HOWARD DAVIS

NATURAL RESOURCE USE LAW IN NEW ZEALAND:

PROBLEMS AND OPTIONS FOR REFORM

Submitted for the LLB (Honours) Degree
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The views expressed in this paper are however those of the author.

LIST OF ABBREVIATIONS

EIR	Environmental Impact Report
NDA	National Development Act 1979
TCPA	Town and Country Planning Act 1977
WSCA	Water and Soil Conservation Act 1967 and the Water and Soil Conservation Amendment Act 1973

I. INTRODUCTION

1. With a topic as large as "National Resource Use Law in New Zealand: Problems and Options for Reform" it is necessary to begin by carefully defining terms. Firstly what are "natural resources" and how can they be usefully classified? In economics it is traditional to divide resources into four types: natural resources (often called simply "land"), labour, capital and entrepreneurial resources[1]. Clearly this paper is only concerned with the first type. The classificaton is also useful because it distinguishes natural resources from capital or "man-made" resources. However for the present writers uses, problems arise with the classification. While it makes sense to exclude livestock from being natural resources, because they are in the nature of a capital investment by the farmer, it is difficult therefore to argue for the inclusion of man-made forests for the same reason. Thus to define and classify natural resources the writers approach has been to return to basic common law principles.

2. While in common usage the expression "land" may mean "the solid portion of the earth's surface as opposed to sea or water"[2] it has a different meaning under the common law. An ancient maxim[3] held that land was comprised of three parts: the earth's surface (as under the dictionary definition), the subsoil beneath it and the airspace above. The common law recognised this by allowing the

owner of an estate in land to separately or jointly alienate one or more parts of that estate or the rights over that estate. Of course, as will be shown, statute law has reduced the applicability of this doctrine though the common law position continues in the absence of statutory limitations.

3. The meaning of "land" at common law could be made wider than these three elements. An ancient maxim[4] held that, as a general proposition to be rebutted in the individual case, all things affixed to the land were part of the land and generally were owned by the owner of the land. This applied to all plants and trees. Since livestock are not fixed to the land they would not be included in the common law definition of land. However the economic definition of land (as not capital) must still be borne in mind since many capital resources are sufficiently affixed for the law of fixtures to consider them part of the land. Thus plants and other vegetable matter will, for the purposes of this paper, be included within the expression "land" since, as far as the author can ascertain, they are the only natural resource that the law of fixtures is relevant to.

4. Freshwater at common law was not capable of ownership because of its changing and moving nature[5]. It was, of course, capable of use, within the bounds of the doctrine of nuisance, by the owner of the river bed. Now under

section 261 Coal Mines Act 1979 the Crown owns all river beds of "navigable" rivers. In addition, under legislation such as the Water and Soil Conservation Act 1967, private landowners' rights of use of water have been severely curtailed. However it is useful that as a basic principle the common law considered rivers and other bodies of water to be not merely a part of the land but a separate resource. As will be seen the Water and Soil Conservation Act, in effect, classifies water into "natural" and other water. It controls the use of the former; which includes vapours, snow and seawater, excluding water in pipes, tanks and the like. The classification is similar to that in this paper except that, to simplify matters, it has been decided to separate freshwater from seawater. The expression "freshwater" in this paper is otherwise synonymous with "natural water". Seawater is included in the definition of sea resources in paragraph 5.

5. Finally the ownership of the sea and the continental shelf at common law were unclear because they involved qestions of international law. However, following on from the Law of the Sea Conference, New Zealand, under the Territorial Sea and Exclusive Economic Zone Act 1977, affirmed the existence of the territorial sea of New Zealand and declared a two hundred mile exclusive economic zone. The Act also used the Continental Shelf Act 1964 definition of "natural resources" which, along

with the sea water itself, is adopted as the paper's definition of sea resources:[6]

> (a) The mineral and other natural non-living resources of the seabed and subsoil; and
>
> (b) Living organis ms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with seabed or subsoil.

Fish are deliberately excluded because it is difficult to distinguish between those that are naturally in the sea and those that are being cultured in some way before being harvested. Also their inclusion would involve the inclusion of wild animals which are analogous. Wild animals have been excluded on the basis that under the common law they are neither part of the wider definition of land, not being fixtures, nor water resources.

6. Therefore a three fold definition and classification of natural resources is adopted. For convenience the airspace will be distinguised from the other aspects of land, because, as will be seen, the legislature have tended to treat it differently than other types of "land". Also the author will call it the "atmosphere" to remove connotations that only air pollution is of interest. "Land" will therefore be classified as the subsoil, with all of the minerals, precious metals, hydrocarbons and so on contained therein; the earth's

surface; and the vegetation. "Land in general" includes all three elements. Such a framework creates problems in practice since all three parts are contiguous, but is conceptually useful. Thirdly freshwater resources (or natural water under the Water and Soil Conservation Act) is adopted as a category. Finally sea resources includes, in addition to sea water, the natural resources definition under the Continential Shelf Act 1964, and excludes fisheries.

7. It is not necessary in this paper to distinguish between renewable and non-renewable natural resources. However since the distinction is often made it is useful to discuss it. The distinction is problematic since many resources supposedly "non-renewable" are merely non-renewable in the very long run roe example hydrocarbon resources. It is also a theroretical possibility that non-renew able resource use, combined with continually improving technology for its exploitation, might result in the resource never being exhausted because of the ever improving technology. The argument is sometimes made about precious metals. In addition some recent research on the weather and the atmosphere, especially the ozone layer, suggests such "renewable" resources as rainwater may be capable of depletion in the same way as those resources traditionally described as non-renewable. The distinction is, then, unhelpful when the focus is on resource use rather than just conservation.

8. The next term needing some explanation is "use" in the context of natural resource use law. The term in the paper is given a very wide meaning. Conservation, or preservation, of part or all of a natural resource is considered by the writer to be a use of that resource. The present writer prefers to see the conservationist versus developmentalist battle over many resources not as a battle about **whether** a resource is used but **how** it is used. This approach is desirable, in the author's opinion, because it accepts that conservation in itself is a legitimate "end use" of a resource. It also avoids compartmentalising developmental and conservationist issues in resource use planning. It is hard to disagree with P. M. Salmon (speaking in the context of the United Nations Stockholm Conference on the Human Environment) that:[7]

> The environmental issue cannot be seen in isolation from the whole complex myriad of difficult issues which today confront virtually every nation - inflation, energy, food, population and social turbulence ... Returning once again to the Stockholm Conference, many of the speakers there agreed that environmental consideration would have to be incorporated into national development strategies in order to avoid the mistakes made by developed countries in their development, to utilise human and natural resources more efficiently, and to enhance the quality of life of their people. Many of the speakers agreed there need be no conflict between their concerns for their development and for environment.

The idea that conservation is just one possible "end use"

for a resource also makes sense in economic terms. Economists do not distinguish between the value in terms of "utility" or "welfare", derived from the use of a natural resource to produce goods and services and one preserved to provide, say, recreational facitilites. The latter are regarded by economists simply as public goods for the consumption of society as a whole rather than the "locking up" of resources. However, because it is useful in some cases to have an alternative expression to "conservation" of a resource the author adopts "utilisation". Utilisation of a natural resource will be defined as the use of that resource to produce (final or intermediate) goods and services, with a value in the market place. Conservation, in this sense, is synonymous with preservation of a resource (usually for future generations or in perpetuity). Such a distinction however is problematic because, for example, it may be possible to charge admittance to a "conserved" park, therefore utilising and conserving the same resource. Finally the related expression "resource allocation" will be used in this paper. That amounts to the choice between competing uses of resources.

9. It is also necessary to define "law" in this context Law has been defined as (inter alia):[8]

> A law is an obligatory rule of conduct. The commands of him or they that have coercive

> power (Hobbes). A law is the rule of conduct imposed and enforced by the Sovereign (Austin). But the law is the body of principles recongnised and applied by the State in the administration of justice (Salmond) ...Vinogradff saw law as a set of rules imposed and enforced by society with regard to the attribution and exercise of power over persons and things ...

It is this last definition - the attribution and exercise of power over things (in this case natural resources) - that is relevant here. The recurring questions are how and by whom are particular powers exercised. To answer these questions, and evaluate where problems exist in New Zealand's natural resource use law, twenty two Acts of Parliament, with their amendments, will be examined. In addition the present administrative structures and the bodies that decide questions of resource allocation will be discussed. The law given, unless stated otherwise, is as at 1 January 1985.

10. This paper will describe most of the major resource use law in New Zealand in the catagories of resources described in paragraph 6. Diagramatic summaries are used to assist understanding. Because of limited space and complexity of subject matter it will not be possible to go into most of the relevant statutes in the depth they merit. Thus the statutes will only be looked at to see how they answer the questions in paragraph 9. Also, because of the reasons in paragraph 9, it is necesssary to look beyond the statutes to the other bodies and

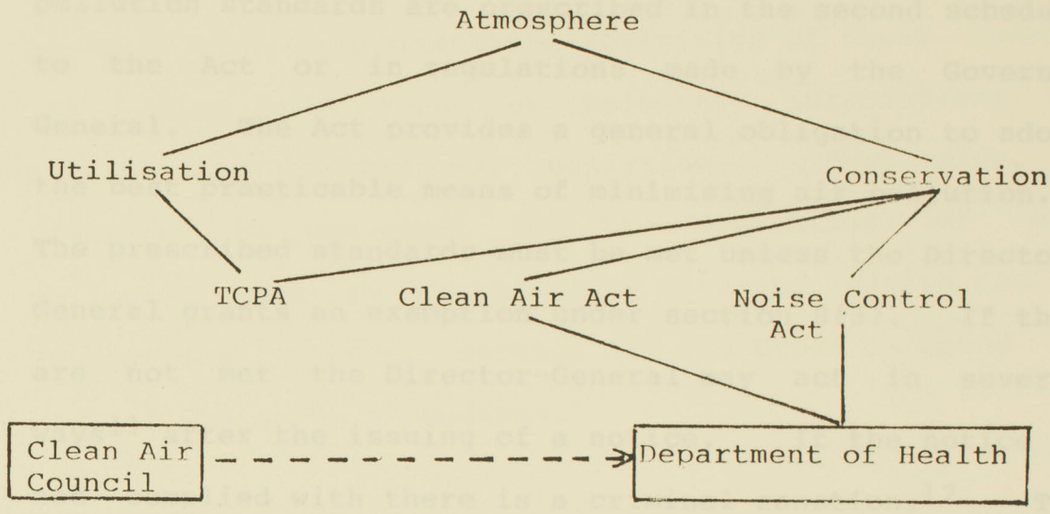
structures that exist in resource use law in New Zealand. After noting what are seen as the two central problems in the area, and mentioning the National Development Act 1979 as an attempt to deal with those problems, three possible options for reform will be described. These options, involve varying degrees of change. The first is based on reform of the administrative structures. The second involves amending the various topical legislation to make them consistent with the Town and Country Planning Act 1977. The third, less ambitious, approach involves a redrafting of the National Development Act.

II NATURAL RESOURCE USE LAW IN NEW ZEALAND

A. Atmosphere

11. Use of the atmosphere is not subject to the same myriad of rules and regulations as land and water use are because the atmosphere is not perceived as being as scarce or as subject to so many competing interests. Its use is also less regulated because of its very nature. The atmosphere is fairly close to what economists call a pure social good.[9] It has no market price because, in practice, it is largely non- rival and nearly perfectly non-excludable. It is close to non- rival because one persons use of it will often not greatly reduce the opportunities for someone elses use. This compares to most private goods which can only be used by one person. It is non-exclusionary in the sense that it is very difficult to exclude someone from using the atmosphere. The corollary of that fact is that people cannot be required to pay for a social good. Who would pay to see a sporting fixture if the ground was unfenced and not patrolled by attendants? Thus it is argued by economists that social goods such as the atmosphere, since they have few or no costs for their utilisation, are prone to over utilisation and pollution. The economists - and the New Zealand legislatures-answer is the regulation of utilisation and pollution by law.

Diagram 1 - Summary of Atmosphere Legislation



NOTES: Administrative bodies are in boxes, legislation is not.

: Arrows denote the direction of the flow of information or authority.

: Dotted lines denote recommendatory, not binding, authority.

: The TCPA structure is in diagram 2.

12. The Clean Air Act 1972, as seen from its long title, is an anti-pollution piece of legislation "to promote the conservation of the air". Since there was no Ministry for the Environment when it was promulgated the Department of Health administers it. The Minister of

Health, the Director-General of Health and his/her delegates have most of the functions under the Act with the Clean Air Council proffering advice. Certain pollution standards are prescribed in the second schedule to the Act or in regulations made by the Governor General. The Act provides a general obligation to adopt the best practicable means of minimising air pollution.[10] The prescribed standards must be met unless the Director-General grants an exemption under section 8(3). If they are not met the Director-General may act in several ways[11] after the issuing of a notice. If the notice is not complied with there is a criminal sanction.[12] The Governor General can also, after application by the relevant local authority or the Clean AIr Council, declare an area a clean air zone where more stringent than normal standards apply.[13] The Minister may in some cases grant exemptions to this.[14] Some scheduled processes involving dangerous substances also require licencing by the Director-General or the licencing authority as the case may be. There are reasonably wide powers to put conditions on such licences[15] and they may be refused.[16] There are also rights of appeal in some cases against conditions on licences to the Director General, then to the High Court[17] and finally by way of case stated to the Court of Appeal[18]

13. The functions of the Clean Air Council are[19] (inter alia)

to recommend to the Minister on matters relating to the prevention and control of air pollution and his/her functions, to the Director-General on his/her powers and to local authorities on their functions under the Act. As well they co-ordinate the activities of these people and bodies with those of voluntary associations to prevent and control air pollution. They also do research on equipment for the prevention of air pollution, publish air pollution data and receive public submissions. Under section 22 the Crown is bound by most of the above procedures.

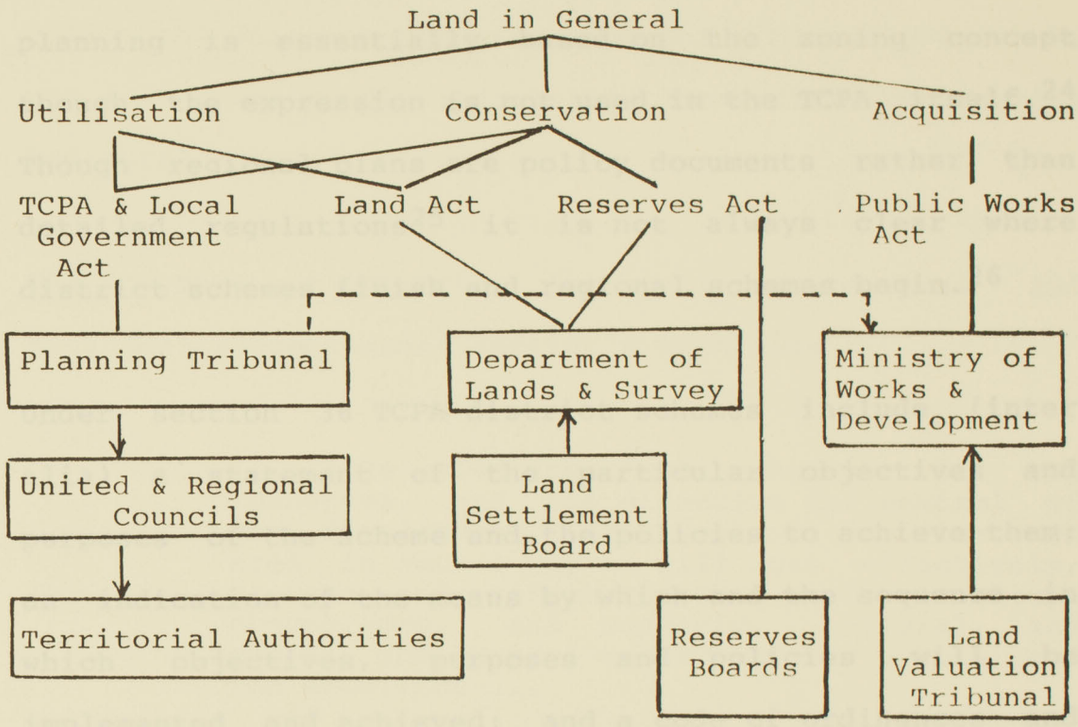
14. D.A.R. Williams[20] notes some problems of jurisdiction between the Clean Air Act and Town and Country Planning Act 1977 (TCPA). These arise because the Clean Air Act is only concerned with air pollution while the TCPA land use provisions have an effect on it. The TCPA implicitly involves a system of zoning. Zoning tends to concentrate air pollution while to achieve the goals of the Clean Air Act dispersion would be more appropriate. THe TCPA also makes specific provision for some types of air pollution in its second schedule; where that pollution is "... fumes, dust, light, smell [or] vibration".

15. A second aspect of pollution of the atmosphere - noise - is also inconsistently treated in the resource use

legislation. The Noise Control Act 1980 is an "Act to provide for the abatment of unreasonable or excessive noise"[21] which is to be read together with the Health Act 1956. Both are administered by the Department of Health. The Noise Control Act however does not live up to its long title since it is limited to a small range of sources of noise.[22] These probably exclude most large works or projects. More relevent is the provision made in the second schedule to the TCPA for noise to be dealt with in a district schemes. From cases like Bitumix[23] it is clear some local authorities take account of noise considerations in formulating district schemes. For more discussions of the structure of government departments in these areas see paragraphs 64 to 78.

B. Land in General

Diagram 2 - Summary of Land in General Legislation



NOTES: This structure is over diagrams 3, 4, & 5.

: Acquisition is given as a separate heading because it is a different function to either utilisation or conservation, though resources once acquired can be utilised or conserved.

16. The most important piece of legislation for the use of Crown or private land is the TCPA. It, with the Local Government Act 1974, provides for a two tier approach to resource use planning. It requires the drawing up of district and regional schemes by local authorities and regional or united councils respectively. District planning is essentially based on the zoning concept though the expression is not used in the TCPA itself.[24] Though regional plans are policy documents rather than detailed regulations[25] it is not always clear where district schemes finish and regional schemes begin.[26]

17. Under section 36 TCPA district schemes include (inter alia) a statement of the particular objectives and purposes of the scheme and the policies to achieve them; an indication of the means by which and the sequence in which objectives, purposes and policies will be implemented and achieved; and a code of ordinances and maps to illustrate the proposals. District schemes in practice, then often, have three parts:

(i) the scheme statement, Robinson describes this as:[27]

> ...a descriptive analysis of the planned entity covering such matters as population, housing, transportation, recreation, employment and **natural resources**, all within the context of the main function of the district. It should also contain the planning strategy (my emphasis).

(ii) the code of ordinances, Robinson describes this as:[28]

> ... a series of control measures, specifying the different land uses permitted within each zone and catagorising these into those permitted as of right, those permitted conditionally and those subject to the Councils discretion ...

(iii) the district planning maps which classify land by use : usually into industrial, commercial, residential and rural "zones".

18. The purpose of district (as well as regional and maritime) schemes under section 4 TCPA are:

> ... the wise use and managment of the resourses, and the direction and control of the development, of a region, district, or area in such a way as will most effectively, promote and safeguard the health, safety, convenience, and economic, cultural, and social, and general welfare of the people, and the amenities ...

As well in the "preparation, implementation and administration" of these schemes certain "matters of national importance" for example : "... [t]he conservation, protection and enhancement of the physical, cultural and social environment ... "and" [t]he wise use and management of New Zealands resources ..." must be recognised[29] For a much fuller discussion of these criteria see paragraphs 79 to 102

19. District schemes go through three distinct stages before they come into effect. First the relevant local authority approves a draft district scheme. The scheme is submitted to the Minister of Works and Development. The Minister or the local authority then has three months to object to the scheme[30]. If there is no objection the scheme becomes a proposed district scheme. The public are then notified of the scheme[31] and objections are heard. Under section 49 there is an opportunity for appeal to the Planning Tribunal. If there are no objections or appeals the scheme becomes operative. The scheme then has the force of a regulation under the Act[32] to be observed and enforced by the local authority.[33] No consents or waivers contrary to it can be given by the local authority.[34] Once operative district schemes are reviewed at least every five years.[35] They can be changed upon the request of the Minister[36] or the local authority[37] by going through the above procedures again.[38]

20. The Planning Tribunal is a judicial or quasi judicial body chaired by a District Court Judge. It has a wide brief to hear appeals under the TCPA and theoretically could act inquisitorially[39] but in practice acts adversarially. Locus standi is wide with anyone "adversely affected" or representing a relevant aspect of the public interest usually being entitled to be heard.

