following which argues that any duty to provide for future human generations should be met by more development, as opposed to the safeguarding of resources and Earth’s life-supporting capacity. There are still those who prescribe to this view. Summers, for example, declares that:\textsuperscript{36}

\begin{quote}
The argument that a moral obligation to future generations demands special treatment of environmental investments is fatuous. We can help our descendants as much by improving infrastructure as by preserving rainforests, as much by educating children as by leaving oil in the ground, as much by enlarging our scientific knowledge as by reducing carbon dioxide in the air. However much, or little, current generations wish to weigh the interests of future generations, there is every reason
\end{quote}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{32} In fact, the national parks concept in general can be traced, nationally and internationally, to the late 1800s. 19 September 1870 "... is the date now honoured as that of the origin of national parks," being the date when North America's Yellowstone National Park was conceived (J Pascoe National Parks of New Zealand (1974) 10). In New Zealand, "[t]he nucleus of the country's first national park, Tongariro, was set aside in 1887," following the gifting of the land to the people of New Zealand by Huronuku Te Heuheu Tukino (Pascoe 9). The Tongariro National Park Act was passed in 1894, but national parks did not become a national concept until the National Parks Act was enacted in 1952.
\item \textsuperscript{33} Section 3(1) of the 1952 Act, and see Chapter 3 n 365 above and accompanying text.
\item \textsuperscript{35} Though, of course, there are those who would deny that any duty is owed: see, for example, the argument put by the World Bank's chief economist that "[t]he premise that our first priority should be to do more for our descendants is, anyway, debatable. Surely it is ethically relevant that our grandchildren will in all likelihood be much better off that we are. While nobody can accurately predict long-term growth rates, remember that standards of living are three times higher than 60 years ago in the United States, seven times higher in Germany and almost ten times higher in Japan. Should my American grandparents have reduced their standard of living, when life was considerably more nasty, brutish and short than now, to leave the raw materials in the ground for my benefit? To think so implies an odd morality." (I L H Summers "Summers on Sustainable Growth" The Economist (30 May 1992) 77).
\item \textsuperscript{36} Summers idem.
\end{itemize}
\end{footnotesize}
to undertake investments that yield the highest returns.

Though the assumption that technological advancement is always a social good and offers the answer to resource depletion and environmental degradation still persists today, it has been powerfully challenged since the modern environmental movement began in the 1960s. That the environmental movement has achieved the impact which it has in just half a century is due, at least in part, to the place environmental issues have managed to secure on the global political agenda since the establishment of international organisations such as the League of Nations and its successor, the United Nations. Not only has this focused attention on environmental issues, but it has also more directly enabled governments, including the New Zealand government, to take on obligations relating to environmental management and use. These obligations have often been implemented in municipal law. The most obvious examples of this in New Zealand's water law are the statutes relating to marine pollution. The Oil In Navigable Waters Act 1965 was expressly enacted to "... enable effect to be given to the International Convention for the Prevention of Pollution of the Sea by Oil 1954 ...,"37 while the new Maritime Transport Act 1994 contains provisions "... that will enable New Zealand to adopt the International Convention for the Prevention of Pollution from Ships 1973 ... ."38

IV. The Modern Environmental Movement

1. Origins

Two ideological developments underpinned the environmental movement of the 1960s. The first challenged the prevailing assumption that economic and technological advancement was inherently good. The second challenged "frontier" economics by using thermodynamics and ecology to promote a new "spaceship" economy.

The challenge began in 1962, when Rachel Carson's Silent Spring was published. As Grundy notes:39

Carson's forceful indictment of modern humanity for its uncontrolled

37 Long Title. This Act, and its successor, the Marine Pollution Act 1974 (the Long Title to which declared that it was enacted at least in part to implement "... certain International Conventions ...") are both described in Chapter 3 nn 322-332 above and accompanying text.

38 The Bill enacted into this Act was described at its third reading as containing "... some provisions ..." to give effect to the international conventions formerly addressed by the Marine Pollution Act 1974, and other "... new provisions ..." to address the International Convention for the Prevention of Pollution from Ships ((1994) New Zealand Parliamentary Debates 4571 (8 November 1994), per Hon Maurice Williamson, and see Chapter 3 nn 333 above and accompanying text.

39 Grundy supra n 23, 12 citing W Fox Towards a Transpersonal Ecology (1990) and H W Arndt The Rise and Fall of Economic Growth (1978).
and indiscriminate use of synthetic pesticides had an enormous impact at the time. More importantly, it questioned the prevailing assumption that technological advancement is necessarily beneficial, and/or essential to human progress ...

The same year saw the publication ... of another widely influential book, Kenneth Galbraith’s *The Affluent Society*. As Carson had questioned the prevailing assumptions on technology, so Galbraith questioned the assumptions on economic growth. That is, that economic growth, in itself, is a desirable policy objective, irrespective of the ends to which that growth is directed ...

These two important works marked the turning point between long held beliefs that economic growth and technological advancement were beneficial, if not essential to human progress, and a developing recognition that unrestrained economic growth and inappropriate use of technologies were, in fact, causing widespread damage to the human environment, and even posing a threat to humanity’s very survival.

The spaceship, or closed, economy was born after scientific experimentation and investigation had confirmed the laws of thermodynamics and revitalised ecology. Ecology (which demonstrates the interdependence of the biosphere) and thermodynamics (which prescribes that “... everything must go somewhere ...”)

the earth has become a single spaceship, without unlimited reservoirs of anything, either for extraction or for pollution, and in which, therefore, [humankind] must find [its] place in a cyclical ecological system which is capable of continuous reproduction of material form even though it cannot escape having inputs of energy.

This image of Earth was dramatically confirmed when Apollo VIII’s pictures of the planet from outer space were shown on Christmas Eve 1968.

The view of Earth ... revealed by the astronauts ... created a powerful image that became a symbol for the environmental movement. From that time onward that image of Earth was conceptual as well as visual ... a subliminal change in basic attitudes towards the Earth appears to have followed from the Apollo flights.

On spaceship Earth, “... throughput [consumption and production] is by no means a desideratum, and is indeed to be regarded as something to be minimized rather than maximized.”

By focusing on the interdependence of all natural things in the biosphere, ecology stimulated the recognition of two non-instrumental values in nature. The first relates to the ecological

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40 See n 29 and 30 above and accompanying text.
41 Boulding, as in Stewart and Krier supra n 1, 93.
42 Caldwell *Between Two Worlds* (1990) 38, as quoted in Grundy supra n 23, 12.
43 Boulding in Stewart and Krier supra nn 1 and 13, 93.
worth of a thing; it is a measurement of the contribution each part of the natural world makes to the overall functioning of the biosphere. The second is intrinsic value. The importance which ecology has, since its revitalisation, assumed in terms of global environmental thinking is illustrated by the fact that it alone has spawned several modern environmental ethics. These include Social Ecology, Deep Ecology and Eco-Feminism.

The movement which began with *Silent Spring* and *The Affluent Society* gained momentum through the 1960s and 1970s as awareness of the rate and extent of global human population growth, and international environmental degradation grew. "The 1970s witnessed an explosion of literature concerned with mounting environmental problems ...." Eventually, politicians and policy-makers (stirred by public pressure, and the cold war which had brought fears of major global environmental calamity) took up the challenge. The politicisation and internationalisation of the environmental movement which has occurred since is based around concepts including sustainability and integrated resource management.

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44 "When we regard an object with appreciation or love, we say it has *intrinsic* value, by which we mean that we value the object itself rather than just the benefits it confers on us" M Sagoff "Zuckerman's Dilemma - A Plea for Environmental Ethics" [1991] Hastings Centre R 32, 33. By focusing on the relationships between things, as opposed necessarily to the things themselves, ecology somewhat ironically promoted this value which is very much centered on individual things. It seems that recognition of ecological values led to an acceptance of value in everything (most things, people perhaps aside, make a positive contribution to the functioning of the biosphere) which in turn stimulated a recognition of the inherent worth of things.

45 These three ethics differ principally in where they locate intrinsic values, and how they seek to control human activity. Descriptions of all three ethics appear in Palmer supra n 29, 59-82.

46 Hoban and Brooks, focusing on the North American experience, comment on the impact of major instances of environmental degradation, noting that "[t]hrough the late 1960s, a gradual awareness was building in the public consciousness that the country faced a wholly different type of pollution problem. Some newly discovered horror was mentioned almost daily in the newspapers: In 1969, the Food and Drug Administration was forced to prevent over 28,000 pounds of salmon from Lake Michigan from going to market because of excessively high levels of DDT and dieldrin; the Great Lakes were widely reported to be dying, choked to death in large part by phosphates that encouraged the growth of plant life; the Apollo astronauts had no trouble picking out the cloud of smog over Los Angeles; the unforeseen consequences of one of history’s great projects – the Aswan High Dam – threatened to destroy the ecological balance of the entire Nile River and topple the fishery of the Eastern Mediterranean; as Americans congratulated themselves on their generally high level of health, reports showed that breast milk from American mothers contained four times the level of DDT considered “safe for human consumption” by the federal government” supra n 25, 22-23.

47 Grundy supra n 23, 13-15, who cites *Blueprint for Survival* (1972) (which "... called for radical changes in the policies of government and the lifestyles of people" and was published by members of the British scientific community) and *Limits to Growth* (D H Meadows et al’s 1972 report to the Club of Rome which warned of the consequences of continuing with then evident trends in population growth, industrialisation, pollution, food production and resource depletion and promoted a shift to "... a condition of ecological and economic stability that is sustainable far into the future," and which was revisited by its authors in their 1992 report *Beyond the Limits*, which again warned that resource depletion and pollution were still occurring at unsustainable rates, and again called for changes in policy and practice to promote a sustainable society) as examples.

48 Basically, the cold war ended with a massive nuclear arms race between east and west. Much popular concern arose during the early 1980s that global nuclear warfare was imminent and that both the Earth and its inhabitants were facing a real threat of extinction. Once the cold war had ended, the international political community had more time for environmental issues.

49 Neither term has a fixed meaning, but for present purposes, the following points should be noted. The term “sustainability” is used here in a general sense, to cover a range of more precise terms such as “sustainable management” (as used in the Resource Management Act 1991, s 5), “sustainable development” (the term
2. Action by the International Political Community


Environmental issues first appeared on the international political agenda in 1966. In that year, the 14th Session of the General Conference of UNESCO adopted a resolution providing for the convention of an Inter-governmental Conference of Experts on the Scientific Basis for Rational Use and Conservation of the Resources of the Biosphere in 1968. The resulting Paris conference reported a growing concern for the environment, and emphasised the ecological “... recognition that the biosphere is a system, all of which may be affected by action on any part of it.”50

In 1972 an even more important conference took place in Stockholm under the maxim Only One Earth. This United Nations conference is “... widely credited as being the first forum to give the concept of ‘ecologically sustainable development’ an international political focus.”51 The Stockholm Declaration opened by recognising that human beings have both “... the fundamental rights to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being ...” and “... a solemn responsibility to protect and improve the environment for present and future generations.”52 Its 26 Principles referred to “... most of the main issues of global significance ...,” as well as the concepts of sustainability and integrated management.53 Although laudable, the Declaration was internally

predominantly used internationally) and “sustainable resource use.” “Integrated resource management” (which is the direct result of the study of ecology and the laws of thermodynamics) is generally seen as having two components: first that the conservation, use and development of individual resources should be integrated (so that those conserving and those developing co-ordinate their tasks, and so that each time a decision is made about the environment, its social, economic and environmental consequences are all simultaneously addressed) and, second, that the conservation and development of the various resources should be coordinated (this component gives rise to a “holistic” approach to resource management and is intended to reflect the interconnectedness of natural processes and elements of the biosphere). See D P Grinlinton “Integrated Resource Management – A Model for the Future” (1992) 9 Envl' and Planning L J 4, 4-5.

51 Grundy ibid, 18.

On sustainability, see (for example) Principles 1 (recognising humankind’s responsibility to “... protect and improve the environment for ... future generations ...”), 2 (declaring that “[t]he natural resources of the earth ... must be safeguarded for the benefit of present and future generations through careful planning or management ...”), 3 (stressing that “[t]he capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved”) and 5 (acknowledging that “[t]he non-renewable resources of earth must be employed in such a way as to guard against the danger of their future exhaustion ...”) (as reproduced in the ILM reprint idem). On integrated management, see Principle 13, which reads “[i]n order to achieve a more rational management of resources and thus to improve the environment, States
inconsistent and "... to some extent intellectually incoherent."\(^{54}\) It stated only goals; offering no guidance as to how these might be achieved.\(^{55}\) Nevertheless, the conference did lead to the establishment of the United Nations Environment Programme "... to coordinate global environmental assessment and management ...."\(^{56}\)

Integrated environmental management, the duty to future generations, and sustainability were further promoted in the World Conservation Strategy produced by the International Union for Conservation of Nature and Natural Processes in 1980. This strategy opened by recognising that "[h]uman beings, in their quest for economic development ... must come to terms with the reality of resource limitation and the carrying capacities of ecosystems, and must take account of the needs of future generations," and "... emphasised three main objectives: the maintenance of essential ecological processes and life support systems, the preservation of genetic diversity, and the sustainable utilisation of species and ecosystems."\(^{57}\)

A decade after the Stockholm conference, the United Nations Environment Programme called a progress meeting in Nairobi. The Declaration made there acknowledged the developments which had occurred since the 1972 conference, observing that:\(^{58}\)

> new perceptions have emerged: the need for environmental management and assessment, the intimate and complex interrelationship between environment, development, population and resources and the strain on the environment generated ... by increasing population .... A comprehensive and regionally integrated approach that emphasizes this interrelationship can lead to environmentally sound and sustainable socio-economic development.

Echoing its predecessor's opening Principle, the Nairobi Declaration concluded by urging\(^{59}\)

> all Governments and peoples of the world to discharge their historical responsibility, collectively and individually, to ensure that our small planet is passed over to future generations in a condition which guarantees a life in human dignity for all.

Also in 1982, the United Nations Environmental Programme reaffirmed its commitment to the

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\(^{54}\) Palmer ibid 266, who writes that the Principles "... marched together in matched pairs. The declaration was also a wish list of items that were inconsistent with one another and the overall result was to some extent intellectually incoherent."

\(^{55}\) Palmer supra n 53, 267.

\(^{56}\) Palmer idem.


\(^{59}\) *Nairobi Declaration* ibid, 678.
concept of sustainability in its New York Declaration. It argued that ecosystems, organisms and natural resources should be managed so as to optimise their “... sustained productivity, but not in such a way as to endanger the integrity of ... other ecosystems or species with which they co-exist.”

The next major international environmental event was the publication of Our Common Future in 1987. This document positively predicted a new era of world economic growth, but also emphasised that development must not “... endanger the natural systems that support life on Earth: the atmosphere, the waters, the soils, and the living beings.” Our Common Future focused on the satisfaction of current and future human needs, but also insisted that the drive to meet those needs must not be allowed to interfere with the life-supporting capacity of Earth. Hence, it argued that “... development [must] meet[] the needs of the present without compromising the ability of future generations to meet their own needs,” and that development should be limited by “... the present state of technology and social organisation on environmental resources and the ability of the biosphere to absorb the effects of human activities.” The Commission also called for greater equity in wealth distribution, and increased participation and consultation in planning and resource allocation. In so far as water resources specifically are concerned, the Commission claimed that because these contribute to the life-supporting capacity of Earth, they must not be endangered. The “... prevention and reduction of ... water pollution ...” was identified as a “... critical task of resource conservation.”

b. UNCED in Rio de Janeiro

Sustainable development was reaffirmed as the central objective of the international environmental agenda at the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro. This conference produced three items of international “soft law,” containing general statements of principle and affirmed by all States represented

61 Compiled by the World Commission on Environment and Development, the report is commonly known as “the Brundtland Report” after the Commission’s Chair, Gro Harlem Brundtland.
63 See, for example, Our Common Future ibid 43-44.
64 Our Common Future supra n 62, 43.
65 Our Common Future ibid 8.
66 The Commission linked world poverty to environmental degradation, noting that it was, in its view, “futile” to attempt to deal with one without also addressing the other (Our Common Future supra n 62, 3).
67 See, for example, Our Common Future ibid 47.
68 Our Common Future supra n 62, 45.
69 Our Common Future idem.
70 This term is generally applied to international law which is not legally enforceable. A wide range of
in Rio, and a small series of international "hard laws." The two most relevant "soft law" items are the Rio Declaration on Environment and Development and Agenda 21.

The Rio Declaration comprises 27 Principles which, though vague, provide generalised explanations of what sustainable development is, why it is desirable, and how it might be attained. Principle 1 is candid in its recognition that sustainable development is being promoted in the human interest. People are, it says, at the "... centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." Principle 2 affirms the basic right of States to develop their national resources; but Principle 3 adds that such development must not interfere with the right of future generations also to meet their needs. For sustainable development to be achieved, Principle 4 directs that "... environmental protection shall constitute an integral part of the development process and [shall not] be considered in isolation from it."

Also promoted by the Rio Declaration are increased levels of public participation, and the adoption of the precautionary approach focusing on the effects of development.

Instruments have been characterised as "soft law," see Chinkin who notes that "soft law instruments range from treaties, ... which include only soft law obligations ["soft" because the obligations are weak or vague] ("legal soft law"), to non-binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organisations ("non-legal soft law"), to statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles" – C M Chinkin "The Challenge of Soft Law: Development and Change in International Law" (1989) 38 Inter'l and Comp LQ 850. Although legally non-enforceable, soft law offers benefits to those trying to reduce global environmental degradation. Thus, Palmer (supra n 53, 269) notes that creating soft law instruments "... is particularly helpful in creating a climate that can produce a hard instrument in the end." Soft law leaves discretion to States, and the obligations or standards are often so vague that enforcement would be impossible anyway. Ambiguity, however, can be helpful, for "[i]t can serve to secure agreement where agreement may otherwise not be achieved ... it promotes feelings of international comity and cooperation that are very valuable. Since political leaders and countries must continue dealing with one another, it is better that those dealings be based on agreement than on disagreement – and soft law solutions produce agreement."

International "hard law" is legally enforceable law, usually sourced in custom or treaty. The "hard law" options created in Rio include the two Conventions on Biodiversity and Climate Change. All documents produced in Rio may be found in: Ministry for External Relations and Trade and Ministry for the Environment United Nations Conference on Environment and Development: Outcomes of the Conference.

The third item is the non-legally binding Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests.

Rio Declaration on Environment and Development, as reproduced in the Outcomes document supra n 71, 2.

See the Outcomes document ibid 3, and note that Principle 3 refers to "developmental and environmental" needs.

See the Outcomes document ibidm. Other prerequisites of sustainable development identified include: "... good faith ..." and a "... spirit of partnership ..." (Principle 27); international cooperation to eradicate poverty, to "... conserve, protect and restore the health and integrity of the Earth's ecosystem ...", and to promote "... a supportive and open international economy ..." (Principles 5, 7, and 10); the reduction and elimination of "... unsustainable patterns of production and consumption ..." (Principle 8); improving scientific understanding, technological development and the sharing of knowledge (Principle 9); the involvement of women, youth and indigenous peoples (Principles 20, 21 and 22 respectively) and the avoidance of warfare (primarily Principle 24, but Principles 25 and 26 are related).

See the Outcomes document supra n 71, 4.

See Principles 15 (which declares that "[i]n order to protect the environment, the precautionary approach
Agenda 21 is a more expansive statement of principles, objectives, proposed activities and means of implementation. Apart from backing the notions of sustainable development and integrated management it also encourages states to provide the means for more future planning in environmental management, the application of the precautionary approach, and greater public participation in resource management and allocation.

3. **Reflections in Municipal Environmental Law**

In New Zealand, the conservation movement had a rapid impact on water law. On what was probably its first major outing, the local conservation lobby managed to convince the legislature to install a minimum levels regime into the Manapouri-Te Anau Development Act 1963. Conservation was specifically mentioned in the Long Title to the Water and Soil Conservation Act 1967, though the actual protection afforded to natural water by the Act was not significant until the water conservation order and minimum flow regimes were introduced in 1981 and 1988 (respectively). Meanwhile, the conservation consciousness of New Zealand’s general body of environmental law had progressively increased.

In 1973 environmental impact assessment was first introduced when the Minister of Works and Development authorised the use of the environmental protection and enhancement procedures. These procedures shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation), and 17 (which promotes the use of national instruments for environmental impact assessment in respect of “... proposed activities that are likely to have a significant adverse impact on the environment ...” – see the Outcomes document idem.

78 Increased planning is advocated in specific areas (for example in managing the coastal and marine environments - see chapter 17, paras 17.5 and 17.6 at 236-8 of the Outcomes document supra n 71) while in other areas, the Agenda seeks to change existing planning methods and priorities (mainly through the integration of social, economic and environmental concerns at all levels - see, for example, chapter 8, para 8.2 at 93 of the Outcomes document).

79 The precautionary approach is advocated, for example, for coastal and marine areas (see chapter 17, para 17.5 and 17.6 at 236-7 of the Outcomes document ibid) and for freshwater resources (see chapter 17, para 18.4 at 287 of the Outcomes document).

80 No one reference is appropriate - this theme is repeated throughout the entire document.

81 This Act is described in Chapter 3 nn 190-196 above and accompanying text.

82 The Long Title to the 1967 Act, and its minimum flow and water conservation regimes are described in Chapter 3 nn 396, and 453-472 above and accompanying text.

83 The original procedures were introduced in November 1973. Later, a revised edition was compiled and published by the Commission for the Environment in 1981 (Commission for the Environment Environmental Protection and Environmental Procedures (revised edn, 1981)).

84 Fisher supra n 34, 3. According to the 1981 edition (ibid 1-2), the procedures applied to “(a) the works and ... management policies of all Government departments which may affect the environment; (b) all proposed actions, by other than Government Departments, which may affect the environment, which are financed [wholly or partly] ... by Parliament ... (c) the works and ... management policies of all statutory boards, corporations, commissions, etc which may affect the environment ... [and] (d) the granting by the Crown of all licenses, authorisations, permits and privileges which may have environmental implications ... issued
applied to all public authority decision-making at policy or operational level. Although environmental impact assessment is a means to an end rather than an end in itself, the implementation of these procedures was clearly linked in substantive terms to the achievement of a policy of conservation or sustainability. Although these procedures were informal, they represented a mechanism that was available to support the objectives of conservation or sustainability if that was intended.

