F946 FRY, S. The mining consent process in the Resource Management

THE MINING CONSENT PROCESS IN THE RESOURCE MANAGEMENT BILL : A STEP FORWARD FROM THE MINING ACT 1971?

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Susan Fry

We believe in an interconnected universe, and that the harmony of ourselves and our planet depends on preserving the integrity of the Earth.

We are part of the living body Earth, and our health and wellbeing cannot be separated from the wellbeing of the planet. Therefore we must take responsibility for the sustainability of the planet.

Coromandel Watchdog kaupapa

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INTRODUCTION

The Resource Management Bill was unveiled late last year by the Ministry for the Environment - the culmination of a two year statutory review of proportions unprecedented in New Zealand's legislative history.

More than 54 statutes and 22 sets of regulations, covering everything from Town Planning to Coastal Management were repealed or revised to make way for this comprehensive and overdue reform of New Zealand's natural resources legislation. The Ministry, charged with the responsibility for drafting the Bill and overseeing its passage through Parliament, has brought together interest groups as diverse as the Ministry of Energy, the Mining and Exploration Association of New Zealand, and ECO (Environmental and Conservation Organisations) to the negotiating process - reflecting the need for a cohesive approach to the difficult task of reconciling conflicting interests in the new management regime.

The general aim of the reform was to "produce legislation which is integrated, workable and fair to resource users, while not compromising the quality of the environment" [1]. To achieve this aim the Bill introduces the revolutionary concept of *Sustainable Management* - a term which translates as "using resources in a way which will not unduly compromise the needs of future generations, while meeting the demands of the present generation[2], as the cornerstone of the new law, making New Zealand the first country in the world to adopt such a principle in its resource legislation.

Further aims of the review were to integrate the multiplicity of existing statutes into one coherent whole by removing conflicts and inconsistencies in existing legislation due to its piecemeal evolution over many years, to redefine the role and functions of Central and Local government (devolving resource decisionmaking away from central control and closer to affected areas), and to place the focus of control on the impacts of activities rather than the activities themselves. The Legislature has aimed at implementing a more integrated and streamlined consent process for each type of resource use, and ensuring a greater degree of public consultation and involvement at every level of decisionmaking.

However, the task of achieving a balanced solution to the different problems has not been easy, with conflicting groups adopting a vociferous and at times uncompromising approach to the negotiating process. This point can be amply illustrated by reference to Part 9 - the section in the Bill on Crown Owned Minerals, and by examining the conflict ridden nature of its development from its inception in 1988 to the present time. For example it seems that the very presumption of Crown ownership of minerals is controversial in the context of the increased willingness of the Legislature and judiciary to accord domestic status to the Treaty of Waitangi.[3]

This paper will briefly outline the history of the mining consent process by reference to the way the Mining Act has functioned in practice and the problems that have been identified with its operation, and to overseas mining legislation.

Secondly, it will attempt to examine and describe the principal features of Part 9 in light of the previous discussion and its relationship with Part 6 (resource consents), and to comment on whether the consent process has been streamlined, what effects it will have on mining companies and environmentalists, and whether it represents a significant improvement from the Mining regime currently in force.

Finally, some suggestions will be made as to the ways in which the process could be modified to achieve a better balance between conflicting interests, with particular emphasis on the need to promote *Sustainability* and to protect the environment for the use and enjoyment of generations to come.

MINING ACT 1971 - THE PRESENT REGIME

1. Analysis of the Mining Act

The Mining Act 1971 is the precursor to the Crown Owned Minerals section in the Resource Management Bill in relation to minerals other than Coal or Petroleum.

The Long Title of the Act states that its purpose is "to consolidate and amend the law relating to mining and provide improved facilities for the development of mineral resources"[4]. The Act does not apply to Coal, Petroleum or Geothermal Energy (which are governed by separate statutes)[5], and sets out a self-contained code for the administration of mining - allowing applications to be dealt with almost exclusively under the Mining Act (except in relation to water rights which must be obtained under the Water and Soil Conservation Act 1967)[6] .

Thus, the Act is widely perceived as being tantamount to a "one stop shop" for miners, and the impetus for reform has come chiefly from those who see the system as providing inadequate safeguards against damage to the environment and permits being too easy to obtain.

The Amendment Act of 1981 exempts the Mining Act from the ambit of the Town and Country Planning Act 1977 [7], which means that mining is not subject to normal planning procedures like other landuse activities, and the externalities of mining (the impacts) are considered in the initial minerals allocation stage, which is under the control of the Minister of Energy.

Under the Act, miners must apply separately for Prospecting, Exploration and Mining licences [8].

Prospecting is defined in s5 as "prospecting for and identifying mineral deposits and testing their mining feasibility"

Exploration is defined as "to explore for minerals on a broad basis and take samples predominantly by hand except where it is impractical to do so, in order to define more accurately specific prospecting areas."

Mining includes-

* Removal of overburden by mechanical or other means, and stacking, deposit, storage and treatment of substances containing the mineral.
* Deposit or discharge of any mineral, material, debris, tailings, refuse or waste water produced.
* Erection, maintainance and use of plant and machinery.
* Lawful use of land, water ... and the doing of all lawful acts incident to such operations.

These applications must be accompanied by a workplan and an "Environmental Impact Assessment" in the form prescribed by the *Environmental Protection and Enhancement Procedures* (a Cabinet directive to the Ministry for the Environment in 1986), and in some cases these must be audited by the Parliamentary Commissioner for the Environment[9]. At this point the Minister may grant the mining privilege subject to such conditions as s/he deems fit, the application with attached conditions must be publicly advertised so that objections can be lodged [10], and the views of the relevant territorial authority must be elicited, although these are not binding on the Minister of Energy. Appeals against the granting of, or conditions attached to a mining privilege may be made to the Planning Tribunal [11], and a hearing must be held if there are any objections to the privilege, whether it be for Prospecting, Exploration or Mining. The persons able to appeal under this section are limited to the applicant, those affected by the grant, the relevant local authority, or a representative of a relevant public interest group. The matters to be taken into account by the Tribunal are specified in s126, and include *inter alia:*

* Whether the land should be used for mining
* The economic, social and environmental effects

* The matters outlined in s69 of the Act
* Any other relevant considerations

The matters outlined in s69 of the Mining Act include:

* The nature and extent of the mineral resource
* The most efficient utilisation of that resource
* Any environmental and social factors involved in the development of the resource
* The wise use and management of New Zealand's mineral resources.

The Tribunal's recommendation is then binding on the Minister, except where it is a decision in favour of the application, in which case the Minister can still decline consent[12] The Minister must charge a reasonable bond to ensure compliance with the conditions[13] and can impose a royalty or resource rental [14], but is not obliged to do so.
At any time after the grant of a mining licence, the Minister may vary the conditions on it[15], but this is subject to a right of appeal to the Planning Tribunal [16]. Perhaps the most significant feature of the Act is the distinction that is drawn between *Crown Land* (which is open for mining) and *Private Land* (which is not). All Crown Land is open for mining[17], and is defined as including land under which the minerals and access rights are owned by the Crown. This covers all land alienated from the Crown since 1913 (when the Land Act in force separated minerals from the title to land), and all land alienated in fee simple prior to 1913 containing Gold, Silver, Uranium or Petroleum.
Private Land is restricted to land under which the Crown does not own the minerals, or has not reserved a right of access by virtue of a previous enactment, which includes any land alienated prior to 1913 containing minerals other than the four mentioned, although some Victorian Titles enable the landowner to deny access to land containing Gold or Silver. In practical terms, there is very little of this land in existence, so most landowners do not have a right to refuse consent to mining activity on their land.

Miners must obtain consent to mine on Maori Land[18] or land being administered by a Minister.[19] The landowner has a right to compensation for loss of privacy and damage occasioned to land.[20]

Enforcement of licence conditions is undertaken by the Ministry of Energy through Mining Inspectors, and the Minister can theoretically order forfeiture of a privilege if conditions are not being complied with, although this is seldom done in practice[21] . The Inspector of Mines can bring a prosecution under the Act [22] or close down mining activities for breach of health and safety conditions, but not for breach of environmental protection conditions.[23] There were few points of agreement between the mining industry and the environmental movement relating to the problems with existing legislation, but there was a consensus that the consent and objection process was too costly and cumbersome [24] .

