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Who Gets What:
Resource Allocation Under The Planning and Water Legislation

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PART I : INTRODUCTION

Many ambitious schemes fall victim to their own grandeur. Sadly, this increasingly seems to be the fate of Environment 1986[1], the Report of the Post-Environmental Forum Working Party, on the reform of the environmental administration in New Zealand.

This report involved some radical restructuring of the present administrative agencies, with a view to subsequently considering the legislation, once those new agencies were established. The report is not without its difficulties, inconcistencies and contradictions, but it had considerable potential to effect an exciting transformation of this aspect of the New Zealand legal system. The full extent of the proposal for Heritage New Zealand might have been a world first - a powerful Government Department devoted to advocacy on behalf of the environment.

This paper was begun with the intention of examining the significance of these proposals for the present law. This intention has been abandoned in the face of the steady erosion of the potential of Environment 1986, at the hands of diverse opponents[1a]. The writer now holds little confidence in the realisation of anything approaching the bold sweep of the original vision. The trend appears very much to be the preservation of as much of the existing law as possible.

The fundamental thesis of this paper has become that this law is not sufficient. There is an array of parallel allocation systems,

with a significant degree of overlap and duplication. There is considerable potential for conflict.

While maintaining broadly parallel courses, these systems are considerably different in form and procedure. This further exacerbates the potential difficulties inherent in the overall situation.

The statutes that are focussed on in this paper, the Town and Country Planning Act 1977 and the Water and Soil Conservation Act 1963, both have resource allocation and environmental protection aspects. The resource allocation aspects are concentrated on, mainly because this is an underrated aspect of the town planning legislation. It is interesting to note however, that the Working Party assumed that this was its prime function without ever discussing the point[1b].

It is unfortunate that a paper of this size cannot adequately consider both the law and practice of this huge area. Not even the whole of the law can be considered. This is primarily why the aspects of these statutes relating to the Crown have been omitted, even though they give rise to some further important issues.

The focus on the law does not mean that the practice is unimportant. An examination of that is perhaps practically speaking the more important of the two, because through it, <u>attitudes</u> are discovered.

Attitudes are crucial. If the participants have attitudes inimical to the intentions behind the system they operate in, then even the best of all possible structures will fall far short of achieving its true purpose.

But the law should be considered first, because that is the foundation of the system. The first question should be whether the foundations are solid. If they are adequate, then is is appropriate to see how they are realised in practice.

If the foundations are inadequate, then no amount of administrative reorganisation can hope to satisfy the urge to have a better system. It is suggested that our foundations <u>are</u> inadequate. It is time we jacked the house up, and did some urgent repiling.

The discussion in this paper concentrates on problems that arise between the statutes. Again, this is for the sake of brevity, and should not be taken to imply that taken by themselves, all the procedures are perfectly acceptable. There can be trenchant criticism of at least some of these.[1c]

PART II : TOWN AND COUNTRY PLANNING ACT 1977

1.0 OVERVIEW

The TCPA provides a comprehensive system to regulate development and allocate resources. This second aspect especially does not seem to be generally appreciated, and this part of the paper is largely devoted to arguing the point.

The system is on two levels - regional and local. The planning authorities executing these functions are derived from territorial divisions and are substantially based on the local government structure. The second wing of the local level maritime planning is a little inconsistent, comprising a variety of possible candidates, including regional government.

The system is based on formal plans, drawn up after an element of public participation. These plans control activity through the statutory requirements to obtain consents according to district plans.

The processes to establish, and the contents of the schemes are prescribed by statute in detail (although less is given for maritime planning). It also provides formal criteria for decisions under the plans.

The Act begins with two general statements of principle which are to govern the administration of the system.

2.0 THE PURPOSE OF PLANNING

2.1 General

As will become apparent, this section of the paper advocates a radical reading of the TCPA, a reading which is directly contrary to three recent Planning Tribunal pronouncements on this very question. The writer believes this Act has been greatly misconstrued, and thus considerable argument is devoted to the point. The second purpose of this section is to illustrate that the Environmental Working Party's unargued for assumption regarding this question is actually correct. Later in the paper it will be shown that the Working Party did not fully realise the significance of their assumption.

2.2 The Planning Tribunal

The three Planning Tribunal statements referred to above all arose in the context of the petrochemical developments in Taranaki under the "Think Big" strategy. One was an ordinary appeal from planning and water right consents, the other two were the report and recommendation required of the Tribunal under the National Development Act 1979 (NDA).

Smith v. Waimate West County Council[1d] arose over the natural-gas-to-ammonia/urea plant. Waimate West Council were in the

process of making a change to their District Scheme to provide for the project at the request of the Natural Gas Corporation (NGC) who were the proponents. The Environmental Defence Society Inc (EDS) objected, and subsequently exercised their right of appeal to the Tribunal. Both NGC and EDS appealed over the water rights. These concerned technical aspects of the conditions imposed.

The other two cases were re An Application by Petralgas ChemicalsNZ Ltd (Petralgas)[2] and re An Application by NZ Synthetic Fuels Corp Ltd (Synfuel)[3]. These related to the natural gas-to-methanol, and natural gas-to-Synthetic petrol plant. Both had the NDA applied to them in respect of (inter alia) planning consent.

Under the NDA, where the Minister of National Development permits, a special procedure for granting consents under various statutes is used instead of the normal procedures. An application to apply the statute is accompanied by various particulars of the project, the consents sought and information relevant to their grant[4].

Assuming the Minister agrees to the Act's use, the application is referred to the Tribunal, which is to report back with its recommendation to the Minister[5]. The Tribunal must consider an Environmental Impact Report, prepared by/on behalf of the developer, and audited by the Commission for the Environment; reports from all local authorities who would otherwise be

granting the consents; and must also hold a public inquiry[6].

The report of the Tribunal is considered by Cabinet before deciding whether to grant the consents. The report is only to take into account those factors that would be relevant under the ordinary procedure[7]. Therefore notwithstanding the special nature of the reports and the circumstances, what the Tribunal has to say is very relevant to the issue of defining the purpose of the ordinary planning process.

In each case, objectors attempted to present arguments on the merits of using natural gas as a feedstock for these projects. The arguments were based on s3(1)(b) of the TCPA, which makes the "wise use and management of New Zealand's resources" a matter of national importance, to be recognised and provided for in the preparation and administration of planning schemes.

In all three, the proposition was rejected. The tone is set well by Treadwell J in Smith, where he said[8]:

> "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 a matter 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. The Act is not designed to thwart the reasonable marketing aspirations of a developer."

In the circumstances of that case this is actually obiter. Counsel for NGC conceded the issue to EDS in the interests of avoiding delay. Attention was concentrated on presenting a positive case that it was a wise use of natural gas.

This concession forced the Tribunal to enter the debate it wished to avoid. It dealt with the dispute on the parties' terms, and then added this obiter in an explicit indication of the future attitude of that Division.

Petralgas and Synfuel resolutely followed this line. Planning was only concerned with the choice of sites for any particular land use, and the environmental consequences of that placement[9]. Petralgas went on to make an additional argument on the provisions of the NDA, which is not relevant here. It appears the interpretation of the TCPA was a sufficiently valid independent reason to stand alone if necessary.

This attitude was largely without supporting argument. It is as much a conscious choice to avoid such arguments, as a careful analysis of the TCPA. Synfuel produced only one argument (and even that is a debatable statement). Petralgas had none. Smith has the most extensive argument, but virtually all of it is a recital of argument from NGC counsel.

The arguments can be summarised as:

1. Vague statements in s.3 indicating a subjective approach to matters of resource planning are of little assistance in construing the TCPA.

2. "Wise" and "resource" have many meanings. It is only by implication that the meaning of s.3 can be contained.

3. Section 3 must be read in the context of the Act as a whole.

4. (Associated with argument 3). There is nothing in the Act which gives councils the necessary powers. Once an area is zoned for particular uses, the council is unable to assess the merits/economics of a proposed use. This would require far greater powers than they possess at present.

5. It would be illogical to restrict such powers of economic appraisal to the consent process and scheme changes.

6. Local bodies are not appropriate agencies to determine the policy issues such questions raise.

7. Nor are they appropriately qualified.

8. The final argument in Smith was based on an interpretation of "recognise" and "provide for" in s.3. "Recognise" meant

an awareness and consideration of the factors listed there. "Provide for" was defined as "allow for" or "make possible". These were read together as requiring schemes to "enable and permit resources to be wisely used, not to determine or direct that they shall be so used"[10].

9. Synfuel added another argument, although there is a suspicion that this is merely a restatement of the basic attitude. Treadwell J said that such questions were the wrong sort to ask when determining whether to consent to land use. It would extend beyond "national" resources and include every commercial or industrial activity in New Zealand.

2.3 A Response to the Tribunal

With the greatest respect to the learned members of these Tribunals, it is submitted their decisions are a deliberate refusal to shoulder the burdens demanded of them by the TCPA. The meagre reasoning provided makes no attempt to measure the competing arguments, which is a crucial exercise when considering such fundamental issues as the purpose of important statutes. Instead it is devoted to justifying the chosen attitude, through a narrow and artificial reading of the provisions, in a virtual vacuum.

In the following pages, the first and eighth arguments are dealt with, s.4 is shown to be the crucial section, and the relationship between these two sections is explained.

2.4 Section 3 : Subjectivity

This deals with the first argument, which disparages s.3(1)(b)'s importance in determining the proper purpose of planning. It was also applied to para (a).

The attitude in this argument is not to be encouraged. All of the items in s.3 are matters of "national importance" which must be provided for in planning. It is not open to the Tribunal (or planning authorities) to be fastidious. Unwelcome though the obligation may be, they must comply.

The very language used by Treadwell J reveals an alarming determination to ignore the statute in favour of the Tribunal's own definition of their proper function. Where this definition is miraculously plucked from is not made clear.

To add to the fallacy, the accuracy of the comment is debatable. Whether something is "wise" does require judgement. So does a decision whether something conserves, protects or enhances.

The exercise of judgement is difficult to escape, under the language of s.3. Besides paras (a) and (b), three others clearly demand it. Paragraph (c) concerns protection from "unnecessary" development, and "preservation" of the "natural character" of shoreline environments. Paragraph (d) requires the "protection" of land with "high" food production value. Paragraph (f) involves distinguishing between "necessary" and "unnecessary" urbanisation. In each of these, note the language : "protection", "preservation", "high", "unnecessary".

Paragraph (e) is more objective - the prevention of "sporadic" subdivision, but Paragraph (g) probably involves a degree of subjectivity. It concerns the relationship between the Maori people, their culture and traditions, and "ancestral" land. How old is "ancestral"? What is part of their culture or tradition? "Relationships" between people and land are inherently intangible and would be difficult or impossible to identify through purely objective techniques.

The Tribunal's narrow definition of planning as involving only the question of "appropriate" sites, itself involves judgement. This is not only difficult to avoid, but impossible. Planning is not an absolute science, comfortably based on easy objective questions. It is a difficult task involving the balancing of many factors, and is an intrinsically judgement-based exercise.

The denigration of para (b) appears to be an attempt to reduce the credibility of arguments flowing from it. The insincerity of this approach is clearly demonstrated when the Tribunal then proceeds to adopt an argument supporting their attitude which itself rests on para (b)[10a]. The whole manoeuvre is exposed as a dubious attempt to undermine what will be shown to be a valid interpretation of the paragraph.

2.5 The "Recognise and Provide For" Argument

This was the eighth argument listed before. It concerned the first part of s.3(12) and its relationship with para (b). They were read together to mean that the obligation was to permit the wise use and management of resources. It was to facilitate such use, not to determine it. This argument is a classic example of a subtle slippery slope being used to deliberate advantage. The resulting interpretation is held out as being the purpose of planning.

It is assumed for the moment that this can be determined from interpreting these two parts together.

It is however, submitted that even if one accepts a further assumption that the first part of s.3(1) should be read as "permit", the argument still fails. All that it proves is that

it is to facilitate the "wise use and management" of resources. Concluding that this does not involve "end use" questions is seizing on "use" and ignoring "wise".

"Wise" has been included for a reason. It qualifies the use (and management) that can be permitted. Reducing the question to one of sites allows all operations and uses, contrary to the qualifier. At best it does not totally ignore it, while reducing it to something even less than expedience.

Semantic sleight-of-hand is used to achieve this reading. Treadwell J begins with "allow for", moves through "make possible", "enable", and ends up at "permit". He then uses "permit" in its "permissive" sense, leading to this laissez-faire approach.

"Permit" can also mean "facilitate" - for example "I now have a pen, which permits me to write". In this sense, the connection with "make possible" and "enable" is seen. These words do not have a great deal in common with "allow for", which has more of a sense of anticipating something or event.

It is submitted that "allow for" is inserted to prepare the way for the "permissive" sense of "permit". Treadwell J confidently expects no-one will notice the dropping of "for" from "allow". With this reference sunken in, the verbal shift from "provide for" to "permit" can be made.

It is agreed that "provide for" in this context means "facilitate". Consider for a moment "... an Act to provide for the establishment of ...". Such formulations are common in long titles of Acts designed to enable the achievement of actions or states expressed in those titles.

A consideration of the impact of Treadwell J's interpretation of the first part of s.3(1), on the meaning of the section reinforces the conclusion that it is erroneous.

Reading it as requiring only that schemes "permit" those matters, the provision is very weak. Besides the (wise) use and management of resources, it can "allow" the conservation, protection and enhancement of the environment; the protection of the coastal environment and high value food producing land; the prevention of undesirable urban sprawl into rural areas; and it can allow the recognition of the relationship between the Maori and their ancestral lands.

This requires very little of the planning authority. All the scheme is required to say is that if someone wishes to for example "enhance the environment", or protect farmland from "unnecessary" urban encroachment, then the authority will not obstruct them. There is no requirement for the Council to take

any positive steps at all. In a statute supposedly about "planning", such a total lack of planning would appear rather incongruous.

The discussion so far has accepted the assumption in the cases that it is s.3 which defines the nature of planning. The next section of the paper considers this assumption.

2.6 The Relevance of Section 4

Of major concern is the apparent perception in the cases that s.4 is unrelated to the issue. None of the cases consider it, and Smith is the only one to even mention it. That reference merely comments that "wise" also appears in s.4.

It is suggested that as "wise" does appear in s.4, at least some examination should have been made of its significance and meaning in that context. This is an elementary technique of statutory interpretation.