The real importance of the introduction of formal environmental impact procedures lay in their implicit recognition of the need to consider the effects of proposals for resource use on the environment. Where such consideration included the effects of activities on the natural world, then it may be seen as reflecting (even if only basically) the teachings of ecology and thermodynamics.

Taking things further, Fisher notes that although the Town and Country Planning Act 1977 section 3's express recognition of the conservation, protection, and enhancement of the physical, cultural and social environment ... was significant in itself, more important was the status of this declaration [as a matter of national importance]. It was not until 1989 that the Court of Appeal in Environmental Defence Society v Mangonui County Council [1989] 3 NZLR 257 ... had an opportunity to determine the meaning and effect of s 3. The narrow issue was the relationship between matters of national importance declared by s 3 and the statement in s 4 of the general purposes of regional, district, and maritime planning. In the event one member of the Court of Appeal indicated that matters of national importance carried greater weight: another indicated that they amounted to an overriding objective [and] McMullin J took an intermediate position .... It would appear that matters of national importance carried great weight but they [did] not necessarily override other considerations.

The most significant changes to municipal environmental law have been made since the fourth Labour government embarked on its policy of reform in the 1980s. In 1986, the concept of

pursuant to: [Acts including] (i) the Coal Mines Act 1979 ... (xi) the Mining Act 1971 ... [and] ... the National Development Act [but not including the Water and Soil Conservation Act 1967, although] documented information on the environmental implications of a proposal may also be required where consents are sought under (i) the Clean Air Act 1972 (ii) the Public Works Act 1981 (iii) the Soil Conservation and Rivers Control Act 1941 (iv) the Town and Country Planning Act 1977 (v) the Water and Soil Conservation Act 1967. " The link between these procedures and conservation and sustainability is indicated, for example, in paragraph 14 (at 5 of the revised edition), which states that environmental impact reports "... are required for all actions or legislative proposals as defined [above] where those actions or legislative proposals are likely to have a significant effect on the human, physical or biological environment. ... [In making deciding whether or not there will be significant effects,] Government organisations are to be guided by consideration of the following questions: ... (d) is the proposal likely to have a significant impact on ecosystems in the area? ... (f) are ... conservation values likely to be affected? ... (j) does the proposal create a significant demand on a resource which is, or is likely to become, in short supply? ...".

85 Fisher ibid 7.
sustainability, which was by then one of the linchpins of the international community’s environmental statements, won municipal recognition as the basis of the quota management system introduced to regulate commercial fisheries under the Fisheries Act 1983. In essence, the quota management system involves the setting of total allowable catches for given species or classes of fish from which individual transferrable quota are allocated to the various fishing interests around the country.86 For present purposes, the significance of the quota management system lies in the Act’s definition of “total allowable catch,” which reads:87

“To total allowable catch”, with respect to the yield from a fishery, means the amount of fish, aquatic life, or seaweed that will produce from that fishery the maximum sustainable yield, as qualified by any relevant economic or environmental factors, fishing patterns, the interdependence of stocks of fish, and any generally recommended sub-regional or regional or global standards.

While there have, predictably, been practical difficulties in determining the quantum of the maximum sustainable yield (many have argued that the amounts set by the Minister in recent years have been too high so as to ensure that the fisheries will be able to be enjoyed by future generations) the fact remains that the concept of sustainability is expressly included in the Act.

The concept of sustainability was also adopted in 1986 by the Environment Act.88 While this Act does not directly control the allocation of resources, it does nevertheless affect how New Zealand’s resources are managed. This is because the Act provides for the establishment and empowerment of the Parliamentary Commissioner, and the Ministry for, the Environment.89 The Commissioner has supervisory, review and reporting functions relating to the allocation, use and preservation of resources, environmental planning and management, and activities and other matters which have adverse potential or actual environmental effects.90 The Ministry has more limited functions,91 and is mainly concerned with giving advice92 and collecting, providing and disseminating information on environmental policies.93

86 In respect of total allowable catches, see ss 28C and 28CA, and in respect of individual transferrable quota see ss 28E, 28EA and 28F of the Fisheries Act 1983.
87 See s 2(1).
88 See the Long Title, which is set out in Chapter 3 n 139 above and accompanying text.
89 The office of Parliamentary Commissioner for the Environment is established in s 4, of the Act. The Ministry, and the posts of Minister and Secretary are established in ss 28 and 29.
90 The Commissioner’s functions are set out in s 16 of the Act, and described in Chapter 3 nn 481-483 above and accompanying text.
91 The Ministry’s functions are set out in s 31; see Chapter 3 n 485 above and accompanying text, and nn 92 and 93 to follow and accompanying text.
92 The Ministry must advise the Minister (s 31(a)), the Government, its agencies and other public authorities (s 31(e)) and is required “... generally to provide advice on matters relating to the environment” (s 31(f)).
93 Section 31(b) requires the Ministry to “... solicit and obtain information from any source, and to conduct and supervise research, so far as it is necessary for the formulation of advice to the Government on environmental policies ...” and s 31(e) requires it “... to provide and disseminate information and services to promote environmental policies ...”
In exercising these functions, both the Commissioner and the Ministry are to consider the matters set out in the Long Title to the Act, and in section 17 thereof. The matters listed in the Long Title include “... [t]he intrinsic values of ecosystems; ... [t]he sustainability of natural and physical resources; and ... [t]he needs of future generations.” Section 17 refers to a total of seven matters – of which two seem especially relevant. These are: “... [w]hether any proposals, policies, or other matters ... are likely to ... [h]ave features [with uncertain] environmental effects ... [or are likely to] [r]esult in the allocation or depletion of any natural and physical resources in a way or at a rate that will prevent the renewal by natural processes of the resources ...” and “... [a]ll reasonably foreseeable effects of any ... proposal, policy, or other matter on the environment, whether adverse or beneficial, short term or long term, direct or indirect ... ”94

Since the functions of the Commissioner and the Ministry are not “... executive ... in the sense that they are empowered to make legally binding decisions”95 and since it is purely administrative, the Act cannot directly impute such concepts as appear in its text into the resource allocation in New Zealand. However, because the roles of the Commissioner and the Ministry involve influencing those with executive functions, the concepts will be indirectly absorbed into decision-making. Thus, Fisher comments:96

\[t\]he effect of the Environment Act 1986 is to enable environmental and other considerations to be taken into account in the formulation of policy. Neither the legislation nor the institutions which it creates directly protects the environment in any specific way. The role of the commissioner and of the Ministry, it should be emphasised again, is influential and not decisive.

For these reasons, the success with which the more conservation conscious concepts appearing in the Act are absorbed into policy and decision-making will largely depend on “... the quality and persuasiveness of the information and advice that [the Ministry] provides to the Government” and “... the independent status of the Commissioner, the Commissioner’s access to Parliament and the Commissioner’s accountability to Parliament.”97

Probably the most significant contribution to the trend of increasing conservation consciousness in New Zealand’s general body of environmental law was made with the enactment of the Conservation Act 1987. This Act establishes and empowers the Department

94 Section 17(e) and (f).
96 Fisher supra n 34, 4.
97 Fisher supra n 95, 320.
of Conservation. Included among the Department's principal functions are:

(a) To manage for conservation purposes, all land, and all other natural and historic resources [held by the Department under the Act] ...:
(b) To advocate the conservation of natural and historic resources generally:
(c) To promote the benefits to present and future generations of—
   (i) The conservation of ... resources ... and
   (ii) International co-operation on ... conservation:
(d) To prepare, provide, disseminate ... material relating to conservation:
(f) To advise the Minister on matters relating to any of those functions or to conservation generally ... .

The purposes for which land may be held by the Department, and the means by which such areas are to be managed is described in detail in Chapter 3 above. For present purposes, the most important point is that all areas held by the Department must be managed for "conservation purposes." Thus, "... the meaning of the word "conservation" is crucial for the administration of this Act." Section 2(1) provides that:

"Conservation" means the preservation [itself defined, "... in relation to a resource ..." as meaning "... the maintenance, so far as is practicable, of its intrinsic values"] and protection [defined, again "... in relation to a resource ..." as "... its maintenance, so far as is practicable, in its current state; but includes— (a) [i]ts restoration to some former state; and (b) [i]ts augmentation, enhancement, or expansion"] of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations.

Thus, the Act not only promotes aspects of sustainability, but it also requires the observation of intrinsic values. Although the notion of conservation, "... particularly when it is defined in this way, creates difficulties of application ... such an objective makes it quite clear what is the general direction of decision making prescribed by the Legislature." In summary, the Conservation Act, like the other municipal statutes mentioned in this discussion, is simply a reflection of the overall direction of the development of New Zealand's environmental law. Describing this development in overview, Fisher observes:

[originally resource management law amounted to the exercise of rights of ownership whether these rights were vested in the Crown, some other public authority or a private institution within the legal

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98 The Department is established by s 5, and its functions are listed in s 6.
99 Fisher supra n 95, 322.
100 Fisher supra n 34, 5. Note that Fisher describes the definition of "conservation" as "... obviously general in conception" somewhat "... general, vague, or imprecise ... ."
system. The intervention of the legislature, certainly in New Zealand, indicates that the priority perceived by the body politic was originally the development of the resource in question.

This has changed dramatically in recent years. The legislature has introduced mechanisms for protecting the environment and for reducing or eliminating the impact of pollution. Attention has turned increasingly in recent years to a more sophisticated and potentially more difficult objective to achieve – namely conservation or sustainable management.

Protection of the natural environment has been an issue of increasing concern both to the international community and to the New Zealand legislature over recent years. This concern began well before the Water and Soil Conservation Act was enacted in 1967, and has continued since. It is a concern which is also felt by ordinary New Zealanders: in 1993, a nationwide survey of New Zealanders showed strong support for strict environmental laws. The survey revealed that 64 percent of the respondents “... favour[ing] taking stronger measures for environment protection even if it harmed economic growth.”102

The fact that calls for more environmental protection, and the apparent trend of increasing conservation consciousness both in global thinking and action and in New Zealand’s environmental and water laws, have persisted since 1967 supports, it is submitted, the contention that the Resource Management Act is meant to offer more protection to water than was the Water and Soil Conservation Act. Since the move towards more conservation and protection has continued through the 1970s and 1980s it is submitted to be at least conceivable that this should be reflected in the Resource Management Act 1991. Several of the more specific (but undeniably significant) ways in which the 1991 Act appears to have in fact furthered the trend of increasing conservation consciousness were previously described in Chapter 6 above. The most talked about means by which this trend may have been even further promoted by the 1991 Act lies in section 5. This section sets out the Resource Management Act’s governing purpose. The extent to which section 5 in fact makes the 1991 Act more conservation conscious than its 1967 predecessor, and the implications of this section generally for the management and allocation of New Zealand’s natural water are the two issues addressed in Chapter 8 to follow.

102 The survey was conducted by Massey University for the International Social Survey Programme, and reported in the Otago Daily Times (21 March 1994).
Chapter 8

Section 5 and its Potential

I. Introductory Remarks

Part II of the Resource Management Act has the potential to significantly further the trend of increasing conservation consciousness in New Zealand’s water law. At the top of Part II’s hierarchy is section 5. Section 5 sets out “the” purpose of the Act. As such, it is submitted, section 5 should be seen as providing the end point towards which all rule- and decision-making under the Act is steered. It is questionable whether, in the first three years of the Act’s life, section 5 has been given the attention it deserves. Undoubtedly section 5 is in places imprecise, and therefore somewhat illusive. Harris points out this feature of section 5, and criticises Parliament for it:

Even the most thorough analysis of s 5 is unlikely to lead to a confident clarity of understanding. Parliament has deliberately left the wording indeterminate. The court, more particularly the Court of Appeal, is being left to give a more definite content to the purpose of the Act. Parliament should not have abdicated its law-making responsibility in this way.

It is submitted, however, that Parliament has not abdicated its function, that the Courts are not being left to “... give a more definite content ...” to section 5. Section 5 is intended to be what it is. As Grieg J said in New Zealand Rail Ltd v Marlborough District Council

[Part II] of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way.

1 This is both because s 5 sets out “the” purpose, and because almost all of the key functions in the Act are linked back to Part II of which s 5 is the apex. On the first point, note the comment made by the President of the Court of Appeal, Sir Robin Cooke, in Ashburton Acclimatisation Society v Federated Farmers of New Zealand [1988] 1 NZLR 78, 87 that, where an Act contains a purpose section, then “[t]he duty of the Court must be to attach significance to and help from this prominent and unusual feature of the Parliamentary enactment.” Cooke P was addressing s 2 of the Water and Soil Conservation Amendment Act 1981, but other Acts contain purpose sections – see the discussion in B V Harris “Sustainable Management as an Express Purpose of Environmental Legislation: the New Zealand Attempt” (1993) 8 OL 51, 56-58. On the second point (the link between s 5 and other actions in the Act), note, for example ss 51(1), 57(1), 61(1), 66(1) and 74(1), and 134 and the discussion in Chapter 5 n 7 above.

2 Harris ibid 67-68.

3 New Zealand Rail [1994] NZRMA 70, 86.
Although section 5 is not the sort of provision whose true and absolute meaning can be revealed through persistent and close analysis, or which can be broken down into a neat test for future application, it is still fundamental to the Act. Section 5 encapsulates a policy, a way of thinking or philosophy and, as such, it should be sympathetically applied by decision- and rule-makers in an open and progressive way. This is a point which should become especially clear when section 5(2)(a)-(c) are addressed in text to follow.

That is not to say that there are no issues of statutory interpretation in section 5. In fact, there is one particular issue which is very fine (it relates to just one word in section 5) but which is also quite fundamental (it determines just how far the Resource Management Act goes in the interests of the natural environment). The word in question is “while” and it joins the first and second parts of section 5(2). “While” is fundamental because its interpretation determines the relationship between the two parts of section 5(2), and thus between the pursuit of well-being by current generations and the sustaining of resources for future generations, the safeguarding of life-supporting capacity, and the avoidance, remedy or mitigation of adverse environmental effects. This explains why “while” has been described as the “fulcrum” of section 5.4

Before proceeding to address the interpretation of “while,” the point should be made that, regardless of how section 5 is interpreted and applied, its mere existence is significant in terms of New Zealand’s water law. This is because section 5 promotes the “sustainable management” of water. Sustainability, and the notions of sustaining resources for future generations and safeguarding the “... life-supporting capacity of ... water, ... and ecosystems ...” have never been expressly relevant to the allocation and management of water in New Zealand before.5 The introduction of the notion of sustainable management as the purpose of the Act offers the potential to draw water management and allocation into a new era. Whether or not this potential is met will be determined by how section 5 is implemented.

II. The Meaning of “While”

In this part of this chapter the three main lines of thought on the interpretation of the word “while” will be described and evaluated. The evaluation begins by assessing the support which the various lines gain from such sources as are likely to be reviewed by a court concerned with


5 Duties of this nature could, arguably be read into the Long Title and such provisions as ss 20B(6)(a) and 20(6) of the 1967 Act, but they were neither so clearly stated, nor in such a pre-eminent position as with the 1991 Act.
the accepted principles of statutory interpretation. Thus, an objective and traditional evaluation of the likelihood that each proposed interpretation will be adopted should be obtained.

I. Interpreting “While” – Three Lines of Thought

In essence, the first line of thought advocates that “while” is a coordinating conjunction. Thus, the concerns encapsulated in paragraphs (a) - (c) will take no priority over the direction to manage the use, development and protection or resources “... in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety ... .” In essence decision- and rule-makers will need to balance the interests in the two parts of section 5(2); “... human values and ecological values [will, prima facie,] carry the same weight in any decision-making process.”6 In some cases, therefore, the interests of development may be allowed to override the ecological interests contained in paragraphs (a) - (c). Development could go ahead despite a failure to meet the demands of one or even all of these paragraphs.

Alternatively, “while” might be interpreted as a subordinating conjunction, meaning “if,”7 and “... “while sustaining” meaning only for “so long as it does not fail to uphold.””8 In this case, “while” may be seen as introducing a clause which is superior to it and so “... the management function [will be] weaker than the ecological function.”9 Thus, people will only be able to take steps to provide for their social, cultural or economic well-being if in so doing they do not breach any of paragraphs (a) - (c). This is the interpretation supported by the present Minister for the Environment, the Hon Simon Upton, who in a recent conference address described paragraphs (a) - (c) as “non-negotiable.”10

The third line of thought removes the focus on “while,” and concentrates instead on the impact of the ambiguities in paragraphs (a) - (c). Its proponents argue that

[i]rrespective of whether “while” is interpreted as a co-ordinating or a sub-ordinating conjunction, rule-makers and decision-makers under the Act will have ample room to trade off environmental interests for development benefits, and vice versa. The flexibility is provided for by

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7 This is the meaning promoted by Fisher ibid 12-3.
8 These are the words suggested by Milligan J R “Pondering the “While”” Terra Nova (May 1992) 50.
9 Fisher supra n 6, 12.
11 Harris supra n 1, 61.
the loose wording of .... [paragraphs] (a), (b) and (c).

In the end, this approach (like the first line of thought) is one of balance. The balance (inherently a process involving compromise) is less apparent than in the first school, however, because it hides in the ambiguity of paragraphs (a) - (c). Decision-makers reading “while” as a coordinating conjunction might actively choose to allow a development to proceed despite the fact that it failed to meet the constraint of one or all of paragraphs (a) - (c). The ecological interests in these paragraphs are acceptably compromised because they are outweighed by current benefits. Decision-makers operating under the third line of thought, however, would not need to admit to any overt compromise of paragraphs (a) - (c) where intuition directed them to allow a development to proceed. They would simply and legitimately employ the “flexibility” produced by the ambiguity in those paragraphs to avoid their constraints.

Because both the third and first lines allow ecological values to be either marginalised or avoided through restrictive interpretation, they permit decision- and rule-makers a wide discretion allowing them to make decisions and rules which emphasise current human needs. Under the second line of thought, however, decision- and rule-making will be underpinned by an ecological bottom line. Current human wellbeing will only be able to be provided for through the use, development and conservation of resources where the limits implied by paragraphs (a), (b) and (c) are not undermined. Obviously, the protection accorded by this interpretation to ecological and long-term interests will be determined by the interpretation given to paragraphs (a) - (c). The more restricted their meaning, the less protection will be afforded; the wider their meaning, the greater their effect.

The subordinating interpretation has its attractions. No doubt there is a great flexibility in paragraphs (a) - (c), though it is submitted that this a product of deliberate, as opposed to loose, wording. Clearly the flexibility in paragraphs (a) - (c) offers decision- and rule-makers discretion in determining whether or not, in any given case, their requirements have been met. Nevertheless it is submitted that the subordinating approach is, and must be, right. Sustainability necessitates restraint on development. There is little point in adopting the concept if the enormity and often, by implication, the impact of a proposed development can legitimately outweigh the maintenance of certain basic biophysical standards. Allowing just such outweighing arguably led us to the condition in which we find ourselves today: living on a degraded planet. What is needed is an objective assessment of the word “while.”
2. Evaluating the Support for Each Interpretation

a. Intrinsic Aids to Interpretation

How should “while” be interpreted? The choice is between the subordinating and coordinating interpretations, that is between, on the one hand, an interpretation which preserves absolutely the matters in paragraphs (a) - (c) and, on the other, one which may not. Since no determinative judicial authority yet exists, any court facing this question will, no doubt, proceed according to the following generally accepted principles of statutory interpretation.

In a recent decision, the Court of Appeal was asked to address the meaning of certain words in the Income Tax Act 1975. In so doing, the Court made comments as to the basic approach to statutory interpretation. Having approved the “... classic formula expressed in Haydon’s Case ...,” the Court went on to observe that

[t]he ... proposition ... that words are to be given their ordinary meaning ... is fundamental to all statutory interpretation. There must be strong and sufficient reason before words can be given some other meaning which they are capable of bearing in a particular context. ... If, however, the words are capable of more than one meaning and the object of the legislation is clear, then the words must be given “such fair, large and liberal construction” as will best ensure the attainment of the object of the Act.

Later, the Court affirmed that “[o]ne should also have regard to the total context of the words used and to the purpose of the legislation in order to arrive at the meaning intended.”

Having regard to these statements, the following discussion addresses the plain and ordinary meaning of “while,” its statutory context, and such judicial comments as exist. It is difficult to know where to turn (in so far as intrinsic aids to interpretation are concerned) to ascertain the purpose of the Resource Management Act in this case, as the section at issue is the very one which purports to define the Act’s object.

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12 There are cases which make brief reference to “while,” but none which actually purport to finally determine its meaning. The cases which have mentioned s 5 are discussed in text to follow.

13 Commissioner of Inland Revenue v Alcan New Zealand Ltd unreported, Court of Appeal, 31 May 1994, CA 150/93.

14 Commissioner of Inland Revenue ibid 6; referring to Haydon’s Case (1585) 3 Co Rep 7a and describing its formula as speaking of “... ascertaining what was the previous law, what was the mischief or defect for which it did not provide, what is the remedy devised by Parliament, and what is the construction which will suppress the mischief and advance the remedy.” The Court described s 5(j) of the Acts Interpretation Act 1924 (see n 15 below and accompanying text) as the “... modern equivalent in New Zealand ....”

15 Commissioner of Inland Revenue supra n 13, 6-7. The quoted words are drawn from s 5(j) of the Acts Interpretation Act 1924.

16 Commissioner of Inland Revenue ibid 8.
i. Plain and Ordinary Meaning

First, where words have a clear and unambiguous meaning, this should be applied. In my view, the plain and ordinary meaning of "while" implies contemporaneity so that "while" means "at the same time as." Thus, if a proposed use, development or conservation of a water resource could not proceed in a way or at a rate which at the same time sustained the potential of those resources to meet the needs of future generations, safeguarded the life-supporting capacity of water and ecosystems, and avoided, remedied or mitigated adverse environmental effects, then that use, development or conservation would not promote sustainable management and would be in conflict with section 5. However, the mere fact that there has been so much discussion on the meaning of "while" tends to suggest that not everyone agrees that this word is so clear.

ii. Context

Section 5 should be read in context. The section's immediate context comprises sections 6 - 8. Each of these sections is expressly linked to section 5 — the opening words of each section are: "[i]n achieving the purpose of this Act." There is a priority between these sections; sections 6 and 8 containing the more important matters, and section 7 the less important matters.