In practice most major projects find their way to the Planning Tribunal (though some in recent times have not - for example the expansions to the Glenbrook Steel Mill and the Marsden Point Oil Refinery[40].)

21. A united or regional council, or in some cases a regional planning authority, is required to draw up a regional scheme.[41] A draft scheme is prepared which includes :[42]

> ... a statement of the objectives and policies for the future development of the region, and of the means by which they can be implemented, having regard to national, regional, and local interests, and to the resources available.

The first schedule also states that the scheme must deal with (inter alia):

> The identification, preservation, and development of the region's natural resources, including water, soil, air, and other natural systems, farmlands, forests, fisheries, minerals (including sand, metal, and gravel), and areas of value for the enjoyment of nature and the landscape.

When preparing the scheme the council must give public notice of the fact[43] and must consider the submissions it receives.[44] A proposed regional scheme is then forwarded to the Minister and the relevant local authorities[45]. Any local authority can request a hearing before the Tribunal[46] who have the power to

hear[47] report and rcommend (only) [48]. The matter is then referred back to the regional or united council who must resolve it in three months or the Tribunal will make a binding determination[49]. The scheme is then sent back to the Minister[50]. If the Minister "considers any matter to be of national importance and having significance beyond the boundaries of the region"[51] s/he can refer it back or, if the dispute continues, send it to the Tribunal[52] for report and recommendation. The Minister has the final say[53] being able to "direct" changes to the regional scheme which the Governor General "may"[54] bring into force with an Order in Council. The operative regional scheme binds all local and regional authorities and the Crown[55]. If a local authority changes its district scheme[56] or is proceeding with a "public work" contrary to the scheme[57] the regional authority may begin the process again. It must change its scheme when the Minister requests it to[58]. Operative district schemes must be changed to give effect to operative regional schemes where they are inconsistent[59]. For further discussion of the extent to which the Crown is bound by the TCPA see Appendix 1.

22. Finally, returning to district schemes, short of seeking changes to a scheme, a developer who finds hislher project contravenes such a scheme can seek a "specified departure" under section 74. The council may grant such a specified departure if it is not contrary to the matters in section 3[60] or the "public interest"[61], is of

"little ... significance"[62] and is urgent[63] otherwise it is heard by the Tribunal.

23. The Local Government Act 1974 is relevant to the TCPA provisions in paragraphs 16 to 22. It is however a very complex piece of legislation for the operation of local and regional government in New Zealand. The Local Government Commission, a Commission of Inquiry under the Commission of Inquiry Act 1908[64], oversees (inter alia) the boundaries, functions and powers of local authories[65]; whether they have sufficient resources[66]; and how regional and united councils fulfil their duties[67]. The Commission can inquire into a regional scheme[68]. Sections 17 to 24 also provide the machinery to set up regions with regional and united councils, while section 25 allows the reorganisation of districts.

24. Much of the rest of the Act (especially Part XV) provides for the acquisition of resources[69] and their use to fulfil functions under district and regional schemes as well as generally. One relevant set of provisions to resource use is in the Local Government Amendment (No.2) Act 1982. Sections 15 to 16 require the owner of land to be developed before any "disturbance of the land surface or the excavation of land" for that purpose, to notify the relevant council[70]. The council then "may" require a development plan from the owner[71]. Where, however, the council "believes" the development is for (at least

one of) administrative, commercial or industrial purposes or is valued at more than fifty million dollars the plan must be submitted. For the reasons in Appendix 1 this requirement probably does not bind the Crown. The Act is administered by the Minister of Local Government.

25. The Public Works Act 1981 is the legislation for the acquisition by the Crown of natural resources, especially land, for a large number of uses. The Act, administered by the Ministry of Works and Development, allows the acquisition of land for "essential work" and/or "government work" (being work under the "control" of the Crown[72]). Essential work is work the Crown or a local authority does for (inter alia) : "... [i]rrigation, river control, soil conservation .... production and distribution of energy ...[and the] creation of reserves and wildlife habitats ..."[73] The Governor General must by Order in Council declare such a work to be essential[74]. Section 16 empowers the Minister or the local authority to acquire land for government or local work respectively. This acquisition may involve prior negotiations[75] or can be compulsory if the work is essential[76] with notice required[77] and an appeal to the Planning Tribunal[78]. Their inquiry can be fairly wide[79] and is binding on the local authority[80] though not the Minister[81]. Where any estate or interst in land is lost there is normally an automatic entitlement to

compensation;[82] the amount to be determined by the Land Valuation Tribunal.

26. Finally the Public Works Act is important to resource use law in New Zealand because Part 1 establishes and defines the functions of the Ministry of Works and Development. These functions include the administration of the Act[83], the "efficient execution" of government works[84], assistance for regional planning" and "the objectives" of the TCPA[85], and as "directed by the Minister, the investigation and coordination of proposals for the conservation, development, and effective use of natural resources "[86]. For further discussion of the Ministry of Works and Developments structure see paragraph 64 to 78.

27. The Land Act 1948 provides for the administration and use of all Crown land, including that acquired under the Public Works Act, except that "set aside for any public purpose"[87]. The Act is administered by the Department of Lands and Survey which is set up under the Act.[88] The most important body under the Act though is the Land Settlement Board whose duties include "... the administration, management, development, alienation, settlement, protection and care of Crown land; and to undertake, control and carry out all negotiations for the purchase of land ..."[89] This is done by the creation of districts[90] and the classification of land purposes

into farm, urban, commercial/industrial and pastoral[91]. This classification is a prerequisite to alienantion[92]. All Crown land may be alienated[93] with the exception (inter alia) of coastal land[94], that around rivers and lakes[95] and, of course, minerals below the surface.

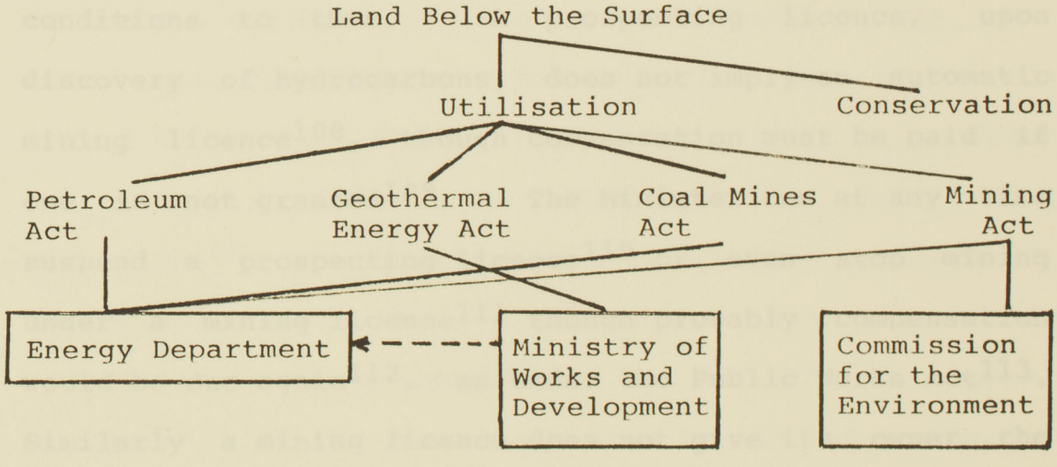
28. Finally the Reserves Act 1977 is the last major piece of legislation of relevance to land use in general. The Act, administered again by the Department of Lands and Survey[96], allows for the "preservation and management" of reserves with (inter alia) "recreational ... potential", "wildlife", "indigenous flora or fauna", "or other special features of value"[97]. The process of setting up such reserves begins when the Minister of Lands and Survey calls for a report on whether virtually any piece of land in New Zealand should be part of such a reserve[98]. The Minister can acquire land for such reserves in a number of ways, including under the Public Works Act [99]. Also a local authority can declare land vested in it to be a reserve[100]. Under the Reserves Amendment Act 1979 the Minister is required to classify all reserve land into recreational, historic, scenic, nature, scientific, government purpose or local purpose. The Minister can then appoint a local authority, voluntary organisation or a reserves board to control the reserve[101], as well as directors and rangers for the reserve as required[102]. The body appointed must prepare

management plans for the reserve which are under continuous review[103]. It should be noted that the Act does not apply to land under the Forests Act 1949 [104].

1. Land below the surface

29. The legislation that has been defined as being for land use below the Earth's surface is that that provides mining regimes for precious metals, minerals and energy sources. There is no specific conservation legislation for what are largely non-renewable resources. As will be seen the legislation has much more of a "developmental" flavour than most of the land use legislation discussed thus far.

Diagram 3 - Summary of Land Below the Surface Legislation



30. The Petroleum Act 1937 is a good example of this. The Acts long title says it is an Act "...to make better provision for the **encouragement** and regulation of mining for petroleum" (my emphasis). Section 3 provides that, with few exceptions, all New Zealand petroleum belongs to the Crown. Professor Fisher[105] says all petroleum in situ is governed specifically by the legislation whereas petroleum recovered in its natural condition is only covered by inference. The definition of "Petroleum" in section 2 is fairly wide though, as is the definition of "land". However on either analysis it seems safe to conclude that the Act applies to all petroleum within New Zealand's territorial limits. Petroleum can only be legally prospected for or mined with the relevant licence[106]. The Minister of Energy has wide discretions as to whether he grants these licences [107] and may attach conditions to them. A prospecting licence, upon discovery of hydrocarbons, does not imply an automatic mining licence[108], though compensation must be paid if one is not granted[109]. The Minister can at any time suspend a prospecting licence[110] or even stop mining under a mining licence[111] though probably compensation would be due again[112], as under the Public Works Act[113]. Similarly a mining licence does not give its owner the right to develop his or her well for commercial use. It merely gives the best right to mine for petroleum. Work programmes for commercial exploitation must be approved by the Minister[114]. Further technical consents from the

Chief Inspector, as to on-site operations, may be required under the Petroleum Regulations 1978. None of these consents, however, is directly open to public challenge through the Planning Tribunal or any other mechanism. Of course the developer must pay the Crown royalties for any hydrocarbons recovered[115].

31. The Geothermal Energy Act 1953 gives even wider powers to the Minister of Works and Development than those the Minister of Energy enjoys over petroleum. It amounts to a nationalisation of geothermal energy. The Crown has the sole right to "tap, take, use and apply" geothermal energy[116]. The only exception is that the Minister may in his discretion[117] grant a licence for private utilisation[118] though the emphasis here is clearly on small scale use. Under section 4 the Governor General in Council can proclaim an area a geothermal energy area. After this the Ministry may authorise any person to search on any land for geothermal energy[119]. By Order in Council, under the Public Works Act[120] or otherwise[121], the Governor General may take any land for the purposes of the Act. Compensation will be paid for injury or damage to land[122] but not for the geothermal energy[123]. If the Minister wishes to use the energy for electricity generation Part II of the Electricity Act 1968 applies, as if the generation were from water[124].

32. The long title of the Coal Mines Act 1979 adopts a slightly more balanced approach than the last mentioned two Acts. The Act is to "... regulate the coal mining industry to ensure the proper and efficient development and use of New Zealand's coal resources". However use here is almost certainly meant in the same way that the word utilisation is defined in this paper. The Act's mechanisms are similar to those already discussed. "Land" is again widely defined to include the foreshore, seabed and water[125]. The Crown have retained their ownership of coal deposit is in much of the land they have alienated[126] and a number of bodies in control of large amounts of Crown land are required, with the assistance of the Secretary of Energy, to inquire whether that land contains coal[127]. Again it is the Minister of Energy who, at his discretion, grants coal prospecting and mining licences "over any land whatsoever"[128], including possibly to the Crown[129]. Where a developer is seeking a mining right but someone else owns the surface of the land or the coal itself their consent for mining will normally be required[130]. However if the consent is not forthcoming the Minister may serve a notice and declare the land open for mining[131]. The consent of the owner is similarly required when a prospecting licence is sought over their land[132]. Applications for coal mining licences must be forwarded to the relevant Commissioner of Crown Lands and the catchment commission in the relevant district[133]. There

is no right of objection to the Planning Tribunal but there is an objection to the District Court[134] or "in fact" to the Secretary[135]. The Minister, in the latter case, has the final decision however[136]. S/he may consider (inter alia) the coal resource and its relationship with the coal resources in the area, the "best and most efficient utilisation of that resource", "special environmental factors" and the "general development and conservation of New Zealand's energy resources"[137]. Ancillary licences can also be given to erect buildings and the like[138].

33. As seen earlier the Crown can acquire all the licences private individuals can acquire. Further section 102 empowers the Minister to open and work coal mines with section 105 allowing the use of the Public Works Act to acquire the land for the purpose. The Act also allows the Minister to declare open for coal mining (inter alia):[139]

- National parks
- Public reserves
- State forest land
- Wildlife refuges
- Maritime reserves
- Soil conservation reserves
- Land acquired under the Public Works Act

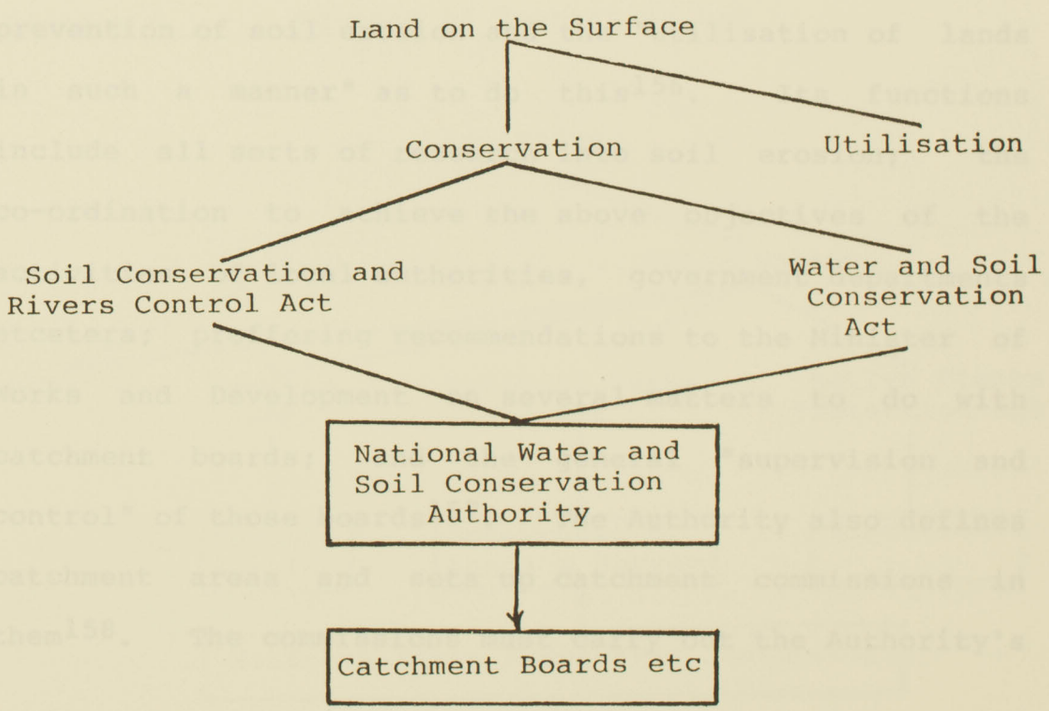
if the appropriate bodies are consulted. In addition the Minister and the Governor General may set aside state forest land for possible future coal mining[140].

34. Finally the Mining Act 1971 provides a similar resource utilisation regime for resources other than coal, petroleum or geothermal energy. As with the other Acts the definition of "land" in the interpretation section is very wide. Also, as with those resources and uranium[141], the Act provides that the Crown owns all New Zealand's gold and silver[142]. Section 7 provides a mechanism whereby the Governor General may, if it is in the "public or national interest", declare that prospecting or mining for a specified mineral is allowed with an appropriate mining privilege[143]. The Act classifies land, including that noted in paragraph 33[144] as open for mining, unless expressly exempted by listing in the Gazette[145]. Private land, including Maori land[146], is open with the owners, irrevocable, consent[147]. The seabed can be mined[148]. If land is open for mining, application for a prospecting licence can be made to the Minister[149] with an Environmental Impact Report (EIR). If it is not open an exploration licence can be applied for[150]. Either can be granted at the Minister's discretion. Similarly application can be made for a mining licence, with an EIR, to the Minister over land open for mining[151]. The Minister in exercising his discretion must consider the factors in

paragraph 32 under the Coal Mines Act. As with the other legislation the Minister may, in his discretion, grant a wide range of ancillary licences[152] and easement certificates[153] for developers. As with the Geothermal Energy Act compensation for land acquired is under the Public Works Act with no compensation for minerals that the Crown has reserved.

B. Land on the surface

Diagram 4 - Summary of Land on the Surface Legislation

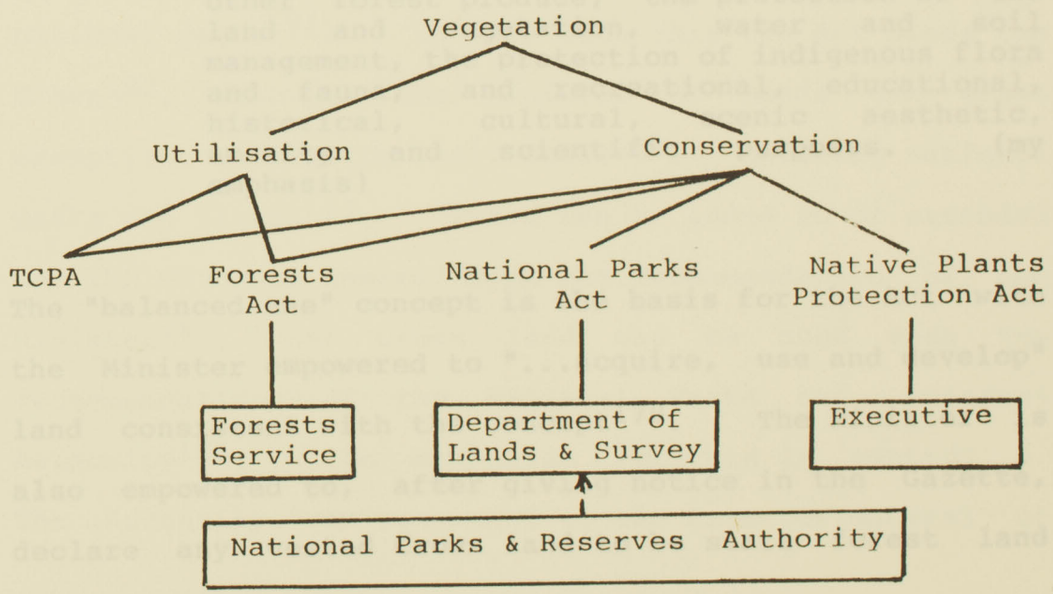


35. The utilisation of the land on the surface is largely governed by the procedures described in paragraph 16 to 24 whereas that below the surface has the special resource utilisation regimes just described. Thus, as with the legislation related to the atmosphere, there are only two pieces of conservation orientated legislation; the Soil Conservation and Rivers Control Act 1941 (with its 1959 Amendment) and the Water and Soil Conservation Act 1967 (and its 1973 Amendment). The first is an "... Act to make provision for the conservation of soil resources and for the prevention of damage by erosion ..."[154]. The Act is largely administered by the National Water and Soil Conservation Authority who took over the functions of the Soil Conservation and Rivers Control Council in 1984[155]. The Authority's soil related "objects" are the promotion of soil conservation, prevention of soil erosion and the "utilisation of lands in such a manner" as to do this[156]. Its functions include all sorts of research into soil erosion; the co-ordination to achieve the above objectives of the activities of local authorities, government departments etcetera; proffering recommendations to the Minister of Works and Development on several matters to do with catchment boards; and the general "supervision and control" of those boards[157]. The Authority also defines catchment areas and sets up catchment commissions in them[158]. The commissions must carry out the Authority's

instructions[159]. In addition to this regulating role the Authority can recommend to the Minister that any land become a soil conservation reserve[160]. The Governor General can proclaim Crown land[161] or the Minister use the Public Works Act[162] to create such a reserve. It is then controlled by the Authority[163]. The consent of the Authority is then required to mine the reserve for coal[164]. The soil aspects of the Water and Soil Conservation Act 1967 and its 1973 Amendment (the WSCA) are also for "...promoting soil conservation and preventing damage by flood and erosion" and add little of interest.

