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7 July 2008

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By email and post

PROPOSED ONE PLAN HEARING – FOLLOW UP ON APPEARANCE AT HEARING ON OVERALL PLAN

1 As you know, we act for Fonterra Co-operative Group Limited (*Fonterra*).

2 As requested by the Hearing Committee, we are writing to address briefly the matters that were raised during Fonterra's appearance on 2 July as follows:

2.1 Provide information on current stocking rates in the Horizons region;

2.2 Outline progress against the Clean Streams Accord targets in the Horizons region;

2.3 Provide information on consultation with regional councils in preparation of the Dairy Industry Guidelines for Developing RMA Policy;

2.4 Provide suggestions on the use of further Section 42A Reports by Horizons, and comment briefly upon the further Section 42A Report of Phillip Percy;

2.5 Summarise points addressed only verbally at the hearing on the Overall Plan; and

2.6 Provide information on a site visit to a dairy farm (or farms) in the Horizons region.

3 We would appreciate it if you could provide a copy of this letter to the Hearing Committee.

Current Stocking Rates in the Horizons Region

4 Commissioner White queried the current stocking rates for dairy farms in the Horizons region.

5 LIC, a company that provides services to the livestock sector, records statistics on dairy farming in New Zealand.[1] According to LIC, the average number of cows per hectare is as follows:

5.1 North Island Average (1998/1999): 2.71 cows per hectare;[2]

5.2 Horizons Average (1998/1999): 2.57 cows per hectare;[3]

5.3 North Island Average (2006/2007): 2.81 cows per hectare;[4] and

5.4 Horizons Average (2006/2007): 2.71 cows per hectare.[5]

6 Statistics are not available for the period prior to 1998 or post 2007.

7 Accordingly, the average number of cows per hectare has increased from 1998/1999 to 2006/2007 as follows:

7.1 3.7% increase across the North Island; and

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[1] See http://www.lic.co.nz/lic_Publications.cfm?

[2] See http://www.lic.co.nz/pdf/dairy_stats/3_regional_dairy_statistics.pdf (attached as **Appendix A**).

[3] See **Appendix A**. Horizons region assumed to be an average of the Wellington, Western Uplands, and Central Plateau farming regions.

[4] See http://www.lic.co.nz/pdf/dairy_stats/DS-3.pdf (attached as **Appendix B**).

[5] See **Appendix B**. Horizons region assumed to be an average of the Wellington, Western Uplands, and Central Plateau farming regions.

7.2 5.45% increase across the Horizons region.

8 These figures are lower than the 10 percent increase referenced in Fonterra's submission.[6] In any event, it is considered that the figures do not reflect "a massive intensification of agriculture during the past 10-15 years, particularly from dairy farming" as suggested in the Section 32 Report.[7]

Progress against the Clean Streams Accord targets in the Horizons region

9 Chairperson Allin requested information on the progress against the Clean Streams Accord targets in the Horizons region.

10 Mr Hutchings provided information on the national progress against the targets in his evidence.[8] We are advised that the progress against the targets in the Horizons region is as follows:[9]

10.1 Exclusion of Dairy Cattle From Waterways. Performance target: dairy cattle excluded from 50% of streams, rivers and lakes by 2007, 90% by 2012. Performance achievement in Horizons Region in 2007/2008: 81% of Fonterra suppliers have either fenced all "Accord waterways" or have no such waterways on their properties. Stock have been excluded from 54% (4% more than required under the Clean Streams Accord) of "Accord waterways."

10.2 Installation of Bridges and Culverts. Performance target: 50% of regular crossing points have bridges or culverts by 2007, 90% by 2012. Performance achievement in Horizons Region in 2007/2008: 98.1%.

10.3 Treatment of Farm Dairy Effluent. Performance target: 100% of farm dairy effluent discharges to comply with resource consents and regional plans immediately. Performance achievement in Horizons Region in 2007/2008: 65% full compliance, 35% non-compliance (of which 20% was considered non-significant non-compliance).[10]

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[6] See Fonterra submission on Proposed One Plan at [36].

[7] See Section 32 Report, Page 65.

[8] See Statement of Evidence of John Lewis Hutchings at [20] to [21].

[9] Supporting documentation available upon request.

[10] Based upon a sample size of 44% of Fonterra suppliers in the Horizons region.

10.4 Nutrient Management. Performance target: 100% of dairy farms to have in place systems to manage nutrient inputs and outputs by 2007. Performance achievement in Horizons Region in 2007/2008: 97% of suppliers have nutrient budgets.

10.5 Protection of regionally significant or important wetlands. Performance target: 50% of regionally significant wetlands to be fenced by 2005, 90% by 2007. Performance achievement in Horizons Region in 2007/2008: 78% of regionally significant wetlands fenced (or being fenced). Other management activities are in place (eg planting plans) for wetlands in the area.

Consultation with Regional Councils in Preparation of the Dairy Industry Guidelines for Developing RMA Policy

11 Commissioner White questioned the degree to which regional councils were consulted in the preparation of the Dairy Industry Guidelines for Developing RMA Policy.[11]

12 In addition to the information provided by Mr Hutchings at the hearing, we are advised that:

12.1 Discussions were held with some members of the Resource Managers Group, which consists of directors from all the regional councils;

12.2 Consultation with regional councils is planned as part of the Primary Sector Water Partnership, which may include consultation on the Dairy Industry Guidelines for Developing RMA Policy as well; and

12.3 The Dairy Industry Guidelines for Developing RMA Policy have been placed on the Quality Planning website.[12]

Further Section 42A Reports by Horizons

13 Chairperson Allin sought suggestions to ensure fairness to submitters with respect to the preparation of Further Section 42A Reports by Horizons.

14 We consider that an appropriate process is as follows:

14.1 The Further Section 42A Reports should be provided (at least) to those submitters who have raised issues in their submissions or evidence that are addressed in the Further Reports;

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[11] Attached as Appendix B to the Statement of Evidence of John Lewis Hutchings.

[12] See http://www.qualityplanning.org.nz/news/new.php?id=509/

14.2 The Further Section 42A Reports should be provided no fewer than 5 working days prior to the commencement of the hearing on the topic to which the Further Report relates; and

14.3 Submitters should thereby be given an opportunity to respond to the Further Section 42A Reports.

15 As Fonterra did not have an opportunity at the hearing to respond to the Further Section 42A Report of Mr Phillip Percy that was provided at the hearing, we make the following brief points:

15.1 We note that Mr Percy agrees that the Code of Good Regulatory Practice, which was referenced in Dr Layton's evidence, "provides a good framework for assisting with such evaluations and is complimentary to the evaluation required by s32 of the Resource Management Act 1991."[13]

15.2 Mr Percy notes that the Section 32 Report provides only a summary of the evaluation, and was a "directive" to submitters to seek additional information.[14] Mr Percy, however, fails to point to any extant information that addresses the matters raised in Dr Layton's evidence, including:

(a) The most efficient means to address agricultural operations, including the most appropriate way to reduce nitrogen leaching into waterways; or

(b) Preference for hydro-electric power generation in water allocation matters.[15]

15.3 Mr Percy appears to discount the usefulness of a cost/benefit analysis by noting that "the variability of activities and environments throughout the region mean that often a single method will not be as effective as another in achieving a specific environmental outcome across all of those variable situations."[16] However, as explained in Dr

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[13] Supplementary Section 42A Report of Phillip Percy at [2].

[14] Supplementary Section 42A Report of Phillip Percy at [5].

[15] See Evidence of Dr Brent Layton at [13].

[16] Supplementary Section 42A Report of Phillip Percy at [12].

Layton's evidence, this scenario is precisely when a cost/benefit analysis "pays its greatest dividends."[17]

15.4 Mr Percy appears to attempt to justify the regulatory approach to dairy farming compared to the non-regulatory approach for hill country farms on the following grounds:

> So for discharges of contaminants from dairy farms to be enabled through the POP, a rule must be put in place to enable this, with the appropriate controls necessary. Land use activities on hill-country farms (such as land disturbance and vegetation clearance) can take place unless they contravene a rule.[18]

15.5 We consider Mr Percy's reasoning to be inherently flawed as Rule 13-1 addresses activities that lie far outside the scope of Section 15 of the Resource Management Act 1991 (*RMA*) on which Mr Percy seeks to rely.[19] For example, water takes are governed by Section 14, not Section 15 as implied by Mr Percy. Furthermore, we note that this issue will be the subject of extensive legal submissions at the upcoming hearing on water quality, and consider that it is not appropriate for Mr Percy to attempt to "pre-litigate" issues at this stage in the hearings.

15.6 Fonterra welcomes Mr Percy's invitation to work with Horizons staff to develop a non-regulatory approach to dairy farming.[20] Fonterra has met, and will continue to meet, with Horizons staff in an effort to develop such an approach for incorporation into the Proposed One Plan.

16 We consider that the other matters raised by Mr Percy do not require further comment as they were addressed in the legal submissions and evidence of Fonterra at the Overall Plan Hearing.

Points Addressed Only Verbally at the Overall Plan Hearing

17 We summarise briefly the following topics as they were only raised and addressed verbally at the hearing and have not been the subject of prior written legal submissions or written evidence:

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[17] See Evidence of Dr Brent Layton at [34].

[18] Supplementary Section 42A Report of Phillip Percy at [16].

[19] Ibid.

[20] Supplementary Section 42A Report of Phillip Percy at [17].

17.1 *Countdown Properties (Northlands) Ltd v Dunedin City Council*;

17.2 Issues in contention; and

17.3 Way forward.

Countdown Properties (Northlands) Ltd v Dunedin City Council;

18 We enclose as **Appendix C** a copy of *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145.

19 While concerning an earlier version of Section 32 of the RMA, *Countdown* is an important part of the Section 32 jurisprudence.[21] We consider the reasoning of this case to be particularly important as it relates to the matter before the Hearing Committee.