The implication of this priority for the interpretation of section 5 is that, since both sections contain matters which relate back to both the first and second parts of section 5(2), then it will be almost impossible to avoid conflict between this priority and any priority, which might exist, as between the two parts of section 5. Therefore, in order to ensure that the various sections in Part II are consistent, the answer seems to be that there can be no priority within section 5. To take an example: say that, in considering an application for a resource consent, a decision-maker finds that "[t]he maintenance ... of public access to ... [a] lake ..." (section 6(d)) is relevant to the issue of using resources "... in a way ... which enables people ... to provide for their social ... wellbeing ..." (section 5(2)). The decision-maker also realises that, on the facts at hand, if access to the lake in question is maintained, then this will interfere with a site with "heritage value" (section 7(e)) and so will not sustain the potential of the land to meet a (cultural or social) need of future generations (section 5(2)(a)). The conflict will thus be between two values each having, simultaneously, both high and low priority. On the one hand, access to the lake is of higher priority than the heritage value of the site (in terms of the priority between sections 6 and 7) but, on the other hand, access to the lake is of lower priority that the heritage value of the site in terms of section 5 (because the former value has been

17 This seems also to be the plain and ordinary meaning in Fisher's view; he describes its as the "... strictly grammatical approach ..." and says "[o]n the face of it, this is what the definition means." See supra n 6, 13.

18 See Chapter 5 nn 42-47 above and accompanying text.
designated as relevant to the first part of section 5(2) and the second value as relevant to the second part of the same provision). In practice, this particular problem (and others like it) could be avoided through a restrictive interpretation of the “needs” of future generations, though this seems somewhat subversive. In any case, the point is highly technical and seems unlikely to be a reason which in the Court of Appeal’s words is “... strong and sufficient ...” enough to justify departing from the plain and ordinary meaning.\textsuperscript{19}

iii. Effect
Third, the interpreting court will no doubt consider the practical effects of adopting each interpretation. If, in either case, the results are absurd, then this indicates that the interpretation at issue cannot reflect Parliament’s purpose. Commentators have most often used the potential effects avenue to argue against the adoption of the subordinating interpretation. Harris, for example, suggests that giving priority to paragraphs (a) and (b) (over the wellbeing of the current human generation) could lead to problems. First he concentrates on paragraph (a):\textsuperscript{20}

\begin{quote}
[a]n interesting problem would arise if ... a development ..., if permitted, would obviously not permit the needs of future generations to be met. In these circumstances [and taking the subordinating approach] the proposed development could not go ahead. The resource capital of future generations would be preserved. However, what if the decision would cause the needs of the present generation not to be met? Rather than the legislation having an absolute preference for the interests of future generations, it is more likely in these circumstances that the courts would strain somehow to balance fairly the competing interests of different generations. The not unlikely potential of this situation arising provides an argument for “while” being interpreted as a coordinating rather than a sub-ordinating conjunction.
\end{quote}

With respect, I find it difficult to see how the coordinating approach, and not the subordinating approach, would lead to a fair balancing of the interests of competing generations. We can assume that all proposed developments will, in one way or another, contribute to the well-being of the current generation.\textsuperscript{21} Only some of these will also interfere with the ability of future generations to meet their needs in terms of paragraph (a). It is only these proposals that could not proceed on a subordinating interpretation. Current generations will be able to provide for their well-being in all other cases (provided, of course, paragraphs (b) and (c) are met). How is it unfair to say that, \textit{in some cases}, developments will not be able to proceed in the interests of future generations? Considering that developments will only be stopped or limited if they will mean that there are insufficient resources available to meet the \textit{needs} of future generations

\textsuperscript{19} These are words from \textit{Commissioner of Inland Revenue}, see n 15 above and accompanying text.

\textsuperscript{20} Harris supra n 1, 63.

\textsuperscript{21} If they do not, they will not satisfy the requirements of the first part of s 5(2), which defines sustainable management as that which “… enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety ….”
(compare this with the ability of current generations to act so as to promote their well-being), and also that the demands of people now will always seem more immediate and real, it seems fairer to adopt the subordinating approach. The argument that, in some cases, the interests of the present generation might be considered more important than the needs of future generations is manifestly inconsistent with the notion of intergenerational equity. If the Resource Management Act was not intended to incorporate this feature, then why was section 5(2)(a) enacted?

Moving on to paragraph (b), Harris argues:

[i]f “while” were to be construed as a sub-ordinating conjunction, and the requirements of section 5(2)(b) were to be construed strictly, little in the way of human activity, or development, could take place. Arguably, draining a puddle would not be safeguarding the life-supporting capacity of the water in that puddle. A squirt of fly-spray would not be safeguarding the life-supporting capacity of the air in a particular room. Thus it follows that either “while” is going to have to be construed as co-ordinating, or the expression “life-supporting capacity” is going to have to be given a flexible interpretation.

With this, I both agree and disagree. I do not agree that the kind of effects Harris anticipates here should be used to avoid the subordinating approach to “while,” but I do agree that they promote a different interpretation of “... safeguarding the life-supporting capacity of ... water, ... and ecosystems ...”. The meaning of section 5(2)(b) will be addressed in text to follow; but for now note that a different interpretation of paragraph (b) seems appropriate for two reasons. First, it seems unreasonable to interpret “water” or “ecosystems” as meaning the water in a puddle or the air in a room. Draining puddles and squirting fly spray are not even the kinds of activities controlled by the Act; this kind of interpretation of section 5(2)(b) seems so absurd it can hardly be what Parliament intended. Second, it is submitted that Harris has paid insufficient attention to the word “capacity.” Paragraph (b) is not concerned with preserving, at all times, all the existing human and non-human life in a water body or ecosystem, but instead with safeguarding the capacity (“... power of ...,” ability, potentiality) of that body or system to support life. As Brash observes:

[athonelend of the scale you could argue that any activity that has even

22 Current needs seem more immediate and real for several reasons: they are frequently advocated on a personal level by real people, they are tangible and easier to quantify, they are frequently more certain and they are usually better known and more familiar.
23 Harris supra n 1, 64.
24 The Concise Oxford Dictionary defines capacity as “... power of containing, receiving, experiencing, or producing.” Roget’s Thesaurus offers the two synonyms “ability” and “potentiality” for “capacity.”
a small adverse effect on any part of an ecosystem is not safeguarding that ecosystem's total capacity to support life. Alternatively, you could argue that as long as the effect is not irreversible it is consistent with safeguarding the capacity of the ecosystem, to the extent that it has the capacity to support similar life forms in the future.

Since clearly some adverse effects are tolerable (consider paragraph (c)), paragraph (b) must be directed at some point between these two extremes. Indeed, considering the ability of ecosystems to tolerate impacts, it may be that the true meaning of paragraph (b) lies closer to Brash's second, that his first, extreme.

iv. Precedents

Having analysed the ordinary meaning, the context and the implications of the two interpretations of the word "while," the interpreting court should look to such precedents as do exist. In so far as precedents are concerned, all we have so far is a handful of comments which, when made, were not intended to be exhaustive or conclusive. For this reason none is determinative, though each nevertheless serves to illustrate the view of the Planning Judge concerned.

In most of the cases discussed below, the comments made by the Tribunal are somewhat brief and, at times, non-committal. On only a couple of occasions has section 5 been used directly to determine a dispute. This may be due, at least partly, by the flexibility of the language used in paragraphs (a) - (c). It is submitted, however, that since section 5 sets out the purpose of the Act, better and more frequent use of it should be made by the Tribunal and by other rule- and decision-makers operating under the Act. The meaning of section 5 will never (and, it is submitted, should never) be set in stone, but its underlying philosophy or policy must be allowed to direct resource management and allocation in a more active way than has so far been the case.

The eight cases which will be addressed below are Darroch v Whangarei District Council,26 Bletchley Developments Ltd v Palmerston North City Council,27 New Zealand Rail Limited v Marlborough District Council,28 Harrison v Tasman District Council,29 Reith v Ashburton District Council,30 Foxley Engineering Ltd v Wellington City Council,31 Shell Oil New Zealand Ltd v Auckland City Council,32 and Plastic and Leathergoods Company

26 Darroch unreported, Planning Tribunal Auckland, 1 March 1993, A18/93.
32 Shell Oil unreported, Planning Tribunal Auckland, 2 February 1994, W8/94.
In *Darroch*, the applicants proposed to allow a small livestock marketing company to use their existing saleyards for stock sales on two days each month. To do this, they required both a land use consent and a discharge permit to collect and dispose of animal waste from the saleyards. In considering the application for the discharge permit, the Tribunal found that, because of the efficacy of the applicant’s proposed waste treatment system, it was unlikely that contaminants would in fact be discharged either directly or indirectly (through land) into the nearby tributary of the Waipao Stream. It found that the proposed treatment system was adequate to protect the tributary and that “... on the balance of probabilities, .. the proposed discharge ... would be consistent with the promotion of sustainable management ..., and consistent with Part II of the Act.”

Having then considered the implications of sections 104(1) (the effects of the activity; in respect of which the tribunal found that there would be no actual or potential contamination of the water), 104(7) (which was found to be inapplicable, again because of the finding that contaminants would not be discharged into the water) and 107(1) (which for the same reasons did not apply), the Tribunal moved to exercise its overall discretion to grant or refuse the application. The Tribunal said:

> [o]ur exercise of the discretion is to be informed by the statutory purpose of the ... Act, that is the promotion of the sustainable management of natural and physical resources.

> Our finding that contaminants from the saleyards would not be likely to be discharged into the waters of the unnamed tributary is critical to our exercise of the discretion. *If we had found that there would be significant discharge of contaminants into the tributary, we would refuse the discharge permit.*

> However, as we have found otherwise, and as the permits would enable a more efficient use of existing stockyards so that people and a section of the local community can provide for their economic wellbeing, we judge that the proposed ... discharge, being consistent with the purpose of the ... Act, deserves to be granted ... (Emphasis added).

It would be helpful if the Tribunal had paused long enough to explain why, had there been “... significant discharge of contaminants into the tributary ...” it would have refused the permit. If it was because the proposal would therefore have resulted in a breach of section 5(2)(a) or (b) (hence the requirement that the discharge be “significant”), being a breach which *automatically* meant that there was inconsistency with the purpose of the Act, it might be possible to argue that the tribunal was according some kind of priority to the ecological and long-term concerns.

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34 *Darroch* supra n 26, 17.
35 *Darroch* ibid 18-19.
embodied in these provisions, and interpreting “while” as a subordinating conjunction. If, on the other hand, the Tribunal would have refused the permit because, being a “significant” discharge it would therefore outweigh any economic benefit to the applicant and the relevant section of the local community, the Tribunal would have, in essence, been undertaking a balancing exercise, and interpreting “while” as a coordinating conjunction.

_Bletchley Developments_ is perhaps a little more helpful. In this case, the tribunal was asked to consider the conditions attached to a consent allowing the appellant to “... excavate, crush and store metal and create two recreational wildlife lakes on the Turitea River terrace.” When it came to considering the impact of section 5 on the proposal, the Tribunal commented that in

[g]iving weight to the sustainable management principles of the Act and to the matter contained in Part II generally and applying that to the resource consent section (s 104) we have concluded that those who wish to carry out quarrying operations even for a short period of two years within this existing environment must be prepared to preserve that environment as much as possible and if they find themselves unable to do so then the quarry material must be left in place.

This comment was driven by section 5(2)(c). Does this passage indicate a preference for either the coordinating or the subordinating approach? Note that the Tribunal did not say that if the environmental effects cannot be avoided (or at least mitigated) then, depending on the current social and economic utility of the proposed quarrying, the quarry material may have to be left in place. It said instead that if paragraph (c) could not be complied with then the material must be left in place. I would argue that there is a hint of subordination here.

A hint of subordination is also discernible in the decision of the Planning Tribunal in _New Zealand Rail_, where the following general comment about section 5 was made:

[t]he term “sustainable management” has a wide meaning and includes development to provide for a community’s economic wellbeing if adverse effects can be avoided, remedied or mitigated. Natural and physical resources also have to be sustained in order to meet the reasonably foreseeable needs of future generations. (Emphasis added).

The word “if” and the phrase “... have to be ...” tend to suggest that unless the requirements of paragraphs (c) and (a) (respectively) can be met by a proposal which will enhance a community’s economic wellbeing, then that proposal will not promote the sustainable management of natural and physical resources. This case went on to the High Court, but it did

36 _Bletchley_ supra n 27, 1.
37 _Bletchley_ ibid 7-8.
38 _New Zealand Rail_ supra n 28, 470.
not address the specific issue of the interpretation of "while." Instead, the High Court emphasised the need to avoid subjecting Part II of the Act as a whole to "... strict rules and principles of statutory construction ...".  

Harrison’s case, conversely, seems to suggest a coordinating approach. In this case the Tasman District Council sought to develop a refuse transfer station facility at the estuarine site of its existing rubbish dump. Objections were made by (among others) the Minister of Conservation who gave evidence to the effect that the estuarine site was a valued wildlife habitat, and home to some endangered species. In the end, the Tribunal held that this proposal could not proceed as it was inconsistent with Part II of the Act, the relevant District Plan and with section 104(7), and because it would have “deleterious” effects. It is the Tribunal’s consideration of Part II of the Act which is of current concern. The Tribunal first referred specifically to section 5, determining that, in its opinion, in terms of s 5 the estuary is a natural resource which should be sustained to meet the reasonable foreseeable need of future generations both from an environmental viewpoint and from the viewpoint of being part of the sustainable chain of marine food resources.

It also found that, in terms of section 6, the proposed facility was “inappropriate” in a coastal environment. Then the Tribunal said:

[have concluded that the activity is inappropriate it is then beholden upon the Council to show to this tribunal some degree of necessity as to why it should be so located and the Council have not even established a prima facie case in that regard. Even if we were to accept that a transfer station is appropriate in this locality having regard to the future development of the district (and we do not) there has been no cause shown as to why it should be located on this precise site aside from the fact that the Council happens to already own the site and that the site is presently used for an offensive activity.

In order to obtain the requisite consent, the Council would, apparently, have to show some need sufficient to outweigh the conflict with section 6, and, presumably, the conflict with section 5. The suggestion that, were there to be some such need, the Council might be able to obtain a consent despite the finding relating to sections 5 and 6 is strongly suggestive of a coordinating approach.

In Reith the appellant sought a land use consent to establish a business retailing second-hand farm machinery. The Planning Tribunal found that

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39 New Zealand Rail (HC) supra n 3.
40 Harrison supra n 29, 200.
41 Harrison ibid 201.
the service that Mr Reith proposes to provide to the farming community is a consideration that falls within s 5 so long as ... adverse effects on the environment can be avoided, remedied or mitigated. (Emphasis added).

Transit New Zealand argued that there would be adverse effects on the “... safe and efficient use of the important State Highway 1 resource ...” but the Tribunal held that these could be either avoided completely or mitigated. It is submitted that the words “... so long as ...” suggest a subordinating reading of “while.”

Foxley, Shell Oil and Plastic and Leathergoods are all decisions of the Planning Tribunal under Judge Kenderdine. She is the Planning Judge who has been most direct in her opinion on the meaning of “while.” Foxley’s case was an appeal against the Wellington City Council’s decision to allow Mobil Oil to establish a service station and carpark at the northern end of the City’s central business district. Turning her mind to Part II of the Act, Judge Kenderdine observed that

[t]he provisions of [s 5(2)(a), (b) and (c)] may be considered cumulative safeguards which exist in order to ensure that the land resource is managed in such a way, or at such a rate which enables the people of the community to provide for the various aspects of their social wellbeing and for their health and safety. They are safeguards which must be met before the Act’s purpose is fulfilled. The promotion of sustainable management has to be determined therefore in the context of these qualification which may be accorded the same legal weight.

And, applying this to the facts of the case before her, the Judge continued:

[a] service station on this site will sustain the resource’s potential to meet the reasonably foreseeable needs of future generations and safeguard it for these purposes. The applicant expressed the view that the limit put on the use of this site (upwards to 12 years) would allow the needs of wider Wellington to be accommodated in that time ... We consider that this approach is one of the proposal’s most creative aspects. The proposal also allows in some ensure for economic well-being by providing competitive prices in motor fuels.

Providing for these issues is only one aspect of the legislation. However, these is also social wellbeing. If we find pursuant to s 5(2)(c) that the adverse effects of the service station cannot be avoided or remedied or mitigated, then one of the purposes of the Act is not achieved. ... As we have outlined earlier in this decision ... we do not consider that the proposal avoids remedies or mitigates ... adverse

42 Reith supra n 30, 255.
43 Reith ibid 255-256.
44 Foxley supra n 31, 41.
45 Foxley idem.
effects which we consider go to the social wellbeing of the community. Leaving the existing building on the site however, whilst not giving an immediate financial return to its owner will also protect the land’s potential for the foreseeable future and meanwhile avoid the adverse effects of the proposal which we perceive.

On the basis that there were adverse effects which the proposal did not avoid or mitigate, the appeal was allowed and the consent cancelled.

*Shell Oil* was another case about a service station but, in this case, the original application was refused by the Auckland City Council. On appeal, Judge Kenderdine again described section 5(2)(a)-(c) as “cumulative safeguards,” adding that these provisions

enure (or exist at the same time) whilst the resource, in this case the land resource, is managed in such a way or rate which enables the people of the community to provide for various aspects of their wellbeing and for their health and safety. ...

In this case there is no great issue with s 5(2)(a) and (b). If we find, however, that the effects of the service station on the environment cannot be avoided, remedied or mitigated, one of the purposes of the Act is not achieved.

Having found that the proposal would result in major adverse effects on amenities in the area, the Tribunal disallowed the appeal principally because it saw that these effects would bring the proposal into conflict with the transitional and proposed district plans.

*Plastic and Leathergoods* concerned appeals against the decision of the Horowhenua District Council to permit the establishment of a “... mini recycle and solid waste transfer station ...” to act as a collection point for refuse and recyclable material prior to its transfer to the Levin tip. Again referring to section 5(2)(a)-(c) as “cumulative safeguards,” Judge Kenderdine confirmed her view that “[i]f we find that any one of these safeguards is unlikely to be achieved then the purpose of the Act is not fulfilled.”

Again, paragraph (c) was found to hold the “key” to the case, and the adverse effects of the proposal were found to include traffic congestion, odour, vermin and other pests, and possible flooding. In the end, the appeal was allowed and the consents cancelled because the proposal “... offends the objectives and policies of the district plan and ... fails the tests of both section 105(2)(b)(i) and (ii) ...” and because of the Tribunal’s finding that “... the purpose of the Act is not fulfilled because adverse effects of the proposal are not able to be avoided or mitigated even with extensive conditions.”

46 *Shell Oil* supra n 32, 10.
47 *Plastic and Leathergoods* supra n 33, 8.
48 *Plastic and Leathergoods* ibid 15. Section 105 places limits on the granting of resource consents.
It is submitted that in all these last three cases, Judge Kenderdine has indicated her support for the subordinating interpretation of “while.” Further support for this approach may be found in the following extra-judicial comment made by former Planning Judge Arnold Turner, acting in his capacity as Presiding Member of the board of inquiry into the proposed New Zealand Coastal Policy Statement. The comment reads:49

[w]e have concluded that [paragraphs] (a) (b) and (c) are 3 specific objectives (or constraints) which must be pursued (or applied) while people and communities are being enabled to provide for [their social, economic and cultural wellbeing]. The requirements of (a), (b) and (c) are cumulative; all must be observed.

We say that, because we believe that in its context, the word ‘while’ in Subsection (2) means “and at the same time”, “and contemporaneously”, “so long as management is”. In other words, Subsection (2) does not call for a balance to be struck between 2 objectives; it requires that management of natural and physical resources be carried out in a way which achieves the objectives (applies the constraints) specified in (a), (b) and (c). (Emphasis added).

Presumably, then, if there was no practical way in which a proposed development of resources could be “... carried out in a way which achieves the objectives ...” in paragraphs (a) - (c), then that proposal could not proceed.

In summary, the intrinsic aids to the interpretation of section 5 tend to support the subordinating interpretation of “while.” What of extrinsic aids? The process of reform which culminated in the enactment of the 1991 Act was long and complex and generated much potentially helpful documentation.50 It may be useful to refer to at least some of this documentation in an attempt to ascertain the true meaning of section 5.

b. Extrinsic Aids to Interpretation: Parliamentary History of Section 5

There appear to be at least five documents generated during the parliamentary history of the 1991 Act of interest to those concerned with ascertaining the correct interpretation of section 5. These are: the Resource Management Bill (as it was when introduced into the House, and when reported back to the House by select committee for the first time); the Report of the Review Group on the Resource Management Bill;51 Supplementary Order Paper Numbers 22 and 40; the Report of the Planning and Development Committee on Supplementary Order Paper No 22,52 and the Minister’s speech on the Bill’s third reading in the House.53 Before

49 Memorandum for the Representative of the Minister of Conservation, 10.
50 See Chapter 4 above for a description of the process of reform and the documents generated.
52 Report of the Planning and Development Committee on Supplementary Order Paper No 22 (1991) I.11B.
addressing the contents of these documents, their potential admissibility must be considered.

i. Admissibility of Extrinsic Aids

In the past, courts "... took a most restrictive approach ..." to the admissibility of material created in preparation for, and during the course of, the creation of a statute.\(^{54}\) However,\(^{55}\)

[p]articularly since 1984 our Courts, most notably the Court of Appeal, have made express their abandonment of the old exclusionary rule; it is now clear that the Courts accept they have a discretion to admit and use parliamentary history, even parliamentary debates.

While it is clear that courts now accept they do have a discretion to admit documents generated during the parliamentary history of an Act, they continue to maintain that they will admit such material only in "... the exceptional case."\(^{56}\) Would a case concerning the interpretation of section 5 be the kind of "exceptional" case where the five documents of concern might be admitted? It seems that three factors will be relevant to this determination: the existence (or otherwise) of ambiguity in section 5;\(^{57}\) the perceived relevance, and the nature and reliability, of the document to be admitted or rejected;\(^{58}\) and the court's perception of the importance of

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54 Burrows J F Statute Law in New Zealand (1992) 131. Burrows explains (still at 131) that the reports of commissions recommending new legislation could be admitted, but only "... for the limited purpose of discovering the mischief the Act was meant to remedy, not to ascertain the intended effect or meaning of the legislation proposed." Explanatory notes accompanying a Bill as introduced, changes made to a Bill during its passage through the House, and Parliamentary debates during a Bill's passage "... could not be referred to at all."