C. Vegetation

Diagram 5 - Summary of Vegetation Law



36. Vegetation is relevant in the TCPA procedures. Trees are given some protection under the TCPA and there is precedent for the denial of planning consents partly on the basis of destruction of trees (see for example Palmer[165]). Besides this there are two main Acts that govern the use of forests owned by the Crown. They are the Forests Act 1949 and the National Parks Act 1980. The Forests Act is for the "management **and** protection of forests ..."[166] (my emphasis). The Forest Service, under the direction of the Minister of Forests, has "exclusive responsibility" for policy on state forests and "exclusive management and control" of those forests[167]. This includes the "establishment, culture, maintenance ... harvesting [and] utilisation "of the forests"[168]. Most importantly in fulfilling their functions they must[169]:

> ... ensure the **balanced use** of such land, having regard to the production of timber or other forest produce, the protection of the land and vegetation, water and soil management, the protection of indigenous flora and fauna, and recreational, educational, historical, cultural, scenic aesthetic, amenity and scientific purposes. (my emphasis)

The "balanced use" concept is the basis for the Act with the Minister empowered to "...acquire, use and develop" land consistent with the concept[170]. The Minister is also empowered to, after giving notice in the Gazette, declare any vested Crown land to be state forest land

[171]. This is irrevocable without an Act of Parliament[172] unless it is to come under the National Parks Act[173]. The Director-General of Forests is required by section 26 to set up management plans for such forests. There are also provisions under the Act for the Governor General to create forest sanctuaries[174], for the Minister to set up recreation areas[175], for the Governor General to set up a state forest park[176], for the Minister to set apart any indigenous state forest[177] or for the Governor General to set apart any wilderness area[178]. However such proclaimations can be as easily reversed as they can be made[179]. Finally if mining is to proceed under the Mining or Coal Mines Act the provisions of the Forests Act still apply[180].

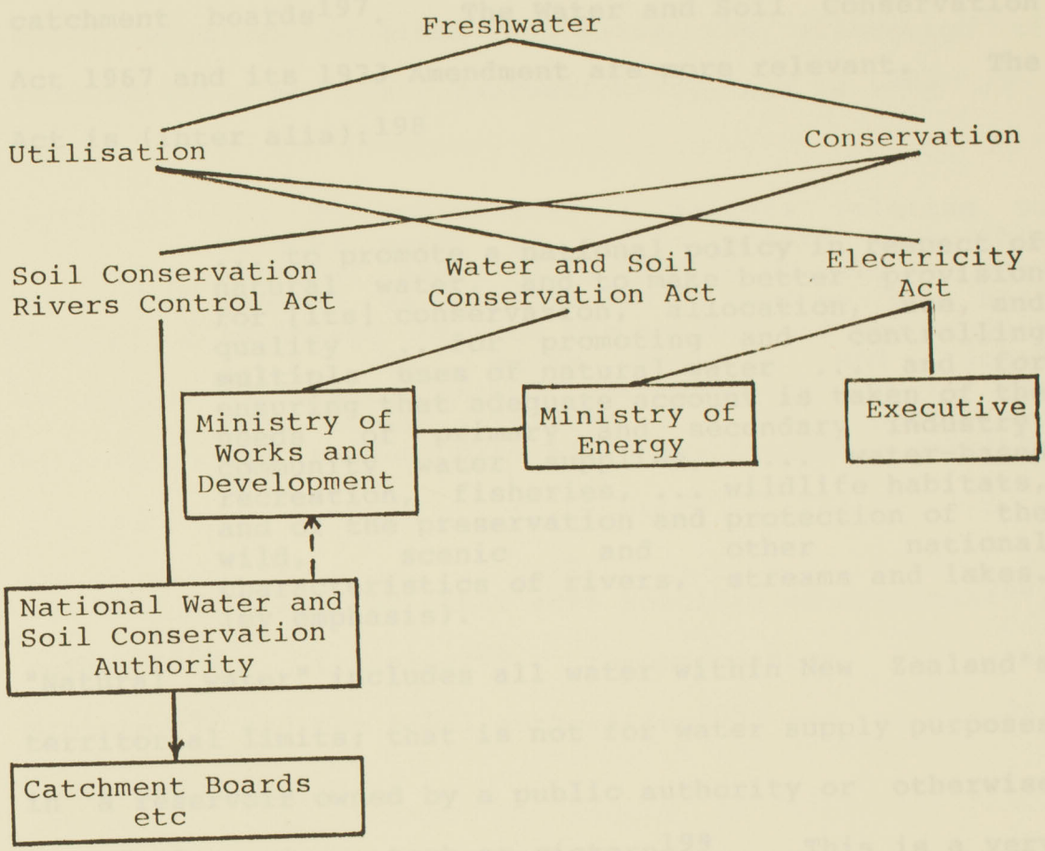
37. The National Parks Act 1980 is to provide for the preservation "in perpetuity" of all animals and plants in national parks[181]. In line with this the Act binds the Crown[182], though the Minister of Lands can grant exemptions to private individuals[183]. Existing national parks are listed[184]. These can be added to or extended by the Governor General upon the recommendation of the Minister[185]. Most Crown land can be used upon the recommendation of the National Parks and Reserves Authority[186]. The mechanism for this is section 8. The Authority can recommend to the Director-General of

Lands that a national park be established or extended. The Director-General gives notice and hears submissions. If the Minister decides to extend or create a national park using private land, after the section 8 proceedures, s/he is empowered to acquire the land, including under the Public Works Act provisions[187]. As with state forests the exclusion of land from a park requires an Act of Parliament[188] however, as seen earlier, a park can be mined under the Mining or Coal Mines Act as easily as any other Crown land[189]. Besides the above the Authority's main functions are to "prepare and approve statements of general policy" on parks[190], advising the Minister[191] and approving the management plans prepared by the individual boards in each park[192].

38. Finally the Native Plants Protection Act 1934 was an early attempt to preserve native plants. It made it an offence to take a native plant that was protected by a warrant from the Governor General[193]. The Act was virtually dead letter until 1973[194] and is still of little applicability.

C. Freshwater

DIAGRAM 6 - Summary of Freshwater Legislation



39. Freshwater utilisation and conservation in New Zealand has largely been combined with soil legislation. Thus the structures outlined in paragraph 35 are relevant here. The water orientated provisions of the Soil Conservation and Rivers Control Act 1941 and its 1959 Amendment are largely to prevent and protect against flood damage. The National Water and Soil Authority

has,as one of its objects the prevention of flood damage[195]. This is achieved by research[196] as well as the co-ordination of the policies of the public bodies in section 11(i) and the "supervision and control" of catchment boards[197]. The Water and Soil Conservation Act 1967 and its 1973 Amendment are more relevant. The Act is (inter alia):[198]

> ... to promote a **national policy** in respect of natural water, and to make better provision for [its] conservation, allocation, use, and quality ...for promoting and controlling **multiple uses** of natural water ... and for ensuring that adequate account is taken of the needs of primary and secondary industry, community water supplies, ... water-based recreation, fisheries, ... wildlife habitats, and of the preservation and protection of the wild, scenic and other national characteristics of rivers, streams and lakes. (my emphasis).

"Natural water" includes all water within New Zealand's territorial limits; that is not for water supply purposes in a reservoir owned by a public authority or otherwise stored in a pipe, tank or cistern[199]. This is a very wide definition including vapour, snow and seawater. The Act attempts to achieve the "national policy" in the long title by putting in place a very complex regulatory structure with the National Water and Soil Conservation Authority coordinating the activities of various regional water boards, river boards, drainage boards, harbour boards, irrigation boards and other local authorities as well as the catchment boards and commissions. Under section 21 (the "conduit leading from the old [law] to

the new" - Woodhouse J[200]) the Crown displaced all the common law rights over natural water and vested them in themselves, While the Act binds the Crown[201] the decisions of the Authority do not. The Authority (inter alia) examines problems and plans the allocation of natural water and its conservation[202], and is :[203]

> ... To coordinate all matters relating to natural water so as to ensure that this national asset is available to meet as many demands as possible and is used to the best advantage of both the country and the region ... To guide national and local administration of natural water ... in the best public interests ... To promote the best uses of natural water, including multiple uses ...

as well as a host of other more specific educational[204], research[205], training[206], recommendatory (to the Minister[207] and the local authorities[208]) and binding[209] functions.

40. Under the Authority a system of water regions[210] and regional water boards are set up[211] to carry out the "functions, rights and powers" delegated by the Authority[212] and the protection of water in their region[213]. The boards are often catchment boards or commissions. The Authority or, if delegated, the board can carry out investigations into natural water to classify it.[214] This classification can be challenged through the Planning Tribunal[215]. The classification

sets a "minimum standard" for the quality of water in that classification[216]. In the granting of water rights the Tribunal has adopted a balancing test for weighing the costs and benefits of such a grant. The Water Resources Council and the Soil Conservation Council were abolished by the 1983 Amendment Act and their functions devolved to the Authority increasing still further its advisory, educative and other functions.

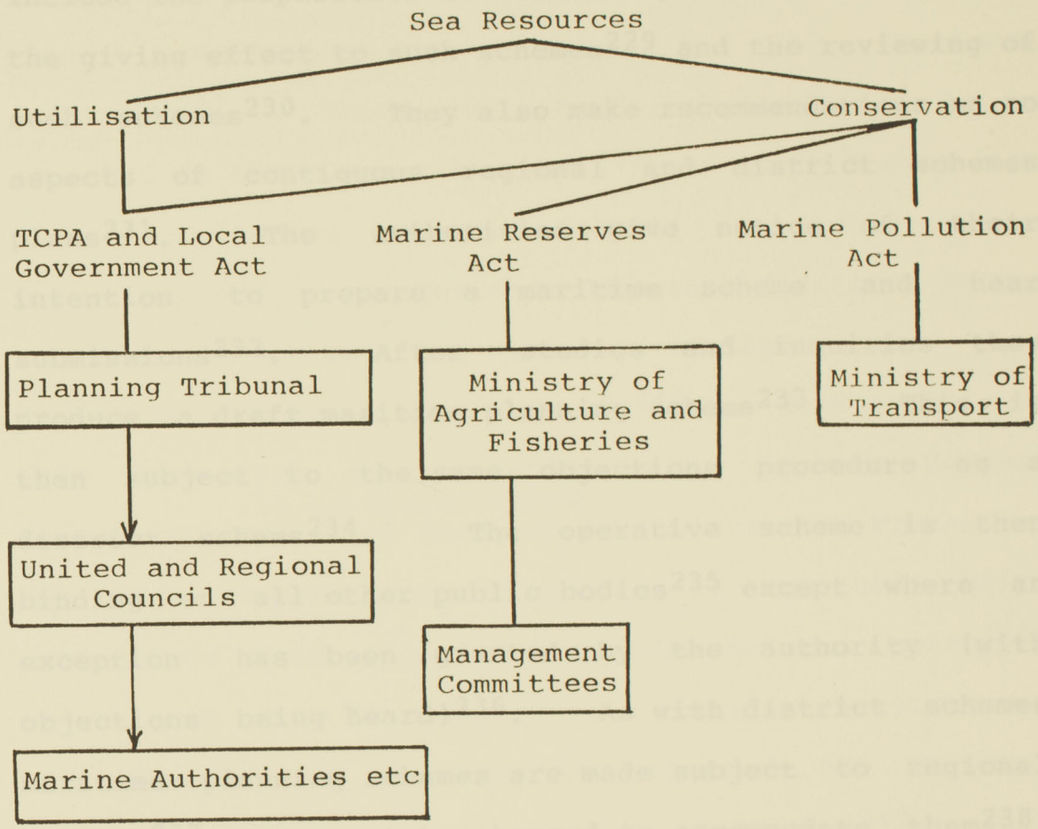
41. Finally the Electricity Act 1968 is listed under the freshwater heading because of the importance of hydroelectrical generation in New Zealand vis a vis the utilisation and conservation of water. The Act gives the Ministry of Energy a number of functions including to "... initiate, organise, coordinate, continue and maintain the production, transmission, and supply of electricity"[217] and to "... encourage the development and improvement of systems of supply of electricty"[218]. Besides carrying out the functions above the Ministry must undertake or provide for the "...generation, purchase, or exchange of electricity"[219] and encourage and execute a "...continuous programme of works providing adequate supplies of electricity"[220]. Specifically section 11 allows the Minister to "... acquire, construct, operate, and maintain, any works for the generation of electricity ... "[221]. However major public works wer carried out as agreed by the Ministers of

Energy and of Works and Development.

42. It is also noteworthy that section 11(2)(c) allows the Minister to "[alter] the level or condition of any lake, river or stream" as is authorised under the WSCA. This theme of working within the WSCA proceedures is reinforced by section 25. That provides that Ministerial consent is needed to generate electricty by water[222]. However subsection 2 recognises the WSCA procedures for use by providing that an application under that Act shall be deemed one under the section (but without limiting the powers of the Minister under the Act). Finally it is noteworthy that a licence, to be granted again at the discretion of the Minister, is required to supply electricity[223]. However these can be cancelled or varied by the Governor General[224].

D. Sea Resources

DIAGRAM 7 - Summary of Sea Resources Legislation



43. As with land use the main statute for the control of the utilisation of New Zealands sea resources in the TCPA. The mechanism of planning by areas in much the same. Within the territorial limits all New Zealand waters are divided into maritime planning areas established by the Governor General on the advice of the Ministers of Works and Development and Transport[225]. Each maritime

planning area has a maritime planning authority[226]. Any existing public authority can be appointed as such a planning authority. They can then appoint a maritime planning committee[227]. The authorities functions include the preparation of maritime planning schemes[228], the giving effect to such schemes[229] and the reviewing of such schemes[230]. They also make recommendations as to aspects of contiguous regional and district schemes plans[231]. The authorities give notice of their intention to prepare a maritime scheme and hear submissions[232]. After studies and inquiries they produce a draft maritime planning scheme[233]. This is then subject to the same objections procedure as a district scheme[234]. The operative scheme is then binding on all other public bodies[235] except where an exception has been granted by the authority (with objections being heard)[236]. As with district schemes maritime planning schemes are made subject to regional schemes[237] and must be changed to accommodate them[238]. Maritime schemes, of course, must also conform with the precepts of international law[239].

44. More specifically, to the use of sea resources, there are two recent statutes that have a bearing on the area. The first is the Marine Reserves Act 1971 which is:[240]

> [A]n Act to provide for the setting up and management of areas of the sea and foreshore as marine reserves for the purpose of preserving them in their natural state as the habitat of marine life for scientific study

The Act is administered by the Ministry of Agriculture and Fisheries. It allows the formation "in the national interest" of marine reserves for scientific study or where they "contain scenery, natural features, or marine life "that are (inter alia) beautiful or unique such as their preservation is, again, in the "national interest"[241]. These are to be "... preserved so far as possible in their natural state"[242] and their marine life "... as far as possible [shall] be protected and preserved."[243] The Governor General - sometimes on the recommendation of the Ministry of Agriculture and Fisheries - declares such reserves[244]. However this is only done after an application to the Director-General by any university, by the Director-General of Lands or Agriculture and Fisheries, by some relevant body corporate or any body which administers land with frontage onto the sea coast[245]. There must also be notice[246] and there is a right of objection to the Secretary[247] upon which the Minister decides[248] on the basis of a number of reasons[249]. Once declared a reserve an area is put under the control of a management committee[250]. The committees "administer, manage and control"[251] the reserve to achieve the goals of the Act and also advise the Minister on matters related to their reserve[252]. They have other more particular powers related to those goals [253]. Reserve rangers can be appointed[254]. The Act however does not provide much protection against the mining legislation in paragraphs 29 to 34. Any consent under those Acts may

be made subject to all or part of the Act if the Ministers of Mines and Agriculture and Fisheries so provide[255]. Secondly, the Marine Pollution Act 1974 creates certain criminal offences as to pollution[256] and gives the Minister of Transport powers to inspect[257] toward the end of "preventing and dealing with pollution" at sea.

III THE PROBLEM

45. In the author's opinion and that as will be shown of a number of commentators, two major groups of problems exist in natural resource use law. These are the problems of resource allocation created by inter-statute legislative inconsistency and by administrative fragmentation. Of course the two principal problems are themselves interwoven and result in further difficulties like insufficient public participation in some cases or the frustration of developer's plans in others. The problems are basically historical in origin and have arisen because New Zealand's resource use law has evolved in an incoherent and ad hoc manner. Professor Fisher alludes to this in the context of environmental law[258]:

> In New Zealand it is frequently a historical accident whether the resource is owned by the Crown or by a grantee of the Crown; whether the resource is situated in traditional Maori land; whether the resource is situated within the continental shelf, within territorial waters or within internal waters; whether the resource is situated in a national park, in a private or state forest or in an area subject to zoning provisions under the planning legislation. The approach of the legal systems in New Zealand as elsewhere has been to provide for each situation as it has arisen: for example, the mining legislation, the water legislation, the forest legislation, the petroleum legislation, the pollution legislation, even the largely administrative attempts to incorporate the environmental dimension into decision making through the agency of the Commission for the Environment. The topical approach to resource management is normal. The potentially wider perspective of the planning legislation has been limited by

> the emphasis upon site specific rather than resource use criteria. It is into this fragmented system of largely single purpose legislation that the policy of environmental resource conservation is to be fitted.

Professor Fisher then goes on to show that the "objective of resource conservation"[259], as has been shown in the first part of this paper, is an aspect of some of the topical legislation, to varying degrees, but absent in others. This lack of consistency is not surprising because as Professor Fisher states "[t]he essence of topical legislation, whatever its objective, is that it has effect within its own context and without reference to other matters"[260]. Finally Professor Fisher notes the attempt made in the environmental protection area to introduce a "wider perspective"[261] under the TCPA and the Environmental Protection and Enhancement Procedures of the Commission for the Environment, remembering that environmental protection is itself a single purpose objective.

46. In the context of environmental administration a discussion paper released by the Minister for the Environment mentions the problem of inter-statute inconsistency[262]:

> The Town and Country Planning Act is at present the principal co-ordinating legislation for balancing economic, social and environmental consideratons, but changes to it and related legislation would be needed to introduce a more integrated and explicit environmental management approach. The Town and Country Planning Act is focussed as regional and local decision-making, and to a large degree it binds the Crown in effect, but it lacks clear statements of conservation principles and national development objectives. This creates uncertainty in regional and local (district) planning and limits its integrative effect on national and sectoral, as well as special purpose authority planning processes. If it is to be the pivotal conservation and development legislation, much more could be done to align other statutes and statutory procedures with it - cross-references in other legislation to environmental principles which could be expressed in the Town and Country Planning Act, and procedures that were parallel to or integrated with those of the Town and Country would bring about a major advance in effectiveness and efficiency. Examples of legislation, and hence environmental management processes and formal procedures, that could be aligned with the Town and Country Planning Act in this way are: Water and Soil Conservation Act, Harbours Act, National Parks and Reserves Act, Forests Act, Mining Act, Clean Air Act.

47. Problems with legislative inconsistency, however, do not just arise when one considers the statutes from an environmental perspective. Christie, a developer with a multi-national exploration company, notes some inequities he perceives within the mining legislation and states that the mining industries use of that legislation "... has meant the industries' involvement in often <u>expensive and lengthy legal procedures</u> and a <u>positive minefield</u> of administrative and legislative hurdles which are administered <u>outside</u> the main body of the Act"[263],

(Christies' emphasis). He contrasts the delays that often arise with private developments and the different processes for Crown projects; mentioning specifically the speed with which planning consents for the methanol plant were attained under the National Development Act. He says:[264]

> I make the point not to preach the virtues of the National Development Act, which has a number of deficiencies; but rather to emphasise the inconsistencies in the various pieces of legislation, which when viewed from a distance should have a common purpose in promoting and regulating <u>any</u> development whether public or private. Inconsistencies elsewhere abound, and have been the subject of much comment from prospective mineral developers. (Christies' emphasis).

