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CATRIONA MARY PENNINGTON

THE PROPRIETARY NATURE OF RESOURCE CONSENTS

Submitted for the LLB (Honours) Degree at
Victoria University of Wellington

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I INTRODUCTION

The Resource Management Act 1991 ("the Act") introduced sweeping changes to the way the use of New Zealand's natural resources is managed. Applications to use natural resources are now considered with regard to the principle of sustainability, a concept which balances the needs of present and future generations with the environment's ability to meet those needs. If a decision-making local authority is satisfied that a proposed activity will satisfy the criteria set out in the Act, the successful applicant will be issued with a resource consent. This paper summarises the main characteristics of resource consents, including the restrictions placed on the ability to transfer them.

The focus of this paper is section 122 of the Act, an important and troublesome provision which commentators on the Act have largely ignored. Section 122 deals with the proprietary status of resource consents. As resource consents are the ultimate product of the Act's decision-making process, it is essential that their nature is clearly defined. It is the contention of this paper that section 122 fails to do this, and in fact adds unnecessary confusion to the issue of what resource consents are and how they may be dealt with.

Section 122 declares that a resource consent is neither real nor personal property. However the section goes on to provide that a resource consent will be treated as personal property in various circumstances.[1] The common law system of property is based on property being classified either as realty or personal property. Section 122 is in effect creating a new category of property — one which has many of the characteristics of personal property despite not actually being personal property. It follows that resource consents only have those personal property characteristics which are expressly endowed by the Act. This has a number of consequences, most of which cannot have been intended, and indeed appear undesirable.

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[1] On the death of a consent holder the consent will vest in the holder's personal representative, and he or she may deal with the consent to the same extent as the holder would have been able to do (s 122(2)(a)). Consents are also considered to be personal property for the purposes of the Protection of Personal and Property Rights Act 1988 (s 122(2)(c)). On the bankruptcy of an individual who is the holder of a consent, the consent vests in the Official Assignee as if it were personal property, and he or she may deal with the consent to the same extent as the holder would have been able to do (s 122(2)(b). Charges may be granted over resource consents "as if they were personal property" (s 122(3)).

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This paper attempts to discover why resource consents have been left in this "non-property" limbo. The paper summarises the legislative processes leading up to the Act's enactment. It is clear that a primary concern of those involved in the reform process was that resource consents should not give property rights to natural resources. However as the paper points out, there is a huge conceptual difference between ensuring that resource consents are merely privileges which do not give ownership rights to the resource to which they relate, and stating that the consents themselves are neither real nor personal property. The latter is not necessary to achieve the former.

A further problem with section 122 is subsection (3), which deals with the ability to grant charges over resource consents. The subsection suffers from poor drafting and would lead to absurd consequences if a literal interpretation of it were adhered to. These problems will be explored by the paper.

II THE RESOURCE MANAGEMENT ACT 1991

All over the world the issue of natural resource management has become increasingly important. In New Zealand several Acts have recently been passed which provide comprehensive management systems for most of our natural resources.[2] The most important of these is the Resource Management Act 1991 which deals with the rights to use land, the coastal marine area, river and lake beds, and water.

Prior to the enactment of the Act, New Zealand's planning legislation was an uncoordinated and eclectic hotch potch. More than 50 statutes were passed at different times to meet various resource use problems as they arose, however they:[3]

> contained no unifying principle or approach. Permission to do things was usually required but there was no golden thread running through the statutes of the standards to be applied

[2] For example the Resource Management Act 1991, the Crown Minerals Act 1991 and the Radio Communications Act 1989.

[3] Sir Geoffrey Palmer "Sustainability - New Zealand's Resource Management Legislation" Resources: the Newsletter of the Canadian Institute of Resources Law No 34 (Spring 1991) 4.

or the outcomes to be achieved. The mechanisms for settling disputes contained no uniformity. The institutional structures for dealing with the issues were almost infinitely various.

The Act, together with its sister act the Crown Minerals Act 1991,[4] has made sweeping changes to the management of natural resources in New Zealand, finally providing the "golden thread". The Act contains a new system of resource allocation whereby applications are considered with regard to their "sustainability", a concept which balances the needs of present and future generations with the environment's ability to meet those needs. Included in the balancing equation are various subfactors such as preserving the natural character of the coastal environment, protecting outstanding natural features, and maintaining and enhancing public access to lakes, rivers, and coastal marine areas.[5]

Regional authorities issue resource consents in accordance with the various principles laid down in the Act, national policy statements and their own regional policy statements. The ultimate product of the decision making process is the granting of a resource consent.

A The General Characteristics of Resource Consents

There are five categories of resource consents: land use consents, subdivision consents, coastal permits, water permits, and discharge permits. Section 108 sets out various conditions which may be attached to a resource consent.[6] These include conditions of a financial nature such as the payment of bonds and administrative charges. A consent holder may also have to make a "financial

[4] The regime for the allocation of minerals was initially contained within the Resource Management Bill, remaining there for both the first and second readings. However the Review Group on the Resource Management Bill recommended, and the government accepted, that the minerals provisions be split out of the bill at the third reading stage. As a result the concept of sustainability does not apply to decisions on the allocation and use of minerals. The Crown Minerals Act 1991 was enacted on the same day as the Resource Management Act 1991.

[5] Section 6.

[6] Section108 was a late inclusion in the legislative process, its creation was precipitated by a letter from the Minister for the Environment to members of the Review Group on the Resource Management Bill in December 1990, asking them to consider the best way to introduce various economic instruments to achieve resource management objectives.

contribution". This is defined in section 108(9) as a contribution of cash, land, or works, such as the planting or replanting of any tree or other vegetation or the restoration or enhancement of any natural or physical resource. This type of condition is designed to act as "environmental compensation". Adverse effects of a development can be compensated for by an environmental gain in another area. Under section 108(1)(c) a consent holder may be required to enter into a covenant in respect of the performance of a condition where the condition relates to the use of the land which is the subject of the consent.

Under section 109 any bond given in respect of a land use consent or a subdivision consent, and any covenant entered into, are deemed to be instruments creating an interest in land within section 62 of the Land Transfer Act 1952 and may be registered under that Act. Section 109(1)(b) expressly provides that when registered, such bonds and covenants will run with the land and bind all subsequent owners.