This fault is compounded when one notes that the entire phrase under consideration in those cases, is repeated in s.4(1). Such repetition demands that the provision be read when construing the phrase in another section. Once read, the section could be ignored if it is directed at something so different that its use

of the phrase is of no possible relevance to its meaning within s.3.

This is not the case, which makes this lack of attention a serious inadequacy. The full measure of the fault is apparent when it is realised that s.4(1) explicitly gives a definition of the purpose of planning.

It is, with respect, submitted that any attempt to explain the nature of the planning exercise must start at s.4. It defines the parameters within which the systems established under the TCPA may legitimately operate.

In contrast, s.3 is a list of matters that must be included within the exercise of planning. To elevate "providing for" one of these terms to the "purpose of planning" ignores its place within this list. It would be as correct to argue that the purpose of planning is to provide for the conservation, protection and enhancement of the environment, or the recognition of the Maori people, their culture, traditions and relationship with ancestral land.

None of these are correct. The purposes of planning are those stated in s.4(1). It is true that references are made to the wise use and management of resources in both sections. It appears the Tribunal has accidentally or deliberately overlooked this, and thus failed to realise the significance of s.4(1).

Section 4 is admittedly subject to s.3. This does not justify the leap to s.3 as the only important provision. Where a section is made "subject to" another, the superior provision operates as a boundary on the inferior, it does not obliterate the inferior's importance.

2.7 Stated Purposes of Planning

Section 4(1) is a comprehensive provision, stating the general purposes of planning for regions, districts, and maritime planning areas[11]. To simplify the discussion, "territory" will be used to refer to all three. The subsection also refers to the "health, safety, convenience and economic, social, cultural and general welfare" of the territory's population. This can conveniently be referred to as "welfare".

It is suggested the subsection establishes three purposes:

1. The wise use and management of the territory's resources.

2. The direction and control of the territory's development.

3. The protection and promotion of the territory's amenities and the welfare of its population.

The provision is not a model of clarity. There is what may

be termed a "causal relationship" expressed between the first two purposes and the third. These first two are to operate "in such a way as will most effectively promote and safeguard ..." This does cause some difficulties of interpretation.

It may suggest that only the first two are the expressed purposes of planning. The third may be a parameter within which they are to operate. Alternatively, the third may be the only purpose, and the first two are the means by which it is assumed that purpose can be realised.

The significance of these alternatives is that in subs.(2), the purposes in subs.(1) are to be the objectives of the planning schemes. Either of these interpretations would leave at least one of the elements in subs.(1) in limbo.

If the first alternative were correct, the "operational parameter" relates to the planning exercise in some general sense, but is not expressly relevant to the principal instrument of planning, the scheme. It was considered necessary to explicitly adopt the purposes of planning for the instrument. It may be open to argument that similar provision must be made for the operational parameter before it becomes relevant.

Similarly, the two methods (as construed by the second alternative) are not expressly relevant to the schemes. While "planning" must be achieved through these two means, the schemes are not limited by this constraint.

In reply, it may be said that the explicit adoption of these purposes for the schemes was out of a concern to emphasise the primacy of these purposes. It does not necessarily mean those other elements are excluded. Therefore that parameter or the limitation to those methods is relevant to the schemes.

This too is a potential reading of the provision. But it is submitted that the uncertainty is undesirable. It would be avoided by adopting the interpretation advocated. In addition, it is difficult to understand why such external matters would be dealt with in the definition. It would be clearer to state the definition, then impose the constraint or identify the means in a separate provision. Incorporating all three into the one subsection tends to suggest all three are part of the definition.

2.8 End Use Issues

It is submitted that all three of these purposes demand consideration of "end use" issues, that the Tribunal is seeking to avoid.

2.8.1 Amenities and Welfare

"Amenities" are defined in s.2(1) as:

> "... those qualities and conditions in an area which contributes to the pleasantness, harmony and coherence of the environment, and to its better enjoyment for any permitted use."

This might suggest that planning does only involve the sorts of issues that the Tribunal was willing to consider. This impression is reinforced by the references to the health, safety and convenience of the population.

This is less certain when one takes a closer look at the types of "welfare" specified. It is submitted that economic, social, and cultural welfare are factors associated more with end use issues than a mere allocation of appropriate sites.

2.8.2 Direction and Control

It is possible to convince oneself that this purpose refers only to questions of site. It does have the words "control" and "development".

But that development refers to development "of the" territory. It is submitted this refers to how the territory develops. Compare that language with development "in the" territory. This has a greater implication that the reference to "territory" is just to define the borders of a jurisdiction.

There is also the word "direction". This would be unnecessary if site was the only issue. "Control" would be adequate even if it was interpreted narrowly as involving only the ability to say "yes" or "no" to a proposed site. "Direction" is a more extensive word. It involves determining the path to be followed, and not just where the traveller is not to go. This supports the argument that this element of s.4(1) involves how the territory develops and thus inevitably requires "end use" considerations.

2.8.3 Wise Use and Management

The argument from this language is straightforward. A purpose of planning is to ensure that the use and management of a territory's resources is "wise". This inevitably will require a judgement on the worth of the end product.

In Smith, Treadwell J said, in relation to very similar language in s.3(1)(b) said[12]:

> "The word 'wise' is capable of many interpretations as is the word 'resources'. There is no indication in the section that it is to be restricted to land use planning and it is only by implication that the wording can be contained in that manner."

The Tribunal's intention is to limit the significance of s.3(1)(b) to a provision which says that planning authorities are to allocate land on which they are to permit the use and management of resources.

The same semantic surgery cannot be used on s.4. It demands that planning authorities strive to ensure their territory's resources are used and managed in ways that are "wise". There is no "provide for" to read down as "permit".

Treadwell J overstates the meanings of "wise". It does have shades of meaning that range from something approaching mere prudence, to a quality altogether more profound and erudite. Whatever its exact meaning, it involves a judgement of the merits of the particular case.

2.9 Causal Relationship in Section 4(1)

Recall that in s.4(1), the first two purposes of planning are to operate "in such a way as will most effectively promote and safeguard the amenities and welfare of the population of the territory". In other words, the first two purposes are subordinated to the third. This is necessary for the second, which has no internal values of its own with which to choose a direction. It is crucial to the first.

The second purpose is concerned only to ensure that there is control and direction of the territory's development. It is not concerned with the destination. This is provided through the causal relationship with the third : the destination chosen must be one that protects and promotes the amenities and the population's welfare.

The first is concerned with the quality of the response to its requirement. That response must be "wise". Read on its own, this could demand the consideration of an enormous range of factors, from the local, through the regional, to the national and even the international.

But it too is related to the third purpose, which is limited to the territorial boundaries. It is not immediately clear whether planning authorities need only consider the wisdom from a

territorial perspective, or whether the wider perspective is still required.

The scheme of the section itself is of limited assistance. The third purpose is territorial in scope. The second is confined to the development of the territory, and is constrained by the third purpose. Therefore at least two thirds of s.4(1) are purely territorial in focus.

The first purpose might be. This would make all three purposes neatly consistent. It is after all, planning for that particular territory. Equally the "wise use and management of resources" might deliberately go beyond territorial concerns, so that any plan must satisfy priorities both within and without the particular territory.

The two interpretations are that planning either looks within the territory, and is only concerned with what is best for that territory; or, while that is the overriding criterion, planning must also search for decisions that also are best from a wider perspective.

It will be seen from a subsequent section of this paper detailing the planning procedures, that the second interpretation is correct. Even district planning, which has the most limited definition of eligible objectors, includes the Minister, that district's regional authority and various public authorities not only with jurisdiction in the district but also adjacent to it. Further, regional planning is subject to Ministerial consent, which ensures the national perspective is adequately catered for.

2.10 Remaining Arguments

2.10.1 Need for Greater Powers

This heading refers to arguments four and five from the summary of the cases' reasoning. Those arguments were that the TCPA did not confer these wide powers of economic appraisal on councils, and it was illogical to restrict them to planning consents or scheme changes.

Bald arguments that no such powers are conferred, are self serving. That is the issue that must be decided.

The assertion that there are no such powers in the Act was supported by an argument based on present zoning practice once an area is zoned, permitted activities cannot be screened further by councils. This may be so, but it is of little help in resolving this issue. If the interpretation of the TCPA advocated in this part of the paper is correct, serious doubts are raised as to the adequacy of existing zoning practice. The TCPA does permit district schemes to distinguish between various classifications of land, including that on which certain activities are permitted as of right[13]. This has been taken to mean distinguishing say 'industrial' from 'residential'. The reading of the TCPA given by this paper will probably require a significantly greater amount of specificity (even greater than the present gradations of class, e.g. "Industrial A").

It is wholeheartedly agreed that if councils did have such powers, it would be illogical to restrict them to determining planning consents or changes to the scheme. But there is no logical reason to make such an artificial limitation. It would make sense to possess them at all stages of the planning process, especially at the crucial formative stage, when the scheme is first prepared. Such powers would also be necessary at the review stage of the scheme (the procedures for preparing the schemes are considered later in the paper).

It is submitted that there is little to commend this argument.

2.10.2 Inappropriate Body

This is argument six from the summarised reasoning of the cases : that councils are not the appropriate bodies to determine the resulting policy issues. It is submitted that this is no argument. If the legislation puts the responsibility on councils (and the Tribunal on appeal), it must be borne. Parliament has considered they are appropriate agencies. If this is too onerous, then the reform should come through Parliament, not through a strained reading of clear language.

2.10.3 Inappropriate Question

This was argument nine from the summary, an argument lifted from Synfuel. It really is no more than a restatement of the cases'

conclusion, and can have no life of its own. If the attitude underlying those cases cannot be supported on the legislation, this argument cannot tip the balance the opposite way.

2.10.4 Expertise

This argument perhaps gets closest to the central concern of the Tribunal. Local Government is simply not equipped to determine complex issues of resource allocation. To make such decisions adequately, a vast range of expert opinion is required, to identify the major considerations, and the likely effects of each option, immediately, and in the longer term. Scientific and economic factors are not easy to understand or calculate from, without detailed training. Qualifications in the social sciences would be required to properly assess the impacts of decisions on the social environment.

Central Government does have at its disposal such advice. Yet Parliament has seen fit to delegate this function to local Government instead. In that case, this argument is no answer. The challenge is to obtain access to such advice, either through central Government facilities, or elsewhere.

2.11 Sections 3 and 4

The thesis of this part of the paper is that planning inevitably involves judging the merits of potential uses of resources, and

is centred on a reading of s.4(1). The argument in Smith is that the nature of planning, as revealed by s.3(1)(b), means that planning schemes only have to determine where a person can do whatever they are proposing to do. Section 4 is subject to s.3. This does not mean that while "planning" is aimed at allocating resources, the schemes are only aimed at allocating sites. The schemes are the instruments through which planning is achieved, and so must follow the nature of planning itself. It is put beyond doubt by s.4(2) which gives for the general objectives of planning schemes, the purposes expressed in s.4(1).

Much of s.3 may suggest that it is just a list of criteria by which to consider sites. For example, paras (c) to (f) do refer to the avoidance of harm to certain types of area, and para (g), in referring to "ancestral lands", is also site-oriented. However, we have seen that the planning exercise, as defined in s.4(1), is not so limited.

The use of the word "general" with "purposes" in s.4(1) explains the nature of the relationship between ss.3 and 4. Section 3 is a list of specific sub-obligations to perform while complying with the obligations in s.4. They are perhaps intrinsic elements of s.4(1) that are repeated to make absolutely sure they will be satisfied. Alternatively they are not necessarily part of the s.4 obligations, but are included in the exercise anyway. It is unnecessary to decide which is their correct origin, for in each

case the obligation is the same.

Thus, in fulfilling the purposes of planning in s.4(1), there is a specific obligation to include provisions that are aimed at ensuring resources are used and managed wisely. The administration of the schemes must ensure that they are so managed and used.

"Ensure" is used with deliberation. We have determined that "provide for" can be read as "facilitate". Section 3 obliges the administration of the schemes to facilitate the wise use and management of resources. They cannot be administered so as to facilitate unwise uses, or the qualification "wise" would be unnecessary. If unwise uses were to be allowed, the instruction would be to facilitate "uses" or "all uses", without any qualifier such as "wise".

2.11.1 Whose Resources?

Section 4(1) refers to the wise use and management of the territory's resources, whereas in s.3(1)(b), they are "of New Zealand". It is submitted that this is not a distinction of title, between "local" and "national" resources. It is possible to say New Zealand owns the resources within itself, but the same cannot be said of any one territorial division, which are partitioned for administrative purposes only. They do not have a separate jurisprudential identity such as that possessed by nations.

This may not be true of federal systems such as the United States, Australia or even Canada, where legal competence is divided between federal and State/ Provincial governments. It is submitted that New Zealand's local government system is too dissimilar to these examples for any argument by analogy (assuming that it can be said of such systems that ownership of resources is divided).

Therefore in the final analysis, all resources are vested in the Crown (except flowing water, over which it is impossible to have title).

A more acceptable interpretation might be that the distinction is between juridsictions to determine the allocation of that particular resource. Thus the "resources of New Zealand" refers to those that central Government is to allocate, through special statutes such as the Coal Mines Act 1979 and the Petroleum Act 1937.

This explanation must fail also. Section 3 concerns those matters that planning authorities are especially to "provide for" (facilitate) in their schemes, and, as the qualifier "wise" is added to s.3(1)(b), they are not merely to facilitate all uses of these resources that are sanctioned by central Government, but must decide for themselves the desirability of that proposed use.

"Wise" must bear this significance in s.3(1)(b) because it would be too arbitrary a distinction to accept that meaning in s.4(1), and to reject it in s.3(1)(b). If a different meaning was intended for s.3(1)(b), the language would not mirror s.4(1) so minutely.

The conflict that arises between these requirements and statutes such as the Petroleum Act 1937 are considered in more detail in Part IV of this paper.

It is submitted these words are intended as spatial parameters. "Of the region" refers to those resources found within that region (and similarly for a district or maritime planning area). "New Zealand's resources" are those found within New Zealand overall.

This does not mean that each planning authority must (in addition to determining the appropriate allocation of the territory's resources) determine the overall allocation of all New Zealand's resources. Their function is to administer their territory, and if they presumed to decide such questions for the entire nation, they would have no power to enforce those decisions. The conclusion is that the difference is merely a result of loose drafting perhaps influenced by s.3 being about matters of "national importance".