For example, requiring Planning Tribunal hearings at each stage (unless there are no objections) results in lengthy delays for mining companies who are anxious to start up operations as quickly as possible, and a great deal of expense and inconvenience for objectors who are often disadvantaged by lack of access to funds and expert witnesses. This problem is exemplified by the recent Waitekauri decision in the Wellington High Court - an appeal by Coromandel Peninsula Watchdog against a decision of the Planning Tribunal to grant a mining licence to Cyprus Minerals (NZ) Ltd for the Waitekauri Valley near Waihi. The mine was to be the largest on the Coromandel Peninsula - bigger in scale than the Martha Hill mine at Waihi, and there was evidence that the area was sesmically unstable, prone to floods, and therefore unsuitable for a tailings dump of the size being proposed by the company because there was a risk of the dam breaching and toxic leachates seeping into the Ohinemuri River. Unfortunately, the objectors did not attend the pre-hearing meeting, and it was held that the role of the Planning Tribunal did not extend to inquiring into matters which were not properly addressed in evidence at the hearing [25] . Therefore, the Tribunal had no jurisdiction to order expert testimony from the United States to be heard in support of the objector's contentions, and the case was lost.

2. Main concerns of Environmentalists about the Mining Act

The Mining Act was widely seen to be actively promoting the mining industry by instituting a separate regime for mining in relation to other landuses such as farming and forestry, and so there was a need to "level the playing field" by subjecting mining to the same planning controls as other landuses [26] , and by removing the long title to the Act which was seen as too pro-development[27] .

Many people felt that the views of local authorities and the public were not being adequately aired in the consent process[28]. Associated with this was the concern that "externalities" ought to be separated from the decision about minerals allocation (both currently being made by the Minister of Energy), because it was inappropriate for a Minister charged with the efficient commercial allocation of resources to be making decisions about the environmental and social impacts of mining activity [29]

Thirdly, there was seen to be a need for a greater degree of public input into the minerals allocation process, in the form of stricter information requirements for applications[30], increased opportunities for objection, and a voice in the policymaking process at central government level.

Fourthly, it was necessary to set up a better system of enforcement of consent conditions - mining companies over the years had found insidious methods of circumventing licence conditions and statutory requirements, and this was frequently going largely unnoticed by the Ministry of Energy. Even the Planning Tribunal has expressed doubt about whether a breach of conditions is actually an offence under the Mining Act, which only appears to deal with breaches of the Act or the regulations.

A recent example of this problem was the breach of licence conditions by Barrack Mines (a large Australian company) pursuant to the transfer of old "hobby" licences from a small operator to Union Gold and then to Barrack, with no change in the conditions. Local environmental groups had noticed that the company had bulldozed tracks through a large area of native forest on the Whangapoua Hill (Coromandel), outside its designated

licence area[31] and this was brought to the attention of the Ministry of Energy, who made the decision not to prosecute the company. This was perceived by many environmentalists as being a "sellout" to the company, and there was a push for the Ministry to require a review of conditions whenever hobby licences were transferred to large companies under the Mining Act.

Finally (and perhaps most importantly), a huge number of submissions to the Core Group expressed the concern that current mining legislation was failing to recognise and protect the private property rights of landowners by not giving them a right to refuse prospecting, exploration or mining activity on their land. It was felt that mining companies were being given a statutory mandate to "trespass" on private land that would not be available to any other industry [32], and which was anaethmetic to the status given to the notion of private property in Western Liberal democracies.

Furthermore, many felt that the integrity of the Conservation estate should be protected by strengthening the Minister of Conservation's power of veto over land owned or administered by DOC. The Minister's decision is already subject to judicial review in the High Court, and can be overturned if the exercise of discretion is held to be *ultra vires* the Conservation Act, and there was a consensus amongst the environmental movement that this right to appeal against a ministerial decision not to grant access, should not be extended in the new Bill to reviewing the factual basis of the decision if it was *intra vires*.[33]

3. Some recent Planning Tribunal decisions - an illustation of environmental concerns

By 1986, only 10 out of 169 mining privilege applications had been declined by the Planning Tribunal, and only two of these refusals were on environmental grounds [34].
In *Tasman Gold Development Ltd; Application for Exploration Licence* , the objector's problem of lack of access to evidence was patent. The proposal was to explore an area of 73.025 km/sq, 14 km North East of Thames. The Tribunal accepted that the area had botanic, wildlife and recreational value, and that parts of it were susceptible to erosion, but the objector's evidence had failed to establish this conclusively, so the Tribunal was unable to take the matter any further. In *Lewis Creek Mining Society; Application for mining licence* ,[35] the Tribunal failed to consider any of the factors listed in s.69 of the Mining Act in any kind of detailed or comprehensive way.
For example,the Tribunal's "consideration" of s69(c) - any environmental or social factors involved in the development of the resource was as follows:

"the environmental and social factors involved in the development of this resource can only be beneficial in that the environmental impact would be minimal and the social factors positive"

Furthermore, the Tribunal stated unequivocally that s69 was not binding anyway - it merely required the Tribunal to "have regard to" the listed factors.
In DA 133/84 *Amoco Minerals NZ Ltd: Application for Prospecting Licence* [36] , the Tribunal held that although there may be areas of such environmental importance that the land should never be mined, in most cases prospecting operations would be necessary to ascertain the extent and value of the mineral deposits with reasonable accuracy.

This comment laid down the general approach the Tribunal has followed in subsequent applications, with economic factors taking precedence over environmental ones and landowner rights being overriden.

These decisions clearly highlight the need for the Planning Tribunal to have a more "inquisitorial" role in relation to mining applications due to the problems of objectors in obtaining evidence to support well founded concerns and the unwillingness of the Tribunal to assume a proactive role in environmental protection.

4. Mining Law in other jurisdictions - a comparison[37]

a. British Columbia (Canada)

British Columbia has a long, profitable history of mining, and so there has been considerable public awareness of the need to protect the environment from damage caused by mining.

Mining in the province is provided for by the British Columbia Mines Act 1980, and environmental impacts are dealt with by the *Mine Development Review Process* (MDRP). Under the Environment and Landuse Act, a committee of 5 government ministers was set up to run the MDRP, and was given broad powers to intervene in resource management issues.The main features of the MRDP are as follows:

A prospectus is required to be submitted for all projects, and an environmental study is done by the ELUC. The project is fast-tracked if there are no outstanding environmental issues that can't be solved through normal licencing procedures. If it is a more complex project, a more extensive review is carried out, and then the project is either accepted or changes are negotiated.

Stage 2 also allows a decision to be deferred in order to obtain more information about possible mitigation proposals.

Public hearings must be held at the initial review stage, the further review stage, and the project implementation stage.

This process (unlike the New Zealand Mining Act) allows the public to have an effective say in whether projects should go ahead, which does not involve the invocation of a costly and time-consuming objection procedure.

The public can also have a say about what conditions should be set at the project implementation stage. Enforcement of conditions is shared by the Ministry of Energy and the Ministry for the Environment - the Ministry of Energy approves and monitors rehabilitation plans, and the Environment Ministry polices environmental protection conditions.

Furthermore, the Ministry of Energy is required to include a bond as part of every rehabilitation plan to ensure compliance with conditions.

Negative aspects of the process are that the rehabilitation monitoring unit, like mining inspection in New Zealand, is too centralised (in New Zealand mining inspectors are appointed under the State Services Act 1962 and are directed in their work by the Minister of Energy). Therefore it is difficult for conditions to be adequately enforced, and the process deals well with single projects, but does not cope with several projects being established in one region. The Resource Management Bill (which provides for District Plans and joint hearings of applications) should with any luck avoid this complication.[38] District Plans, like the current District schemes should be designed to cope with several projects being set up concurrently, and the process of joint hearings will ensure that projects requiring more than one consent or consents from more than one authority will not get bogged down in bureaucracy.

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b. California[39]

The U.S Federal Government policy on Mining is that it is essential to the continued wellbeing of the country, but that rehabilitation of mined land is necessary to mitigate the effects on the environment and protect public health and safety. There are Federal laws setting out minimum standards of environmental quality (e.g the Water Pollution Control Act), and the state of California must have laws equal to or more stringent than this. Under the Surface Mining and Reclamation Act, there is a State Mining and Geology Board which lays down minimum state requirements for surface mining and reclamation.These are administered by the Department of Conservation. Furthermore, under the Environmental Quality Act, the state can set more general environmental protection policies, and the Act requires that environmental impact assessments be submitted for each mining project.

The Federal Bureau of Land Management, in conjunction with the Forest Service, controls access to land which is federally owned, and on private or state land the County usually assumes "lead agency status".

The County commissions an Environmental Impact Assessment (similar to the New Zealand type), and the mining company pays for an independent consultant to be appointed. It is interesting to note that in New Zealand the company can chose its own consultant. Next, there is public participation, and this may result in a *County Use Permit* (the equivalent of a Planning Consent in New Zealand) being granted. As part of the EIA, the company must prepare a reclamation plan which is reviewed by the State Mining and Geology Board, and then by the Lead Agency. Once the EIA has been approved, the company usually has no difficulty in obtaining the other water and discharge permits that it needs. Monitoring of conditions imposed on the County Use Permit is carried out by the County authorities, who carry out unannounced spot checks and regular environmental audits (6 monthly) where all data are reviewed. The legislation provides that the public can take out private prosecutions against companies for breach of permit conditions.

