THE RESOURCE MANAGEMENT ACT 1991 "A BIOPHYSICAL BOTTOM LINE" VS "A MORE LIBERAL REGIME"; A DICHOTOMY?

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I. INTRODUCTION

"The Bill [Resource Management 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 affair. As such, the Bill provides a more liberal regime for developers. On the other hand activities will have to be compatible with hard environmental standards, and society will set those standards. [Section 5] sets out the biophysical bottom line."

Hon Simon Upton, Minister for the Environment[1]

The *Resource Management Act* 1991 (*"the Act"*) was enacted to provide a comprehensive and integrated system of resource management for New Zealand. The Hon Simon Upton had high hopes for the Act at the time of its introduction. Planning Tribunal Judge Treadwell,[2] after working with the Act for two years, did not share these hopes.[3]

"My conclusion, after working with the Act since it came into force, is that far from being a panacea for environmental ills, it is merely a cosmetic and semantic approach to the problem and has buried many real issues in a welter of words...."

Six years after its introduction, the Act remains in its infancy. Its ultimate success will be judged over a much longer time frame. However, patterns are beginning to emerge. Not in the setting of standards, policies, and plans since these remain formative, but in the resource consent process. The resource consent provisions of the Act had an immediate effect on new developments. This article examines these provisions, and analyses the case law to assess emerging patterns, and their likely direction. In particular, the article considers whether the courts are formulating a "biophysical bottom line" as the underlying foundation for the Act.

In conclusion, the article considers whether Simon Upton's apparently contradictory dual objectives of "a more liberal regime for developers" and "a biophysical bottom line" are achievable under the Act, or whether Judge Treadwell is correct that "it [the Act] is merely a cosmetic and semantic approach to the problem."

II RESOURCE CONSENT PROVISIONS

1. Introduction

The expressed purpose of the Act is "to promote the sustainable management of natural and physical resources",[4] which involves "managing resources in a way, or at a rate, which enables people and communities to

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1 Hon Simon Upton, in the third reading of the Resource Management Bill, Hansard (1991), at 3016.

2 The Planning Tribunal, pursuant to s6 of the *Resource Management Amendment Act* 1996, became the Environmental Court, and Planning Tribunal Judges became Environmental Judges.

3 Treadwell W J M, "Address to NZ Water and Wastes Association", (1993) Water and Wastes in NZ, November at 16.

4 Section 5(1).

provide for their social, economic, and cultural wellbeing and for their health and safety while", inter alia, "avoiding, remedying, or mitigating any adverse effects of activities on the environment."[5]

To achieve this purpose, procedures are necessary for assessing the effects of activities on the environment in order to ensure that those effects are avoided, remedied or mitigated. The processes of "resource consents"[6] and "assessment of effects on the environment" (AEE)[7] provide such a mechanism.

2. Resource Management Act 1991 Provisions

The Act classifies five types of "activities" in terms of the extent to which they are permitted within a regional or district plan.[8] The purpose of this classification is to ensure that the relative effects of each activity are reflected in the type of consent procedure required. "Permitted activities" are expressly allowed by a plan. "Controlled activities" are also expressly allowed by a plan, but the consent authority[9] has a discretionary power to attach conditions to the consent.[10] "Discretionary activities"[11] are specified in the plan and are not prohibited by the plan. "Non-complying activities" are not specified in the plan, but are not prohibited. "Prohibited activities" are expressly prohibited by the plan.

"Resource consents" are required for "controlled",[12] "discretionary" and "non-complying" activities.[13] No application can be made for a resource consent for a "prohibited" activity.[14] The only method of implementing a prohibited activity is for an applicant to apply for a change to the plan.[15]

The Act focuses on effects of activities, rather than the types of activities themselves. Therefore, the Act requires an AEE to gauge the effects of allowing an activity as mandatory for resource consents.[16] The Act specifies five types of resource consent; "land use consent", "subdivision consent", "coastal permit", "water permit", and "discharge permit".

For a controlled activity, reflecting its express allowance in the plan, and also in the case of a subdivision consent, the consent authority "shall" grant the consent, subject only to the scope of conditions contained in the relevant plan.[17] Controlled activities also have a reduced requirement for environmental assessment. The requirement is to produce "such assessment

5 Section 5(2)(c).
6 Sections 2(1) and 87.
7 Fourth Schedule; Assessment of Effects on the Environment.
8 Sections 63 to 71, and 72 to 77 deal with the preparation of and changes to regional and district plans respectively.
9 Section 2(1) defines "Consent Authority" as "means the Minister of Conservation, a regional council, or a territorial authority, whose permission is required to carry out an activity for which a resource consent is required under this Act."
10 Section 105(1)(a), as amended by s55 of the *Resource Management Amendment Act* 1993, provides that consent authorities may grant consents subject to certain conditions. However, in relation to controlled activities, the consent authority is restricted to imposing conditions in accordance with the criteria specified in the plan.
11 Section 2(10) of the *Resource Management Amendment Act* 1993 provides for two types of "discretionary activity", amending s2 of the principal Act; those where the consent authority does not limit the matters over which it will exercise control, and those where the consent authority does limit its discretion to particular matters. Where the consent authority has restricted its discretion, conditions may only be imposed in respect of those matters (s105(1)(b)).
12 Section 88(5).
13 Section 88(4).
14 Section 105(2)(c).
15 Clause 22 of the First Schedule.
16 Section 2(1) defines "Resource Consent" as "has the meaning set out in section 87; and includes all conditions to which the consent is subject." The requirement for an AEE is specified in s87.
17 Section 105(1)(a), as amended by s55 of the *Resource Management Amendment Act* 1993.

as may be specified in the plan of any actual or potential effects that the activity may have on the environment and the ways in which those adverse effects may be mitigated."[18] For all other resource consents, the application must include an "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."[19]

For a discretionary activity, the *Resource Management Amendment Act* 1993 (*"the Amendment Act"*) amended s105 to provide that the consent authority may restrict its discretion, and where this is done it can only impose conditions in respect of those matters. There is also a provision limiting the scope of environmental assessment as is the case for controlled activities.[20]

In all cases, the assessment required shall "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"[21] and shall "be prepared in accordance with the Fourth Schedule."[22] This places an onus on the applicant to assess the level of detail required in the assessment, depending on the nature of the effects of the proposed activity.

The resource consent provisions had an immediate impact on new developments,[23] since consents are required for controlled, discretionary and non-complying activities under transitional plans. In some cases, resource consents are required for existing activities.[24] The application of these provisions provide an indication of the direction of the Act to date, since many consent applications have been appealed to the Planning Tribunal, and some further appealed to the High Court. This article discusses the courts' treatment of resource consent appeals in assessing the courts' interpretation of s5 of the Act.

III THE BIOPHYSICAL BOTTOM LINE

1. Introduction

New Zealand became the first country to incorporate the principle of sustainability in its legislation with the enactment of the *Resource Management Act* 1991. The central purpose of the Act is specified in Part

18 Section 88(5).
19 Section 88(4)(b).
20 Section 88(5), as amended by s44 of the *Resource Management Amendment Act* 1993.
21 Section 88(6)(a).
22 Section 88(6)(b).
23 Existing uses are also permitted to continue under the Act. The principal provisions are ss10 and 20. Pursuant to s10, existing land uses which contravene a rule in a district plan or proposed district plan can continue, providing the use was lawfully established prior to the plan, and the "effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified." Pursuant to s20, any activity restricted by ss9, 12(3), 13(2), 14(2) or 15(2) which contravenes a rule in a proposed regional plan may continue until the regional plan becomes operative if the activity was lawfully established before the plan was notified, and the activity was not discontinued for more than six months since the plan was notified, and the "effects are similar in character, intensity and scale to those which existed before the plan was notified." After the plan becomes operative, if such a formerly permitted activity becomes a controlled, discretionary, or non-complying activity an application for a resource consent is required within 6 months of the plan becoming operative. Therefore, some existing activities require or will require resource consents under the Act. Existing activities are also subject to the duty imposed on "every person" by s17 to "avoid, remedy or mitigate" any adverse effect on the environment (confirmed by the Planning Tribunal in *Marlborough District Council v New Zealand Rail Ltd* [1995] NZRMA 357 in the context of s12).
24 Ibid.

II, s5(1); "to promote the sustainable management of natural and physical resources." "Sustainable management" is defined in s5(2) of the Act in the following terms:

"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; and
(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment."

The concept of "sustainable management" in the Act emerged from the Brundtland Commission Report, *"Our Common Future"*.[25] The authors of this report referred to the concept of "sustainable development",[26] which arguably is a more human centred concept than the concept of "sustainable management", as defined in the Act.

There is no definitive case law on the interpretation of s5.[27] Whatever its ultimate deemed meaning, the section is central to the detailed provisions of the Act. Section 5 is directed to the Act as a whole, and is echoed throughout the Act. It is reflected in the stated

principles of the Act,[28] and throughout the three management levels, national, regional and territorial.[29] Although s5 has generally only been considered in the context of resource consents, its meaning will assume paramount importance in relation to district, regional and coastal plans, since applications for plan changes can be based on a failure to comply with the requirements of s5.[30]

25 World Commission on Environment and Development, *"Our Common Future"*, Australian Edition with the Commission for the Future, Oxford University Press (1990).

26 Ibid, "...a process of change in which use of resources, the direction of investments, the orientation of technological development and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations."

27 The Court of Appeal has not given a definitive interpretation of s5 to date, and the High Court has given only cursory consideration of the provision. The Planning Tribunal has referred to s5 on a number of occasions, but generally restricted its views to those necessary to decide the case at hand. The case law to date is analysed in Section III(5) of this article.

28 The Act does not explicitly state that ss6 to 8 are the principles of the Act. However, in *RH Pickmere v The Franklin District Council* (Unreported, decision no A046/93) the Planning Tribunal noted the lack of specific reference to principles and said "we infer from the heading to Part II that sections 6 to 8 may be the object of that reference to principles."

29 The principles (ss6 to 8) are prefaced by the words "in achieving the purpose of this Act". The National Policy Statements refer to "achieving the purpose of this Act" (ss46 and 56). The functions of regional councils and territorial authorities (ss30 and 31) are linked to s5 by the phrase "of giving effect to this Act". In particular, regional and district plans are to "achieve the purpose of this Act" (ss59, 63, 72). Under s32, the duty of national, regional and territorial governments to consider alternatives prior to regulation must be carried out "in achieving the purpose of the Act." Barker J in *Falkner v Gisborne District Council* ([1995] 3 NZLR 622, at 632) noted that each of the operational levels under the Act are linked back to the core provisions of Part II. He described the purpose of "sustainable management" as the "touchstone" of the Act.

30 Section 32 of the Act is one of the key sections for local and national governments. The purpose of s32 is to ensure that governments consider whether there is a need to adopt any particular objective, policy or rule, to ensure that alternatives are considered, and to ensure that the reasons for and against a proposal and any alternatives are explicitly considered. Governments must be satisfied that any such objective, policy, rule, or other method is necessary "in achieving the purpose" of the Act, and is *the* most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means. Thus, s5 is imported into s32. Section 32(3) provides a power of challenge in a submission on a plan, or in a request for a plan change as to whether government has selected appropriate measures in accordance with s32. In *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* ((1993) 2 NZRMA 497) the Planning Tribunal was of the view that s32(3) allowed the Tribunal to challenge the performance of duties under s32(1). Thus, if a government has not satisfied s5 of the Act in implementing plan measures, s32(3) provides a power of challenge on the basis that the measure does not achieve sustainable management. The meaning of s5 is therefore of paramount importance for all levels of government.

The meaning of the purpose of the Act is also important in the context of the courts' statutory interpretation processes. It is clear that the courts' traditional preference for the literal approach to statutory interpretation has given way to a tendency for the courts to attempt to effectuate parliamentary intent.[31] Where ambiguities exist in the Act, the courts are likely to interpret these in accordance with s5.[32]

This section of the article reviews commentator opinion on the interpretation of s5, and analyses the case law to date to assess the courts' interpretation of s5.

2. "The Ambiguity"

Professor Fisher has presented a penetrative analysis of the meaning of s5.[33] His view is that the word "while" in s5(2) is inherently ambiguous, going "to the very heart of the policy direction of the legislation."[34] He presents an argument that the word "while" in s5(2) can be interpreted in two different senses. Professor Fisher says that if "while" is used to introduce a superior clause then the ecological factors in s5(2)(a), (b) and (c) ("the ecological function") are superior to the development factors that precede those subsections ("the management function").

On the other hand, he says that if "while" is used as a coordinating conjunction, meaning "and", then the management of ecological factors are treated equally with the development factors to result in a balancing approach. He concludes that the former interpretation is more grammatically correct.[35] However, he stresses that the history of the Act through Parliament indicates that the intention was to dilute the concept of sustainable management,[36] and concludes that the question is an open one.[37]

Other commentators have since commented on Professor Fisher's analysis. The Ministry for the Environment is of the view that concerns and uncertainties about Part II of the Act have been reduced by the publication of explanations on its meaning, and by the availability of background documents for the preparation of regional policy statements.[38] Dr Roger Blakeley, Secretary for the Environment, is of the view that the initial concerns regarding interpretation of Part II have been unfounded

31 Burrows Professor J F, "Approaches to Statutory Interpretation", New Zealand Law Commission Seminar, "Legislation and Its Interpretation" (Wellington, 18-19 March 1988), at 11-12.

32 In some cases, even to the extent of "filling gaps" in legislation (*Northern Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530).

33 Fisher Professor D E, "The Resource Management Legislation of 1991: A Juridical Analysis of its Objectives" in the introduction of *"Resource Management"* (Brooker & Friend).