Furthermore, section 108(2) of the Act provides that a consent authority may attach any other type of condition to a consent that it considers appropriate. With no limit on the type or number of conditions that may be applied, there is a potential for onerous duties being placed on the consent holder. Because of this, consents for schemes which are on the face of it very similar in nature may be of widely varying value depending on the nature of the conditions imposed in each particular case.

Unless the consent expressly provides otherwise, all consents will lapse after 2 years if the consent has not been used.[7] Furthermore a consent may be changed or cancelled if, in the opinion of the Planning Tribunal, information made available to the consent authority by the applicant contained inaccuracies which materially influenced the decision to grant the consent.[8] It may be noted that the Tribunal can cancel the consent whether or not the consent has been subsequently transferred to an innocent third party who knows nothing of the inaccurate information originally provided.

[7] Section 125.
[8] Section 314(e).

The duration of a consent (subject to the possibility that it may be cancelled or changed as mentioned above) depends partly on what type of consent it is. Generally land use consents and subdivision consents are granted for an unlimited duration.[9] Water permits, discharge consents and coastal permits which do not deal with reclamation, run for a maximum of 35 years (their duration is presumed to be 5 years if no time period is specified in the consent).[10]

B The Transferability of Resource Consents

1 Coastal permits

Coastal permits are consents to do something that would otherwise contravene sections 12, 14 or 15.[11] These sections deal with restrictions relating to water, discharging contaminants into the environment, and use of the coastal marine area. Restricted uses of the coastal marine area as defined by section 12 include the erection or alteration of any structure on, under or over any foreshore or seabed[12]. In this respect coastal permits may authorise activities similar to those authorised by land use consents (as discussed below). Coastal permits may also authorise activities which would normally require a licence or *profit a prendre,* such as the removal of sand, shingle or other natural materials from the coastal marine area.

Section 135 allows a holder of a coastal permit to transfer the whole or any part of their interest in the permit to any other person, unless the consent expressly provides otherwise. Such a transfer has no effect until written notice of the transfer is sent to the consent authority that granted the consent.

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[9] Section 123 . However a land use consent or coastal permit which permits a holder to do something which would otherwise contravene section 13 (which places restrictions on certain uses of beds of lakes and rivers) may run for a maximum of 35 years only.

[10] Section 123(d).

[11] Section 18(c) Resource Management Act 1991.

[12] Section 12(1)(b) Resource Management Act 1991.

2 *Water permits*

Water permits deal with the taking, using, damming, or diverting of any water which is not for an individual's reasonable domestic needs nor the reasonable needs of an individual's animals for drinking water.[13]

Water permits are not as freely transferable as coastal permits. Section 136(1) provides that the whole of the holder's interest in a water permit granted for damming or diverting water may only be transferred by the consent holder to an owner or occupier of the site in respect of which the permit was granted. The permit may not be transferred to any other person or from site to site.

Water permits granted other than for damming or diverting may be transferred to any owner or occupier of the site in respect of which the permit was granted.[14] They may also be transferred to another person on another site in the same catchment area, aquifer, or geothermal field, if such a transfer is expressly allowed by a regional plan or the holder makes an application to be able to do so to the consent authority which issued the permit.[15]

3 *Discharge permits*

No person may discharge any contaminant into water, land or the air unless the discharge is expressly allowed by a rule of a regional plan, regulations, or a resource consent.[16] Such permits are essential to the operation of many industrial businesses and farms.

A holder's interest in a discharge permit may not be transferred to any person other than an owner or occupier of the site in respect of which the permit is granted, or from site to site.[17]

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[13] Section 14. The taking or use of water for such domestic purposes must not have an adverse effect on the environment. A further exception is provided where the water is needed for fire-fighting. This section also deals with the use of heat or energy from water and from the material surrounding geothermal water.

[14] Section 136(2).

[15] See s136(3) for the application procedure, and decision criteria.

[16] Section 15.

[17] Section 137.

4 *Land use and subdivision consents*

Section 134 provides that land use[18] and subdivision consents:

> attach to the land to which each relates and accordingly may be enjoyed by the owners and occupiers of the land for the time being, unless the consent expressly provides otherwise.

Stating that land use and subdivision consents attach to the land makes sense when one looks at the nature of the activities which these types of consent are authorising. Both types of consent result in alterations to land which are at least semi-permanent. Such alterations are, by their nature, necessarily enjoyed by anyone who occupies the land.

Subdivision consents authorise the division of a parcel of land which was previously a continuous area without boundaries on a survey plan.[19] Land use consents authorise uses of land which would otherwise contravene a rule in a district plan. In the Act the word "use" in relation to any land means:[20]

> (a) Any use, erection, reconstruction, placement, alteration, extension, removal, or demolition of any structure or part of any structure in, on, under, or over the land; or
> (b) Any excavation, drilling, tunnelling, or other disturbance of the land; or
> (c) Any destruction of, damage to, or disturbance of, the habitats of plants or animals in, on, or under the land; or
> (d) Any deposit of any substance in, on, or under the land; or
> (e) Any other use of land.

There may be cases where a land use consent has an ongoing nature, such as the depositing of a substance on a piece of land by a business which does this regularly, but in most cases the types of activities which these "uses" describe are those which will end at a certain point in time; the structure will have been erected, the tunnelling will have reached its destination. The result will remain to be enjoyed, but the actual task will have been completed. Thus although the Act speaks of land use and subdivision consents as being of an "unlimited

[18] Except land use consents which allow their holder to do something which would otherwise contravene section 13; section 134(2).
[19] Section 218.
[20] Section 9(4).

duration",[21] their role, or at least their active role, is completed when the project which the consent authorises has been completed.

The focus of section 134 is the transferability of land use and resource consents. Although it is not expressly stated, the effect of the section is that these consents are transferred by the mere transfer of the land to which they attach. The consent holder has no integral part to play in a transfer, they are not even mentioned in the section.

III SECTION 122

Considering that resource consents are the ultimate product to which the whole Act and its decision making process are geared, it is crucial that there are clear guidelines as to what consents actually are, and how they may be dealt with. In this respect, section 122 is particularly problematic.