As in the Resource Management Bill, decisionmaking is devolved to local authorities, allowing them to decide whether a project is in their interest. National control is exercised through minimum environmental standards, and public participation is encouraged.
The policing of conditions is separated out so that mining inspectors are not responsible for policing environmental matters in which they have no expertise; this is undertaken by state agencies. This monitoring is subject to scrutiny by the public which can institute private proceedings against companies, and there are adequate bonds attached to permits to ensure compliance with conditions.
The disadvantages of the system are that county authorities are often unqualified to deal with mining, and have to request outside help from state agencies. Furthermore, there is an inconsistency of approach between different county authorities, and so it easy for some miners to obtain permits, and difficult for others[40]. There is a danger of this occurring in New Zealand as a result of the devolution of resource decisionmaking to local authorities in the new Bill.

ANALYSIS OF THE MINING CONSENT PROCESS IN THE RESOURCE MANAGEMENT BILL

1. Implications of Part 9

There was considerable disagreement as to what the relevant objectives of Part 9 should be, with Treasury and the Ministry of Commerce anxious to limit them to considerations of economic efficiency and individual property rights, but the Core Group felt that the purpose should be to *balance* the interests of mineral owners, developers and landowners, whilst ensuring a fair economic return to the Crown.[41] The amended Bill does not now contain a reference to balancing the rights of these three parties - perhaps in recognition that such an exercise would be potentially in conflict with the principle of *Sustainability* .

It was agreed that allocation of minerals would be made on a purely commercial basis by the Ministry of Commerce, in accordance with the move towards devolution of externalities consents to local authorities, but that the Crown as minerals owner should retain the overall responsibility for the allocation of its resource. Most importantly, there was agreement that the new legislation should neither actively promote nor discourage the mining industry in relation to other industries, and that landowners should be given the right to veto mining activity on their land, subject to a right of appeal to the Planning Tribunal.[42] Interestingly, a power of refusal for landowners for land under which the Crown owns the minerals appears to be without precedent in Commonwealth jurisdictions, but is entirely consistent with the present Government's "new Right" emphasis on private property rights.

The first important thing to notice about Part 9 is that it is that it no longer contains a purpose section.[43] The 'purposes' of Part 9 now relate solely to Minerals Programmes, and are:

(a) Sustainable Management

(b) Efficient allocation of rights in relation to Crown Owned Minerals

(c) Obtaining a fair financial return for the Crown

Secondly, cl 204 carries over the presumption of Crown mineral ownership of Gold, Silver, Petroleum and Uranium from the Mining Act; an anachronistic provision which has attracted a great deal of criticism. The Core Group drafting the Bill expressed the view that it was not the appropriate forum for a consideration of Maori ownership rights in relation to minerals [44], but nevertheless a continued statutory presumption of Crown ownership of Gold, Silver, Petroleum and Uranium appears to derogate substantially from decisions of the Waitangi Tribunal and the New Zealand Court of Appeal on the right to *Rangatiratanga* (or "Chieftainship") [45] of Maori *Taonga* ("treasured things"), because it theoretically enables the Crown to alienate its mineral rights to private interests with no statutory protection for Maori minerals ownership claims akin to that contained in

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the Treaty of Waitangi (State Owned Enterprises) Act 1986 for Crown land being transferred to SOEs.

The new legislation was seen by many to be a perfect opportunity to redress the grievances of the Maori by acknowledging that the Treaty guarantees them ownership, or at the very least Tribal Sovereignty over minerals, but a presumption of Crown ownership is arguably a necessary evil to be endured in any legislation dealing with minerals allocation. There needs somewhere to be a statement of who owns the minerals for the purposes of deciding who is entitled to distribute them, and collect the rents and royalties. The Select Committee considering the Bill decided that the weak reference to a "duty to consider" the Treaty in the original cl 6 needed to be strengthened to a duty to take into account the special relationship between the Crown and te iwi Maori as embodied in the Treaty,[46] however the status of the Treaty in New Zealand law does not seem to have been determined yet with sufficient clarity by the Legislature, and until it has been, it is unlikely that this presumption of Crown ownership will disappear from minerals legislation. Once mineral rights have been allocated to private interests, the jurisdiction of the Waitangi Tribunal will be ineffective in clawing back minerals for Maoris. One alternative might be to retain the presumption, but allow Maori interests to claim specific amounts of resource rental back from the Crown pursuant to ownership claims upheld by the Waitangi Tribunal.

Another might be to require a substantial degree of consultation with Maori interest groups at the Minerals Progamme stage - encouraging the resolution of ownership issues relating to each separate mineral before individual allocations are made.

Clauses 206-218 of the Bill outline a procedure for the drafting of *Minerals Programmes* for each Crown owned mineral - a significant innovation from the present regime where allocations are made on an ad hoc basis by the Minister of Energy, and are limited in their scope to the factors contained in s 69 of the Mining Act.

The programmes are to contain the relevant policy that will govern the allocation of each mineral, and must state whether the mineral can be mined at all, and is so at what rate. They recognise the possibility that the mineral could be declared exempt from mining

altogether, although this would be an unlikely scenario in light of the need to ensure a fair economic return on minerals for the Crown.

An interesting feature of the new process is that it will be possible for any member of the public - whether affected by the Minerals Programmes or not [47], to make submissions to the Planning Tribunal on the draft programmes and to have the Tribunal conduct a public hearing into the matters raised, but it appears that the Tribunal's recommendations in this respect are not to be binding on the Minister of Commerce [48] .This is a recognition that the although the public has a legitimate interest in assisting with the formulation of the programmes, the ownership, and therefore the ultimate power of disposal is vested in the Crown.

The commercial nature of the programmes is testimony to the Legislature's desire to draw strict demarcations between the respective roles of Central and Local Government [49] ; the Minister is not entitled to consider matters that may be considered by local authorities in applications for resource consents (cls217 and 218 deal with matters to be considered, and matters not to be considered in the drafting of Minerals Programmes.)

A problem with the application of *Sustainability* to Part 9 is that many of the specified factors appear to be in conflict, and no relative weight is apportioned to any of them. The presciptive meaning of *Sustainable Management* is in cl 4 [50] , and is so vaguely worded that it may be difficult to apply in individual Minerals Programmes or allocation decisions. Crucial factors in Section 4 which define the meaning of *Sustainable Management* such as:

* The maintainance and life supporting capacity of the environment
* The use, development and protection of natural and physical resources in a way that provides for the needs of present and future generations
* The mitigation and avoidance of adverse effects on the environment
* The ethic of *Stewardship*

may conflict with other factors in the definition such as:

* The actual and potential effects of an activity on the environment
* The balancing of public and private interests
* The costs and benefits of any proposal to the environment
* The maintainance of the natural, physical and cultural features which give New Zealand its character
* The relationship of Maori culture and traditions to ancestral land.

Very often, the weight to be assigned to each of these factors will depend on the individual decisionmaker and the needs of the region (if a local authority is pro development it will tend to focas on the economic aspects of Sustainability ,whereas if it is more environmentally conscious it will focus on the environmental protection factors) For example, the fact that there is a relationship of the Maori people to the land may necessarily conflict with the balancing of public and private interests. ECO was concerned that such a balancing execise would not constitute adequate protection for environmental values, but the Select Committee opined that it was inappropriate to have a hierarchy of factors in a statute intended to be as neutral as possible[51] . However, it is difficult to imagine how sustainability can be achieved without giving a certain degree of primacy to environmental concerns. A new clause has been inserted into the Bill stating that priority and weight of factors is a matter to be determined by the decisionmaker depending on the issue. This is bound to promote inconsistency of interpretation and uncetainty for resource users.

ECO and Coromandel Watchdog have suggested that the Minerals Programmes be replaced with a regime of binding National Policy Statements on Minerals - locating the major responsibility for minerals policy in the Minister for the Environment as set out in Part 5 of the Bill [52] .

There are a number of advantages with this proposal:

Firstly, the statements would be binding on local authorities, thus compelling them to take cognizance of national minerals depletion issues, not just local ones.

Secondly, the terms of reference of the Ministry for the Environment would allow a much wider perspective to be taken on individual allocation decisions, incorporating notions of *Sustainability* and environmental protection rather than just economic efficiency, thus ensuring that the need to obtain a fair economic return from minerals was not permitted to obscure other issues. The pitfalls of the proposal are as follows:

It fails to adequately define the role of the Energy and Resources division of the Ministry of Commerce in the allocation issue. If it was entitled to retain the mechanical function of allocating minerals without being able to make policy decisions of any kind, then the channels of communication between the Commerce and Environment Ministries would have to be excellent, to ensure that the binding policies were being complied with in individual allocation decisions, and that the Ministry of Commerce was not undermining the authority of the Ministry for the Environment.