These words refer to the importance for the nation of having those matters provided for in the planning schemes. Thus it is of importance to the nation that schemes provide for the conservation, protection and enhancement of the environment[14]. This language should not have persuaded the drafter of s.3(1)(b) that they were to write a provision aiming at "national" resources, but it is possibly the only explanation for the reference to "New Zealand's resources".

2.12 Summary

It is not open to the Tribunal to denigrate "subjective" elements in the planning process. Planning is essentially a question of judgement. The Tribunal attempts to read the statute as permitting all uses and management of resources, but even on the most liberal of concessions to that approach, s.3(1)(b) cannot be read without the qualifier "wise", which imposes a standard by which to judge. Furthermore, s.3 is not just about what is to be permitted, it is about what is to be facilitated. The list in s.3 is of a number of subobligations to be satisfied while engaging in the planning exercise. This engagement is to be governed by s4(1) which gives three purposes for planning. All three require consideration of the merits of the end products of resources. Particular note should be made that the semantic arguments used in relation to s.3(1)(b) cannot work on s.4(1) because there is no "provide for" to read down as

"permit". This interpretation cannot be rejected by pointing to present practice as the manifestation of the powers conferred by the Act. Nor can the responsibilities be rejected as inappropriate or too burdensome for local government. These may be good arguments against conferring resource allocation functions in the first place, but they do not justify distorting the Act to avoid the task.

3.0 STRATEGIC POTENTIAL : PRESCRIBED CONTENTS

So far this paper has been concerned to establish that planning involves making judgments on the merits of resource uses. We will now see that it is not merely a series of isolated decisions on particular proposals, but should be made ahead of time.

In the first instance, these judgments have to be made in the course of preparing a planning scheme. Therefore the system should be producing forward looking strategies. The merits of particular resource uses are to be predetermined.

It was noted previously that s4(1) required a determination of how the territory was to develop, by making one of the purposes of planning, the direction and control of the development of that territory. That planning schemes are to work as a strategic blueprint is supported by considering the contents prescribed for them by the TCPA.

3.1 The Sections

Section 4(2) requires regional schemes to have a statement of the objectives and policies for the region's future development, and the means by which they can be implemented. While "policies for future development" could be read down as referring only to a need to accommodate any future developments that occurred, the

use of the word "objectives" prevents this provision from bearing only that limited meaning. Its presence ensures that the regional authority must decide what sort of future the region should have, and plot the paths by which to reach that future.

Notice that the subsection refers to means by which the objectives "can be" attained. This provides a considerable degree of flexibility, and would allow the mapping of several alternative routes to the same end.

This provision probably entails a wide element of flexibility at a more basic level too. There is nothing in the language that requires that statement to contain only a single set of objectives and policies. It would appear to be quite open to a regional authority to provide for alternative futures.

At the same time, to remain anything like a "planning" exercise, the scheme must not just list all the possible destinations, and routes by which to reach them. It should involve discriminating between destinations and routes. Only the most desirable should be selected, otherwise the scheme cannot control and direct the development of the region.

Section 104(3) uses similar language when referring to the contents of maritime schemes, although it does not mention "future development". This omission is probably not too significant as the scheme still must provide for the authority's objectives for

the area, and the means to attain those. This still implies a sense of determining where to go from the present and how to get there.

Section 36(1) does not use this language for district schemes, only requiring that councils are to make provision for such matters in the (second) schedule as appropriate having regard to the "requirements" (present and future) of the district, and its relationship to neighbouring areas.

Once again the difference may be more cosmetic than real, as not only are the immediate needs of the district to be catered for, but also those in the future. The same sort of questions would be asked : What will be needed? How are we to satisfy that?

In stating this, s36(1) is given a liberal construction. It might be read as referring only to land allocation, involving some consideratin of the neighbours and the future. But this reading cannot survive the force of s4, which establishes that planning involves more than that.

Both ss11 and 36 require the schemes to provide for matters in the appropriate schedules. There does not appear to be any requirement for maritime planning authorities to do the same, although s104(5), concerning the preparation of a planning scheme in sections, comtemplates that it should be done.

3.2 The Schedules

3.2.1 First Schedule : Regional Planning

The first schedule to the Act lists the matters that should be provided for in regional plans. Clause 1 requires the determination of certain needs[14a] of the region in particular fields, and in their light to provide for the "appropriate" social and economic opportunities. Clauses 5, 6, 8 and 9 refer to other needs[14b] of the region. "Providing for" these matters would require the identification of these needs, and decisions on how to satisfy them.

Clause 10 empowers planners to include the scale, sequence, timing and relative priority of development when "presenting policies and strategies on many of the matters listed in clauses 1 to 9 of the schedule".

The decisions involved in setting those parameters have the potential to make regional planning an extremely deep exercise. Previously the possibility of providing for alternative futures was discussed. There may be room to consider several orders of priority for each alternative. Making use of clause 10 as well as this scope for alternatives could create a very complex document, covering a range of permutations.

So long as this was clearly thought out, this would not of itself offer major problems. It would need very clear forward thinking

to ensure that the permutations chosen offered a broadly compatible set of choices, and not so many unrelated options that the plan was meaningless.

3.2.2 Second Schedule : District Planning

Clause 1 refers to "the" needs of the district, both present and in the future, ie any and all needs. Clause 2 refers to land uses and activities appropriate to the "circumstances" of the district.

A dictionary[14c] defines circumstances as (inter alia) "surroundings", but it is submitted that clause 2 does not refer merely to appropriate placements. It would then be referring to the circumstances (surroundings) of the district, not those of sites. A more coherent interpretation would result from adopting another interpretation from the same dictionary, being "the state of financial or material welfare" (emphasis added). The word focusses on the condition of its object, being here the district[14d].

Clause 10 is an abbreviated reference to the "programming" of development as in clause 10 of the First Schedule.

3.2.3 Third Schedule : Maritime Planning

Clause 4 of the Third Schedule refers to the "maintenance or attainment of water quality appropriate to the circumstances". It is not completely clear whether "circumstances" is being used

in the same way as in the Second Schedule. "The circumstances" by itself could refer to the surroundings, but it is perhaps more meaningful to gauge water quality by referring to a broader frame of reference than merely the physical environs.

Such a frame would include the types of issues that have indicated in the foregoing parts on regional and district planning, ie what sort of positive policies should be adopted? This is supported by "attainment" in the clause, which suggests a setting of goals and moving towards them.

Clause 3 covers provison for activities considered appropriate to the circumstances and the purposes and objectives of the scheme.

The third schedule makes no reference to "programming" priorities as the other two schedules do. Presumably that could still be done under the clauses implying a strategic element. It would surely be part of "providing for" a particular matter, to establish its relative priority against other matters. What can be said about its omission is perhaps that there is no explicit reminder to consider such questions, whereas there is for the other two.

3.2.4 Summary

There are a variety of differences between these groups of provisions. One of the largest is that only regional and maritime plans require explicit statements of strategy. These in conjunction with the

requirement to make provision for the items in the First Schedule provide considerable potential for mapping out detailed options for the future, while retaining flexibility.

The District planning provisions include a direction to determine what is appropriate to provide for from the schedules, which it has been suggested, entails the same issues as for regional and maritime planning. The difference is that the latter two must explicitly articulate their strategy whereas it remains implicit for district plans. This expression would be a useful focus in reviewing the schemes, and the process of articulating the strategy would force a careful analysis of it to ensure the statement was accurate. That is useful in identifying its strengths and weaknesses.

In each case the exercise involves considering what the most desirable options for the future are, and identifying the best means of reaching them. While the other differences in drafting are really only cosmetic, they are less than desirable, as they needlessly obscure the essential similarity of the provisions.

It is perhaps worthwhile pointing out that these provisions discussed here also support the thesis that planning involves judgment of the merits of particular resource uses. Each one requires discrimination between various ways to attain desired futures. The schemes are strategies for <u>resource</u> allocation, not merely site allocation.

4.0 PLANNING SYSTEM

This section describes the authorities responsible for planning and the processes involved in the preparation and maintenance of schemes. The description focusses only on the main features of each. The purpose is to provide a basis for comparison with the WSCA and the energy-related statutes in Part IV . Each of these statutes approaches the question of resource allocation with such different solutions that only a broad comparison can be made within this paper.

4.1 Territorial Divisions

4.1.1 Districts and Regions

The history of the development of local government is a long and tangled one, which is too involved to trace here. By the time of the TCPA it had resulted in an array of different divisions : city, borough, county and district. All of these are "districts" and "district councils" for the purposes of the TCPA.

Regions are constituted by the Local Government Commission according to ss.17 to 24 of the Local Government Act 1974, (LGA). These sections provide for an involved process that includes a considerable element of public participation, and is similar in nature to the planning procedures under the TCPA. The Commission prepares a provisional "Regional Scheme", there are objections and submissions, and a final scheme is prepared.

Regions are formed from groups of districts, which must be kept completely intact : s.40(5) LGA.

4.1.2 Maritime Planning Areas

These are constituted by the Governor General by Order in Council, according to s.96(1)(a) TCPA. This is "on the advice" of the Minsters of Transport and Works and Development. Presumably this is a mandatory requirement.

The two Ministers are to notify the public of the proposed planning area and must call for submissions[15]. There is no express provision for criteria relevant to considering submissions. The structure is so bare, that there is not even an express requirement to consider the submissions at all, although this would appear to be contemplated by the Act, as it imposes the obligation to call for submissions.

Generally speaking, the territory of a maritime planning area is all that between the seaward side of the high tide mark, and the outer limits of the territorial sea[16].

4.2 Planning Authorities

4.2.1 Districts

There are a variety of possible authorities. No doubt normally it will be a city, borough, county or district council[17].

Section 2(1) of the TCPA also includes "other" authorities responsible for the administration of the district. The Minister of Works and Development has a residuary jurisdiction, derived from two provisions. Under s.2(1), the Minister is the "Council" for the Act where there is no other authority. Section 39 empowers the Minister to take any necessary steps to prepare a district scheme if the Council fails to.

4.2.2 Regions

The LGA provides for the constitution of councils to administer the regions that Act establishes. Regional Councils are elected by popular vote, each member representing a constituency[18]. Constituencies can be entire, or combined districts, or wards of districts[19].

United Councils are appointed by the constituating authorities of the region[20], generally one nominee per authority, although sometimes a nominee may represent several authorities[21]. Whether there is a regional or united council for the region depends on the capital value of that region, and the size of its population[21a].

Section 5 of the TCPA imposes responsibility for regional planning on all regional and united councils except as provided in s.23. Section 23 preserves "Regional Planning Authorities" (RPAs) which were constituted under the Town and Country Planning Act 1953. While that Act as a whole is now repealed, certain provisions are served under s.23 of the new Act so that these RPAs can continue to function. Operative and proposed schemes under the former Act are also preserved[22].

4.2.3 Maritime Planning Areas

Section 98(1) TCPA empowers the Governor General to establish Maritime Planning Authorities by Order in Council. This is "on the advice" of the Ministers of Transport, and Works and Development, which presumably is a mandatory procedural element. The Local Government Commission may become involved through the Ministers' discretion to consult it[23].

There is a wide range of potential candidates, from a regional or United Council; to a Regional Planning Authority; to a Harbour Board; to "any other existing public authority"[24]. Section 98(2) constrains the choice when the Area is entirely within a harbour as defined in the Harbours Act 1950. The Harbour Board is to be appointed unless it does not want the responsibility.

4.2.4 Summary

The district/regional structure is set up by statute, but that is the limit of central Government's role in its operation. Membership is locally determined, and as far as regional councils are concerned, there is a high degree of direct public participation. Local government generally is a decentralisation of certain aspects of the administration of the nation. The TCPA has grafted onto this existing skeleton the considerable flesh of the planning function under that Act.

Central Government has total control over the formation of maritime planning areas and the appointment of Authorities at the highest level. Membership is locally determined, with some direct public participation (viz. elections for regional councils and Harbour Boards).

4.3 Planning Procedures

4.3.1 General

Although planning schemes for regions, districts and maritime planning areas all share the same purposes and objectives (s.4(1) and (2)), and must all recognise and provide for the same matters of national importance, the procedures by which they are to attempt this are quite different. In the broadest perspective, they are similar, each having a formative stage, a revision stage, and an approval stage. It is the detail of each stage that differs. Each process will now be outlined separately and then all will be considered together in a comparative analysis.

4.3.2 Regional Planning Schemes

The first step towards a regional plan is a public notice of the intention to prepare a scheme. The Minister and any "interested" body or person may make submissions on matters that should be included in the scheme[25]. These must all be

considered[26], by whatever means that are deemed appropriate, including public meetings : reg 6(2) Town and Country Planning Regulations 1978, SR 1978/130.

There are other preliminaries also contemplated. Where they are considered necessary, the region's planning authority is obliged by s.11(5) to undertake studies, enquiries, discussions and negotiations as soon as practicable.

Then a draft scheme is prepared. This is to be accompanied by a report identifying the range of measures designed to deal with regional matters, and the isues to deal with. The particular choices preferred in the draft must be justified with reference to economic, social and environmental factors[27].

The revison of the draft begins with the notification to the public of the draft. Again, "any interested body or person" can make submissions[28]. While the Minister is not (in comparison with the first stage) referred to in the provision for submissions, this may not be significant, as reg 8(1) provides that the Minister and any interested body or person can make submissions[29]. Again consideration of the submissions may involve public meetings[30]. This consideration may lead to amendments in the draft.

At this time the draft becomes a proposed regional scheme. There is a mandatory pause, in which local authorities can

bring the proposed scheme before the Planning Tribunal. This will be considered in a moment.

At the end of this period, the proposed scheme is forwarded to the Minister[31]. The Minister will either recommend the scheme be approved, or send it back for further consideration. This is open to the Minister over "matters of national importance with planning significance outside the region"[32]. The writer submits that this is referring to the matters of national importance in s.3.

The regional authorities are not bound to accept the Minister's view, and are not legally obliged to change the proposal before resubmitting it. However this is likely to be a factual necessity if they wish to obtain the Minister's favour.

Formal approval is granted by the Governor General through an Order in Council[33].

The Tribunal may become involved in this process at two stages. The first is immediately after a draft scheme becomes a proposed scheme. Local authorities then have the chance of requiring the Tribunal to consider matters included or excluded from the plan[34]. This is a public inquiry, with the Tribunal's full powers as provided for in Part VIII of the TCPA[35].

