Resource Consents: Pitfalls and Opportunities

Presentation to AWATEA Marine Energy Consenting Workshop

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Introduction

Topical issues and relevant case law relating to:

- Procedural priority – competing applications for the same resource
- Monitoring and review conditions/adaptive management – a Clayton's consent?
- National (i.e. central Government) policy direction under the RMA
- Possible RMA reforms

Procedural priority – *Central Plains*

- Case associated with long running debate over water allocation in Canterbury
- Either a pitfall or opportunity – priority can create significant economic advantage
- Well-established case law regarding priority of applications for same resource
- No clear statutory direction in RMA about priority
- Generally first-in, first served – applications heard and determined first, a *de facto* allocation regime?

Procedural priority (continued)

- Extension beyond finite resources?
- Has been applied to competing windfarms
- Key issue for marine energy is occupation of coastal space, water column
- Section 14(2) RMA - few regional plans have rules about taking energy from open coastal water
- Established case law orthodox

Procedural priority – established law

- Priority attained at point applicant lost control of the process, when application was notifiable
- Applications lodged later but notifiable first could gain priority over incomplete applications filed earlier
- When associated applications were required but had not yet been lodged, priority was not attained
- Implied all necessary consents had to be sought and notifiable to attain priority, undue delay could result in loss of priority

Central Plains in Court of Appeal

- CPWT water "take" application filed and notifiable, on hold for four years, "use" application filed almost 4 years later
- Ngai Tahu applied for consents to take and use water from the Waimakariri River for irrigation purposes, all applications notifiable, gain priority according to council and lower Courts
- 2 -1 decision in Court of Appeal: minority upheld existing approach

Central Plains – majority view

- Inappropriate risk of a major development being "gazumped" or undermined by later, smaller, simpler, inconsistent proposals
- Priority accrues to first applicant in time (i.e. lodgement determines priority)
- No undue delay on the part of CPWT
- Application not so insubstantial/insufficient to be nullity

Central Plains – possible implications

- Possibility of barely adequate "placeholder" applications solely intended to gain economic or competitive advantage
- Potential *de facto* reservation of coastal space
- Councils may need to use section 88(3) of RMA and return inadequate applications (within 5 working days of receipt), to discourage "placeholder" applications
- Appealed to Supreme Court, appeal heard and awaiting decision – return to orthodox position likely

Adaptive management – a Clayton's consent?

- Issue has arisen in a number of coastal environment cases
- Associated with risk/precautionary principle
- Often a consequence of insufficient scientific knowledge
- Effects of low probability but high potential impact
- Dolphins and marine mammals a particular focus
- Validity of conditions a key issue
- Has arisen in Crest Energy application

D-G of Conservation v Marlborough DC

- Case concerned proposed new marine farm
- Issues over potential impact on Hector's dolphin
- Environment Court imposed strict monitoring conditions
- Only partial exercise of consent – a "trial" while effects being further researched/determined
- Characterised as a condition precedent (i.e. can only fully exercise a consent once uncertainty addressed)
- Monitoring reports to be *certified* by Council

Implications and risks of such conditions

- May never be able to fully exercise consent
- Risk that consent could be cancelled under section 132
- Additional costs and delays
- Inability to provide sufficient or sufficiently reliable data to allow consent to be fully exercised
- Funding/investment risks
- Sets high threshold for quality/reliability of information in application

National Policy Statements under the RMA

- Reflection of perceived lack of central direction/consistency
- First "non-mandatory" NPS in April 2008 – electricity transmission
- A number of NPS' under active consideration
- Relevance and weight comparatively untested
- *Potential* to create considerable opportunities in consents and plans for wave and tidal energy
- But *content* and *clarity* of NPS is critical

NPS on renewable electricity generation

- Wave and tidal energy included in definition, not a particular focus of proposed NPS
- Five policies in proposed NPS, broadly stated
- Not particularly clear or directive – states the obvious?
- Exceptions – policy 5 seeks to encourage "small and community-scale distributed renewable electricity generation"
- However definition excludes wave and tidal energy
- AWATEA has submitted to address shortcomings – watch this space, but NPS of limited value in current form?

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Other relevant policy directions …

- RMA a high priority for reform
- Some matters of potential relevance to wave and tidal energy
- Major projects provisions – priority for major infrastructure projects, decisions within 9 months
- Not necessary to be nationally significant?
- Possibility of reduced council involvement
- Environmental Protection Agency role

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Possible RMA reforms

- Removal of Minister of Conservation veto in CMA
- Simplifying regional and district plans
- Reduction in consent activity categories (5 to 3)
- Removal of Treaty principles/spiritual references, socio-economic considerations
- Free consent processing if timeframes not met
- Reduced “vexatious” submissions, need for standing?
- Continuation of existing direction – NES/NPS?
- Some scope for debate/uncertainty

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