20 *Countdown* concerned a private plan change sought by Woolworths. The issue before the High Court was whether a local authority was required to complete and publish a Section 32 report prior to notifying the private plan change. The Court held that a local authority was not required to complete its Section 32 report prior to notification of a private plan change; however, it was required to complete the Section 32 report for a plan change initiated by the local authority.[22]

21 The High Court reasoned that:

21.1 Because the public was required to challenge the Section 32 analysis in its submission on plan changes initiated by local authorities, the analysis must have been completed prior to notification. Otherwise, submitters would either be unable to make appropriate submissions or would be required to make precautionary submissions challenging the adequacy of the analysis.[23]

21.2 Parties, however, were not obligated to challenge the adequacy of the Section 32 analysis in submissions on private plan changes – parties could raise the Section 32 issue at any time under the version

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[21] We note that leave to appeal the Section 32 issues decided by the High Court in *Countdown* was denied. See *Countdown Properties (Northlands) Ltd v Dunedin City Council* (High Court, AP214/93, 20 June 1994) at page 8.

[22] *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 at page 159.

[23] *Ibid* at 159-160.

of the RMA at the time. Therefore, there was no need for the Section 32 analysis to be completed prior to notification of the plan change.[24]

22 Section 32A(1) of the RMA now requires:

> A challenge to an objective, policy, rule or other method on the ground that section 32 has not been complied with may be made only in a submission under Schedule 1 or a submission under section 49.[25]

23 Therefore, as with plan changes initiated by local authorities in *Countdown*, submitters must now challenge the adequacy of a Section 32 analysis in a submission on the plan under Section 32A.[26] If submitters do not raise the Section 32 issue in the submission, they are barred from raising it later in the proceedings. It goes without saying that a Section 32 analysis needs to be conducted in order for it to be challenged in a submission.

24 It is acknowledged that there is a difference of degree between conducting no Section 32 analysis (as in *Countdown*) and conducting an inadequate one (as is contended in this matter). However, as Section 32A(1) requires that challenges to a Section 32 analysis must be made in a submission on the proposed plan, we consider that the majority of the Section 32 analysis – and especially the weighing of competing policy options – must be conducted prior to notification. If this is not done, a submitter may find itself having to lodge a submission challenging the adequacy of the analysis before the actual analysis has taken place, which is exactly the outcome that the High Court sought to avoid.

Issues in contention

25 Fonterra identified its primary issues of concern at the Overall Plan Hearing to assist the Hearing Committee in understanding Fonterra's positions. A number of questions were raised about Fonterra's particular concerns with respect to certain issues, and Fonterra witnesses and counsel endeavoured to provide useful information to the Hearing Committee to guide their understanding.

26 We emphasise that these issues will be addressed in greater detail at the later hearings through legal submissions and evidence. With respect to the

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[24] *Ibid* at 160.

[25] RMA, s32A.

[26] Section 32A came into force in August 2003. The version of Section 32 at issue in *Countdown* likewise required submitters to challenge the Section 32 analysis (for plan changes initiated by local authorities) in submissions on the notified plan change. See former Section 32(3).

two issues that received considerable attention at the Overall Plan Hearing, we note the following:

26.1 It is not accepted that the values in Table 13.2 are based on sound science and/or correspond to a specified and appropriate degree of water quality;[27] and

26.2 It is not accepted that Policy 6-16(b) is limited to protecting water takes for existing hydro-electric facilities or that (if it is) unlimited protection for these facilities is necessarily appropriate in all circumstances.[28]

Way forward

27 We outlined a "way forward" in the relief sought in the legal submissions.[29]

28 We elaborated on the process that might be used to accomplish the requested relief at the Overall Plan Hearing, and reiterate its key parts as follows:

28.1 The Hearing Committee could circulate a letter to all submitters (or just those who made submissions on the Section 32 analysis) with a preliminary list of principal issues in contention based upon the submissions received;

28.2 The submitters should be given the opportunity to make suggestions to add or delete issues from the list;

28.3 Once the issues are identified, the relevant experts for Horizons and the submitters could convene a caucusing-like session in an effort to develop a methodology for preparing a further Section 32 analysis;

28.4 Once the methodology is agreed (if possible), Horizons could complete the further Section 32 analysis; and

28.5 The further analysis could be released concurrently with the Officers Report for the individual topic hearings.

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[27] See Fonterra submission on Proposed One Plan at [66] to [69].

[28] See Fonterra submission on Proposed One Plan at [72].

[29] See Opening Legal Submissions at [71] to [75].

Dairy Farm Visit

29 Fonterra would be happy to assist with arranging a site visit to a dairy farm (or dairy farms) in the Horizons region.

30 Horizons staff should feel free to contact Mr Sean Newland, Sustainable Dairying Strategist for the Horizons Region to arrange a visit. Mr Newland can be reached at 04 494 0725 or sean.newland@fonterra.com.

31 Please contact us if you have any questions. Thank you.

Yours faithfully

Suzanne Janissen / Barclay Rogers
Partner / Senior Legal Advisor

APPENDIX A – LIC REGIONAL DAIRY STATISTICS (1998/1999)

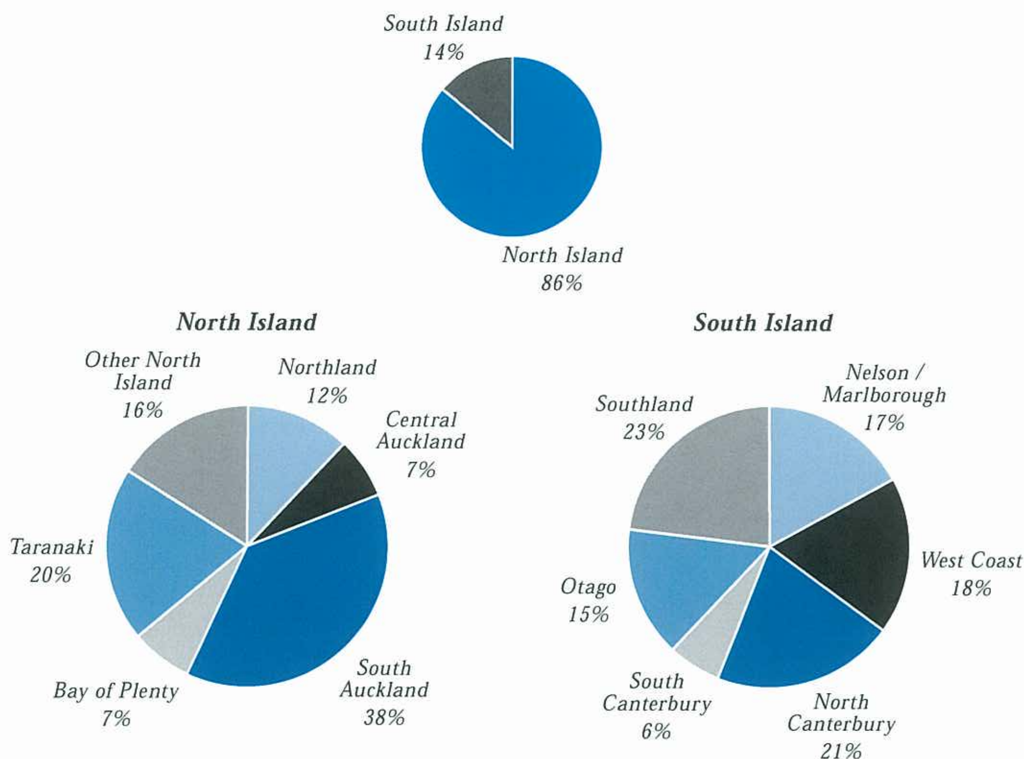
3. Regional dairy statistics

- ***No change in the distribution of the number of dairy farms from 1997/98 to 1998/99***

During the 1998/99 season, eight of the 15 dairy companies mainly supplied product for export (seasonal supply) and seven supplied the domestic market (town supply).

The distribution of dairy farms in 1998/99 has remained the same as the previous season. South Island farms account for 14% of the national total.

Graph 3.1: **Regional distribution of dairy farms in 1998/99**



The number of dairy cows increased by 2% from 1997/98 to 1998/99, with the North Island cow population rising by 0.9% (from 2,596,727 to 2,620,567) and the South Island cow population rising by 6.8% (from 625,864 to 668,752). The rate of increase for both the North and South Islands is less than 1997/98.

• *Larger average herd size in the South Island*

Farms in the South Island region are on average, larger both in terms of physical size and cow numbers than those in the North Island. Within the South Island, South Canterbury has the largest average herd size with 437 cows. In the North Island Hawkes Bay has the largest average herd size with 347 cows (Table 3.1).

Table 3.1: 1998/99 Herd analysis by region

Farming region	Total herds	Total cows	Average herd size	Average effective hectares	Average cows per hectare
Northland	1,491	290,898	195	98	2.1
Central Auckland	807	151,570	188	83	2.4
South Auckland	4,765	991,591	208	77	2.8
Bay of Plenty	818	188,375	230	86	2.8
Central Plateau	494	148,997	302	124	2.6
Western Uplands	78	19,206	246	111	2.4
East Coast	19	3,761	198	72	2.9
Hawkes Bay	66	22,887	347	140	2.5
Taranaki	2,453	481,034	196	74	2.8
Wellington	712	172,334	242	97	2.7
Wairarapa	632	149,914	237	92	2.7
North Island	**12,335**	**2,620,567**	**212**	**84**	**2.7**
Nelson/Marlborough	343	78,571	229	91	2.7
West Coast	371	80,787	218	118	2.0
North Canterbury	432	177,579	411	148	2.9
South Canterbury	112	48,915	437	163	2.9
Otago	302	112,577	373	139	2.8
Southland	467	170,323	365	139	2.7
South Island	**2,027**	**668,752**	**330**	**130**	**2.6**
New Zealand	**14,362**	**3,289,319**	**229**	**91**	**2.7**

- ***Highest farm production recorded in South Canterbury***

South Island farms have, on average, higher per farm production, with South Canterbury recording the highest average farm production at 73,467 kilograms of milkfat and 56,522 kilograms of protein. In the North Island the Hawkes Bay region recorded the highest average farm production with 54,731 kilograms of milkfat and 41,540 kilograms of protein (Table 3.2).