34 Ibid, at 13.

35 Ibid, at 13, "If "while" is a coordinating conjunction, then the Act prescribes a balance to be achieved between the first function and the second function. If "while" is a subordinating conjunction, then the ecological function is afforded a degree of priority over the management function. In this sense the management function is ancillary. This is the grammatically "correct" interpretation. Whether it is the meaning of s5(2) is not at all clear."

36 Ibid, at 13 he said; "In the original version of s5(2), sustainability was either the only or the most significant element in the definition of sustainable management. Subsequent policy papers seem to suggest that the final version of s5(2) was intended to achieve something more in the nature of a balance between the use, development, and protection of resources and ecological and environmental sustainability."

37 Ibid, at 16; "The fundamental direction of the RMA 1991 thus depends to a large extent upon the meaning of one particular word: a word not in any way dealing with the actual substance of natural and physical resources."

38 Ministry for the Environment, "Resource Management Act; Section 24 Monitoring Report", February 1993, at 6.

"so far".[39] With respect, these views are perhaps unduly premature, given the lack of definitive interpretation of Part II of the Act.[40]

The Minister for the Environment, the Hon Simon Upton, appears to support the view that the ecological factors in s5(2)(a), (b) and (c) are superior to the "management function". In a letter published in the New Zealand Law Journal,[41] replying to an article by K J Grundy,[42] the Minister referred to his own interpretation of s5, after admitting to the authorship of the section:

"The Act pursues a more cautious, less robust formula. It says that whatever people and communities conceive their well-being to be they shouldn't pursue it in a way that prejudices the matters set out in paras (a), (b) and (c) of subs (2)."

Kerkin suggests that Professor Fisher's analysis is somewhat artificial, and says that a compromise meaning of the word "while" is possible, meaning "during the time that; for so long as".[43] "In this context, managing while sustaining, supporting and avoiding means managing only for so long as paragraphs (a), (b) and (c) are adhered to." She concludes that this interpretation gives long-term environmental considerations some influence over short term management ends. This interpretation requires a balancing of the different values, but acknowledges that human values can only be effectively implemented if ecological values are sustained.[44]

Harris says that the importance of the interpretation of "while" has been overstated, and that rather, it is the loose wording of the environmental parameters in (a), (b) and (c) which provides room to trade off environmental interests for development benefits.[45]

In contrast to Professor Fisher, some commentators have taken a more pragmatic view of the meaning of s5, maintaining that development is permitted, provided that the adverse effects on the environment are not "significant" in magnitude. Randerson, in referring to s5(2)(b), said:[46]

"It is submitted that the subsection 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."

39 Blakeley Dr R, "The Resource Management Act - 18 Months On", Seminar, The Resource Management Act - 18 Months On, April 1993. He stated the following, at 2; "Initial concerns about possible varying interpretations of Part II: Purposes and Principles are unfounded so far. Local government and the Planning Tribunal have not experienced any difficulties with Part II in considering resource management issues."

40 Somerville R, and Gallen J (Office Solicitor, Ministry for the Environment), "Applications for Resource Consents", in "Applications under the Resource Management Act 1991", New Zealand Law Society Seminar, October-November 1993, considered the issue to be an open one: "However the question of the so-called ecological bottom line and the contrasting arguments of Professor D Fisher in "A Juridical Analysis of its Objectives", Brookers Resource Management and Mr J Milligan in "Pondering the While", Terra Nova, May 1992 at p50 have yet to be addressed."

41 [1995] NZLJ 124.

42 Grundy K J, " In Search of a Logic: s5 of the Resource Management Act", [1995] NZLJ 40.

43 Kerkin S, "Sustainability and the Resource Management Act 1991", [1993] AULR 290.

44 Ibid, at 298.

45 Harris B V, "Sustainable Management As An Express Purpose of Environmental Legislation: The New Zealand Attempt" [1993] OLR 51, at 61.

46 Randerson et al, *"Resource Management Act 1991"*, New Zealand Law Society Seminar, September 1991, 8.

Majurey has presented an analysis in a similar vein to Randerson:[47]

"One view is that the safeguards contained in s5(2)(a)-(c) are intended to protect against *significant* environmental modification. Provided such modification does not occur, activities can proceed, especially if they have socio-economic benefits." (emphasis added)

Clearly, there are diverse views amongst commentators as to the interpretation of s5. Of course, commentator opinion becomes irrelevant in the face of judicial interpretation. The key questions are; how are the courts interpreting s5, and to what extent does their interpretation reflect the views of commentators? The following sections of this article assess the extent to which Professor Fisher's ambiguity has been reflected in the case law interpretation of s5(2). The article then makes an assessment as to whether the Act provides a "biophysical bottom line", as intended by the Hon Simon Upton.

3. Section 5 and Resource Consent Applications

The resource consent provisions of the Act are of particular interest to this analysis. These provisions had an immediate impact on new developments, and have resulted in a number of court decisions. In analysing the courts' interpretation of s5, the first question to consider is to what extent the Act requires consent authorities to consider s5 in determining a resource consent application?

The principal Act, pursuant to s104(4), required the consent authority, when considering an application for a resource consent, to "have regard to" a number of factors, including Part II of the Act (which contains s5).[48] The Act was not clear as to whether Part II was to be given priority to the other provisions of s104(4), or whether it was simply to be balanced against those other factors.

In *Batchelor v Tauranga District Council*[49] the Planning Tribunal held that where the intent of the detailed provisions of the Act is clear, and express guidance is given for the exercise of a discretion, it is not necessary to refer to the purpose of the Act. The High Court, sitting as a full court of three judges, dismissed an appeal against the Planning Tribunal decision:[50]

"Although section 104(4) directs the consent authority to have regard to Part II, which includes section 5, it is but one in a list of such matters and is given no special prominence." (emphasis added)

However, the High Court appeared to water down the effect of this view by stating that it is implicit in the Tribunal's decision that overall regard was had to s5.[51] With respect, there is some conflict between these two statements. It is difficult to envisage how a court is to accord s5 "no special prominence" while at the same time give "overall regard" to and not "offend against the general dictates of s5" in making a decision.

47 Majurey P F, "Legal Issues Associated with Discharges under the Resource Management Act 1991", "Waste and Industry", Waste Management Institute of New Zealand, 4th annual conference, 21-23 October 1992, at 3.

48 Section 104(4)(g).

49 [1992] 1 NZRMA 266.

50 *Batchelor v Tauranga District Council* (No2) (Full Court) ([1993] 2 NZLR 84, at 89).

51 [1993] 2 NZLR 84, at 89; "There is some suggestion in the tribunal's decision that the specific measures detailed in other provisions, which spell out the legislature's intent in detail, may render reference to s5 unnecessary. However, read as a whole, we think that it is implicit in the tribunal's findings that overall regard was had to s5, in that the weighing of the s104 considerations which resulted in consent being refused was found not to offend against the general dictates of s5."

Some Planning Tribunal decisions subsequent to *Batchelor* appear to interpret the High Court's decision as a requirement to have "overall regard" to s5, rather than as one to accord the section "no special prominence". For example, in *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No 2)*,[52] decided prior to the enactment of the Amendment Act, the Planning Tribunal, in considering a resource consent for a non-complying activity, implicitly imported s5 of the Act under s104(1). Section 104(1) requires that "the consent authority shall have regard to any actual and potential effects of allowing the activity."[53] The court allowed an appeal against the granting of a resource consent by placing a high priority on s5, and clearly did not accord s5 "no special prominence".

Similarly, in *Small GA and Betty Leila v North Shore City Council*, the Planning Tribunal, in discussing s104(3) of the principal Act, said that the effects on trade competition are not to be taken into account by a consent authority in determining an application:

"A Council is not inhibited by s104(3) in its ability to take into account (against the background of the Act's basic purpose under s5) the wider economic effects of existing commercial centres, when determining where, and in what respects, and to what extent, new commercial development opportunity should be provided for in the district plan."

Once again, this decision was delivered after *Batchelor*, but before the Amendment Act. This passage suggests that the Tribunal gave priority to s5 over s104(3), without referring to s104(4)(g), the provision expressly importing Part II. With respect, assessing an application "against the background of the Act's basic purpose under s5" is not consistent with giving s5 "no special prominence". These two decisions demonstrate that the Planning Tribunal is prepared to import s5 without reference to the express provision in s104(4)(g).

On the other hand, the Tribunal's decisions in *Kennett v Dunedin City Council*[54] and *New Zealand Rail v Port of Marlborough*[55] supports the approach adopted in *Batchelor*.

The Amendment Act repealed s104, and replaced it with a new provision. Pursuant to the new s104(1), the consent authority "shall have regard to" a number of matters when considering an application for a resource consent, which are expressly "subject to Part II" of the Act. The words "subject to" suggests that the amendment was intended to strengthen the weight to be given to Part II by according it priority, in response to the *Batchelor* decision.

Whether the Planning Tribunal will interpret this new provision as a priority is another question. In *Reith v Ashburton District Council*,[56] the first decision on the point after the enactment of the Amendment Act, the Tribunal stated that the words "subject to" in s104(1) now gave primacy to matters in Part II of the Act. The court said, apart from this, it was open to the Tribunal and consent authorities to give deserving weight to matters in s104(1), including the objectives and policies of a district plan. On the

52 [1993] 2 NZRMA 574.
53 Ibid, at 584 the Tribunal concluded: "We have 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 (section 104(1)) when the term "effects" is defined by section 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."
54 [1992] 2 NZRMA 22, at 31.
55 [1993] 2 NZRMA 449, at 463.
56 Unreported, decision no C034/94, noted at [1994] 1 BRM Gazette 1.

other hand, in *Glentanner Part (Mt Cook) Ltd v MacKenzie DC*[57] the Tribunal held that Part II should be used simply as an aid to construing s104. With respect, *Reith* is the preferable view. The insertion of the words "subject to" indicates that Parliament intended that Part II should be given a higher order of priority than simply an interpretation tool. This is consistent with the dicta of Cooke P in *Environmental Defence Society v Mangonui County Council.*[58]

"The qualification "subject to" is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict."

There is perhaps another analysis which could have been adopted by the High Court in *Batchelor* to give priority to s5. Prior to the Amendment Act it was open to argument that, by virtue of s30(1)(h) and s31(f), for Regional Councils and Territorial Authorities respectively, the "any other functions specified in this Act", includes the duty as a consent authority to consider resource consents. This function, like all other functions under s30(1) and s31, must be carried out "for the purpose of giving effect to this Act", thus importing the Part II provisions of the Act. It is submitted that pursuant to these provisions, Part II considerations expressly take priority over the old s104(4) considerations. This is in contrast to the indirect route of reference to s5 as suggested by the Planning Tribunal in *Batchelor*. On this view, or on the alternative approach adopted in the *Te Aroha* case discussed earlier of impliedly importing s5 into s104 considerations, the amendment to s104(4) was unnecessary. On this view, the purpose of referring to Part II in s104(4)(g) was intended simply as a "signpost"[59] to ensure that consent authorities take Part II into account.

Regardless of whether the amendment was necessary, s5 of the Act, pursuant to the new s104(1), is now to be accorded a high priority by consent authorities when considering resource consent applications. The judicial interpretation of s5 is now of paramount importance.

4. "The Management Function"

Professor Fisher has labelled the first human centred principle in s5(2) as "the management function".[60] The phrase "use, development, and protection" of resources implies that natural and physical resources will be managed with respect to all three factors, depending on the circumstances. However, the provision implies that this must be achieved at a rate which enables provision to be made for the social, economic and cultural well-being and health and safety of communities. This implies a balancing approach with the balance achieved by the rate of use, or protection of resources.

This apparent balancing approach within the management function was confirmed by the Planning Tribunal in *Cash v Queenstown Lakes DC*[61] where the applicant appealed against a refusal of a resource consent for a

57 Unreported, decision no W050/94, noted in [1994] 1 BRM Gazette 46.
58 [1989] 3 NZLR 257, at 260.
59 Phillipson M, in "The Relationship between Part II of the Resource Management Act 1991 and Resource Consents: Recent Developments" [1994] NZLJ 67, at 67 presents a similar analysis that s104(4)(g) was simply intended as a "signpost", and that the requirement to "recognise and provide for" in Part II prevails over the other provisions.
60 Fisher Professor D E, "The Resource Management Legislation of 1991: A Juridical Analysis of its Objectives" in the introduction of *"Resource Management"* (Brooker & Friend). At 11 Fisher uses the term "management function" for the clause prior to the word "while" in s5(2).
61 Unreported, decision no A003/93.

river development. The Planning Tribunal dismissed the appeal on the basis that the health and safety of other river users would be jeopardised, balanced against the benefits of allowing the consent. The Tribunal stated that the positive effects of the activity did not "deserve to be advanced at the expense of the adverse cumulative effects of low probability of reducing the safety for passengers on boats in the lower Shotover River."

The case also emphasises the seriousness with which the Tribunal is treating environmental effects of low probability with high potential impact, specifically included in the definition of "effects".[62]

5. "The Ecological Function"

(a) Introduction

Professor Fisher has labelled the paragraphs following the word "while" in s5 as the "ecological function".[63] The function is expressed in s5(2), paragraphs (a) to (c). These three paragraphs are linked by the word "and", indicating that the three are to be carried out simultaneously, without any given order of priority.[64]

Section 5(2)(c) requires avoidance, remedying, or mitigation of adverse effects. "Effect" is defined widely in s3. Some problems may be encountered by the interpretation of "adverse", which is not defined in the Act. If s5 is interpreted as a biophysical bottom line, there may be difficulty in deciding exactly what is an adverse effect. Already, it has been recognised in some cases that this could have a subjective element, for example, for some air emissions, or odour discharges.