Whether or not one agrees with Christie that overall the legislation shows a bias to public rather than private use, its application to the two certainly lacks a measure of consistency.

47. Planning Tribunal Judge Skelton, after listing much of the natural resource use legislation, notes Christie's sort of concern, as well as other inconsistencies inherent in that legislation[265]:

> In a direct way, each of these statutes makes provision for the use of a resource, or resources, some of which are permanent or renewable, while others are non-renewable. In some statutes, such as the Planning Act; the Mining Act; and the Water Act, with minor variations, there are regimes which recognise and provide for rights of objections and

> appeal. In others, such as the Reserves Act; the National Parks Act, and the Forests Act, there are regimes which contemplate certain rights of objection or submission, but no rights of appeal. In many of them, the matters to be taken into account in makaing decisions about the use of particular resources, vary considerably. I do not suggest there should be an amalgamation of all these statutory provisions. I do suggest that it would be worthwhile considering some rationalisation of them. In saying that, I recognise that some concern the rights of the Crown, exclusively. Others are more general. However, if there is to be credibility in any regime for resolving conflicts relating to resource use, reform is necessary. Arising out of these comments, the next deficiency to which I will refer, is the lack of co-ordination between the procedures provided for in certain of the statutes which I have listed. In many instances, this leads to frustration on the part of developers; a lack of confidence in the system, on the part of the communities involved or the public at large, and therefore a lack of interest in seeing the system work; and it opens the way for serious errors to occur.

Judge Skelton then enumerates a number of examples. Therefore, though taken one by one, or in some cases area by area, the topical legislation may be quite adequate as a tool for its specific purpose or purposes, when looked at in toto, the author submits, the body of law lacks a consistent structure.

49. If this is so, is the problem of legislative inconsistency of sufficient importance to warrant the considerable effort necessary for reform? Certainly, as shown above, Judge Skelton thinks so. The present writer respectfully agrees with the learned Judge. All

resources are interrelated; resource use decisions in one area or with respect to one resource directly or indirectly affect other resources. Thus intuitively statutory regimes for resourse use should be consistent in their application to different resources and different uses and, overall, provide a sensible administrative structure for planning the use of those resources. What do we mean by "planning" in this context? The New Zealand Planning Council said this:[266]

> The word "planning" means different things to different people, For some it means regulations, red tape, and restrictions. For others it means setting targets and moving along a predetermined path to achieve them. But for most planners (both in public and private sectors) planning is a process through which people try to anticipate and manage change. It is a forward-looking and continuing process which:
>
> *sets goals and objectives;
>
> *designs broad strategies to achieve them;
>
> *formulates more specific policies and programmes to put the strategies into effect;
>
> *evaluates the costs and benefits of alternative programmes;
>
> *monitors the effectiveness of programmes and the relevance of the original goals in the light of changing circumstances and changing attitudes... Planning should be comprehensive in the sense that all aspects of the human environment (social, economic, and cultural) and their interrelationships with the physical environment are included.

Therefore planning can be contrasted with the other type of decision-making; once off or ad hoc decision making. The distinction between the two types of decision-making

is the consistent application, over time, of rules in the former, not relevant to the latter.

50. The Planning Council argues the TCPA relects an holistic approach to the anticipation and management of change[267]. It, after all, provides for district and maritime planning largely binding on local government and private land users, but not the Crown; and regional planning, which binds most land users. (See Appendix 1). However as well as certainty, planning requires a measure of flexibility. The Courts have recognised the Act provides for both[268]. B. Williams summarises the TCPA's provision of flexibility thus (inter alia)[269]:

(i) Five yearly review
(ii) Scheme change or variations
(iii) Specified departures
(iv) Conditional uses
(v) Section 71 modification of conditions
(vi) Section 75 applications against changes or review
(vii) Dispensations and waivers
(viii) Section 36 discretions.

As well as attaining a fine balance between certainty and flexibility the TCPA provides for a wide opportunity for objection to the independent Planning Tribunal As described in paragraph 20. However, as seen in paragraph 27, the TCPA is not relevant to most Crown land

which is administered under the Land Act or other legislation. The legislation that provides for the conservation or preservation of certain natural resources (for example the Reserves Act, the Marine Reserves Act and the National Parks Act) is, as seen, independent again; as is the end use of state forestry. The relationship between the TCPA and the mining legislation is idiosyncratic. Since Stewart v Grey Country Council[270]; as affirmed by the 1981 Amendment and Re An Application by Westland Catchment Board[271] the Mining Act is not affected by the TCPA procedures. Similarly, as seen in paragraphs 32 and 33, the Coal Mines Act is largely outside the TCPA with unique provisions for District Court hearing and recommendation augmenting Ministerial discretion. The Petroleum Act is radically different to the other two Acts in probably being subject to the TCPA; except the provisions dealing with pipelines[272]. It is unclear what relationship, if any, the Geothermal Act has with the TCPA. In the spirit of Stewart, though, one suspects a Court would be reluctant to find any. In addition much of the legislation dealing with natural water and atmospheric and water pollution is independent of the TCPA.

51. This fundamental lack of overall structure has many undesirable effects - some of which have been mentioned already. Further specific examples are included in the papers of authors already noted. At its worst such lack

of structure produces uncertainty and complexities which inhibit speedy and rational decision-making. The inherent uncertainty and complexity of the legal questions involved may deter developers with worthwhile projects from attempting to use the legal machinery to gain consents, and hence, to proceed with those projects. They may deter objectors or interested parties with valid contributions from seeking to be heard. They may result in the wastage of physical and intellectual resources in the determination of issues that are only subsidiary to the substantive questions of resource allocation. It is possible to multiply examples of these sorts of effects but it is straightforward that lack of structure and consistency in legal mechanisms primarily for planning, inhibits that planning. This must ultimately contradict the purpose of planning; resulting in poorer resource allocation decisions than would be possible with a better structure.

52. As well as this problem of lack of legislative co-ordination (and largely because of it) there is the problem Aburn concentrates on[273]:

> ... the present administrative framework for resource management is characterised by a high degree of fragmentation with major responsibilities being held by several agencies ... Missing is the element of coordination, for no single agency has the breadth of policy concern necessary to bring about an effective (overall) resource management programme...

He then sets out two options for the rationalisation of the administrative framework .

53. Even in the diagrams used to illustrate the various structures of resource use law there were a large number of bodies of different types with different roles. Firstly, and mainly, there were the government departments; Health, Works and Development, Lands and Survey, Energy, the Forest Service, Agriculture and Fisheries, and Transport. Secondly there were various quangos; the Clean Air Council, the Land Settlement Board, the Reserves Board, the National Parks and Reserves Authority; as well as a large number of smaller, single purpose bodies like the management committees under the Marine Reserves Act. Thirdly there were all the local and regional government bodies under the TCPA and WSCA regimes. Fourthly there were the administrative tribunals like the Land Valuation Tribunal, and, most importantly, the Planning Tribunal.

54. Thus a large number of bodies have a role in the planning for natural resource use in New Zealand, within structures that lack consistency, symmetry and, most importantly, as Aburn says, an element of coordination. Again the question: "Is this problem of sufficient importance to merit reform?" is fairly straightforward to answer. Lack of structure is bound to produce inefficiency in one form or another whether it be from duplication of effort,

uncertainty as to where decision-making power lies, a failure to take full advantage of economies of scale or, most importantly, the inferior quality of planning which must result.

55. Of course the discussion thus far has not taken account of an important and controversial statute that bears on natural resource use law - the National Development Act 1979 (NDA). It is discussed separately because, though the approach is slightly anachronistic, it is possible to see the NDA as an attempt by the government to deal with the problems of legislative inconsistency and administrative fragmentation that inhibited, and still inhibit, natural resource use planning. Although debate on the NDA centred on some of the supposedly unconstitutional aspects of the Act, the NDA did attempt, in a limited way, to provide an holistic consideration of a wide range of issues in one forum; the Planning Tribunal. Thus it could be seen as providing a simple, overriding structure onto the current structurelessness. Similarly, it addressed the problem of legislative inconsistency by providing a standard legislative setting for the consideration of a wide range of consents under different statutes. Therefore the NDA is discussed next, followed by three options for reform which attempt to deal with the two problems outlined above.

IV THE NATIONAL DEVELOPMENT ACT 1979 - AN ATTEMPT TO DEAL WITH THOSE PROBLEMS

56. The National Development Act 1979 (NDA) is:[274]

> An Act to provide for the prompt consideration of proposed works of national importance by the direct referral of the proposals to the Planning Tribunal for an inquiry and report and by providing for such works to receive the necessary consents.

Though it is arguable that the two Orders in Council required under the Act are sufficiently important to warrant mention in its long title, it is a good summary of the mechanics of the Act. The exact motivation for[275] and origin of[276] the NDA is unclear. It is known that it arose out of the frustration of the government with procedures for gaining planning consents for large projects. Rather than attempting to amend the various topical legislation, the NDA created a "fast track" whereby consents obtainable under twenty two statutes could be granted by an Order in Council; after a wide ranging Planning Tribunal hearing. The Hon. Mr Barry Brill M.P. said that:[277]

> [The] basic principles are ... that the planning procedures and other statutory consents should be telescoped into a single hearing. The second is that there should be full public participation in the planning process but with strict time limits

decisions on matters of national importance be taken by the Government of the day.

The Act is administered by the Minister of National Development and defines "land" very broadly[278] to allow it to be used for offshore projects. The definition of "consents" in section 2 is of great importance: "Consent means an authorisation, permission, a licence, a permit, a right, and any other approval of any type whatsoever capable of being granted under any statutory provision". This is a unique provision in New Zealand resource use law and because of section 18 includes all the authorisations, permits and the like obtainable under the twenty two Acts.

57. Appendix 2 provides a diagramatic explanation of the NDA procedures or "timetable". The process begins with a (private or Crown) application to the Minister to use the Act[279]. The applicant (inter alia) furnishes the Minister with the information normally required to gain the consent, a description of the "land" and the reasons it is preferred, plans of the proposed work and site, the consents sought and a "statement of the economic, social and environmental effects of the proposed work"[280]. These requirements have been somewhat reduced by the judicial interpretation of the Court of Appeal in CREEDNZ[281]. The Governor General in Council "may" apply the NDA to the proposed work if s/he considers three

tests satisfied[282]. Firstly the work must be a "major work ... likely to be in the national interest". Secondly that the work is "essential" for one of the criteria below, namely:

> ... The orderly production, development or utilisation of New Zealand's resources ... The development of New Zealand's self sufficiency in energy ... The major expansion of exports or of import substitution ... The development of significant opportunities for employment...

Thirdly that it is "essential" that a decision be made "promptly". The courts have been reluctent to define the meaning of the three tests. However they have discussed the meaning of "essential" as used above. Cooke J argued it was a "strong" word, more emphatic than "desirable", "expedient" or "necessary"[283]. Richardson J said it was "unusually emphatic" and "requires ... high standards"[284]. It, however, remains a question of degree and value judgement[285] and it is sufficient if the consents are viewed "... collectively and generally, in order to decide whether, when they are viewed as a group required to enable the project to proceed, it is essential that a decision be made promptly ..."[286].

58. Once the Order in Council is passed the timetable comes into effect. Under section 4 the Minister must forward the application and information to the Planning Tribunal adding or deleting any consents. The Minister must also give notice that s/he has referred the application to (inter alia) the Commissioner for the Environment and the relevant statutory bodies[287]. Section 4(5) requires that if a TCPA consent is applied for the relevant territorial authority must "as soon as practicable" serve notice on those who would normally receive such notice a notice. Similarly the applicant must service notice or supply an applicaton to those who would normally receive such information[288]. The EIR procedures are in section 5. They are mandatory. The applicant is required "as soon as practicable" after his/her application to furnish the Commissioner for the Environment with an EIR[289]. This is audited by the Commissioner[290]. Once the audit is complete a certificate to that effect, but not the EIR or audit, is forwarded to the Planning Tribunal[291]. This is because both the EIR and audit are inadmissable as evidence. As Appendix 2 shows the Commissioner has a maximum of three months to do this, with six weeks for submissions on the EIR[292]. Also the statutory authorities who normally grant the consents sought by the applicant may complete such investigations as they think fit and forward recommendations to the Tribunal[293].

59. Section 7 (1) gives the Tribunal the power to conduct an inquiry into all the consents referred to it. This is an important provision because, as was mentioned in one Tribunal decision[294], this extends the Tribunal's power to matters previously outside their scope. As soon as practicable after receiving the EIR audit certificate, the Registrar of the Tribunal must set the date and place of the inquiry, notifying the applicant and the relevant statutory bodies[295]. As soon after the Order in Council, a public notice is given;[296] though the two notices may appear in different newspapers. From the date of the above notice the applicant has three to five weeks to file a summary of arguments with the Tribunal and serve them on all parties appearing before it[297]. Those who are eligible to be heard have one to three weeks to apply to the Tribunal after the notice[298]. The Commissioner, the Minister of Works and Development and the relevant local authority have an automatic right to be heard[299]. In addition any body or person "affected" by the proposed work[300] or "representing some relevant aspect of the public interest"[301] has that entitlement. Under this second ground Values Party representatives, Federated Farmers representatives, a wide range of environmental groups and several groups of residents have gained locus standi[302]. The NDA inquiry has precedence over all Tribunal business[303].

60. Once the inquiry is complete the Tribunal prepares a written report with recommendations as to the consents sought[304]. The Tribunal must decide whether each consent should be granted, granted in a modified form or not granted[305]. In doing this the Tribunal must take into account the factors which would normally be taken into account by the decider.[306] The report is then (inter alia) made public with notice being given[307]. Three weeks after the public notice of the report the Governor General, after considering the report and recommendations and reconsidering the section 3(3) criteria, may grant such consents as s/he sees fit by Order in Council[308]. The Act also provides procedures for a successful applicant to gain further consents[309] or for an applicant dissatisfied with restrictions on his/her consent to go back to the Tribunal[310]. After an abbreviated hearing, report and recommendation by the Tribunal another Order in Council can be passed[311].

61. As stated earlier the NDA makes some attempt to simplify administrative structures for the granting of consents and overcomes some of the legislative inconsistency of the various topical legislation by superimposing a new statutory structure on it. It also allows the consideration, in one form, of the wider range of issues that may be raised by a project. This holistic approach, though, has been compromised. The Tribunal

has limited its jurisdiction by ruling it will consider issues in a "site specific" context[312] and, in line with its interpretation of the TCPA[313], will not consider questions of "end use"[314]. The Act makes it clear that the various consents will be considered on the bases on which they would normally. It would enhance the consistency of the NDA Tribunal's decisions if one universal set of criteria - say the section 3 TCPA criteria - were applied in addition to the consents usual criteria. The NDA's time constraints, as described below, may prevent full public participation, thereby inhibiting the flow of information and compromising the holistic approach. However, given these shortcomings, the Act does seem to have a number of advantages.

62. What were the Acts disadvantages ? Commentators have pointed out a number of these. The present writer would note the following eleven major problems with the NDA:-

(i) The timetable set out in Appendix 1 is in the author's opinion too brief and inflexible to allow full public participation in the decision-making process. The provisions of section 8 (4) are particularly lacking in this respect. More than one to three weeks should be provided for interested parties to apply to be heard.

(ii) Similarly the timetable favours the applicant who only has to, for example, furnish the Commission for the Environment with an EIR "as soon as practicable". This is particularly objectionable since the developer would normally be at an advantage: given that only they know in advance that they will apply to use the Act and that the requirements of the Act are set out.

(iii) The placing of public notices in different newspapers under the different requirements of sections 2 and 7 (4)(a), is undesirable. This is especially so when the section 7 notice, arguably the most important one, is given the least coverage. This problem is, of course, increased by the strict time constraint in section 8 (4).

(iv) The Act could lead to conflicts of interest if applied to public works, since it effectively allows decision-making by the executive arm of government over whether Crown projects gain consents.

(v) In addition to the second problem, the NDA favours the applicant over the complainant with respect to appeal rights. Section 13(4)

allows the complainant no appeal against an unfavourable determination. However the applicant does have one[315] and if s/he is fortunate s/he might only have to argue against the relevant statutory authority[316].

(vi) The NDA allows the "fast tracking" of land acquisition[317], including Maori land, despite a strong common law presumption that land should only be compulsorarily acquired within strict express guidelines.

(vii) The section 3 (3) requirements, as interpreted by the Court of Appeal, are, in the author's opinion, so wide as to not be an effective check on executive action. It is difficult to envisage anything but the most unsound major project being challenged on these bases.

(viii) The NDA explicitly discriminates in favour of major works simply because of their size. There is no economic justification for such discrimination and several economists have argued this leads to bad resource allocation[318].

(ix) The NDA represents a change of direction in New Zealand natural resource use law. Up

until 1979; as epitomized by the Local Government Act 1974, the TCPA 1977 and the Planning Council report[319]; there was a visible trend in favour of the devolution of functions from central to local government. There were a number of arguments put forward for such devolution[320]. Irrespective of whether one accepts such arguments the NDA, which in effect shifted decision-making power back to central government, is not consistent with that trend and is not in this wider sense consistent with the philosophy behind such legislation as the TCPA.

(x) Perhaps the most commonly heard criticisms of the Act was that it offended against constitutional principles. These partly revolved around how the Act came into being[321]. Some submissions on the Bill doubted the validity of the "ouster clause" in the Bill which purported to exclude judicial review[322]. That remained, to a lesser extent, in section 13(4). Some commentators questioned the constitutional propriety in the grant of such power to the executive[323]. Most criticism of this sort centred on what became section 18 (2). That provided that:

> The specified provision the [twenty two] Acts set out in the Schedule to this Act and the provision of every regulation, rule, Order in Council, Proclamation, notice, or by-law in force under any of those provisions shall be read subject to the provision of this Act so far as is necessary to give effect thereto.

Since "the provisions of this Act" allow for the granting of consents by Order in Council the NDA explicitly allows such an Order in Council, in effect, to override substantive provisions in the twenty two statutes. It has been argued this is not a constitutionally legitimate exercise of regulation making power; and indeed it is difficult to argue that such regulations come within the six reasons for delegated legislation set out by the Algie[324] and Donoughmore Committees' reports.

(xi) The final, and it is contended most important, disadvantage of the NDA is that it does not allow for the planning of natural resource use (as defined in paragraph 49). The NDA provides for once off, ad hoc, decision-making - the very antithesis of planning. At the Tribunal stage there are no criteria to be applied to the project other than those that would normally be applied. Thus one NDA project is judged by different standards than

another, if different consents are sought. Because of the peculiar nature of an NDA inquiry, for example usually within a site specific context and without reference to questions of end use[325], the same consents gained under the NDA are not directly referrable to decisions to grant the consents under the normal procedures. In addition executive decision-making using a tool like Orders in Council, in the place of statutory regimes, allows little opportunity for the designing of broad strategies to achieve goals let alone for the sort of holistic approach the Planning Council advocates. The NDA is not designed to be "forward-looking" in the way, say, the TCPA is and of the components of planning the Planning Council notes contains only a very limited evaluation of "the costs and benefits of alternative programmes"[326]. Therefore the author concludes the NDA is fundamentally flawed since it does not allow for the planning of resource use; supplanting it with ad hoc decision-making.

The advantages and disadvantages of the NDA form the basis of the suggested reform of the NDA that is Option 3 when combined with the principles for reform described above.