In 1998/99 production per effective hectare and per cow shows that milkfat and protein per hectare and per cow is higher in the South Island than the North Island. At a regional level this translates to a higher protein to milkfat ratio for the East Coast of the South Island for the 1998/99 season.

Table 3.2: 1998/99 Farm production analysis by region

Farming region	Average litres per farm	Average milkfat per farm	Average protein per farm	Average milkfat per effective hectare	Average protein per effective hectare	Average milkfat per cow	Average protein per cow
Northland	584,564	27,267	20,510	284	213	135	101
Central Auckland	569,315	26,211	19,911	325	246	135	102
South Auckland	651,280	31,077	23,200	410	305	145	108
Bay of Plenty	735,661	34,088	25,659	400	300	143	107
Central Plateau	1,013,650	47,567	35,419	400	297	155	115
Western Uplands	775,020	36,323	27,198	340	255	144	108
East Coast	624,979	29,821	22,295	426	317	149	111
Hawkes Bay	1,177,029	54,731	41,540	383	290	152	115
Taranaki	607,462	31,027	22,650	426	311	153	111
Wellington	782,695	35,852	27,206	374	284	142	107
Wairarapa	768,307	36,858	27,468	407	302	151	112
North Island	**666,414**	**31,879**	**23,776**	**389**	**289**	**145**	**108**
Nelson/Marlborough	734,258	34,896	25,494	389	283	148	107
West Coast	667,206	33,553	23,997	294	209	152	108
North Canterbury	1,506,616	69,929	53,595	461	355	160	123
South Canterbury	1,592,985	73,467	56,522	464	359	162	125
Otago	1,343,833	61,705	47,715	449	347	157	122
Southland	1,304,457	61,304	47,627	443	344	164	127
South Island	**1,156,229**	**54,326**	**41,333**	**412**	**313**	**157**	**119**
New Zealand	**735,544**	**35,047**	**26,254**	**392**	**292**	**147**	**109**

Central Otago has the largest farms and highest herd size with an average herd size of 704 cows and an average of 260 hectares (Table 3.3). Matamata-Piako (in South Auckland) is the district with the most herds with 1,426 herds, while South Taranaki is the district with the most cows (292,999).

Table 3.3: 1998/99 Herd analysis by district

Region	District	Total herds	Total cows	Average herd size	Average effective hectares	Average cows per hectare
Northland	Far North	422	77,537	184	93	2.1
	Whangarei	475	98,847	208	105	2.1
	Kaipara	594	114,514	193	96	2.1
Central Auckland	Rodney	304	53,061	175	86	2.2
	Manukau	32	7,096	222	76	2.9
	Papakura	18	4,378	243	93	2.7
	Franklin	453	87,035	192	81	2.5
South Auckland	Thames-Coromandel	124	24,459	197	84	2.5
	Hauraki	568	112,216	198	76	2.7
	Waikato	941	197,638	210	81	2.7
	Matamata-Piako	1,426	277,181	194	68	3.0
	Hamilton	10	1,891	189	78	2.6
	Waipa	791	170,616	216	79	2.9
	Otorohanga	465	106,218	228	85	2.8
	South Waikato	439	100,888	230	85	2.8
Bay of Plenty	Western Bay of Plenty	299	67,486	226	85	2.7
	Tauranga	10	2,379	238	89	2.6
	Whakatane	399	94,235	236	87	2.8
	Opotiki	110	24,275	221	86	2.7
Central Plateau	Taupo	112	40,645	363	163	2.4
	Rotorua	383	108,836	284	113	2.7
Western Uplands	Waitomo	63	15,394	244	110	2.4
	Ruapehu	15	3,812	254	112	2.4
East Coast	Gisborne	8	1,500	188	62	3.0
	Wairoa	11	2,261	206	80	2.7
Hawkes Bay	Napier/Hastings	24	8,796	367	153	2.3
	Central Hawkes Bay	42	14,091	335	133	2.6
Taranaki	New Plymouth	638	117,456	184	73	2.6
	Stratford	399	70,579	177	69	2.7
	South Taranaki	1,416	292,999	207	75	2.9
Wellington	Wanganui	29	7,570	261	118	2.4
	Rangitikei	97	26,220	270	108	2.7
	Manawatu	325	76,021	234	92	2.7
	Palmerston North	44	11,962	272	109	2.6
	Horowhenua	173	41,370	239	97	2.6
	Kapiti Coast	31	7,119	230	86	2.9
	Upper Hutt	13	2,072	159	67	2.5
Wairarapa	Tararua	406	89,471	220	85	2.7
	Masterton	23	7,209	313	118	2.8
	Carterton	94	22,262	237	88	2.8
	South Wairarapa	112	31,888	285	114	2.6
North Island		**12,335**	**2,620,567**	**212**	**84**	**2.7**
Nelson/Marlborough	Tasman	222	49,005	221	90	2.6
	Nelson	6	1,146	191	67	3.0
	Marlborough	87	19,380	223	86	2.8
	Kaikoura	28	9,040	323	126	2.7
West Coast	Buller	126	27,782	220	105	2.2
	Grey	60	14,804	247	139	1.8

Table 3.3 continued

Region	District	Total herds	Total cows	Average herd size	Average effective hectares	Average cows per hectare
	Westland	185	38,201	206	120	1.8
North Canterbury	Hurunui	40	22,169	554	212	2.7
	Waimakariri	70	17,018	243	91	2.9
	Christchurch	11	2,832	258	100	2.7
	Banks Peninsula	14	2,134	152	78	2.1
	Selwyn	151	57,399	380	130	3.0
	Ashburton	146	76,027	521	187	2.9
South Canterbury	Timaru	71	26,080	367	132	3.0
	Waimate	41	22,835	557	217	2.7
Otago	Waitaki	73	36,406	499	180	2.9
	Central Otago	5	3,521	704	260	2.9
	Dunedin	99	26,117	264	98	2.8
	Clutha	125	46,533	372	142	2.8
Southland	Southland	371	135,347	365	140	2.7
	Gore	56	21,268	380	142	2.8
	Invercargill	40	13,708	343	129	2.7
South Island		**2,027**	**668,752**	**330**	**130**	**2.6**
New Zealand		**14,362**	**3,289,319**	**229**	**91**	**2.7**

NOTE: Districts with fewer than five farms have been added to a neighbouring district to preserve the anonymity of the farms.

Central Otago district with five farms has the highest average production per farm with 120,927 kilograms of milkfat per farm and 94,851 kilograms of protein per farm. The North Island district with the highest production is Taupo with an average of 58,759 kilograms of milkfat per farm and 43,832 kilograms of protein per farm (Table 3.4).

Table 3.4: 1998/99 Farm production analysis by district

Region	District	Average litres per farm	Average kg milkfat per farm	Average kg protein per farm	Average kg milkfat per effective ha	Average kg protein per effective ha	Average kg milkfat per cow	Average kg protein per cow
Northland	Far North	534,786	24,696	18,679	268	202	129	97
	Whangarei	634,552	30,073	22,482	293	219	140	105
	Kaipara	579,956	26,849	20,234	287	216	135	101
Central Auckland	Rodney	503,355	24,044	17,856	283	209	132	98
	Manukau	726,199	31,285	24,636	414	324	141	111
	Papakura	805,249	34,977	27,557	378	293	141	110
	Franklin	593,122	26,960	20,652	344	263	135	103
South Auckland	Thames-Coromandel	603,922	28,090	21,123	338	254	138	103
	Hauraki	603,115	28,453	21,358	382	287	141	106
	Waikato	656,458	30,710	32,140	383	288	142	106
	Matamata-Piako	598,753	29,166	21,600	433	320	146	108
	Hamilton	576,738	28,631	20,944	369	267	140	101
	Waipa	685,223	32,595	24,392	419	313	146	109
	Otorohanga	731,286	35,018	26,048	416	309	149	110
	South Waikato	742,103	35,442	26,371	425	315	151	112
Bay of Plenty	Western Bay of Plenty	705,588	33,201	24,878	392	293	143	107
	Tauranga	767,916	35,128	26,726	370	280	141	107
	Whakatane	765,198	35,047	26,492	411	310	144	108
	Kawerau	1,046,084	53,346	39,214	364	269	127	94
	Opotiki	707,336	32,922	24,666	381	285	143	106
Central Plateau	Taupo	1,250,961	58,759	43,832	372	276	158	118
	Rotorua	944,254	44,295	32,960	408	303	154	114