These paragraphs most clearly emphasise the shift from direction and control of resources to the consideration of effects of activities. They are a mixture of ecocentric and anthropocentric considerations. They are concerned with long range planning, whereas the management function is more concerned with matters of short term interest. The meaning of the "ecological function" and its relationship to the "management function" is central to Professor Fisher's analysis.

(b) Analysis of Case Law

i. Introduction

There has been no definitive interpretation of the purpose of the Act by the New Zealand Court of Appeal. Cooke J referred to s5 in *ARC v North Shore City Council*[65] in terms which indicate the Court is likely to adopt a new approach to decisions under the Act:

"As stated in the long title, it is an Act to restate and reform the law relating to the use of land, air, and water. As stated in s5(1), the purpose of the Act is to promote the sustainable management of natural and physical resources. Section 5(2)(a) speaks of "the reasonably foreseeable needs of future generations". Such an Act is not to be approached in any narrow way or with an eye to the protection of supposedly vested administrative interests."

62 Section 3.

63 Fisher Professor D E, op cit, at 11.

64 This was confirmed by the Planning Tribunal in *Plastic and Leathergoods* (Unreported, decision no W026/94) where the Tribunal said that if it finds that one of the safeguards in s5(2)(a), (b) and (c) is unlikely to be achieved then the purpose of the Act is not fulfilled, and in *Shell Oil* (Unreported, decision no W008/94) where the Tribunal said that each of these qualifications are to be given the same weight.

65 [1995] 3 NZLR 18, at 19. MacKay J also referred to s5 in *Canterbury Regional Council v Banks Peninsula District Council* ([1995] 3 NZLR 189, at 191), but without interpreting the provision.

Cooke P, Casey, Gault, McKay and Fisher JJ in *McKnight v NZ Biogas Industries Ltd*,[66] in a judgment delivered by Gault J, held that a charge of discharging a contaminant pursuant s15(1) of the Act is one of strict liability. Their honours considered this to be:[67]

"...consistent with the broad and carefully drawn purpose and principles in Part II of the Resource Management Act...It is entirely consistent with the importance attached to protection of the nation's natural and physical resources in the Resource Management Act."

This dicta suggests that the Court of Appeal is likely to place a heavy emphasis upon Part II considerations in any interpretative reasoning.

While the Court of Appeal has not yet set out its interpretation of the purpose of the Act, s5 has been considered in several Planning Tribunal and High Court decisions. These range from a cursory reference of the section to justify a conclusion made on more specific grounds, to a reasonably in-depth analysis of the section.

ii. Early indications of conservatism

The fears of environmentalists that the purpose of the Act would not be given primacy were raised by the decision of the Planning Tribunal in *Batchelor v Tauranga District Council.*[68] The case concerned a resource consent application for a non-complying activity to extend and use a property for the retailing of liquor. The Planning Tribunal held that where the provisions of the Act are clear as to how a discretion is to be exercised, then there is no need to refer to the purpose of the Act.

As discussed in Section III(3), in the context of the importation of s5 into the resource consent provisions, the Tribunal's reasoning was affirmed by the High Court.[69] However, its effect was diluted by the High Court adding that it was implicit in the Tribunal's decision that it had given "overall regard" to s5. As discussed in Section III(3), it appears some subsequent decisions have adopted an interpretation in accordance with this latter view of the High Court. The court was not required to provide an interpretation of s5, since the resource consent was refused on the basis of the adverse effects of allowing the activity on confidence in the consistent administration of the district plan, and on the plan's coherence.

iii. Qualified support for the biophysical bottom line

The Planning Tribunal's decision in *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No. 2)*[70] provides qualified support for a biophysical bottom line. The case concerned an appeal against the granting of a land use consent and a resource consent for discharge of contaminants into the air from a proposed beef by-products rendering plant.

The issue of odour emissions was considered by the Planning Tribunal in *JD Wallace Ltd v Piako County*,[71] decided under the previous *Town and Country Planning Act* 1977. In the *Wallace* case, which coincidentally concerned the same plant as the *Te Aroha* case, the Tribunal stated that although it was possible to design a plant that would operate without noxiousness, it was impossible to preclude the possibility of a degree of

66 [1994] 2 NZLR 664.
67 Ibid, at 672.
68 [1992] 1 NZRMA 266.
69 *Batchelor v Tauranga District Council (No2)* (Full Court) ([1993] 2 NZLR 84).
70 [1993] 2 NZRMA 574.
71 Unreported, decision no A052/79.

noxiousness arising occasionally from plant failure or from some other random and unforeseeable cause. The Tribunal considered that such a degree of noxiousness or danger had to be accepted, but that it should not be allowed to arise so often as to become the norm.

In *Te Aroha* the proposed rendering plant was to occupy a purpose-built building incorporating air control systems to collect odour emissions, and a biological filter for odour absorption treatment. The proposed activity was non-complying for the Rural A1 zoning of the site, and the discharge consent was also treated as a non-complying activity. The Tribunal noted that both consents involved the exercise of discretionary judgment under s105(1)(b)[72] after regard has been paid to the matters mentioned in s104, including the actual and potential effects on the environment.

The Tribunal noted the *Wallace* decision, but said that the *Wallace* case was decided in the context of the statutory purpose of district planning, as specified in s4(1) of the *Town and Country Planning Act* 1977, "a purpose which gave value to convenience and welfare of people and to amenities in the context of direction and control of the development of the district."[73] The Tribunal compared this to the purpose of the Act:[74]

"By comparison, the meaning given by section 5(2) of the present Act to sustainable management (the promotion of which is the statutory purpose), though still giving value to use and development of natural and physical resources for people and communities to provide for their well-being, also expressly gives value to potential to meet future needs, to life-supporting capacity, and to avoiding or mitigating adverse effects."

The Tribunal noted that the duty to have regard to any actual and potential effects of allowing the activity is to be performed by reference to the extended definition of "effects" in s3 of the Act. The Tribunal said that the "effects" of activities are to be judged in relation to the "environment",[75] which includes people and communities, amenity values and social, economic, aesthetic and cultural conditions which affect them.[76] The term "effects" includes any potential effect of low probability which has a high potential impact.[77] In referring to the concept of sustainability, the Tribunal noted:[78]

"For value to be given to promoting sustainable management, enabling people to provide for their wellbeing while avoiding adverse effects, there is no place for accepting objectionable odours even occasionally and when resulting from malfunctions or breakdowns"

72 [1993] 2 NZRMA 574, at 577 and 582 the Tribunal stated that the land use consent was non-complying, and appeared to treat the discharge permit application also as non-complying. If that was the case, the relevant threshold test is specified in s105(2)(b), having considered the matters set out in s104, not s105(1)(b), as stated by the Tribunal. One of these tests must be satisfied prior to proceeding to exercise the discretion whether to grant the consent, as held in *Batchelor v Tauranga DC*. Presumably the Tribunal, for the purposes of the decision, assumed that one of the two tier threshold tests had been met, and moved on to consider whether they should exercise their discretion or not. This is a technical point only, since in practice the same considerations would be brought into the initial threshold tests contained in s105(2)(b) as in the exercise of discretion in s105(1)(b). Note also that these provisions are a reference to the Principal Act, prior to the enactment of the *Resource Management Amendment Act* 1993.

73 Ibid, at 582.

74 Ibid, at 582.

75 Section 2.

76 [1993] 2 NZRMA 574, at 582.

77 Section 3(f).

78 [1993] 2 NZRMA 574, at 582.

The Tribunal stressed that there was no longer room under the Act for the attitude taken by the Planning Tribunal in the 1979 *Wallace* decision, which accepted the occasional noxiousness from plant failure or other random or unforeseeable cause.

The Tribunal also considered whether to grant the consents with a condition that the grantee would unconditionally fulfil its assurances that there would be no emission of odours from the rendering plant capable of reaching adjoining properties. However, the Tribunal said that avoidance of adverse effects is more consistent with the purpose of the Act than enforcement proceedings after adverse effects have been experienced.

The decision is significant in a number of respects. First, the Tribunal displayed no difficulty in diverting from a decision under previous legislation, giving credence to the view that the courts are operating under a new regime, and that previous decisions, and more importantly, attitudes to adverse effects, are no longer appropriate. Secondly, the decision apparently gave priority to avoiding adverse effects over development. Thirdly, the case, like the *Cash* decision, discussed in Section III(4), emphasises the seriousness with which the courts will treat effects of low probability, but high potential impact. Fourthly, the Tribunal was particularly concerned with the adverse effects on sensitive nearby uses, involving a cemetery (740 metres) and a motor camp (550 metres).

The Tribunal also stressed the avoidance of adverse effects, rather than remedying or mitigating those effects. This supports the view that the requirement of "avoiding, remedying, or mitigating" in s5(2)(c) is a hierarchy in some situations, particularly as in this case, where the application is for a "greenfield" development. This is supported by the Tribunal's comment that avoidance of adverse effects should take priority over the enforcement provisions of the Act.

The question is whether the Tribunal's interpretation of s5 could still be interpreted as a balancing approach? It could be argued that the court implicitly decided on the particular facts of this case that, on balance, the adverse effects on the community outweighed any economic advantage to the community from granting the consents. This view is less likely for two reasons. First, the Tribunal stressed that it was departing from previous legislation in considering adverse effects. Secondly, the court did not expressly consider the benefits of the project and did not expressly weigh these against any adverse effects, suggesting that it was not a matter the court thought relevant. The court appeared to decide the matter solely on the basis of the likely occurrence of adverse effects.

From an applicant's perspective, the decision appears a harsh one. There are numerous projects which have a low probability of a high potential impact, for example, river flooding, dam overtopping, dam failure, etc. How can these activities be developed in light of the *Te Aroha* decision? If the activity is non-complying in terms of the district or regional plan, an applicant may find it difficult to obtain a consent. Presumably, the applicant would need to demonstrate either that the probability of a high potential impact is of such insignificance that it does not fall within the scope of the definition of effects in s3(f), or alternatively that the effect, although of a discernible low probability, does not have a high potential impact.

For example, in the case of a dam development, the design would need to be such as to demonstrate an insignificant probability of overtopping, if a high potential impact is predicted. Alternatively, that the design and siting

is such that any low probability occurrence, for example, dam overtopping, would not have a high impact. Both approaches would involve difficulties in project design and siting.

In the case of an odour discharge, it could be argued that an effect of low probability but of high potential impact should have a time component, such that if an odour occurred for a short period of time, it loses any high impact quality. Such an approach is arguably consistent with s107(1)(e) which requires that a consent authority shall not grant a discharge permit allowing "any emission of objectionable odour" unless the consent authority is satisfied that there are exceptional circumstances justifying consent, or that the "discharge is of a temporary nature."

Alternatively, policies and plans should make allowance for development of such low probability, high impact activities as permitted activities. Such activities and their effects could then be considered in terms of the wider district and regional environment.

On the other hand, from a applicant's perspective, the decision provides support for the view that the Planning Tribunal is interpreting "adverse effects" in s5(2)(c) to mean "significant adverse effects" in refusing the resource consent. The judgment spoke of "strong and objectionable odours",[79] "occasional noxiousness",[80] "offensive"[81] and "nauseating"[82] odours, and allowed the appeal on that basis. Presumably, the result would have been different had the applicant established that, although the effects were likely to be adverse, they were not likely to be "significantly" adverse. This supports the pragmatist interpretation of s5 that developments can proceed provided the effects are not "significant" in nature.

It has been suggested that the *Te Aroha* decision should not be regarded as a precedent; that it should be viewed as a case decided "on its own particular facts",[83] and that it is "unnecessary and inappropriate to start applying the decision in a wider context."[84]

While it is an unusual case in the sense that the evidence was insufficient to satisfy the Tribunal that the plant could be designed and operated to prevent neighbouring properties being subjected to objectionable odours, it is respectively submitted that the Tribunal's dicta applying the purpose of the Act is of general application. It was open to the Tribunal to refuse the consent on the basis of a balancing approach between development and adverse effects. The Tribunal did not do so, but instead stressed the departure of philosophy from the *Town and Country Planning Act* 1977, and that for value to be given to sustainable management, enabling people to provide for their wellbeing while avoiding adverse effects, there is no

79 Ibid, at 581.
80 Ibid, at 582.
81 Ibid, at 582.
82 Ibid, at 582.
83 Nolan D, "Odours and Other Air Pollutants - Legal Perspective", Proceedings of Resource Management Law Association of New Zealand, first annual conference, "From Principles to Practice", 15-16 October 1993, at 28. The author, at 27, outlined six statements of the Tribunal that he considered crucial to considering the case as one decided on its own peculiar facts. However, all are consistent with the Tribunal's general statement of principle regarding s5.
84 Ibid, at 28.

place for accepting objectionable odours, even occasionally or when resulting from malfunctions or breakdowns.[85]

The Planning Tribunal's decision in *RH Pickmere v The Franklin District Council*[86] also provides qualified support for a "biophysical bottom line". The case concerned an appeal by applicants against the refusal of a resource consent for subdivision of their kiwifruit orchard at Karaka. It was proposed to subdivide a 5.3 hectare orchard into two lots, a rural-residential lot of 2.03 hectares, leaving the balance as a horticultural lot. The application was treated as non-complying. The application satisfied the two tier test in s105(2)(b) for a non-complying activity, since although it was contrary to the objectives and policies of the district plan, the effects on the environment were held to be minor.

In exercising its discretion under s105(1)(b) to refuse the consent, the Tribunal expressly considered s5 of the Act. The Tribunal referred to s5(2)(a) and (b) within the "ecological function":

"Section 5 provides a purpose, relevant to deciding the appeal, of sustainable management of natural resources, particularly in sustaining the potential of the land to meet the reasonably foreseeable needs of future generations, and sustaining the life-supporting capacity of the soil....We are to make a decision that is guided towards the statutory purpose of sustainable management (as defined). We have concluded that the purpose would be more fully served by refusing the application than by granting it."