A Consents Are Neither Real Nor Personal Property

Section 122 expressly states that a resource consent is neither real nor personal property. However the section goes on to provide that a resource consent will be treated as if it were personal property in various circumstances.

On the death of a consent holder the consent will vest in the holder's personal representative, and he or she may deal with the consent to the same extent as the holder would have been able to do.[22] Consents are also considered to be personal property for the purposes of the Protection of Personal and Property Rights Act 1988.[23] On the bankruptcy of an individual who is the holder of a consent, the consent vests in the Official Assignee as if it were personal property, and he or she may deal with the consent to the same extent as the holder would have been able to do.[24]

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[21] Section 123(b).
[22] Section 122(2)(a).
[23] Section 122(2)(c).
[24] Section 122(2)(b).

As mentioned in the introduction, the common law system of property is based on property being classified either as realty or personal property.[25] Section 122 is in effect creating a new category of property - one which has many of the characteristics of personal property despite not actually being personal property. Thus consents can only have those personal property characteristics which are expressly endowed by the Act. This means a consent holder will probably be unable to institute civil or criminal proceedings for interferences with their consent such as conversion, trespass, or theft.[26]

The non-property status of resource consents also has ramifications for the operation of floating charges. A company granting a floating charge to a bank over its present and future property would presumably not be granting a charge over its resource consents (or any it might be granted in the future) as these, being neither the "real nor personal property" of the company, would not fall within the ambit of a standard charging provision. This is despite the fact that resource consents are valuable commodities which are usually essential to the operation of a business. Financiers will have to be particularly careful to expressly include resource consents within the charging provisions of their standard form documents.

The fact that there are negative spinoffs from section 122's casting of resource consents as neither real nor personal property (such as the diminishing of the rights usually associated with the ownership of property, and the need for time and money to be spent changing standard form documents throughout the finance industry) suggests that there was some justification for the creation of a new category of 'non-property' in relation to resource consents. However analysis of the legislative history of section 122 leads to the conclusion that the designation of resource consents as neither real nor personal property is unwarranted.

[25] G W Hinde and D W McMorland *Introduction to Land Law* (2 ed, Butterworths, Wellington, 1986) para 1,002, p 3.

[26] See *Resource Management Volume 2 - Crown Minerals and Hazards Control* (Brooker & Friend, Wellington, 1991) para B92.04.

B The Law Reform Process and Property Rights to Resources

The various characteristics of resource consents outlined in Part II of this paper illustrate that consents do not provide absolute and unassailable rights to a resource, nor are resource consents "freely" transferable. A consent holder has no more than a transient privilege, thus the terms "consent" and "permit" rather than "right" more accurately describe the effect of the granting of a resource consent.[27] Most importantly, consents do not have the effect of granting title to resources. The issue of resource ownership is avoided by the Act. This is no accident, but the result of the extensive policy generation processes which shaped the Act and left it in its final form.[28]

Sir Geoffrey Palmer, Minister for the Environment when the reform of New Zealand's resource management system began, set out the objectives to be achieved throughout the reform process. These provided the basis for the working papers and discussion which ensued. He stated that the primary goal of the reform was to produce an enhanced quality of life, both for individuals and the community as a whole, through the allocation and management of natural and physical resources. He went on to say:[29]

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[27] See *Working Paper No 21 -Synopsis of Submissions Received in Response to Directions For Change* (Resource Management Law Reform, Ministry for the Environment, Wellington, 1988)27.

[28]The resource management law reform project was a long and complicated affair. The first phase was the publication of a discussion paper entitled "Directions for Change: A Discussion Paper" (Resource Management Law Reform, August 1988). This was followed by a total of 32 working papers commissioned by the Government which covered many aspects of the proposed reforms from a variety of perspectives. Throughout the reform process public meetings were held all over New Zealand, there was a freephone operating, and a newsletter entitled "Viewfinder" was published regularly to give information of the latest developments.
The Resource Management Bill was finally introduced to the New Zealand Parliament in December 1989. A Select Committee of Parliament was set up and more than 1,400 submissions were received. The bill was read a second time before the 1990 general election which saw a new government in power. The new (national) government set up a Review Group which published an initial discussion paper entitled "Discussion Paper on the Resource Management Bill: Prepared by the Review Group" (Resource Management Law Reform, December 1990). The Review Group received 160 submissions, and then published its final review, "The Report of the Review Group on the Resource Management Bill" (Resource Management Law Reform, February 1991). The government introduced a Supplementary Order Paper to the House of Representatives, a parliamentary select committee heard more submissions, and a new Supplementary Order Paper was produced. The bill was finally enacted in July 1991.

[29] See G Palmer *Environmental Politics - A Greenprint for New Zealand 91* (John McIndoe, Christchurch,1990) 91.

(2) Resource management legislation should have regard to the following, sometimes conflicting objectives:

(a) to distribute rights to resources in a just manner, taking into account the rights of existing rightholders and the obligations of the Crown. The legislation should also give practical effect to the principles of the Treaty of Waitangi;

(b) to ensure that resources provide the greatest benefit to society. This requires that rights to use resources are able to move over time to uses which are valued most highly, and that the least costly way is adopted to achieve this transfer;

(c) to ensure good environmental management (as specified in the World Conservation Strategy) which includes considering issues related to the needs of future generations, the intrinsic value of ecosystems, and sustainability;

(d) to be practical.

It was hoped that the best result would be achieved through the dynamic interaction between environmentalism, economics and the maori perspective.

1 *The application of economics to the issue of property rights to resources*

Working Paper No 1 contained a paper exploring the economics issues in natural resource management.[30] The paper expounded the view that the "highest possible commercial benefit, or net monetary return, can be obtained if rights to resources are transferable, exclusive and enforceable".[31] It said this could be done by allocating property rights to resources.

The paper recognised potential problems involved with the allocation of property rights, but claimed these could be overcome. A source of these problems was that the working group's brief was to establish how to obtain the greatest commercial return from a wide range of natural resources, each with differing characteristics. In propounding that all resources should be able to be owned, the working group had to contend with the fact that some resources are mobile (such as water), the spatial boundaries of some resources are difficult to define (such as air and petroleum), and some resources are renewable and some are not. The Working Group suggested that boundary and mobility problems could be overcome by defining resource use rights by quantity, quality and time period.