Table 3.4 continued

Region	District	Average litres per farm	Average kg milkfat per farm	Average kg protein per farm	Average kg milkfat per effective ha	Average kg protein per effective ha	Average kg milkfat per cow	Average kg protein per cow
Western Uplands	Waitomo	765,023	36,218	26,933	340	253	145	108
	Ruapehu	817,009	36,765	28,311	340	263	141	109
East Coast	Gisborne	595,399	28,591	21,288	465	343	155	114
	Wairoa	646,493	30,715	23,028	398	298	145	108
Hawkes Bay	Napier/Hastings	1,220,557	56,160	42,504	337	256	146	110
	Central Hawkes Bay	1,152,156	53,914	40,989	410	309	155	117
Taranaki	New Plymouth	558,849	28,155	20,511	388	282	147	107
	Stratford	534,221	26,753	19,653	387	284	146	107
	South Taranaki	650,003	33,526	24,458	455	331	158	115
Wellington	Wanganui	835,686	37,499	28,581	330	249	139	106
	Rangitikei	889,297	42,484	31,774	402	301	151	113
	Manawatu	752,833	34,707	26,257	374	282	141	106
	Palmerston North	879,711	39,980	30,408	378	285	142	107
	Horowhenua	775,562	34,711	26,602	367	281	140	107
	Kapiti Coast	748,515	32,277	25,093	394	306	138	107
	Upper Hutt	463,690	21,055	16,005	314	238	129	98
Wairarapa	Tararua	700,848	33,980	25,232	404	299	150	111
	Masterton	1,058,927	49,242	37,128	431	323	155	116
	Carterton	784,134	36,774	27,643	422	316	151	113
	South Wairarapa	938,074	44,743	33,388	399	297	155	115
North Island		**666,414**	**31,879**	**23,776**	**389**	**289**	**145**	**108**
Nelson/Marlborough	Tasman	695,496	33,655	24,295	383	275	148	106
	Nelson	630,876	26,865	20,960	417	323	148	114
	Marlborough	712,274	32,794	24,360	392	289	144	106
	Kaikoura	1,132,052	52,985	39,489	426	318	159	119
West Coast	Buller	668,405	33,178	23,750	322	230	146	104
	Grey	787,434	38,859	28,019	287	206	156	112
	Westland	627,397	32,088	22,860	276	197	154	110
North Canterbury	Hurunui	2,097,676	96,967	74,181	478	365	173	132
	Waimakariri	820,763	36,099	28,145	413	322	142	111
	Christchurch	890,408	38,090	30,065	386	306	140	111
	Banks Peninsula	432,567	19,349	14,671	258	194	125	94
	Selwyn	1,394,981	63,690	49,442	471	367	158	123
	Ashburton	1,938,391	92,442	69,959	494	375	172	130
South Canterbury	Timaru	1,334,873	60,671	46,980	463	360	158	123
	Waimate	2,039,958	95,627	73,046	467	356	169	129
Otago	Waitaki	1,853,746	84,470	65,727	484	377	166	129
	Central Otago	2,670,151	120,927	94,851	481	375	169	132
	Dunedin	904,321	40,887	31,426	412	317	145	111
	Clutha	1,341,084	62,529	48,210	455	352	162	125
Southland	Southland	1,296,156	61,101	47,437	440	342	164	127
	Gore	1,396,754	64,682	50,177	466	361	167	130
	Invercargill	1,252,226	58,457	45,816	434	339	160	125
South Island		**1,156,229**	**54,326**	**41,333**	**412**	**313**	**157**	**119**
New Zealand		**735,544**	**35,047**	**26,254**	**392**	**292**	**147**	**109**

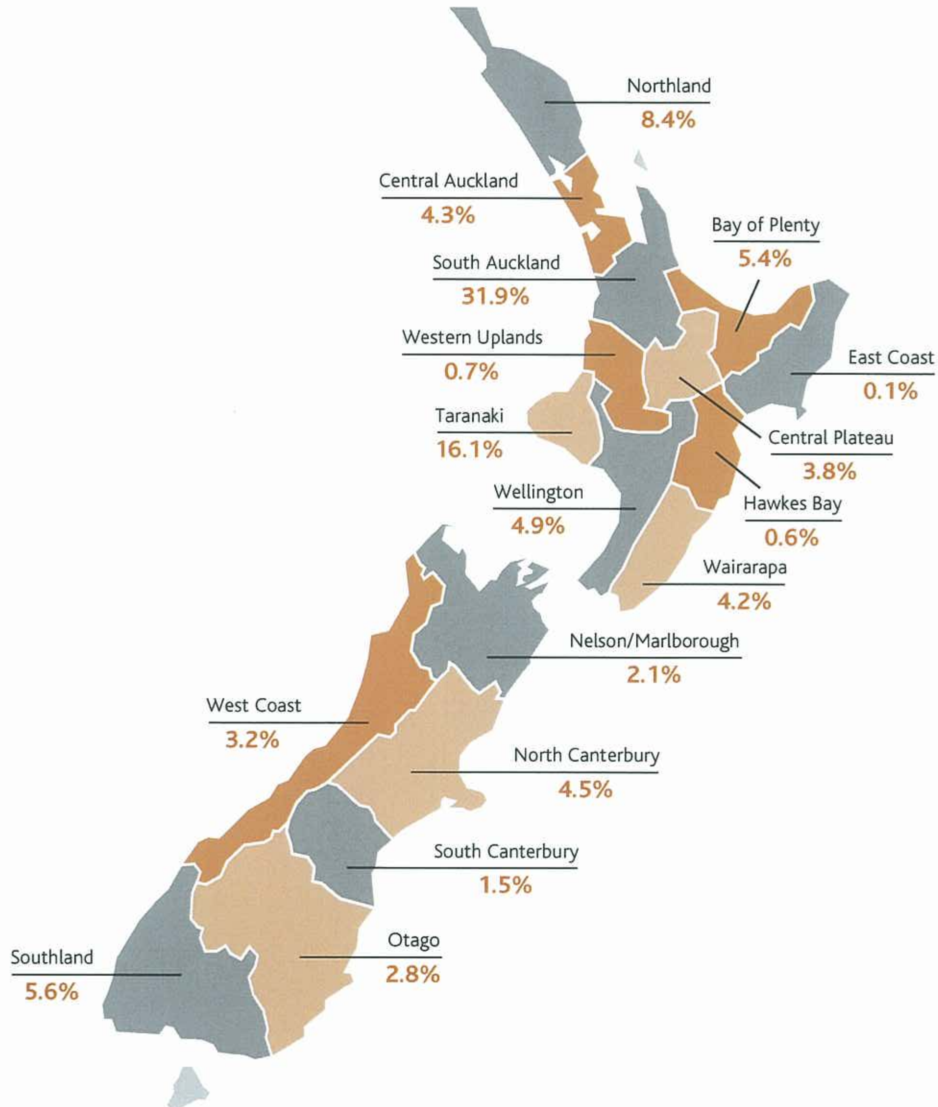
APPENDIX B – LIC REGIONAL DAIRY STATISTICS (2006/2007)

3. Regional dairy statistics

- *One third of all dairy herds are located in the South Auckland region*

The vast majority of dairy herds (80%) are located in the North Island, with the greatest concentration (32%) situated in the South Auckland region. Taranaki, with 16% of dairy herds, is the next most heavily populated region. South Island dairy herds account for 20% of the national total, but have 29.5% of the cows. The distribution of dairy herds within regions of each island in 2006/07 (Graph 3.1) has remained similar to previous seasons.

Graph 3.1 ***Regional distribution of dairy herds in 2006/07***



- *Over one million cows in the South Island*
- *Largest average herd size (692) and average cows per hectare (3.27) in South Canterbury*
- *Average herd size in the South Island is the highest on record at 505*

Farms in the South Island are, on average, larger than those in the North Island, in terms of both farm area and cow numbers. The overall number of herds in New Zealand (11,630) has dropped compared with the previous season (Table 3.1). Seventy-one percent of the total cows are in the North Island, with 28% in the South Auckland region. The average herd size in both islands continues to increase. Within the South Island, South Canterbury has the largest average herd size of 692 cows, an increase from the previous season's figure of 648 cows. In the North Island, Hawkes Bay has the largest average herd size of 557 cows. The smallest herd averages are in Central Auckland, Taranaki and Northland, averaging 233, 256 and 272 cows respectively. South Canterbury has the highest average cows per hectare (3.27), followed by North Canterbury (3.20) and South Auckland (3.02). The regions with the lowest average cows per hectare are found in Northland (2.20) and the West Coast (2.22).

Table 3.1 ***Herd analysis by region in 2006/07***

Farming region	Number of herds	Percentage of herds	Number of cows	Percentage of cows	Number of effective hectares	Percentage of effective hectares	Average herd size	Average effective hectares	Average cows per hectares
Northland	976	8.4	265,776	6.8	120,926	8.6	272	124	2.20
Central Auckland	500	4.3	116,379	3.0	48,358	3.4	233	97	2.43
South Auckland	3,713	31.9	1,082,244	27.6	364,101	25.8	291	98	3.02
Bay of Plenty	623	5.4	190,523	4.9	66,480	4.7	306	107	2.90
Central Plateau	444	3.8	207,157	5.3	79,056	5.6	467	178	2.72
Western Uplands	77	0.7	30,435	0.8	11,707	0.8	395	152	2.66
East Coast	14	0.1	4,221	0.1	1,768	0.1	302	126	2.52
Hawkes Bay	67	0.6	37,298	1.0	12,582	0.9	557	188	2.82
Taranaki	1,870	16.1	479,238	12.2	170,058	12.0	256	91	2.85
Wellington	571	4.9	189,392	4.8	69,675	4.9	332	122	2.74
Wairarapa	488	4.2	158,832	4.1	57,795	4.1	325	118	2.75
North Island	**9,343**	**80.3**	**2,761,495**	**70.5**	**1,002,506**	**71.0**	**296**	**107**	**2.81**
Nelson/Marlborough	250	2.1	81,309	2.1	30,355	2.1	325	121	2.76
West Coast	369	3.2	127,581	3.3	59,127	4.2	346	160	2.22
North Canterbury	518	4.5	348,659	8.9	109,053	7.7	673	211	3.20
South Canterbury	171	1.5	118,402	3.0	36,558	2.6	692	214	3.27
Otago	322	2.8	160,884	4.1	57,181	4.0	500	178	2.85
Southland	657	5.6	318,482	8.1	118,145	8.4	485	180	2.70
South Island	**2,287**	**19.7**	**1,155,317**	**29.5**	**410,419**	**29.0**	**505**	**179**	**2.80**
New Zealand	**11,630**		**3,916,812**		**1,412,925**		**337**	**121**	**2.81**

- ***Highest average per herd and average per hectare production recorded in South Canterbury***
- ***Highest average per cow production recorded in Southland***

South Island farms have, on average, higher per herd production than herds in the North Island, with South Canterbury recording the highest average herd production at 251,661 kilograms of milksolids (Table 3.2). In the North Island, the Hawkes Bay region recorded the highest average herd production of 176,537 kilograms of milksolids.