56 Wellington International Airport Ltd v Air New Zealand [1993] 1 NZLR 671. In this case, counsel for the respondent invited the Court of Appeal to consider, in determining the correct meaning of "consultation" in s 4(2)(a) of the Airport Authorities Act 1966, parliamentary debates on the Bill, ministry papers and departmental correspondence, and select committee minutes. The Court held (at 675) that to do so would be "inappropriate," adding: "[t]he law is to be found in the enactment itself, and not in the subjective intentions of the draftsman or of the department, nor in those of the Minister or of other members of the legislature. In a very few cases the Court may find it helpful to refer to such extraneous material [but] ... the Court ... would not wish to encourage reference to such materials, except in the exceptional case. ... To do otherwise may not only burden the Court with irrelevant material, but may result in counsel feeling they must research such extraneous materials in every case of statutory interpretation in case they may find something, thereby adding unnecessarily to the burden of cost on the litigant."

57 In Marac Life (supra n 55, 701) Cooke J stated that "[a] governmental statement in the House could not be allowed to alter the meaning of an Act of Parliament in plain conflict with it ...." The point that, where it is clear, the words of an Act must prevail was also made in Brown v Langwoods Photo Stores Ltd [1991] 1 NZLR 173, 176. In this case, reports of the Law Reform Committee were referred to, and found to be "confirmatory" of the Court's provisional interpretation – note, however, Cooke J's interesting rider that "... if [the reports of the Law Reform Committee] did suggest a different intention it would be necessary to reconsider whether the Act is really clear on the point." Note that ambiguity in the section at issue was specifically identified as an essential consideration in the determination of admissibility in Pepper v Hart [1992] 3 WLR 1032, 1061. This case marks the adoption by English courts of the newer and less restrictive approach to the relevance of an Act's parliamentary history.

58 In Auckland City Council v Minister of Transport [1990] 1 NZLR 264, 293 Cooke P described the recent practice of the court as being to "... allow reference to such speeches [as the Minister's speech on a Bill's third reading] when they may throw real light on ambiguous statutory language."
the case.\textsuperscript{59}

A certain ambiguity has already been accepted to exist, for present purposes, in section 5. Clearly, if the court decided otherwise, holding that section 5 was clear then, since nothing any of the five documents said could be allowed to alter the plain meaning of the provision, reference to extrinsic aids would be unnecessary.

The court's assessment of the importance of the case should, it is submitted, make reference to the place which section 5 occupies in the 1991 Act, the ambit and impact of the Act itself, and the significance of the difference between the two interpretations of "while." Section 5 sets out the purpose of the Act, it lies at the apex of the Part II hierarchy, and it directs plan- and decision-making.\textsuperscript{60} It could be justifiably described as the most important provision in the Act. The Act itself provides for planning in respect of all natural and physical resources, and establishes a specific mechanism for the allocation of land, air and water resources, in New Zealand. The significance of the difference between the subordinating and coordinating interpretations is hard to predict, but could be vital, if only in a few cases. This is an issue which will be addressed in text to follow.

As to the nature of the documents at issue, it is relevant to note that, so far, courts have referred to the explanatory notes to a Bill, changes made to a Bill by a select committee, a Minister of Finance's budget speech, the speech made on a Bill's third reading by its promoting Minister, submissions to a select committee, and even a letter from the Securities Commission to the government requesting an Act's amendment.\textsuperscript{61} It seems that, potentially, documentation generated either by parliamentary bodies or otherwise can be admitted. Thus, the \textit{Report of the Review Group} is not immediately excluded. All but one of the five documents of concern

\textsuperscript{59} In \textit{New Zealand Maori Council} (supra n 55, 658-9) the nature and importance of the case meant that it would, in Cooke P's view, be "irresponsible" to not refer to Hansard. At issue in that case was s 9 of the State-Owned Enterprises Act 1986. This Act provided for, and regulated, the transfer of major state-owned assets (including large tracts of land) to the newly-created state-owned enterprises, and s 9 provided that "[n]othing in [the] Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi." Since such a transfer of land might involve the Crown in a breach of the Treaty's principles, and might thus cause the Crown to fall foul of s 9 \textit{should it apply to land} the question of the extent of s 9 was found to be one of considerable constitutional importance. This was the principal reason behind Cooke P's consultation of the \textit{New Zealand Parliamentary Debates}.

\textsuperscript{60} Recall that each of ss 6-8 open with the words "[i]n achieving the purpose of this Act ...," and see n 1 and Chapter 5 n 7 above and accompanying text.

\textsuperscript{61} The explanatory notes to Bills have been referred to in, for example, \textit{Real Estate House (Broadtop) Ltd v Real Estate Agents Licensing Board} [1987] 2 NZLR 593, 593 and \textit{Southern Service Station} (1968) Ltd v \textit{Invercargill City Council} [1991] 1 NZLR 86, 90. Submissions made to a select committee and changes made to a Bill by a select committee were considered in \textit{Brown & Doherty Ltd v Whangarei County Council} [1990] 2 NZLR 63, 67. In \textit{Marac Life} supra n 55 the Minister of Finance's budget speech was admitted. The speech made by the Minister in charge of a Bill on its third reading was referred to in \textit{Auckland City} supra n 58. In \textit{R v Rada Corporation Ltd (No 2)} [1990] 3 NZLR 453, 477-478 a letter from the Securities Commission to the government requesting an amendment to the Securities Act 1978 was referred to. See Burrows supra n 54, 135, 136 and 142.
could, however, be excluded due to a lack of specific relevance. As each of these four documents is considered in text to follow, it will be seen that each merely proposes and supports a different definition for “sustainable management.” Only the Minister’s speech at the Bill’s third reading actually addresses the language finally used. This is not to say that the other four documents will not offer insights into the wording as enacted; but it does suggest they might not meet the test of “... throw[ing] real light on ...” the actual words in section 5.62

In summary, provided that the court perceives the interpretation of “while” to be an issue of importance, and provided it accepts that each document might “... throw real light ...” on that issue, it seems it could lawfully admit all five of these documents generated during the parliamentary history of the Resource Management Act 1991. What then is the substance, and hence the relevance, of the five documents? This question will be addressed to follow, leaving only the question of the significance of the difference between the two potential interpretations of “while” for later consideration.

ii. The Substance of the Extrinsic Aids

As first drafted, the Resource Management Bill defined “sustainable management” as

managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people to meet their needs now without compromising the ability of future generations to meet their own needs ...

This definition uses the phrase “without compromising” in place of “while,” and thereby makes quite clear the drafter’s intent that unless a proposal could proceed “without compromising” the ability of future generations to meet their needs, then it would not be able to proceed, regardless of its benefits for present generations. The strength of this wording was reduced significantly by the select committee appointed to consider the Bill after its first reading. This committee inserted the word “unduly” into the definition of “sustainable management,” so that it read:

means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people to meet their needs without unduly compromising the ability of future generations to meet their own needs ...

The impact of this change is perhaps greater than at first appears, principally because it introduces at least some balancing of present and future needs. Clearly, on this definition, some interference with the ability of future generations to meet their needs is tolerable—only undue interference would be precluded. No doubt, in ascertaining whether or not the

62 These were the words used by Cooke P in Auckland City, see n 58 above.
interference implied by a proposal would, or would not be, undue, the likely present benefits of the proposal would be considered. A certain interference may not be undue if major benefits would accrue to present generations. If, however, the benefits were small, then the interference may not be justified. This argument, however, should not be taken too far: the select committee’s definition still has a bottom line: a proposal which would clearly and significantly compromise the ability of future generations to meet their needs would not be able to proceed, despite its immediate benefits.

Following the Bill’s second reading, and the fall of the fourth Labour government, matters were referred to the independent Review Group. In its Report the group proposed that “sustainable management” should be defined so as to enable people to provide for their current wellbeing “while” safeguarding (“... to the extent reasonably foreseeable ...”) the ability of future generations to meet their needs and “[a]voiding, remedying or mitigating the adverse effects of their activities on the environment.” The group, which had expressed concern that in its former state the Bill gave no clear priority to any of the various interests concerned with resource management and use,63 saw its formulation as “... strik[ing] a reasonable balance between present and future requirements for the use, development and protection of natural and physical resources.”64 The use of the word “balance” by the group should not be taken to imply that it saw “while” as a coordinating conjunction: later comments by the group clearly suggest otherwise. Thus, the Group notes its view that the redraft both65 provide[s] a succinct definition of the term “sustainable management” which refers to managing the use, development and protection of natural and physical resources in a way which will provide for current social, economic and cultural wellbeing as well as health and safety, subject to two parameters [being the need to safeguard the ability of future generations to meet their needs and the need to avoid, remedy or mitigate any adverse environmental effects] [emphasis added]

and66

spell[s] out in detail the various dimensions of sustainable management, including, in particular the biophysical dimension. ... [T]he recommendation of the review group conceives of the biophysical characteristics of resources as a constraint on resource use. [Emphasis added].

By the time Supplementary Order Paper Number 22 was tabled in the House, the wording of the the definition of “sustainable management” indicated even more clearly that the matters

which now appear as paragraphs (a), (b) and (c) were to be pursued at the same time as those which now appear in the first part of section 5(2). Thus, the use, development and protection of resources was to proceed "... in a way, or at a rate, which ensure[d] that, in providing for the social, economic, and cultural wellbeing of people and communities ..." the potential of resources to meet future needs was sustained, the life-supporting capacity of water and ecosystems was safeguarded and adverse environmental effects were avoided, remedied, or mitigated.\footnote{Had this wording been retained, there would be less argument as to the meaning of section 5. However, in a move which perhaps tells against the adoption of the subordinating interpretation of "while," the select committee charged with considering the Supplementary Order Paper removed the words "... which ensures that ..." and replaced them with "while."}

The Planning and Development Committee saw the Review Group's definition of "sustainable management" as creating an "... imbalance ... between sustainable management and social and economic development ... ."\footnote{This Committee "... wanted the purpose of the bill to reflect a balance between the promoting of a healthy and safe environment and the maintenance of social, economic and cultural development"\footnote{and, to this end, it proposed that the clause should be changed to a formulation essentially the same as that which now features in section 5. This suggests that this Committee at least saw "while" as meaning something other than "... which ensures that ..." and, by implication, that it saw "while" as a coordinating conjunction. This is interesting, especially when it is recalled that, when the Review Group first introduced the word "while" into the definition it did so on the assumption that it was thereby making present interests "... subject to ..." the "constraint" of the biophysical dimension. It seems that although the Group and the Committee used the same word, they had different objectives and different understandings as to its meaning. The wording proposed by the select committee was taken up by the government and used in Supplementary Order Paper Number 40.}

Considering the different objectives, and the different understandings of the bodies so far involved in the Resource Management Bill's parliamentary history, the likelihood that their reports and other commentaries would "throw real light" on the meaning of section 5 as enacted seems remote. This may well mean that they would not be admitted as legally relevant extrinsic aids. The last document remaining for consideration is the Minister for the Environment's speech accompanying the Bill's third reading in the House.

The Minister for the Environment's speech on the Resource Management Bill's third reading clearly supports the subordinating interpretation of "while." The Minister, having expressed

\footnote{Clause 4, emphasis added.}
\footnote{\textit{Report of the Planning and Development Committee} supra n 52, 14.}
\footnote{\textit{Report of the Planning and Development Committee} idem.}
his hope that judicial notice would be taken of his comments, said:

those who exercise powers under the legislation are referred to a purposes clause that is about sustaining, safeguarding, avoiding, remedying, and mitigating the effects of activities on the environment. It is not a question of trading off those responsibilities against the pursuit of well-being. ...

The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their own affair. ...

[A]ctivities will have to be compatible with hard environmental standards, and society will set those standards. Clause 4 [now s 5] sets out the biophysical bottom line. [Emphasis added].

c. Concluding Remarks

In summary, the intrinsic aids to the interpretation of “while” tend to support the subordinating approach. The extrinsic aids, excluding for the time being the Minister’s speech at the occasion of the Bill’s third reading, may not prove all that helpful. Not only do the comments and reports of the various groups and committees involved in the Bill’s development show a diversity of aims as to what the purpose of the Bill should be, but they also show that the precise issue at hand (the meaning of “while”) was the subject of disagreement. It is doubtful whether the reports could be safely relied upon as throwing “real light” on the meaning of section 5. The Minister’s speech is perhaps a little different since it is so clear in its rejection of the coordinating approach. The strength of his comments, and his desire that they in fact be referred to, tend to add to their potential reliability.

To those who argue that the Minister should have made his views clearer in the Act itself, I would reply that the Minister may have seen no need to do so. I have stated previously my view that, given its plain and ordinary meaning, “while” is a subordinating conjunction and implies that paragraphs (a) - (c) must all be met at the same time as resources are used, developed, and protected to enable present generations to provide for their wellbeing. If any one of these four goals is sacrificed, then natural and physical resources are not, in terms of the Act, being sustainably managed. As well as seeing this as the ordinary meaning of section 5, I also see it as the best meaning of section 5 and will endeavour to explain why below.

3. The Best Interpretation

It is submitted that only one of the two alternative definitions for “while” is ethically, and environmentally, acceptable. This is the subordinating approach, which lets paragraphs (a) -
(c) impose absolute limits on what people today can do with natural and physical resources. Those limits prescribe that the potential of resources to meet the needs of future generations must be sustained, that the life-supporting capacity of water and ecosystems must be safeguarded and that the environmental effects of activities must be minimised or, if possible, completely avoided. These standards must be maintained even if they require us to abandon a development proposal which offers significant social, economic or cultural benefits to New Zealanders now.

Adopting the balancing approach would no doubt be easier—it is more flexible and more politically palatable. It will put neither conservationists nor developers immediately off-side: each group can comfort itself with the thought that, provided they can present weighty arguments, their interests will (at least) sometimes prevail. The subordinating approach will sometimes produce uneasy decisions: proposals which would generate short-term wealth and employment will not be able to proceed if they would lead to a breach of section 5(2)(a), (b) or (c). In these times of fiscal frugality and high unemployment, such decisions may prove unpopular. Nevertheless it is my belief that this is the interpretation we should accept.

If an interpreting court were to accept that "while" is in fact ambiguous, and the intrinsic and extrinsic aids available to assist in its interpretation do not finally resolve the issue, then, it is submitted, the court must adopt the interpretation of section 5 which best promotes what the court perceives to be parliament’s object in enacting the 1991 Act. In fact, the likelihood that, having considered the plain and ordinary meaning of "while," the context of the word, the effects of adopting each of the two interpretations, and all the extrinsic aids as are considered admissible, the court would be left without guidance seems remote. But, should this in fact be the case, what could be done? First, the courts could identify section 5 as unacceptably ambiguous (without arriving at any conclusions as to how it should be interpreted) and, in effect, force Parliament to revisit its wording. This would satisfy the constitutional purists among us who feel that, in leaving ambiguity in section 5, parliament has wrongly abdicated its responsibilities. Second, the courts could adopt either interpretation fairly quickly and

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71 A breach of just one will suffice: the three paragraphs impose cumulative limits since they are joined by the conjunction "and."

72 Though this seems unlikely—a recent survey conducted by Massey University for the International Social Survey Programme revealed that "... most New Zealanders believed that the environment was under threat from ... river, lake and stream pollution (90%) ..." and that "[n]early 80% of the respondents believed the Government should pass strict environmental laws to prevent harm to the environment and 64% favoured taking stronger measures for environmental protection even if it harmed economic growth" (emphasis added). The survey was based on the responses of "... 1272 people randomly selected from the electoral roll, a response rate of 70% with a 3% margin of error" Otago Daily Times (21 March 1994).

73 See, for example, Harris (supra n 1, 68) who argues that "Parliament should not have abdicated its law-making responsibility in this way. The principles determining the priorities between development and maintenance of the natural environment are based on matters of high policy for which the elected government and parliament should be politically accountable. These principles should not be settled by the
indicate to parliament that, should the wrong interpretation have been adopted, then it (parliament) remained free (and was indeed being encouraged) to intervene.74 Third, the courts could proceed normally, exercising their constitutional function of interpreting statutes without suggesting that further parliamentary input was necessary or desirable. They would simply interpret that Act, and resolve its ambiguities of their own volition. In all three cases, it is my submission that parliament or the courts, whoever ends up having to decide what section 5 means and entails, should risk annoying development interests, sometimes override short-term concerns and give absolute priority in rule- and decision-making to the ecological and long-term concerns embodied in paragraphs (a) - (c). There is no question that parliament, exercising its plenary powers, is entitled to do this (it, in Diceyan terms, can make or unmake any law whatsoever) – but why should it? And what of the courts? What right do the courts have to take the “best” approach, to adopt an interpretation which they think is more socially just than its alternative? In the face of clear words, or an apparent parliamentary intent against such an interpretation, the courts have no such right. But if “while” is truly ambiguous, if the parliamentary intent is not clear, why should they prefer the subordinating interpretation of “while”? Do the courts retain any freedom to interpret legislation so that it best accords with an approach which, it is submitted, is the best approach?

In the remainder of this section of this chapter, two issues are addressed. These are: first, can courts interpret statutes so that they promote social outcomes which courts think are best; and second, if so, why should New Zealand courts adopt the subordinating interpretation of “while”?

a. Authority for Adopting the Best Interpretation

It is submitted that in fact there is little difficulty in advocating the adoption of the subordinating interpretation by the courts. This interpretation is not necessarily radical (there is, after all, sound authority and perhaps even popular support,75 for its adoption) but, even if it is radical, it may, in the end, be what is needed. Even if all the intrinsic and extrinsic aids outlined above pointed towards the more moderate coordinating approach as representing the true parliamentary intent (which, as has been shown, they do not), one could still argue that the courts should promote the subordinating interpretation, and that they have legitimate authority to do so.

74 There is no question that parliament could change the wording of s 5 should it be dissatisfied with the judiciary’s interpretation (see s 15(1) Constitution Act 1986) – so long as in so doing parliament did not also seek to reverse any decision made by the courts consequential on their interpretation. If parliament did this, it would be acting retrospectively, and perhaps thus in breach of the rule of law or constitutional convention (see Chapter 3 n 209 above).

75 See n 72 above.
In New Zealand there exists a prime example of the courts adopting an interpretation of a statute which was arguably not consistent with such evidence as there was of Parliament’s intent, or the short-term interests of the majority of New Zealanders. This example is *New Zealand Maori Council v Attorney-General*,\(^\text{76}\) which produced a result not many parliamentarians would dare to promote but which few of us would argue has not made New Zealand a better and fairer place in which to live. The principal question in this case related to the interpretation of the State-Owned Enterprises Act 1986, section 9. In general, the 1986 Act provided the means and authority for the transfer of Crown-owned assets to the newly-created State-owned enterprises as part of the government’s policy of corporatisation of state functions. The enterprises were then enabled to transfer any assets they held on to third parties. Section 9, which provides that “[n]othing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi,” had been introduced following pressure from the Waitangi Tribunal and others who were concerned that in transferring land to the state-owned enterprises (and thereby making such land available for sale by those enterprises) the Crown would inevitably find itself acting inconsistently with the Treaty’s principles and, as a consequence, with its own Act. The fine point was whether section 9 was of general ambit, covering the transfer of Crown assets including land, or whether it should have a more restricted interpretation which excluded land transfers. The Court of Appeal conceded that the Solicitor-General, arguing for the more restrictive interpretation, had a\(^\text{77}\)

solid basis for contending that the consequence of [taking the wider interpretation would be that] the intention manifested by the 1986 Act as a whole would be put in limbo for an unpredictable time; that the [state-owned enterprises] would be able to act only “in a withered and crippled way”. ... [That] the momentum evidently expected by Parliament would be largely lost.

Economically speaking, the short-term interest evidently promoted the Crown’s preferred interpretation. Cooke P felt compelled to consult Hansard. He found that there was a surprising lack of discussion on section 9, but still gained a “... strong impression ... that Members who took part in the final debate thought that the Act would have the effect now contended for by the Crown.”\(^\text{78}\) Nevertheless, the interpretation contended for by the Maori

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\(^{76}\) *New Zealand Maori Council* supra n 55. Another good example of judicial activism at odds with apparent parliamentary intent is *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385. In this case Cooke P, with “... evident zeal ... wielded the [Official Information Act 1982] to fashion an entire system of criminal discovery” (M Taggart “Courts, Ombudsmen and Freedom of Information: the Empire Strikes Back” (1990) 20 VUWLR Monograph 2, 17). This was done despite parliament’s apparent intention that the Act should not be so employed (this intention was evidenced by the appointment in 1984 of the Criminal Law Reform Committee to consider the issue of criminal discovery and by its enactment of s 24A – via the Official Information Amendment Act 1987 – which specifically excluded pre-trial discovery from the ambit of the Act).

\(^{77}\) *New Zealand Maori Council* ibid, 657-658.
Council won the support of the Court of Appeal. There were orthodox legal reasons for the Court’s decision: the words in section 9 were clear, it made more sense in terms of the scheme of the Act. But arguably there were also underlying reasons of social justice: at the end of his judgment Cooke P added that:

\[ \text{[t]he effect of our present decision ... is that in relation to land now held by the Crown it should never again be possible to put aside a Maori grievance [as had been done in Hoani Te Heuheu Tukino v Aotea District Maori Land Board.]}^{80} \]

In short the present decision together with the [State-Owned Enterprises Act 1986 and the Treaty of Waitangi Act 1975] means that there will now be an effective legal remedy by which grievous wrongs suffered by one of the Treaty partners in breach of the principles of the Treaty can be righted. I have called this a success for the Maoris, but let what opened the way enabling the Court to reach this decision not be overlooked. Two crucial steps were taken by Parliament in enacting the Treaty of Waitangi Act and in insisting on the principles of the Treaty in the State-Owned Enterprises Act. If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity.

If the subordinating approach to section 5 of the Resource Management Act cannot win clear support from the usual aids to statutory interpretation, and an activist stance needs to be taken by the courts, then this case represents a precedent for such action. As with the State-Owned Enterprises Act, Parliament has offered, through the Resource Management Act, an opportunity for the courts to be creative and to take an interpretation which, as is argued below, would be best in the long term.