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30 *Working Paper No 1 - Fundamental Issues in Resource Management* (Resource Management Law Reform, Ministry for the Environment, Wellington 1988).

31 Ibid "Commercial Issues in Natural Resource Management" 73.

The Working Group also recognised that some use rights require 'joint production', for example minerals can not usually be extracted without disturbing the surface of the land, and many mining operations require water rights as well. They thought that all that might be necessary for efficient outcomes was clear prior specification of the right of one user to affect the right of another resource user. They suggested a register containing an exact description of each resource owner's rights be established to give a standardised method of registering title.

The question also arose as to who actually owned New Zealand's natural resources in the first place, thus having the authority to sell resources and reap the financial rewards. The Working Group explored the possibility of resumption of Crown ownership to all natural resources not already allocated, followed by either cash bidding, bid royalties or purchase of resources for predetermined sums.

The view that well specified property rights to natural resources should be established has been the subject of vigorous debate, particularly in the United States.[32] Proponents of property rights to resources contend that the holders of such rights would feel the discipline of exclusive ownership, because mismanagement would result in the fouling of their own nest. As rights would be transferable, right-holders would have incentives to preserve their resources because neglect would reduce their market value.[33] Furthermore the proponents of such a system argue that imaginative right-holders would actually have an incentive to improve the quality of their holdings in order to "capture the value of environmental amenities" and thus profit.[34]

To prevent right-holders from fouling their neighbours' nests, a system of strict liability administered by the courts would also be imposed. This would prevent

[32] For a useful discussion on this see R A Pennington "The Use of Criminal Sanctions to Enforce Environmental Laws: The Resource Management Act 1991" (LLM Research Paper, Victoria University of Wellington, 1992) 10-16.

[33] J E Krier "The Tragedy of the Commons, Part Two" (1992) 15 Harv J L & Pub Poly 325,327.

[34] T L Anderson & D R Leal "Free Market Versus Political Environmentalism" (1992) 15 Harv L & Pub Poly 297,303.

the "tragedy of the commons" first described by Garrett Hardin in 1968.[35]

Serious flaws have been identified in these arguments, particularly in the areas of enforcement of the strict liability system (a polluter would need to be identified before they could be charged, and this might be impossible), and in the initial distribution of property rights to resources.[36] However, despite criticism of free market environmentalism and Law and Economics in general, it is now broadly accepted that most government action should be informed by economic analysis.

The acceptance of this idea in relation to environmental policy formulation in New Zealand is itself evidenced by the commissioning of "Commercial Issues in Natural Resource Management" in Working Paper No 1. However even within the Working Group there were some members who disagreed with what they saw as an "uncritical faith in market forces" held by the majority. In a document expressing their views which was annexed to the Working Group's main paper these dissenters claimed such faith was extraordinary:[37]

> when it [was] realised that market-led resource development in many parts of the world has been responsible for, among other things, widespread deforestation and erosion, pollution, and extinction of species. Development of resources for commercial reasons alone, without consideration of other factors, has historically led to widespread problems that are left for others (eg Government or future generations) to sort out.

In particular the dissenting minority disputed the contention that property rights to resources would provide the highest commercial return from the use of resources. They gave the example of under-capitalised mining ventures which had devastated the landscape for little return to shareholders, effectively ruining a larger-scale mining prospect, and causing long term environmental damage.

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[35] G Hardin "The Tragedy of the Commons" (1968) 162 Science 1243. Hardin's theory is that when resources are not owned and able to be used by all, there is a perverse incentive to use the resource as quickly as possible (or pollute it - for example air pollution), without worrying about conserving it for the future.

[36] See W Funk "Free Market Environmentalism: Wonder drug or Snake Oil?" (1992) Harv J L & Pub Poly 511; P S Menell "Institutional Fantasylands: From Scientific Management to Free Market Environmentalism" (1992) 15 Harv J L & Pub Poly 489; J E Krier "The Tragedy of the Commons, Part Two (1992) 15 Harv J L & Pub Poly 325.

[37] Above n23, 93.

2 *The views of the public at large*

Many submissions from various sectors of the public to "Directions for Change" expressed concerns about the allocation of property rights and questioned the practicality of such a regime.[38] For example Fletcher Challenge Titanium products stated:[39]

> We have considerable misgivings about the practicality of making unallocated rights available for tender, eg
>
> - most water resources vary in quantity over time and we see difficulties in selling water rights without assurances of continuity of supply;
>
> - who will be responsible for purchasing water rights on behalf of recreational users?
>
> - placing economic values on water assumes parity of economic power among all interested parties;
>
> - we do believe that waste disposal rights are too use-specific to be tradable.

The Blenheim Borough Council pointed out the costs involved in allocating property rights to resources:[40]

> We have considerable difficulty with the notion of broadening property rights, and in particular reconciling this essentially western European view with the major thrust of giving recognition to Maori issues. We see some justification for private trading of certain resource rights, such as water, but we are acutely aware of the costs of surveying the limits of the resource and of ongoing monitoring.

Overall there was very little support for a purely market based approach.

3 *Maori rights to resources*

The strongest argument against ownership of natural resources however comes from the Maori quarter. In New Zealand, before property rights to resources can safely be allocated, the issue of maori ownership of resources under the Treaty of

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38 See *Working Paper No 21 - Synopsis of Submissions Received in Response to Directions for Change* (Resource Management Law Reform, Ministry for the Environment, Wellington, 1989) 26 - 28
39 Ibid 27.
40 Ibid.

Waitangi and/or aboriginal title would need to be conclusively settled. This is obviously an extremely large and complicated task, and a big disincentive to incorporating such a regime within legislation hoped to be passed within a reasonable time frame. As warned by the Working Group which produced Working Paper No 5:[41]

> [a] shift away from the present rights arrangements, in respect of minerals and water particularly, requires considerable caution. Before such a shift is even contemplated, Maoridom has the right (and expectation) to be involved in the decision-making process with the Crown as treaty partner. Accordingly, Ministers are advised to decide whether the privatisation of Crown-owned minerals is to be seriously contemplated prior to embarking on Phase II. If it is to be so considered, the timetable for reform will not be able to be adhered to.