The Tribunal makes a recommendation[36]. If the regional and the local authority have failed to reach agreement on a compromise, the Tribunal will make a final decision[37].

The second place is where the Minister and the regional authority are deadlocked over matters of national importance with extra-regional significance. The Tribunal is to make a recommendation[38], which is the full extent of its jurisdiction in such matters. It is then up to the Minister and the authority to reach agreement, although there would be nothing in the way of returning to the Tribunal for another attempt.

4.3.3 District Planning Schemes

The formative stage of the District Scheme is rather different from that of a regional scheme. There is no initial public input, and it is in fact provisionally approved[39] by the Council before the public have access to the process. In between approval and public notification, there is a stage in which various public authorities are notified and given the opportunity of requiring provision for public works.

Section 44 requires public notification of the draft scheme. Those able to make submissions or objections are prescribed by s.2(3). They are the Minister; those united or regional councils, regional planning, maritime planning and local authorities with

jurisdiction in or adjacent to the district; any "affected" person; and those representing an aspect of the public interest.

A further round of submissions ensues once the Council prepares and notifies the public of a summary of requests for alterations to the draft, that came in the first round[40]. This second round is more properly described as generating notices of support or opposition to the requests.

Every submission is to be considered, and everyone making submissions in the first and second rounds has a right to be heard at the public hearing that is contemplated by the TCPA and regulations[41]. Each objection is to be allowed or disallowed individually[42].

When all submissions and objections have been determined, the draft is amended where necessary to effect those decisions[43]. All appeals must also have been determined. These are considered in more detail shortly.

The Council approves the final draft. They have the option of approving all or part of it[44]. Presumably this provision is to enable the rest of a scheme to proceed while a snag in relation to a particular segment is resolved.

The Council does not have the untrammelled power to determine the contents of the district scheme. Section 49 provides for

appeals to the Tribunal related to any decision on a submission or objection. The Tribunal is able to overrule the Council.

4.3.4 Maritime Planning Schemes

The formative stage for these schemes resembles that for regional schemes. The Planning Authority must decide the principal matters that should be dealt with in the scheme[45], and the possible options to provide for those matters[46]. Submissions are received and considered. There may be studies, inquiries, discussion and negotiation. It is submitted that in providing for such preliminary consultations the Act seeks to encourage this approach.

A draft is then prepared and submissions called for. Section 105 enables "any body or person" to make submissions, which is an apparently wider pool of potential objectors than exists for district schemes. This may seem a little odd in view of the rest of s.105 which applies ss.45 to 49 of the TCPA to this stage. These sections refer to the public participation in forumlating district schemes, including appeals to the Tribunal.

The Authority makes any amendments considered necessary in the light of the public input and any appeals, and then will approve the scheme by gazetting it[47].

4.3.5 Comparison and Summary

The beginning of this section identified three broad stages in the preparation of planning schemes : the formative, the revision and approval. There are a number of differences between the various procedures, not all of which are readily explainable.

The formative stages of regional and maritime plans are very public. By contrast, that for district planning is very private.

The pattern is reversed in the revision stage, the regional process being the odd one out. It has a more limited form of public input, allowing only one set of submissions, and no rights of appeal for the public. Maritime and district planning both allow two sets of submissions, the second being responses to an ordered summary of the first. The similarity is not complete as maritime planning can involve a greater section of the community.

In some respects this pattern of public participation is understandable. The next section will illustrate how the regional plan acts as a 'master plan' for the other two schemes. It would seem a desirable policy to have that plan reflect the community concerns. Therefore regional planning involves public participation at the earliest stage. The community defines what is important to it through this early opportunity. It is then up to the planning authority to translate those concerns into a plan.

With district planning, the community has less freedom to define these concerns, as the terms of the regional plan constrain scope of district planning. The emphasis shifts more to a council interpreting the implications of that plan for the district, and presenting that interpretation for public reaction.

This view of the structure has a certain symmetry in that as the public are kept out of the formative stage of district planning, so they have a greater role in the revision process of district plans.

The difficulty is that maritime plans are equally constrained by regional planning, yet have a similar formative stage, in that it involves public participation. It is different in that it is the planning authority that defines what matters are important from the very beginning. This aspect is similar to district planning. In other words, maritime planning has a curious amalgam of the two systems in its formative stage. Nor does this explain why only local authorities may appeal in respect of a draft regional scheme, when it is open to any objector to do so for the other two.

The mechanics of the approval stage vary. The district and maritime schemes are approved by the planning authorities, though in different ways. The regional plan is approved at the highest political level. This is perhaps understandable, as it is regional planning that ultimately determines the content of the subordinate schemes, and Parliament has wanted to keep some central Government

element in this otherwise decentralised system. It is logical to have that element at the most strategically influential position.

It is odd to note that only regional planning, which we have viewed as a process in which the public help define the important issues, involves an explicit justification for the decisions made. Neither district nor maritime planning authorities are required to produce a report justifying the provisions of the draft scheme, yet in both it is the authorities who make the decisions such a report justifies.

Such a requirement can be advantageous. Having to justify decisions in writing will often bring out the strengths and weaknesses of those decisions. That knowledge would be useful in the revision process. As it is the district and maritime authorities which originally decide what should be in the draft scheme, one might have thought that such a justification for that draft would first be used in those contexts. Its absence is a puzzling omission.

This paper is not primarily a critique of the procedures involved in resource allocation from within their own statutes. It focusses on the connections and contradictions between the statutes. However the writer considers that some note should be taken of the comments above, and the awkward way in which maritime planning sits with regional and district planning. Its formative stage is a curious hybrid of regional and district planning, but its revision process is borrowed from district planning with the

exception of the definition of those who may object. This appears to be wider in maritime planning.

The body acting as the maritime planning authority can be any of a number of bodies set up for different purposes, including a regional or united council. This gives the maritime authorities something of an aura of the ad hoc, in comparison with the other planning authorities which are firmly based on the system of local government.

Those comments aside, what should be noted about all the procedures is that they possess a degree of formality. All three involve formal plans, which cannot be simply altered[47a]. The planning authority has to obtain public reaction at least once, and sometimes twice. Ultimately all draft schemes are subject to judicial opinion (from the Planning Tribunal) on their merits. It perhaps is an unusual use of a self confessed judicial body, to have them as the ultimate arbiters in questions of policy.

There are particular features to note about regional planning. It involves the formal justification for the decisions made. It has an element of informal information generation : the requirement to undertake studies, negotiations and studies "as necessary". It is in the end dependent on Ministerial consent for its adoption, which operates above the Tribunal's jurisdiction. This political involvement is to ensure the national perspective is adequately catered for. It is not the only injection of the national

perspective as the Minister may become involved at earlier stages of all schemes as an objector. It does operate as an effective guarantee that the 'master plan' will reflect what is considered to be in the national interest.

4.4 Interrelationships

4.4.1 Heirarchy

Planning schemes can be arrayed in a basic pyramid, with regional planning at the apex and the other two at the base. This is provided for in general terms in s17(1) TCPA, and again in more specific form in ss37 and 112. These require that the subordinate authorities give effect to the regional scheme when preparing their own[48], and that the regional scheme prevails over the others[49].

Generally the subordinate schemes must change in the event of a conflict[50], although some inconsistencies are permitted. The conflict can be referred to the Tribunal, which has jurisdiction to require the subordinate or the regional plan to be changed[51].

4.4.2 Interaction

Regional authorities only govern district and maritime authorities through the schemes, but they do have another avenue of direct input into these subordinate processes. Section 10[52] confers

on regional authorities power to become involved through submissions on proposed schemes, at the public participation stages. Additionally, the provisions regarding standing to object to the proposed schemes permit this involvement anyway[53].

These powers extend to participation in the procedures of subordinate authorities outside the actual region. They include adjacent districts, and there is no geographical restriction for the maritime procedures.

There is also power for a more informal involvement by way of advice, recommendations and assistance[54]. This includes interaction with other regional authorities. While there is no national planning authority, this may provide some basis by which regional authorities can begin to look at planning on a national level.

In return, councils and maritime planning authorities would have standing to participate at the public input stage in the production of regional plans. This is also specifically authorised for maritime authorities under s102, which includes a similar informal power of involvement as that for regional authorities.

There is no such specified list of functions for district authorities.

4.5 Implementation

4.5.1 Methods

We have seen that regional plans operate as a 'master plan' for the other two schemes. Its implementation is through these subordinate authorities ensuring that their schemes are consistent with the regional plan.

Both district and maritime planning involve procedures to consent to activities. These differ considerably in detail.

Section 36(4) enables district schemes to distinguish between classes of use or development in various ways : those that are permitted as of right, those for which the site must be approved ("conditional uses") and those that are permitted subject to discretions specified in the scheme. Section 36(5) enables councils to confer certain discretions on themselves, which basically are to give effect to the councils environmental impact policies[55]. Permission can also be obtained outside of these, through the "specified departure" consent in s74[56].

It appears that controls on resource allocation in districts are implemented through decisions as to what uses are permitted as of right, and decisions on conditional use and specified departure applications.

There are criteria specified for determining these applications.

For a conditional use consent, the council is to have regard to the suitability of the site[57], and[58]

> "the likely effect of the proposed use on the existing and foreseeable future amenities of the neighbourhood and on the health, safety, convenience, and the economic, cultural, social and general welfare of the people of the district."

There are three requirements that must be satisfied before a specified departure is granted[59]. It must not be contrary to the public interest. It must have little planning significance outside the site's vicinity. The scheme must be able to remain unchanged.

Both ss72 and 74 are subject to s3.

Section 108 imposes an apparently inflexible obligation to comply with the maritime planning scheme. It appears that if an activity conforms with that scheme no further consent procedures are applicable. Section 110 does permit the maritime authority to consent to exceptions to the scheme. Applications are made, any submissions are received (from "any body or person"[60]) and then the decision is made.

The procedure for consents under the district scheme is similar. Section 66(1) defines those people that can make submissions[61].

This is a more limited pool than that for maritime planning. Under s67, the council is empowered to determine the application after it, and any objections have been heard. It is unclear why, although the process is similar, the rights to object are so much wider for maritime planning.

4.5.2 Implications for the Thesis

If the Tribunals in Smith, Petralgas and Synfuel had considered ss72 and 74, they might have found several more arguments to support their restrictive interpretation of the nature of planning. Section 72(2)(a) refers expressly to the suitability of the site. Section 72(2)(b) refers to the amenities of the neighbourhood. This would tend to suggest a focus on the site, as neighbourhood is generally a more intimate space than an entire district. "Amenities" is defined in s2(1) and relates to the qualities of an area that contribute to the harmony and coherence of the environment. Section 74(2)(a) refers to the "immediate vicinity".

Arguments could be advanced on these bases, that as these provisions (which relate to the implementatin of planning) refer to factors concerning sites, planning must also be concerned with siting. Such arguments could be supported by referring back to s36(4), which involved determining classification of land according to classes of use, and not specific uses.

However, ss72 and 74 are both subject to s3, which has been shown to involve also the more rigorous exercise of resource allocation.

Section 74(2)(a) would allow the broader interpretation of planning advanced : its last words refer to the ability of the provisions of the scheme to survive the departure.

The conclusive argument is that s72(2)(b) uses the very language of the third purpose in s4(1) which was used as support for this broad view of planning. It could hardly have been intended that a conditional use application is to be determined with reference to the merits of the resource use but a specified departure is not. Therefore the thesis of this part survives this challenge.

5.0 SUMMARY

5.1 Thesis

It has been the major theme of this part that the TCPA is not merely a statute concerned with what appears to be the appropriate place to allow an activity. It is suggested instead that it is a comprehensive system of resource allocation. The Planning Tribunal has rejected any argument that approaches this sort of reading, and it is probable that this thesis goes a long way beyond those arguments.

They were concerned merely to introduce some consideration of the desirability of the end use of a resource at the planning consent stage. This paper argues that in fact such decisions must be

made from the very beginning of the planning exercise : the formulation of the various planning schemes. With the Tribunal's conservative attitude in mind, this thesis would seem radical indeed, and thus that attitude must first be dealt with before the argument can take root.

It is suggested that the Tribunal's arguments have been successfully overcome. Planning does involve judgment. This cannot be avoided, and it does not render the exercise "merely" subjective and of little importance. The semantics used by the Tribunal to misread s3 have been revealed, and it has been established that s4 is the provision which defines the purpose and nature of planning, although s3 is important as a set of instructions as to certain necessary parts of the exercise that must be included.

The argument presented on the rest of the TCPA's regime has been rejected on the basis that the regime as currently administered is founded on the same misreading of the TCPA. It has been shown that the consent system actually supports t he thesis in this paper.

It is suggested that planning must ensure the resources of the region/district/maritime planning area are used and managed wisely; it must ensure that the development of the region/district/maritime planning area must be controlled and directed; and that in doing both these things, planning must promote and safeguard the amenities, and the welfare of the population, of the region/district/maritime planning area.

This is much more than an ad hoc exercise. The TCPA provides for a very detailed but flexible strategic process. It covers a very wide range of concerns, from social to ecological, from cultural to economic. It considers the present and the future. Its constant questions are : What sort of future do we want? How do we want to achieve that?

There is a further level of sophistication in the relationship between the levels of planning. The district and maritime processes are "ground zero". They must determine what is best for the district and the maritime area. They are subject to the regional scheme, which is ultimately controlled by Ministerial approval, according to the national interest. The ground-level schemes should thus reflect not only the best choices for their own jurisdiction, but they should also embody the desirable choices from the regional and national perspective.

In this way, if all the procedures are used to their fullest potential, there is a good chance that the resources of New Zealand will be allocated to the best uses known at present.

The last two paragraphs have referred to "best choices" and "best uses". This does not imply that planning attempts to select <u>the</u> best use out of all possible uses. But it is suggested that the significance of the word "wise" is that any use chosen as an acceptable one, must come from those several options considered the most desirable of all.

5.2 Suggested Improvements

5.2.1 Information and Expertise

While the Tribunal's argument that such issues are inappropriate to planning, and local authorities are inappropriate agencies to determine them, must be rejected, a contention that carries more weight is the undoubted fact that many councils are not equipped with the skills needed to properly assess such questions. But this cannot be an argument justifying the distortion of compelling language such as in the TCPA. Instead that expertise must be tapped from somewhere. The challenge is to find that source.

The problem is ameliorated by heavy involvement of the community in the planning process. There are many concerned individuals and organisations who do have the appropriate skills, and their input can supply this needed exertise to a degree, although it is still, in the final analysis, missing from the decision making level.