V. SOME OPTIONS FOR REFORM

63. It is possible to envisage a great many measures for the reform of natural resource use law in New Zealand to provide a greater measure of administrative structure and legislative consistency. The question is largely: "what degree of reform is desired given the higher costs of more radical reform?" Three options for reform are set out which seek to address the two basic problems described. The three options are in the order of the most radical change first and the least radical last. The options are also distinguishable on the basis of how they address the two basic problems. The approach of the first option is to build a rationalised administrative structure - around new Ministries for Resource Utilisation and the Environment - adopting the various legislation to "fit" it while attempting to achieve a greater degree of legislative consistency. The second option largely takes the administrative structures as given, with some steps taken to reduce their fragmentation, and is based on reforming the topical legislation. The approach, as suggested by a number of writers in paragraphs 45 to 51, is to use and extend the TCPA to provide some measure of consistency in the various legislative resource use regimes. More specifically this involves extending the TCPA concepts of district and regional planning and the addition of a

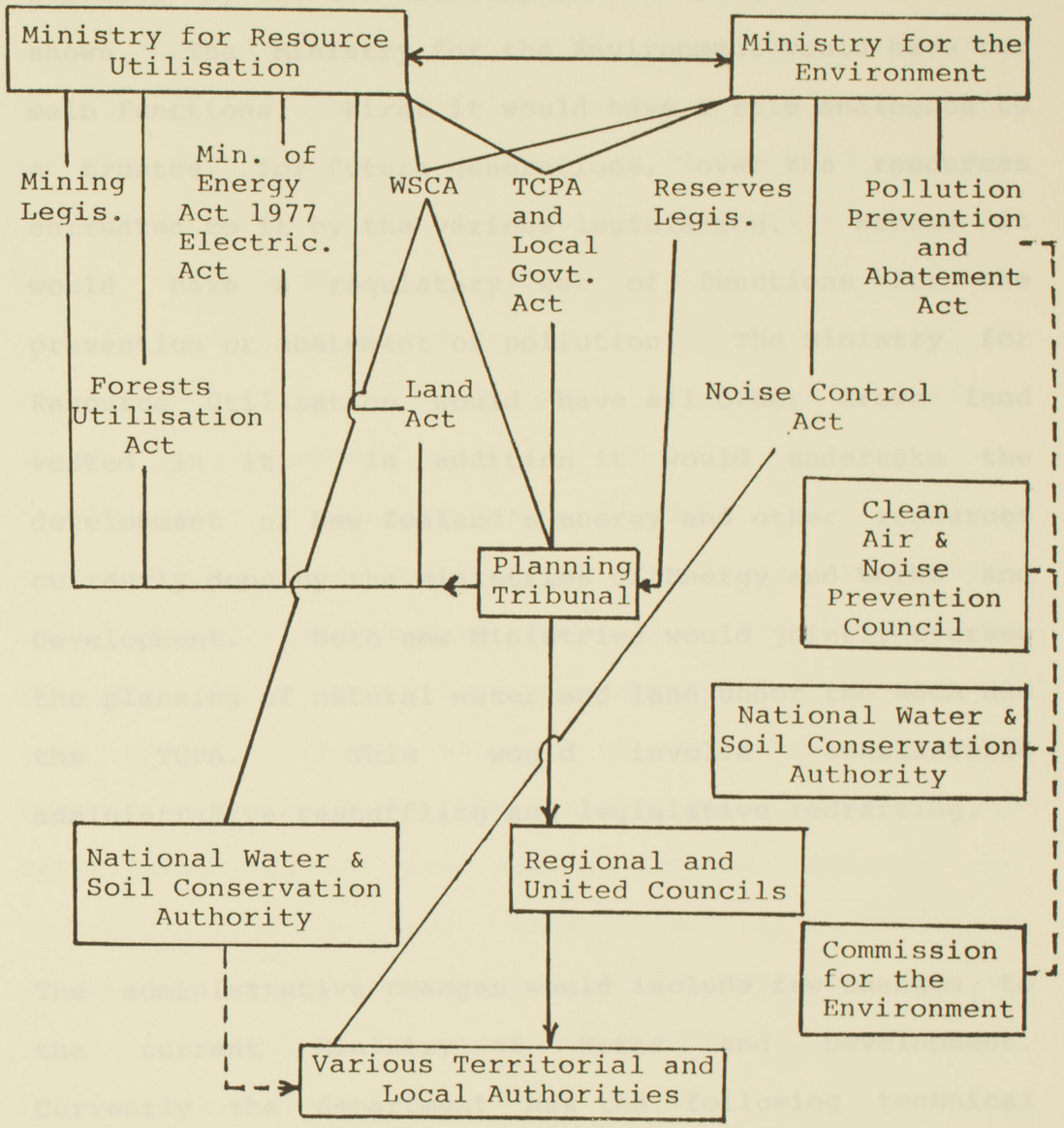
third tier, national planning. The national plan would cover both private and Crown resources. The legislation dealing with Crown resources is also made more consistent with, but not brought under, the present TCPA provisions. The third option is more of a compromise. It provides for a new regime, based on the NDA but amended to take account of the NDA's disadvantages as described in paragraph 62, to be superimposed on the existing legislation. It is designed to address the two problems when they are at their worst; when a developer needs decisions on consents urgently. It is also possible to envisage Option 3 being used as an interim measure while more comprehensive reform is put in place. Finally, because of the more general nature of Options 1 and 2, compared to 3, it is not possible to go into the same depth on questions related to those options.

A. Option 1 - An Administrative Option

64. Natural resource use law, as this paper has limited it, involves, directly, seven government departments - the Ministry of Works and Development, Ministry of Engergy, Department of Lands and Survey, and the Forest Service, as well as less importantly, the Departments of Health and Transport, and the Ministry of Agriculture and Fisheries. In addition the Commission for the Environment - only gives statutory recognition in the

NDA[327] - is a body of relevance. The Commissions' role is environmental impact assessment, reporting and auditing. Option 1, involves the reallocation of the relevant responsibilities held by these agencies under two new Ministries - a Ministry for Resource Utilisation and a Ministry for the Environment. As well as subsuming these functions the new departments would undertake other functions not currently provided for. Option 1 can be diagramatically represented as in diagram 8.

Diagram 8 - Summary of Option 1



NOTES: Many bodies are not included.

: Reserves legislation means the Reserves Act 1977, the National Parks Act 1980, the Marine Reserves Act 1971, the Soil Conservation and Rivers Control Act 1941 and the proposed Forests Preservation Act.

: The Public Works Act 1981 is not included above because it is a statute for resource acquisition not utilisation or conservation.

65. The relevant divisons of the seven ministries could be replaced by the two closedly co-ordinated deparments as shown. The Ministry for the Environment would have two main functions. First it would have a role analogous to a trustee, for future generations, over the resources entrusted to it by the various legislation. Second it would have a regulatory set of functions for the prevention or abatement of pollution. The Ministry for Resource Utilisation would have all other Crown land vested in it. In addition it would undertake the development of New Zealand's energy and other resources currently done by the Ministries of Energy and Works and Development. Both new Ministries would jointly oversee the planning of natural water and land under the WSCA and the TCPA. This would involve considerable administrative reshuffling and legislative redrafting.

66. The administrative changes would include few changes to the current Ministry of Works and Development. Currently the department has the following technical divisions: Architectural; Civil Engineering; Mechanical and Electrical Engineering; Power; Roading; Town and Country Planning; and the Water and Soil Conservation Division[328]. All those divisions would continue under the new Ministry. The last two, however, would be altered to allow both new Ministries to administer the land and natural water use legislation. Currently the

Ministry of Works and Development is the sole ministry with control over the TCPA. Its principle responsibilities are advising the government on national and regional policies; coordination of the TCPA and NDA statutory actions of the Crown, with the tendering of advice to the Minister on that; advising local, regional and national planning agencies in the development of planning standards and techniques; research into various aspects of planning; and the provision of advice on "environmental planning and design" to various agencies[329]. Under Option 1 the Ministry would continue all these activities except the last. The Ministry for the Environment would be a more appropriate source of such advice. Also, as part of the scheme of joint control over the TCPA, the Ministry for the Environment would also forward its own advice on national and regional policies and, because of its different perspective, would be empowered to undertake it's own, or joint, research. The present Ministry of Works and Development Water and Soil Division has similar responsibilities, namely: advising the government on national and regional policies on water and soil conservation; providing the technical, administrativem and research services required by the National Water and Soil Conservation Authority; administering the other water legislation; research into relevant matters; and the provision of advice, information and services to the

relevant local authorities[330]. As with the TCPA Division the WSCA Division in the new Ministry would continue to proffer advice, with the Ministry for the Environment providing a different perspective to central government. The Ministry for Resource Utilisation WSCA Division would have sole responsibility, as would the TCPA Division, for advising local authorities on technical matters to avoid unnecessary duplication of effort. However both Ministries would have the authority to separately, or jointly, undertake research on matters related to natural water. The Ministry for the Environment would be in the best position to provide for the needs of the National Water and Soil Conservation Authority and to administer the scenic rivers legislation.

67. The present Ministry of Energy has four divisions: Electricity, Mines, Oil and Gas (with responsibility for matters related to geothermal energy) and Planning[331]. All of these would be brought under the Ministry for Resource Utilisation. The present Planning Division's function is "... to co-ordinate and reconcile energy planning and forcasts of demand for the various energy forms on a Ministry-wide basis, and also to provide an integrated approach to energy research and development ..."[332]. Such a division, along with the others, would benefit from closer co-ordination with the Ministry of

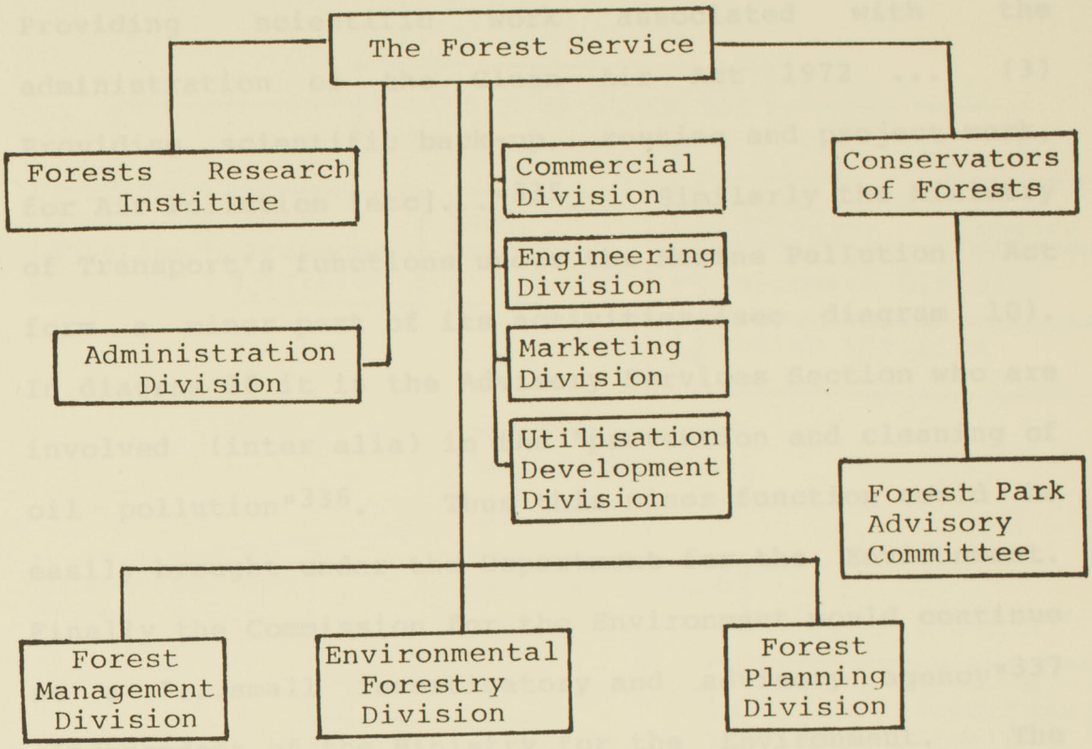
Works and Development divisions.

68. The present Department of Lands and Survey would have to be radically reorganised. At present the department is "... Government's major agency in the administration and management of Crown land and survey and mapping requirements ..."[333]. This administration of Crown lands includes (as previously noted) that under the Land Act, the Reserves Act and the National Parks Act. They also control the various bodies thereunder. Under Option 1 the administration of the Land Act would continue much as at present under the Ministry for Resource Utilisation. The National Parks and Reserves Acts, as legislation for the preservation of natural resources, would be more appropriately administered by the Ministry for the Environment. The mapping and survey functions would be most appropriately handled by a third ministry - perhaps the Department of Internal Affairs - in the same way that the Department of Statistics currently collects certain economic data independent of the Treasury. This would involve the removal of the Technical Division under the Surveyor-General from the current deparment.

69. The Forest Service, as it was in 1984, would have to be substantially altered. The "balanced use" concept of

the Forests Act is inconsistent with the partitioning of utilisation and conservation of Option 1. In 1984 the Forest Service had the structure in diagram 9. It is difficult to split its divisions readily between the two new Ministries since the Forest Service does not distinguish between its forest utilisation and conservation functions. Clearly divisions like the Utilisation Development Division, the Marketing Division and Commercial Division would be under the Ministry for Resource Utilisation, while the Environmental Forestry Division would be under the Ministry for the Environment. Some divisions however, including the Administrative Division, the Forests Research Institute and the Engineering Division, would have to be duplicated. Because of the magnitude of this reshuffle considerable changes are needed to the Forestry Act (as explained in paragraph 74) Also, because of the nature of forests, where their preservation may necessarily involve some selective logging[334], the two new departments, via the mechanisms described below, will have to work closely together.

Diagram 9 - Structure of the Forest Service

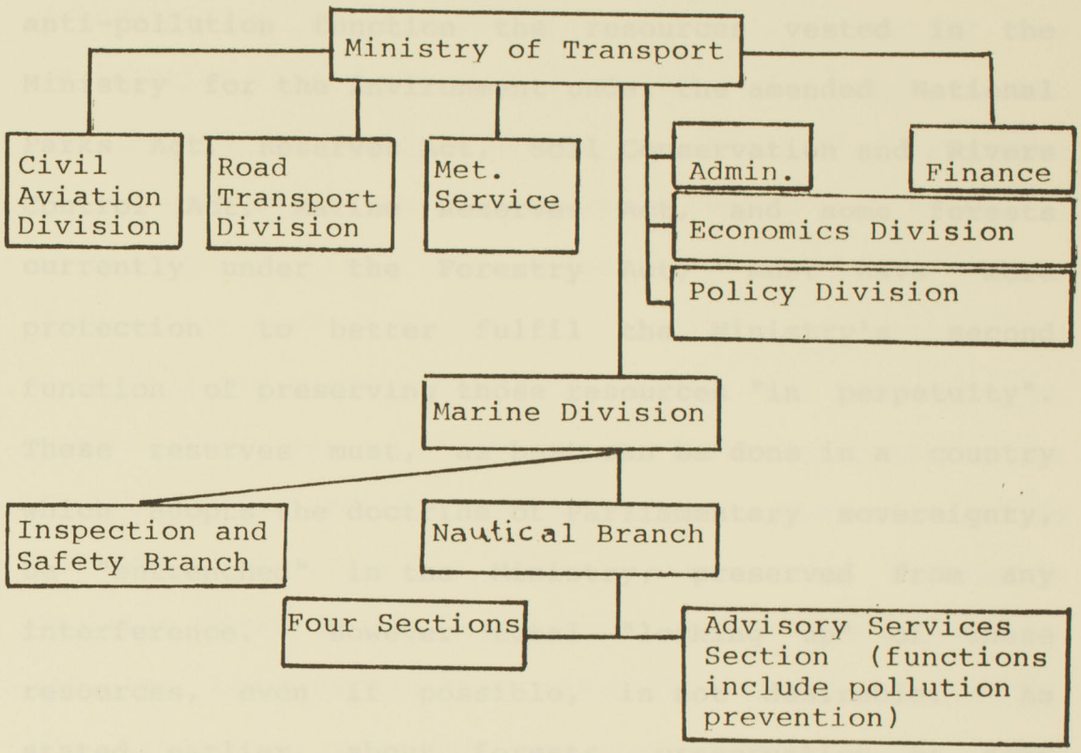


NOTE: Adapted from N. Wells (ed). A Guide to Environmental Law in New Zealand (2 ed., Brooker and Friend, Wellington, 1984), p.113.

70. In addition to these major changes to the present government departments there will need to be a number of minor adjustments. The minor functions of the Ministry of Agriculture and Fisheries under the Marine Reserves Act should be brought under the Ministry for the Environment. In the area of pollution prevention and abatement functions of the Department of Health currently undertaken by the National Environmental, Chemical, and

Accoustic Laboratory (NECAL) would be brought under the Ministry for the Environment. These functions are "(1) Providing scientific work associated with the administration of the Clean Air Act 1972 ... (3) Providing scientific back-up, routine and project work, for Air Pollution [etc]..."[335]. Similarly the Ministry of Transport's functions under the Marine Pollution Act form a minor part of its activities (see diagram 10). In diagram 10 it is the Advisory Services Section who are involved (inter alia) in the "prevention and cleaning of oil pollution"[336]. Thus this minor function could be easily brought under the Department for the Environment. Finally the Commission for the Environment would continue as a "...small investigatory and advisory agency"[337] ;independent of the Ministry for the Environment. The Commission would continue to audit EIRs and would have extra functions under the new Pollution Prevention and Abatement Act. It would be given the power to initiate investigations but would remain recommendatory. The enforcement of the Pollution Prevention and Abatement Act would be the responsibility of the Ministry for the Environment. The Commission's new, expanded, role might necessitate giving it a statutory basis. Once the administrative structures have been reorganised in this way the legislative structures and the relevant advisory bodies can be reorganised around them.

Diagram 10 - Sea Pollution Prevention as a Function of The Ministry of Transport



NOTE: Adapted from: State Services Commission Directory of Official Information 1983 (Government Printer, Wellington, 1983), pp. 623-646.

71. Clearly the issue of most concern is the relationship between the two very large[338] and powerful Ministries. As suggested by the above the Ministry for Resource Utilisation is designed to make the most efficient use of the Crown resources vested in it, within the boundaries of the land and natural water use legislation (where

applicable) and the pollution controls administered by the Ministry for the Environment. As described both Ministries administer the TCPA and WSCA. Besides its anti-pollution function the resources vested in the Ministry for the Environment under the amended National Parks Act, Reserves Act, Soil Conservation and Rivers Control Act, Marine Reserves Act, and some forests currently under the Forestry Act, must have more protection to better fulfil the Ministry's second function of preserving those resources "in perpetuity". These reserves must, as best can be done in a country which adopts the doctrine of Parliamentary sovereignty, be "entrenched" in the Ministry; preserved from any interference. However total "locking up" of these resources, even if possible, is not desirable. As stated earlier, about forests, preservation of some resources may require some measure of utilisation. In addition new information may become available in the future which may make utilisation more desirable than it appeared in the past. In this situation, though, there should be at least some sort of burden of proof in favour of preservation.

72. In the author's opinion these conflicting goals can best be achieved by, firstly, making the aforementioned resources legislation binding on the Crown. Secondly those Acts would be amended so that resources under them

could only be shifted from the control of the Ministry for the Environment to the Ministry for Resource Utilisation after a wide ranging inquiry and favourable determination by the Planning Tribunal. Further the legislation must place the burden of proof, that utilisation is a wiser use of New Zealand's resources than preservation, on the developer; where utilisation is inconsistent with the objective of preservation. Necessarily such an inquiry must not be site specific and must consider questions of "end use". The Tribunal must specifically address the question of whether preservation or the proposed utilisation of the particular resource is the wiser use. In the author's opinion the Tribunal's decision should be binding and not merely recommendatory (to, say, the Governor General) to improve the quality of the protection afforded to preserved resources. The executive are likely to have a bias in favour of utilisation where they propose it. This would also avoid the conflict of interest over Crown resource utilisation under the NDA. By making the decision a Planning Tribunal one, it is possible to combine the independence of judicial decision-making with the expertise and consistency of that particular body. The mechanism would not operate in the reverse direction - when resources being utilised are to be preserved under one of the Acts - because the preservation of a resource rarely precludes later utilisation in the way the converse often does. However, consistent with the **audi**

alteram partem principle[339], in such situations the legislation should provide some lesser right of hearing to parties "injuriously affected".