Furthermore, from a purely maori cultural point of view, the idea of granting property rights to natural resources is unacceptable. Maori groups were particularly concerned during the reform process that the environment should be treated as something over which we have guardianship, not ownership.[42]

> From early times we recognised the transitory nature of the human presence and the permanence of the land: "Whatungarongaro te tangata, toitu te whenua" (man passes on but the land endures). Human development is, therefore, still regarded as being a necessary consequence of the establishment of a balanced relationship between the iwi and their physical and metaphysical surroundings. We regard this relationship as being comprehensive and complete and still regard it as being relevant today and for the future.

In the end, the weaknesses in the economic argument for fully transferable property rights to resources, and the enormous practical difficulties in instituting such a regime (particularly those difficulties unique to New Zealand because of the implications of the Treaty of Waitangi) led to the rejection of the market based approach, and a continuance of Crown 'management' of New Zealand's natural resources through the allocation of use privileges. The question of who actually owns New Zealand's natural resources remains unresolved.

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41 *Working Paper No 5 - The Rights to Use Land, Water and Minerals* (Resource Management Law Reform, Ministry for the Environment, Wellington, 1988) 46.

42 *Working Paper No 21 - Synopsis of Submissions Received in Response to Directions for Change* (Resource Management Law Reform, Ministry for the Environment, Wellington, 1989) 26.

4 *The relationship between the objectives of reform and section 122*

As an examination of the reform process shows, a decision was clearly made early on to avoid allocating property rights to natural resources. However there is a clear conceptual difference between ensuring that resource consents are merely privileges which do not give ownership rights to the resource to which they relate, and stating that the consents themselves are neither real nor personal property. The latter is not necessary to achieve the former.

A statement at the outset of section 122 to the effect that consents do not confer any property rights to the resources to which they relate would have been more apt, but even this is arguably unnecessary, as this core characteristic of consents is patently clear throughout the structure of the Act.[43] It is the contention of this paper that the creation of a new category of property is redundant and should be repealed.

C *Granting Charges Over Resource Consents*

The second focus of this paper is the ability to grant charges over resource consents provided by sections 122(3) and 122(4) as follows:

> (3) The holder of a resource consent may grant a charge over that consent as if it were personal property, but the consent may only be transferred to the chargee, or by or on behalf of the chargee, to the same extent as it could be so transferred by the holder.
>
> (4) Subject to the provisions of this Act, and in particular to subsection (3), the Chattels Transfer Act 1924 and Part IV of the Companies Act 1955 shall apply in relation to a resource consent as if -
>
> > (a) The resource consent were a chattel within the meaning of the Chattels Transfer Act 1924; and
> >
> > (b) The resource consent were situated in the Provincial District in which the activity permitted by the consent may be carried out (or, where it may be carried out in more than one Provincial District, in any such Provincial Districts).

[43] See for example s 125 - lapsing of consents, s 314(e) - the ability of the Planning Tribunal to cancel or change consents, and ss 134 to 137 - governing the restricted transferability of consents.

1 *Mortgage or charge?*

The first issue is whether the term "charge" is being used in a generic sense which includes mortgages, or whether it is being used in a strict sense to mean equitable charges only. Unlike in the Companies Act 1955 where the term "charge" is expressly defined as including mortgages, there is no immediate indication in the Act of what the term means.

Professor D W McLauchlan suggests in his article "The Concept of "Charge" in the Law of Chattel Securities" that an accurate definition of a charge is as follows:[44]

> A charge, except to the extent that a mortgage is expressly included by statute, is a security whereby, without any transfer of or agreement to transfer title/ownership or possession, property is appropriated to the discharge of a debt or other obligation.

As there is no express inclusion of mortgages within the term 'charge' in the Act, it would appear prima facie that the term 'charge' means equitable charges only. However there are strong arguments which suggest that the term 'charge' as it is used in section 122 must include mortgages.

First, it could be argued that there is no policy reason why the ability to grant mortgages over consents should be denied, while the ability to grant equitable charges is sanctioned. By allowing any type of security device to be granted over consents, the principle of stewardship (as opposed to ownership) of resources is immediately undermined. All securities "presuppose some proprietary right, though not necessarily an ownership right, in the holder of the security".[45]

While there are clear conceptual distinctions between mortgages and equitable charges,[46] the remedies available under both have been largely assimilated.[47] In the case of a chattel mortgage the mortgagee may resort to the charged property on

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44 (1974) 7 VUWLR 283; 295.

45 Sykes, *The Law of Securities* (2nd ed. 1973) 12.

46 A mortgage involves a transfer of ownership to the creditor by way of security. An equitable charge does not transfer the legal title to an asset, but constitutes a right to have a designated asset appropriated to discharge indebtedness on default. In situations of priority disputes these distinctions are vital.

47 See above n 44; 291.

default to satisfy the outstanding debt, usually by seizure and sale. An equitable chargee's right to have a designated asset appropriated to discharge indebtedness is satisfied in the situation of default out of the proceeds of sale of the asset, "whether the sale results from the debtor's voluntary act or takes place under an order of the court made on application of the chargee".[48]

It is true that legal charges over personal property involve an immediate transfer of the legal title to the property, whereas equitable charges do not. Considering the Act's emphasis on keeping strict control of the allocation of rights to natural resources, it may appear that stricter control can only be achieved by allowing equitable charges to be granted over consents. However this belief is illusory. As both legal and equitable charges may lead to the sale of a consent on default to satisfy an outstanding debt, the rights of an equitable chargee may still dictate a change in the allocation of the resource to which the consent relates. Therefore if holders are allowed to grant equitable charges over their consents, they should be able to grant legal charges as well.

Perhaps the strongest argument for the inclusion of legal charges within the term "charge" in section 122 is provided by provisions in the Crown Minerals Act 1991. As mentioned in the introduction, the provisions of the Crown Minerals Act were initially contained within the Resource Management Bill. Section 92 of the Crown Minerals Act is almost identical to section 122. It states that permits issued under the Act are neither real nor personal property, but then goes on to endow these permits with various personal property characteristics, including the ability to "grant a charge over [a] permit as if it were personal property".[49] Just like the Resource Management Act, there is no definition in the Act of the word "charge".