Also serious is the lack of any but the most informal and ad hoc process for collating and generating relevant information. A great deal of data is needed on a huge number of issues to properly perform the exercise of planning as outlined here. A more rigorous structure for obtaining information is contained in the Water and Soil Conservation Act 1963. This is considered in the next part.

5.2.2 Ministerial Control

The Minister currently responsible for planning is the Minister of Works and Development. As such, this element of control will naturally tend to favour development, which is not necessarily the choice that the planning process would otherwise come to. Recall that s4 includes an element of non-use.

It is accepted that the process needs a development-oriented input just as much as it needs a conservation-oriented input. But the position of ultimate control should be neutral and not determined by one concern. This would enable true decisions on the "wise" use and management of resources to be made.

In this regard, the suggestion in Environment 1986 that the Minister for the Environment be responsible for the TCPA is supported.

5.2.3 The Planning Tribunal

The use of the Tribunal as an appellate body from the preparation of planning schemes is perhaps an unwelcome intrusion of the judiciary into explicit policy making. The Tribunal's function as an appellate body from the consent process is perhaps more acceptable. This is still open to question as the consent procedures are the implementation of the district scheme's policy, and will involve significant aspects of policy themselves (they must provide for the matters in s3, and have to take account of the expressed purposes of planning in s4(1)).

Judicial resolution of disputes is usually predicated on the assumption of legal rights, and the fact that so much of the decision making that is subject to these appeals is essentially policy, certainly makes this writer wonder whether it is appropriate for the Tribunal to exist at all.

PART III : WATER AND SOIL CONSERVATION ACT 1963

1.0 OVERVIEW

For most practical purposes it is an acceptable conclusion to say that this Act (the WSCA) reserves all rights to water, to the Crown. The WSCA does not actually state this in terms, instead listing the rights that are vested in the Crown, relating to damming, diverting, taking and discharging (directly and indirectly through percolation), into natural water[62].

The WSCA establishes consent procedures to permit activities in relation to water, which expressly makes it an allocation statute. It also creates three separate "protective systems" impacting on the consent system.

Administrative bodies are established, partly grafting onto existing structures, and partly creating its own agencies. These bodies have a very wide range of functions to perform.

There is an enormous difference between the structures of the TCPA and the WSCA. One of the most fundamental is that the WSCA neither provides criteria nor a statement of its general policy to guide decision making. Compare this with ss3 and 4 and the consent criteria under the TCPA.

The consequence of this is that judicial interpretation has been necessary to extract these elements. Much use has been made of the lengthy lists of functions provided for the administering agencies that the Act establishes. This paper will follow that sort of approach, therefore unlike Part II, these agencies and their functions and relationships are examined before discussing the purpose of the system.

2.0 ADMINSTRATIVE AGENCIES

2.1 Constitution

2.1.1 National Level

At the national level, the WSCA created the National Water and Soil Conservation Authority (NWSCA). The Minister of Works and Development has the chair[63], and the other fourteen members are appointed by the Governor-General, after advice from the Minister[64]. The Minister must consult certain bodies in relation to thirteen of those nominations, for them to select an appropriate representative.

This ensures a range of interests have a direct input into water administration in New Zealand. Seven seats on the NWSCA represent "institutional" interests, eg NZ Catchment Authorities Association Inc. Three are "users" representatives, for groups such as NZ Manufacturing Federation Inc, and Federated Farmers. Two represent

what may be loosely termed "conservation interests". The Minister of Internal Affairs has one nominee to represent wildlife interests. The other represents scenic and recreational interests in relation to water, on behalf of the National Parks and Reserves Authority, the Nature Conservation Council, the Minister of Internal Affairs and the Minister for the Environment.

This is the expanded constitution that began operating in April 1984. Previously there were only the Minister and nominees, and five others, all representing institutional interests, including two nominees from now defunct water administration agencies. The intention would seem to be to have a broad range of sectarian interests represented. The significance of this will become apparent when the NWSCA functions are described.

2.1.2 Local Level

The picture at the local level is more complex. The WSCA divided all of New Zealand up into water regions, with a Regional Water Board ("Water Boards") for each. To a large extent this grafted onto the existing administrative structure under the Soil Conservation and Rivers Control Act 1941 (SCRCA). Thus the administrative divisions (catchment districts and areas) and bodies (Catchment Boards and Commissions respectively) under that Act became water regions and Water Boards[65].

The same is true of the territory and body of the Waikato Valley

Authority[66]. Any remaining areas are amalgamated with existing water regions, or constituted as a water region itself[67].

2.1.3 Catchment Authorities

Catchment districts were constituted by Order-in-Council, under s34 SCRCA, and each had a Catchment Board to administer it. Everywhere else was "catchment territory" and a body called the Soil Conservation and Rivers Control Council had the discretion to establish catchment areas out of and part of this territory, and to establish Catchment Commissions to administer them[68].

Section 13 of the SCRCA originally made provision for soil conservation districts and Soil Conservation Committees to run them. In 1959 s13 was substituted and these bodies were all converted to Catchment Commissions.

The functions of these committees were provided for by regulation[69]. They involved among many, advisory functions to the Soil Conservation and Rivers Control Council on the relationship between existing land uses and erosion, and the control of land use operations where it was (likely) to cause erosion. Such controls included prohibiting the activity.

2.2 Overview of Functions and Powers

We have seen the administrative functions under the SCRCA at the local level have been absorbed into the WSCA. This is also true at the national level, where the NWSCA has taken over the role of the Soil Conservation and Rivers Control Council, which has been dissolved[70]. To a large extent, the SCRCA has become part of the WSCA, and keeping the two separate makes the study of the WSCA that much more arduous.

Grafting onto the existing structure under the SCRCA has meant that not all Water Boards have uniform powers. The SCRCA conferred different powers on Catchment Boards and Commissions, and we have seen that some Catchment Commissions have their own special set of powers under regulation, retained from when they were Soil Conservation Committees.

In addition the Waikato Valley Authority will have its own powers under its Constituting Act, and Water Boards constituted for new water regions formed under s19 WSCA may have particular powers conferred by the constituting Order-in-Council.

The WSCA confers certain powers on all Water Boards, which may be considered the core of their powers, and certainly their prime function under the WSCA. The same is true of the NWSCA which has functions under both Acts.

The provisions of the SCRCA are at least as convoluted at those of the WSCA. They also have potential for a perplexing degree of conflict with the TCPA, even on the Planning Tribunal's strict interpretation of that Act. It would be an interesting exercise to explore the relationship between the TCPA, and the provisions of the SCRCA relating to the control of land use.

It is unfortunate that in a work of this scope, such an exercise cannot be performed. Attention will be limited to an examination of the functions and powers conferred directly by the WSCA.

The next sections of the paper consider the functions of the administrative bodies established by the WSCA. This involves a description both of the various duties prescribed for these bodies, and of the various procedures set out in the WSCA. The procedures include the consent system to permit activities in relation to water, the various "protection systems" that impact on it.

There is a broad distinction between the functions of the two bodies. The NWSCA is concerned with the formulation of policy and the direct implementation of certain aspects of that policy. The Water Boards are concerned with the everyday implementation of water policy. The distinction is not absolute for there is a degree of overlap and flexibility in this arrangement.

It will be seen that planning is only one aspect of this regime, although many of the other functions relate to planning.

3.0 NATIONAL WATER AND SOIL CONSERVATION AUTHORITY

The NWSCA has a number of functions under the WSCA, conferred by various provisions. Section 14 sets out one list, and other duties are imposed by ss20A-20I, 23, and 26A-26K. These functions can be broadly classified as relating to policy formation on one hand, and those relating to its implementation on the other.

3.1 Policy Formation

This is provided for in s14. Firstly there is s14(3)(a) which empowers the NWSCA to examine various "problems", and make "plans" in respect of them. The topics are specifically listed and include for example the allocation, quality and conservation of water.

A full reading of this provision would imply a wide scope of concerns anyway, but to ensure all proper factors are considered, it refers to items such as the needs of industry and the community; recreation, fisheries and wildlife habitats; and protection for the natural characteristics of water.

Section 14(3)(d) gives the NWSCA responsibility for "co-ordinating" all matters relating to natural water. There are two concerns expressed as objectives for this co-ordination : the maximum satisfaction of all demands on water and its use to the best advantage.

These two concerns are repeated in other provisions of s14 in various ways. Subsection (3)(j) refers to guiding water administration in the "best public interests". Subsection (3)(m) refers to "best uses" and specifically includes "multiple uses", Subsection (4)(b) follows subs (3)(d) in referring to the settlement of competing demands "as it seems best in the public interest".

There are variations between these provisions. The degree to which the concerns must be satisfied is expressed at different levels. The frames of reference in which what is "best" varies in scope. The effects of these changes are considered more fully in a later section of this paper.

Hidden amongst the paragraphs of s14(4) is a provision which appears to be a general operating rule for the NWSCA's planning and advisory role, subs (4)(1). It demands the consideration of the present and future needs of industry, local authorities water supply, recreation, and a "due regard" for the scenic and natural features, fisheries and wildlife habitats. The locally-based perspective this paragraph demands may not fully mesh with the various other frames of reference mentioned above.

A specific form of policy formation is provided for in s14(3)(o). This empowers NWSCA to set minimum standards of water quality, for lakes, and flow- and quality levels of running water.

The WSCA is also concerned with water pollution, and s14(4)(q)

empowers it to provide codes of requirements for the treatment of wastes before they are discharged into water.

Much of this policy setting function relates to the allocation of water between various demands, and in a sense, the setting of quantitative, qualitative and waste treatment standards is also part of that function. The representative nature of the NWSCA's constitution therefore could be very useful in ensuring that the full range of factors is adequately considered when forming policy.

3.2 Means of Implementation

3.2.1 Directions to Regional Water Boards

There were several provisions relating to the guidance and supervision of water administrarion that were referred to in the previous section. They imply a dominant relationship with the bodies most directly concerned with the daily execution of water administration, that is, the Water Boards. The nature of this relationship is discussed infra, but one more provision can be mentioned at this stage. Section 14(4)(s) confers the power to investigate conflicts of interest between various people or groups in connection with water quality, and to make recommendations on their resolution. This is not only in relation to existing conflicts, the NWSCA can also act in respect of potential conflicts it perceives[71].

3.2.2 Classification Systems

Section 14(3)(a) listed the making of plans regarding water quality as one of the NWSCA's functions. Sections 26A to 26J establish the means to effect these plans. The NWSCA (or the relevant Water Board)[72] is empowered to investigate waste discharges into any waters, and determine the extent to which they should be controlled[73].

If there is a need for controls, the waters are placed in one of a number of classes, prescribed by s26C. The classification is according to geographical location (inland or external waters), and various chemical and physical standards and the water's usefulness both as a resource for human use and as a habitat[74].

The classification becomes the minimum standard at which the waters are to be maintained[75]. All existing rights to discharge waste are terminated by s26K(1). This is subject to the authority originally granting the discharge right[76] exercising its powers to preserve the right under ss26K and 26KA.

Section 26K(2) empowers the granting authority to preserve the right pending the grant of a new water right. Section 26KA refers to s24I which preserves permits granted under the Waters Pollution Regulations 1963, although they are allowed to be amended or revoked as necessary to maintain the minimum standards. (cf for water rights, cancellation is automatic.)

Classification also constrains decision making in the consent process. This effect is considered when that process is discussed.

The process of classification is quite straightforward. The NWSCA makes a preliminary classification under s26D, and calls for public submissions. There is no special status required for those making submissions : anyone may do so. The NWSCA must consider all submissions received[77], and on the basis of that consideration prepares a final classification under s26E(2).

3.2.3 Wild and Scenic Rivers

Sections 20A to 20I, relating to "water conservation orders" were inserted in 1981[78]. As one commentator has said[79]:

> " T he legislature has introduced a fundamental change in the scheme of the Water and Soil Conservation Act in that the multiple use concepts in relation to water resource management have been substantially modified by a strong emphasis on preservation and protection of appropriately qualified rivers, streams and lakes."

There are two types of order, national and local. The differences relate to some of the procedural aspects leading up to their making, and to one detail in the effects of the order. The prescribed contents of the orders are the same[80].

Both must specify the waters which are to be preserved as far as possible in their natural state or the outstanding characteristics

or features that should be protected[81].

The orders may also specify quantities, maximum and minimum flowrates and water levels that must be preserved, and may identify those parts where there is to not be any water right granted to construct a dam. Nor should those parts be affected by dams elsewhere in that river or stream.

Neither form of order is retrospective : existing rights are unaffected[82]. The orders can place certain constraints on the granting of water rights. These are considered when the consent system is discussed.

What can be noted here is that the restrictions that a particular order may impose on that system is also relevant in a wider perspective. Everyone exercising a statutory power, function or duty is to "have regard to" the provisions of the order "as far as possible"[83]. This specifically includes the various planning authorities under the TCPA when preparing, reviewing and administering their planning schemes[84].

The process leading to the making of an order can only be started by some authority or Government Minister having a function relating to, or potentially affected by water or soil conservation[85]. Besides those administering water, and others concerned with any form of conservation, this would appear to include users of water and those involved in some way with that use. The word "affected"

would presumably extend this far, although it is difficult to imagine when a water user would want to initiate a process that could severely restrict their future use of that water (at any rate when that future use was different in some way from their present use).

Application is made to the Minister of Works, who refers it to the NWSCA. The NWSCA[86] undertakes a consultative process to determine if the order should be a national or local one and makes the appropriate recommendations to the Minister. The process is continued by the NWSCA for national orders, and referred to the relevant Water Board for local orders.

The application is notified to the public, and submissions called for. The right to make submissions is conferred on the applicant; the Minister; all those "affected" or representing a "relevant aspect of the public interest"; any Water Board or planning authority under the TCPA whose territory is affected; and the NWSCA[87].

There are specific factors that must be taken into account when considering the application[88]. These range from "all forms of water based recreation" to the water's wild and scenic characteristics, to the needs of industry and the community. The intention seems to be to have a broad range of considerations being balanced, from ecological to commercial to social. It is interesting to note that while planning authorities are to have

regard to the order once made, the provisions of the relevant regional and district schemes are listed as specific factors to be considered[89].

The NWSCA or the Water Board then decides whether to draft an order; recommend that the application be treated as one for the other form of order; or decline the application[90]. In the case of a national order, it is only a recommendation. The Minister makes the final decision.