73. What legislative changes are necessary to put this new regime in place? Besides having the various Acts administered by one of the two Ministries, as previously described, and putting the Tribunal determinaton requirement in the relevant Acts a number of legislative changes are necessary. Section 21 of the Coal Mines Act and sections 21 and 26 of the Mining Act, which provide for national parks, reserves and the like to be mined would have to be amended. Other than these changes, if the mining legislation described in paragraphs 29 to 34 were made binding on the Crown, few changes would be necessary to it. Systems for prospecting and/or mining on non-preserved land, with the consent of the Minister for Resource Utilisation, or the Governor General (as the case may be) are quite consistent with the scheme of Option 1.

74. The Forests Act, as stated earlier, would have to be radically changed since it is based on the "balanced use" concept. The approach adopted here is to create two new Acts. The Forests Utilisation Act would vest the

responsibility for state forests management and control in the Minister for Resource Utilisation. The Minister would be empowered to "... acquire, use and develop" land, as at present, to maximise the current and future economic gain from it. Thus the Minister could, by notice in the Gazette, declare any Crown land vested in the Ministry to be state forest land. State forest land would continue to be readily capable of being mined, or utilised in any other non-forestry manner, since the Ministry for Resource Utilisation is designed to be free, within anti-pollution requirements, to decide the most economic use of the resources vested in it. The system of conservators of forests would continue for the land declared to be state forest land. The complementory Forests Conservation Act is described in paragraph 77.

75. No other changes are needed to the varous statutes administered by the Department of Energy: they would continue under the Ministry for Resource Utilisation. The Land Act would continue as in paragraph 27 with the Land Settlement Board responsible to the new Ministry. As stated earlier both the TCPA and WSCA, which deal primarily with privately owned resources or private use of resources, would not be radically changed under Option 1. Some amendment would, however, be necessary since most of the bodies under both statutes would receive their present technical and financial support from the

Ministry for Resource Utilisation. Both new Ministries would take the current role of the Ministry of Works and Development in, for example, receiving draft district schemes or calling for the review of operative schemes. The powers of determination currently exercised by the Minister, for example under section 15 for approving regional schemes, would be vested in the Governor General. This may improve the schemes by providing for cabinet discussion with input from the two Ministers briefed from often very different perspectives. The WSCA would have to be similarly amended. The Public Works Act would be administered by the Ministry for Resource Utilisation though the Ministry for the Environment would have access to its procedures.

76. It is possible to envisage a number of legislative techniques for making the Ministry for the Environment the "trustee" over the resources currently controlled under the Reserves Act, the Soil Conservation and Rivers Control Act, the Forests Act, the National Parks Act and the Marine Reserves Act. A new consolidating and amending statute, binding on the Crown with the earlier described mechanism, could be drafted. The preferred techique of the author is to, apart from the Forests Act, simply amend the various topical legislation because, despite the inconsistencies that may thus arise, the

resources governed are quite diverse and require different legislative approaches. Each Act then must be made to explicitly bind the Crown and provide that, given an objection to a development inconsistent with the preservation of the resource a development cannot proceed without a favourable Planning Tribunal determination. The Reserves Act would continue to provide for the preservation and management of reserves with one or more of the various features of value present now[340]. The procedure for their creation, by the Minister for the Environment or a local authority, would remain the same, but, because of the "entrenchment" provision, objectors should have some right of hearing in the Act. There is no right of hearing to such a declaration in the current regime so it would be desirable to allow for a Planning Tribunal hearing and recommendation if there is an objector with locus standi[341]. The classification and management of reserves would continue. Similarly the National Parks Act would not require much alteration. Even the section 5 provision, whereby the Minister for the Environment can grant exemptions to the preservation in perpetuity principle of the Act, can continue subject to a right of hearing where utilisation is inconsistent with that principle. As with forests some destruction of park resource for example the culling of noxious animals, may be necessary for their preservation. Since a mechanism is provided for objections to the establishment or extension of a national park (see

paragraph 37) it is not necessary to create one in. The structure of management boards, with the National Parks and Reserves Authority, would continue.

77. As noted earlier the state forests currently under the control of the New Zealand Forest Service would have to be divided. Certain forests of scenic, ecological, historic or other interest would be preserved by a new Forests Preservation Act; drafted similarly to the amended Reserves Act. The selection of which forests would be included would be a major task. Though it would be desirable, where possible, that all preserved forest be administered by their own management committees the avoidance of excessive administrative duplication, in cases of small preserved areas within larger utilised forests, may preclude this. This would not compromise the tenets of the new Act though, because such conservators of forests would be required to act within the provisions of the Forests Preservation Act over the forests it governed. The Ministry for the Environment would administer the Soil Conservation and Rivers Control Act described in paragraph 35 and the Marine Reserves Act described in paragraph 44. The former, once made binding on the Crown, would remain much as it is described in that paragraph, except that the soil conservation reserves proclaimed by the Governor General

would be "entrenched" as described. Section 20(2) would therefore be repealed. In addition, as provided under the Reserves Act, there would be a right of objection to the Planning Tribunal about such a proclamation. The Marine Reserves Act would be amended to bind the Crown and "entrench" the reserves preserved in the national interest under section 3. Since there is a procedure, under section 5, for objection against an area being designated a reserve, a hearing before the Planning Tribunal is unnecessary.

78. Finally to provide for the second function of the Ministry for the Environment - the regulation of the utilisation of resources rather than their preservation - a consolidating and amending statute is required. The Pollution Prevention and Abatement Act, will bind the Crown and set controls on air, noise and seawater pollution. This part of the Ministry would also undertake some measures to prevent soil erosion, flood damage and protect native vegetation. The Act would incorporate the present Clean Air Act with its second schedule of standards, Governor General regulations, licencing , and clean air zones. The Director-General for the Environment would have the power of the present Director-General of Health to issue exemptions. The Clean Air Council would become the Clean Air and Noise

Control Council; to advise the Minister on both matters. Provisions for maximum levels of noise pollution for industrial and other commercial uses would be set with exemptions granted, analogously to under the present Clean Air Act, by the Director-General. In this way the Pollution Prevention and Abatement Act would complement the Noise Control Act. The Noise Control Act would continue as at present to be administered by the Ministry. The Marine Pollution Act would be one of the Acts consolidated. The Ministry would be given the powers to bring prosecutions and inspect as currently. The provisions of the Soil Conservation and Rivers Control Act concerning flood damage and soil erosion, excluding the creation of soil conservation reserves but including the relevant functions of the National Water and Soil Conservation Authority, would be brought within the new Act too. Also the powers of the Governor General under the Native Plants Protection Act would similarly be made part of the new Act.

B. Option 2 - A Legislative Option

79. Whereas Option 1 started from the problem of administrative fragmentation and proposed legislative reform consistent with a rationalised administrative structure, Option 2 addresses in a more direct way the inconsistency of the legislation. As a number of commentators have pointed out, as shown in paragraphs 45 to 55, these inconsistencies are rarely within the various statutues but arise from their interaction. In the opinion of the author these difficulties (of conflicting purposes, criteria and structures) are less evident in what has been described as the atmosphere, freshwater and sea resources use legislation; and at their worst in the land use legislation. Therefore more radical reform is proposed to the land use legislation than to the other statutes. With the former the approach which seems most sensible is to attempt to integrate the other legislation with and, to a certain extent, under the TCPA. This is the approach suggested by a number of the commentators in Part III. However in doing this it is important to ensure that the new structure accommodates both private and Crown land use. Option 2 does not bring Crown land within the current system of district and regional schemes but rather creates a compatible system with those schemes. Also a third tier of planning - at the national level - is added

under the TCPA. The WSCA is similarly amended to provide for national water use planning. Also, because the TCPA covers maritime planning, some of the sea resources use legislation is made consistent with the TCPA. The anti-pollution atmosphere legislation is not to be changed because, as explained in paragraph 11, the atmosphere is a different type of resource than the others. It would not be practical to provide national atmosphere use plans, for example, when all that is required is regulatory legislation. Therefore, because the TCPA is central to Option 2, it is important to examine its provisions in more depth than has been done so far.

80. The result of the approach in Option 2 is the further elevation and enhancement of the Tribunal's judicial (or quasi-judicial) decision-making role and the importance of the section 3(1) TCPA criteria for deciding questions of resource use. While some authors, no doubt, would find fault with both aspects of this[342], to do so it is necessary to closely examine section 3(1). Besides the very important "wise use and management of ...resources" criterion a number of matters of "national importance" are "recognised and provided for" in "... the preparation, implementation, and administration of regional, district, and maritime schemes". These take

account of the need for the "conservation, protection, and enhancement" of the "physical, cultural, and social environment"[343]; special protection for land abutting on water[344]; the prevention of urban expansion into rural areas[345]; the "prevention of sporadic subdivision and urban development"[346] and; importantly, the special relationship of the Maori people, their culture and traditions, and the land[347]. Though some of the criteria clearly apply specifically to town planning, rather than to wider land use questions, there is no reason why such a list of criteria cannot be applied to such wider questions. The criteria adequately provide for a consideration of conservation and Maori interests in addition to developmental ones. However because of the generality of section 3(1)(b)- arguably all of the other section 3 criteria are subsets of it - the adequacy of the criteria for planning must largely be determined by the adequacy of the "wise use" criterion.

81. Some have suggested that the pivotal "wise use" criterion is not stict enough since several competing uses of land may be "wise" with perhaps some less wise than others. Thus it is theoretically possible a land use, clearly inferior to an alternative, may be legitimately sanctioned. Therefore it has been argued that to avoid this possibility of sub-optimal resource allocation requires the adoption of a "best use and management of

New Zealand's resources" test[348]. Despite the compelling logic of this argument the present writer would reject it on pragmatic grounds. Firstly the operation of the price mechanism within reasonably competitive markets (according to economic theory), aided hopefully by full and open public participation in decision-making should reduce the possibility and size of such misallocations. Secondly the "science" of resource allocation, along with its "tools" like cost benefit analysis and linear programming, are not sufficiently advanced, even in theory, in dealing with uncertainty to determine all resource allocation questions optimally. In the writer's opinion it would be to expect too much of local and regional planners and even the Planning Tribunal to apply a "best use" criteria. The problem is aggravated when metaphysical or spiritual questions, like those related to Maori land, arise.

82. In the alternative to setting a higher standard in section 3(1)(b) it might be possible to further enumerate criteria implicit in "the wise use and management of resources". It is submitted that while such further detail would add little to the certainty of the TCPA it would compromise the flexibility of the Act which is its other hallmark[350]. Flexibility is required of procedures which must deal with projects as diverse as a

corner dairy and an aluminium smelter. Thus it is desirable that some measure of ambiguity remain in the criteria so they can be general enough to provide for such diversity. This point is reinforced when one is trying to further extend the scope of the TCPA as in Option 2. Therefore purely in terms of the statutory formulae the author would not wish to change section 3(1)(b).

83. However it is necessary to look at the judicial interpretation of section 3(1)(b) to see if it is consistent with the approach in Option 2. Section 3(1)(b) has not come before the ordinary courts but has been interpreted by the Planning Tribunal. The Planning Tribunal is not a strictly judicial body so its interpretation is not binding on itself. Not surprisingly though, to promote certainly of the law, the Tribunal has consistently interpreted the provision and, one assumes, would only be dissuaded from such interpretation by legislative redrafting. In cases like Smith v Waimate West County[351] and Re an Application by New Zealand Synthetic Fuels Corporation[352] the Planning Tribunal have held that the final goods or services produced from the (natural gas) resources (in the first case ammonia urea, in the second synthetic petrol) are not relevant under section 3(1)(b). The Synthetic Fuels case said such question of "end use" are irrelevent

under the Act:[353]

> Broadly speaking we must consider the appropriate placing of enterprises which wish to make use of a resource which is of importance but we are not concerned with how that resource should be used ... Parliament has clearly not given to any county or indeed this Tribunal the power to adjudicate upon whether the use of a resource is the best use.

The case followed Smith:

> We have concluded that the 'wise use of resources' provisions [sic] is aimed at ensuring in a planning sense that an opportunity is afforded to make use thereof. When a person wishes to take advantage of the opportunity so afforded the economics of the end-product of his processing is not for investigation by the Council or the Planning Tribunal. We would also record that the ultimate use of the end-product and its effect on farming in New Zealand is of no relevance.

84. In reaching the conclusion in Smith the Tribunal adopted the submissions of the learned counsel for the Waimate West Council. The arguments for the exclusion of questions of "end use" where two-fold. Firstly section 3(1) must be read as part of the TCPA which provides for zoning under district schemes[355]. Once an area is zoned, it is argued the[356]:

> Council has no power to consider the economics of the proposed industry, viability, market ability of its product or whether it is the best use that can be made of the raw materials ... it would be illogical to give such powers of economic appraisal only in those cases where a specified departure or conditional use application is necessary, or as here with a

> scheme change to cater for a particular new industry.

The second argument was:[357]

> It is inherently unlikely that matters of the kind mentioned (i.e. economic appraisal) should have been intended to be decided by local authorities especially when matters of national importance are involved. Local bodies are neither qualified or appropriate bodies to determine national issues of resource use.

85. It is possible to, as Ackley has,[358] cast doubt on both arguments. As it is put in the first argument there would clearly be an illogicality, if the Tribunal considered matters of end use whereas councils did not. However, remembering that the wise use of resources is just one of the criteria, it is at least arguable that in zoning councils have some regard to the possible end uses of the land being zoned. Of course no council has the time or opportunity to attempt thorough "economic appraisals" on individual projects. Surely, however, it is no coincidence when good pastoral land is zoned rural or land desirable for housing, residential. At least one consideraton of the council must be whether the end use of the resource is a wise one. Land in a rural area with few people would not be zoned commercial, even though it might be physically possible to build a supermarket there, because such a project would not be commerically viable.

86. This contention is strengthened when one examines some of the reasons the project in Smith was accepted as being a wise use of resources. These included there being "an assured export market" for the product which would "earn overseas funds"[359]. As Ackley concludes these reasons are difficult to describe as anything other than justifications in terms of end use.[360]

87. The second argument in Smith, it is submitted, is contrary to the concept of the devolution of responsibility to lower tiers of government implicit in the TCPA and the Local Government Act; and explicit in the New Zealand Planning Councils Planning and the Regions report[361]. It is this author's contention that if such devolution of responsibility to local authorities is to have any meaning, local authorities must have the power, responsibility and ability to consider the matters referred to in the second argument as far as they relate to their areas.

88. The Tribunal's reasons for not considering questions of end use have not been discussed to evaluate their merit within the context of the current TCPA. The question is whether the interpretation is consistent with the approach of Option 2. It is contended that the Tribunal's interpretation is not consistent with that

approach. Option 2 requires that the Tribunal, when considering say an application for a mining licence over land currently a scenic reserve, should weigh up the competing interests of conservation and development. It should also consider other interests - for example Maori land interests, the prevention of urban sprawl, the effect on water, and so on. As argued in paragraphs 8 conservation of a resource is a legitimate end use of that resource. Therefore it is submitted that if the Tribunal is to plan for good resource allocation, it must weigh like interest against like. In the mining licence example, it should be a relevant consideration that on the international market the resource is in a state of excessive oversupply, and that this is not expected to improve in the forseeable future. Such a factor should make the arguments for conservation more attractive. It is contended that this new interpretation of section 3(1)(b) is necessary to extend the TCPA to the consideration of land use questions in the wide sense that "land" is used in this paper.

88. How should the Act be redrafted to achieve this reinterpretation? As the quotation from the case[362] shows this could be achieved by substituting "best" for "wise". However in paragraph 81 "best" was rejected in favour of "wise" for reasons which at least partly accord

with the fears of considering end use expressed in Smith. The "wise use" test should be retained so that the "economic appraisal" required of Councils and the Tribunal is not beyond their means. This can be achieved by adding the words "including their end use in the production of goods and services:" after "resources" in section 3(1)(b). To avoid statutory interpretaton problems the same phrase would have to be included in section 4. Such a phrase might, unfortunately in the author's opinion, result in the interpretation of "use" in section 3(1)(b) in the sense that the word "utilisation", has been used in this paper. However this is not regarded as a major problem with the phraseology because section 3(1)(a) requires the local authority or Tribunal to have regard to conservation considerations.

90. The other major change proposed to the TCPA is the introduction of a "third tier" for the planning of land use. This third tier would take the form of an annual land use plan prepared and tabled in Parliament by the Minister of Works and Development. It would bind the Crown. The plan would be analogous to the Energy plan currently required under the Ministry of Energy Act 1977. It would be tabled with a national natural water use plan, described later. Since the plan would cover both private and Crown land it is appropriate that those two

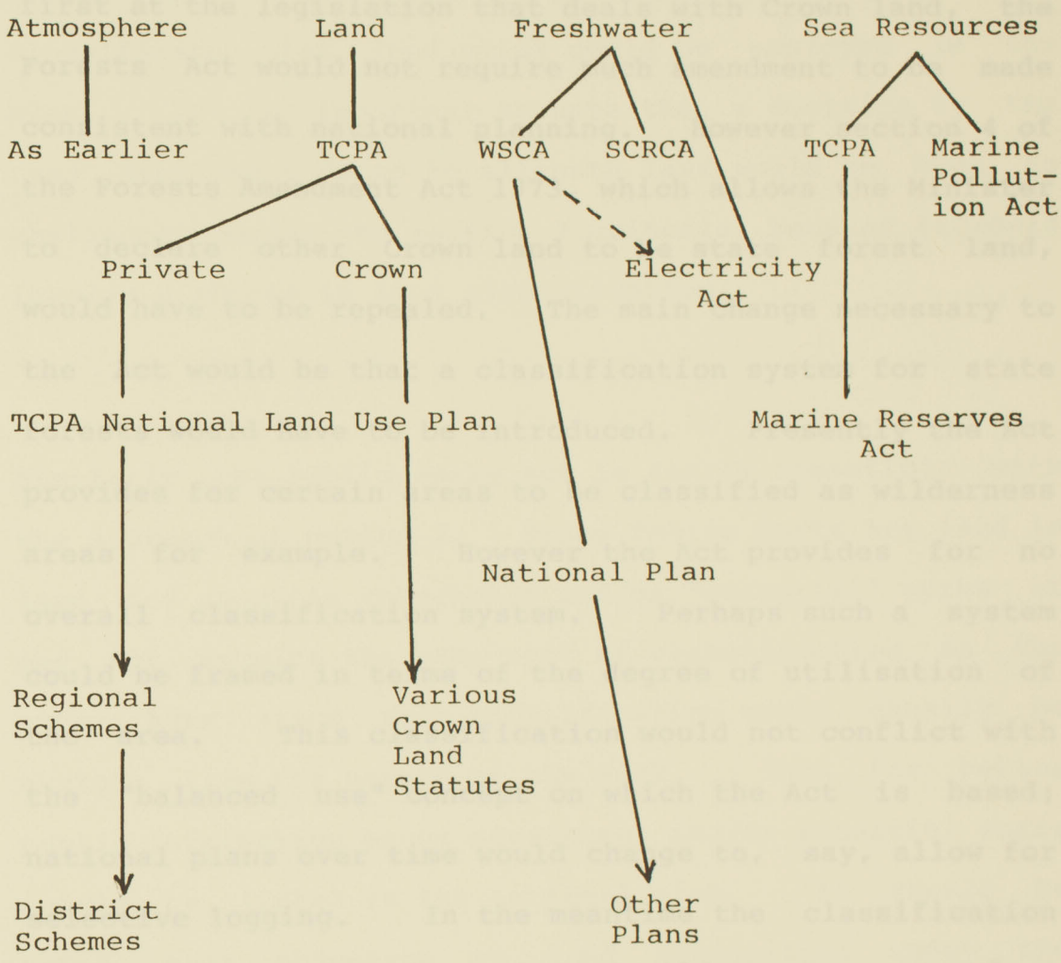
types of land be provided for differently. With respect to private land the plan would summarise the policy statements of the various regional schemes and frame some broad objectives for private land use which local authorities and the Tribunal would be required to consider as if they were, for the time being, amendments to section 3(1). These "amendments" would not affect Crown land. The plan would also summarise some of the more technical information in district and regional schemes currently in operation, as a source of information for the public. Like district, regional and maritime schemes the national plan would have to be drafted having regard to the matters of national importance in section 3(1). Similarly to the present section 37 the policy statement part of the national plan would prevail over regional and, in turn, district shemes. If there is conflict between a scheme and the plan, a scheme change would be necessary. As in section 37 if there is a dispute as to whether such a conflict exists there would be provision for a Tribunal hearing. Regional and district schemes, with provisions for their review, change, the granting of specified departures and the like, would continue as at present.