Section 41 of the CMA governs the transfers of mineral permits. It states:[50]

> (2) No permit holder or any other person shall enter into an agreement (**except by way of mortgage or other charge only**) which -
>
> (a) Transfers a permit; or
>
> (b) Creates any interest in or affecting any existing or future permit; or
>
> (c) Transfers or otherwise deals, either directly or indirectly, with any interest in or

48 R M Goode *Commercial Law* (Penguin Books, Auckland, 1988) 714.

49 Section 92(3) Crown Minerals Act 1991.

50 Emphasis added.

> affecting any existing or future permit; or
>
> (d) Imposes any obligation on the permit holder which relates to or affects the production of minerals from the land to which the permit relates or the proceeds of such production -
>
> unless the agreement is entered into subject to the consent of the Minister and an application for such consent is made within 3 months after the date of the agreement.

This suggests that the drafters of the Crown Minerals Act assumed that the term "charge" used in section 92 of that Act included mortgages. Considering that section 92 of the CMA and section 122 are practically identical **and** that both sections (including the equivalent of section 41 of the CMA) were once in the same Bill, a very strong argument can be made that the intention was that mortgages should be able to be granted over resource consents, not just equitable charges.

Further, recent decisions in the Courts have used the terms "charge" and "mortgage" interchangeably, suggesting a general movement towards the use of "charge" as a generic term.[51] It is thus highly unlikely that a court will hold the term "charge" in section 122 to mean equitable charges only.

It is a pity that the drafters of the Act did not see fit to include a definition of "charge" in the Act which expressly explained what was meant by the term. While reason and logic points to the inclusion of mortgages, on a strict literal reading of section 122(3) it does not confer on consent holders the ability to grant legal charges over their resource consents. The subsection should be altered to clarify the situation.

2 *Subdivision and land use consents*

Land use and subdivision consents present unique difficulties in relation to the ability to grant charges over consents as given by section 122(3).

As outlined earlier in this paper, land use and subdivision consents attach to the land and accordingly may be "enjoyed by the owners and occupiers of the land for

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[51] See for example *BNZ* v *Elders Pastoral* where the term "charge" was used by the Court of Appeal in the generic sense of a security granted by a debtor.

the time being".[52] Although it is not expressly stated, the effect of this statement is that these consents are transferred by the mere transfer of the land to which they attach. The consent holder has no integral part to play in a transfer, they are not even mentioned in the section. Thus, despite the fact that section 122(3) ostensibly gives the holder of a subdivision or land use consent a residual right to grant a charge over their consent as though it were a separate and valuable personal asset, it appears that once the project for which the consent has been granted is completed, subdivision and land use consents eventually become a non-severable part of the land to which they relate, able only to be enjoyed with the land itself.

In this respect, land use and subdivision consents should be regarded as loosely analogous to fixtures, being items of personal property (but only to the extent recognised by the Act) which become so attached to real estate that the law no longer considers them to be personal property. As a general rule, once personal property qualifies as a fixture, it becomes subject to mortgages and other security interests over the real estate.

It is extremely unclear as to exactly how subdivision and land use consents may be charged - either with the land, or separately as seems to be the case with the other types of consents. The present terms of section 134 are insufficient to provide any guidance in this matter. Therefore despite the fact that a consent granted to allow the subdivision of a piece of land will immediately increase the land's value, it is extremely unclear whether, or how, the consent holder can take advantage of this by using the consent itself as security for a loan.

3 *Restrictions on the transfer of consents to chargees*

Assuming that the term 'charge' includes both legal and equitable charges, another problem immediately arises when one examines the wording of section 122(3) closely. The troublesome words are those which state that a consent may only be "transferred to the chargee ... to the same extent as it could be so transferred by the holder". These words bring into play the provisions restricting the transfer of consents which have already been outlined.

52 Section 134.

Legal charges involve the transfer of an interest in an item of personal property to a chargee. In contrast, equitable charges do not involve any transfer of part of the debtor's "bundle of ownership rights". When granting an equitable charge, consent holders would be *creating* an equitable interest in their consent; they would not be, strictly speaking, *transferring* anything.[53]

Because a legal charge over a resource consent would involve the "transfer" of an interest in that consent to the chargee, the statement that consents may only be transferred to a chargee to the same extent as they could be so transferred by the consent's holder would on its face act as a restriction of the category of persons to whom a legal charge over a resource consent might be granted. On the other hand the statement would not restrict the people to whom an equitable charge might be granted, such charges not involving the "transfer" of any interest in the consent.[54] This is an anomaly with absurd consequences.

On this strict literal reading of section 122(3), while equitable charges could be granted to anyone, legal charges could only be granted to a very select group of people. Legal charges over water permits for damming or diverting water could only be granted to the owner or occupier of the site in respect of which each permit was granted.[55] Legal charges over water permits granted other than for damming or diverting water could only be granted to the owner or occupier of the site in respect of which each permit was granted, or to another person on another site, if both sites were within the same catchment, aquifer or geothermal field and the transfer was expressly allowed by a regional plan or was approved by

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[53] See also R M Goode *Commercial Law* (Penguin Books, Auckland, 1988) 714: An equitable charge does not involve the transfer either of possession or of ownership but constitutes the right of the creditor, created either by trust or by contract, to have a designated asset of the debtor appropriated to the discharge of the indebtedness.

[54] The restraint on the transfer of the consent to the chargee would only be relevant in the case of default where the chargee, having appropriated the consent for the satisfaction of the outstanding debt, decides to transfer the consent to his or herself, instead of realising the security by selling the consent to a third party. Similarly the statement that the consent may only be transferred "by or on behalf of the chargee to the same extent as it could be so transferred by the holder" regulates the realisation of the consent by the chargee on default under the charge. The inclusion of such a restriction in section 122(3) is strictly unnecessary, as the transferability provisions (section 134 to 137) would presumably apply to such realisations (being transfers of ownership) automatically.

[55] Section 136(1), see howecer the arguments made below based on the use of the phrase "the whole of the holder's interest".

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the consent authority which granted the permit.[56] Legal charges over discharge permits could only be granted to the owner or occupier of the site in respect of which the permit was granted.[57] Only legal charges over coastal permits could be granted to anyone.[58]

These restrictions would be ridiculous enough considering that most chargees in business transactions are financiers who would seldom fall into the categories of permitted transferees. However the picture gets worse when the diverse terminology used in the sections restricting the transfer of the various types of consents is analysed.