If it is recommended that it be treated as an application for a local order instead, it is referred to the Water Board and left in their hands[91]. There is no obligation for the national process to be initiated if the recommendation is for a national order instead[92].

Both the draft order and the decline of an application can be appealed against to the Planning Tribunal, by the applicant, anyone who objected and anyone affected. The Tribunal is to call a public inquiry, and the Minister, the NWSCA, the Water Board, the relevant planning authorities under the TCPA and the objectors can be heard[93].

The Tribunal can make recommendations to the Minister regarding a national conservation order, or direct the Water Board to initiate the process for a local order instead[94]. It can confirm, modify or cancel a draft local order or a decision to decline an

application for one. It can also recommend to the Minister that a national order be drafted instead of a local one[95].

If a Water Board makes a draft order, and there are no objections, or it is confirmed by the Tribunal, it is to be adopted and gazetted. Water Boards are to follow Tribunal directions to make orders[96].

National orders are made by Order-in-Council on the advice of the Minister who must explain to Parliament if a recommendation from the NWSCA or the Tribunal, approving a national order, is rejected[97].

This section of the paper has related to both the local and national agencies for water administration even though it is within a part focussing on the national level. This has been for greater convenience, but it is perhaps useful to bring the discussion back to the national.

It may be pointed out that in this process the primary policy making agency under the WSCA is reduced to an advisory role from the very beginning. Even the decision as to which type of order should be pursued is a political decision. This may be contrasted with the local orders, where it is the Water Boards that make the decisions.

3.2.4 Waters of National Importance

Section 23(7) empowers the Governor-General to declare waters to be of national importance. There is no public participation in the decision, no rights of appeal, and no formal input from the water administration. The writer suspects that this provision is something of an anachronism now that the much more complex and detailed procedures relating to conservation orders have been enacted.

Once again the effects of this mechanism on the consent system will be considered later.

3.2.5 Advice to Public Authorities

Section 14(4) has three provisions relating to advice for local and public authorities. Paragraph (f) concerns advice on the efficient use and transfer of water. Paragraph (r) empowers the NWSCA to compile model bylaws on the treatment and disposal of trade waters. Paragraph (t) refers to advice for the purpose of co-ordinating the activities and policies of such authorities regarding water quality.

3.3 Other Functions

3.3.1 Information and Education

Section 14 empowers the NWSCA to gather and generate information on a number of topics. There are eight provisions in s14 relating

to research in various areas[98], such as "the water supply industry", industrial requirements for water, and water quality. Subsection (3)(k) is a general provision concerning research into "matters relating to natural water and soil conservation". This would probably cover all the other provisions and more, such is the sweep of its language.

Some of these provisions refer to the NWSCA as undertaking this research itself, others seem to indicate it is to encourage others to do it, and some cover both. There appears to be no consistent pattern in such references.

Two provisions refer to the keeping of records. Subsection 4(a) is the broader[99], covering the identification of water resources, existing rights and future requirements.

Subsection (4)(a) is the only provision to expressly link this information gathering with policy formulation[100] by adding a catch all phrase to include any information that would be useful in deciding allocation questions. However the other provisions do refer to information that would be useful for such issues, and it is submitted the implication is that this data collation is intended to aid in the NWSCA's policy functions.

The NWSCA also has educational functions which are discharged in two contexts. Three provisions in s14 refer to the collation and public dissemination of information on various topics[101]. This is

the broader context. There is also a narrower one relating mainly to the training and education of water administration and water works personnel. However subs 3(1) is broad enough to refer to everyone. It concerns the dissemination of information on efficient soil and water conservation measures.

What can be emphasised here is the broad data base that these provisions appear to contemplate the NWSCA operating from when it engages in policy formation. There is also its function as an educational agency to be aware of.

3.3.2 Miscellaneous

There are a number of other ancillary functions imposed on the NWSCA by s14. Subsection (3)(b), (c) and (h) cover certain 'structural' functions, relating to the legislation, agencies and funding of water administration. Under s14(3)(n) the NWSCA can "negotiate the acceptance by appropriate authorities of added responsibilities" (regarding water and soil conservation).

Section 14(5) empowers the NWSCA to make financial grants for the supply of water in rural areas for domestic and agricultural purposes.

What are possibly most important here are the 'structural' functions, in that the Minister can be advised directly, of problems encountered with the system. The users of the procedures have a statutory role in the maintenance of the legislation, and (it appears) can be responsible for initiating maintenance procedures (through amendments).

4.0 REGIONAL WATER BOARDS

4.1 Consent System

4.1.1 General

We have seen that water rights are vested in the Crown. This means that any activity in relation to water requires governmental consent, and this is granted through the decentralised system of the Water Boards. In general there are two means to grant consent. Section 21 provides for the conferral of water rights, and s22 provides for the authorisation of activities in relation to a specified area.

There is a third special process available for the Crown, should it wish to make use of it[103]. Otherwise the Crown applies for water rights through the normal channels. Even though all rights to water are vested in the Crown, the WSCA binds the Crown[104], and therefore it must seek consent under this regime. This ensures that water is administered at all times through the complex structure the WSCA establishes.

4.1.2 Water Rights

Section 21(3) empowers the Water Board to grant water rights on terms and conditions in its discretion.

Unlike the planning system for water, this consent process involves outside input. The Water Board must consult with authorities

responsible for certain public lands that may be affected by the right[105], and there is a wide opportunity for public participation. Everyone has a right to object, along with the NWSCA, any Water Board and any public authority. Objectors may claim that their own interests would be prejudiced by the grant, or those of the public generally[106].

There is provision for consideration of especially technical issues[107]. An applicant can request a special ad hoc tribunal of the Board to be appointed. Members are chosen for their expertise in the matter. The constitution of such a tribunal cannot be opposed by objectors. Its function is recommendatory only, although as it is appointed to consider issues too technical for the Water Board, that recommendation would presumably carry weight.

The Water Board's decision is appealable to the Planning Tribunal[108], but not every objector can do so. This is only available to the Minister, the NWSCA, parties to the application, and those Water Boards, public authorities, bodies and persons who have an interest greater than the general public's[109].

4.1.3 Protection Systems and Water Rights

Where the application is for waste discharge into classified waters, the NWSCA must consent if it is within two years of final classification[110]. In all cases, the classification constrains

the Water Board's discretion to grant conditions. Conditions must be imposed that ensure that the receiving waters maintain their minimum prescribed quality, and the discharges must be free of certain types of waste, depending on the classification[111]. If for "temporary" reasons, the imposition of such conditions is impractical and the NWSCA consents, the right can be granted without such conditions. A refusal by the NWSCA can be appealed to the Planning Tribunal[112].

Both water conservation orders and declarations that the waters are of national interest constrain the Water Board's discretion to grant water rights. The two types of conservation order can impose "conditions restrictions and prohibitions" on the Water Board in relation to the granting of water rights[113]. National water conservation orders can also do this to the NWSCA and its power to consent to Crown water rights under the special procedure[114].

Generally speaking, the provisions of these conservation orders are binding on Water Boards. This is so at all times for national orders. The Board can deviate from a local order if it considers the right is of minor nature, duration and effect, and the public interest in the particular circumstances warrants it[115].

Declarations that the waters are of national importance are more flexible. The Water Board is constrained by the need to obtain the NWSCA's consent to grant the right, and this is subject to the NWSCA's conditions. The applicant can appeal against the NWSCA to the Planning Tribunal[116].

4.1.4 Area Authorisation

Instead of a water right, Water Boards can authorise activities in relation to water over a specified area[117]. This involves a degree of consultation which is far broader than for water rights[118]. This is presumably because this is a far more flexible means of consenting to water-related activities. There is however no provision for public participation.

There is a wide range of periods for which these authorisations can be granted, from "casual" to seasonal, to permanent. However they are subject to cancellation at any time in the "public interest"[119].

At least one purpose of these authorisations is where the user needs a large degree of flexibility. They are used for example to permit the taking, use, and discharge of water during petroleum prospecting, in which the prospector is never certain exactly where the subsequent wells will be drilled until the present one has been analysed. Time is money in petroleum prospecting as the use of drilling rigs is expensive to obtain. If a proponent was to wait for a full water right after each well, prospecting would take years. Instead, a general authorisation is obtained, and the Water Board gives its approval of each extraction and discharge as it is proposed[120].

4.1.5 Protection Systems and Area Authorisation

Final classifications terminate any existing authorisations and

prevent any in the future[121]. The only exception to this is an authorisation to dam waters. The writer is unsure whether this is a deliberate exclusion. For some reason damming is provided for in a separate subsection from the other types of authorisation in s22, and only that latter subsection has a proviso referring to classification. This would seem a little odd in view of the potential for dam construction to affect the quality of the water.

Conservation orders can impose the same restrictions as can be imposed on Water Boards in respect of the grant of water rights, except there is no provision for the Water Board to disregard a local order[122].

Declarations that waters are of national importance only appear to have legal effect on water rights. However, given that effect on water rights, it is probably that Water Boards would feel greatly inhibited by such a declaration when considering an application for an area authorisation. It is unlikely that the Board would feel free to make a decision that in a closely aligned situation, is not theirs to make.

4.2 Other Functions

4.2.1 Delegated Functions

Section 20(5) of the WSCA provides for the functions of Water Boards under that Act. There are several provisions which

contemplate the NWSCA delegating its functions to Water Boards. Paragraph (a) provides for this explicitly; para (b) makes the Boards the general agent of the NWSCA for the region; and para (f) requires the Water Boards to collect, sort, record and disseminate data on water resources, when directed to be the NWSCA. This is at least a partial delegation of the NWSCA's duties in this regard.

4.2.2 Co-extensive Functions

There are other provisions giving Water Boards broadly equivalent functions to those of the NWSCA. The Boards are to promote the conservation of water supplies and the "most beneficial" uses of water where necessary to ensure all demands are met. This goes beyond just forming policy, and can include planning and promoting various works[123].

The Boards are also to recommend minimum and maximum flow levels, and minimum quality standards for waters in the region, where this is "warranted in the circumstances"[124].

They also have as a function in their own right the investigation and recording of water resources, and the effects of various uses on the quality and availability of those resources. This provision indicates a specific use of this function as being an early warning system for the NWSCA regarding "important problems and needs" in relation to water[125].

4.2.3 Directions from the National Authority

These "co-extensive functions" are exercisable on the Board's own motion, but are all subject to the directions of the NWSCA. There are also general provisions subordinating the Water Boards to the NWSCA. Paragraph (d) requires the Boards to obtain and apply NWSCA directions, and they are required to co-operate with the NWSCA under para (h).

This gives the appearance of a system totally dominated by the NWSCA. This is in contrast to the image made possible by the provisions regarding delegation. This image is of a system with a great degree of overlap, that enables the agencies to determine the actual divisions of responsibiltiy between themselves. It is possible in such a system to turn over complete responsibility to the Water Boards, or withold it completely. The actual balance cannot be ascertained from the legislation alone.

5.0 CONCLUSIONS

5.1 A Lack of Clarity

This part of the paper has focussed on the WSCA, and has avoided the convolutions of the SCRCA. However the WSCA is not an ideal statute from the perspective of clarity either.

We have drawn heavily on the provisions stating the functions of the NWSCA and the Water Boards under the NWSCA. Particularly

with regard to that statement for the NWSCA, it may be said to meander aimlessly without a great deal of coherency.

It is formed from two subsections, that have similar introductory language. They either have overlapping repetitive paragraphs, or meanings are extremely close. The order imposed on them in this paper is not drawn from the WSCA, but comes from an attempt to relate each function to the others.

This expression is at best confusing, and at worst it positively assists the overlooking or underrating of particular functions. This is a criticism of the legislation only, and is not meant to cast aspersions on the performance of the NWSCA. The point is that the legislation should be a clear, ordered statement of functions. It should positively assist those agencies it establishes and not make their tasks more difficult. What should be searched for is a clear, unambiguous, concise and coherent statement of what those agencies are to do and how they are to go about it.

Quite apart from the benefits to the agency to which the legislation relates, the exercise of demanding clear expression is a good opportunity to clarify exactly what it is that the system should do.

One commentator[126] has noted that the statute was a compromise between the many interests that became involved in its formation. It appears this compromise attempted to keep all sides as satisfied as possible. This has left the statute unsure of just what it is to do.

This would explain why there is no statement of the purposes of water administration, in comparison with ss3 and 4 in the TCPA. Instead, the legislature has scattered a wide range of clues through the WSCA, and left it up to the Courts and future litigants to actually work some sort of firm shape to the nature of water administration.

If this has been the motivation behind the statute, it is suggested this is an inappropriate way to design the administration of our resources and environment. That design should be deliberate, with a clear idea of the shape of the system desired, and of the way in which it should work.

5.2 Policy of the Water Legislation

5.2.1 General

Notwithstanding this lack of clarity, some idea of what the WSCA can be said to intend, can be gained from these statements of function, which are essentially an elaboration of the long title.

Section 14 has a number of provisions relating to the co-ordination of matters relating to water, and having the widest scope of factors being considered in all decisions relating to water. Ecological, scenic, recreational and community and industrial needs are all relevant.

There are a number of provisions which make it quite clear that the "best" uses of water are to be found. Although the frames of reference for "best" are not always consistent, it seems that the aim is to maximise the satisfaction of competing demands, whether they be for use or non-use.

There is a specific concern to preserve water quality, for a number of the ordinary provisions concerning the NWSCA's functions refer to it. There are specific means available to assist in that where their use would be appropriate (the classification system). There are also other means available where special protection is deemed necessary. These are the national importance declarations and the wild and scenic rivers legislation.

Here the procedures are intended to tip the normally value-free procedure firmly to the side of protection. There is no equal opportunity to tip it as decisively to the side of development. Any decision to allow development must come from the normal consent procedures and satisfy the normal balancing exercise. This "balancing exercise" is considered shortly.

The words "value-free" were used in the last paragraph because apart from the protection systems, the procedures under the WSCA are only aimed at finding the "best" solution after a consideration of the widest range of factors. The emphasis is neither on development or the inhibition of development. It is for the Water Board (subject to directions from the WSCA) to determine

the balance between use and protection that is appropriate to the word "best".

5.2.2 Planning Tribunal : The Balancing Test

Over the years the Planning Tribunal has developed a working rule from these provisions and the long title that consenting to water rights involved balancing the benefits and the detriments of any proposed activity. This includes measuring the losses that would result from the grant against the merits of the particular use proposed.