In 2006/07, average production per effective hectare and per cow was higher in the South Island than in the North Island. South Canterbury recorded the highest average milksolids per hectare in the South Island (1,232 kg), while South Auckland had the highest average milksolid production in the North Island (1,002 kg).

Southland had the highest average milksolids per cow (389 kg). The region with the lowest average milksolids per cow was recorded in the East Coast (266 kg).

Table 3.2 ***Herd production analysis by region in 2006/07***

Farming region	Average litres per herd	Average kg milkfat per herd	Average kg protein per herd	Average kg milksolids per herd	Average kg milkfat per effective hectare	Average kg protein per effective hectare	Average kg milksolids per effective hectare	Average kg milkfat per cow	Average kg protein per cow	Average kg milksolids per cow
Northland	928,145	45,358	33,903	79,261	358	267	625	161	120	281
Central Auckland	821,716	39,443	30,056	69,498	406	310	716	165	126	292
South Auckland	1,118,007	55,693	41,641	97,334	574	428	1,002	189	142	331
Bay of Plenty	1,160,882	55,995	42,279	98,275	534	403	936	183	138	321
Central Plateau	1,814,472	88,261	66,351	154,612	525	395	920	194	146	339
Western Uplands	1,333,601	65,844	49,447	115,291	447	336	783	167	125	292
East Coast	991,947	41,662	34,520	76,182	364	302	665	145	120	266
Hawkes Bay	2,080,755	100,302	76,235	176,537	500	379	879	173	131	305
Taranaki	912,743	48,114	35,305	83,418	534	391	925	186	137	323
Wellington	1,280,314	62,130	47,129	109,259	511	386	897	185	140	326
Wairarapa	1,173,034	59,201	43,969	103,169	496	367	863	180	133	313
North Island	**1,098,475**	**54,754**	**40,920**	**95,674**	**520**	**387**	**907**	**183**	**137**	**320**
Nelson/Marlborough	1,207,037	61,241	45,296	106,537	526	389	915	190	141	331
West Coast	1,235,795	64,319	47,377	111,696	440	323	763	197	145	342
North Canterbury	2,901,927	140,571	109,268	249,838	684	531	1,215	215	168	383
South Canterbury	2,922,000	141,519	110,143	251,661	693	539	1,232	213	166	379
Otago	2,175,173	104,087	81,102	185,189	616	481	1,096	217	170	387
Southland	2,146,307	104,926	81,512	186,438	590	458	1,049	219	170	389
South Island	**2,129,933**	**104,290**	**80,415**	**184,705**	**591**	**455**	**1,046**	**211**	**162**	**373**
New Zealand	**1,301,308**	**64,495**	**48,687**	**113,182**	**534**	**400**	**934**	**189**	**142**	**330**

South Taranaki continues to be the district with the most herds (1,132) and cows (308,388), followed by Matamata-Piako (Table 3.3). Waimate in South Canterbury has the highest average herd size with 793 cows.

Table 3.3 ***Herd analysis by district in 2006/07***

Region	District	Total herds	Total cows	Total effective hectares	Average herd size	Average effective hectares	Average cows per hectare
Northland	Far North	274	69,928	33,428	255	122	2.11
	Whangarei	328	94,159	40,795	287	124	2.30
	Kaipara	374	101,689	46,703	272	125	2.19
Central Auckland	Rodney	174	41,929	18,213	241	105	2.30
	Manukau City	19	3,966	1,489	209	78	2.69
	Papakura	9	1,286	555	143	62	2.30
	Franklin	298	69,198	28,101	232	94	2.49
South Auckland	Waikato	717	213,764	74,132	298	103	2.93
	Hamilton City	12	2,974	983	248	82	3.05
	Waipa	596	186,258	60,542	313	102	3.10
	Otorohanga	391	124,372	43,109	318	110	2.94
	Thames-Coromandel	92	22,740	8,577	247	93	2.65
	Hauraki	446	115,001	42,123	258	94	2.79
	Matamata-Piako	1,082	295,757	93,324	273	86	3.19
	South Waikato	377	121,378	41,311	322	110	2.99
Bay of Plenty	Western Bay of Plenty	207	66,838	22,520	323	109	2.99
	Tauranga	12	3,232	1,136	269	95	2.72
	Kawerau/Whakatane	321	96,357	34,272	300	107	2.86
	Opotiki	83	24,096	8,552	290	103	2.82
Central Plateau	Taupo	120	77,002	30,844	642	257	2.67
	Rotorua	324	130,155	48,212	402	149	2.73
Western Uplands	Waitomo	57	22,588	8,673	396	152	2.68
	Ruapehu	20	7,847	3,034	392	152	2.59
East Coast	Gisborne	5	1,696	720	339	144	2.51
	Wairoa	9	2,525	1,048	281	116	2.52
Hawkes Bay	Napier/Hastings	26	16,330	5,350	628	206	2.83
	Central Hawkes Bay	41	20,968	7,232	511	176	2.81
Taranaki	New Plymouth	468	109,510	41,519	234	89	2.69
	Stratford	270	61,340	23,406	227	87	2.63
	South Taranaki	1,132	308,388	105,133	272	93	2.97
Wellington	Wanganui	20	7,312	2,788	366	139	2.69
	Rangitikei	86	31,082	10,403	361	121	2.93
	Manawatu	274	87,245	32,341	318	118	2.74
	Palmerston North City	38	14,859	5,452	391	143	2.72
	Horowhenua	127	42,525	15,828	335	125	2.70
	Kapiti Coast	20	5,521	2,438	276	122	2.39
	Upper Hutt City	6	848	425	141	71	2.02
Wairarapa	Tararua	317	95,775	34,880	302	110	2.75
	Masterton	18	6,875	2,329	382	129	2.90
	Carterton	64	20,760	7,665	324	120	2.72
	South Wairarapa	89	35,422	12,921	398	145	2.75
North Island		**9,343**	**2,761,495**	**1,002,506**	**296**	**107**	**2.81**

(table 3.3 continued)

Region	District	Total herds	Total cows	Total effective hectares	Average herd size	Average effective hectares	Average cows per hectare
Nelson/Marlborough	Marlborough	62	17,115	6,173	276	100	2.74
	Kaikoura	26	9,017	3,392	347	130	2.69
	Tasman / Nelson City	162	55,177	20,790	341	128	2.77
West Coast	Buller	129	45,013	19,536	349	151	2.38
	Grey	88	36,367	16,108	413	183	2.31
	Westland	152	46,201	23,483	304	154	2.04
North Canterbury	Hurunui	52	37,396	12,605	719	242	3.05
	Waimakariri	67	32,209	10,409	481	155	2.95
	Christchurch City	9	4,482	1,513	498	168	3.27
	Banks Peninsula	10	1,377	717	138	72	1.98
	Selwyn	165	105,651	33,441	640	203	3.20
	Ashburton	215	167,544	50,368	779	234	3.36
South Canterbury	Timaru/MacKenzie	109	69,229	21,484	635	197	3.28
	Waimate	62	49,173	15,074	793	243	3.25
Otago	Waitaki/Central Otago	104	64,810	21,989	623	211	3.10
	Dunedin City	63	20,430	7,772	324	123	2.64
	Clutha	155	75,644	27,420	488	177	2.76
Southland	Gore	103	48,914	18,183	475	177	2.70
	Invercargill	49	23,233	8,751	474	179	2.61
	Southland	505	246,335	91,211	488	181	2.70
South Island		**2,287**	**1,155,317**	**410,419**	**505**	**179**	**2.80**
New Zealand		**11,630**	**3,916,812**	**1,412,925**	**337**	**121**	**2.81**

Note: *Districts with fewer than five herds have been added to a neighbouring district to preserve anonymity*

Ashburton district has the highest average production per herd with 282,463 kilograms of milksolids (Table 3.4), as well as the highest average kilograms of milksolids per effective hectare (1,263). Dunedin City district recorded the highest production per cow (423 kg of milksolids). The North Island district with the highest milksolids production per herd is Taupo with an average of 210,495 kilograms of milksolids.