91. The national plan's provisions concerning Crown land would not bring that land under the current system of district and regional planning but rather promote

legislative consistency by creating a different but analogous and compatible regime for it. The national plan would summarise the various classifications of the land resources in the Acts under which they are vested. The classifications would then be binding on the bodies that administer the land. Such classifications would be challengeable under the section 3(1) criteria. However if a body or even a Minister wished to use Crown land for some purpose inconsistent with its national plan classification the equivalent of a specified departure to the plan would have to be sought. This would be heard by the Planning Tribunal. An example might be land held for a native conservancy under the Forests Act. If classified as such there would be a right of objection to the Planning Tribunal if the Minister granted a coal mining licence over the land.

92. To achieve this, the legislation dealing with Crown land would have to be made subject to the Crown land national planning provisions of the TCPA. All private land use would be subject to the rest of the TCPA. How this would affect the individual statutes is set out next. Since the TCPA covers maritime planning, and sea resources are largely vested in the Crown, the Crown part of the national plan would also cover sea resources. How this would operate is described in paragraph 101.

Diagram 10 - The Legislative Structure of Option 2



NOTE: SCRCA means the Soil Conservation and Rivers Control Act.

93. What legislative changes are necessary to the other Acts to make them compatible with the new TCPA ? Looking first at the legislation that deals with Crown land, the Forests Act would not require much amendment to be made consistent with national planning. However section 4 of the Forests Amendment Act 1973, which allows the Minister to declare other Crown land to be state forest land, would have to be repealed. The main change necessary to the Act would be that a classification system for state forests would have to be introduced. Presently the Act provides for certain areas to be classified as wilderness areas for example. However the Act provides for no overall classification system. Perhaps such a system could be framed in terms of the degree of utilisation of the area. This classification would not conflict with the "balanced use" concept on which the Act is based; national plans over time would change to, say, allow for selective logging. In the meantime the classification would provide some protection of wilderness areas and a change of classification, under the national plan, would allow the possibility of objection to the Tribunal on the basis of the section 3 criteria.

94. The Land Act, once made subject to the national plan provisions of the TCPA, would require very little amendment. It already provides for a system of classificaton for land which could be employed in the plan. It is important to note that a decision by the Land Settlement Board to alienate land would be open to challenge, under the section 3 criteria, because it would involve a change in land classification.

95. Similarly the Public Works Act is fairly compatible with the approach of Option 2. Since Public Works Act land is land for specific government and/or "essential" works it may not require the same sort of classification as the other Acts since such classification would usually be obvious from the nature of the work. Thus for better public information major government and/or essential works should be listed in the national plan. It should be noted that objection to land acquisition under the national plan would be possible since there would be a change in classification because the resource originally would have been privately owned. This is appropriate because it would complement the existing right of a Planning Tribunal hearing in the case of compulsory

acquisition for those currently without locus standi. Part 1 of the Act could well be amended to make one of the Ministry's functions the preparation of the national land use and natural water use plans.

96. The Reserves Act's classification of reserves described in paragraph 28 would continue once the Act was made subject to the TCPA. Also it is desirable to make the Soil Conservation and Rivers Control Act soil reserves subject to the national land use plan while continuing its other, water related, functions. It is therefore proposed to place section 16 of that Act in the Reserves Act; repealing section 20(2) of the Soil Conservation and Rivers Control Act. Therefore "soil reserve" would become another Reserves Act land use classification. National parks would be listed in the plan and would continue under the management plans of the individual park boards and the National Parks and Reserves Authority. Making the National Parks Act subject to the TCPA would require section 78 be deleted. Option 2 would not affect the Native Plants Protection Act.

97. The anomolous situation, described in paragraph 50, where some of the mining legislation is independent of the TCPA provisions and some not, would be solved by Option 2.

All the mining regimes would be made subject to the TCPA. However, as has been shown, how the TCPA national plan would affect projects under the various legislation would depend on the ownership of the land resource to be mined. As was shown in paragraphs 29 to 34 a lot of the resources capable of mining are vested in the Crown. These land resources would be subject to the Crown land national plan provisions of the TCPA only. Classification under the mining regimes would be very easy since land is either being mined or not. Under the Coal Mines Act there is already a classification system - under which some land is declared to be open for mining. That system could continue. Otherwise the decision to grant a mining licence would amount to a change in classification. The granting of prospecting or exploration licences under the Act would continue as present, not amounting to a change in classification of either Crown or private land, because such activities do not usually affect the predominent use of the land.[363] This distinction between the exploration for and the exploitation of resources has some merit, as Christie argues, because exploration rarely has important environmental or other impacts but provides technical data bases of our resources.[364] The granting of mining licences over private land to private developers would be subject to the TCPA in the same way that most projects currently are. For the reasons given above exploration and prospecting licences for private developers should

not be subject to the TCPA unless their impact is such as to change the predominent use of the land.

98. Other than these changes the Petroleum Act would continue as described in paragraph 30. The Geothermal Energy Act, since it deals largely with Crown resources, would be bound by the national plan with the proclamation of a geothermal energy area amounting to a change in Crown land classification. Besides repealing sections 21 and 106 of the Coal Mines Act few other changes would be needed than those in paragraph 97. The Mining Act would have to be amended similarly to the Coal Mines Act, except concerning declarations of land being open for mining which are not applicable in the Mining Act.

99. Turning from land to freshwater a national natural water use plan (the water plan) is proposed. It would be provided for in the WSCA with the Ministry of Works and Development administration of it under the Public Works Act. The concept of a water plan is consistent with promotion of a national policy in respect of natural water included in the WSCA's long title. In fact it merely involves the extension of the classification principle already in the Act. The water plan would be in two parts. Firstly it would set out some general

principles the Minister thought important in natural water use policy, to guide the National Water and Soil Conservation Authority and the relevant local authorities. Secondly it would set down guidelines for the classifying of natural water and some specific classification for important areas of natural water. Both parts would bind the Authority, catchment boards and the like. It, unlike the national land use plan, would not be divided into resources of private or Crown ownership because water is incapable of ownership; being capable only of use. However like the natonal land use plan it would be open to objection, before the Planning Tribunal. Since there is no equivalent to the section 3(1) criteria in the TCPA the plan would have to be challengeable as being ultra vires the Act. Classification of water would continue at the local authority level with such classifications challengeable as at present if they are inconsistent with the plan. The idea of the water plan is similar to the land use plan in that it is desirable that the Minister be able to classify certain areas, by use, say for special conservation or utilisation, within certain judicially enforced constraints.

100. It would not be very useful to make the other water legislation subject to the WSCA. The water related

provisions of the Soil Conservation and Rivers Control Act deal largely with floods and have little to do with natural water use. Also as stated in paragraph 42 the WSCA is already relevant to the provisions of the Electricity Act for the generation of electricty from water. While these provisions would be made stricter, making the Electricity Act subject to the WSCA, it is felt that this would add little. However the above changes to the WSCA might require amendment to other Acts, for example the Harbours Act 1950, which are outside the scope of this paper.

101. While this paper has separated land and sea resources use legislation the TCPA does not. It provides for maritime planning. Since Option 2 is largely based on the extension of the TCPA to achieve a greater measure of legislative consistency it seems reasonable to similarly extend the maritime planning function of the TCPA. Therefore the national land use plan should also make some provision for maritime planning. Since sea resources cannot be privately owned it makes sense to include them in the Crown land part of the plan. The plan would classify sea resources in the same way land is - in terms of end use. It would also prevail over the Marine Reserves Act in the same way that the TCPA prevails over the Reserves Act. The Marine Pollution Act, however, would not be under either plan. Nor would the

legilsation dealing with the atmosphere since those statutes perform a regulatory anti-pollution role which for the reasons in paragraph 11 is quite different to the role performed by the other statutes whose role is much more related to resource allocation.

102. As stated previously Option 2 is a much more limited reform than Option 1. It does not attempt to deal with the problem of administrative fragmentation in the way Option 1 does. Therefore in theory Option 2 proposes no changes to administrative structures. In practice there would be sustantial effects within the structures. The Ministry of Works and Development, and therefore the Minister, would have a new pivotal role in resource use decision-making. As with the other two options the Planning Tribunal would have a much larger, and more discretionary, role in deciding resource use questions. Also the proposal, involving the promotion of the TCPA and WSCA, would allow a larger devolution of responsibility to local authorities; though they would be guided more by central government on some matters. To this extent the proposal would provide a greater amount of cohesion to the administrative as well as the legislative side of natural resource use law.

C. Option 3 - A New National Development Act

103. The approach in Option 3 is very much less ambitious. Of the three options it is this one which goes least far in addressing the problems of legislative inconsistency and administrative fragmentation with which this paper deals. Alternatively Option 3 could be seen as a "stop gap" measure to allow more substantial reform. This is to some extent a logical approach since Option 3 provides a mechanism for "fast tracking" consents on the basis of urgency. It is presumed that the legislative and administrative problems described in Part III would be at their worst when speedy decision -making is for some reason necessary or very desirable.

104. However despite this measure being a compromise it does provide some degree of legislative consistency and administrative structure. It is a redrafting of the National Development Act. As stated in Part IV the NDA provides an administrative structure of environmental impact assessment, a Planning Tribunal hearing and ministerial decision-making on all consents within a strict "time table". Option 3 has a similar structure. Since the one statute is applied to all the various consents the NDA provides some measure of legislative consistency. This is enhanced by Option 3 requiring the

Tribunal to evaluate all the consents on the basis of the section 3(1) TCPA provisions (as amended in Option 2) with the criteria they are currently required to apply. This would allow for consistency between Tribunal decisions of the various projects that come before it.

105. While retaining the holistic approach of the NDA, and improving it by eliminating some of the compromises in paragraph 61, Option 3 attempts to deal with the eleven problems of the NDA described in paragraph 62. Before setting out in more detail how the statute would be amended it is useful to make clear how the eleven problems would be overcome. Problems (i) and (ii) with specific aspects of the NDA "timetable" are reduced by lengthening some of the more severe time constraints. The inconsistency of public notices under the Act is dealt with by standardising their requirements. The conflict of interest noted, if the NDA was applied to a public work, since the power is in the executive's hands, is reduced by giving the Tribunal a power of determination rather than recommendation. Problem (v) of the applicant having certain "appeal" rights while the objector has no similar right is eliminated by removing those rights. To avoid the "fast tracking" of land acquisition under the Public Works Act section 7(12) is repealed. Since it is the goal of this paper to provide

better measures for the planning of resource use the inclusion of provisions for Crown resource acquisition are not helpful in the new NDA. Problem (vii) of the width of the section 3(3) criteria is solved by repealing that subsection.

106. In the present writer's opinion problem (viii), that the Act explicitly discriminates in favour of large projects, is a major one. As stated in paragraph 62 not only is there no economic justification for giving preference to one project over another simply because of size; it promotes sub-optimal resource allocation. To take a very simplistic example, a project might use resources costing five hundred million dollars and produce a rate of return of five per cent. Those resources might also be used by a great number of smaller projects to produce a rate of return averaging ten per cent. All other things being equal, the latter would be the more desirable option. Therefore it is proposed that the only criteria for the application of the new NDA to any project should be that decisions on the consents are urgently required. After all the main virtue for the developer of the NDA is its speed[365]. It seems logical that if this preferential treatment is desired it should only be granted when it is required.

107. By granting substantial power to the executive it was argued that the NDA was contrary to the spirit of devolution in the TCPA. This option would not create this problem since the power of determination on consents is given to the judicial or quasi-judicial Planning Tribunal. A number of constitutional difficulties the Act created were described in paragraph 62 (x). Principally, these concerned the granting of executive power in the Act and the unusual use of regulations. The first difficulty is not present in the new NDA as described. Similarly, the second problem does not arise since regulations are not used.

108. What was described as the most important problem of the Act in paragraph 62 - that it provides for the antithesis of planning, ad hoc decision-making - would be reduced by Option 3. The problem was one of how and by whom decisions are made. It was argued that since the NDA is based on executive decision-making using regulations decisions must be ad hoc. Since the new NDA would give the Tribunal decision-making power planning, as defined in paragraph 49, would be better served. The Tribunal, as an expert body of many years standing that exhibits the independence of a judicial body, it is submitted, is well placed to do such planning. It was also argued that NDA decision-making is ad hoc because the criteria applied, are not absolutely comparable to those applied

under the Acts from which they are derived; because of the peculiar nature of an NDA inquiry. There is also no consistency of criteria between NDA projects. Therefore it is proposed to promote consistency by applying the section 3(1)TCPA criteria to all consents. It is contended that the above will, in some measure, aid consistency and therefore natural resource use planning.

109. From the above the general scheme of the new NDA will be discernible. However, to aid understanding of the third option, the amendments proposed to the NDA will be given section by section. For reasons of space, and consistency, the provisions analysed in paragraphs 56 to 60 in the most depth will be similarly analysed here. As a good summary of what is proposed in Option 3 the Act would have this long title: "An act to provide for the prompt consideration of consents for proposed works which the Governor General reasonably considers merit urgent consideration by their direct referral to the Planning Tribunal for an inquiry and determination." The Act would then be made explicitly binding on the Crown although, as argued in Appendix 1, this would not change the Act's effect. However, this would clear up the ambiguity that surrounds the question. The interpretation section, including importantly "land" and "consent", would not be altered.

110. As already stated section 3(3) would include an objective regulation-making power and would state: "(3) After an application has been made under subsection(1) of this section, the Governor-General in Council may, if the Governor-General considers, on reasonable grounds, that the Government work or private work merits urgent consideration apply the provisions of this Act to the work or any part of it." Section 3(2)(a) would be amended accordingly.

111. There are bound to be difficulties in amending a statute that specifically provides for major works only to provide for all urgent works. It is contended that two such difficulties arise. Firstly the provisions for environmental impact assessment and auditing may not be appropriate in cases of smaller projects with a negligible impact on the environment. While this to some extent involves a prejudging of the issue, after all major projects may have negiligible impacts, it is contended that some exemption to the procedures is needed for appropriate small projects to save developers and the Commission unnecessary time and expense. Secondly, and similarly, it may not be appropriate to require the presence of the Minister of Works and Development and the Commissioner for the Environment in such cases.

112. To deal with the first problem a new section 5A is proposed:

> **5A Exemption from environmental impact report and audit requirements** - (1) The applicant may, within two weeks of making an application under section 3 of this Act, forward to the Commissioner for the Environment an application for an exemption to the environmental impact report and audit requirements of this Act giving reasons:
>
> (2) If the proposed work is not a major work and the Commissioner for the Environment reasonably believes it will have negligible environmental impact he may declare his intention to grant such an exemption by a public notice:
>
> (3) If there has been no objection in writing to the Commissioner for the Environment within 4 weeks of this public notice the Commissioner for the Environment may forward a certificate of exemption to the Tribunal as soon as practicable:
>
> (4) A certificate of exemption granted under subsection (3) of this section shall have the same effect as a certificate granted under section 5(3).

Section 5 would have to be amended accordingly. Section 5A, in the writer's opinion, would, and should, impose a heavy burden of proof on the developer wishing to use it. In addition to the practicality of such a provision it is contended that section 5A would often be legitimate discrimination in favour of smaller developers who have less resources to undertake EIR's.

To deal with the second problem section 8(3) should be amended to read:

> The Minister of Works and Development and the Commissioner for the Environment shall be represented at the inquiry if the Tribunal so wishes, and, if they are, shall adduce such evidence and make available for cross-examiniation such witnesses as they or their representative consider will assist the Tribunal.

113. It is proposed to increase some of the more strict time constraints shown in Appendix 2. For the reasons given in Part IV these will be provided to allow objectors more time. More time will also be given to the Commissioner and the Tribunal to allow them to consider the further matters Option 3 may make it necessary for them to consider. Section 5(3) would be amended to allow four months for the Commissioner for the Environment to forward his/her certificate; section 5A is consistent with this. The period for public submissions would be increased from six weeks to two months. This would allow the Commissioner the balance of the time. Section 7(3) would be amended: the expression "6" would become 8 and the expression "8" would become 10. This would allow interested parties three to five weeks to apply to the Tribunal to be heard. There would remain no time limit on the length of the Tribunal inquiry. Of course some time would be saved at the end of the timetable since the present second Order in Council would no longer

be required.

114. A new section 9(2) would be drafted providing that in addition to the matters to be taken into account in section 9(1), in their report and determination, the Tribunal will consider, as far as they are relevant, to the individual consents the section 3(1) TCPA criteria. As part of Option 3 those criteria would have to be amended as in Option 2 to include questions of end use in the "wise use" test. This is necessary here, as it was for the TCPA in Option 2, because while the Tribunal's interpretation of that criterion may be sufficient for town planning and the like, it is submitted it is inadequate for the determination of questions of resource use. Because of the wide variety of types of legislation in the NDA's schedule it is, and would be under Option 3, for the determination of these wider questions. Section 9(1) would have to be amended accordingly. Section 10, 11, and 12 would be no longer needed since the Tribunal would determine whether or not consents are granted.

115. The provisions of sections 10 to 13 could be adequately replaced by two new sections. The new section 10 would provide:

> **10 Conditions, restrictions, prohibitions, terms or periods of time in the determination -**
>
> (1) The determination may specify such conditions, restrictions, and prohibitions (if may) which the Tribunal considers should be imposed if in each case such conditions, restrictions and prohibitions could have been granted or imposed in the normal way:
>
> (2) The determination may grant each consent for such term or period of time that the Tribunal considers should be imposed if in each case such term or period of time could have been granted or imposed in the normal way.

Section 13(1), therefore would be rewritten thus:

> **13 Effect of granting consents** - (1) The determination of the Tribunal shall have the same force and effect as if such a determination had been arrived at if each consent had been applied for in the normal way:

with subsections 2 to 4 amended accordingly. There should also be provision, after a public notice, for the Tribunal report be made available for publication and viewing. All other references to the report and recommendation of the Tribunal, for example in section 4(1), should be altered to report and determination. All references to the second NDA Order in Council should, similarly, be replaced by the Tribunal's determination.

116. Section 14, under which the successful applicant can

obtain further consents would remain after the necessary amendments. In line with the fifth problem of the NDA described in paragraph 53 the unsuccessful applicant's "appeal rights" under sections 15 and 16 would be repealed. The provisions for judicial review in section 17 were not examined in Part IV of this paper so, without passing a view on their merits or demerits, they will be retained in Option 3.

117. The pivotal section 18 would remain unchanged. Option 3 does not require much alteration to the Schedule of Acts made subject to the NDA. All of the Acts described in this paper are contained in the Schedule except the Public Works Act, the Native Plants Protection Act, and the Marine Reserves Act. It is not proposed to include land acquisition in the new NDA; section 7(12) would be specifically repealed to prevent it. The Native Plants Protection Act is not considered to be of sufficient importance to merit inclusion. However it would be useful to include the Marine Reserves Act to provide, perhaps, for the "fast tracking" of the creation of marine reserves in emergencies, even though such creation would seldom be a slow process.

Appendix 1 - Is the Crown Bound by Natural Resource Use Law in New Zealand ?

118. Obviously it is not possible in an appendix of this length to say whether, and to what degree the Crown is bound by legislation which does not explicitly settle the matter either way. It is useful to set out some general principles and practical considerations which apply to whether the Crown is bound. The NDA, TCPA and WSCA, as examples of important statutes in this paper will be very briefly discussed.