Section 135 states that the holder of a coastal permit may transfer "the whole or any part of [their] interest in the permit" to any other person, unless the consent expressly provides otherwise.

In contrast, section 136(1) provides that "the whole of the holder's interest" in a water permit granted for damming or diverting water may only be transferred by the consent holder to an owner or occupier of the site in respect of which the permit was granted. When granting a mortgage, a consent holder transfers their title/ownership of the consent to the mortgagee, but retains their equity of redemption. Strictly speaking then, a mortgage does not involve the transfer of the "whole" of a holder's interest. This means that section 136(1) would not in fact restrict to whom a mortgage over a water permit for damming or diverting might be granted.

Section 136(2) reverts to the use of the phrase, "the whole or any part of the holder's interest" to govern the transferability of water permits granted other than for damming or diverting. Presumably, this subsection would place restrictions on the granting of mortgages over water permits other than for damming or diverting, such mortgages involving the transfer of a "part" of a holder's interest. This may seem a strange result, particularly considering that section 136(2) appears at first sight to place less restrictions on transferability than section 136(1), however the use of the two different phrases in the same section

56 Section 136(2).

57 Section 137.

58 Section135.

must be assumed to be deliberate.

Section 137, which regulates the transfer of discharge permits introduces a new phrase. It states that "the holder's interest in [his or her] discharge permit" may not be transferred to any person other than the owner or occupier of the site in respect of which the permit was granted. It is difficult to clearly interpret "the holder's interest" as meaning anything distinct from "the whole of the holder's interest" or alternatively "the whole or any part of the holder's interest" as used in section 136. As the thrust of section 137 appears to be to strictly control any changing of hands of discharge permits, the best approach might be to interpret the phrase as covering both outright sales and the granting and transferring of mortgages. However the position remains unclear and confusing.

If the drafters of section 122 did believe that the term "charge" included mortgages, they did not fully investigate the ramifications of using the transferability sections of the Act to restrict the ability to grant them.[59] Sections 134 to 137 definitely do not appear to have been drafted with their relationship to section 122 borne in mind. They do not even appear to have been drafted bearing in mind their relationship to each other.

Of course any court dealing with a case which turned on an interpretation of section 122(3) and its relationship with sections 134 to 137 would adopt the approach of the Court of Appeal in *R* v *Salmond,* where Cooke P said:[60]

> In many cases this Court has emphasised the importance of a practical and realistic interpretation of Acts of Parliament. In cases of ambiguity or hiatus they should be interpreted so as to be made to work. Gaps may be filled to cover problems not foreseen when the legislation was enacted, provided that the policy-making function is not usurped by the Courts.

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[59] By contrast, admitting mortgages within the ambit of the term "charge" in section 92 of the CMA does not have nearly as many conceptual problems. Section 41 of the CMA deals with the transferability of all permits granted under the CMA. It expressly excludes the granting of mortgages "and other charges" from the requirement that the Minister's permission be obtained (the only restriction on the transferabiltiy of mineral permits). Sections 134 to 137 have no reference to the ability to grant charges over consents at all.

[60] [1992] 3 NZLR 8, at13. See also *Northland Milk Vendors Association Inc* v *Northern Milk Ltd* [1988] 1 NZLR 530; *Hadlee* v *Commissioner of Inland Revenue* [1991] 3 NZLR 517; and *Hamilton City Council* v *Waikato Electricity Authority* Unreported, 7 July 1993, High Court Hamilton Registry CP 21/93.

> ... It is also consistent with the general rule laid down by s 5(j) of the Act Interpretation Act 1924 that every Act shall receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning, and spirit.

This would inevitably lead the court to a conclusion that any distinction between the treatment of mortgages and equitable charges on a strict literal interpretation of section 122(3) should be ignored because of the absurd consequences which would result.

The absurd consequences are compounded when one looks at commercial practice in relation to the granting of charges. Charges over resource consents granted by individuals are registrable under the Chattels Transfer Act 1924.[61] In commercial situations 'pure' equitable charges are seldom registered under the Act, despite the fact that the definition of 'instrument' in the Chattels Transfer Act includes:[62]

> (f) any agreement, whether intended to be followed by the execution of any other instrument or not, by which a right in equity to chattels, or to any charge or security thereon or thereover, is conferred.

This is because most charges are embodied in documents which follow the form numbered 4 in the First Schedule of the Act.[63] This form includes a covenant by the debtor to "assign and transfer" by way of mortgage the chattels which are the subject of the instrument to the lender. In practice most lending institutions use forms closely worded on form 4, even where the security is expressed to be by way of charge. The charging instrument might contain a provision stating that the grantor hereby:

> (a) charges; and

[61] Section 122(4). Most creditors would ensure that charges they have been granted are registered in order to protect themselves against subsequent transferees or chargees of the charged property claiming no notice of the charge.

[62] Section 2 Chattels Transfer Act 1924. Note that for a charge to be registrable under the Chattels Transfer Act, it must be embodied in an 'instrument' (ss 4 and 5 Chattels Transfer Act 1924).

[63] Section 33 of the Chattels Transfer Act states that every instrument by way of security may be in this form.

(b) assigns, transfers and sets over to the fullest extent possible

by way of mortgage to the grantee with payment of the moneys secured and the performance of the grantor's obligations under this deed and the relevant documents all the grantor's estate and interest in X (the chattel).

The idea is that the lender is receiving the best form of security possible. However, if the literal interpretation of section 122(3) was accepted, this practice in relation to a resource consent would subject a purported equitable charge to the same restrictions on the identities of potential chargees that mortgages are subject to under the strict literal interpretation. This is because the wording of form 4 "transfers" an interest in the charged property to the chargee.

So what is the purpose of the wording in section 122(3) stating that a consent may "only be transferred to the chargee, or by or on behalf of the chargee, to the same extent as it could be so transferred by the holder"? It appears that what the drafters of section 122(3) were intending to achieve was a clear indication that resource consents remain subject to the same restrictions on their transferability in the hands of a chargee as they do in the hands of a consent holder. Thus a chargee attempting to realise a consent to satisfy an outstanding debt after default by a chargor would only be able to transfer the consent to a person eligible to hold it under sections 134 to 137 of the Act. The chargee could not "sell" a consent to themselves if they did not fall within the group of eligible transferees.