Table 3.4 ***Herd production analysis by district in 2006/07***

Region	District	Average litres per herd	Average kg milkfat per herd	Average kg protein per herd	Average kg milksolids per herd	Average kg milkfat per effective hectare	Average kg protein per effective hectare	Average kg milksolids per effective hectare	Average kg milkfat per cow	Average kg protein per cow	Average kg milksolids per cow
Northland	Far North	895,749	43,125	32,499	75,624	339	254	593	159	120	279
	Whangarei	973,853	48,595	35,868	84,464	376	277	654	161	119	280
	Kaipara	911,792	44,155	33,208	77,363	357	267	624	161	121	283
Central Auckland	Rodney	801,912	39,918	29,796	69,714	370	276	646	160	119	279
	Manukau City	792,221	36,350	28,194	64,544	458	355	813	164	127	291
	Papakura	463,544	20,973	16,603	37,576	318	252	571	137	109	245
	Franklin	845,977	39,920	30,732	70,653	427	328	755	170	131	300
South Auckland	Waikato	1,136,446	55,713	42,035	97,748	546	411	957	185	139	324
	Hamilton City	927,711	47,306	34,853	82,159	581	426	1,007	189	139	328
	Waipa	1,212,471	60,416	45,273	105,689	596	445	1,041	191	143	335
	Otorahanga	1,202,563	60,069	44,883	104,952	558	417	975	188	141	329
	Thames-Coromandel	858,049	41,937	31,360	73,297	448	335	782	168	125	293
	Hauraki	978,950	48,458	36,272	84,730	523	392	915	187	141	328
	Matamata-Piako	1,044,281	53,032	39,283	92,314	611	452	1,063	191	142	333
	South Waikato	1,291,499	63,468	47,638	111,106	592	444	1,036	197	148	346
Bay of Plenty	Western Bay of Plenty	1,161,561	57,417	42,794	100,211	534	397	931	177	132	308
	Tauranga	975,297	47,321	35,810	83,131	464	352	817	168	127	295
	Kawerau/Whakatane	1,189,596	56,448	42,976	99,424	548	417	964	190	145	335
	Opotiki	1,074,970	51,952	39,238	91,191	491	369	860	172	130	302

(table 3.4 continued)

Region	District	Average litres per herd	Average kg milkfat per herd	Average kg protein per herd	Average kg milksolids per herd	Average kg milkfat per effective hectare	Average kg protein per effective hectare	Average kg milksolids per effective hectare	Average kg milkfat per cow	Average kg protein per cow	Average kg milksolids per cow
Central Plateau	Taupo	2,449,097	120,206	90,289	210,495	516	386	902	194	145	339
	Rotorua	1,579,426	76,430	57,485	133,915	529	398	926	194	146	339
Western Uplands	Waitomo	1,327,751	66,388	49,609	115,997	453	338	791	167	125	292
	Ruapehu	1,350,272	64,291	48,986	113,277	431	330	760	166	127	293
East Coast	Gisborne	993,400	41,723	34,570	76,293	290	241	531	110	91	201
	Wairoa	991,140	41,628	34,492	76,120	405	335	740	165	137	302
Hawkes Bay	Napier/Hastings	2,251,566	107,584	81,231	188,815	489	369	858	169	128	297
	Central Hawkes Bay	1,972,436	95,684	73,067	168,752	508	385	892	176	134	310
Taranaki	New Plymouth	838,816	44,039	32,077	76,116	501	365	865	186	135	321
	Stratford	826,163	42,716	31,569	74,286	491	363	853	186	138	323
	South Taranaki	963,957	51,086	37,530	88,616	558	409	966	187	137	324
Wellington	Wanganui	1,414,706	65,097	50,377	115,475	495	380	875	184	141	325
	Rangitikei	1,384,127	68,409	51,470	119,879	566	424	990	194	146	340
	Manawatu	1,247,147	60,795	46,051	106,846	514	388	902	186	141	326
	Palmerston North City	1,424,676	70,350	52,926	123,276	502	377	879	184	138	323
	Horowhenua	1,279,815	61,275	46,822	108,097	493	374	867	180	137	318
	Kapiti Coast	1,115,054	51,702	39,571	91,273	441	338	779	186	142	328
	Upper Hutt City	506,131	24,030	18,268	42,298	310	236	546	158	120	278
Wairarapa	Tararua	1,051,571	54,070	39,649	93,720	489	358	847	178	130	308
	Masterton	1,640,018	78,671	59,810	138,481	596	451	1,047	202	153	355
	Carterton	1,180,250	57,844	43,420	101,264	474	354	828	175	131	305
	South Wairarapa	1,506,024	74,511	56,544	131,055	516	390	906	185	140	326
North Island		**1,098,475**	**54,754**	**40,920**	**95,674**	**520**	**387**	**907**	**183**	**137**	**320**
Nelson/Marlborough	Marlborough	1,047,504	52,161	38,846	91,007	521	388	909	189	141	330
	Kaikoura	1,420,451	70,544	52,708	123,252	547	412	959	202	153	355
	Tasman/Nelson City	1,233,841	63,223	46,575	109,798	524	386	910	189	139	328
West Coast	Buller	1,209,558	62,662	46,331	108,993	496	366	862	206	151	357
	Grey	1,495,400	76,256	56,898	133,154	428	318	746	186	138	324
	Westland	1,107,765	58,814	42,753	101,566	399	290	690	196	143	339
North Canterbury	Hurunui	3,233,934	155,181	121,051	276,232	679	530	1,209	223	174	397
	Waimakariri	2,329,838	109,455	86,179	195,634	659	519	1,178	224	176	400
	Christchurch City	2,201,365	103,666	80,933	184,598	664	517	1,181	203	159	363
	Banks Peninsula	526,408	24,493	18,792	43,285	356	274	629	180	138	318
	Selwyn	2,765,866	133,460	103,637	237,096	679	528	1,207	216	169	385
	Ashburton	3,244,141	159,135	123,329	282,463	712	551	1,263	212	164	376
South Canterbury	Timaru/MacKenzie	2,760,873	132,614	103,739	236,353	704	549	1,253	214	167	381
	Waimate	3,205,270	157,173	121,400	278,573	673	522	1,196	212	164	376
Otago	Waitaki/Central Otago	2,616,203	126,058	97,946	224,004	656	509	1,165	212	165	377
	Dunedin City	1,532,734	71,571	56,180	127,751	616	487	1,103	236	187	423
	Clutha	2,140,376	102,561	79,930	182,491	589	460	1,048	213	166	379
Southland	Gore	2,147,840	103,909	80,597	184,506	595	461	1,056	221	171	392
	Invercargill	2,119,216	102,541	80,207	182,748	567	444	1,011	216	169	385
	Southland	2,148,623	105,365	81,825	187,191	591	459	1,051	219	170	389
South Island		**2,129,933**	**104,290**	**80,415**	**184,705**	**591**	**455**	**1,046**	**211**	**162**	**373**
New Zealand		**1,301,308**	**64,495**	**48,687**	**113,182**	**534**	**400**	**934**	**189**	**142**	**330**

Note: *Districts with fewer than five herds have been added to a neighbouring district to preserve anonymity*

APPENDIX C – *COUNTDOWN PROPERTIES (NORTHLANDS) LTD V DUNEDIN CITY COUNCIL*

enforcement of such orders. However I am not persuaded that being able to require that security be given was necessary for the effective exercise of the power to order payment of costs. I was not given any actual example of abuse of the Tribunal's process from the absence of an order that security be given, and from my own experience of the practice under the 1977 Act I have not myself been able to recall an example. The specific provision for District Courts to order security for costs does not support the notion that such power is implied in authority to order payment of costs.

In summary, as the Tribunal is not a superior Court with inherent jurisdiction, having regard to the nature of Planning Tribunal proceedings generally, and the omission of the relevant topic from the powers of the District Court selected for conferring on the Planning Tribunal, I hold that the Tribunal does not possess authority to order the giving of security for costs. If it is intended that the Tribunal should have that authority for the future, it can be conferred expressly, or by addition to the selection of District Court powers now conferred by s 278(1) of the Resource Management Act l 991.

It is therefore unnecessary for me to consider whether security for costs should be ordered in the present case; and similarly, it is unnecessary for me to consider whether the proceedings should be stayed and a final order not sealed until security is given.

However, to avoid Electricorp's right of appeal against this decision being nugatory, the sealing and issue of a final order on the appeals will be postponed for one month (cf s 162A(l) of the 1977 Act) in case Electricorp wishes to exercise that right.

The Tribunal's decision is that Electricorp's application that Geotherm be ordered to give security for costs is dismissed for want of jurisdiction.

Countdown Properties (Northlands) Ltd v Dunedin City Council

High Court, Wellington AP 214/93
1-8 February; 7 March 1994
Barker J, presiding, Williamson and Fraser JJ.

District plan — Plan change — Private request for a plan change — Timing of s 32 report — Whether report should be available prior to public hearing of submissions on plan change — Distinction between privately requested plan changes and changes initiated by local authorities or Ministers — Robust and practical approach to whether substance of report complies with s 32 — Whether Tribunal capable of curing defects — Amendments to advertised plan change — Deferral of change until review of district plan — Use of zoning in transitional district plans — Applicability of both ss 290 and 293 — Resource Management Act 1991, ss 5, 9(1), 19, 32, 38, 39, 73(2), 76, 290, 293, 299, 311, 373(3), First Schedule.

These were appeals concerned with a request by M L Investments Co Ltd and Woolworths (NZ) Ltd (collectively referred to as Woolworths) to the Dunedin City Council (the council), seeking a plan change to rezone a central city block from an existing Industrial B zone to a new Commercial F zone. Woolworths intended to develop a "Big Fresh" supermarket in the block. The appellants, Transit New Zealand (Transit), Countdown Properties (Northlands) Ltd and Countdown Foodmarkets New Zealand Ltd (collectively referred to as Countdown), and Foodstuffs (Otago/Southland) Ltd (Foodstuffs) were dissatisfied with the council's decision in favour of the plan change, and initiated references to the Planning Tribunal under cl 14 of the First Schedule to the Resource Management Act 1991 (the Act). They subsequently appealed from the Tribunal's decision to the High Court on numerous grounds.