**b. Why is the Subordinating Interpretation “Best”?**

There are, it is submitted, three essential reasons for identifying the subordinate meaning of “while” as leading to the best interpretation of section 5. These are first that this approach best accords with the international political agenda, and trends in global environmental thinking, and that it represents progress in the law on the management and allocation of New Zealand’s water resources. Second, it is submitted that this approach should lead to more consistent decision-making. Finally, and provided this approach does in practice give the matters in paragraphs (a) - (c) of section 5 some priority over developmental interests, it seems that New Zealand’s natural water could benefit from the adoption of a more cautious approach to its use. The first

78 New Zealand Maori Council supra n 55, 659.
79 New Zealand Maori Council ibid 668.
80 Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1941] AC 308, of which Cooke P notes “[t]hat judgment represented wholly orthodox legal thinking ... but it is of interest that Smith J ... recorded in his judgment in the Supreme Court that counsel or both sides agreed that the Maori owner had cause to feel a sense of injustice ... .”
and last of these reasons are explained to follow, leaving the second for more detailed consideration once the potential effect of paragraphs (a) - (c) has been explored.

i. Consistency With Global Thinking and Action, Marking Progress in New Zealand Law

In Chapter 7, the point was made that the modern environmental movement which is usually perceived as having begun in the 1960s has continued to gain momentum since. Perhaps the most dramatic example of the level of support which the movement has generated since then is the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992. There seems little reason to suppose that the New Zealand Parliament would seek to ignore global trends and its international commitments (even if not legally enforceable), and every reason to suppose that it would instead choose to promote those trends and commitments.81 In fact, by expressly declaring that the ethic or philosophy of sustainability should underlie water management and allocation, the New Zealand parliament has arguably indicated a desire both to bring change to water law, and to subscribe to global environmental thinking and its international commitments. The Resource Management Act employs all the same management and allocation mechanisms as did the Water and Soil Conservation Act, though some are extended.82 It makes express reference to intrinsic values.83 But the largest potential move it makes towards a more conservation conscious system is through section 5. For this to operate according to the same priorities as between development and biophysical considerations as the Water and Soil Conservation Act seems to defeat the potential of the 1991 Act.84

If section 5, and the Act as a whole, clearly precluded this kind of change, it would be foolish to argue for its adoption. But such is not the case: the subordinating interpretation offers greater potential to environmental protection, appears consistent with the plain and ordinary words used in section 5, is supported by some extrinsic aids and by the weight of judicial opinion thus far expressed and, furthermore, it takes the trend of environmentalism in New Zealand was a party to the United Nations Conference on Environment and Development 1992, for example, and a signatory to the Conference Declaration. Burrows (supra n 54, 238) notes that "... if a statute touches on the subject-matter of a treaty, its interpretation can be influenced by the principle that the legislature is unlikely to have legislated in a manner contrary to its international obligations," and cites Van Gorkem v Attorney-General [1977] 1 NZLR 535, affirmed on appeal [1978] 2 NZLR 387; and Ahmad v Inner London Education Authority [1978] QB 36, 48 where Scarman LJ said that the Courts will "... pay very serious regard ..." to international treaty obligations, even where they have not been expressly incorporated into municipal law by parliament.

81 See Chapters 5 and 6 above.
82 See s 7(d).
83 Under the balancing test employed under the Water and Soil Conservation Act, there was no priority between environment and development; both were prima facie of equal weight (see Chapter 3 nn 429-433 above and accompanying text). Interpreting "while" as a coordinating conjunction also accords no priority to the matters in paras (a)-(c) as against the management of resources to enable present generations to provide for their wellbeing. The subordinating approach on the other hand, because it will permit no trade off between the two parts of s 5(2), effectively accords some priority to paras (a)-(c).
Zealand’s resource management law one step further.

That the 1991 Act was intended to improve the conservation consciousness of New Zealand’s water law is emphasised by the judgment of the High Court (convened in Full) in *Machinery Movers Ltd v Auckland Regional Council*.\(^85\) The Court said (in responding to the respondent’s argument that “... sentencing “tariffs” under the Water and Soil Conservation Act 1967 ... were irrelevant under the R[esource] M[anagement] A[ct]:”) “[t]he R[esource] M[anagement] A[ct] is informed by a wholly different environmental philosophy which places far greater emphasis on environmental protection ...”\(^86\) Looking to the Long Title of the 1967 Act, and noting particularly the requirement that “... adequate account [be] taken of ... fisheries, wildlife habitats, and all recreational uses of natural water” (original emphasis), the Court then continued:\(^87\)

\[
[\text{t}he\ \text{limited\ protection\ given\ [by\ the\ 1967\ Act\]\ to\ environmental\ interests\ was\ clear\ from\ the\ [italicised\]\ words\ and\ was\ reflected\ in\ Planning\ Tribunal\ decisions\ such\ as\ Greensill\ v\ Northland\ Catchment\ Commission\ (1971)\ 4\ NZTPA\ 59,\ 61\ and\ Keam\ v\ National\ Water\ and\ Soil\ Conservation\ Authority\ (1979)\ 7\ NZTPA\ 11.\ The\ only\ area\ in\ which\ environmental\ protection\ was\ given\ primacy\ was\ in\ the\ special\ and\ limited\ area\ of\ the\ wild\ and\ scenic\ river\ protection\ introduced\ under\ the\ 1981\ Amendments:\ see\ Ashburton\ Acclimatisation\ Society\ v\ Federated\ Farmers\ of\ New\ Zealand\ Inc\ [1988]\ 1\ NZLR\ 78,\ 88;\ (1987)\ 12\ NZTPA\ 189.}
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The contrast with s 5 of the RMA is obvious.

It is possible that the conservation consciousness of the 1991 Act could be quietly furthered using the coordinating interpretations should rule- and decision-makers simply give increased weight to environmental issues when balancing them against the interests of people now. Under this approach, of course, the environmental limits prescribed by section 5(2)(a) - (c) could still be avoided where development interests seemed sufficiently significant. The problem with this is that such avoidance might occur rather more often than would be desirable for several reasons. The first is that, as has been previously mentioned, current human interests are easier to value and are usually more predictable.\(^88\) The second reason is that (especially where a development proposal offers local or regional benefits, and the decision- or

\(^{85}\) *Machinery Movers* (1993) 2 NZRMA 661.

\(^{86}\) *Machinery Movers* ibid 666.

\(^{87}\) *Machinery Movers* supra n 85, 667.

\(^{88}\) Current human interests can be valued by considering, for example, how many jobs a proposed development would create, how many tourists it might attract, how much productive farming land it might make available. Such considerations can be relatively easily quantified. Environmental values like the beauty of a river, the extent to which a water body contributes to ecological events in the catchment/region/country/biosphere, the extent to which the water body will be needed by future generations are generally more difficult to measure and accurately predict. They are difficult to measure because, often, they involve externalities and have a non-exclusive impact. Frequently also, environmental effects may be anticipated as occurring some time in the future: they thus seem distant, less immediate.
rule-maker bears principally local or regional responsibilities)\textsuperscript{89} a kind of tragedy of the commons effect can marginalise the relevant environmental values.\textsuperscript{90}

Of course, the increase in concern for the natural environment which has occurred during the last 30 years or so is simply a reflection of increased awareness of the extent global environmental degradation, and its implications for people. The continuing and rapid degradation of coastal resources was noted as a basis for action by Agenda 21, as was the increasing global demand for fresh water, and the fact that “[t]here are few regions of the world that are still exempt from .... degraded water quality and pollution of surface and groundwater sources.”\textsuperscript{91} New Zealand’s coastal and inland waters are no exception.

ii. The State of Natural Water in New Zealand

Although the 1967 Act provided a method for protecting rivers and lakes with outstanding national or regional qualities, wild fresh water bodies continue to be reduced in quantity today. “In New Zealand over 62 hydroelectric schemes are our contribution to the loss of wild fresh water.”\textsuperscript{92} As at November 1992, just 0.6 percent of New Zealand’s total length of rivers was protected by National Water Conservation Orders.\textsuperscript{93} More dramatic is the loss of wetlands (the 1967 Act’s water conservation regime did not extend to wetlands;\textsuperscript{94} but the 1991 Act’s does\textsuperscript{95}) – Pike presents the following figures:\textsuperscript{96}

\textsuperscript{89} Under the Resource Management Act much planning will be generated at the regional and local levels (see Chapter 5 above for a description of the Act’s planning scheme), and resource consents will, in the first instance, almost always be allocated by regional and local councils (the exceptions being those applications which are called in for decision by a board of inquiry appointed by the Minister for the Environment and applications to undertake restricted coastal activities, which are decided by the Minister of Conservation following the recommendation of a hearings committee of the relevant regional Council – see ss 140-150 and 117-119 and Chapter 5 nn 224-232 and 218-223, respectively).

\textsuperscript{90} The idea here is that where a development offers significant (probably economic) regional or local benefits, decision- and rule- makers whose principal responsibility is owed to that district or region might find themselves more concerned to offer local people those benefits than to, say, safeguard the life-supporting capacity of a river. Where the benefits offered by the river are not exclusive (that is, they may be enjoyed by people, or ecological processes, from outside or extending beyond the district or region) it is often hard to say that the local people should miss out for the benefit of others or in the “national interest.”

\textsuperscript{91} United Nations Conference on Environment and Development \textsl{Agenda 21} (1992), 236, 273, and 284.

\textsuperscript{92} Collier K \textit{“Linking the Mountains to the Sea – Conserving New Zealand’s Rivers”} (November 1992) 266 Forest and Bird 28.

\textsuperscript{93} Collier ibid 29.

\textsuperscript{94} \textit{Auckland Acclimatisation Society Inc v Sutton Holdings} (1984-5) 10 NZTPA 225, and see Chapter 5 n 292 above.

\textsuperscript{95} Section 199(1) declares that the purpose of water conservation orders is “... to recognise and sustain ... outstanding ... values ... afforded by waters ...” (whether or not in their natural state, emphasis added), while s 199(2) directs that such orders may make provision for the protection of any “... water body ...” in its natural state, or for the protection of the characteristics of any “... water body ...”. Section 2(1) defines “water” as meaning “... water in all its physical forms whether ... over or under the ground ...” and as including fresh, coastal and geothermal water and “... water body ...” as meaning fresh or geothermal water in “... a river, lake, stream, pond, wetland, or aquifer ...”.

\textsuperscript{96} Pike D \textit{“Watching our Wetlands Vanish”} (September 1991) \textit{Terra Nova} 21-22.
In 1840 about 18,636,000 ha of New Zealand was estimated to be in native forest, ... and 7,730,000 in tussock grassland, with the balance of 3,650,000 ha comprising alpine and subalpine vegetation, bare rock, and wetlands – lakes, rivers and swamps ..., and estuaries, lagoons, intertidal marshes, mudflats and sandspits (coastal wetlands).

By 1961, 524,000 ha of natural wetland had been drained ...

By 1983 an estimated 90 percent of New Zealand’s natural wetlands had been destroyed or irretrievably modified and, in some areas such as the former Whakatane County, less than one percent of the considerable wetlands formerly found on the coastal plains remained.

Globally speaking, New Zealand’s waters are of good quality. Such a comparison may, however, be misleading: the world’s waterways are generally accepted as being intolerably polluted (and so congratulating ourselves simply because we have less polluted water is shortsighted); research reveals that New Zealand does, in fact, suffer significant water pollution and that this is an issue of concern to New Zealanders;97 and it must always be remembered that such degradation as has been suffered by New Zealand’s natural waters has generally occurred within just 150 years.

Informal accounts tell us, for example, of the degradation of parts of the Manawatu98 and Huka99 Rivers, Lake Hayes100 and the Tamaki101 and Manukau102 Estuaries. The Otago Regional Council (but one of twelve regional councils in New Zealand) has concerned itself with pollution in several regional rivers and streams (the Kaikorai Stream103 and the Taieri River,104 for example) and with the degradation of lakes like Waipori and Waipori.105 A

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97 See n 72 above.
98 Collier (supra n 92, 26) describes this river as one which has “... long suffered from the incremental effects of catchment erosion, industrial waste and sewage, farm runoff and the dewatering of tributaries. The result is that the lower section of the river is severely degraded.”
99 In her article “The Unhappy Huka” (August 1991) Terra Nova 35, Suzanne Miller writes “[t]he Huka falls personify the image of unspoilt New Zealand, with cascades of clear, blue water tumbling into a haze of swirling white foam. How deep does this image go? How clean is the water, how clean should it be? It would be a surprise to know that treated sewage is discharged a few kilometers upstream of the falls. Police divers working beneath the falls in 1989 suffered gastric infections.”
100 This lake is regionally notorious for its extreme eutrophication problems.
101 This estuary has been described as “... Auckland’s most polluted waterway,” see L Bercusson “Is there Time to Rescue the Tamaki?” (September 1991) Terra Nova 16.
102 The former state of the Manukau, its process of degradation (principally by way of sedimentation and pollution) and the loss of fisheries and other ecological values is described in Waitangi Tribunal Finding of the Waitangi Tribunal on the Manukau Claim (1985) 55-60.
103 See Otago Regional Council Discussion Paper Series No 4 Kaikorai Stream: Issues and Options for Resource Management (August 1991) – which document records (at 1, 12-13, 22 and 34-35) that, despite its high ecological, educational and recreational values, the Kaikorai Stream and estuary have suffered “... considerable impacts ...” including habitat loss (through reclamation of the wetlands) and contamination (from a range of sources, including land disposal of septic tank waste, landfill waste disposal, agriculture, sewerage overflows and mining).
104 In Otago Catchment Board and Otago Regional Water Board The Taieri River: A Water Resources Inventory (March 1983), pollution was identified as one of the “... four major threats to wildlife habitats in the Taieri catchment ...” (at 117), with water quality in the lower Taieri River being classified as “... generally poor ....” due, at low flow, to sewerage and dairy factory effluents with wastes from land drainage
recently completed national study on freshwater quality in New Zealand – having identified problems with numerous rivers (including the lower, and sometimes also middle, reaches and major tributaries of the Waikato, Piako, Waitoa, Kaituna, Tukituki, Tukipo, Manawatu, Whanganui, Rangitikei, Ruamahanga, Waiohine, Buller, Grey, Mataura and Makarewa Rivers),106 streams (many minor streams were found to have suffered significantly from agricultural practices) and lakes (eutrophication is identified as the main problem, and has affected Lakes Hayes, Johnson, Mahinerangi, Omapere, Pupuke, Rotorua and Tutira)107 – concluded that:108

waterways in sparsely developed areas of New Zealand are in good condition. This includes many of the South Island rivers. Headwater reaches of the North Island’s major rivers are also in good condition. In contrast, lowland rivers reaches in agriculturally developed catchments are in poor condition. ... Their poor condition also reflects agriculturally derived diffuse and point source waste inputs in isolation or in addition to urban and industrial waste inputs. ...

The sparse data suggests that small streams and creeks in dairying areas are in very poor condition. ... Small watercourses that receive multiple rural point source animal waste inputs are usually (i.e., for much of the time) not safe for contact recreation and some reaches are usually not safe for stock water supply...

... nitrate-nitrogen concentrations in shallow groundwaters frequently exceed 10 g m-3 in areas where stock densities are high and the upper soil permeable. Thus, levels often exceed the Department of Health guideline concentration for domestic water supply waters. ...

Eutrophication ... is the cause of a number of water quality problems in New Zealand lakes. ... Development of their catchments, primarily for agriculture is almost certainly responsible ...

Although perhaps not yet serious, many of these problems are significant and continue to grow. Many water quality problems are exacerbated when low levels and flows of water occur – which events are also experienced in New Zealand:109

"... accentuating] the problem at high flow" (at 140). Specifically, faecal coliform levels (caused by effluent and bird and animal excrement) in Silverstream and the lower Taieri were found to have "... exceeded the upper limit for bathing ..." from 1977-82 (at 122); and copper and nickel were found above acceptable levels in the Taieri (both metals pose a hazard to aquatic life, copper being damaging even at low levels) (at 122).

105 These two lakes were identified in The Taieri River: A Water Resources Inventory (ibid) as (at least from 1977-82) having faecal coliform levels in excess of those suitable for bathing (at 122) and as being adversely affected by eutrophication caused by agricultural activities and sewerage (at 142).


107 Towards Sustainable Agriculture ibid 62. Eutrophication is described as "... enhanced phytoplankton growth in response to elevated nutrient levels. ... Development of [the lake] catchments, primarily for agriculture, is almost certainly responsible ..." (at 65).

108 Towards Sustainable Agriculture supra n 106, vii-ix.

109 Collier supra n 92, 29.
With such an abundance of rivers and lakes, most people would never believe that New Zealand could become short of water. However, increasing demands from agriculture, industry and urban communities mean that some areas of the country ... may face long-term water supply problems.

Kopp identifies several areas with actual or potential water supply problems: the cities of Auckland and Christchurch, the South Island's east coast (including parts of Otago), Nelson's Waimea Plains, Northland and the land lying eastward of the North Island's mountain ranges.

4. Conclusion: The Correct and Best Interpretation of “While”

In conclusion, it is simply submitted that the subordinating interpretation of “while” is not only correct in terms of the principles of statutory interpretation, but is also the best meaning for the word. Thus, the purpose of the Resource Management Act 1991 is to promote the management of the use, development, and protection of water resources in such a way or rate as enables present generations to provide for their wellbeing without failing to sustain the potential of resources to meet the reasonably foreseeable needs of future generations; to safeguard the life-supporting capacity of land, air, water, soil and ecosystems; and to avoid, remedy or mitigate adverse environmental effects.

III. The Implications of Section 5 for the Management and Allocation of Water in New Zealand

Section 5 of the Resource Management, as coloured by the subordinating interpretation of “while,” will, it is submitted, lend a new emphasis to decision-making in respect of the management and allocation of water in New Zealand.

111 Kopp (idem) describes “[t]he great urban sprawl of Auckland ...” as draining “... more water from its catchments than nature puts in.” One has to look only as far back as the summer of 1993-1994 to find confirmation of the problems faced by Auckland.
112 The Otago Regional Council has studied specific water resources under extreme pressure: see, for example, its work on the Taieri (abstraction for irrigation, combined with loss of surface water through gravels and other natural reductions, means that some of this river's tributaries in the Manitoto and Strath Taieri dry up completely in “... most summer dry spells ...” – The Taieri River: A Water Resources Inventory supra n 104, 77), Kakanui (natural water limitation combined with over-abstraction has caused problems – The Kakanui River Catchment Water Resource Inventory (September 1983) 78) and Shag (while this river has natural flow limitations, the added stress of irrigation has caused problems for aquatic life. In 1973 a residual flow was set, but “... is regarded as inadequate for the fishery ...” – Shag River Catchment: Resource Description, Issues and Options for Management (February 1991) 6-7) Rivers.
1. A Different Emphasis in Decision-Making

Under the old regime, dominated by the Water and Soil Conservation Act 1967 and the balancing test as adopted in *Keam v Minister of Works and Development*, allocation decisions were made by weighing the advantages of a proposal against its disadvantages. The proposal could proceed so long as, overall, it involved a beneficial use of water. There was no kind or degree of advantage or disadvantage in itself determinative; the issue was purely one of weight.

Under section 5 of the Resource Management Act there will still be room for decision-makers to exercise discretion by balancing or weighing up considerations, but there will also be uncompromisable limits. When considering section 5, a decision-maker must first be sure that any proposed use of water will enable people to provide for their social, economic, or cultural wellbeing. No doubt many proposals will have both positive and negative social, economic and cultural implications. For example, damming a river for hydroelectric generation may imply both social and economic advantages (in that electricity will be produced) and social and economic disadvantages (perhaps a valued fishery will be lost, which fishery has both recreational and economic value for a region).114 The decision-maker will have to assess those advantages and disadvantages, and make a determination as to the proposal’s overall utility. Only such proposals as imply a net overall benefit will satisfy the first part of section 5(2). Next, the decision-maker will have to ensure that all of paragraphs (a) - (c) are met. Again, it is submitted, the exercise of a certain discretion, an inevitable weighing up or balancing of interests will need to occur.115 In order to explain why, the substance of paragraphs (a) - (c) must first be addressed.

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113 *Keam [1982]* 1 NZLR 319, and see Chapter 3 nn 424-428 above and accompanying text.

114 Arguably the loss of the fishery could also be relevant under each of the three paras in s 5(2). If the loss of the fishery is accepted as not sustaining resources to meet future need; or as not safeguarding the life-supporting capacity of resources or ecosystems; or as constituting an adverse environmental effects which could be avoided, remedied, or mitigated then, on the preferred interpretation of “while” the question ceases to be one of the value or impact of loosing the fishery. The fact that matters such as the loss of a fishery could be potentially relevant under all four parts of s 5(2) confirms that s 5 must be read with a certain flexibility. It is also submitted as support for the argument that s 5 is not about weighing current human interests against ecological and future needs and the direction to minimise environmental effects. If relevant to all four parts of s 5(2), does the loss of a fishery carry the same weight when considered in the first limb of s 5(2) as when considered under any one of the three paras (a) - (c)? It certainly seems that the answer to this question should be “yes.” If so, then logic tells us we may as well cancel this concern out of the equation completely. If “while” represents a direction to balance, then on this example, the effect will be to require that the loss of a fishery be weighed against the loss of the same fishery. This renders the loss of the fishery effectively neutral and meaningless. This clearly makes s 5 a nonsense, and therefore cannot be what the legislature intended.

115 Though it is emphasised that this balancing will occur within the confines of each of paras (a) - (c) and not between these three paras and the first part of s 5(2).
a. Section 5(2)(a)

The first limit prescribed by section 5(2) on the pursuit of wellbeing by present generations requires that the "... potential of natural and physical resources ..." be sustained in order to "... meet the needs of future generations."