Secondly, because the Ministry of Commerce is likely to have better information than the Ministry for the Environment about minerals, there would be a danger of National Policy Statements being written by the Ministry of Commerce and approved by the Ministry for the Environment which is strongly in favour of the mining industry anyway [53] . If the statements were binding, it would be virtually impossible for local authorities to circumvent a pro-development mining policy at the resource consent or district plan stage.

Returning to an analysis of Part 9, where there is no relevant minerals programme, the Minister shall grant permits in accordance with Part 2 and by reference to the need for efficient allocation and a fair economic rent.[54]

Here there is even more danger that minerals will be allocated on an entirely commercial basis, because there is no requirement that permit applications be publicly advertised before the permit is granted, and there is no equivalent of s 69 specifying environmental and social factors which must be taken into account. The only specified factor is in s 4 (f)

The use or development of non-renewable resources in a way that sees an orderly and practical transition to renewable resources .

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It is difficult to see how this principle could be applied to a mineral such as gold. The absence of a public process for the granting of minerals permits means that the only public input into the allocation process is at the Minerals Programme stage, and many people would not bother with submissions at this stage because they would not perceive themselves being directly affected. It is at the individual permit stage that the need for a public process arises, where a particular landowner ot interest group will be directly affected, and it is at this stage that there is no public process. An example of this problem might arise in relation to a Maori tribe claiming minerals from the Crown - it is unlikely that they would have much influence on the drafting of an entire minerals programme and would be unlikely to hear about the programme until it was too late.

The amended Bill now requires the Minister of Commerce to give consideration to policy statements and plans issued under Part 5 of the Bill when drafting Minerals Programmes, and to landowner access agreements and relevant mining prohibitions in other Acts - this is a considerable step forward from the narrow factors in the original draft of the Bill.

The next important point about Part 9 is that it reverses the definitions of *Prospecting* and *Exploration* contained in the Mining Act. The Mining Act allows Prospecting licence holders to "dig pits, trenches and holes, sink bores and tunnel to the extent necessary...in, on or under the land"[55] .

Because none of these activities is subject to impact controls, much actual mining is able to take place under the guise of "bulk sampling" - causing a great deal of environmental degradation. Prospecting is also not subject to the obligation to avoid damage to the surface of the land [56] or to a landowner right of refusal.

Prospecting under Part 9 includes :

* Geological surveys
* Taking samples by hand held methods
* Aerial surveys

but the provision prohibiting "dredging or excavation except for small samples, or drilling to a depth greater than 25 metres" has been deleted from the amended Bill, so there are few environmental protections for prospecting activity.

The definition of Exploration in the Bill allows miners a considerable degree of freedom from environmental constraints. For example, two of the exclusions that were in the original draft of Part 9 - the prohibition on extraction for commercial use and the prohibition on pilot projects, have been deleted from the amended Bill.

One positive feature of the Mining Act (the ability of the Minister of Energy in conjunction with the Minister of Lands to exempt Crown Land from mining) has all but been removed from the Resource Management Bill - the only way in which land can now be exempted is by Order in Council from the Governor-General.

One highly controversial addition to the Bill has been cl 232, which replaces the current process of having to apply separately for prospecting, exploration and mining permits (with Tribunal hearings at each stage) with the automatic substitution process [57], or right to subsequent permits that was dropped from the Mining Act in 1981 as a result of widespread censure. The process will require the Minister to grant the next stage permit if s/he is satisfied in the case of prospecting permits that the results of prospecting justify the granting of an exploration permit and in the case of exploration permits that the holder has discovered a deposit or occurrence of the mineral that justifies granting a mining permit. There is no further information requirement for an application for a permit at the next stage, so it is conceivable that a company could reduce the whole process to one local authority hearing and a Planning Tribunal hearing by applying for all the requisite resource consents at once in anticipation of being granted subsequent permits [58].

This would significantly reduce the opportunity for public input into the objection process, because there would be no obligation on the Minister to publicly advertise the new application (it is only Minerals Programmes that must be publicly advertised).

Other miscellaneous provisions in Part 9 relating to consents are-

1. The expiry periods for minerals permits (cl 235) : 2 years for a prospecting permit, 5 years for an exploration permit (although this can be extended by the Minister), and 40 years for a mining permit. An objection here is that the duration of the mining permit should be tied to the duration of resource consents under Part 6 (35 years).

2. Cl 232A is a new provision allowing for compensation to be paid to a prospecting or exploration permit holder who discovers a mineral but is prohibited from mining it because of a minerals programme or National Policy currently in force.

3. Cl 282 requires permit holders to keep registers and records of activities, available to the Secretary of Commerce on demand. This provision will ensure that enforcement is carried out much more effectively than at present.

4. Cl 240 relates to the transfer of permits. Transfer requires the consent of the Minister, and s/he can change the conditions of the permit on transfer. A memorandum of transfer or lease must be lodged with the District Land Registrar to effect the transfer.

5 The Minister may impose rent or royalties on the permit, but is not obliged to do so[59]. This clause should be amended to give effect to the purpose of Part 9 by making the payment of rent or royalties a compulsory requirement of every mining permit.

2. Transitional Provisions relating to minerals (Part 14)

Part 14 of the Bill will have a disastrous effect on the implementation of the Bill and the concept of *Sustainable Management* in relation to minerals. The cutoff point for applications to be heard under the new legislation is the first public notice of the application. Under the original Bill, the second public notice under the Mining Act was the cutoff point. The inclusion of such provisions effectively means that the rash of applications for mining permits that have been lodged over recent months will all be dealt with under the Mining Act and not under the Resource Management Bill, therefore the Bill will not truly begin to take effect for about two years.

3. Effect of Part 6 on Part 9

The complete devolution of environmental decisionmaking to local authorities is a cause for major concern. It allows for the possibility that a District Council could declare certain effects of mining "permitted uses" under Part 5 in their District Plans [60], thus paving the

way for companies to damage the environment with little or no central government control. Another possibility is that there could be a regional policy in favour of mining, binding local authority decisionmaking. The only public input into this process would be at the original Regional or District Plan hearing, at which it would be difficult for objectors to adduce enough evidence to deter a majority who felt that mining was beneficial for the area.

However, there are clearly advantages to this devolution process,which can be summarised under the following headings:

- Focus on impacts rather than activities
- Greater public input
- Increased information requirements

Focus on impacts

Part 6 requires miners (along with any other resource users) to apply for resource consents for the various land and wateruse activities that are undertaken, whether the minerals permit is for prospecting, exploration or mining. Under the present mining legislation, the Minister of Energy is not required to consider the environmental impacts of prospecting or exploration at all; these are only considered by the Planning Tribunal if an appeal is lodged under s 126, and even then the Tribunal (as previously indicated) does not necessarily consider itself bound by the presence or absence of the factors specified in s 69 of the Mining Act, even in relation to mining. They are only 'considerations', not 'criteria'.

Consent authorities are must have regard to the entire definition of *Sustainable Management* in Part 2, and to satisfy themselves that the proposed activity does not contravene a regional or district plan [61]. They must also distribute copies of the application to other relevant local authorities (cl 76), and allow 20 working days for public submissions to be lodged (cl 83). This does not seem to be nearly long enough for

people in rural areas to find out about an application, think about the implications of it and write a submission.

The application must be accompanied by an Environmental Impact Assessment, and the criteria for these are specified in a new schedule to the Bill (3A). However, it is unclear what role the Parliamentary Commissioner for the Environment will have in the EIA process - it would be unfortunate if the Commissioner's auditing role was dropped from the Bill, and the process of assessing EIAs was left to consent authorities. Notice must be served on any person to whom the application relates[62] , and any person may make a submission who has been notified under cl 79[63]

The advantage of this devolution process is that a consent authority is likely to have a much better idea than the Minister of Energy whether an activity will have adverse effects on the local environment. The problem with the present process is that decisions about mining in particular regions are made by executive staff in Wellington who frequently do not have adequate information about impacts, and will not have to live with the consequences of a wrong decision to grant a mining permit. There is a right of appeal to the Planning Tribunal if either party is dissatisfied with the consent authority's decision.[64]

Under cl 93, Consent authorities can charge bonds and set conditions on resource consents. Charging bonds (as well as the bonds which will be attached to minerals permits) will ensure that miners comply with the consent conditions, and even if they do not, they run the risk of forfeiture or review of the consent or permit, and prosecution under the Act which is accompanied by significantly increased penalties. Consent Authorities are likely to have to appoint inspectors to police resource consents in order to fulfill their new duty to monitor and ensure compliance under Part 3 of the Bill, so mining consents will be better enforced under the new legislation.