119. The NDA is a good example because it probably binds the Crown though this is not explicitly stated. However section 5(k) of the Acts Interpretation Act 1924 states that an Act of Parliament "shall not in any manner" affect the rights of the Crown unless it is "expressly stated therein" that it does. Hogg,[366] though, gives two reasons why it is likely the NDA would be held to bind the Crown. Firstly he argues that since the word "bound" used in section 5(k) is synonymous with "effect the rights of" and "bound" means "restricted" or "restrained" therefore "affect" in this context must mean "prejudicially affect". Hogg cites New Zealand cases in

support of this argument. Since the NDA's provisions are of benefit and do not prejudicially affect the Crowns' rights they must be bound by the Acts provisions. There is a second, more straightforward reason. It turns on the meaning of "expressly stated". Hogg cites New Zealand cases which have held that "expressly stated" includes words that give rise to a necessary implication that the Crown shall be bound. As seen in Part IV the NDA procedures specifically apply to public works. In some ways those procedures are different from private works. It is therefore submitted that the Crown is bound by the NDA.

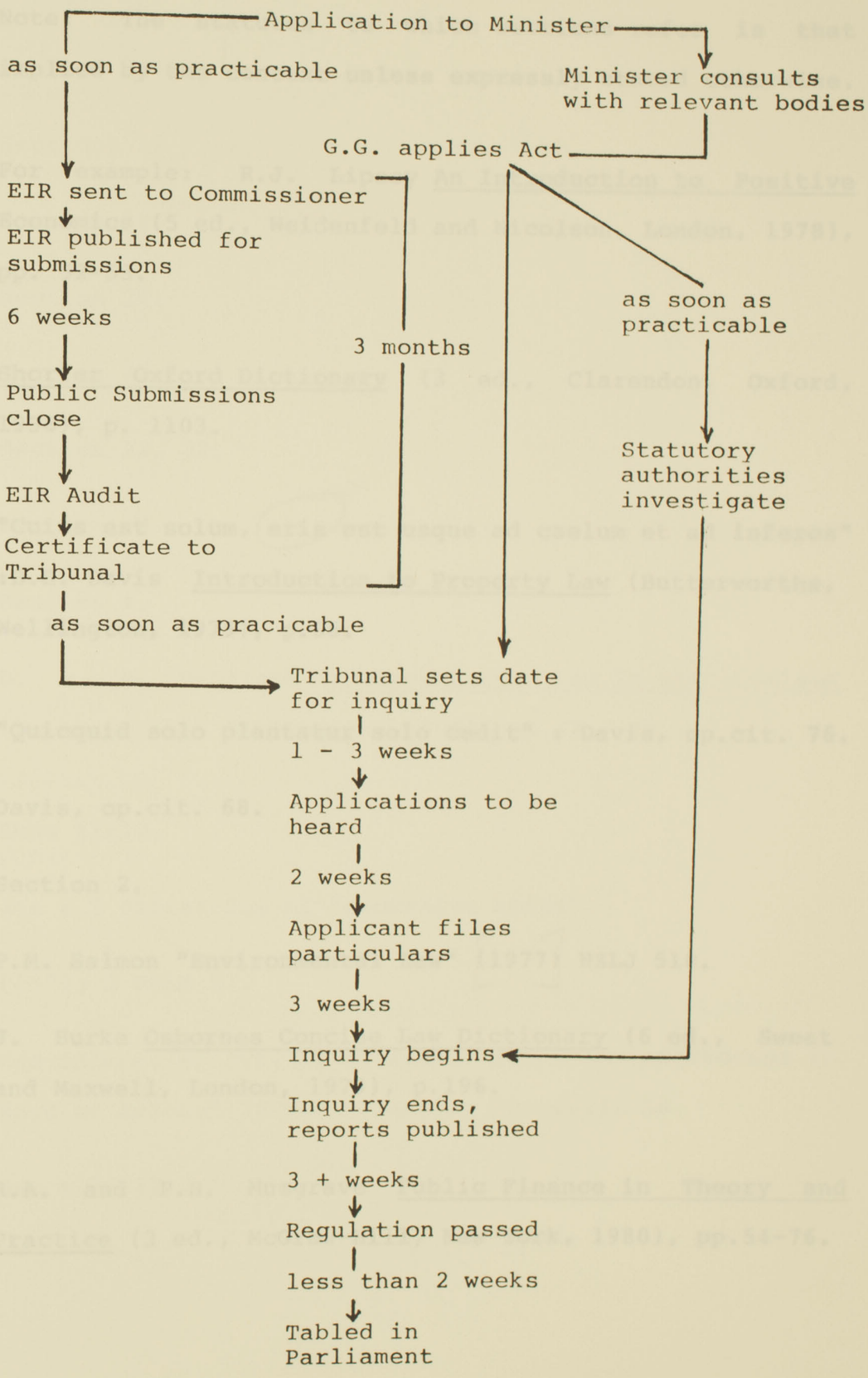
120. On similar analysis a number of Acts which do not explicitly say so may bind the Crown. The position of the TCPA is a good deal more complex. Generally, because of section 17(1) TCPA, the Crown is bound by regional schemes. Due to sections 62(3) and 108(1) the Crown is under some sort of presumption to observe and enforce the observance of district and maritime schemes. This does not make district schemes binding on the Crown, however, as held in Wellington City Council v Victoria University of Wellington.[367]

121. The issue though may often not be of much practical importance. Turner D. J. said:[368]

> The Crown is required to obtain planning consents and water rights. The procedures are somewhat different from those set down for private applicants and both [the TCPA and the WSCA] contain "let-out" clauses enabling the Executive to make the final decision ... I have not heard of a situation in the last ten years where the Crown has invoked these "let-out" clauses. Indeed in the current climate of public opinion it is doubtful whether the Crown would be bold enough to do so.

122. From the above the present writer would simply submit that though it may appear from resource use statutes that the Crown is not bound the fact or the practical effect of those statutes might be different. One interpretation of that might be that the explicit binding of the Crown often might have little practical effect other than to resolve the ambiguity that presently exists.

Appendix 2 - A Diagramatic Explanation of the National Development Act "Timetable"



FOOTNOTES

Note: The statutes to which sections refer is that implied by the context unless expressly stated otherwise.

1. For example: R.J. Lipsey An Introduction to Positive Economics (5 ed., Weidenfeld and Nicolson, London, 1978), pp. 52-53.

2. Shorter Oxford Dictionary (3 ed., Clarendon, Oxford, 1936), p. 1103.

3. "Cuius est solum, eris est usque ad caelum et ad inferos" :B.H. Davis Introduction to Property Law (Butterworths, Wellington, 1979), p.66.

4. "Quicquid solo plantatur solo cedit" : Davis, op.cit. 76.

5. Davis, op.cit. 68.

6. Section 2.

7. P.M. Salmon "Environmental Law" (1977) NZLJ 518.

8. J. Burke Osbornes Concise Law Dictionary (6 ed., Sweet and Maxwell, London, 1979), p.196.

9. R.A. and P.B. Musgrave Public Finance in Theory and Practice (3 ed., McGraw-Hill, New York, 1980), pp.54-76.

10. Joseph Lucas (N.Z.) Ltd v Health Department [1978] 2 NZLR 247, 248.

11. Section 9.

12. Section 9(3).

13. Sections 12 - 18.

14. Section 18.

15. Section 26.

16. Section 29.

17. Section 32, 33.

18. Section 40.

19. Section 6.

20. D. A. R. Williams Environmental Law in New Zealand (Butterworths, Wellington, 1980), pp.42 - 43.

21. Long title.

22. See s.2 definition of "excessive noise".

23. [1979] 2 NZLR 57.

24. See Salmon, op.cit. or H. Biggs "The Planning Process in Need of Reform" 58 Town Planning Quarterly 18.

25. See s.11 (2).

26. See K. Robinson The Law of Town and Country Planning (3 ed., Butterworths, Wellington, 1981), p.13.

27. Ibid. 16.

28. Idem.

29. Section 3.

30. Section 45.

31. Section 44(1).

32. Section 62(1).

33. Section 62(3).

34. Section 62(4).

35. Section 59.

36. Section 56.

37. Section 54.

38. Section 55.

39. Section 149.

40. A. R. Turner "Resource Management by Judicial Process", a paper presented at an Environmental Defence Society Seminar on 26 November 1983, p.5.

41. Section 9.

42. Section 11(2).

43. Section 11(5).

44. Section 11(7).

45. Section 12(1).

46. Section 12(2).

47. Section 12(4).

48. Section 12(8).

49. Section 12(10).

50. Section 13.

51. Section 13(2).

52. Sections 13(2), (3).

53. Section 15.

54. Section 15(2).

55. Section 17; see Appendix 1.

56. Section 20 (1)(b).

57. Section 20(1)(a).

58. Section 20(2).

59. Section 57.

60. Section 74(2).

61. Section 74(2)(a).

62. Idem.

63. Section 74(2)(b).

64. Section 13.

65. Section 15(1)(a)(ii).

66. Section 15(1)(a)(iii).

67. Section 15(1)(a)(iv).

68. Sections 15(2), 2.

69. Usually by agreement or under the Public Works Act 1981, see paras. 25 - 26.

70. Section 16.

71. Idem.

72. Section 2.

73. Idem.

74. Section 3.

75. Section 18.

76. Section 22.

77. Section 23.

78. Section 23(3).

79. Not site specific see s.24(7).

80. Section 24(10).

81. Section 24(11).

82. Sections 60,61.

83. Section 6(1).

84. Section 6(2)(a).

85. Section 6(2)(k).

86. Section 62(2)(o).

87. Section 2.

88. Section 4.

89. Section 13.

90. Section 22.

91. Section 51.

92. Part IV.

93. Section 52(1).

94. Section 58(1)(a).

95. Section 58 (1)(b), (c).

96. Section 3(1).

97. Section 3(1)(a).

98. Section 4.

99. Section 12.

100. Section 14.

101. Sections 28 - 30.

102. Sections 7, 8.

103. Section 41.

104. Section 5 Reserves Act 1977.

105. D. E. Fisher "The Legal Context of Petroleum Development in New Zealand" (1984) 14 V.U.W.L.R. 13, 15 - 20.

106. Section 4(1).

107. Sections 5, 12.

108. Section 11.

109. Sections 11, 39.

110. Section 10.

111. Section 15.

112. Section 39.

113. Section 39 (2) - (6).

114. Section 14A.

115. Sections 18, 18A.

116. Section 3.

117. Section 9(8).

118. Section 9.

119. Section 6.

120. Section 7.

121. Section 8.

122. Section 13.

123. Section 14.

124. Section 11; see paras. 41 - 42.

125. Section 2.

126. Section 5.

127. Section 6.

128. Section 20; see also s.7.

129. Section 30.

130. Section 26, 27.

131. Section 27(2).

132. Section 33.

133. Section 50.

134. Section 65.

135. Section 66.

136. Section 67.

137. Section 41(2).

138. Section 56.

139. Section 21.

140. Section 106.

141. Atomic Energy Act 1945, s.8.

142. Section 6.

143. Section 7(1).

144. Sections 21, 26.

145. Section 24.

146. Section 30.

147. Sections 35, 36.

148. Section 27.

149. Section 48.

150. Sections 59 - 68.

151. Section 70.

152. Section 93.

153. Section 97.

154. Long title.

155. See s.7 Soil Conservation and Rivers Control Amendment Act 1983.

156. Section 10.

157. Section 11.

158. Section 13.

159. Section 13(10).

160. Section 16(1).

161. Section 16(2).

162. Section 16(3).

163. Section 16(4).

164. Section 20(2).

165. (1969) 3 NZTCPA 160.

166. Long title.

167. Section 14.

168. Section 14(b).

169. Forests Amendment Act 1976, s.4.

170. Ibid. s.5.

171. Forests Amendment Act 1973, s.4.

172. Section 19(1).

173. Section 19(3).

174. Section 20.

175. Section 63A.

176. Section 63B.

177. Section 63D.

178. Section 63E.

179. For example see s.6(1)(c).

180. Section 35(5).

181. Section 5.

182. Section 3.

183. Supra. n. 181.

184. Section 6.

185. Section 7(1).

186. Section 7(2).

187. Section 9.

188. Section 11(1).

189. Section 78.

190. Section 18(a).

191. Section 18(c), (d), (e), and (g).

192. Section 18(b).

193. Sections 3, 4.

194. See Williams, op.cit. 195.

195. Section 10(c).

196. Section 11(e), (ee), (f).

197. Section 11(k).

198. Long title.

199. Water and Soil Conservation Amendment Act 1981, s.4(1).

200. See Williams, op.cit. 93.

201. Section 3.

202. Section 14(3)(a).

203. Section 14(3).

204. For example s.14(3)(l) or s.14(4)(d).

205. For example s.14(4)(a).

206. For example s.14(3)(p).

207. For example s.14(3)(h).

208. For example s.14(4)(f).

209. For example s.14(3)(o).

210. Section 19.

211. Idem.

212. Section 20(5)(a).

213. Section 20(5)(c).

214. Section 26A.

215. Section 26G (1).

216. Section 26H.

217. Section 6(a).

218. Section 6(b).

219. Section 7(2)(b)(i).

220. Section 7(2)(c)(i).

221. Section 11(i).

222. Section 25(1).

223. Section 20.

224. Section 22.

225. Section 96(1).

226. Section 98.

227. Section 99.

228. Section 102(a).

229. Section 102(b).

230. Section 102(d).

231. Section 102 (c).

232. Section 103(1).

233. Section 104(1).

234. Section 105.

235. Section 108(1).

236. Section 110.

237. Section 112.

238. Section 113.

239. Section 115.

240. Long title.

241. Section 3(1).

242. Section 3(2)(a).

243. Section 3(2)(b).

244. Section 4.

245. Section 5(1)(a).

246. Section 5(1)(b).

247. Section 5(3).

248. Section 5(7).

249. Section 5(6).

250. Section 6.

251. Section 10(a).

252. Section 10(b).

253. Section 12.

254. Section 17.

255. Section 4(5), (6).

256. For example s.22.

257. For example s.17.

258. D. E. Fisher "A Policy of Resource Use and Conservation Means for its Implementation", a paper presented at an Energy and Natural Resources Law Association seminar on 24 March 1985, p.2.

259. Idem.

260. Ibid.3.

261. Idem.

262. "Environmental Administration in New Zealand A Discussion Paper" released by the Minister for the Environment (State Services Commission, Wellington, 1984), p.31.

263. R. G. M. Christie "Resource Use - The Developer's View", a paper presented at an Energy and Natural Resources Law Association seminar on 23 March 1985, p.4.

264. Ibid. 6.

265. P. R. Skelton "Resource Use - Resolving the Conflicts", a paper presented at an Energy and Natural Resources Law Association seminar on 23 March 1985, p.6.

266. New Zealand Planning Council Planning and the Regions (Government Printer, Wellington, 1980), p.11.

267. Idem.

268. See Ideal Laundry Ltd v Petone Borough [1957] NZLR 1038. Though the Court of Appeal's decision was on the 1953 Act the two principles seem applicable to the 1977 Act.

269. B. Williams "An Optimistic View of the New Zealand Town and Country Planning Act and Regulations" 70 Planning Quarterly 17.

270. [1978] 2 NZLR 577.

271. 10 NZTPA 190, 191.

272. See, for example, T. Black "Planning for Petroleum Development" (1984) 14 V.U.W.L.R. 35.

273. A. Aburn "An Administrative Framework for Resource Management in New Zealand" 57 Town Planning Quarterly 6.

274. Long title.

275. It has been attributed to problems over the Clutha project: see D. A. R. Williams, op.cit. 258.

276. The Hon. Mr Kidd M.P. and the Hon. Mr McLean M.P. claimed the idea to be theirs: see "Fast Track to Derailment" (1979) 15 Soil and Water 2,4.

277. N.Z. Parliamentary debates Vol. 427, 1979; 4408.

278. To include water, the foreshore and the seabed: s.2.

279. See s.3(1).

280. Section 3(2).

281. [1981] 1 NZLR 172, 175, 176. Firstly "irregularities" in s.3(2)(2)(c) particulars must be "serious" to nullify the relevant part of the application. Secondly s.3(2)(f) does not require a statement of all the possible effects of the proposed work. These must just be stated reasonably fully.

282. Section 3(3).

283. EDS v South Pacific Aluminium Ltd (No.2) [1981] 1 NZLR 153, 157.

284. Ibid. 163.

285. EDS v South Pacific Aluminium Ltd (No.3) [1981] 1 NZLR 216, 220.

286. Ibid. 218.

287. Section 4(3).

288. Section 4(6).

289. Section 5(1).

290. Section 2 National Development Amendment Act 1981 amended the scope of the audit "tieing" it to the EIR.

291. Section 5(3).

292. Sections 5(2)(b) and 5(3).

293. Section 6.

294. Re An Application by NZ Synthetic Fuels Corp (1982) 8 NZPTA 138, 141.

295. Section 7(3).

296. Section 7(4) cf. s.2.

297. Section 7(5), but not the discretionary time limit.

298. Section 8(4).

299. Section 8(1).

300. Section 8(1)(e); "Affected" has been interpreted as materially more affected than the general public: supra.

n. 294, 143.

301. Section 8(1)(f).

302. See supra. n. 294, 140 - 141 and Petralgas (1982) 8 NZTPA 106, 107 - 108.

303. Section 7(7).

304. Section 10(1).

305. National Development Amendment Act 1981, s.7.

306. Section 9(1).

307. Section 10(2)(c).

308. Section 11.

309. Section 14.

310. Section 15.

311. Section 16.

312. For example Petralgas, op.cit. 111 - 113.

313. See Option 2 for the Tribunal's interpretation.

314. Petralgas, op.cit. 109.

315. In effect: s.15.

316. See s.15(4).

317. Section 7(12).

318. See submissions on the National Development Bill 1979 by Henry Lang and Geoff Bertram.

319. Supra. n. 266.

320. Idem.

321. A month only was given for submissions. In Auckland, because of the two weeks it took for the Bill to arrive at the Government Bookshop, there was in effect only fifteen days. However in the time allowed five submissions in favour of the Bill and 367 against were given. The first, second and third readings of the Bill were allowed two, six and three hours respectively. The Committee to hear the submissions requested to hear seventy. They sat for fifty hours spread over only four weeks. Only forty nine of those submissions were finally heard.

322. See, for example, the submissions of Professor K. Keith and A. Frame on the National Developoment Bill 1979.

323. See, for example, the submission of Sir Guy Powles.

324. N.Z. Parliament, Delegated Legislation Committee, Wellington, 1962.

325. Supra. n. 313.

326. Supra. n. 266.

327. Section 2.

328. Source: State Services Commission Directory of Official Information 1983 (Government Printer, Wellington, 1983), pp. 647 - 663.

329. Ibid. 651.

330. Ibid. 651 - 652.

331. Ibid. 560 - 599.

332. Ibid. 560.

333. Ibid. 254.

334. Ibid. 712 -713.

335. Ibid. 124.

336. Ibid. 625.

337. Ibid. 62.

338. The two Ministries combined would have at least 30,000 employees. Source: Report of the State Services Commission (Government Printer, Wellington, 1984).

339. This usually amounts to a right of hearing and notice, for example Ridge v Baldwin [1963] AC 40.

340. See para. 28.

341. In Option 1 locus standi would be that under the NDA.

342. For example, supra. n. 40.

343. Section 3(1)(a).

344. Section 3(1)(c).

345. Section 3(1)(d),(f).

346. Section 3(1)(e).

347. Section 3(1)(g).

348 For a discussion of this see D.E. Fisher "Environmental Policy Developments in New Zealand" (1984) 1 Environmental and Planning Law Journal 387, 391.

349. See, for example, A. R. Turner "The Changing Basis of Decision-Making" [1985] NZLJ 195.

350. Supra. n. 268.

351. (1980) 7 NZTPA 241.

253. Supra. n. 249.

353. Ibid. 141 - 142.

354. Supra. n.351, 259.

355. Ibid. 259 - 261.

356. Idem.

357. Idem.

358. K. A. Ackley "Fast Tracking with the Town and Country Planning Act" (1981) 64 Town Planning Quarterly 11.

359. Supra. n. 355.

360. Supra. n. 358.

361. NZ Planning Council, op.cit. 22 - 24.

362. See para. 83.

363. See, for example, Christie, op.cit. 4.

364. Idem.

365. Ibid. 6.

366. P. W. Hogg Liability of the Crown (Law Book Co., Melbourne, 1971), pp. 184 - 188.

367. [1975] 2 NZLR 301.

368. Supra. n.40.