Paragraph (a) opens with the words "[s]ustaining the potential ..." It is the potential of resources to meet future needs which must be "... h[e]ld up, ke[pt] from falling or sinking ..." or "support[ed]." 116 This is just one of the words in section 5 which show that the Resource Management Act was not intended to halt development. 117

In some cases, a practical difficulty may arise in determining what kind or extent of resource use will not sustain this potential. Then, it is submitted, scientific evidence of the functioning of the resource (and the natural processes which that functioning does or may affect), and the nature, extent, time-frame and scale of the anticipated environmental effects will be needed. In so far as the time-frame of the effects of exploitation are concerned, it is clear that irreversible adverse effects will absolutely fail to sustain the potential of resources. Short of irreversible damage, some long-term degradation might also fall foul of section 5(2)(a). But how long is too long in terms of a resource's ability to recover: from exploitation, or in terms of its ability to be available for future generations? Often, this will have to be a scientific, and not a legal, question. It will be up to those who understand the natural processes likely to be affected by a proposal to put appropriate time-frames to decision- and rule-makers. Generally speaking the appropriate maximum time-frame for renewable resources should reflect the rate of regeneration, and for non-renewable resources should reflect the times required to make transitions to the use of substitute (preferably renewable) resources. 118

In fact, in the cases which have so far used section 5(2)(b), these issues have been resolved on a more conceptual level. In Harrison v Tasman District Council, the Planning Tribunal was concerned with an application to establish a refuse transfer station at the site of an existing rubbish dump, near Motupipi estuary. 119 The Tribunal found that the station would cause...
continued leaching of rubbish tip contaminants into the estuary for many years to come,” that “... substantial traffic can also be expected ...,” and that the station structures would be “alien” to the coastal environment.\textsuperscript{120} Noting that, to Maori, the tip was associated with “... unacceptable contamination of marine life ...,” the Tribunal continued that though there was no evidence that marine life would in fact be endangered by the station (no tests having been conducted), there was concern that rodents and, in turn, cats and stoats, may be attracted and that these would “... prey upon birdlife.”\textsuperscript{121} These findings were sufficient to justify the Tribunal holding that paragraph (a) was not met by the proposal, the estuary being a “... natural resource which should be sustained ...”.\textsuperscript{122} There were no fine questions asked as to the permanence of the potential adverse effects in this case, or in any of the other four cases which have addressed paragraph (a), and which are described to follow. In another case, time was raised by the applicant as a relevant concern, this case (being \textit{Foxley Engineering Ltd v Wellington City Council}) will also be re-addressed below.\textsuperscript{123}

\textit{Minister of Conservation v Kapiti Borough Council} concerned appeals against the grant of land use consents for a rural lifestyle subdivision on sand dunes adjoining the esplanade reserve on a part of the Kapiti Coast.\textsuperscript{124} According to the Planning Tribunal, “[t]he decisive issue in th[e] appeal [was] whether, as a matter of principle, the land should be subdivided for lifestyle housing at all.”\textsuperscript{125} The principal potential effects of the subdivision were found to be the “... significant adverse effects ... from both intended and unintended modifications to the natural landform,” and the impact on the natural character of the coastal environment caused by “... the presence of 17 houses and other structures and the provision of sealed roads and drives.”\textsuperscript{126} This second effect was then found to breach paragraph (a), the Tribunal holding that the “... presence [of the houses and other structures] would ... diminish the extent of the coastal environment having [natural] character to meet ... reasonably foreseeable needs of future generations ...”\textsuperscript{127}

In \textit{Jessep v Marlborough District Council} the Council had refused an application for a coastal permit to establish a scallop and mussel farm in Wilson Bay, Pelorus Sound.\textsuperscript{128} The Tribunal found that there would be minor effects on the activities of recreational fishers, on navigation, and on the use of Wilson Bay as a sheltered anchorage.\textsuperscript{129} It also found that “... the mussel

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\item\textsuperscript{120} \textit{Harrison} ibid 197-198.
\item\textsuperscript{121} \textit{Harrison} supra n 29, 197.
\item\textsuperscript{122} \textit{Harrison} ibid 200.
\item\textsuperscript{123} \textit{Foxley} supra n 31.
\item\textsuperscript{124} \textit{Kapiti Borough Council} [1994] NZRMA 385.
\item\textsuperscript{125} \textit{Kapiti Borough Council} ibid 387
\item\textsuperscript{126} \textit{Kapiti Borough Council} supra n 124, 392.
\item\textsuperscript{127} \textit{Kapiti Borough Council} ibid 393.
\item\textsuperscript{128} \textit{Jessep} [1994] NZRMA 472.
\end{itemize}
farm [would be] of great [economic] benefit to the people and communities which it [would] serve[]’ but that matters should not be viewed in: “... pure economic terms.” On the other hand, establishing the farm would “... effectively prevent use ...” of the area by commercial scallop dredgers. This existing scallop fishery was considered to be the correct object of the concept of sustainability, and the Tribunal held that since “[i]t supports people and is likely to support future generations [it] should not be rendered unusable by superimposing a farming regime upon it.” This was despite the fact that the permit sought was for a maximum term of 35 years, and that there was no express consideration of whether or not the effects of the farm on scallop beds would be reversible.

Both *Thorn v Grey District Council* and *Pickmere v Franklin District Council* concern applications for land use permits to subdivide land and turn it over to residential use. In *Thorn*, the land in question was perceived by the applicant to be isolated from, and surplus to, his existing farming operations. The land fell beyond areas identified in the district plan as suitable for future subdivision and development; accordingly Judge Kenderdine found that “[i]f Mr Thorn has approval for his subdivision he will: be creating sporadic division which we hold to be directly contrary to the Act’s purpose of sustaining the potential of the land resource to meet the reasonably foreseeable needs of future generations.” In *Pickmere*, the applicants claimed that due to the site’s topography, small size, and physical separation from their orchard, it was not suited to production. Judge Sheppard accepted that, under current economic conditions, and “... despite the quality of its soil, the land ... does not have high present value for primary production because of its small usable area and awkward shape.” However, it was held that because economic conditions vary, and recognising the quality of the soil, ... the land has high potential value for production. Permanently subdividing it from the rest of the appellants’ property and devoting it to residential use would preclude that potential being recognised. To that extent ... [the proposal] would conflict with the statutory purpose of sustainable management of natural resources, in sustaining the potential of land to meet reasonably foreseeable needs of future generations for food production ....

In *Foxley’s* case (where the application was to establish a service station in Wellington’s

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129 *Jessep* ibid 477-478.
130 *Jessep* supra n 128, 478.
131 *Jessep* ibid 476.
132 *Jessep* supra n 128, 480.
133 *Thorn* unreported, Planning Tribunal Greymouth, 13 December 1993, C95/93, Judge Kenderdine; *Pickmere* unreported, Planning Tribunal Auckland, 29 April 1993, A46/93, Judge Sheppard.
134 *Thorn* ibid 7.
135 *Pickmere* supra n 133, 11.
136 *Pickmere* ibid 11-12.
central business district), Judge Kenderdine noted the twelve year limit on the proposal, and the applicant’s argument that this promoted in section 5 in that “... it would allow the wider needs of Wellington to be accommodated in that time ... .” In the Judge’s view this was “... one of the proposal’s most creative aspects.” 137 There was little further comment on this aspect of the application and the Tribunal, having found that paragraph (a) would be met whether the proposal went ahead or not, cancelled the consent on the grounds that section 5(2)(c) was not satisfied. Though the time limit on the proposal was thus of little consequence, it is interesting to note that the applicant (and perhaps also the Judge) thought this positively relevant to section 5(2)(a).

The purpose for which resources must be sustained under paragraph (a) is to “... meet the reasonably foreseeable needs of future generations.” “Needs” contrasts immediately with the term “wellbeing” as used in the first limb of section 5(2) in reference to current generations of people and communities. “Needs” is apparently more limited, and there has been debate as to its ambit: 138

[t]here is much room for differing opinions as to what will constitute a “need” of future generations. For example, can future generations be regarded as needing a view of a particular unspoilt coastline?

Or is the phrase limited to only the “bare necessities” of life; food, water and shelter? In practice the approach has been broad and embracing: the Tribunal has accepted without dispute that future generations have reasonably foreseeable social, cultural and sporting needs, 139 and needs for food production, 140 for support from an established local industry, 141 to “... experience a sand dune coastal environment having natural character,” 142 and to an estuary “... both from an environmental viewpoint and from the viewpoint of being part of the sustainable chain of marine resources.” 143 Should this issue ever be disputed, it is submitted that the underlying purpose of section 5(2)(a) should guide the tribunal or court. Section 5(2)(a)

137 Foxley supra n 31, 41.
138 Harris supra n 1, 62.
139 Wellington Rugby Football Union v Wellington City Council unreported, Planning Tribunal Wellington, 30 September 1993, W84/93, per Judge Kenderdine who held (at 19) that “[t]here is little doubt that Athletic Park is a unique resource. The fact that it is in need of redevelopment as a multi-sports stadium to international standards is an issue which goes to its potential to meet the reasonably foreseeable sporting needs of future generations. Expanding the use of the resource to encompass the needs of sporting, social and cultural groups in the way proposed ..., will meet the purposes of the Act. Socially, the function rooms will provide for facilities which are sadly lacking in wider Wellington. Culturally, it will be a centre for the beneficiaries of the Trust, and at the same time provide a venue for all cultural and conference groups and the greater public.”
140 See Pickmere and Thorn, supra n 133.
141 See Jessep, supra n 128, where the existing scallop dredging industry was identified is the resource to be sustained.
142 See the Kapiti Borough Council case, supra n 124, 393.
143 Harrison supra n 29, 200.
intends to introduce into the Act the concept of intergenerational equity. This tends to suggest that the "... needs of future generations ..." should be measured by ascertaining the "needs" of current generations. Thus, some answers might be revealed if, during policy and plan making processes, current generations were to be consulted about their perceived needs. If regional and district plans and policy statements identified, in respect of a given resource, demands on that resource which were strong and well-supported then it could be said that current generations had indicated what they needed from that resource. For example if, during the consultation stage, a significant number of people identified access to unspoilt rivers as important to them, then they might be argued to be identifying a current need. Intergenerational equity might then suggest that reasonable access to unspoilt rivers would be a "need" of future generations.

While referring to the interests of current generations for the purpose of ascertaining future needs seems appropriate, it seems inappropriate to determine the "... needs of future generations ..." by weighing them against "... the worth of the current developmental interests which would be sacrificed should the needs of future generations be recognised and provided for." The question is not whether perceived future needs are worth providing for – the Act tells us that once a relevant need has been identified, and it has been determined that a proposal would reduce the ability of future generations to provide for that need, then the need must be provided for. There is no room to refuse to sustain the potential of a resource to meet a future need on the basis that that need does not seem as weighty as the current developmental interest.

Though there should be no balancing of future needs against present interests, there may, inevitably, be balancing within section 5(2)(a). Take again the example of a proposal to dam a river for hydroelectric generation. Assume that the river offers a significant fishery, and has outstanding scenic and recreational value. Some may argue that the proposal will not sustain the potential of the river to meet the needs of future generations to enjoy the fishery, the recreational opportunities, and the natural scenery. Others may argue that not proceeding with the proposal would amount to a failure to recognise and sustain the potential of the river to meet the needs of future generations for power. Assuming further that all of these future needs can be evidenced in the tribunal or court, the question becomes: which should prevail? It is submitted that this issue could be determined in one of two ways. First, a value-judgment could be made, and the weight of the future demand for the various opportunities offered by the river used to determine which prevails. In such cases, the abundance of other rivers

144 Harris supra n 1, 62.
145 This, of course, is true only if the preferred meaning for s 5 (which defines "while" as a subordinating conjunction) is adopted.
available for each of the various uses might prove relevant. Second, a decision to sustain the potential of a resource to meet future demands for its already established uses might be made. In Jessep, for example, the Tribunal took the view that the resource whose potential had to be sustained was the existing scallop fishery, and in Wellington Rugby Football Union v Wellington City Council, Judge Kenderdine held that upgrading Wellington’s Athletic Park was consistent with paragraph (a), because this would allow the future sporting, social, and cultural needs of New Zealanders to be met. In both cases, the existing use of the water and land (respectively) was identified as the purpose for which the potential of the resource should be sustained. Although this approach had the effect of precluding the development of Wilson Bay as a mussel and scallop farming resource, it is not inherently adverse to progress. The decision in Wellington Rugby Football Union shows that development which facilitates future demands for existing uses may proceed.

It is submitted that the first approach (of weighing future needs according to perceived value) is best, essentially on the grounds that under the second approach, judges may unwittingly end up preserving inefficient existing uses. This may have occurred in Jessep, where the effect of the decision was to preserve Wilson Bay for scallop dredging, whilst precluding its use for more intensive marine farming. I am ignorant as to the comparative environmental impact of each of these two methods of scallop harvesting, but it seems at least possible that dredging is not the best (that is, most environmentally sound) of the two practices. While the Tribunal’s approach in Jessep of taking the existing scallop dredging as the resource to be sustained has its merits, it is submitted that in fact Wilson Bay should have been identified as the resource to be sustained, and the comparative impact of dredging and farming on the ability of Wilson Bay to meet future needs to harvest scallop should have been addressed.

The qualification that only the “reasonably foreseeable needs” of future generations need be considered was inserted by the review group. The group explained that these words were intended to place some limit on the extent to which consideration of the needs of future generations will be required. That limit will be based on a reasonable assessment of the anticipated needs of future generations for natural and physical resources having regard to the current state of knowledge and projected future requirements. There is no reason why this should not include prudent provision for unforeseen factors and the importance of retaining some options for future generations.

146 See n 132 above and accompanying text.
147 Wellington Rugby Football Union supra n 139.
148 This is asserted because dredging involves disruption of the seabed, because it harvests the natural population, and because it is profoundly non-intensive.
With respect, it is hard to see how (without stretching the meaning of the phrase well beyond its ordinary confines) “unforeseen factors” can constitute “reasonably foreseeable needs.” Perhaps one could say that it is reasonably foreseeable that future generations will have to use resources to provide for factors which, on a current assessment, are unforeseeable; but this tends to have the effect of undermining the impact of the phrase as a “limit.” As Harris notes, “[t]he last sentence makes one wonder whether “reasonably foreseeable” does impose any real limit on the rule-makers’ and decision-makers’ foresight obligation.”

In fact on one approach, the words “reasonably foreseeable” may not even be necessary. In practice detailed scientific assessments of, for example, how much land future generations will need for food production are not made. That kind of information is simply not available, and would be very expensive and time-consuming to generate. So far, the approach to paragraph (a) has been far more conceptual; operating, for example, according to the general principle that land currently used for farming should not be sporadically subdivided and turned over to residential uses. Even without the words “reasonably foreseeable,” the assessment will necessarily be limited by the current state of knowledge. We cannot expect decision-makers to consider that which is not known. It is extremely difficult to anticipate how decision-makers will decide whether a prospective need for a resource is or is not reasonably foreseeable. If the need is actually foreseen, then it seems it must be reasonably foreseeable. If the need is not foreseen, then no doubt a decision could be retrospectively challenged on the basis that the need should have been predicted, it being reasonably foreseeable. But how, in any prospective assessment (for this is what section 5(2)(a) requires) can a need be identified as reasonably (un)foreseeable?

Harris argues that

competing current developmental needs will inevitably influence that which is considered reasonably foreseeable and that which is not. The consideration of the needs of future generations is obviously prospective and dependent upon the availability of information; not only about the likely needs of future generations, but also about the consequences for the environment of the proposed development. This vagueness may provide room for the more tangible value of the proposed development subtly to influence the assessment of the reasonably foreseeable needs of future generations.

Rather than arguing about whether or not a perceived need of future generations is or is not reasonably foreseeable, it is submitted that developmental interests would be better served if

150 Harris supra n 1, 62.
151 Harris ibid 63.
they directed their efforts towards establishing that the future needs which their proposal(s) will provide for outweigh other future needs which the status quo will protect. This is both because this seems to be an argument with more scope; and because it seems that, as a matter of fact, at least some of the future needs which may not be able to be met should a proposed development proceed will also be existing needs. Taking again the hydroelectric dam example, future needs which the river (either dammed, or left in its natural state) has the potential to provide for could include needs for electricity, for access to unspoiled rivers, and for recreation. In its current state, the river may already be being used to meet existing needs for recreation and access to unspoiled nature. It would thus be pointless to argue that the needs of future generations for recreation and access were not reasonably foreseeable. If current generations experience those same needs, and the river is already used to meet them, it is at least reasonably foreseeable that future generations will also experience those needs and that the river, if left alone, would have the potential to meet them. In practice, it may well be that where the future needs being argued are not based on existing uses the case for development will be more tangibly supported. This would be true in the hydroelectric dam example, where developers would probably have more financial and other resources available to prove a future need for electricity. This is nothing new to the planning tribunal, which would be expected to work to ensure that “... the more tangible value of the proposed development ...” does not “... subtly ... influence [its] assessment of ...” the extent to which a future need is or is not reasonably foreseeable.\textsuperscript{152} The issue of reasonable foreseeability should not fall for determination according to the value of a proposed development. If it did, then the purpose of the Act would be thwarted.

Even if, as the review group suggested, “... prudent provision for unforeseen factors ...” can be made under section 5(2)(a), this cannot be taken to imply that the natural world should be left completely unmodified. The Act clearly contemplates on-going resource development.\textsuperscript{153}

\textit{b. Section 5(2)(b)}

Section 5(2)(b) directs that resources may be used, developed and protected to enable people to provide for their wellbeing while “[s]afeguarding the life-supporting capacity of air, water, soil, and ecosystems.”

As with paragraph (a), it is submitted that the interpretation of this paragraph should be purposive and not unduly literal. As has been previously stated, the legislature obviously did not intend that section 5(2)(b) be used to prevent the draining of a puddle, or the squirting of

\textsuperscript{152} These words are drawn from the Harris quote idem and accompanying text.

\textsuperscript{153} Harris observes (supra n 1, 62): “[s]urely the best way to make “prudent provision for unforeseen factors” would be to leave nature unmodified. Nature should not be modified at all in case options are foreclosed.” One need only go as far as s 5(2)(c) to confirm that the Act does not intend to halt development in this way.
fly spray. A more conceptual approach is needed.

The objects of the section 5(2)(b) direction are “air,” “soil,” “water,” and “ecosystems.” Of the first three, only “water” is expressly defined in section 2 of the Act. Even this definition does not, however, help with the problem of ascertaining the extent or ambit of the relevant “... air, water, [or] soil ...”. The best course here, it is submitted, is to let the anticipated effects of the proposed activity determine relevance – thus the life-supporting capacity of any affected air, water or soil should be considered.

“Ecosystem” is defined in another Act arguably part of the Resource Management Act’s statutory scheme. The Environment Act 1986 defines an “ecosystem” as meaning “... any system of interacting terrestrial or aquatic organisms within their natural and physical environment.” This definition seems to accord with those from other sources, and could be relevant to an interpretation of the 1991 Act.154 As with “... air, water, soil ...” the main difficulty with “ecosystems” lies less with how it should be defined, and more with how it should be applied. The difficulty will be ascertaining, in any given case, the extent and boundaries of the relevant ecosystem or ecosystems. This is an issue which will impact directly on the assessment of whether or not paragraph (b) as a whole has been met. For example, if in the proposal to build the hydroelectric dam, the river upstream of the dam is taken as the relevant ecosystem, and “life” is taken to mean “river life,” then damming the river could well interfere with its capacity to support the kind of life which generally exists in rivers. If, on the other hand, the catchment is defined as the relevant ecosystem, then damming a river (perhaps one of a number or tributaries) within the catchment may not fail to safeguard its life-supporting capacity as a whole. Pardy suggests that155

154 Bruce Pardy (supra n 4, 355) quotes Lincoln, Boxstall and Clark’s (A Dictionary of Ecology, Evolution and Systematics (1982) at 75) definition “... a community of organisms and their physical environment interacting as an ecological unit,” and later comments that “[e]cosystems are enormously complex theatres. “As a matter of practical necessity, field ecologists can rarely specify, much less quantify, all of the interactions’” (at 359, quoting W Schaffer “Ecological Abstraction: The Consequences of Reduced Dimensionality in Ecological Models” (1981) 51 Ecological Monographs 383 at 383). Cronin (in Ministry for the Environment Ecological Principles for Resource Management (1988), 19) describes the “... five levels of organisation ...” making up and including the biosphere; “[a] group of individual organisms of the same kind is called a population. A group of plant and animal populations living in a particular locality is called a natural community. Any organism, population or community also has an environment, including non living (abiotic) components, and living (biotic) components. Together, these elements made up an ecosystem. ... All the various ecosystems on the planet made up the biosphere ... .” As to the relevance of the 1986 Act’s definition, see Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188, where principles from the Town and Country Planning Act 1977 were used as aids in the interpretation of the Water and Soil Conservation Act 1967, being an Act in the same statutory scheme. The 1986 and 1991 Acts are argued to be part of the same “scheme” principally because the bodies and officers established under the 1986 (the Minister and Ministry for the Environment) are heavily involved in the administration and implementation of the 1991 Act.

155 Pardy ibid 363-364.
[t]he appropriate choice of ecosystem in a particular case will depend upon the nature of the activity. ... For instance, the impact of a proposal to cut down an expanse of forest should be considered as it will affect the forest, not the South Island of New Zealand. However, where the impact is not concentrated but dispersed over a wide area, the ecosystem defined by that area is more appropriate. For instance, if one was to evaluate the sustainability of carbon oxide emissions from automobiles, it would be more appropriate to identify the planetary biosphere than the city of Wellington as the ecosystem in question, since the exhaust does not remain where it is expelled.

The appropriate ecosystem in any particular case should be determined in the same manner as any technical question of fact in a legal proceeding: by evaluating the evidence of qualified experts.

In principle, both of these points seem sound. However, it may not be strictly (or scientifically) correct to identify "the biosphere" as "an ecosystem." While the biosphere can no doubt be described as "... a community of organisms and their physical environment interacting as an ecological unit," it is also true that ecosystems are but elements of the biosphere and that "ecosystem" and "biosphere" represent different levels in the organisation of life.156

The words "life-supporting capacity" tend, as Randerson notes, to suggest157 that the subsection does not mean that a development would be unable to proceed in the event that ... some flora or fauna were destroyed as a result of a development. It is likely to be interpreted as requiring a broad assessment of life supporting capacity generally.

It is of interest that this paragraph, which was immediately perceived as one offering significant ecological potential, has so far been used mainly to protect human interests. In Pickmere v Franklin District Council, the Tribunal held that the proposed subdivision and residential use of rural land with high potential value for primary production would "... conflict with the statutory purpose of sustainable management of natural resources, in ... sustaining the life-supporting capacity of soil."158 In Thorn, Judge Kenderdine described the Grey District Council's objectives and policies as "... carefully directed at stopping good rural land from being swallowed up by ribbon development which is such a profligate waste of the resource. In this it is safeguarding the life supporting capacity of the soil."159 In Harrison's case, though the Tribunal was concerned about the ecological impact of establishing a refuse transfer station in the estuary, it expressed these concerns only in terms of section 5(2)(a).160

156 See n 154 as to these two definitions of "ecosystem."
158 Pickmere supra n 133, 12.
159 Thorn supra n 133, 7.
160 Harrison supra n 29, 200 where Judge Treadwell did refer to para (b), but did not apply it directly to the case at hand. He did, however, say that the estuary was a resource which should be "... sustained to meet
Though there is clearly no objection to section 5(2)(b) being used to safeguard the capacity of air, water, soil and ecosystems to support human life, care should be taken to ensure that the paragraph is not limited to such matters. Paragraphs (a) and (b) should both be assumed to have meaning; the presumption must be against either being effectively redundant. There is little doubt that something which is “life-supporting” is also a “need” and so, if a proposal would fail to safeguard the capacity of that air, water or soil to support human life, it would almost certainly also fail to sustain the potential of the same air, water or soil to meet future human needs. The differences between the two paragraphs are that paragraph (a) applies to a wider range of resources, and that paragraph (b) covers ecosystems. The inclusion of “ecosystems” in paragraph (b) especially should not be overlooked as it suggests that both human and non-human life is of relevance and that an ecological approach is appropriate.