The Tribunal was of the view that the proposed subdivision would reduce the production potential of high quality soil. On its face, this decision gives support for the view that a consent will be approved pursuant to the management function in s5(2) if it meets the reasonably foreseeable needs of future generations, and if it safeguards the life-supporting capacity of the soil. If this was simply a balancing approach, the decision should have been different since the Tribunal expressly held that the effects on the environment were minor, and that the development had some advantages.

The other aspect of note is that s5(2)(c) was apparently satisfied since the effects on the environment were minor. This suggests that an application must satisfy all three provisions ((a), (b), (c)) of the "ecological function" for approval to be granted. This is consistent with the conjunctive word "and" in (a) and (b).[87]

On the other hand, the court relied on the first threshold test in s105(2)(b)(i), with the second test in s105(2)(b)(ii) not being satisfied.[88] It was held that the application was not consistent with the objectives and policies of the district plan. It could be argued that the Tribunal, without expressly stating it, was more concerned with maintaining the integrity of the plan, as decided in *Batchelor*, and simply made use of s5 in support of its decision to refuse consent.

85 The decision in *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No 2)* ([1993] 2 NZRMA 574) was distinguished by the Tribunal in *Medical Officer of Health v Canterbury Regional Council* (Unreported, decision no W109/94), but not in a way which lessens the impact of what was said in relation to s5. That case concerned the continued operation of an "in zone" fertiliser plant situated on industrial zoned land. The Tribunal said that persons living in those areas cannot expect an environment free from odour without qualifications. If, on the known state of technology, odour cannot be prevented, then the consent authority's duty is to minimise it by imposing appropriate conditions.

86 Unreported, decision no A046/93.

87 This supports a similar conclusion discussed in Section III(5)(a).

88 The Court's approach in *Batchelor* to have regard to the precedent impact of an application on the objectives and policies of the district plan was confirmed by the Court of Appeal in *Manos v Waitakere City Council* ([1996] NZRMA 145).

It should also be noted that the Tribunal used s7(a) in this instance to support the concept of sustainable management. The Tribunal stated:

"Section 7(a) directs that we are to have particular regard to the efficient use and development of natural and physical resources. It would not be an efficient use of valuable productive soil to subdivide the land into allotments too small for its potential to be realised economically. We can find nothing in sections 6 to 8 that would give support to the application."

This supports Fisher's analysis that s7 can be used as a principle in support of a biophysical bottom line.

The Planning Tribunal adopted a similar analysis in *Lambly v Whangarei District Council*.[89] The case concerned an appeal by the Whangarei District Council against a consent granted for seven dwellings on a coastal site at Whangaumu Bay, Northland. The Tribunal treated the application for consent as a non-complying activity. The Tribunal held that the effects on the environment would be minor, thus the threshold test for a non-complying activity was satisfied under s105(2)(b)(i). However, the Tribunal was of the view that the proposal would be contrary to the objectives and policies of the transitional district plan and would contravene the rules for the zone. In exercising its discretion under 105(1)(b) not to grant consent, the Tribunal referred to s5 to provide support for its decision; that the proposal would not serve that purpose because of a future need for the natural character of the coastal environment, and avoiding adverse visual effects upon it.

The Tribunal's reference to "adverse visual effects", with respect, is confusing, since the Tribunal had previously held that the application met the threshold test that the effects on the environment were minor. It is possible that the Tribunal was suggesting that pursuant to s5, even minor effects must be avoided. The decision is ambiguous in this respect.

Lambly is another case where the Tribunal said that the effects on the environment were minor, but that the proposal contravened the objectives and policies of the plan. Again, like the *RH Pickmere* case, it could be argued that the Tribunal, without expressly stating it, was more concerned with maintaining the integrity of the plan, as decided in *Batchelor*, and simply made use of s5 to support its decision to refuse consent.

The decision of the Planning Tribunal in *Montreal v Whangarei District Council*[90] also provides qualified support for a biophysical bottom line. The case concerned an appeal against an Abatement Notice in respect of a suburban property in Whangarei where derelict goods and rubbish were stored. The Tribunal, in dismissing the appeal, held that the appellant's actions had "substantially" adversely affected the values of neighbouring properties and the personal well being of neighbours.

The decision provides some support for a biophysical bottom line since the appeal was dismissed on the basis of adverse environmental effects created by the appellant. However, the decision probably only provides weak support for this view, since there was nothing positive in the appellant's activities that could justify a balancing approach in this case. In addition, the Tribunal's reference to "substantial" adverse effects in the context of s5(2) provides support for the view that the Tribunal interpreted adverse effects in s5(2)(c) as "significant" adverse effects.

89 Unreported, decision no A086/93.
90 Unreported, decision no A083/92.

Although a decision in the context of an application for enforcement orders against an existing activity, rather than a resource consent application, the Planning Tribunal's decision in *Marlborough District Council v New Zealand Rail Limited*[91] (*"the Fast Ferries"* case) provides some insight into the Tribunal's interpretation of s5. New Zealand Rail Ltd and Sea Shuttles (NZ) Ltd, during the summer of 1994/95, commenced operating two fast ferries on the inter-island route. A residents' group, together with local iwi, concerned at the effects caused by the ferries, including an alleged more forceful wash, applied to the Tribunal for enforcement orders to slow down or otherwise control the adverse affects caused by the fast ferries. On the facts, the Tribunal held that the erosion effects were "minimal" and that the sustainable management of the resource as a whole was "not under threat".

The Tribunal considered, pursuant to the enforcement provisions of s17 and s314, that it had a similar power to impose conditions on an otherwise lawful activity or to require the activity to cease, as it did in considering an application for a resource consent. In applying the provisions of s17 the Tribunal said that it could only make a cessation order where the effect was noxious, dangerous, offensive or objectionable. The Tribunal also said that, pursuant to s17, it could require steps be taken in order to avoid, remedy or mitigate any actual or likely adverse effect on the environment.[92]

Significantly, the Tribunal said that the enforcement provisions of the Act did not contemplate a balancing of positive and adverse effects, nor was that contemplated by s5. Judge Treadwell said:

> "A particular activity might be a high benefit activity, but the Act as I read it indicates that if such an activity was deleterious to the environment of this country in the manner contemplated by s5, then the matters which s5 addresses must prevail."

He also said that he could not place the commercial benefits to the town of Picton above the matters set forth in Part II of the Act. These dicta suggests that the Tribunal interpreted s5 not as a balancing approach, but as a "biophysical bottom line".

The Tribunal's analogy between its powers under s17 of the Act and the resource consent provisions, together with its view that the Tribunal could not make a mitigation order under s17 which resulted in cessation of a lawful activity unless the effects are "serious", provides support for the view that although the Tribunal interpreted s5 as defining a biophysical bottom line the adverse affects must be "significant" in nature.

iv. Section 5 as a restatement of the balancing approach

The decision of the Planning Tribunal and the High Court in *New Zealand Rail Ltd v Marlborough District Council* (the port development case),[93] supports an interpretation of s5 more consistent with a balancing approach than the adoption of a biophysical bottom line.

In this case, Port Marlborough NZ Ltd applied for resource consents to establish port facilities at Shakespeare Bay, in the Marlborough Sounds. The consents were granted by the consent authority, with the exception of consents for a proposed coal berth and mooring dolphin. New Zealand

91 [1995] NZRMA 357.
92 Refer to Section IV(2) for a discussion of the Tribunal's application of s17. Refer also to note 141.
93 [1993] 2 NZRMA 449.

Rail appealed against all consents. Port Marlborough appealed against the excluded works. The consents sought were for non-complying activities. Port Marlborough's appeal was upheld by the Planning Tribunal, and consents for the coal berth and mooring dolphin were granted. New Zealand Rail appealed to the High Court, and Port Marlborough cross-appealed against the conditions of consent. Both appeals were dismissed.

The Tribunal held that the proposed development "would have more than minor effects on the visual environment, on air quality and water quality." However, the Tribunal concluded that the relevant objectives and policies of the plans supported the development, thus met the threshold test of s105(2)(b)(ii).

In exercising its discretion to grant the consent, the Tribunal noted the High Court's decision in *Batchelor* that the Act "does not expressly or inferentially specify the weight which is to be attached to the general purpose (s5 RMA) when applying the requirements of s104 RMA", and was "given no special prominence."

In considering s5 the Tribunal stated:[94]

"The 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)

On its face, this passage suggests the Tribunal interpreted the word "while" in s5 as "if", thus giving primacy to the ecological function. However, in applying its reasoning to the facts of the case, the Tribunal adopted a balancing approach, by weighing the benefits of the development against any adverse effects, which they regarded as permissible if mitigated:

"Benefits to be gained from port facilities for timber exports outweighed negative effects, some of which could be mitigated in any case."

Professor Palmer is also of the view that this statement demonstrates a balancing approach:[95]

"This statement encapsulates the conceptual balance between the initial pragmatic management focus on anthropocentric (human centred) needs and the secondary baselines of maintaining inter-generational equity, safeguarding the ecological life systems, and mitigating other adverse effects of activities on the environment."

In this case, the court was of the view that s5 was satisfied if the applicant mitigated any adverse effects, and that the applicant did not need to go so far as to avoid those effects. This view is apparently contrary to the decision in the *Te Aroha* case where the court favoured avoidance of adverse effects where a new development was considered, rather than mitigation of those effects. The decision in this case suggests that the phrase "avoiding, remedying, or mitigating" in s5(c) is not a hierarchy, but is a choice for the Planning Tribunal to consider, depending on the facts of each individual application.

The court allowed the management function to prevail in favour of adverse effects, which are described in the judgment as "more than minor" on the visual environment, on air and water quality. If this means that the adverse effects in this case are not "significant" then the decision is arguably consistent with the *Te Aroha* decision that s5 is satisfied provided the

94 [1993] 2 NZRMA 449, at 470.

95 Palmer Professor K, "Case-Law Clarifies RMA's Intent", Planning Quarterly, December 1993, at 5.

adverse effects are not "significant". Again, the decision gives support for the view that the courts are interpreting the meaning of "adverse effects" on the environment as "significant adverse effects".

In applying the *Batchelor* decision, the question is whether the court would have taken a different view if the decision had been considered under the new s104(1), which arguably gives priority to s5? This is unlikely, since the Tribunal expressly said that it was of the opinion that the development was consistent with s5.

Similarly, the Planning Tribunal in *Danes Shotover Rafts Ltd v Queenstown Lakes District Council*[96] displayed a balancing approach in its reasoning. The case concerned an appeal against refusal of a consent for a helipad in Queenstown. The activity was non-complying. The principal environmental effect related to the noise of aircraft. In allowing the appeal, the Tribunal considered the concept of sustainable management in the following terms:

"Sustainable management includes serving the needs of tourists, so providing for the economic wellbeing of people and communities. Proposed conditions would avoid, remedy, or mitigate any adverse effects on the environment....The community was already exposed to noise from helicopter operations and noise of the proposed helipad could be appropriately controlled by imposition of conditions."

With respect, it is submitted that the Tribunal's reasoning in applying s5 is conceptually flawed. The "remedying" of effects in s5(2)(c) is relevant to "past, present, or future" effects, as defined in s3(c). Arguably, where past adverse effects have occurred there is a duty to remedy these if possible. This is a case concerning the past adverse effects of noise on the environment, and the Planning Tribunal granted the resource consent pursuant to s5 on the basis that the adverse effect of the activity could be mitigated. Equally, it could be argued that the consent should be refused on the basis that although the effect of the consent is not significant, it adds weight as a cumulative effect to past adverse effects; that if past adverse effects are to be remedied, there is no room pursuant to s5 for cumulative additions to those effects. Significantly, the Tribunal did not refer to the cumulative element in the definition of "effects".[97]

If the Tribunal's approach in this case is adopted as a general principle it could mean that communities with existing adverse effects are likely to receive additional adverse activities on the basis that the activity itself is not significant. This adds weight to the suggestion that the extensive consultation principles in the Act, coupled with the potential to purchase environmental harm, could result in lower-socio economic areas receiving the brunt of undesirable activities (refer to Section IV(3)).

The Tribunal concluded that "if carried out in compliance with conditions proposed...there would be no significant adverse effect on the environment". Like the *Te Aroha* decision, this gives support to the view that the Tribunal is interpreting "adverse effects" in s5(2)(c) as a requirement that adverse effects are permissible, provided they are not "significant adverse effects".

This case demonstrates one of the difficulties of interpreting s5(2)(c) as relating to the avoidance, remedying or mitigation of "significant adverse effects" when potential cumulative effects are involved. The definition of "effects" in s3 includes past effects. It could be argued that although the

96 Unreported, decision no A055/93.
97 Section 3.

activity in question is itself not significant, its cumulative effect on the existing past effects are "adverse" in nature.

The question is whether it is consistent with the concept of sustainable management to conclude that because past effects are already present and adverse, additional cumulative effects, in isolation minor in nature, are permissible? It is submitted that sustainable management requires the management of resources in ecosystems so that they continue to provide services for the future. Each marginal adverse effect reduces the opportunity of remedying those past effects, thus restricting the potential options for the use of resources.

The decision also has consequences for the treatment of existing uses. These are tolerated under the Act on the basis of the adverse economics of making alterations to these uses. The Tribunal's decision in this case gives licence for the cumulative effects of existing uses to increase.