5.2.3 Judicial Acceptance

The approach has been accepted by the Court of Appeal in Keam v. Minister of Works[127] which was followed shortly afterwards by the High Court in Gilmore v. NWSCA and the Minister of Energy[128].

In Keam, the Minister had applied for a five year water right under s23 WSCA, to take geothermal water from an underground reservoir. This was to test the viability of tapping the reservoir as a power source for the landowner - a timber processing plant. This was duly granted, but Keam appealed. He was a physicist from Auckland University who was studying the area's geothermal fields.

He was successful before the Tribnunal, who decided the possible detriments to the scenic and scientific value outweighed the

possible benefit from the information. This one-off test was considered different from a from a comprehensive survey, taken after full environmental impact evaluation.

The High Court focussed on the interrelationship between the WSCA and the Geothermal Act, and decided the NWSCA, who granted the right were encroaching on the Minister's jurisdiction under the Geothermal Act and were not deciding the question under the WSCA.

The two Acts do overlap. "Natural water" in the WSCA means all forms of water, including geothermal steam. The Geothermal Act concerns "geothermal energy" including water heated to more than $70^{o}C$, by subterranean, natural heat phenomena[129].

The Tribunal's approach was unanimously upheld in the Court of Appeal. The absence of specific criteria was referred to, as evidence of an intention to avoid tying down administrative bodies to rigid rules. While improper to attempt this judicially, it was proper to endorse working rules developed by the Tribunal to effect the legislation's broad purposes. The Tribunal used such a rule in this situation.

Cooke J[130] did impose one restriction on this approach. He limited it to situations where there are competing demands, and there exists the potential for significant detriment.

There were competing demands : the public (and private in the case of the plant owner) interest in geothermal exploration and the

public interest in preservation for scenic attraction and scientific study. The damage to that second public interest could be extreme. Therefore it was appropriate for the Tribunal to engage in the balancing exercise. The outcome of that was discretionary and it was not for the Court to reject the Board's opinion of the merits.

Gilmore was also a s23 application, this time for the Clutha High Dam, to generate electricity for the Aramoana smelter. This was granted, and an appeal before the Tribunal was dismissed because the question raised was outside the Tribunal's jurisdiction, i.e. the argument that as the smelter was unlikely to go ahead, the water right should be denied, as the existence of the smelter was the only justification for the high dam.

The High Court followed Keam, and considered the question as one of balancing costs and benefits. It did introduce a potentially important elaboration that in that process the only factors to be balanced were those drawn from the WSCA, not those which an observer might feel were relevant.

Referring to Metekingi v. Regional Water Board[131], the Court held that the WSCA could include the question of whether land should be retained for production, as part of "soil conservation" in the long title. Therefore the balance was between the orchards and farmland that would be drowned, and the benefits of producing electricity.

This meant the issue of the smelter's existence could be crucial to the balance. Without it, the loss of land was a waste, as the power produced would not be consumed. Ignoring this was a failure to consider a factor the Tribunal was obliged to take into account under the WSCA.

5.2.4 A Difficulty

In both cases, the decision facing the Water Board would have been relatively easy to resolve.

In Keam, the exploratory bore was a one-off exercise, with no environmental impact assessment having been done. Such ad hoc 'on spec' activities should not be permitted where there was a chance of significant damage being caused. It might be different if it was part of an exploratory programme, with full environmental impact assessment, and appropriate safeguards in the light of that assessment. In such situations the cost involved may be outweighed by the benefits of the whole programme.

In Gilmore, there was great uncertainty that the only intended consumer of the electricity produced (the Aramoana smelter) would actually eventuate. If it did not, measures to export the power to other parts of the country would be too expensive. It was a relatively simple matter then to put the retention of agricultural land above this nebulous chance that a significant benefit would accrue.

But what if the end use in Gilmore definitely existed? The Water Board would then be faced with having to determine whether the benefits of supplying power to a controversial "Think Big" project outside the region could justify the drowning of quality pasture and orchards.

This would involve two questions - whether it could be justified in general terms, to produce hydro-electric power for a user outside the region, and whether that particular user was sufficient justification. This second question would involve an assessment of the merits of that user, which is in fact a parallel decision to that of the relevant planning authorities and Water Boards in whose jurisdictions the user is actually sited.

It is submitted these two questions msut be asked, in order to fulfil the balancing requirement. Only by examining the end uses or effects of the particular water right sought, can its merits and detriments be measures against one another. Yet in some circumstances, this can result in the assessment of a project's merits being undertaken several times. (As will be shown in the next part of this paper, any project involving water will be assessed twice as it is.)

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5.3 Strategic Potential

5.3.1 General

This section returns to s14 and its statement of the functions of the NWSCA. There are a number of interpretative questions that

could be asked which have a bearing on the scope and nature of the potential of this system to develop strategic plans for water.

The first focusses on s14(3)(a), the most explicit provision concerning the NWSCA's planning function. There is the question of just how far the NWSCA's co-ordinating function can be taken. We have noted the range of provisions indicating the concern over obtaining the "best" use(s) for water. The degree of satisfaction required and the frame of reference for determining what is best in these provisions are expressed in a variety of ways. Lastly there is some question over what the NWSCA's response to these provisions is required to be.

5.3.2 Making Plans

Recall that s14(3)(a) empowered the NWSCA to examine problems and make plans in respect of them.

"Problems" could be interpreted two ways. A narrow reading would have it refer only to actual points of difficulty and contention. A broader reading would extend it to cover "questions" or "issues", over which there may actually yet be no dispute.

The broad reading would enable the NWSCA to be much more forward thinking, anticipating possible future situations and providing for them.

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ment with the detail prescribed for town and country

nation

d) gives the NWSCA responsibility for co-ordinating
elating to natural water" (emphasis added). The
his provision is virtually endless. At its widest,
ve the direction of matters far outside the immediate
SCA, for example siting, design and technology of

potential users of water. It might include decisions as to whether some activity could take place at all because of its impact on water, even though no water right is required.

In a more narrow sense, the NWSCA might be required to have some effect through its policies for the waters in question which might be such as to force a proponent to adopt a particular design or technology, or decide not to proceed at all.

The first sense was taken as meaning making those decisions directly. Such decisions have consequences for natural water, and at its fullest 'co-ordination' would involve the water administration making them. The narrower sense cannot actually co-ordinate such matters, but only provide a demand of consistent influence from water policies, on the various decisions outside the administration of water that have an impact on water. This meaning falls short of the implication from the words "co-ordination" and "all matters", but is perhaps the only workable meaning.

Alternatively, one could read it down as just meaning the co-ordination of water administration, which is an even narrower meaning. It focusses only on consistency of decision making within the administrative structure.

Once again the broader interpretation would be preferable, so that the NWSCA should strive through its policies to influence decisions outside water administration to be consistent with policies of that administration.

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5.3.5 How the Best Uses Must be Attained

We have noted that there are a number of provisions with two common concerns : the maximum satisfaction of all demands on water, and its use to the best advantage. What separates these otherwise related provisions is the means by which, and the degree to which the concerns must be satisfied.

Section 14(3)(d) demands that the NWSCA "ensures" their satisfaction. Subsections (3)(j) and (4)(b) refer to "guidance" and "supervision" towards those ends. Presumably these would be satisfied by attempts to achieve these required ends.

Subsection (3)(m) refers to the "promotion" of the best uses. This could be satisfied by guidance and/or public education and/or research and research co-ordination. All of these are provided for in other parts of s14. Does this imply that all are to be used?

It is also unclear to what extent "promotion" is to achieve the "best" uses. To demand actual satisfaction of that requirement, as in subs (3)(d) is perhaps asking too much.

5.3.6 Frames of Reference for Best

These vary quite widely. Subs (3)(d) is to be fulfilled according to a perception of what is best for New Zealand and the particular water region. Subsections (3)(j) and (4)(b) are expressed to be

according to the "public interest". It is not clear whether this refers to the public of the nation or only of the region, and it does not contemplate the possibility of conflict. Subsection (3)(m) is even less helpful. Its only standard is "best".

Then there is subs (4)(l), with a locally based perspective focussing on industry water supply, recreation, scenic and natural features, and the ecology of the area. While perhaps giving direction to those references to "best" that lack a specific frame of reference, it is not apparent how it relates to the national perspective : which one is to dominate?

Perhaps the most obscure provison in this respect is subs (4)(c). The NWSCA is at all times to promote the "adequacy" of water. There is no hint as to <u>what</u> about the water is supposed to remain adequate, or what it is to be kept adequate for. "Promotion" leaves it entirely up to the NWSCA as to how it is supposed to achieve this.

5.3.7 <u>Nature of the Response</u>

It is not even clear what the NWSCA's response to these provisions is to be. They are expressed as "functions and powers". "Powers" usually implies merely that the provision confers a capacity to engage in that action. "Function" can also have that meaning. A dictionary132 defines "function" as (inter alia) " a ctivity proper of a person or institution".

It can also have a more extensive meaning : "mode of action or activity by which thing fulfills its purpose"133. This meaning implies the capacity to act appropriately. On either reading of "function", "powers" is essentially superfluous and does little to assist the choice between the two meanings.

The effect is that the NWSCA is essentially able to determine for itself just what its response to s14 will be. This includes its response to s14(4)(1) which was described earlier in the paper as a useful operating rule for the NWSCA's planning and advisory roles. That provision demanded the consideration of the present and future needs of industry, local authorities water supply, recreation and a "due regard" for scenic and natural features, fisheries and wildlife habitats.

5.3.8 Protection Systems

Two of these systems sit oddly with the scope of the NWSCA to act as the primary policy organ in water administration. The declarations of waters of national importance have nothing to do with the NWSCA until after they are made, although then the NWSCA effectively determines any applications for water rights under s21. It only acts in an advisory capacity in respect of the special Crown water rights in these circumstances. Its usual jurisdiction to determine such applications becomes a political decision made in Cabinet (s23(7)).

The most potentially significant protection system, that relating to the national and local water conservation orders, cannot be activated by the NWSCA at all. It must wait until some authority related to or affected by water administration in some way, applies for an order to be made.

It is only in respect of classification that the NWSCA can act freely. One can only hope that this system is vigorously used, as an avenue for the NWSCA to implement its strategies.

5.3.9 Significance

If the provisions discussed are given a generous interpretation and a sincere effort is made to fulfil them, there is considerable potential for this administrative structure to generate detailed strategies. Sincerity alone is not enough to achieve this, as equally valid interpretations of the import of these provisions would be a greater focus on ad hoc decision making, and the concentration of focus on specific immediate issues.

The Court of Appeal in Keam referred to the absence of rigid standards and procedures as evidence of a desire to avoid tying the hands of administrative bodies134. This section has shown that it is almost totally up to the NWSCA to define what its duties will actually be, and hence what the administration of water is all about.

PART IV : CONCLUSIONS

1.0 PRINCIPAL COMMENTS

A major theme of this paper was fully developed in Part II of this paper. That theme was that the TCPA was very much concerned with resource allocation, and the processes it established possessed considerable potential as a strategic tool for determining the best future for the area concerned.

The major problem with this, is that the TCPA is not the only resource allocation system operating. The WSCA is specifically concerned wtih the allocaiton of water. As well the functions of the administrative bodies established under the WSCA impinge on questions of land use through the association with the SCRCA.

This duplication could perhaps be acceptable if the systems were well integrated and designed on at least broadly similar lines. This is not the case.

There are some connections between the TCPA and the WSCA. Section 4(3) of the TCPA requires that planning authorities have regard to the principles and objectives of the WSCA and the SCRCA when preparing, implementing and administering their planning schemes. Given the broad nature of the TCPA and the more specific focus of the WSCA, this might seem appropriate.

The problem is that the "principles and objectives" of the WSCA are obscure, and essentially the real nature of the system established under that statute is determined by the NWSCA. It is not possible to accurately determine the actual features of that system from the legislation, as there are a variety of possible choices that could be assembled from the mmny aspects of the WSCA. This difficulty reduces the significance of this provision.

Of more impact is the ability of the administrative agencies under the WSCA to become involved in both the planning and consent procedures as objectors. This would allow them to define for the planning authorities just what those principles and objectives should be taken to be.

However, in the end, the planning authorities only have to "have regard" for this influence. In the final analysis it is their own system that they must operate under and with the many structural differences between the two, there is a considerable possibility that the two systems may come to conflicting conclusions on particular issues.

In return, the TCPA palnning systems have a very limited impact on the water syustem. The only apparent input the planning authorities have is through the objection procedures for the WSCA's consent system, and for the national and local water conservation order procedures. Given the apparent function of the TCPA as a tool for the direction of the future development of

an area, the inability to influence in any great degree the administration of water could be a significant problem.

It is suggested that this capacity to act as objector cannot have a significant effect on the WSCA system, which operates under the dictates of its own legislation, and has no reference to the TCPA.

The final connection is the somewhat schizophrenic use of the Planning Tribunal as an appellate body from both systems. The jurisdictions under each Act are quite different.

Under the TCPA the Tribunal is able to become involved from almost the beginning in the setting of policy through the planning system. It can decide appeals from the preparation of planning schemes for each of the authorities, and not only from the consent procedures.

In comparison its jurisdiction under the WSCA was limited to the consent procedures, although it now has a limited input into policy through the appeals from the water conservation order system.

It is suggested that there is little consistency, harmony or effectiveness in what little integration there is between these two systems.

The structural differences are even more marked. The TCPA system involves a high degree of formality, with publicly available

documents to encapsulate the settled policy. These documents are to conform to an extremely detailed set of prescriptions as to their contents.

The preparation, review and change of these plans are highly formalised and public, with a large degree of public participation. This includes a definition of what the important matters are for the regional scheme, which is to operate as the 'master plan' in the heirarchical structure which the TCPA constructs.

There is a very clear territorial basis for the process and its concerns. At the same time, it is structured to ensure that national, regional and local concerns will all be integrated and reflected in the policies, which are to define which futures are desirable for the area.

The WSCA is in almost complete contrast. It involves very little formality in its planning, although the implementation of those plans can become more formal, through the classification process, and the water conservation orders. Apart from these, the plans, such as they are, are not readily available in formal documents. There are virtually no prescribed contents for the "plans" so vaguely required by the WSCA.

The development of any plans is done away from the public, and there is no opportunity for the public to have any input into decisions as to what it is important to plan for. This criticism

is ameliorated to some degree by the opportunities to participate in the classification and conservation order procedures.