As with paragraph (a), the main conceptual difficulty with paragraph (b) lies in defining at which point the line should be drawn. How much damage can air, water, soil or ecosystems sustain before their life-supporting capacity is affected? The concept of “environmental bottom lines” has often been associated with paragraph (b), but is regarded as dangerous by some scientists.\textsuperscript{161} Pardy has suggested a test for the application of both paragraphs (a) and (b), based on his concept of “ecological share.”\textsuperscript{162} So far, however, neither concept has been applied by the tribunal in relation to section 5(2)(b).\textsuperscript{163} A much more embracing and general

\textsuperscript{161} The best known reference to an association between para (b) and the ecological bottom line concept was made by the Minister for the Environment, the Hon Simon Upton at the occasion of the Resource Management Bill’s third reading, see n 70 above and accompanying text. Donald Scott, of the University of Otago’s Department of Zoology, refers to a more recent statement by the Minister, who talked about environmental bottom lines as “... the point beyond which serious environmental damage occurs and ecosystems or parts of them are likely to suffer irreversible effects.” Scott identifies two problems with this: first that “... damage to ecosystems is a continuous variable so that there is no bottom line. The only way this could have meaning would be the elimination of all life, and presumably the Minister did not mean that.” Unlike Scott, I am (unhappily) not confident that the elimination of all life in a given area of air, water or soil at any given point in time would necessarily breach para (b), so long as the capacity of the air, water or soil to support future life was not affected. Second, Scott observes that “... irreversibility is an unlikely concept. Ecological systems exhibit a capacity, over time, to re-establish themselves in the appropriate areas.” Further, Scott argues that “[t]he danger is that if some pseudo bottom line is specified, the economic pressures will tend to force conditions down to that level. The line is an invitation to push the system to an imagined limit.” See D Scott “Bottom Lines—a Dangerous Myth?” 4 Environmental Perspectives (June 1994) 11-12, and note that the concern that “... economic pressure will tend to force conditions down to the level...” may be met by s 5(2)(c).

\textsuperscript{162} Pardy supra n 4, who argues that a resource use is sustainable if it does not exceed its “ecological share.” The ecological share attributable to each user is determined by dividing the total carrying capacity of an ecosystem between its total number of users.

\textsuperscript{163} That is not to say that neither concept has been applied in other circumstances. In fact, the concept of environmental bottom lines is one which has in the past been associated with the minimum flow regime under the Water and Soil Conservation Act, see for example Electricity Corporation of New Zealand Ltd v Manawatu-Wanganui Regional Council unreported, Planning Tribunal Wanganui and Wellington, 29 October 1990, W70/90, Judge Sheppard (“the Wanganui River Minimum Flows Case”).
approach has been adopted. Thus, in *Pickmere* and *Thorn* it was accepted, without scientific investigation or the application of fine tests, that sporadic or ribbon development is inconsistent with the notion of safeguarding the life-supporting capacity of soil.

Again like paragraph (a), paragraph (b) may involve the making of a value-judgment, a balancing of competing interests. The hydroelectric dam example serves to illustrate this point. One could argue that damming the river would breach paragraph (b) in that the life-supporting capacity of the soil directly under the dam would not be supported because the plants and animals which used to live and grow there would no longer be able to do so; or in that the life-supporting capacity of the soil to be flooded by the new hydro-lake would be lost. One could also argue that a natural river ecosystem would be lost. On the other hand, the developers might argue that damming the river serves to increase its life-supporting capacity (in that its waters will be used to generate power essential to human activities), and also tends to safeguard the life supporting capacity of air (because then fewer thermal power stations will be needed). It is impossible to predict how such arguments might be resolved, though if the Electricity Corporation of New Zealand proceeds with its plans to dam the Clutha River at Tuapeka Mouth an example could soon be available.

c. Section 5(2)(c)

This final paragraph in section 5(2) illustrates the legislature's commitment to the precautionary principle by requiring that the adverse environmental effects of activities be "[a]void[ed], remed[ied], or mitiga[t]ed ... ."

Clearly adverse effects can be brought to bear on the environment without breaching the purpose of the Act, since paragraph (c) is met where such effects are just mitigated or remedied. The three words "[a]voiding, remedying, or mitigating ..." are joined by the conjunction "or," which suggests that there are alternatives, though not necessarily mutually exclusive. As a matter of common sense, it seems that there should be some priority as between the three, so that adverse effects should, if possible, be avoided, though they may otherwise be remedied or mitigated. No priority is suggested by the words of the Act.

Some cases have taken quite a hard line under paragraph (c), implicitly preferring that adverse

164 This argument parallels those in *Thorn* and *Pickemere*, since it concerns the loss of land which could be used for primary production.

165 This argument parallels Wellington Rugby Football Union, where the upgrading of Wellington's Athletic Park "... to encompass the needs of sporting, social and cultural groups in the way proposed on a year round basis, will meet the purposes of the Act ..." in that it "... goes to [the Park's] potential to meet the reasonably foreseeable needs of future generations."

166 An adverse effect might be avoided up to a point, and then further mitigated or remedied.
effects be avoided, as opposed merely to remedied or mitigated. In other cases, the tribunal has been more flexible, content to ensure that the manner and/or timing of a proposal serve to mitigate or remedy its potential adverse effects.

An example of the first kind of case is Shell Oil New Zealand Ltd v Wellington City Council. In this case, which will be further discussed below, the Tribunal found that a proposed new service station would have adverse effects which were not minor. Although it was not actually required to consider section 5, the Tribunal did so and concluded that “[i]f adverse effects are to be avoided then the short answer is that the service station should not be placed upon that site.” There was no suggestion that, if the adverse effects could be mitigated or remedied, then section 5 would be satisfied.

Hanton v Auckland City Council is also about a proposal to establish a service station. In this case the necessary consents had been granted by the City Council, subject to conditions. The appellants argued that the consents should have been refused as the service station would be a serious detraction from the visual appearance of an open green-belt area, would compromise the ... walkway and natural habitat, would be a continuing disturbance for residents ..., would create risk of ... pollution, would cause detrimental effects on traffic flow and safety, ... and increasing hazard to young people attracted to convenience goods.

The Tribunal rejected these arguments, finding that

if established and operated in accordance with the conditions imposed by the [Council], the service station would ... enable people and the community to provide for their economic well-being in the refuelling of their vehicles without compromising the values expressed in paras (a) to (c) of s 5(2). We consider that the proposal, established and carried on in that way, would avoid, remedy, or mitigate any adverse effects of the activity on the environment.” (Emphasis added).

The details of the proposal and the content of the conditions attached to the consents are summarised in the headnote to the case. Thus, the entire service station complex “... was planned to occupy about 3000 m² of the 1.6250 ha site, with the remainder of the site to be planted in trees so that it appeared to integrate with an adjoining reserve ...,“ and was “... designed for one-way traffic flow ..., [with] signs designed to discourage right turns across

167 Shell Oil (1992) 2 NZRMA 80
168 Shell Oil ibid 85.
170 These arguments are set out Hanton ibid 305.
171 Hanton supra n 169, 306.
172 The details and conditions are described at Hanton ibid 289.
southbound traffic lanes.” Also, a noise level condition had been imposed which would “... effectively prevent the operation of the automatic car wash after 9 pm.” This is a case which seems to have placed emphasis on the words “... in a way, or at a rate ...” in section 5(2). 173

The use of the word “environment” in paragraph (c) has caused some debate. This word is defined in section 2 of the Act as including ecosystems (which are themselves said to include people and communities), and all natural and physical resources, and amenity values, and “[t]he social, economic, aesthetic, and cultural conditions which affect ... or which are affected by [ecosystems, resources, and amenity values].” Because of this definition, it has been argued that: 174

section 5 creates an obligation to avoid remedy or mitigate adverse effects on people and communities, and on social and economic conditions. The context makes it clear that not just people’s health, safety and aesthetic preferences but also their economic well-being is to be protected from adverse effects. That conflicts with the general thrust of the objectives of the rest of section 5 and indeed Part II of the Act. It also ... support[s] an interpretation of the character of the Act as being primarily a discretionary balancing statute like its predecessors rather than a statute intended to create “environmental bottom line” constraints within which development is free to proceed.

The fact that social, economic, and cultural concerns are relevant under paragraph (c) makes for two difficulties. The first arises when one considers the implications for section 5 as a whole, of accepting that these matters are relevant both under paragraph (c) and in the first part of section 5(2). As is argued above, this tends to suggest that section 5 sets up a balancing regime, rather than one involving “environmental bottom lines.” In the cases social, economic, and cultural concerns have been addressed at both points of section 5(2). Only one of the following four such cases however involves discretionary balancing; and even then this is not overt.

As earlier noted, in Shell Oil New Zealand Ltd v Wellington City Council applications for resource consents to establish a service station had been refused, at first instance, by the council. 175 The Tribunal held that the application fell for determination under section 105, and

173 These words are not expressly referred to, but, it is submitted, could have been appropriately employed.
174 Salmon G “Notes on Some Emerging Issues in Resource Management” a paper delivered at Practice Makes Perfect, the second annual conference of the Resource Management Law Association (1994). And see also J McLean “New Zealand’s Resource Management Act 1991: Process with Purpose?” (1992) 7 OLR 538, 546-7, who notes the wideness of the definition of “environment,” and its implications for s 5(2)(c): “[a]dverse effects on the social, economic and cultural dimensions of people’s lives must also be avoided, mitigated or remedied. On that reading the Act would tolerate a general deterioration of air and water quality if that were all that we could economically sustain. 38 If that is so then the Act hardly has the aspirational quality which it has been attributed to it.” McLean’s footnote 38 reads “[t]hat is unless we are prepared to take a robust view of s 2 and say that the context requires another reading.”
then that it had failed to overcome that section’s prohibitions. The Tribunal was therefore not required to consider section 5 at all, but did so on the ground that “... great weight must be accorded a section which sets forth the base philosophy of the whole Act.” Having found that the establishment of the service station would have several adverse effects on its surrounding community (including visual impact, and reduced comfort for drivers and public safety), the Tribunal said: “[i]f adverse effects are to be avoided then the short answer is that the service station should not be placed upon that site.” Though this statement is uncompromising, the Tribunal’s earlier description and assessment of the argued effects of the proposal seems to involve an implicit weighing up process.

First the Tribunal found that the proposal would have a (sometimes major) visual impact on some residents but that, “... for commercial profitability, the service station will be ideally located.” Though it was considered that the station would attract motorists, the Tribunal found there to be “... no need for a service station ... upon the subject site, motorists in [its] catchment ... being already adequately catered for in respect of fuel.” It was suggested that the “... reduce[d] margin of comfort for drivers ..” and “... increased potential for conflict ...” which the proposal would bring would be warranted in the public interest “[i]f there was a proven need ... ” for the station. No such need was found, especially since, in the Tribunal’s view, locating the station “... close to a busy intersection will [not] add to public safety.” Having thus effectively weighed up the pros and cons of the proposal, the Tribunal moved to consider section 105. No explicit balancing occurred under this section, or under section 5 when it was addressed, but the Tribunal’s earlier discussion nevertheless conveys the impression that this was the process in fact used to determine the issue. In the end, the appeal failed and the consent was refused.

*Te Aroha Air Quality Protection Appeal Group v Wellington Regional Council (No 2)* is an interesting case which concerned an appeal against the granting of consents required to

175 *Shell Oil* supra n 167.
176 The reasoning in respect of s 105 is set out in *Shell Oil* ibid 84-85.
177 *Shell Oil* supra n 167, 86.
178 The Tribunal found that “... the proposed service station will have a visual impact upon those residents ... who can see the site, that impact lessening with distance. For the closest residents that impact will be major. The service station is designed with no thought for residential amenities, being red and yellow with a brightly-lit forecourt designed to attract motorists.” The reduced comfort to drivers would be “... caused by the reduced length of the deceleration lane resulting from the service station location.” The risk to the safety of pedestrians, particularly children, lay in establishing “... such an attractor upon this site close to a busy intersection ...” *Shell Oil* ibid 82-83.
179 *Shell Oil* supra n 167, 85.
180 *Shell Oil* ibid, 82.
181 *Shell Oil* idem.
182 *Shell Oil* supra n 167, 83.
183 *Shell Oil* idem.
establish a beef by-products rendering plant adjacent to a Te Aroha export beef plant. The Tribunal found there to be a plausible risk (albeit of low probability) that as a result of management error, malfunction or mechanical failure, objectionable odours from the proposed rendering plant would reach other properties. We also find that if they did, they would adversely affect people and their social, economic, aesthetic and cultural conditions, and the amenity values that contribute to people's appreciation of the pleasantness of the area.

Thus, it concluded that, having regard to the statutory purpose of sustainable management, and the direction to have regard to the actual and potential effects of allowing the activity (s 104(1)), when the term "effects" is defined by s 3 so as to include those of low probability but high potential impact, the intention of the Act would not be fulfilled by granting the consents sought.

There is no balancing of interests in this case, implicit or otherwise. The risk that there could be an escape of odour was unacceptable; even though the plant would presumably have brought employment and featured a relatively sophisticated design, aimed at eliminating odour. The Tribunal held that "[o]ccupiers, business people and their patrons should be free of rendering plant odour at all times without condition or qualification." This lack of discretionary balancing, and the fact that even a risk of adverse effects was sufficient to disqualify, tend to distinguish the reasoning in this case from the kind of reasoning which would have occurred under the Town and Country Planning Act 1977. In the words of the Tribunal, while "... occasional noxiousness from plant failure or other random or unforeseen cause ..." might have been acceptable under the Town and Country Planning Act 1977, under the Resource Management Act "... there is no place for accepting objectionable odours even occasionally and when resulting from malfunctions or breakdowns."

This finding, which has created a point of interest in the case, was based on the different purposes of the two Acts, and on section 3 of the 1991 Act. The purpose of the 1977 Act was described as one "... which gave value to the convenience and welfare of people and to amenities in the context of direction and control of the development of the district." By comparison the purpose of the 1991 Act,

184 Te Aroha (1993) 2 NZRMA 574.
185 Te Aroha ibid 583-584.
186 Te Aroha supra n 184, 584.
187 The design of the plant is described at Te Aroha ibid 577.
188 Te Aroha supra n 184, 583.
189 Te Aroha ibid 582.
190 Te Aroha idem.
though still giving value to use and development of natural and physical resources for people and communities to provide for their wellbeing, also expressly gives value to potential to meet future needs, to life-supporting capacity, and to avoiding or mitigating adverse effects.

Section 3 of the 1991 Act defines “effect” for the purposes of the Act, and expressly includes in paragraph (f) “[a]ny potential effect of low probability which has a high potential impact.” Although there was but a risk that odour would escape, the Tribunal found that “... if an escape ... reached the motor camp when visitors were present, or the racecourse during a race meeting or reception, or the cemetery during a burial service, it would have a high potential impact.”

This point about the Resource Management Act’s definition of “effect” is one which, it is submitted, could also have been made (but was not) in AFFCO New Zealand Ltd v Far North District Council. In this case, AFFCO appealed against the granting of consents enabling Northland Abattoir Ltd to establish an abattoir at Tautoro, near Kaikohe. AFFCO was itself the owner of an existing meatworks at Moerewa, some 30 kilometres from Tautoro. The Tribunal held that it was entitled to have regard to the effects that the trade competition between AFFCO’s Moerewa works and Northern Abattoir’s proposed works would have on the community of Moerewa. It thus considered AFFCO’s arguments that social and economic conditions of people and communities would be adversely affected by loss of employment at the Moerewa works as a result of livestock being killed at the applicant’s abattoir instead; ... that the abattoir would threaten [AFFCO’s plant,] the only export sheep and lamb processing works in Northland, which would prejudice the interests of sheep farmers in the district ...

The arguments that AFFCO would have to terminate employment contracts, and that its works may be threatened, were found to depend upon whether or not, and to what extent, the new works undertook killing which would otherwise have gone to AFFCO. Instead of addressing this potential diversion as a risk (either of high or low probability under section 3 of the 1991 Act) the appellant directed most of its argument towards predicting the extent to which diversion would occur. Had the diversion been put in terms of a risk, the Tribunal might have been less concerned about its inability to be certain that such would even occur. Instead, the

191 Te Aroha supra n 184, 582.
192 Te Aroha ibid 584.
194 Though considering the effects of trade competition on trade competitors is prohibited by s 104(8) of the 1991 Act.
195 The arguments are set out in AFFCO supra n 193, 236. A third argument (“... that the proposal would unnecessarily duplicate existing killing and processing resources at the appellant’s Moerewa plant”) was rejected on the grounds that it related to the effects of trade competition on trade competitors (see n 194 above).
Tribunal proceeded to find that it had no "... sound basis for a judicial finding of the extent of the diversion" which could, if it occurred, be due to a number of factors including relative prices and service and personal influences. The Tribunal held:\[^{196}\]

> [a]ny finding that we might make would be little better than speculation, and an unworthy basis for deciding these appeals. If the applicant finally ... establishes its abattoir, the resulting competition of animal killing facilities in mid-Northland is likely to advance in a general way the economic wellbeing of those involved in supplying livestock and in dealing in meat, and may also advance the economic wellbeing of the mid-Northland community.

When the Tribunal came to consider section 5, it mentioned these social and economic advantages and disadvantages only briefly, and then apparently not in the context of paragraph (c). The Tribunal said: "... we accept that the proposed abattoir would enable people and communities to provide for the social, economic and cultural well-being (but at a cost to the social and economic well-being of other people and communities)."\[^{198}\] If there was any balancing it would seem to have occurred within the confines of the first part of section 5(2).

In *Cook Island Community Centre Society (HB) Inc v Hastings District Council*, the issue was whether or not the Tribunal’s finding that the establishment of a funeral parlour on a site opposite Flaxmere’s Cook Island Community Centre would, "... if a body is present within, ... put an end to much of the centre activities because of the reverence the Cook Islanders will accord the dead person” was an “effect” on the “environment.”\[^{199}\]

The Tribunal had no difficulty holding that this was an “effect” within the meaning of the Act, and little difficulty holding that it was an “effect” on the “environment.” Noting that, under section 2, “environment” includes “ecosystems” which in turn includes people and communities, the Tribunal held that “ecosystems” "... is intended to encompass activities such as those carried on by the Cook Island communities."\[^{200}\] Since “... the definition of environment then goes on ... to include within the broader ecosystem definition the social, economic, aesthetic and cultural conditions which affect [ecosystems, resources, and amenity values] ...,” the Tribunal held that the effect of the funeral parlour on the Cook Island community was relevant under section 5(2)(c).\[^{201}\] This being the case, the proposal as a whole was found not to “... fit within the principles of s 5.”\[^{202}\] There was no question asked as to

\[^{196}\] AFFCO ibid 238.
\[^{197}\] AFFCO idem.
\[^{198}\] AFFCO supra n 193, 239.
\[^{199}\] Cook Island [1994] NZRMA 375; this effect was described at 379, and the issue put at 380.
\[^{200}\] Cook Island ibid 380.
\[^{201}\] Cook Island idem.
\[^{202}\] Cook Island supra n 199, 381.
whether the disadvantages involved in establishing the funeral parlour on the site in question might be outweighed by the advantages, which were undisputed, offered by “... provision of funeral services by persons culturally sensitive to Maori and Island requirements ...”

The second difficulty arising from the fact that social, economic, and cultural concerns are relevant under paragraph (c) arises when one considers that developers could use section 5(2)(c) to promote, rather than limit, activity. They could argue that since there is a duty to avoid or mitigate adverse effects on economic conditions which affect people and communities, then activities which generate employment should proceed. Of course this argument could also (and, I would argue, probably should) be made under the first part of section 5(2). The point is that, if it is made under paragraph (c), then this paragraph ceases to comprise a limit or constraint on activities.

The current Minister for the Environment attempted to answer this difficulty in a keynote address he gave to the Resource Management Law Association in 1994. The Minister’s argument was based around an example:

[s]uppose I am involved in the unsustainable harvest of a native crop ..., and suppose I make an application to continue that harvest, suppose, too, that from the proceeds of that unsustainable harvest I have built a community of people dependent on it.

I present my application only to be told that I must avoid, remedy or mitigate the adverse effects of my harvest on the environment .... My lawyer jumps to his feet and points out that in his interpretation of the definition of the word environment, there are social and economic conditions which affect people and communities ... and that the Act therefore requires that I should mitigate any adverse effect on my adverse unsustainable harvest.

But clearly, that’s a circular nonsense. Quite aside from the fact that I am also bound to sustain the potential needs of future generations and safeguard the life supporting capacity of eco-systems, it cannot seriously be argued that Parliament’s intention was to safeguard the very unsustainable activities we are supposed to avoid, remedy or mitigate!

Clearly, if a proposed activity breached either or both of paragraphs (a) and (b) it would not be able to proceed, regardless of its compliance or otherwise with paragraph (c). The Minister’s speech does not, however, offer any real constructive assistance to decision-makers. The section 2 interpretation of “environment” makes it very clear that the social and economic concerns of people and communities are relevant. There is no reason why such matters should not be included in a consideration of paragraph (c). In the Minister’s example the problem is

203 These advantages are described, *Cook Island* ibid 378.
204 Upton supra n 10.
resolved by common sense: "... it cannot seriously be argued that Parliament’s intention was to safeguard the very unsustainable activities we are supposed to avoid, remedy or mitigate!" Nowhere is it explained how decision-makers are expected to find (or otherwise know) that an activity is unsustainable other than by applying section 5. For the purposes of the Act, the sustainability or otherwise of an activity must be determined through the application of section 5(2) – if a proposal meets its requirements, how is a decision-maker expected to know that it is somehow otherwise unsustainable and that it was therefore not Parliament’s intention that it be safeguarded?

In fact section 5(2)(c) has not, to my knowledge, been used by developers to promote resource exploitation. It seems that the likely cause of this is that social, economic, and cultural wellbeing are directly relevant under the first part of section 5(2); there is simply no need to resort to paragraph (c).