A better solution may be for the relevant local authority to consider provisions for the activity in a plan, where the cumulative effects can be considered as a whole. An ad hoc approach to the consideration of cumulative adverse effects is likely to be inconsistent with the concept of a biophysical bottom line.

v. The difficulty of defining an "adverse" effect

A similar balancing approach was adopted by the Planning Tribunal in *Ebben v Manawatu-Wanganui Regional Council; Wanganui District Council.*[98] The case concerned an appeal against the conditions of a resource consent for an increase in the number of pigs from 20 to 100, and an increase in the discharge of effluent onto land from 1.5m^3 to 4.0m^3. The activity was discretionary under the relevant District Plan. The case was decided after the *Te Aroha* case, therefore the decision is important in its treatment of that case when considering odour discharges.

The Tribunal dismissed the appeal, subject to a condition that the discharge of effluent onto land be restricted to 2.0m^3. In relation to the odour issue, the Tribunal stated the following:

"[The Tribunal]...was not satisfied that 4m^3 of effluent per day could be safely discharged onto the one hectare available throughout the year, so as to ensure that any smell emanating to nearby properties *was not so lasting and/or pervasive as to be a nuisance.*" (emphasis added)

The question is whether this case is reconcilable with the *Te Aroha* decision? The court did not cite *Te Aroha*. Arguably it is reconcilable since the Tribunal in *Ebben* apparently equated nuisance with an adverse effect. However, the court apparently put a gloss on the meaning of "adverse effect" by allowing a time component on an objectionable odour such that it is permissible, providing that the odour is not so lasting as to be a nuisance.

This decision appears to restrictively apply the *Te Aroha* decision with respect to odour emissions. Whereas in *Te Aroha* the Tribunal said there was no room for adverse odour even occasionally, this decision appears to define adverse odour in terms of a time span. It allows adverse odour of a short duration. This is more of a balancing approach than the *Te Aroha*

98 Unreported, decision no A100/93.

decision, although the Tribunal stressed that its decision was consistent with s5 of the Act.[99]

This raises the question of the difficulty of defining an adverse effect. The term "adverse" is not defined in the Act.[100] This case, and the decision in *Te Aroha* demonstrate the difficulty. In *Te Aroha* an adverse odour was not defined in relation to time, simply in relation to its noxiousness, yet in *Ebben* it was attributed a time component. Yet, both courts stated that they were being consistent with s5.

Commentators have also recognised the difficulty of defining an adverse effect,[101] in the context of the duty specified in s17 of the Act, as applied by the Tribunal in *Marlborough District Council v New Zealand Rail Limited* (*"the Fast Ferries"* case).[102]

The difficulty of defining an adverse effect may become a significant problem in forming the shape and extent of a biophysical bottom line under s5. Creative interpretations of the term are possible, since in considering the effects of many activities, like odour, an element of subjectiveness is involved.

vi. Other cases

There are a number of other cases where courts have referred to s5 of the Act to provide support for a decision made on alternative, specific grounds. For example, in *Neil Construction Ltd v Manukau City Council,*[103] the appellant sought to overturn refusal of a non-complying consent to subdivide 24 ha of land located at Flatbush into four lots of equal size. The appeal was dismissed on the basis of s406(a)(ii) of the Act; that the proposed subdivision would not be in the public interest. In support of this decision, the Tribunal said:

"As to Part II of the Act, we consider that the Act's Purpose under s5 will be better served by retaining the land as an unsubdivided block for the meantime, so that it can be developed along with other similarly zoned land in a way, or at a rate, which will enable the social and economic well-being of people in south Auckland to be provided for."

This decision is another example of a consent refused for a non-complying activity where the effects on the environment are minor, but contrary to the principles of the relevant plan. It is difficult to see how the Act has created a more liberal regime for developers in this regard.

6. The Principles of the Act

The question is whether the courts' interpretation of the principles of the Act assist in determining the likely interpretation of s5? Fisher concludes that the legislation is equivocal in this regard, but suggests that if the word "while" in s5 is interpreted as "if" then ss6 and 7 can support the priority

99 Ibid, "Having considered the relevant provisions of the plan and the actual and potential effects of the proposed activity, the Tribunal was satisfied that its decision, subject to numerous conditions imposed, took due and proper account of Part II of the Resource Management Act."

100 In *Marlborough District Council v New Zealand Rail Limited* ([1995] NZRMA 357) Judge Treadwell noted that the expression "adverse effect" is not defined in the Act, and was of the view that it should not be defined. However, he said that in his opinion, "it must be a perceptible effect - not the type of effect that one might normally experience in the day-to-day activities of society."

101 Kos Stephen, and Bielby Steven, in "Fast Ferries Decision: Seeing Sense in its Wake" ([1995] NZLJ 363 at 366) recognised the potential uncertainty of the reference to "adverse effects" in the context of s17 and s314 of the Act, as applied by the Planning Tribunal in *Marlborough District Council v New Zealand Rail Limited* ([1995] NZRMA 357).

102 [1995] NZRMA 357.

103 Unreported, decision no A078/93.

given to the ecological function. Alternatively, the courts interpretation of ss6 and 7 may provide clues to the likely direction in interpreting s5.

In *Cash M v Queenstown Lakes District Council*[104] the Tribunal considered s7 in the context of the efficient use and development of a resource and its finite characteristics. The Tribunal used s7 to support a decision to refuse the consent. The Tribunal was of the view that the matters in s7 point to limiting the use of over-used resources to provide an incentive to develop under-used resources. This suggests that resource overuse is a consideration as a factor against development. It supports the balancing approach of the first part of s5(2), the management function.

In contrast, in *Witten-Hannah v North Shore CC*[105] the Planning Tribunal appeared to interpret s5 as a "biophysical bottom line" in referring to the efficient use of resources specified in s7. Using the language of s5, the Tribunal said that a proposal may provide an efficient use of a resource if it enables people to provide for their social and economic wellbeing, but only to the extent that it: (a) does not impair the social wellbeing and health of other people and the community; (b) avoids, remedies, or mitigates adverse effects on the environment; (c) maintains and enhances amenity values and the quality of the environment.

7. Conclusion on Courts' Approach to Section 5

The question is whether the case law supports the view that s5 of the Act provides a statutory biophysical bottom line? The net result is probably equivocal. The decisions in *Te Aroha* and the *"Fast Ferries"* case provide the strongest support for the proposition. The decision in *RH Pickmere* also provides some support for this view. However, this latter decision must be treated with caution since although consent was refused on the basis of s5, the application was also inconsistent with the objectives and policies of the plan. It may be that the Tribunal, without expressly stating it, was influenced more by this consideration in refusing consent. The decision in *Lambly* was decided in a similar vein.

On the other hand, the decision in *New Zealand Rail* (the port development case) favours a balancing approach, despite the court expressing priority for s5. Similarly, the decisions in *Batchelor* and *Danes Shotover* favour a balancing approach, rather than support for an underlying biophysical bottom line.

Significantly, two of the decisions providing strongest support for the biophysical bottom line, *Te Aroha* and *RH Pickmere*, were both presided over by Planning Judge Sheppard. He has indicated extra-judicially that he is prepared to adopt a more activist interpretation of s5.[106]

Allin describes the inclusion of the phrase "avoiding, remedying, or mitigating" in s5(c) as "unbelievably bold",[107] suggesting that the phrase was intended to be read as a hierarchy. In fact, it is doubtful whether the courts are consistently interpreting s5(c) as a hierarchy, such that adverse effects are to be avoided if possible, and only when avoidance is not possible, shall the effects by remedied or mitigated. The decision in *Te Aroha* provides apparent support for this view, without expressly stating

104 [1993] 2 NZRMA 347.
105 Unreported, decision no A019/93.
106 Sheppard D, "The Resource Management Act - From Principles to Practice; A Personal Perspective of a Planning Judge", First Annual Conference of Resource Management Law Association of New Zealand, 15-16 October 1993.
107 Williams D, "Joan Allin: Law at the Core", Terra Nova 7, July 1991, 22, at 24.

it, at least when new developments are considered. The decision in *Medical Officer of Health v Canterbury Regional Council*[108] also provides some support for the hierarchy interpretation. In that case, the Tribunal distinguished *Te Aroha* in granting a consent for the continued operation of a fertiliser plant, but said:

"If, on the known state of science and technology, odour cannot be prevented then the consent authority's duty is to minimise it by the imposition of appropriate conditions consonant with the provisions of Part II of the Act and sections 104, 105, and 108."

This passage suggests that the Tribunal looked first to whether the current state of technology allowed the odour to be eliminated before looking at possible conditions to minimise the odour.

On the other hand, the decision in *New Zealand Rail* (the port development case) is contrary to such a view. Similarly, the Minister for the Environment has recently expressly rejected a hierarchical approach within the requirements of s5(c) adopted by New Zealand's first Board of Inquiry appointed under the call-in provisions of the Act. The case concerned an application by the Electricity Corporation of New Zealand for carbon dioxide emissions from the proposed Taranaki Combined Cycle Station at Stratford. The Board looked first to consider whether adverse effects could be avoided, prior to considering whether the effects could be mitigated or remedied. In rejecting the Board's approach, the Minister said that the options of avoiding, remedying or mitigating adverse effects are alternatives which are to be adopted as appropriate.

Allin is of the view that s5(c) should be read with the additional gloss of "significant effects" or "reasonably practicable remedies", rather than the literal wording of simply "effects".[109] In fact, all cases give varying degrees of support for this conservative interpretation of the phrase. The courts appear to take the view that as long as adverse effects are less than "significant", and the application meets other criteria, consent should be granted.

The possibility of this interpretation was raised by Randerson soon after the Act's enactment.[110] On the face of it, such an interpretation puts a gloss on s5(2)(c) that is not warranted on a literal reading.

The dominant feature of the cases considering s5 is the inconsistency of reasoning. The non-specific language of s5 provides an opportunity for flexibility in decision making, but the danger is that the complexity of the language will result in inconsistent and uncertain decisions. The evidence to date suggests this is occurring.

The concept of sustainable management, as expressed in the Act, is a goal oriented concept; a state to be achieved over time. This requires desired outcomes to be identified and pursued. It requires a fundamental strategic planning analysis. Ad hoc, and inconsistent court decisions on resource consents are not consistent with that approach. It may be that the courts are an inappropriate body to consider the complex principle of sustainable management for some projects, based solely on information from an applicant based AEE system.

108 Unreported, decision no W109/94.
109 Williams D, op cit, at 24.
110 Randerson et al, "Resource Management Act 1991", New Zealand Law Society Seminar, September 1991, at 8.

On the other hand, perhaps the inconsistent approach of the courts is an indication of the formative stages of the policies and plans required under the Act. This was noted by Thorp J in *KB Furniture Ltd v Tauranga District Council*,[111] in discussing the apparently conservative approach in *Batchelor*:

"I am not more minded that the Full Court (Batchelor No 2) seems to have been to try to formulate a set of rules which will define the middle way. The process must indeed involve pragmatic resolution of conflicts between the old and the new. However, in general it would appear to me that the pragmatic process should endeavour to promote 1991 policy as far as that can be done without destroying the integrity and coherence of the transitional arrangements."

It may be unrealistic to expect a consistent application of the concept of sustainable management during the present transitionary period. Rather, the principal application of sustainable management should be through the formation of policies and plans, with resource consent applications measured against these. This may develop over time.

IV. EXCLUSION OF PART II

1. Introduction

The debate amongst commentators has focused on the meaning of s5. There has been little discussion on those provisions in the Act where potential exists to advance legal arguments to negate the application of s5. It is submitted that these apparent anomalies in the Act have a greater potential to abrogate the purpose of the Act than arguments concerning the semantics of s5.

In particular, there are two provisions within the resource consent provisions where a free market approach apparently undermines the application of the purpose of the Act. These involve the procedure for non-notification of resource consents, and resource consent approvals from affected persons.

2. Notified vs Non-notified Applications

A different regime operates under the Act for "notified", as opposed to "non-notified" resource consent applications.[112] Resource consent applications need not be "notified" where the consent is for a subdivision consent, if the subdivision is a controlled activity,[113] or in the case of a coastal permit or land use consent, if it is a controlled activity and the plan allows consideration of the application without the written consent of persons affected.[114] All other resource consents for controlled activities need not be notified if written approval has been obtained from all persons adversely affected.[115]

Applications for a resource consent for a discretionary activity or a non-complying activity need not be notified if the consent authority is satisfied that adverse effects on the environment will be minor and written approval has been obtained from all those adversely affected.[116] In addition,

111 [1993] 2 NZRMA 291, at 297.
112 A decision on whether an application should be notified is usually made by a consent authority (s94) after public consultation by the applicant (Fourth Schedule, cl1(h)), and after the application is lodged, along with the assessment of environmental effects.
113 Section 94(1)(a).
114 Section 94(1)(b).
115 Section 94(1)(c).
116 Section 94(2).

the Amendment Act[117] provides that if the consent authority has restricted its discretion for a discretionary activity and the plan expressly provides that the application can be considered without written approval of those affected, then notification is not required.[118]

The requirement for public consultation prior to consent application is specified in the "assessment of environmental effects"[119] as being "an identification of those persons interested in or affected by the proposal, the consultation undertaken, and any response to the view of those consulted".

For "notified" applications, the application is publicly notified in local newspapers,[120] served on a number of government agencies,[121] and "such persons who are, in its opinion, likely to be directly affected by the application",[122] and displayed at the proposed site location.[123] "Any person" may make a submission to a consent authority concerning a "notified" application.[124] There is also an opportunity for the consent authority, upon request or of its own motion, to hold a "pre-hearing meeting" with the applicant and any person who has made a submission for the "purpose of clarifying, mediating, or facilitating resolution of any matter in issue."