Greater Public Input

Local authorities are under a statutory duty to call for submissions and hold public hearings in respect of Regional Policy Statements and Plans, and District Plans and rules[65]. Therefore, there is an opportunity for any member of the public (not just those with locus standi under current legislation) to have a say about whether any mining related activity should be permitted in a plan, or whether it should be made a discretionary use or a prohibited activity.

If the activity being applied for does not comply with a Regional or District Plan, the consent authority must publicly advertise any application for a resource consent [66], persons may make submissions on this, and then a hearing must be held if there are significant objections. A pre-hearing meeting must be held prior to any full public hearing.[67] Under current legislation, there is no public input into the initial decision to grant a licence (which includes externalities considerations) - it is only once the conditions have been imposed that there is a duty to advertise the application [68], so that the appeal to the Planning Tribunal under s 126 is effectively an appeal against preset conditions, not against the grant of the permit itself. None of these requirements apply to Prospecting Licences. Most importantly, there are provisions which allow consent authorities to review conditions attaching to resource consents[69] - currently water rights and other consents are issued with no or inadequate conditions which cannot be reviewed at a later stage.

Increased information requirements

The information requirements for a Resource Consent under Part 6 are very similar to the those prescribed by s 70 of the Mining Act in relation to Mining Privileges. The Bill provides that the consent authority may require further information about the proposed activity before a consent may be granted, and it may commission a report, which will then be made publicly available.[70] There is no such equivalent in the Mining Act.

A certain degree of Central control is reserved in this process by means of a ministerial "call-in" for applications of national significance.[71]

Summary

The provisions for joint hearings and combined hearings for 2 or more applications to the same authority[72] will streamline the resource consent process to a considerable extent. a consent authority also has the power to defer hearing an application in anticipation of other consents being applied for[73]

The process is also likely to provide greater protection for the environment. For example, there is a provision which prohibits consent authorities from granting a discharge permit if it will be likely to produce certain specific adverse effects[74] There are improved provisions for the transfer of resource consents with the acquiescence of the Authority[75] , so this should play a major role in streamlining the process and relieving the need for a miner to necessarily apply for a new consent and go through a public hearing process. However, it is unfortunate that the 3 stage consent process for mining will not reflect the streamlining of the new planning process - if anything the process is likely to be more costly and cumbersome for miners than it already is. Decisionmakers will have to ensure that their decisions reflect the principle of *Sustainability* , and this will inevitably entail the need for more research into the effects of a proposal, and therefore greater delay.

3. Access to Land

The most significant innovation in Part 9 is cl 253, which provides that the granting of a minerals permit does not confer on the holder an automatic right of access to the land under which the minerals are contained other than for *Minimum Impact Activity* [76] or *Seismic Surveying* . For any other kind of activity (including prospecting and exploration, the miner must obtain the consent of the landowner).

The definition of Minimum Impact Activity has been the subject of considerable debate, because it is the only type of mining activity that will not now require landowner consent. In the amended Bill it has been defined as:

(a) Geochemical and geophysical surveying

(b) Taking samples by hand held methods (the original draft of the Bill contained a provision limiting the size of samples to 5kg)

(c) Aerial surveying

(d) Land surveying

(e) Any activity prescribed in a Minerals Programme as a minimum impact activity

(f) Any lawful act incident to any of the activities in (a) to (f). This is a disastrous provision from an environmental standpoint. It could be interpreted loosely to include almost any kind of 'incidental activity', whether small scale or large scale.

Allowing miners to circumvent the need for landowner consent for seismic activity is also unfortunate, and counteracts much of the effectiveness of the landowner consent provisions.

In the amended Bill there is no longer a prohibition on the use of machinery for minimum impact activity - this has been substituted with the lesser safeguard of 'damage to improvements, stock or chattels'. Thus, the use of machinery for minimum impact activity would not be a violation of the Act until damage had actually occurred (unless the machinery was being used to remove samples).

The prohibition on using more than 5 persons for a minimum impact activity has also been deleted from the amended Bill, and replaced with 'the use of more persons than is reasonably necessary'. This will presumably be a decision made by the miners themselves!.

It is submitted that if landowners are not to have the right to refuse access for minimum impact activity, this activity should be limited to non-mechanised operations, and should not involve the removal of samples, however small [77] .

The corollary of cl 253 is that the Crown's statutory rights of access under the Mining Act [78] are extinguished under cl 254 of the Resource Management Bill (s8 of the Mining Act confers a right of entry on the Crown on the Crown or any permit holder to land under which the Crown owns the minerals, unless it falls within a limited class of cases including land under crop etc, or alienated prior to the 1913 Land Act where the minerals

are privately owned). It is not clear whether the landowner consent provisions are to apply to minerals which are privately owned under "Victorian title"; this is a point which needs clarification in the legislation.

Consent is required for land under crop, or within an urban area etc, but there are unfortunately no land protection provisions relating to minimum impact activity. Clause 261 empowers the owner or occupier of private land to grant access by agreement with the minerals permit holder for any other kind of activity, and to impose conditions on the access agreement. The landowner's decision is final.[79] Crown Ministers have the power to decline access to Crown Land[80], and in addition to the matters specified in the Act under which the land is administered, the Minister must also have regard to:

* The adverse effects on the land or the owner or occupier thereof
* The safeguards against these
* The cultural and spiritual values associated with the land
* The compensation offered by the applicant

One positive feature of Part 9 is the requirement that Minerals Permits and access agreements be registered on Certificates of Title to land [81] - this binds subsequent purchasers of the land who are deemed to have constructive notice of the conditions when they purchase the land.

4. Views of the Mining Industry on the consent process

The Industry's main objections to the mining consent process are found in NZMEA's submission to the Parliamentary Select Committee, and can be summarised as follows:

(i) The cumbersome nature of the consent process (see above) [82]

The Association's view is that delays will occur in three main areas; the formulation of Policy Statements and Plans, the time taken for decisions by consent authorities, and the hearings held in the Planning Tribunal.

The industry will be involved with 7 types of policy document, of which Regional Statements and Plans, District Plans and Minerals Programmes can result in a Planning Tribunal hearing. This may also occur when plans are amended, and amendments can now be initiated by anyone, not just interested parties. Decisions will be delayed while policy is set, which is a possible 2 years in the case of Minerals Programmes.

There are no real incentives or penalties for Consent Authorities to avoid unreasonable delay, and no time limits are specified for the allocation decision pursuant to a Minerals Permit, or for the duration of hearings conducted by Consent Authorities under cls 86 & 89.

Opportunities to appeal to the Planning Tribunal have greatly increased [83], with the definitions of persons able to appeal widened and the Tribunal's jurisdiction expanded, along with the issues it can take into consideration.

(ii) Increased costs to companies

* Through the administration of policies and plans, and participation in the hearing process.

* Charges by Consent Authorities, including reasonable costs for their services (cl 35), and the commissioning of reports and audits.

* The objective of a fair economic return to the Crown will entail setting resource rents and royalties.

* The cost of obtaining landowner consent may be considerable.

* There are bonds which can be levied by the Minister of Commerce to ensure compliance with conditions.

The Industry's contention is that it cannot afford a system which enables all three consent bodies to charge rents and bonds - a significant departure from current legislation where levies are minimal.

(iii) The industry is strongly opposed to provisions that allow any person to object to an application for a Minerals Permit or Resource Consent, because this could result in frivolous objections and deliberate delaying tactics by environmentalists, and runs contrary to the principle of the review that decisionmaking power should be located in the people and organisations most affected by proposals.

(iv) Part 2 of the Bill is strongly biased in favour of environmental values, with no priority given to the need for development. Furthermore, it is incoherent in the sense that the factors conflict, and no indication is given as to what kind of balance should be struck by Consent Authorities.

(v) Minerals Programmes

The objective of Minerals Programmes (to establish policies and procedures in respect of the management of any Crown Owned Mineral) is too broad and creates an uncertain policy environment for mineral explorers. This is compounded by the fact that there is increased scope for ministerial intervention under cl 209.
The industry is also unhappy about the assumptions in cl 4 that the government can predict the needs of future generations, and that the continued development of non-renewable resources is unsustainable. It must surely be argued that the government is constantly engaged in the process of policymaking, weighing up social and economic factors based on predictions about the future - this is the function of government, and it cannot be expected to perform it without reference to the future.

Secondly, it follows from the very definition of non-renewable resources that continued development is unsustainable in terms of the resource, so it is essential that sustainable alternatives be sought.