The first three grounds concerned the council's duties under s 32 of the Act. Foodstuffs and Countdown argued that the Tribunal was wrong in law when it held that the council had fulfilled its obligations under s 32. Foodstuffs and Countdown claimed that s 32 required the council to prepare a s 32 report before advertising the plan change, or at the latest before the hearing of submissions regarding the plan change. The focus of their argument was on the effect of the words "before adopting" in s 32. It was submitted that s 32(3) clearly indicated that the words "before adopting" meant "prior to public notification". It was also argued that s 19 would produce an anomalous situation if any other interpretation was adopted. It was claimed that the

principles of natural justice required that a s 32 report be made available to people making submissions prior to a hearing. The adequacy of the council's s 32 report was also challenged, which raised the issue of whether the subsequent Tribunal hearing could have cured any defect in the council's s 32 report, should one have existed.

After hearing submissions on the plan change, the council ultimately adopted a plan change which differed from the plan change which had been advertised before the hearing. The appellants argued that the council's action in making the amendments had been ultra vires. At issue was the effect of cl 10 of the First Schedule to the Act, which states that after hearing submissions "the local authority concerned shall give its decision regarding the submissions and state its reasons for accepting or rejecting them".

The appellants asserted that the Tribunal should have referred the proposed plan change back to the council with the direction that it should be cancelled, because the forthcoming review of the whole district plan was a more appropriate way of dealing with the resource management issues involved. The appellants argued that it was preferable to pursue integrated management for all parts of the district and that the best time to do this was at the time of the review.

The appellants mounted a challenge to the way in which the council used zoning in the proposed plan change. They claimed that the Act does not provide for zoning to restrict activities according to type or category, unless it can be shown that the effects associated with a particular category breach "effects-based" standards.

The appellants challenged the validity of rule 4 of the plan change on the basis that the rule purported to require persons undertaking a number of activities expressly referred to in the district plan to acquire a resource consent before they could proceed. It was submitted that this rule was ultra vires the rule-making power of s 76 of the Act.

It was argued that the rules in the plan change contained a number of phrases which were vague and uncertain. The appellants claimed that the Tribunal had incorrectly applied the law relating to uncertainty and vagueness, and came to a decision which was so unreasonable in the circumstances that no reasonable tribunal could have made it.

The appellants claimed that, by accepting the evidence of one of the respondent's witnesses on the economic effects of the plan change, the Tribunal had made a decision so unreasonable that no reasonable tribunal could have made such a decision. The appellants also claimed that the Tribunal had failed to consider the evidence presented by a number of the appellants' witnesses, and that the Tribunal had been unfairly selective in the evidence it relied upon.

It was argued that s 290 of the Act applied to the proceedings before the Tribunal, and that pursuant to s 290(1) the Tribunal had a duty to carry out a s 32 analysis in the same way as the Council had. The Tribunal had held that s 290 did not apply, and that instead s 293 was applicable, and it received its powers from that section.

Transit had reached a settlement with the Council prior to the hearing of this appeal. The appellants claimed that the settlement should not be implemented in the manner suggested, and that the rules of the settlement should be remitted to the Tribunal for consideration before they were implemented.

Held (dismissing the appeals by Countdown and Foodstuffs):

(1) The Tribunal made the correct decision about the timing of the s 32 report. There is no reason to read the phrase "before adopting" other than in its plain and ordinary meaning. Adopting involves the local authority making an objective, policy or rule its own. It is not inconsistent with the procedure set out in cls 21 to 28 of the First Schedule to the Act a local authority to adopt changes after public notification, submissions and decisions on submissions.

(2) "Adopting" by a local authority under s 32(1) takes place at a different time with a privately requested plan change than it does when the plan change is initiated by the local authority itself or at the request of another local authority or a Minister. When a private individual requests a plan change, it can be rejected only in limited circumstances. Once a request passes the threshold, a local authority might well feel the need to hear and consider submissions before it proceeds with the potentially onerous s 32 investigation. There is no restriction on the time in which a s 32 report can be challenged on a privately requested plan change. However the effect of s 32(3) is that where a plan change has been initiated by the local authority itself, or by another local authority or a Minister, a s 32 report must be made available at the time the plan change is advertised.

(3) There was no merit in the submission relating to natural justice. Section 39 requires a public hearing with appropriate and fair procedures. Such a hearing took place on this occasion.

(4) The Tribunal had held that while the council's s 32 report did not scrupulously follow the language of s 32(1), it was not substantially deficient in any respect. The Tribunal was correct in the robust and practical approach that it took. Any defect of substance in the council's decision and s 32 analysis would have been capable of exploration, resolution and correction by the Planning Tribunal.

(5) To take a legalistic view that under cl 10 of the First Schedule a local authority may only accept or reject the relief sought in any given submission would be unreal. The local authority or Tribunal must consider whether any amendment made to a plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. In effect, the Tribunal did this here. It was difficult to see how anyone could have been prejudiced by the alterations in the council's finished version. Of all the changes made by the council, only the change to rule 4 could not have been justified by any of the submissions. The Tribunal was correct in holding that this omission was not fatal, and that there was a power to excise offending variations without imperilling the plan change as a whole.

(6) The Court rejected the appellants' claims that the plan change should

have been cancelled and dealt with in the forthcoming review of the whole district plan. The legislature had indicated in the Act that plan changes which had more than minimal planning worth should be considered on their merits, even though sponsored by private individuals, unless they were sought within a limited period before a review.

(7) Zoning is a method of resource management, albeit a rather blunt instrument in the Resource Management Act context. Here use of zoning represented a reasonable and practical accommodation of the new plan with the old scheme, and was acceptable for the remainder of the life of the transitional plan.

(8) Rule 4 in the plan change, which required resource consent applications for certain activities within the zone, was within the general scope of s 76(1) and was not ultra vires the council's powers. Even if this decision was incorrect, s 373(3) applies so that a transitional district plan must be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity.

(9) The Tribunal did not incorrectly apply the law, nor make an unreasonable decision, with regard to the certainty of certain phrases used in the plan change.

(10) The acceptance or rejection of the evidence of one of the respondent's witnesses was a question of fact for the Tribunal, and could not be appealed.

(11) The appellants' submission that the Tribunal was unfairly selective in its adoption of evidence had to be considered in the light of the Tribunal's expertise. The hearing was extremely thorough, and the Court was unable to hold that the Tribunal erred in law merely because it omitted to mention the appellants' witnesses by name.

(12) Both ss 290 and 293 applied to the proceedings before the Tribunal, as the hearing was in effect an appeal. Although the Tribunal did not recognise that s 293 applied, and that it therefore had a duty to carry out a s 32 analysis, the steps it would have taken in its deliberation and judgment had it recognised the applicability of s 293 would have been no different from those set out in detail in its decision. Therefore as a whole the Tribunal's approach was correct, and it did not err in law.

(13) The Court allowed Transit's appeal by consent and remitted to the Tribunal for its further consideration and determination the possible exercise of its powers under s 293 or cl 15(2) of the First Schedule in relation to the rules forming part of the settlement between the Council and Transit

Cases considered

Ashburton Borough v Clifford [1969] NZLR 927
Auckland City v Auckland Heritage Trust (1993) 1 NZRMA 69
Batchelor v Tauranga District (No 2) [1993] 2 NZLR 84; (1992) 2 NZRMA 137
Bitumix Ltd v Mt Wellington Borough [1979] 2 NZLR 57
Burr (AJ) Ltd v Blenheim Borough [1980] 2 NZLR 1
Calvin v Carr [1980] AC 574
Environmental Defence Society Inc v Mangonui County [1987] 2 NZLR 496; (1987) 12 NZTPA 349
Environmental Defence Society Inc v Mangonui County [1989] 3 NZLR 257; (1989) 13 NZTPA 197
Haslam v Selwyn District (1993) 2 NZRMA 628
K B Furniture Ltd v Tauranga District [1993] 3 NZLR 197; (1993) 2 NZRMA 291
Kirkham v Attenborough [1897] 1 QB 201
Love v Porirua City [1984] 2 NZLR 308
McLeod Holdings Ltd v Countdown Properties Ltd (1990) 14 NZTPA 362
Manukau City v Trustees of Mangere Lawn Cemetry (1991) 15 NZTPA 58
Meade v Wellington City (1978) 6 NZTPA 400
Morrow v Tauranga City (Decision A 46/80)
Nelson Pine Forest Ltd v Waimea County (1988) 13 NZTPA 69
Noel Leeming Ltd v North Shore City (No 2) (1993) 2 NZRMA 243
Northland Milk Vendors Association Inc v Northern Milk Ltd [1988] 1 NZLR 530
Royal Forest and Bird Protection Society Inc v W A Habgood Ltd (1987) 12 NZTPA 76
Waimea Residents Association Inc v Chelsea Investments (High Court, Wellington M 616/81, 16 December 1981, Davison CJ)
Wainuiomata District v Local Government Commission (High Court, Wellington CP 546/89, 20 September 1989, Greig J)
Wellington City v Cowie [1971] NZLR 1089
Wellington International Airport v Air New Zealand [1993] 1 NZLR 671

Appeals under the Resource Management Act 1991.

R J Somerville and *R J M Sim* for Foodstuffs
T C Gould and *D G Bigio* for Woolworths
E D Wylie for Countdown
A J P More for Transit
N S Marquet for Dunedin City Council

Judgment of the Court. These appeals from a decision of the Planning Tribunal given on 4 August 1993 have significance beyond their particular facts. They involve the first consideration by this Court of various provisions of the Resource Management Act 1991 (the RMA) — a statute which made material alterations to the way in which land use and natural resources are managed. A number of statutes, notably the Town and Country Planning Act 1977 (the TCPA) were repealed by the RMA and the regimes which they imposed were altered significantly, both in form and in substance. Although the RMA was amended extensively last year, counsel assured the Court that its decision is likely nevertheless to offer long-term guidance to local authorities and to professionals concerned with planning. Counsel were agreed that transitional provisions in the 1993 amendment required these appeals to be determined under the provisions of the 1991 Act without reference to the 1993 amendment.