There is also an opportunity for the applicant, or any person who made a submission on the application for a resource consent to appeal against the decision of the consent authority.[125] This is a major change from the previous planning regime, where appeals could only be made by persons having sufficient interest in the proposal.[126]

In the case of "non-notified" applications, public participation in decision making is restricted. It was held in *Aro Valley Community Council v Wellington City Council*[127] that there is no right of appeal from a decision by a consent authority under s94(2) to treat an application as non-notified. The court's reasoning was that submissions can only be made upon a notified application,[128] and under s120 the right of appeal is only conferred on an applicant or consent holder, and on any person who made a submission on the application. Therefore, a decision under s94 to allow a non-notified application is not a decision on the application itself but a procedural decision.[129]

117 Section 49(2).
118 Section 94(1A).
119 Fourth Schedule, cl1(h).
120 Section 93(1)(g), and s2 defines "public notice".
121 Section 93(1).
122 Section 93(1)(e).
123 Section 93(1)(h).
124 Section 96.
125 Section 120.
126 Section 274(1) also allows "any person having any interest in the proceedings greater than the public interest generally" to appear before the Planning Tribunal and call evidence on any matter. Section 13 of the *Resource Management Amendment Act* 1996 amended s274(1) to provide also for "any person representing some relevant aspect of the public interest" to appear and call evidence before the Planning Tribunal. These provisions allow a party who has not lodged a submission to an application to be heard on appeal.
127 [1992] 1 NZRMA 221.
128 Section 96.
129 Section 357 provides a right of objection to a consent authority concerning a decision not to notify, but this is available only to an applicant. It is difficult to envisage in what circumstances an applicant would exercise such a right.

The court in *Aro* also queried, without actually deciding, whether there would be a right to apply to the High Court for review of a consent authority's decision not to notify.[130] The Act provides for a High Court review on question of law only. The right is available only to "any party to any proceedings before the Planning Tribunal".[131] It could be argued that this extends to an appeal against a decision by a Planning Tribunal not to hear an appeal regarding non-notification of an application.

Some clarification on the potential for judicial review of a decision not to notify is gained from the more recent decision of the High Court in *Quarantine Waste (NZ) Ltd v Waste Resources Ltd.*[132] In that case, the Manukau County Council granted the first respondent a land-use consent to incinerate rubbish without notifying the application. The applicant sought an order to set aside the decision not to notify. The High Court found that the applicant had no standing for proceedings under the *Judicature Amendment Act* 1972. The court said anyone could make submissions under the Act, but standing for judicial review is restricted to those with "sufficient interest". The court said that in judicial review proceedings, a liberal approach for standing will be applied where environmental concerns are raised, or where a public interest group is concerned. However, the court said that economic effects do not distinguish the applicant in this case from the public, since consent authorities cannot take into account effects of trade competition under s104(3) of the Act.

This decision suggests that if an applicant is potentially affected by the proposal, or a group has a particular interest in the activity, then judicial review is possible for a decision not to notify.

The interpretation in *Aro* is clearly the intention of the Act; to carry over the same regime of notified and non-notified activities that prevailed under the *Town and Country Planning Act* 1977, where there was also no right of appeal to a decision not to notify. The question is whether this is desirable? This is particularly significant when it is considered that in exercising its discretion not to notify an application for a resource consent for a discretionary or non-complying activity under s94(2), the consent authority is obliged, pursuant to s94(4), not to take into account "the effect of the activity on any person" whose written approval has been obtained in considering whether the adverse effect on the environment is minor.[133]

On its face, s94(4) appears to allow a consent authority to exercise its discretion not to notify an application without considering significant adverse environmental effects, and therefore curtails the right to make

130 [1992] 1 NZRMA 221, at 228, per Planning Judge Skelton: "Some commentators have already suggested that such a decision may be reviewable by the High Court. Again, whether that is so is not for us to say. It may also be susceptible to enforcement proceedings under the Resource Management Act 1991, but so far as we are aware, except for one case, which in the end did not come to anything on this point, that proposition has not yet been tested....While the term "right of appeal" is widely and commonly used, at least in the case of a statutory regime such as the one we are dealing with here, the word "right" relates to the right given by the statute. There is no inherent right of appeal, and it would be quite wrong for us to read into s120 of the Act words that are not there, in order to fill what might be thought to be a lacuna in the statute."

131 Section 299(1).

132 Unreported, High Court, 2 March 1994.

133 Section 94(4).

submissions or appeal against a decision.[134] Given the significant costs involved in a "notified" application there is a real incentive for applicants to place pressure on consent authorities to treat their applications as non-notified. There is evidence that some applicants are "buying off" neighbours to obtain consents.[135]

On the other hand, it may be possible to draw a distinction in s94(4) between effects "on the environment" and effects "on any person", such that effects on the person are permissible, if approved by that person, but not to the extent that it results in adverse effects on the environment. However, it may not be possible to draw such a fine distinction, particularly when it is considered that the definition of "environment"[136] includes "people and their communities".[137]

The significance of an absence in the Act of a right to appeal against a consent authority's decision not to notify is further highlighted if it is considered that, under the *Town and Country Planning Act* 1977, the circumstances in which an application for planning consent could be treated as "non-notified" were limited. In contrast, the Act provides consent authorities with a much wider discretion to treat applications for consent to discretionary or non-complying activities as a "non-notified" application. The only possible alternative to an appeal against a decision not to notify is an application for judicial review, based on the dicta in *Quarantine Waste (NZ) Limited* discussed above. However, such a possibility appears inconsistent with s296, which requires any right of appeal to the Planning Tribunal to be exercised before an application can be made for review.[138]

Presumably, s94(4) is overridden by the underlying purpose of "sustainable management", which includes "avoiding, remedying or mitigating any adverse effects of activities on the environment."[139] However, unlike s104(1), there has been no amendment to s94(4) to specify that a consent authority's decision is "subject to Part II". Presumably also, the general duty under s17 of "every person" to "avoid, remedy or mitigate" any adverse effect on the environment also takes primacy. Some support for this view comes from the Tribunal's decision in *Marlborough District Council v New Zealand Rail Ltd* (*"the Fast Ferries"* case)[140] where the Tribunal applied s17 in the context of an application for an enforcement order. Judge Treadwell described s17 as sounding a "firm environmental warning". He said that the Tribunal has similar powers under s17 to enable conditions to be imposed on a lawful activity as it does in imposing conditions in granting a resource consent.

With respect, it seems an odd result that s94(4), by reason of an applicant's right to seek approval from affected parties, could give rise to the granting of a resource consent which either avoided conditions or

134 Section 49(3) of the *Resource Management Amendment Act* 1993 repealed s94(5) of the Act to provide that where the consent authority considers "special circumstances" to exist it may require notification, even if a plan expressly provides that the application need not be notified. It should be noted that this is a discretionary provision, and does not alter the potential of a consent authority to exercise its discretion not to notify an application that has potentially adverse environmental effects.

135 Collins D W, "The Innovations - How Are They Working?", First Annual Conference of Resource Management Law Association of New Zealand, 15-16 October 1993, at 6.

136 Section 2.

137 Section 2(a).

138 This argument was advanced, but rejected by the court in *Aro Valley Community Council v Wellington City Council* ([1992] 1 NZRMA 221).

139 Section 5(2)(c).

140 [1995] NZRMA 357.

resulted in a significant adverse effect, only for a Tribunal, by way of enforcement proceedings, pursuant to s17,[141] to either impose conditions on the activity or order the activity to cease if the effects were sufficiently serious. Clearly, the two approaches are inconsistent, suggesting that s94(4) is out of step with both the general duty under s17 to "avoid, remedy, or mitigate" adverse effects, and the purpose of the Act specified in s5.

On the other hand, a courts' use of s17 or s5 to defeat a consent authority's lawful application of s94(4) may be doubtful in light of the decision in *Batchelor v Tauranga District Council*[142] that where the intent of detailed provisions in the Act is clear, and express guidance is given for the exercise of a discretion, it is not necessary to refer to the general purpose of the Act.

One possible argument for a more direct importation of Part II of the Act into s94(4) considerations, without a direct reference to s5, is to consider the functions of consent authorities. That is, pursuant to s30(1)(h) and s31(f), for Regional Councils and Territorial Authorities respectively, the "any other functions specified in this Act" includes the duty as a consent authority to consider resource consents. This function, like all other functions under s30(1) and s31, must be carried out "for the purpose of giving effect to this Act", thus arguably importing the Part II provisions of the Act. It is submitted that pursuant to this, Part II considerations could be imported into a consent authority's discretionary decision whether or not to notify an application for resource consent.

The lack of an appeal against a decision to notify appears to be an anomaly in the public participation principles of the Act. It means that once a consent authority has exercised its discretionary power not to notify the application, there is no right of appeal, apart from the possibility of judicial review of the procedural decision in the High Court, despite there being the potential for significant adverse environmental effects. The potential for judicial review appears to be dependent on an applicant establishing "sufficient interest" in the subject of review to separate the applicant from the general public, based on the dicta in *Quarantine Waste (NZ) Ltd v Waste Resources Ltd.*[143] This may be possible if an interest group is involved, or the applicant for judicial review is likely to suffer an adverse effect as a result of a successful consent application.

The lack of an appeal against a consent authority's decision not to notify an application for a resource consent risks public suspicion of applicants' activities and a lack of confidence in consent authorities.[144] In contrast, Australian legislation allows at least an administrative appeal against a

141 The Tribunal in *Marlborough District Council v New Zealand Rail Limited* ([1995] NZRMA 357) divided the enforcement orders under s17 and s314 into two categories. Under the first category of ss17(3)(a) and 314(1)(a)(ii) the Tribunal said that it could require an otherwise lawful activity to cease only if the activity 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. The Tribunal characterised these "cease orders" as requiring a "top-level of adverse effect". The Tribunal characterised the second category, under ss17(3)(b) and 314(2)(b)(ii) as "mitigate orders" in which the Tribunal may require steps be taken in order to avoid, remedy or mitigate any actual or likely adverse effects on the environment. The Tribunal said it would not impose a condition aimed at avoiding, remedying or mitigating an adverse effect if the condition was such as to result in cessation of an activity which might not be causing a serious effect.

142 [1992] 1 NZRMA 266.

143 Unreported, High Court, 2 March 1994.

144 Ministry for the Environment, "Investment Certainty Under the Resource Management Act 1991", March 1994, at 28 notes the problem, particularly the inconsistencies between consent authorities as to whether an application will be notified, but concludes that no alteration to the Act is required at this stage.

decision not to assess a proposal, or an appeal against the level of assessment stipulated by the consent authority.[145]

3. Exclusion of Consideration of Adverse Effects

One of the strengths of the Act is its flexibility to allow consent authorities to make appropriate decisions for local communities. However, this also carries an inherent danger that decisions on resource consent will vary between authorities, and possibly within consent authorities. This danger is mitigated by a degree of standardisation of the requirements for the "assessment of environmental effects",[146] and also by the specified matters which a consent authority is obliged to consider in making a decision on resource consent under s104, as repealed by the Amendment Act.

Section 104 raises a concern. In particular, s104(6)[147] provides that where written approval has been obtained from any person, and that person has not made a submission on the application withdrawing approval,[148] the "consent authority shall not have regard to any actual or potential effect on that person"..."and the fact that any such effect on that person may occur shall not be relevant grounds upon which the consent authority may refuse to grant its consent to the application".

Section 104(6) apparently allows the applicant to "purchase" the right to adversely affect neighbouring properties.[149] While economic instruments have a role within the Act, it is submitted that these should be confined to internalising the real costs of activities, with the aim of enhancement of the environment, not to purchase the right to adversely affect the environment. Planning Judge Treadwell, speaking extra-judicially, has noted the potential under the Act to "purchase" the right to adverse effects.[150] The Planning Tribunal has since confirmed the ability to "purchase" consents from potentially affected persons.[151]

A similar argument can be advanced here as discussed in Section IV(2) in the context of a consent authority's decision not to notify a resource consent application. On its face, s104(6) allows a consent authority to grant a resource consent without considering significant adverse environmental effects, provided written consent is received from those persons affected. This could result in consent approval to a particular activity in one area by "purchasing" the right to harm the environment, and yet refusal of a consent for the same activity with identical effects in a similar area. This could result in a reinforcement of the perception by some sectors of the community that lower socio economic areas are the recipients of locally undesirable activities which provide a benefit to the public as a whole, for example, the siting of sewage treatment works, landfill sites, and waste transfer stations.

145 For example, s45 of the *Environmental Protection Act* 1986 (WA).
146 Fourth Schedule.
147 As amended by s54 of the *Resource Management Amendment Act* 1993.
148 Section 104(7), as amended by s54 of the *Resource Management Amendment Act* 1993.
149 Collins D W, "The Innovations - How Are They Working", First Annual Conference of Resource Management Law Association of New Zealand, 15-16 October 1993, at 7 notes the potential and confesses to having some "niggling doubts".
150 Treadwell W L M, "Keynote Address", "Diversity, Issues, Resources, Responses", New Zealand Planning Institute Annual Conference, Nelson, 27-30 April, 1994.
151 *BP Oil Limited v Palmerston North City Council* (Unreported, decision no W064/95).

Again, as discussed in Section IV(2), it may be possible to draw a distinction in s104(6) between "effects on the environment" and "any actual or potential effect on that person", such that effects on the person are permissible, if approved by that person, but not to the extent that it results in adverse effects on the environment. Again, there may be problems in drawing such a fine distinction, particularly when it is considered that the definition of "environment"[152] includes "people and their communities".[153]

In the case of controlled activities, the consent must be granted and s104 can only be used to set conditions within the discretion retained by the consent authority. Special provision is provided for non-complying activities, such that a consent shall not be granted unless the application satisfies one of two conditions specified in s105(2)(b), as amended by the Amendment Act. Those being that either the effect on the environment will be minor, or the granting of consent will not be contrary to the objectives and policies of the plan or proposed plan.[154] The Amendment Act removed the words "having considered the matters set out in section 104", which presumably allows a wider discretion by the consent authority in considering whether the application falls within one of the two limbs. However, s105(2)(b)(i) expressly provides that in considering the adverse effects on the environment, the effects as specified in s104(6) shall not be taken into account, thereby maintaining the possibility of "purchasing" the right to adverse environmental effects.