However, the industry has a valid objection that the legislation fails to clarify certain ownership issues relating to minerals, including who is responsible for the allocation of *Private Minerals* (those other than Gold, Silver, Petroleum and Uranium on land alienated before 1913).

(vi) The industry is extremely concerned about the separation of minerals policy from local authority resource consents because of the likelihood of a Minerals Permit being rendered ineffectual by a refusal to grant a Resource Consent. The recommendation is that Minerals Programmes be abolished and minerals allocation be governed by a separate statute, or that minerals policy be binding on local authorities, and not subject to review at any stage by the Minister, affecting existing permits.

(vii) Minerals Permits

Part 9 as it is presently drafted makes it possible for minerals permits to be granted for different minerals on the same land - the industry is unhappy about this. Furthermore, the Association holds that permits should run from the date that work is able to commence, not the date of issue, and that enforcement orders should only be able to be obtained by consent authorities or persons affected by the breach of conditions, not by anybody.

(viii) Landowner Access

The industry is concerned that the new landowner consent regime will generate conflict between the Crown as minerals owner, and the landowner. It is inevitable that there will be a conflict of interest between the Crown (who will want to obtain a return from the mining of the resource) and the landowner, but this is preferable to the rights of the

landowner being completely overidden in the decision to allow a Company to mine, as is presently the case.

(ix) Regional and District Plans

The industry is concerned that these will be biased, because they will have to take *Sustainable Management* into account, which gives insufficient weight to economic and social factors. Applications for changes should be restricted to those people directly affected by a plan. Rules should be made on the basis of "actual or likely effects" rather than "potential effects" to remove the possibility of subjectivity.
Consent Authorities should not be entitled to charge "development levies" on top of royalties charged by the Ministry of Commerce, and there should be one authority monitoring compliance with all aspects of all consents.

(x) Resource Consents

The industry is concerned that there are too many opportunities for consent conditions to be changed, and that changes in plans could be retroactive in relation to permits. Furthermore, it sees no necessity for public input into the consent process when there has already been public input into the drafting of Regional and District Policy Statements and Plans.

5. Summary

Part 9 and its interrelationship with Part 6 leaves many of the problems in existing legislation unsolved or worsened. The costly and cumbersome nature of the consent process seems to have been exacerbated in the new legislation, even though it allows for greater public input.

However, it seems that the new three stage consent process finds its justification in the greater degree of environmental protection it affords. For the first time in New Zealand's history, resource allocation across the spectrum will be governed by a coherent principle (*Sustainable Management*) rather than the individual whim of decisionmakers. It is unfortunate that the Legislature has not given greater guidance as to what the appropriate weight of the various factors in the definition is, and it is to be hoped that the references to efficient allocation and obtaining a fair financial return will not be permitted to override the principle of Sustainable Management.

There is no general duty on the Tribunal to inquire beyond the evidence presented to it (although specific parts of the Bill provide for this possibility) [84] , and the Tribunal retains most of the constitution and functions of a District Court [85] , thus placing poorly funded objectors at an inherent disadvantage as illustrated by the Waitekauri case, so the provisions relating to the Planning Tribunal do not advance the general aim of the Bill toward greater public participation and information requirements before a decision is made.

The aim of better enforcement falls considerably short of being achieved in Part 9; Various Strict Liability offences are created by cl 383, but it is difficult to see how prosecutions will be laid under these sections. However, it is encouraging to note that the penalties for contravention of permit conditions have increased markedly from present legislation,[86] and there is provision for the Minister of Commerce to revoke a minerals permit if s/he has reason to believe that the permit holder is not complying with conditions.[87] However, it is not clear who will police Minerals Permit conditions - there is no provision for mining inspectors in the Bill . There is no duty on the Minister of Commerce (as there is on local authorities under Part 3) to gather information and monitor compliance, and to take action where necessary to prevent a breach occurring. This can be contrasted with the clear provision for enforcement in the Canadian and Californian legislation.

Part 9 fails to fulfill some of the specific objectives of the Core Group in relation to Crown owned minerals, both on its own and in conjunction with Part 6, the most important of these being an integrated and streamlined consent process which reduces transaction costs for all parties concerned. However, the amended Part 9 is a considerable step forward from the industry bias of the current mining regime, and a recognition that mining affects third parties and the environment not just miners, landowners and the Crown, and the principle of *Sustainable Management* is a continuation of the government's moves toward greater protection for our natural heritage which began with the passage of the Environment Act in 1986 and the Conservation Act in 1987.

PART 9 - A MODEL FOR REFORM

1. Minerals Programmes and Permits

The process of incorporating *Sustainability* into the mining consent process should entail an expanded role for the Ministry for the Environment either in the form of binding National Policy Statements on Minerals, or by leaving minerals programmes in place, but requiring them to be drafted by the Ministry of Commerce in conjunction with the Ministry for the Environment after a mandatory process of consultation.

The Report of the Select Committee does not appear to recognise that the Ministry of Commerce may be an inappropriate body to be setting minerals depletion policy - it is submitted that there needs to be increased liaison between the resource allocation agencies and local government in either of the above scenarios, because often a management policy in concerning a particular mineral will directly affect a specific locality, and the local authorities will have better information about the extent and location of the resource, and thus will be better equipped to predict factors such as the depletion rate of the mineral. It is not sufficient for the Minister of Commerce (in drafting minerals programmes) to only consider the views of local authorities if they happen to make submissions under cl 210.

Even though Central government will no longer be responsible for externalities, it is vital from the point of view both of efficiency, and of protecting the environment that there be mandatory consultation with local authorities before Minerals Programmes are drafted. If this model for resource allocation was adopted, there would be no need to reinstitute a right of appeal to the Planning Tribunal against permits granted at each of the three separate stages of prospecting, exploration and mining, because the Ministries would be obliged to consider (and give effect to) *Sustainable Management* , there would be opportunity for public input into the process and a Planning Tribunal inquiry, and so the conditions under which individual permits for each of the three activities would be granted would be outlined in the Minerals Programmes and scrutinised by the public at that stage. This would allow the quicker and more streamlined approach of automatic consents in cl 232 to remain in place, with the safeguard that the activity would need to conform to the statutory definition of it at the beginning of Part 9, and with the Minerals Programme which would necessarily include *Sustainability* considerations.
Where there is no relevant minerals programme, the permits should be granted in accordance with all of Part 2, and there should be a right of appeal to the Planning Tribunal at each stage of the process. Although this right of appeal may appear cumbersome, it would strengthen the duty on the Minister to draft a programme contained in cl 207, because the Ministry, faced with the dissatisfaction of mining companies and objectors at the expense and inconvenience of having to go through the Planning Tribunal, would feel the incentive to implement the programmes more quickly. The process would also ensure that Sustainability considerations were not overlooked where there was no relevant Minerals Programme.

2. <u>Enforcement</u>

The duty on the Minister of Energy to enforce permit conditions needs to be strengthened from the current duty to "monitor the effect and implementation of ...minerals permits" [88] There is no mention of a positive duty to enforce, no procedure by which information

about breach of conditions can be gathered, and no provision for inspectors to carry out this function. Local authorities cannot be expected to shoulder the full responsibility of enforcing permit conditions relating to extraction rates, in addition to externalities consents, and so there needs to be a regime of inspectors to deal with these matters, and a general duty on the Minister akin to the duty on local authorities in Part 3 to ensure compliance with permit conditions. A greater role for the Ministry for the Environment (as in the Californian model) would be desirable to ensure that those enforcing environmental conditions had the relevant expertise. Furthermore, it would be helpful if Part 9 contained a provision equivalent to s 103a of the Mining Act - imposing a duty on companies to avoid and mitigate damage to the surface of the land with a corresponding offence provision. This would operate to ensure that land was not adversely affected by mining activity even if the individual permit did not contain environmental protection conditions.

3. Consumer Protection

In addition to these measures, Part 9 should include some form of Consumer Protection to avoid the possibility of landowners not being fully aware of what they are consenting to.[89] This is particularly so in light of the automatic minerals permit consent process - landowners may be consenting to prospecting, exploration and mining at the same time, and so they need to have as much information (in plain English) as possible to allow them to make a fully informed decision. This aim could be achieved by inserting a clause in the section on minerals permits requiring applications and minerals permits to be drafted in plain English, and by imposing a general duty on permit holders seeking access under cl 253 to take reasonable steps to ensure that the landowner was fully aware of the implications of the application.

This could include a requirement that access agreements be ratified by an independent solicitor before being registered on land titles.[90] It is unfortunately unlikely that Consumer Protection will be furnished by the Bill in its present form, but it is necessary

in order to achieve the aims of greater information and landowner participation in the consent process

CONCLUSION

The mining consent process is incongruous with the overall scheme of the Resource Management Bill, because it seems to ignore many of the fundamental aims of the reform in general terms and in relation to minerals; in particular the need for integration, streamlining and efficiency . Furthermore, the roles of Central and Local Government in resource decisionmaking and enforcement of permits must be clarified, and better safeguards against the potential dangers of devolution implemented.