The meaning of the word “effects” in section 5(2)(c) is wide, as was illustrated by Te Aroha Air Quality Protection Appeal Group v Wellington Regional Council (No 2).205 Referring to section 3 of the Act, “effects” in the context of paragraph (c) includes “... temporary or permanent ...; past, present, or future ...; and ... cumulative ...” effects, and “[a]ny potential effect of high probability [or a]ny potential effect of low probability which has a high potential impact.”206

d. Concluding Remarks on Paragraphs (a) - (c)
In summary, the approach to paragraphs (a) - (c) has been broad and conceptual. Rather than enquiring, in a given case, as to specific scientific details as to the actual capacity or potential of resources, or the anticipated needs of future generations, the Tribunal has adopted general principles which it applies in a sometimes superficial way. Since the Tribunal is in fact well equipped to assess fine scientific detail, it is assumed that its approach is one of choice.207

Clearly paragraphs (a) - (c) are not intended, and do not operate, to halt development. In some cases, they have even been found to promote development.208 Though no specific examples have been cited which prove this point, it is submitted that some discretionary balancing of competing interests may be required, especially under paragraphs (a) and (b). It is emphasised that this balancing should only occur within the confines of each of section 5(2)’s

205 See nn 184 and 192 above and accompanying text.
206 Section 3 also lists “positive” effects, but these are excluded from s 5(2)(c) as it refers only to “... adverse effects ...”.
207 Again, the Wanganui River Minimum Flows case (supra n 163) is offered as an example of the Tribunal dealing with a mass of scientific detail.
208 See, for example, Wellington Rugby Football Union supra n 139.
requirements, and not as between the two limbs of the subsection. This point is submitted to be the source of the main difference between decision-making under the Water and Soil Conservation Act 1967, and decision-making under section 5 of the Resource Management Act. As was earlier noted, while under the 1967 Act there was no kind or degree of advantage or disadvantage in itself determinative of an application for a water right, under the 1991 Act there will be uncompromisable limits.

As well as affecting the emphasis of decision-making in respect of the management and allocation of water, section 5 of the Resource Management Act may also enable more consistent decision-making.

2. More Consistent Decision-Making

As a general rule, predictability and certainty are desirable commodities in resource management and development – especially from the perspective of developers. Potential resource developers, it is submitted, should be able to predict whether or not a proposal will be consistent with and therefore able to proceed under the Resource Management Act with greater certainty than they could under the Water and Soil Conservation Act 1967. Their assessment would be based around the likelihood that a proposal would, or would not, exceed the limits imposed by section 5(2)(a) - (c). Likewise, more certainty may be available to conservationists, who would know that successful environmental protection would not depend on a discretionary assessment of the value of a development proposal as measured against the value of the environmental considerations involved. On the balancing approach used under the 1967 Act a significant environmental concern could be defeated by high development values – at the same time as perhaps lesser environmental concerns won through simply because they were being measured against less beneficial proposals.

It would surely be better to know, in advance, that environmental effects of a particular kind (that is, those which would result in a breach of section 5) will not be tolerated in any case; and that developments of a particular kind (those without effects of the kind listed in section 5) are likely to win the approval of decision-makers. The kind of inconsistency which might be avoided through the adoption of the subordinating approach can be illustrated by a comparison of two cases decided under the previous legislation.

The first case, Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Water Board, concerned applications to dam, divert water from, and discharge water
into the Rangitaiki and Wheao Rivers for the purpose of establishing an hydroelectric generation station. The economic benefits of the proposal were significant and since the station was to be relatively small, the capital input would also be small. Around 56,000 consumers would be serviced by the electricity produced.

At the same time, however, significant ecological and recreational impacts were anticipated. Both rivers were used by anglers, the Rangitaiki being described as "... relatively inaccessible as a fishery but ... contain[ing] some sections that are fished at present." The river was thought to be "... not important as a fishery at the present time ..." although it was conceded that it "... could become more important in the future ..." The upper Wheao, on the other hand, was "... important to the fishery in that it contain[ed] the major tributaries; [was] a source of food supply to the lower fishery and [was] a nursery for young rainbow trout which eventually supplement the downstream stock." The Appeal Board commented that "... the fishing offered by the Wheao is of a specialist kind, viz, dry-fly fishing ..., and the lengths of water available for that type of fishing are very limited indeed." Additionally, the Wheao catchment was home to four species of native waterfowl – the grey duck, the black teal, the blue duck (which "... although not classed as rare in New Zealand, is on the endangered list") and the brown teal (described as "... now uncommon in New Zealand and is considered in the endangered category ..."). Experts denoted the association of the four bird species in one short stretch of river as "unique," and argued that the "... small remnant stock of brown teal ... is important to the survival of the species in the broader context of New Zealand as it exists today."

The Appeal Board described the anticipated effects of the proposal in the following terms:

the applicant’s proposals would affect the volume and velocity of the waters in the various streams affected thereby. One of the effects of the reduction in the volume of the Rangitaiki between the weir and the confluence with the Wheao, would be to destroy that stretch of the river as a fishery. One of the most dramatic consequences of the alteration to the volume and velocity of the Wheao ... would be the channel widening and deepening and the reduction in channel slope which would occur as the river adapted to the new flow regime. Experts

209 Royal Forest and Bird (1978) 6 NZTPA 361 (Town and Country Planning Appeal Board).
210 Royal Forest and Bird ibid 364. Note that the fishery was not widely used; Mr Broker, a member of the Appeal Board, commented (at 367) that the fisheries "... were the prerogative of a somewhat elite class of discerning and well-informed sportsmen, including tourists from overseas who could afford to patronise such exclusive facilities."
211 Royal Forest and Bird supra n 209, 364.
212 Royal Forest and Bird idem.
213 Royal Forest and Bird supra n 209, 364.
214 Royal Forest and Bird ibid 365.
215 Royal Forest and Bird idem.
216 Royal Forest and Bird supra n 209, 365-366.
estimate that if the river is left to do the work naturally, it would take about 12 twelve years for the channel to stabilise. [If certain works were done by the applicant], it would take about five years for the river channel to stabilise. ... the period of instability would be a traumatic time for the river as a fishery and for the wildlife which at present inhabit the river valley. During this period ... the Wheao as a fishery would be completely disrupted but in due course fishing conditions would return. What the quality of that future fishery would be is difficult to predict. ... Certainly the fishery would be nothing like the excellent quality which exists at present. ... For the purposes of this decision we accept that an excellent dry-fly stream would be lost forever and replaced by a poor quality fishing stream.

It is certain that the present association of four different New Zealand ducks in the one locality would not survive the transitional period. Expert opinion was expressed that the habitat of the grey duck, the blue duck and the brown teal would be destroyed. The value of the Wheao as a wildlife habitat would be disrupted during the transitional period and thereafter a habitat of lower ecological value and interest would persist.

Because the case revealed irreconcilable competing demands, it could only be resolved through the making of a value judgment. Each member of the Appeal Board chose to offer their own reasons, but each judged that the applications should be granted. In favour of the application, according to the members, was the value of hydrological electricity generation, the potential monetary savings, the number of beneficiaries, the lack both of impact on productive land and of competing economic users and the suitability of the location.\textsuperscript{217} Minimising the ecological and recreational losses, the members argued that the fisheries were exotic and somewhat exclusive, that no bird would be threatened with extinction by the proposal, and that while the close physical association of the four bird species was of scientific interest, it was not an issue of high concern to the community.\textsuperscript{218} One member of the Board suggested that "... other streams and rivers may be discovered or improved, to fill what loss there can be from the Wheao"\textsuperscript{219} while the Chairman described the ecological losses as highlighting "... the challenge to man's skill and ingenuity that he would assist rare species to survive in a modified

\textsuperscript{217} The value of hydroelectric generation was referred to by both the Chairman (Judge SM Turner, who said, \textit{Royal Forest and Bird} ibid 366, "[t] method of electricity generation proposed ... does not involve the consumption of a resource .... Furthermore [it] ... involves little or no pollution") and Mr Martin (who referred, ibid 369, to the nation's needs to conserve fossil fuels and avoid the need to resort to nuclear energy). The potential monetary savings were cited by all the members, but most explicitly by Mr Tutt (ibid 368). The number of beneficiaries was clearly in the minds of all members, but a direct comparison with the "... very few people ..." who benefited from the fishery was made by the Chairman (ibid 366). The lack of impact on productive land was emphasised by Mr Tutt and Mr Martin (ibid 368), and the lack of impact on competing economic users by Mr Martin (ibid 368). The suitability of the location was cited by the Chairman (ibid 366).

\textsuperscript{218} The point that the fishery was an exotic one was made by the Chairman (\textit{Royal Forest and Bird} supra n 209, 366). All members, but Mr Martin, commented upon the exclusive nature of the fishery (ibid 366-368). That no bird would be threatened with extinction was emphasised by the Chairman (ibid 366) and Mr Broker (ibid 367). Mr Broker thought that the association of four birds was of scientific, but not community value (ibid 367).

\textsuperscript{219} This comment was made by Mr Tutt (\textit{Royal Forest and Bird} ibid 368) in spite of the expert evidence that the close association of the four bird species was "unique."
In *Auckland Acclimatisation Society v Waikato Valley Authority (No 2)* the applicants sought to divert and discharge water so as to drain some 172 hectares of the Whangamarino swamp. The principal advantage of the proposal was that "... certain land at present unproductive from the owner's point of view ... would be converted into productive farm land." The principal disadvantage was ecological – the land would "... cease to be part of the Whangamarino Swamp, an area of some 7,700 ha, which is an important wetland, with a consequent diminution in ecological values." The Planning Tribunal decided that the applications should not be granted, reasoning that

> [t]he evidence of the ecological importance of the swamp in national terms and as to the rare birds, fish and plant found there persuaded us that the loss to ecological values ... would be more significant than the benefits which follow from the exercise of the rights

and that

> although the areas affected by these applications are small relative to the area of swamp as a whole, and although what the applicants propose will not cause any substantial harm to the ecosystem as a whole, nor cause any complete loss of any rare or endangered species, there would be a qualitative loss of substantially greater significance than the quantitative loss.

The Tribunal considered it important both that "[o]n a national basis the areas of wetland are now relatively small and the areas of existing farmland are very large" and that the proposal could allow a change in the character of the land affected which would to all intents and purposes be irreversible; its ecological value would be gone. Once drained it would not be impossible to turn the land back to wetland at some future date, but its ecological value could not be restored.

When compared from an ecological aspect these two cases illustrate the point that a balancing approach to resource management can produce inconsistent results. In the one case, two rivers were to be significantly altered, and a unique association of four waterfowl species (all

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220 *Royal Forest and Bird* supra n 209, 366.
222 *Auckland Acclimatisation Society* ibid 169.
223 *Auckland Acclimatisation Society* idem.
224 *Auckland Acclimatisation Society* supra n 221, 170.
225 *Auckland Acclimatisation Society* idem.
226 *Auckland Acclimatisation Society* supra n 221, 170-171.
indigenous, two endangered) would be lost forever. In the second case a portion of wetland was to go and while the land could potentially be re-swamped, its significant ecological value would be lost (this despite the findings that no substantial harm would be suffered by the ecosystem as a whole and that no species would be rendered extinct). The benefits offered by each proposal are what made the difference to the decision-makers. Hence, the decision as to whether or not particular ecological (or, presumably, other) concerns could displace a development proposal under the 1967 Act depended less on their own value than their value relative to the economic and other advantages offered by the proposal. The potential was clearly there for ecosystems of high ecological value to be sacrificed to proposals offering high and widespread economic gain at the same time as other ecosystems with inherently less ecological value survived simply because their exploitation did not offer as much benefit to people and communities. From an ecological perspective, this seems incongruous.

Under the Resource Management Act as interpreted, all ecosystems and other environmental systems and resources of high ecological and future value will be protected in all cases. A proposal with significant current economic, social or cultural benefits will not proceed where this would result in a failure to safeguard the life-supporting capacity of air, water, soil or ecosystems, or a failure to sustain the potential of resources to meet future human needs. All developers are expected to ensure that their activities progress in a way, or at a rate, which minimises their adverse environmental impact, regardless of the immediate economic, social or cultural benefit offered.

3. **Concluding Remarks**

The main change in decision- and rule-making which section 5 of the Resource Management Act imports into the management and allocation of land (which previously occurred mainly under the Town and Country Planning Act 1977) already existed in respect of the management and allocation of water. This change, from a focus on the nature of activities to a focus on the effects of activities, was confirmed in respect of land by the High Court in *Batchelor v Tauranga District Council*.

The [Resource Management] Act imposes a significantly different

227 In fact, the impact of the proposed hydroelectric dam on the rivers themselves, as opposed to the fishery and wildlife values which they offered, does not seem to have been considered by the Appeal Board. Consider the Chairman’s comment (*Royal Forest and Bird* supra n 209, 366) that hydroelectric generation “... does not involve the consumption of a resource, it utilises a constantly renewing energy source ...” – which comment may be true of the water flowing in the rivers, but not of the rivers themselves. Note also that I did not include the fisheries loss here for the reason that the current context is ecological; since the fisheries were introduced and exotic, their value would more correctly be described as recreational or amenity.

228 “High” in terms of their contributions to the concerns listed in ss 5(2)(a)-(c), 6, 7 and 8.

229 *Batchelor* (1992) 2 NZRMA 137, 139.
regime for the regulation of land use by territorial authorities. Commentators have said that the Act moves away from the concept of direction and control of development, inherent in the 1977 Act, towards a more permissive system of management of resources, focused on control of the adverse effects of land use on the environment ....

This focus on effects is not new to the management and allocation of water, it being the essence of the test applied under *Keam v Minister of Works and Development* 230. Of course under this test, the advantages and disadvantages (or positive and adverse effects) were simply weighed up, and activities which were more advantageous than disadvantageous could proceed. Under the 1991 Act, some disadvantages (or adverse effects) will not be tolerated, despite the advantages of a proposal to the economic, social or cultural wellbeing of people and communities. These disadvantages are those which would fail to meet the requirements of section 5(2)(a), (b) or (c).

Of course the point that certain disadvantages will not be tolerated under the 1991 Act regardless of the advantages of a proposal matters little if the same disadvantages would, in fact, not have been tolerated under the *Water and Soil Conservation Act*. It seems at least possible that where a proposed activity would have had the disadvantage of damaging a resource to the extent that its use by future human generations was precluded, or of damaging water, air, soil or ecosystems to the extent that their life-supporting capacity was negated, such proposal would not have been allowed to proceed even under the 1967 Act. This would, however, depend in the final analysis on the potential advantages of the proposal. Such damage was legitimate where it was outweighed by the benefits of the proposed activity. Thus in the Rangitaiki and Wheao Rivers case the fisheries resource and the unique association of the four indigenous bird species were sacrificed to the advantage of power supply to some 56,000 consumers, whereas in the Whangamarino Swamp case the advantage to the landowner was insufficient to outweigh the loss of part of the wetland. 231 Whether or not the two cases would be decided in the same way had they fallen for determination under the 1991 Act is impossible to predict. It seems certain however, that the emphasis of the decision would be different in that there would be no final value-judgment weighing up advantages and disadvantages. If the environmental effects of the proposals in the two cases were found to breach section 5(2)(a)-(c), then the benefit offered to the landowner or the 56,000 consumers could not effectively authorise the activities.

230 *Keam* supra n 113.
231 The Rangitaiki and Wheao Rivers case is *Royal Forest and Bird* supra n 209, and the Whangamarino Swamp case is *Auckland Acclimatisation Society* supra n 221.
Chapter 9

Conclusion

Once the signing of the Treaty of Waitangi (and Hobson’s subsequent proclamations) had brought British sovereignty and law to New Zealand, the legislature here frequently exercised its plenary powers to modify and supplement the common law which formed the legal basis for the management and allocation of natural water until the Water and Soil Conservation Act was enacted in 1967. The common law basis, and the statutory modifications and supplementations which were made to it, are detailed in Chapters 2 and 3 above.

In the early days, the statutory supplementations and modifications were often piecemeal and overlapping, and were usually addressed specifically at a defined use of, or problem with, natural water. There was little to no coordination between the various public bodies which had an input into the management and allocation of water, virtually no recognition was made of the needs for future planning and for integrated management. Only the health aspect of the public interest in the protection of water was provided for. As time passed better coordination between the bodies involved in managing water was achieved; more provision was made for planning, for integrated management, and for aspects of protection not directly associated with public health; and the law generally became less piecemeal as fewer but more comprehensive statutes were enacted.

When the Resource Management Act was enacted in 1991, it was greeted with excitement. The Act is the product of a massive law reform exercise, the like of which has probably never been seen before in New Zealand. The process, which is described in detail in Chapter 4 above, was initiated in 1979 when the National Development Act was enacted as part of the National government’s “Think Big” policy. Begun in earnest in 1987 (when the fourth Labour government was returned to power), the Resource Management Law Reform process generated at least 32 working papers published by the Ministry for the Environment, numerous other reports published by consultants, and extensive public participation. The Resource Management Bill had its third reading on 4 July, was assented to on 22 July, and came into force on 1 October 1991. The extent of the reform process, the size and ambit of the Act,1 its commitment to the principles of integrated and sustainable resource management, the language

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1 "The Resource Management Bill is probably the largest piece of legislation ever to come before the House as a single measure. It repeals more than 75 laws and amends more than 150 other laws. It brings together more than 15 measures in an integrated process that deals with the management of our natural and physical or built resources” per Hon Simon Upton (Minister for the Environment) on the occasion of the Bill’s third reading. (1991) New Zealand Parliamentary Debates 3018 (4 July 1991).
it uses,\textsuperscript{2} and comments that it “... provides a new process for the management of ... water ..., pollution control, ... and the coast”\textsuperscript{3} all fuelled the sense of anticipation which accompanied the Bill’s passage into law.

This thesis has sought to address the extent to which the Resource Management Act did bring change by measuring the Act against its historical background and context. This process of comparison began with Chapter 5’s description of the themes and mechanisms of the Act. These descriptions revealed that, in general, the Act employs processes which were also used under its main predecessor, the Water and Soil Conservation Act 1967. Thus, the allocation regime first imposes restrictions and prohibitions on the use of water (as did section 21 of the 1967 Act) and then provides for the issuing of resource consents enabling activities which would otherwise be prohibited (again, this was previously done under section 21 of the 1967 Act). Under both the 1967 and 1991 Acts, the tasks of planning for and allocating water, fall mainly to regional councils. Conservation is available under a water conservation regime, which parallels that introduced to the 1967 Act in 1984. Minimum and maximum flows for water can be set, and quality classifications made, under the 1991 Act just as they could under its predecessor.

There are, however, differences between the old and new Acts. These differences (which include, for example, the re-introduction of central government planning for water, the inclusion of activities which used to fall under the Waters Pollution Act 1953, and the extension of the conservation mechanisms to cover wetlands) were found, in Chapter 6 above, to result in the continuation of four trends which were first discerned in the water law up to and including the Water and Soil Conservation Act. Thus, the Resource Management Act has been found to be consistent with its background and context in that it continues the basic themes of the history and development of New Zealand’s water law.

In that it furthers the four trends, the 1991 Act represents an improvement on its predecessors. The Act has a wider coverage than the Water and Soil Conservation Act; this effectively makes for a more coordinated planning and management regime. Under the provisions of the 1991 Act, there is more formality and better coordination of management and planning. Economy, society and environment are better integrated by the new Act than they were by the old, and generally a more holistic approach to resource management is encouraged. Also perceived as a positive improvement in the law is the increased conservation consciousness of the water

\begin{footnotesize}
\begin{enumerate}
\item John Milligan ("The Resource Management Act – 9 Months On" [1992] \textit{NZLJ} 351, 352) notes the impact that the use of “new” (or different) language can create: “[l]awyers and the laity alike tend to think that when Parliament abandons an old formulation in favour of something new, some substantive alteration to the law [is] intended.”
\item This comment was made by the Hon Simon Upton supra n 1.
\end{enumerate}
\end{footnotesize}
management and allocation aspects of the 1991 Act. It is this last improvement which is pursued in Chapters 7 and 8 above. While Chapter 6 describes some of the ways in which the Act furthers the trend of increasing conservation consciousness, it leaves section 5 for Chapter 8. Section 5 is the Act’s purpose section; it sets out the purpose and definition of sustainable management. It is in section 5 that the main potential for change in the Resource Management Act is located.

Section 5 offers most to the trend of increasing conservation consciousness if it is interpreted in a way which ensures that development cannot proceed in a way or at a rate which would lead to a failure to sustain the potential of resources to meet the needs of future generations; or a failure to safeguard the life-supporting capacity of air, water, soil, or ecosystems; or a failure to avoid, remedy or mitigate the adverse effects which the development may or will bring to the environment. If, on the other hand, section 5 is interpreted and applied so as to let rule- and decision-makers simply balance up the advantages of a proposal against its disadvantages, then it will fail in this respect to improve the conservation consciousness of the 1991 Act as against its 1967 predecessor.

Chapter 7 makes the simple point that, if by adopting the first of these two potential interpretations of section 5, the conservation consciousness of the Resource Management Act can be improved, then this would allow the Act to better reflect general trends in environmental thinking. The Chapter serves to illustrate that environmental issues have, since the Water and Soil Conservation Act was enacted, continued to capture global attention. In general terms, concern for the natural environment has increased since the 1960s. If the Resource Management Act does in fact further the trend of increasing conservation consciousness, then such would not be out of step with events and thinking outside New Zealand. We would be in line with global trends.

The support for the two alternative interpretations for section 5 is reviewed in Chapter 8. The conclusion drawn is that the more conservation conscious interpretation is not only well supported, but is also the best (most sound) interpretation available. It is argued that this interpretation will lend a different emphasis to rule- and decision-making in respect of the management and allocation of water, and will lead to more ecologically consistent outcomes than were produced under the Water and Soil Conservation Act 1967.

The Resource Management Act will be four years old in October next. There is a dearth of authoritative decisions in respect of water. Whether or not the results anticipated from the
adoption of the more conservation conscious interpretation of section 5 are in fact realised is an issue only time can resolve. I should confess that it is my fervent hope that Sir Geoffrey Palmer was right when he asserted in 1992:\(^4\)

\[\text{[t]here is no doubt that the result [of the enactment of the Resource Management Act] will be a new legal baseline that is friendlier to the environment and offers some protection for those who are to come after us.}\]

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268