Again, as discussed in Section IV(2), s104(6) is presumably overridden by the underlying purpose of the Act stated in s5. The Amendment Act expressly provides that s104(1) is subject to Part II, which contains the purpose and principles of the Act. However, this provision does not expressly extend to s104(6). It could be argued that because the legislature has provided only for s104(1) to be subject to Part II, by implication, the remainder of s104 is not subject to Part II. The decision in *Batchelor v Tauranga District Council*[155] provides some support for this; that where the intent of detailed provisions of the Act is clear, and express guidance is given for the exercise of a discretion, it is not necessary to refer to the general purpose of the Act.

Presumably s104(6) is also subject to the general duty under s17. Again, as discussed previously in the context of s94(4) it seems an odd result that application of s104(6) could give rise to the granting of a resource consent which either avoided conditions or resulted in a significant environmental effect, only for a Tribunal, by way of enforcement proceedings, pursuant to s17, to either impose conditions on the activity or order the activity to cease if the effects were sufficiently serious. Again, the two approaches are inconsistent, suggesting that s104(6), like s94(4), is out of step with s17 and s5.

152 Section 2.

153 Section 2(a).

154 In *Batchelor v Tauranga District Council* ([1992] 1 NZRMA 266) the court held that the two disjunctive conditions of s105(2)(b) are not tests, the passing of which would justify the granting of consent. Rather, they are conditions the fulfilling of which enables the consent authority to consider the proposal on its merits having regard to the matters referred to in s104. In other words, even if one of the two disjunctive conditions is satisfied, the consent authority still retains the discretion whether or not to grant consent.

155 [1992] 1 NZRMA 266.

McLean also suggests that vague references to the risk of activities in the definition of "effect",[156] combined with the wide provisions for public involvement in decision making will lead to inconsistent consent authority decisions.[157] Experts tend to underestimate project risks, while the public tend to overestimate such risks. The danger is that communities with the skills to become actively involved in public input will enjoy the benefits of activities, while exporting the environmental costs of the risk. This reinforces the argument presented above that lower socio economic communities are likely to bear the burden of environmentally undesirable activities.

V. CONSIDERATION OF ALTERNATIVES

Inadequacy in the consideration of alternatives has been identified as an area of weakness in the Australian process of environmental assessment.[158] The criticism is that alternatives will only be examined in a cursory and biased way, unless they are acceptable to the applicant. Even where alternatives are discussed, the criticism is that their environmental impacts are not examined in detail, thus defeating the purpose of examining alternatives, which is to provide a comparison of their economic and environmental benefits and costs with those of the proposal. It is difficult to argue that a particular activity is sustainable, in terms of s5, if alternatives have not been considered, and the most appropriate alternative selected, based on the concept of sustainability. The question is how does the Act ensure that the most appropriate alternative is selected?

The importance of the consideration of alternatives for undertaking a particular proposal has been recognised in the AEE process. First, there is a requirement that "where it is likely that an activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking the activity"[159] should be provided. Given the focus in the Act for the need to consider alternatives, this requirement appears weak since it only requires a "description" of alternatives. If this is prepared in the same manner as the requirement in the Fourth Schedule for a "description"[160] of the proposal, applicants are likely to limit the information to geographical and technological descriptions. On its face, this provision does not require an evaluation of the environmental, social and economic effects of locating the activity at alternative locations. There is certainly no requirement, on its face, that the proposed site should be the most appropriate site, which would seem to be desirable for a planning system that has shifted from an activity zoning to an activity effect emphasis.

156 The definition of "effect" in s3 includes:
"(e) Any potential effect of high probability; and
"(f) Any potential effect of low probability which has a high potential impact."
157 McLean J, "New Zealand's Resource Management Act 1991: Process with Purpose", (1992) 7 OLR 538.
158 Formby J, "Environmental Impact Assessment: Where Has It Gone Wrong? EIA and the Tasmanian Woodchip Controversy", [1987] EPLJ 191, at 200.
159 Fourth Schedule; Assessment of Environmental Effects, cl1(b). This is reinforced by s92(2)(a)(i), which provides that a consent authority can request information where, in its opinion, the activity may result in "any significant adverse effect on the environment", require an explanation of "any possible alternative locations or methods for undertaking the activity and the applicant's reasons for making the proposed choice."
160 Fourth Schedule; Assessment of Environmental Effects, cl1(a).

It should also be noted that the requirement to consider alternative sites and methods is only necessary where "it is likely" that there is a "significant adverse" effect on the environment. This raises a question as to the extent of adverse environmental effects before a consideration of alternative sites or methods becomes necessary. The meaning of this phrase has been considered under the New South Wales *Environmental Planning and Assessment Act* 1979, and the Land and Environmental Court has interpreted "likely" to mean "possible", rather than "more possible than not".[161] The term "significant" has been interpreted as "weighty", "important", "notable", or "more than ordinary", judged in the light of prior impacts on the environment.[162] All activities have some effect on the environment, therefore the applicant may have some uncertainty in deciding when those effects become "significant". To some extent, this provision begs the question, since the effects on the environment are to some extent related to site location.

There is also a possible conflict with the applicant's requirement to consider the cumulative effect of an activity.[163] The applicant is required to consider alternative locations only where the effects of the activity are likely to be significant. However, an activity with effects less than significant may have a greater impact on cumulative effects at one location than at another, yet the applicant is not required to consider this. The danger is that environmental problems may become apparent only with the last project in a chain, too late to avoid, remedy or mitigate any effects. This has particular implications for the principle of inter-generational equity contained in the concept of "sustainable management."

Secondly, there is a requirement that where the activity includes the discharge of any contaminant, a "description" of "any possible alternative methods of discharge, including discharge into any other receiving environment" should be provided.[164] This appears to be aimed at considerations of alternative receiving waters or land, or changing the receiving environment, for example from air to water, rather than considerations of alternative sites for locating the activity.

The principal Act also had a requirement in cl1(c) of the Fourth Schedule that "where an application is made for a discharge permit, a demonstration of how the proposed option is the best practicable option."[165] The "best practicable option" is defined as the "best method for preventing or minimising the adverse effects on the environment", having regard to the nature of the discharge and the effects on the environment, financial implications and effects in comparison to other options, and the current state of technical knowledge.[166] Given that the "best practicable option" also appears in the requirements for the formulation of rules in regional

161 *Farasius v Forestry Commission of NSW*, unreported, NSW Land and Environmental Court, 4 March 1988.

162 *Bailey v Forestry Commission of NSW* (1989) 67 LGRA 402.

163 This results from the widely defined term "effects" (s3) to include "Any cumulative effect which over time or in combination with other effects" (s3(d)), and the requirement in the Fourth Schedule to include "An assessment of the actual or potential effect on the environment of the proposed activity." (cl1(d)).

164 Fourth Schedule; Assessment of Environmental Effects, cl1(f). This is reinforced by s92(2)(b), which provides that in the case of an application for a discharge or coastal permit a consent authority may require an explanation of (i) "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 (ii) any possible alternative methods of discharge, including discharge into any other receiving environment."

165 Fourth Schedule; Assessment of Environmental Effects, cl1(c).

166 Section 2(1).

plans for discharge quality,[167] this appears to focus on the adoption of appropriate technology to achieve the requisite standard, rather than the selection of the most appropriate site for locating the activity. The provision was repealed by the Amendment Act.

Prior to repeal of cl1(c), it was open to argument that if the following clauses in the Fourth Schedule are read together; a description of alternative sites,[168] a demonstration of the best practicable option in the case of a discharge permit,[169] and a description of alternative methods of discharge,[170] then for any proposed activity that requires a discharge permit, the "best practicable option" could extend to selecting the best practicable site for locating the activity. This conservative interpretation was recently adopted by the author in a site selection study for a proposed municipal composting plant.[171] The repeal of cl1(c) has weakened this argument, and would suggest that there is no intention that the best or most appropriate site should be selected for an activity.

Planning Judge Treadwell, speaking extrajudicially, appears to be of the view that a consent authority has the power to substitute one site for another,[172] or even reject an application where a more appropriate site is available:[173]

"The Resource Management Act appears to overlook a concept which has been enunciated time and again by the Tribunal namely, that the discharge and/or land use is either acceptable or unacceptable. If it is acceptable the question of alternative sites, methods, sites etc is equally irrelevant. Our function is environmental protection not the options the local authorities intend to adopt to achieve that protection."

With respect, this is misconceived. The role of the courts, as bodies exercising functions under the Act, is not environmental protection per se, but "to promote"[174] sustainable management. This role may require the assessment of alternatives, and the selection of the alternative which is likely to best promote the purpose of the Act. On the other hand, the requirements within the Act do not appear to provide the court with the option of refusing a consent if there is a more appropriate site available. Courts may not be the most appropriate bodies to select those alternatives, on the basis of an applicant prepared assessment of environmental effects, is a separate issue. It may be that for some types of project, the courts are not competent "to promote" the concept of "sustainable management".

It could also be argued that for value to be given to sustainable management, the most appropriate site should be selected. In particular, s5 specifies a duty to "avoid, remedy or mitigate". Given the Planning Tribunal's apparent interpretation of this clause as a hierarchy in some situations, a strong argument can be advanced that where two sites are available, one that avoids adverse effects, while the other remedies or mitigates these effects, there is a duty under the Act to select the former site.

167 Section 70(2).
168 Clause 1(b).
169 Clause 1(c).
170 Clause 1(f)(ii).
171 Smith G, "Christchurch City Compost - Site Selection Procedure and Evaluation of Alternative Sites", Christchurch City Council, February 1993.
172 Treadwell W J M, "Address to New Zealand Water and Wastes Association", Water and Wastes in New Zealand, November 1993, at 16.
173 Ibid, at 19.
174 Section 5(1).

In contrast to Judge Treadwell's view, Judge David Sheppard, also speaking extra-judicially, after noting that "social wellbeing" is an element of the definition of "sustainable management", suggests that siting inequity could be a relevant consideration against a resource consent application where a low income or minority area is to receive an environmentally undesirable activity.[175] On this view, a consent application could be refused on the basis of social siting inequity. This has significant implications for consent applications in their assessment of alternative sites to ensure that those social factors are taken into account.

However, it is difficult to reconcile Judge Sheppard's view with the relatively weak requirements in the Fourth Schedule to the Act to investigate alternative sites. It would suggest that applicants may need to take a conservative approach when evaluating alternative sites.

With respect, it could also be argued that such a view does not accord with the provisions of s104 where an agreement has been reached with those persons affected by an application. Such agreements could legitimise environmental harm, pursuant to s104.

In summary, there is potential for one of the pivotal aspects of the Act; the consideration of alternatives in applications for resource consent, to be abrogated in a similar experience to the implementation of Australian environmental legislation. It is inherent in the concept of sustainability that the correct choices of use of resources are made so that they continue to provide services in the future. This can only be achieved if the relevant options are evaluated. It is submitted that the weak requirements in the Act to consider alternative sites are unlikely to assist in the achievement of that goal.

VI. MORE LIBERAL REGIME FOR DEVELOPERS?

1. Introduction

One of the major claims made by the Hon Simon Upton in introducing the Act was that it will provide a "more liberal regime for developers". The question considered in this section of the article is; to what extent has the resource consent provisions of the Act provided a more liberal regime?

2. Activity Location

The ability of consent authorities to grant resource consents for non-complying activities suggests, on its face, that developers may have more scope for the implementation of activities not provided for in the relevant plan. This potential is constrained by the High Court's decision in *Batchelor v Tauranga District Council*[176] where the court said that the effects of activities includes any effect on the integrity of the plan. The court said that the lack of significant adverse environmental effects of a particular

175 Sheppard David, "The Resource Management Act - From Principles to Practice; A Personal Perspective of a Planning Judge", First Annual Conference of Resource Management Law Association of New Zealand, 15-16 October 1993. He treated the subject circumspectly in saying (at ll):

"I am not to be taken as having held that the issue would be relevant. I merely ask the question to provide the opportunity to observe that if an issue like that is to be raised before the Tribunal, it would be necessary in practice to avoid treating it as a political question; so the claim would presumably need to be supported by expert evidence from sociologists or other relevant professionals."

176 [1993] 2 NZLR 84.

activity on sustainable management objectives cannot of itself justify consent to a non-complying activity. The court also said that the traditional planning technique of zoning is not precluded under the Act.

Subsequent decisions have confirmed that applications for non-complying activities are difficult to obtain, even where the effects on the environment are minor.[177] It is difficult to see how this has provided a more liberal regime for developers.

On the other hand, the Amendment Act has amended s104 in a manner which may permit a more liberal interpretation than the *Batchelor* decision. Previously, consent authorities had to have regard to "any actual and potential effects of allowing the activity". Section 104(1)(a) has now been amended to read that the consent authority shall have regard to "any actual and potential effects on the environment...." (emphasis added). This amendment suggests that the legislature intended that the effects on the integrity of the plan are not to be considered as effects "on the environment". This amendment may affect the weight to which a court will give to the integrity of the plan in considering a consent application, potentially creating a more liberal regime.

In *Reith v Ashburton District Council*,[178] the first case to consider s104 after the amendment, the Tribunal stated that the words "subject to" in s104(1) now gave primacy to matters in Part II, but said apart from this, it was open to give deserving weight to matters listed in s104(1), including objectives and policies of a district plan. This decision suggests, notwithstanding the amendment to s104(1)(a), that the Tribunal is still prepared to give a high priority to the integrity of the district plan.