Administration is at the higest, done on a national level and never gets below the regional, although with flexibility available in the assignment of functions, a great deal of it may end up at the regional. There is no clear structural guarantee that the range of concerns from national to local will be included. Indeed, it is suggested that the concerns of the level at which the administration is performed will tend to dominate the process.

Even the central concern of each statute is different. The TCPA is concerned with forward thinking, strategy, and the selection of "wise" options. It clearly contemplates the choosing of several options, and does not require the isolation of the single most desirable choice. The WSCA repeatedly refers to the "best" use. It is submitted that, notwithstanding the judiciary's concurrance with the Planning Tribunal's interpretation of the WSCA as involving merely a balancing of costs and benefits, "best" involves more. It calls for the divining of the single best choice available.

The one criticism of the TCPA that could be made when it is compared with the WSCA is that the latter has a detailed information gathering system available, and the NWSCA is constituted so as to bring a broad spectrum of interests and expertise to bear on its functions. The TCPA lacks both, whihc could prove to be a serious hindrance to the full realisation of its potential.

Perhaps the final criticism that can be made of the disfunctions between the TCPA and the WSCA is that wherever a project involves water, it is subject to two totally separate assessments. Under the TCPA it must be acceptable with reference to the national, regional and local perspectives in the planning strategy for the district. Under the WSCA it must be the best use for the water, or to take the Tribunal's more limited view of the question, its benefits must outweigh the costs. As it has been commented, this may involve an assessment of its merits. Such an assessment duplicates that to which it was subjected to under the TCPA, but there is no guarantee that the same judgment will be made.

2.0 POSTSCRIPT : THE WIDER PERSPECTIVE

The fragmented approach to legislating for resource allocation becomes even more apparent when a wider focus is taken. There are many especific resource statutes, for example the Petroleum Act, the Coal Mines Act, the Mining Act, the Geothermal Act, and so on. Each of these has their own special allocation system, radically different from the one discussed in Part I. There is also the Ministry of Energy Act which establishes its own planning system in yet another direction.

The effect of all these systems is to reduce the effectiveness of the system in the TCPA, for although those processes have determined

the desirable futures for the area concerned, these other allocation structures, usually run from a high political level, are driven by their own imperatives, without reference to the TCPA. Those imperatives could be in fundamental conflict with the planning decisions reached by the TCPA.

The effect of this is merely to have the TCPA system overruled in the majority of cases, with the sepcific statutes shutting off that resource from it. The criticism then focusses on the duplication and fragmentation involved.

Another level of criticism arises when the petroleum legislation is considered. There the petroleum allocation structure is expressly subject to the TCPA. In addition to the duplication of judgment, there is also the possibility of contradiction.

The final conclusion can only be that an urgent review of the entire resource allocation super system is needed. The concerns driving such a review should be integration, consistency, depth of judgment and the availability of technical support and expertise. Until then, the decisions as to who gets what will remain imperfect.

ENDNOTES

In these notes, the following abbreviations are used:

TCPA for the Town and Country Planning Act 1977
TCPR for the Town and Country Planning Regulations 1978, SR 1978/130
LGA for the Local Government Act
WSCA for the Water and Soil Conservation Act 1963
SCRCA for the Soil Conservation and Rivers Control Act
MoEA for the Ministry of Energy Act 1977

1. Released in June 1985 by the Minister for the Environment.

1a. See for example The Evening Post Wellington, New Zealand, 13 June 1985, 18 June 1985 p6, 17 September 1985 p4.

1b. Supra n1 at 22.

1c. See for example DAR Williams infra n79.

1d. (1980) 7 NZTPA 241.

2. (1981) 8 NZTPA 106.

3. (1981) 8 NZTPA 138.

4. The contents of the application are prescribed by s3(2) NDA 1979.

5. s10 National Development Act 1979.

6. These requirements are prescribed by ss4-7 NDA.

7. s9(1) National Development Act 1979.

8. Smith supra n1 at 259.

9. Petralgas supra n2 at 109;
Synfuel supra n3, at 141-2.

10. Smith supra n1 at 260.

10a. That argument was that planning was about the making provision for the use of resources. The Tribunal placed its own emphasis on the language it had just derided.

11. These divisions are considered in more detail later in the paper under the subheading "Planning Authorities".

12. Smith, supra n1 at 259.

13. TCPA, s36(4).

14. Ibid s3(1)(a).

14a. Employment housing and welfare needs.

14b. Clause 5 covers necessary public works, ie sewerage, water supply, and transport, health and educational facilities; Clause 8 covers civic and commercial facilities (from refuse disposal to conference halls); and Clauses 6 and 7 cover cultural and recreational facilities.

14c. Sykes JB (ed) The Concise Oxford Dictionary 6ed Clarendon Press Oxford 1976.

14d. It should be noted that s11(2) TCPA requires that the regional scheme is to provide for such matters in the First Schedule as are appropriate to the circumstances of the region.

15. TCPA s96(2).

16. TCPA s95. Section 96(3) provides for the Ministers to advise the Governor-General that the landward boundary be above or below the high tide mark. Those councils affected must consent.

17. See the definition of 'Council' in TCPA s2(1).

18. LGA, s42.

19. Ibid, s42(3).

20. Ibid, s45.

21. Ibid, s45(3), (4).

21a. TCPA ss42 and 45.

22. TCPA (1977) s23(6). Section 23(7) exempts Regional Planning Authorities form certain provisions of the 1977 Act.

23. Ibid, s98(3).

24. These are listed in s98(1), TCPA.

25. Ibid, s11(5).

26. This is not provided for in terms. However, reg 6(2) of the Town and Country Planning Regulations 1978 SR 1978/130 (TCPR) provides for the consideration of submissions, and s11(6) assumes that all the submissions will be considered before the preparation of a draft is begun. Regulation 7(1) requires that regard should be paid to any relevant matters in the submission when preparing the draft scheme.

27. Regulation 7(2) TCPR.

28. TCPA, s11(6).

29. There may be some question whether this regulation is intra vires the Act. If the Act does not specify the Minister as someone who may make submissions, and does so elsewhere, the implication is that the exclusion is deliberate. As a general principle, regulations cannot be inconsistent with their constituating statute. If the exclusion was deliberate in s11(b), the inclusion of the Minister in reg 8(1) may be ultra vires.

30. TCPA s11(7).

31. Ibid s13(1).

32. Ibid s13(2).

33. Ibid s15(2).

34. Ibid s12(2).

35. Ibid s12(5).

36. Ibid s12(8).

37. Ibid s12(10).

38. Ibid s14(4).

39. Ibid s42.

40. Ibid s46.

41. Section 48 TCPA confers the right to be heard on all first and second round submissions. The public hearing seems to be assumed. Section 48(1) empowers the Council to appoint committees for the purpose; subs (3) confers the right to be heard; subs (4) empowers the Council to summons witnesses; and reg 29(1) requires a date to be set for hearing each submission.

42. TCPA reg 31(2).

43. TCPA

44. Ibid s52(1).

45. Ibid s103(12).

46. TCPR reg 42.

47. TCPA s107(1).

47a. Ad hoc changes to the schemes are provided for in ss20, 54, 55, 109. Reviews are provided for in ss21, 59 to 61B, and 109. (s109 covers both changes and reviews for maritime

planning.) Both ad hoc changes, and formal reviews, follow the same procedures that led to the schemes.

48. Ibid ss37(1), 112(1).

49. Ibid ss37(2), 112(2).

50. Ibid ss57(1), 113(1).

51. Ibid ss37(3) and (6), 112(3) - (6). See also s57(3), 113(3). Note also that appeals over a provision in the district scheme can be determined in contravention of the regional scheme, in which case either the regional scheme is changed, or the conflict is permitted as insignificant: s49(3).

52. Ibid s10(b). Note that this provision also empowers the regional authorities to participate in the consent processes.

53. Ibid ss2(3), 10.

54. Ibid ss10(a) - (c).

55. These policies more specifically relate to : design and appearance of buildings; the preservation or conservation of vegetation; landscaping; and areas of special value. It is an odd omission that even though s36(4) is referring to these discretions, it does not mention the flora conservation policy that s36(5) provides for. It does not seem to be anything but an arbitrary exclusion.

56. There is another consent, the dispensation or waiver, in s76. This is less an allocation decision, as one to exempt an allocation from certain controls in the exploitation of that decision.

57. TCPA s72(2)(a).

58. Ibid s72(2)(b).

59. Ibid s74(2)(a). Subsection (2)(b) also allows specified departures where they are in accordance with an "initiated change" that has not yet been completed, where the consent would be in the public interest.

60. Ibid s110(2).

61. Ibid, s66(1) refers to s2(3) which lists this group. It includes the Minister (of Works and Developments), regional and authorities within or adjacent to the area (in this case, the district).

62. WSCA, s21(1). Provisos to s21(1) make exceptions for the diversion taking or use of seawater, and any domestic, animal or firelighting uses. Discharging into the sea

still requires a water right. As an exercise in abstract logic it would be interesting to explore whether there are aspects of the old common law system of riparian rights that s21(1) does not cover.

63. WSCA s5(1)(a).

64. Ibid s5(1)(b), (c).

65. Ibid ss18(1), 19(1).

66. Idem.

67. Ibid s19(3) - (9).

68. See s13 SCRCA.

69. Soil Conservation and Rivers Control Regulations 1945, SR 1945/32. These regulations have not been revoked. Presumably they still confer their powers onto those Catchment Commissions (and hence Water Boards) that began as Soil Conservation Committees.

70. Soil Conservation and Rivers Control Amendment Act 1983, s5(1).

71. Section 14(4)(s) of the WSCA refers not only to conflicts that "have arisen", but also those that "may arise".

72. It will be shown later that one of the functions of the Water Boards is to act as the NWSCA's agent in the water region, executing certain of the NWSCA's functions at that decentralised level.

73. WSCA s26A(1), (9).

74. The factors involved in classification are the water's acidity and dissolved oxygen content (chemical); the temperature, colour and clarity changes resulting from the discharge (physical); the water's odour and potability (resource utility); and the effects on aquatic life (habitat utility). These are prescribed for each classification, in the schedules to the WSCA.

75. WSCA, s26H(1).

76. It could be the Water Board, or the NWSCA, which has some functions in the consent system. This is explained when the consent system is discussed.

77. WSCA, s26E(1).

78. Water and Soil Conservation Amendment Act 1981, s7.

79. DAR Williams, The Concept of Resource Conservation with Particular Reference to Water Resources Unpublished seminar paper.

80. WSCA, ss20D(2), (3), 20H(2), (3).

81. Sections 20D(2) and 20H(2) list wild, scenic or other natural characteristics; and recreational, fisheries, wildlife habitats, scientific or other features.

82. WSCA ss20D(7), 20H(5).

83. Ibid, ss20D(8), 20H(6).

84. Ibid, ss20D(9), 20H(7).

85. Ibid s20A(1).

86. Ibid s20A(3), (4).

87. Ibid ss20B(1), (2), 20F(2), (3).

88. Ibid ss20B(6), 20F(7).

89. Idem, para (d) in both subsections.

90. Ibid ss20B(7), 20F(8).

91. Ibid s20F(1).

92. Section 20F(11) contemplates this situation but only provides that if the Minister rejects the Water Board's recommendation (that the procedures for a national conservation order be used), the Water Board can draft a local water conservation order, in its discretion.

93. WSCA ss20C and 20G. See s20C(1) to (4), and s20G(1) to (3).

94. Ibid s20C(6).

95. Ibid s20G(4), (6).

96. Ibid, s20H.

97. Ibid s20D(1), (6).

98. WSCA s14(3)(k), (4)(e), (h), (j), (k), (n), (o) and (p). It is s14(4)(e) that cncerns the water supply industry; subs (4)(h), (j) refer to the requirements of industry; and subs (4)(n) to (p) refer to the maintenance, inprovement and loss of water qualtity.

99. The other provision is WSCA s14(3)(i) which refers to the keeping of information rights and duties relating to uses and activities that concern water.

100. But note that s14(4)(e) refers to the information collected under that paragraph leading to advice to the Minister and local authorities.

101. WSCA s14(3)(p), (4)(i) and (p).

102. Section 143(b) WSCA concerns advice to the Minister as to legislation to effect the most efficient administration of water, and water and soil conservation, in the national interest. Paragraph (c) concerns an ongoing review of constitutions, functions and performances of water administration agencies. Paragraph (h) concerns advice to the Minister on funding necessary to effect the purposes of the WSCA.

103. WSCA s23. Water rights under this section are grasnted by the NWSCA.

104. Ibid s3.

105. The Water Board must consult the Minister of Forests in respect of any potential effects on water in or adjoining State forests. The consultant in respect of national parks is the Minister of Lands, and in respect of public reserves it is the reserves administering body. See the proviso to s21(3) WSCA.

106. Ibid s24(4).

107. Ibid s24(8), (8A), (8B).

108. Ibid s25(1).

109. Ibid s25(3).

110. Ibid, third proviso to s21(3).

111. Ibid s21(3A).

112. Ibid s21(3B), (3C).

113. Ibid ss20D(4), 20H(4).

114. Ibid s20D(4).

115. Ibid s21(3G).

116. Ibid s21(3D).

117. Ibid s22.

118. Ibid s22(1), (2). This involves the Minister of Lands and "any public authority which may be interested".

119. Idem. For reasons unknown, only subs (2) relating to damming, expressly refers to the Water Board's opinion of the matter, but presumably subs (1) which covers all other types of activity is also according to the Board's judgment.

120. Don Gray, Group Planning Manager Petrocorp, Interview with the writer, February 1985.

121. WSCA proviso to s22(1).

122. Ibid ss20D(4), 20H(4).

123. Ibid s20(5)(c).

124. Ibid s20(5)(d).

125. Ibid s20(5)(e).

126. DAR Williams see n79 supra.

127. 1982 1 NZLR 319.

128. (1982) 8 NZTPA 298.

129. Between these cases arising and being determined, the WSCA was amended to clarify the relationship, establishing clearly that water rights are also required. Of course the case was decided in the absence of these provisions.

130. Cooke and Somers JJ delivered separate but very similar decisions. Holland J concurred completely. It is sufficient to refer only to Cooke J's opinion. See Keam op cit, at 322, 323.

131. 1975 2 NZLR 150.

132. See n14c supra.

133. Idem.

134. Keam, supra n127, at 322.