Until this occurs (along the lines of the submitted proposal), the new process will be of considerable inconvenience to miners, and of immense concern to environmentalists who are fighting to protect our natural heritage from the very kind of degradation that the process permits by its failure to reduce costs for those concerned with protecting the environment and inadequate public participation into the initial process of minerals allocation.

The consent process can be seen as an enormous step forward in legislative consciousness of the need for sustainable management of resources and the protection of our environment and natural heritage, therefore the lack of integration and the narrow focus of Minerals Programmes should not be allowed to spoil the overall positive thrust of the legislation, and the consent process should be modified to bring it in line with the general aims of the reform, drawing from the strengths of overseas legislation, and avoiding the weaknesses of the Mining Act.

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[1] *Introducing the Resource Management Bill*, Ministry for the Environment, Dec 1989, p1
[2] Resource Management Bill, Part 2, s4(2)
[3] ECO Submission, p119
[4] Cf: *Re application by Amoco Minerals* for a prospecting licence - "perhaps it can be said in broad terms that the Act seeks to facilitate mining and the wise use and management of our country's mineral resources, but it also requires that due regard be had to the economic, social and environmental effects of mining", pp460-461

[5] Cf: Coal Mines Act 1979
Petroleum Act 1937
Geothermal Energy Act 1953

[6] Under the Act, miners must apply to the appropriate Catchment Authority for rights to dam or divert water or to discharge wastes of pollutants into 'natural water'. Factors to be taken into account include:
* The most beneficial use of natural water
* The needs of primary and secondary industry
* Community water supplies
* Recreation, fisheries and wildlife habitats
* allocation and quality of natural water
* control of erosion and flooding
* Maori spiritual values in relation to water (cf: *Huakina Development Trust* v *Waikato Valley Authority*)

The Act leaves water ownership issues unresolved, but vests sole allocation rights in the Crown. There is a right of appeal to the Planning Tribunal from a decision of a Catchment Authority.

[7] Mining Act 1971, s4A. See also *Analysis of Existing Statutes* ,Working Paper no 2 - at the time the Mining Act was exempted from the Town & Country Planning Act, many of the principles of the latter Act were incorporated into the Mining Act, including determination of objections being made by the Planning Tribunal, provision for the variation of conditions, and a compulsory bond. The factors which the Minister was to have regard to were broadened.

[8] ss 49, 61 and 69

[9] *Environmental Impact Reports* are required to be audited by the Parliamentary Commissioner for the Environment. They are written reports describing environmental impacts, and must be completed for any development project which is likely to have a significant effect on the human, physical or biological environment (see p5 of the Environmental Protection & Enhancement Procedures for details of factors which are taken into account in deciding whether an EIR is required rather than an Environmental Inpact Assessment). The Parliamentary Commissioner may order independent advice to assist him/her in the preparation of the independent assessment.

[10] Mining Act, s104

[11] Ibid, s126

[12] Mining Act, s104A

[13] Ibid, s108A

[14] Ibid, s85. The standard charge by the Ministry of Energy is $2/ha for Prospecting and $10/ha for Mining. Where minerals are privately owned royalties must be determined by agreement between the minerals owner and the licencee.

[15] Ibid, s103D

[16] Ibid, s103E

[17] Ibid, s21

[18] Ibid, s30

[19] Ibid, s26(4)

[20] Ibid, s220

[21] Ibid, s118

[22] In practical terms prosecution for most offences under the Act (s234) is virtually pointless, because the penalties do not act as a deterrent to non-compliance. Most penalties are up to $1500 for a first offence and then $50 per day for a continuing offence, although for unauthorised mining there is a $50,000 penalty under s41 and $1000 per day for the continuing offence. It has been suggested that there should be a levy on miners in addition to the bond to pay for damage caused by contravention of the Act or of licence conditions as there is in South Australia (cf: *Analysis of Existing Statutes*)

[23] Ibid, s201

[24] *People, the Environment and Decisionmaking: the Government's proposals for Resource Management Law Reform,* Ministry for the Environment 1988, p41

[25] Peninsula Watchdog Inc v Cyprus Gold New Zealand Ltd, High Court Wellington Registry, AP 199/89, p1

[26] RMLR Minerals and Energy Resources Committee decisions, July 1989, p1

[27] Ibid, n4

[28] *Analysis of Existing Statutes*, p23

[29] *So what's wrong with the present system?* RMLR Journalist's Seminar, Dr Roger Blakeley, Secretary for the Environment, speechnotes, p4

[30] The Mining Act, strengths and scope for reform - a note to Minerals Task Group members, Cath Wallace, May 1989, p1
[31] Barrack Mines - Ministerial Briefing Paper, Denis Tegg, May 1989, p3
[32] ECO - Ministerial Briefing Paper, 23 May 1989, p1
[33] ECO Submission
[34] *The place for environmental control of the Mining Industry in New Zealand*, Brian J Bargh, former Environmental Manager, Mining Division, Ministry of Energy
[35] This was an application by 2 individuals on behalf of hobby fossickers for a mining licence over 11.35 ha in the Howard Valley, Nelson Lakes District. There were objections that the grant of a licence would prevent larger scale mining by commercial interests. The Tribunal (in its consideration of s126(9)(a) said that there was no reason why the land should not be used for mining operations...the only reservation was that mining should not be allowed to destroy the recreational value of the creek. Regarding factor (d)- matters specified in the Town & Country Planning Act, the Tribunal said that the conservation and enhancement of the social and physical environment would be better served by granting the privilege and thus retaining the cohesive social environment created by the present applicants and their friends.
The Tribunal said that it did not have sufficient information to comment on whether the grant of a licence would be the wise use and management of NZ's resources - "In so far as the resource is concerned we have a paucity of information, but much of the information we do have suggests that it may not be of great value. As against that we have an abundance of evidence concerning the recreational and social value of the area for a significant number of regular fossickers".
[36] This was an application for a Prospecting licence over 1090ha of land on the Eastern side of the Coromandel Peninsula. Much of the land was State Forest, and the Minister of Forests gave consent under s26 subject to conditions, particularly that a mining licence should not be granted in respect of a defined "scenic area" which included coastal cliffs and native bush.
The main opposition of objectors was to the environmental damage which would follow from the Prospecting and Mining activity. The Thames Coromandel District Council and the Parliamentary Commissioner for the Environment expressed concern at the absence of a comprehensive study into parts of the Coromandel in need of protection from mining activity, particularly in view of the flood prone nature of much of the Coromandel. It was held by the Tribunal that s126(9)(a) required consideration of whether the land should be used for mining operations ; this did not include Prospecting. It may be objected that the "mining operations" is a generic term referring to the spectrum of mining related activity (similar to the sense in which "mining privilege" in the Act refers to Prospecting, Exploration and Mining Licences). The Tribunal said (even in response to the Commissioner's evidence that mining on the Coromandel would have cumulative effects) : "We are not prepared to presume that large scale mining anywhere on the Coromandel would be environmentally and socially unacceptable". Neither was the Tribunal prepared to adopt the Environmental Defence Society's submission that all mining applications should have to be accompanied by a full Environmental Impact Report.
[37] Ibid, pp3-5
[38] RM Bill, ss62 and 88
[39] Ibid, n37
[40] Ibid, n37
[41] Report of the Minerals and Energy Taskforce to the Core Group
[42] Ibid, n41
[43] In the original draft of the Bill Part 9 had a purpose section which incorporated balancing the rights of mineral owners and developers and landowners, and ensuring a fair economic return to the Crown.
[44] Minerals and Energy Resources in Resource Management Law, Report of the Cabinet Committee on the reform of Local Government and Resource Management Statutes, 10 April 1989, p6
[45] New Zealand Maori Council v Attorney-General (1987) 1NZLR 641; 663
Report of Waitangi Tribunal on the Manukau Harbour Claim, 1985, p10
[46] Cf: Appendix 4
[47] Resource Management Bill, cl 211
[48] Ibid, cl 213
[49] Ibid, cls 101,102 and Parts 10 &11
[50] "managing the use, development and protection of natural and physical resources in a way or at a rate which enables people to meet their needs now without unduly compromising the ability of future generations to meet their own needs"
[51] See report of the Select Committee on the Resource Management Bill.
[52] ECO Submission on RMLR, p38

Coromandel Watchdog Submission, pp2-4

[53] Above n 33

[54] RM Bill, Cl 220

[55] Mining Act s55(b)