Subsequently, the Tribunal adopted a similar approach, confirmed by the High Court, in *Hopper Nominees Ltd v Rodney District Council.*[179] Tompkins J said that s104(1)(a) allows consideration of the effects on the consistent administration of a district plan, and that effects on the integrity of a district plan could also be taken into account under s104(1)(i), which enables consideration of any other matter considered to be relevant.

The courts' approach in applying s104, notwithstanding its amendments, suggests that they are reluctant to depart from the traditional town planning approach of placing a heavy emphasis on the contents of statutory plans.

In this context, in a report prepared by the Reserve Bank,[180] Owen McShane is critical of the approach of planners and councils in applying the Act's provisions as though they were the traditional controls contained in the *Town and Country Planning Acts*, instead of taking the opportunity of applying the Act in a less interventionist manner.

Notwithstanding this criticism, at the resource consent level, there is now real potential for developers to become involved in the policy and rule-making stages at local government level to present arguments for desired "permitted" or "discretionary" activities. This allows the expense

177 *RH Pickmere v The Franklin District Council* (Unreported, decision no A046/93), and *Lambly v Whangarei District Council* (Unreported, decision no A086/93).
178 Unreported, decision no C034/94, noted at [1994] 1 BRM Gazette 1.
179 Unreported, High Court, Auckland, HC 105/95, 6 February 1996, Tompkins J.
180 McShane Owen, "The Impact of the Resource Management Act on the "Housing and Construction" Components of the Consumer Price Index" (August 1996).

and uncertainty of the consent process to be circumvented,[181] potentially allowing greater development freedom.

In addition, as discussed in Section IV(3), developers now have potential to circumvent the resource consent process by providing "compensation" to objectors to a resource consent application. While this provides a more liberal regime for developers, it does so at the expense of the concept of sustainability. This ability therefore cannot be said to assist in the aim of the Hon Simon Upton to integrate development with a biophysical bottom line.

3. Delay

The Act imposes strict time constraints on consent authorities when considering resource consent applications.[182] The Act also contains provisions to suspend the time limits while additional information is being sought,[183] and provisions to extend the time limits by up to a factor of two in certain circumstances.[184]

Applicants have criticised some consent authorities for not adhering to the times specified in the Act. Delays have largely been caused by consent authorities lacking the resources to consider applications. In addition, there is some evidence that consent authorities are using the provision in s92 of the Act to require the applicant to provide additional information as a means of slowing down the consent process.[185]

Applicants have also criticised delays resulting from "frivolous" submissions.[186] The Act allows "any person" to make a submission concerning a resource consent application.[187] However, there is no requirement for that person to be involved in any consultation, or to attend the resource consent hearing. But, as a submitter, that person retains the power to lodge an appeal to the granting of a consent.[188] Potentially, this could create delays in the consent process, without submitters being asked to substantiate their objections until the case reaches the Planning Tribunal.

On the other hand, the experience varies amongst consent authorities. There has been a reduction in average consent times for those consent authorities taking the opportunities in the Act for delegation of decision making, and the flexibility provided for non-notified procedures. Consent times are predicted to improve when new district and regional plans are completed specifying permitted and controlled activities, criteria for notification, and information to be provided with applications.[189]

In addition, the number of cases awaiting hearing by the Planning Tribunal is the lowest it has been for several years.[190] The procedures for

181 Sommerville R J, "Environmental Law; The Resource Management Act; Cost Implications of the Act on Commercial Development and Activity", New Zealand Law Conference Papers, 1993, 269 at 286 suggests that commercial interests can distribute the costs involved in participation in the policy and rule-making stages of Act.

182 Sections 95, 96, 101, and 115.

183 Section 92.

184 Section 37.

185 Ministry for the Environment, "Section 24 Monitoring Report", February 1993, executive summary. The Ministry for the Environment proposes a new framework for monitoring the effect and implementation of the Act. Refer to the report entitled, "A Monitoring Framework Under Section 24" (Ministry for the Environment, March 1997).

186 See comments by Canterbury Regional Councillor Roger Tasker, "Changes Sought to Resources Act" ("Christchurch Star", Wednesday, 13 April 1994).

187 Section 96.

188 Section 120.

189 Ministry for the Environment, "Section 24 Monitoring Report", August 1993, at 10.

190 Ibid, at 9.

pre-hearing meetings have often reduced the need for or time spent on hearings, and reduced the potential for an appeal.[191] Again, the use and outcome of pre-hearing meetings varies between consent authorities, suggesting that some authorities have more effective dispute resolution skills.

The reduction in the number of appeals may be a reflection of the effectiveness of the Act, or alternatively it may reflect the reluctance of submitters to appeal a decision, given the costs involved of producing evidence, and the potential for an award of costs should the appeal fail.[192]

To some extent applicants themselves can control the time period for a successful resource consent application. Short cuts taken in the preparation of environmental assessment documentation, and the public consultation undertaken, could result in delays through consent authorities requesting additional information. In addition, if public consultation is treated lightly, this may increase the number of submissions, and could increase the likelihood of an appeal against a consent authority's decision.[193]

4. Cost

Costs to developers have increased under the Act. However, the Act is an effects based system, which requires the accurate assessment of environmental effects in order to ensure that those effects are avoided, remedied or mitigated. There is no doubt that environmental assessment can be an expensive process, particularly for major developments which require a multi-disciplined approach to adequately assess the effects of developments. If the project cannot support those costs, consent should not be granted, since the alternative is a higher level of uncertainty in the environmental effects of projects.

In addition, the Act has sought to legalise subjective value judgments. This will require a much more legalistic and costly approach by developers to participation under the Act.[194]

On the other hand, the evidence is that consent authorities are taking an unnecessarily conservative approach in requiring information from applicants on resource consents, without focusing on potential adverse effects.[195] This is unnecessarily increasing the cost of consent applications, reflected in the charges by consent authorities in a cost-recovery climate.[196] In response to the problem, the Ministry for the Environment has recommended a right of appeal against award of costs.[197]

Applicants have also been critical of the short duration of consents granted, imposed by consent conditions, for some projects of capital expenditure of several million dollars. This is a conservative approach by consent authorities. It allows consent authorities to grant consents, while

191 Ministry for the Environment, "Section 24 Monitoring Report", February 1993, at 9.
192 For example, in *Peninsula Watchdog Group v Waikato Regional Council* (Unreported, decision no A014/96) the Tribunal awarded costs of $20,000 against a local environmental group.
193 These findings have been confirmed by the Ministry for the Environment. See Ministry for the Environment, "Section 24 Monitoring Report", August 1993, at 9.
194 Somerville R J, "Environmental Law; The Resource Management Act; Cost Implications of the Act on Commercial Development and Activity", New Zealand Law Conference Papers, 1993, 269 at 273.
195 Ministry for the Environment, "Section 24 Monitoring Report", February 1993, 9. Mitchell Dr P, "How Best to Deal With Contentious Issues Under the Resource Management Act", at 4.
196 Ministry for the Environment, "Section 24 Monitoring Report", February 1993, at 9.
197 Ministry for the Environment, "Investment Certainty Under the Resource Management Act 1991", March 1994, at 26.

retaining the option of reassessing the project in full upon expiry of the consent. If there are real environmental uncertainties at the consent stage, and these cannot be solved by the applicant providing additional information, then it may be preferable for consent authorities to refuse consent.[198] The Ministry for the Environment has noted the problem, but concluded that this represents no change from the previous planning regime.[199] While this may be true, one of the benefits of a system which requires an applicant to prepare an environmental assessment of likely effects as part of the consent process should be a greater level of certainty in the consent granted. The present approach is not conducive to a "more liberal regime for developers".

After reviewing the effect of the Act on investment climate, the Ministry for the Environment concluded:[200]

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

This view has not convinced industry. The Minister of Commerce, the Hon John Luxton, has called for submissions on the costs to business of the Act. The Government has set up a joint industry/officials group to examine and provide advice on improving regulation and reducing costs. The focus of the review for the next year is the compliance costs associated with the Act. Industry has suggested that negative effects of the Act include stifling of competition and the moving of operations offshore.

VII. CONCLUSION

1. Introduction

The questions posed at the commencement of this article are, first, whether the courts are formulating "a biophysical bottom line" in interpreting s5 of the Act? Secondly, whether the Act provides for "a more liberal regime for developers", and thirdly whether the Act is capable of achieving both of these apparently contradictory dual objectives?

2. "A biophysical bottom line?"

There are some indications that the courts are interpreting s5 as a "biophysical bottom line". The decisions in *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No 2)*[201] and *Marlborough District Council v New Zealand Rail Limited* (*"the Fast Ferries"* case) suggest that where there are adverse effects on the environment the courts are prepared to interpret s5 as a high priority in the decision process to refuse consent, or in the application of enforcement provisions.

198 The Planning Tribunal in *Medical Officer of Health v Canterbury Regional Council* (Unreported, decision no W109/94) rejected an argument by the appellant that rather than imposing a yearly review condition, the term of the resource consent should be limited to five years so that the applicant would have to apply afresh after that time. The Tribunal said that a review condition could not be used to impose new conditions which have the effect of preventing the activity, and said that the consent authority must take these matters into account in deciding whether to grant the consent. The Tribunal said that to allow for such a possibility would introduce an entirely unacceptable degree of uncertainty into the resource management process.

199 Ibid, at 17.

200 Ibid, at 35.

201 [1993] 2 NZRMA 574.

The courts' approach is qualified in two respects. First, the courts are by no means consistent in this interpretation. The decisions in *Batchelor v Tauranga District Council*,[202] *New Zealand Rail v Marlborough District Council* (the port development case)[203] and *Danes Shotover Rafts Ltd v Queenstown Lakes District Council*[204] indicate a balancing approach in interpreting s5. The inconsistency of the courts' approach is a concern, but may be a reflection of the transitionary period, during which the statutory plans are under preparation. The extent to which this approach will be modified following amendments to s104 of the Act has yet to be seen, although early indications are a continuation of this inconsistent approach.

Secondly, the court in *Te Aroha* refused consent, relying on s5, on the basis that the adverse effects were "significant". Other decisions support the view that the courts are interpreting the phrase "avoid, remedy, or mitigate adverse effects" in s5, as avoiding, remedying or mitigating significant adverse effects. This potentially derogates from the concept of sustainable management.

Based on the evidence to date, the courts' interpretation of s5 is not providing a consistent biophysical bottom line, as predicted by the Hon Simon Upton. On the contrary, there is some truth in Planning Judge Treadwell's comments that the detail in the Act provides for legal arguments contrary to the principle of sustainable management, both within s5 itself, and specific provisions of the Act, particularly in the areas of consideration of alternatives, and the purchasing of approvals from potential objectors.[205]

If Parliament's intention was to create "a biophysical bottom line", an amendment to s5 would remove some of the ambiguities, and provide a better foundation for a consistent interpretation.[206]

3. "A more liberal regime for developers?"

Flexibility in the choice of location of developments is not apparent to date under the Act. On the contrary, the decision in *Batchelor* appears to restrict such an approach. There are judicial indications that this approach will continue, notwithstanding amendments to the Act.

While there is some evidence that the average time for the granting of a consent is less than under previous legislation, the timing for larger, more complex projects has probably increased due to the requirement for detailed environmental assessment.

There is no doubt that the cost of preparation of consent applications has increased. This was inevitable, given that an effects' based statutory system must have mechanisms for assessing the environmental impact of activities. In addition, the applicant prepared environmental assessment requires auditing by consent authorities, which further increases costs.

The ability of developers to "compensate" objectors to a consent application provides developers with some flexibility, but potentially at the expense of the concept of sustainable management.

202 [1993] 2 NZLR 84.
203 [1993] 2 NZRMA 449.
204 Unreported, decision no A055/93.
205 Harris B V, "Sustainable Management As An Express Purpose of Environmental Legislation: The New Zealand Attempt" [1993] OLR 51, at 73 - in a penetrative analysis of s5, he comes to a similar conclusion; "the baffling complexity of s5, the loosely guided discretion left with rule-makers and decision-makers, and the problem of weighing diverse competing interests where it is difficult to attribute to them comparative worth on a common value scale."
206 Ibid. Harris suggests a rewording of s5(2) to clarify the requirement of the inevitable balancing between current development interests and long term environmental interests.

4. "A dichotomy?"

To summarise, the Act is unlikely to be as successful in integrating the two contradictory objectives of a "biophysical bottom line" and "a more liberal regime for developers" as Simon Upton would suggest. However, it must be questioned whether the two are indeed entirely complementary, and whether it is possible for any legislation to achieve such an outcome.[207] On the other hand, the Act has at least partially achieved this result, and has certainly been more successful in doing so than previous legislation.

If the courts' inconsistent approach to interpretation of s5 continues after the formation of plans, some questions need to be asked. It may be that the courts, used to dealing with legal issues in an adversarial environment, are not competent to deal with the complex and polycentric concept of "sustainable management".[208] For some major projects, a public inquiry body may be required to assess all options and formulate the most sustainable solution.

While there is some truth in Planning Judge Treadwell's comments that the Act is no "panacea for environmental ills", his view that it is "merely a cosmetic and semantic approach to the problem", with respect, is too harsh a judgment.

207 Grundy Kerry James, in "In Search of a Logic: s5 of the Resource Management Act" ([1995] NZLJ 40) in criticising the Minister for the Environment's address to the Resource Management Law Association Conference in Wellington on October 7 1994, is of the view that the two approaches are irreconcilable.

208 Peet Dr J, "A Theoretical Framework for Sustainable Management", in *"Sustainable Management and the Resource Management Act"*, at 6, Centre for Advanced Education, University of Canterbury (Seminar Proceedings, School of Engineering, University of Canterbury, 20 February 1992). He suggests that to expect simplistic definitions of sustainability to have any meaning at all is "a fantasy".