However despite what may have been intended, poor drafting has led to section 122(3) having an extremely undesirable literal interpretation. The only way to remedy the problems with section 122(3) appears to be to redraft the whole section.

IV RESOURCE CONSENTS AS 'BANKABLE DOCUMENTS'

One commentator questioned in passing during the Bill stage of the Act whether charges over resource consents would be 'bankable documents' considering the proposal that conditions imposed on consents could be reviewed during the term of the consent, even where all the conditions attached to the consent were being

satisfactorily complied with. He claimed that:[64]

> [a] developer would not be able to install and operate a facility secure in the knowledge he or she can operate for the period of its consent, when at any stage, the consent could be called in for review, and the conditions altered.

The clauses of particular concern to that commentator did not make it into the Act. However he might have had similar concerns about section 314(1)(e) which allows a consent to be changed or cancelled if, in the opinion of the Planning Tribunal, information made available to the consent authority by the applicant contained inaccuracies which materially influenced the decision to grant the consent. As noted previously, it appears that the Tribunal can cancel the consent whether or not the consent has been subsequently transferred to an innocent third party who knows nothing of the inaccurate information originally provided.

Other characteristics of consents make them less amenable to being good securities. For example consents would be very difficult to value for the purposes of providing security for a sum advanced. Due to the restrictions on to whom they may be transferred/sold by the chargee on default, their market value may be driven down by the lack of eligible transferees, despite the fact that the consent might be an extremely vital part of the operations of the chargor's business as a going concern.

Serious reservations have already been raised as to the practicalities of granting charges over land use or subdivision consents as assets separate from the land.

However as the following example shows, the fact that section 122(3) specifically gives the ability to grant charges over consents means that financiers should endeavour to ensure that they hold first ranking charges over a borrower's discharge and water permits (in particular), rather than letting somebody else get hold of them.

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[64] Peter Kingett "Administration of Water Resources" (Seminar Paper in *Legal Implications of the Resource Management Bill* 11 May 1990, Clifford House, Auckland) 10.

A *Case Study: Farmer X*

Farmer X owns a large kiwifruit orchard. In mid 1992 he granted a mortgage over his orchard to Bank A, using Bank A's standard mortgage form. Under the mortgage Farmer X agreed not to sell, lease, mortgage or otherwise make any disposition or part with possession of the land without the prior consent of Bank A.

Farmer X was granted a water permit in early 1992 which allowed him to take water from the nearby Mangawaiho stream in order to irrigate his kiwifruit vines. The permit was essential to the viable operation of the orchard.

Farmer X began facing financial difficulties in late 1992 with the downturn in the kiwifruit export industry. In an attempt to raise additional working cash, he granted fixed charges over his car, tractor and his water permit to Bank B.

In January 1993 Farmer X defaulted under his mortgage to Bank A and his charges to Bank B, and informed both of them that he would be unable to make further repayments under the loans. Bank A decided to move in and hold a mortgagee sale of the orchard. Bank A intended to sell the property as a going concern, or at least as a property with the potential for growing other types of fruit. However at the mortgagee auction, a potential buyer stood up and asked the auctioneer whether the orchard had a water permit attached to it.

After consultation with Farmer X, it was revealed that he had charged the permit to Bank B, being well within his rights to do so. Apparently Bank B had already moved in to appropriate the permit to discharge the debt owed by Farmer X, and they had managed to find a willing buyer of the permit, an orchardist from a site upstream from Farmer X's property and within the same catchment area.

The transfer of the permit meant that Farmer X's property could not be irrigated, and so was no longer a viable orchard, at least until another water permit could be secured. It was widely known in the area that the consent authority for the region was extremely reluctant to grant any more water permits for the Mangawaiho stream, as they believed that more permits might affect the stream's

sustainability. As a result, the sale of the orchard reached well below the amount expected by Bank A, and Bank A suffered a large loss on the mortgage.

Variations of this scenario raise their own problems. Suppose Bank B had not transferred the consent to another eligible holder, and had agreed to let Bank A sell the property intact with the permit. In the event of the farm not reaching a price to cover the amount owing to both Bank A and Bank B, it would be necessary to calculate the percentage of the purchase price attributable to the fact the land came complete with a water permit, which would be difficult to do. The problem doesn't arise from competing security interests, but rather from the fact that although the land and the consent are two legally distinct pieces of property, they are for all practical purposes extremely difficult to separate and value separately.

Suppose Farmer X had not charged the permit. If the mortgagee sale of the farm as a going concern (complete with consent) failed to reach a price which would cover the amount owing to Bank A under its mortgage, it is arguable that Farmer X could still claim a portion of the price paid as being attributable to the permit, Bank A having no legal or equitable interest in the permit which at all times remained the "property" of Farmer X.

If Farmer X had incorporated a company to run his orchard, and had granted a floating charge to Bank A in 1991 over all his vines, equipment and any other property he might acquire in the future, the water permit would probably not be included within the ambit of the charge. Being neither "real nor personal property" a water permit would have to be expressly included in any floating charge for the charge to apply to it.

The only conclusion to be reached seems to be that financiers must ensure that their standard form mortgage documents contain a provision expressly granting a charge over any resource consents granted over the land at the date of signing and/or any consents granted over the land in the future. Although it is not clear what the exact consequences will be, failing to do so could be dangerous.

V CONCLUSION

There appears to be no convincing reason why resource consents should be neither real nor personal property. The desire to steer clear from granting property rights to natural resources provides no justification for denying resource consents the status of personal property. The problems which arise due to the piecemeal nature of the personal property characteristics with which resource consents have been endowed, suggest that resource consents should be granted full personal property status.

Particular problems are posed by section 122(3) which states that charges may be granted over resource consents as if they were personal property. The subsection displays a lack of understanding of some of the most basic principles of commercial law. Poor drafting has led to section 122(3) having a literal interpretation which produces nightmarish complexities and anomalies. The conclusion reached by this paper is that the difficulties with section 122(3) as it is now drafted can not be satisfactorily overcome, and that section 122 as a whole is a prime candidate for reform.

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