[56] s 103A inserted by the Mining Amendment Act 1981

[57] Analysis of Part 9, Cath Wallace

[58] Under cl 232

[59] RM Bill, cl 434

[60] Analysis of Part 9, Cath Wallace

[61] Resource Management Bill, cl 89(3)

[62] Ibid, cl 79, unless there is contrary provision in a plan or the authority reasonably considers the likely effect of the proposal to be minor

[63] Ibid, cl 82

[64] Ibid, cl 201

[65] Ibid, cls 79 & 86. See also the First Schedule to the Bill which sets out this process in more detail

[66] Ibid, cl 75

[67] Ibid, cl 85

[68] Mining Act, s104(7)

[69] RM Bill cl 109 However, it is unfortunate that this review can only be undertaken in 3 situations:
* Where there is a review clause in the consent
* Where the review corresponds to changes in a regional plan
* Where information used in the initial decision was inaccurate

[70] RM Bill, cl 85

[71] Ibid, cl 121. Where the Minister has called in a proposal od national significance, there are provisions for a Board of Inquiry into the proposal (cl 126) and public submissions (cl 125)

[72] Ibid, cl 88A

[73] Ibid, cl 77

[74] Ibid, cl 92 (a) Conspicuous oil or grease, scum, foam or floatable material
(b) Conspicuous change in colour
(c) any emission or objectionable odour
(d) likely to render water unsuitable for consumption by farm animals
etc

[75] Ibid, cls 115-118

[76] Ibid, cl 258

[77] ECO Submission

[78] Mining Act, s8

[79] See Appendix 4 - the Select Committee recommended that the appeal to the Planning Tribunal for consent 'unreasonably withheld' contained in the original draft of the Bill be removed in the amended Bill. The original cl 263 was strongly objected to by environmental groups and even by groups such as Federated Farmers as being contrary to the landowners' private property rights and likely to render the right of refusal completely ineffectual (a landowner threatened the expense and inconvenience of a Planning Tribunal hearing would soon capitulate and allow the miner access to his/her land). Furthermore, it was felt that a right of appeal against a ministerial decision to deny access would be unconstitutional, because a minister is accountable to the electorate whereas the Planning Tribunal is not.

[80] RM Bill, cl 262

[81] Resource Management Bill, cls 273-274

[82] New Zealand Mining and Exploration Association submission, pp8-14

[83] The right of appeal exists for (*inter alia*)-
Minerals Programmes, Regional Policy Statements and Plans, Regional Coastal Plans, District Plans, disputes about inconsistencies, Resource consents, Landowner Consents, and call-in projects.

[84] cff Part 6 and cl 323

[85] cff Part 10, particularly cl 325

[86] The penalty for breach of a minerals, landuse, water of discharge permit is anything up to $150,000 and $10,000 per day for a continuing offence or a prison term not exceeding 2 years

[87] RM Bill, cl 238

[88] Ibid, cl 25. ECO supports a duty on the Minister of Commerce similar to that placed on local authorities in Part 3 to gather information and ensure compliance with permits.

[89] Draft Submission for the Thames Environment Society, Denis Tegg.

[90] ECO Submission, p135

APPENDIX 1 THE CONSENT PROCESS UNDER THE MINING ACT 1971

1. Prospecting
Exploration Application to Minister of Energy accompanied by an
Mining Environmental Impact Report or Environmental Impact Assessment

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2.Minister considers the application and sets conditions:
- Views of local authorities are sought
- Submissions from the public are called for
- If an *Environmental Impact Report* this must be audited by the Parliamentary Commissioner for the Environment

|

3. Mining Company must apply for any necessary water permits from the relevant Catchment Authority.
- if there are objections to this, there is an appeal to the Planning Tribunal which can be incorporated with the appeal from conditions set by the Minister of Energy on the Mining Permit

OBJECTIONS? No >>>>> licence and water right are granted with condition set.

4. Yes >>>>> anyone who made objections, or against water permit under the appeal provisions of the Water and Soil Conservation Act 1967. Tribunal's decision is binding on the Minister only if it is against the application.

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5. Appeal to the High Court on a point of law only

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APPENDIX 2 CONSENT PROCESS UNDER THE RESOURCE MANAGEMENT BILL

1. Drafting of Minerals programmes by Ministry of Commerce
- Public input (submissions)
- Planning Tribunal inquiry if necessary

|

2. Application for Minerals Permit to Ministry of Commerce

- May be either a prospecting, exploration or mining permit
- permit must be granted in accordance with the minerals programme and all of Part 2
- No public input
- No right of appeal

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3. National Policy Statements on Minerals

- Not binding on local authorities but they must not do anything inconsistent with these statements
- Public process for drafting these policy statements

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4. Regional Policy Statements (compulsory), Regional Plans (optional), regional rules (optional), District Plans (compulsory), District rules (optional).

- Must be prepared in accordance with Part 2 of the Bill and the Matters set out in the second schedule to the Bill
- Must be prepared using the public process set out in the first schedule of the Bill
- Any person may request a change
- District Plans must not be inconsistent with Regional Polict Statements and Plans
- District or Regional Plans can declare activities *Prohibited* , *Permitted*, *Discretionary* or *non complying*

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5. Application to relevant territorial authority for a landuse or wateruse permit for discretionary or non-complying activities

- Further information may be required by the local authority
- Application must be publicly notified and submissions called for
- A pre-hearing meeting must be held
- A full, public hearing must be held
- Consents are granted in accordance with Part 2 and with regional policy statements and plans, and District Plans and rules.
- Any person who made a submission can appeal a decision of a consent authority
- The duration of the consent must not exceed 35 years

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6. Landowner consent for activities other than minimum impact activity, and for all Maori land

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APPENDIX 3 EXTRACTS FROM THE REPORT OF THE PARLIAMENTARY SELECT COMMITTEE ON THE RESOURCE MANAGEMENT BILL

6.3 The Committee recommended that the exemptions of Part 9 from the purposes and principles section in Part 2 be removed, and that Part 9 be made subject to all of Part 2.

6.7 The Committee recommended that the overall purpose of Sustainability be retained, but that the wording be modified to read "without unduly compromising the ability of future generations to meet their needs"

6.8 The Committee expressed the view that a hierarchy of purposes and principles would be too difficult to determine, given the number of conflicting interest groups involved in resource management, but added a new principle to cl 5 concerning access to the public estate

6.9 The Committee recommended that the "duty to consider" the Treaty in cl 6 of the Bill be strengthened to a duty to "take into account the special relationship between the Crown and te iwi Maori as embodied in the Treaty"

6.21 The Committee proposed that there be another schedule to the Bill outlining matters to be taken into account in the preparation of Environmental Impact Reports, and that the Parliamentary Commissioner's powers under the Environment Act be retained

6.23 The Committee recommended that there only be a review of resource consent conditions where a regional plan was implementing new rules, or where inaccurate information had influenced a decision to grant a resource consent.

6.27 The Committee noted that a number of submissions had asked for Part 9 to be dropped from the Bill completely, but did not adopt this recommendation.

6.28 The Committee responded to an overwhelming condemnation of the appeal to the Planning Tribunal from landowner refusal of consent by dropping these clauses from the Bill

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BIBLIOGRAPHY

* *Introducing the Resource Management Bill* , Ministry for the Environment, Dec 1989

* The Resource Management Bill

* *Environmental and Conservation Organisations'* (ECO) submission to Select Committee on the Bill

* Mining Act 1971

* Water and Soil Conservation Act 1967

* *Analysis of Existing Statutes* , RMLR working paper no 2

* Environmental Protection and Enhancement Procedures 1986

* *People, the Environment and Decisionmaking: the Government's proposals for Resource Management Law Reform* , Ministry for the Environment, 1988

* Decisions of the Energy and Resources Committee of the Core Group, July 1989

* *So what's wrong with the present system?* RMLR journalists' seminar, Dr Roger Blakeley,
Secretary for the Environment, speechnotes

* *The Mining Act, strengths and scope for reform* - a note to the Minerals task force members,
Cath Wallace, May 1988

* Barrack Mines - a ministerial briefing paper, Denis Tegg, May 1989

* ECO - a ministerial briefing paper, 23 May 1989

* *The place for environmental control of the Mining Industry in New Zealand*, Brian Bargh,
former Environmental Manager, Mining Division, Ministry of Energy

* *Minerals and Energy Resources in Resource Management Law* , report of the Cabinet Committee
on the reform of Local Governement and Resource Management Statutes, 10 April 1989

* *Should Part 9 be axed?* Barry Weeber, ECO Researcher

Analysis of Part 9 , Cath Wallace

* *Recent decisions on mining* , Cath Wallace

FRY, S. The mining consent process in the Resource Management Bill

F946 FRY, S. The mining consent process in the Resource Management Bill.