All three appeals were heard together by a Court of three Judges which was assembled because of the importance of the issues raised and the need for guidance in the early stages of the RMA's regime. At the commencement of the hearing, the Court was advised by counsel for the appellant, Transit New Zealand (Transit) that his client had reached a settlement with the first respondent, the Dunedin City Council (the council) and the second respondents, M L Investment Co Ltd and Woolworths (NZ) Ltd, (called collectively Woolworths). This settlement was on the basis that, if the other two appeals were substantially to fail, agreement had been reached on the appropriate rules for parking, access and traffic control which should be incorporated in the relevant section of the council's District Plan.

Counsel for Transit was given leave to be absent for the bulk of the hearing but appeared for the hearing of submissions by the other appellants who claimed that the proposed settlement was incapable of implementation. Those other appellants were Countdown Properties (Northlands) Ltd and Countdown Foodmarkets New Zealand Ltd (collectively called Countdown); and Foodstuffs (Otago/Southland) Ltd (Foodstuffs).

Like most local bodies in New Zealand, the Dunedin City Council underwent major territorial changes in 1991 as a result of local body re-organisation. Instead of being just one of several territorial authorities in the greater Dunedin region, the council now exercises jurisdiction over a greatly enlarged area which includes all the former Dunedin municipalities plus areas of rural land formerly located in several counties. Allowing a certain straining of the imagination in the interests of municipal efficiency, the "city", as now defined, penetrates into Central Otago, past Hyde, and up the northern coast, including within its boundaries a number of seaside townships such as Waikouaiti.

In consequence, the Council inherited a pot-pourri of District Schemes under the 1977 Act, some urban, some rural. These schemes became the council's transitional district plan under the RMA. The task imposed by the RMA on the council of preparing a comprehensive plan for this new and varied territorial district is a daunting one, particularly in view of the wide consultation required by the RMA. It was estimated at the hearing before the Tribunal that the section of the new district plan covering urban Dunedin will not be published until late 1994 at the earliest.

We note that the RMA has introduced a whole new vocabulary which has supplanted the well-known terms used by the TCPA. For example, "scheme" becomes "plan"; "ordinance" becomes "rule". Presumably, the drafters of the RMA wanted to emphasise that Act's new approach; it was not to be seen as a mere refurbishment of the TCPA.

One of the many ways in which the RMA differs from the TCPA lies in the ability of persons other than public bodies to request a council to initiate changes to a district plan. The cost is met by the person proposing the plan change. Under the TCPA, only public authorities of various sorts could request a scheme change. The process by which this kind of request is made and implemented is an important feature of these appeals and will be discussed in some detail later.

Essentially, these appeals are concerned with a request by Woolworths to the council seeking a plan change to rezone a central city block from an existing Industrial B zone to a new Commercial F zone. On about 40% of the area of this block (which is bounded by Cumberland, Hanover, Castle and St Andrew Streets and has a total land area of some 2 ha), stands a large building, formerly used as a printing works. Woolworths wishes to develop a "Big Fresh" supermarket within this building; all parking as well as the retail outlet would be under the one roof. Had Woolworths sought an ad hoc resource management consent under the RMA to use the land in this way (cf the "specified departure" procedure under the TCPA) Countdown and Foodstuffs would not have been able to object. When a plan change is advertised, however, there is no limit to those who may object.

Both appellants operate supermarkets within the same general area in or near the Dunedin central business district. They lodged submissions in opposition to the plan change with the council and appeared at a hearing of submissions before a Committee of the council. Dissatisfied with the council's decision in favour of the plan change, they initiated references to the Tribunal under cl 14 of the First Schedule to the RMA (the First Schedule). The concept of a "reference". of a proposed plan change to the Tribunal instead of an appeal to the Tribunal is part of the new approach found in the RMA. The appellants subsequently appealed to this Court alleging errors of law in the Tribunal's decision. Appeal rights to this Court are governed by s 299 of the RMA but are similar in scope to those conferred by the TCPA.

Amongst numerous parties other than Countdown and Foodstuffs making submissions to the council were two who subsequently sought references of the proposed plan change to the Tribunal; ie Transit and the NZ Fire Service. Transit's concern was with the efficiency of the State Highway network and with parking and access; two of the streets bounding the proposed new Commercial F zone constitute the north and southbound lanes respectively of State Highway 1. The Fire Service was concerned with the effect of the traffic generated by various vehicle-orientated retail outlets on the efficient egress of fire appliances from the nearby central fire station. NZ Fire Service did not appeal to this Court.

In addition to the references, there was a related application to the Tribunal by Countdown seeking the following declarations under s 311 of the RMA:

- whether the council could change its transitional district plan; and
- whether the council could lawfully complete the evaluation and assessments required by s 32 of the RMA subsequent to the public hearing of submissions on the plan change.

The first question was considered by Planning Judge Skelton sitting alone; on 1 February 1993, he determined that it was permissible for Woolworths to request the council to change its transitional district plan at the request of Woolworths and to promote the change in the manner set out in the First Schedule. There was no appeal against that decision. The second question was

subsumed with other matters raised in the references, and was left for argument in the course of the substantive hearing before the Tribunal.

That hearing before the Tribunal chaired by Principal Planning Judge Sheppard lasted 16 sitting days; its reserved decision occupies some 130 pages. [The decision is reported in part as *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* (1993) 2 NZRMA 497.] The decision is notable for its clarity and comprehensiveness; we have been greatly assisted in our consideration of the complex issues by the way in which the Tribunal has both expressed its findings and discussed the statutory provisions which are at times difficult to interpret.

Because the decision of the Tribunal contains all the necessary detail, we do not need to repeat many matters of fact and history adequately summarised in that decision. Nor do we feel obliged to refer to all the Tribunal's reasons particularly where we agree with them. Aspects of the essential chronology need to be mentioned.

Chronology

Woolworths' request, made pursuant to s 73(2) of the RMA, was received by the council on 19 December 1991. In addition to asking for the change of zoning of the relevant land from Industrial to Commercial, Woolworths provided the council with an environmental analysis of the request and some suggested rules for a new zone. On 20 January 1992, the Planning and Environmental Services Committee of the council, acting under delegated authority, resolved to "agree to the request" in terms of cl 24(a) of the First Schedule. This resolution was made within 20 working days of receiving the request as required by cl 24. The council also resolved to delegate to the District Planner authority to prepare the plan change, undertake all necessary consultations, and to request and commission all additional information as required by the RMA. There was consultation by the council with Woolworths as envisaged by the legislation, which requires private individuals seeking plan changes to underwrite the council's expenses in undertaking the exercise.

Early in February 1992, the council informed the owners of land in the block and some statutory authorities of the proposal. Public notice of the proposed plan change was given on 21 March 1992. It advised the purpose of the proposed change as "to provide for vehicle-orientated large scale commercial activity on the selected area of land on the fringe of the Central Business District". The proposed changes to policy statements and rules in the District Plan were opened to public inspection and submission.

Some 15 submissions on the plan change were received by the council and a summary prepared. A further 66 notices of opposition or support were then generated; a public hearing was convened at which submissions were made by the parties involved in this present appeal plus many others who had either made submissions or who had supported or opposed the submissions of others. After the public hearing, a draft report purporting to address matters contained in s 32 of the RMA was presented to the Council Planning Hearings Committee by a Mr K Hovell, a consultant engaged by the council to advise it on the proposed change. It was found by the Tribunal, as fact, that the analysis required by s 32 (to be discussed in some detail later) was not prepared by the council until after the hearing of submissions. Obviously therefore, no draft s 32 report was available for comment at the public hearing of the submissions.

After the hearing of submissions, amendments were made by the committee to a draft s 32 analysis prepared by Mr Hovell; a final version was prepared by him at the committee's direction on 31 July 1992. The Tribunal found that Mr Hovell acted as a secretary and did not advise the committee at this stage of its deliberations. On 11 August 1992, the committee, acting under delegated powers, decided that the change should be approved. It had amended both the policy statements and the rules from those which had originally been advertised. The extent to which these amendments could or should have been made will be discussed later. All those who had made submissions were supplied with the council's decision, a legal opinion from the council's solicitors and a revised report from Mr Hovell headed "Section 32 Summary".

The extensive hearing before the Tribunal ensued as a result of the references made by the present appellants and NZ Fire Service. In broad terms, the effect of the Tribunal's decision was to direct the council to modify the proposed plan change in a number of respects; however, it approved the change of zoning of the block in question from Industrial to Commercial.

Foodstuffs, Countdown and Transit exercised their limited right of appeal to this Court. A number of conferences with counsel and one defended hearing in Wellington refined the issues of law. Counsel cooperated so as to avoid unnecessary duplication of submissions. We record our gratitude to all counsel for their careful and full arguments.

Approach to Appeal

We now deal with the various issues raised before us. Before doing so, we note that this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:

- applied a wrong legal test; or
- came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
- took into account matters which it should not have taken into account; or
- failed to take into account matters which it should have taken into account.

See *Manukau City v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.

Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349, 353.

Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82.

In dealing with reformist new legislation such as the RMA, we adopt the approach of Cooke P in *Northland Milk Vendors Association Inc v Northern*

Milk Ltd [1988] 1 NZLR 530, 537. The responsibility of the Courts, where problems have not been provided for especially in the Act, is to work out a practical interpretation appearing to accord best with the intention of Parliament.

In dealing with the individual grounds of appeal, we adhere to counsel's numbering. Some of the grounds became otiose when Transit withdrew from the hearing and one ground was dismissed at a preliminary hearing.

> **Grounds 1, 2 and 3**
>
> 1 The Tribunal misconstrued the provisions of s 32(1) when it held that the first respondent adopted the objectives, policies, and rules contained in Plan Change No 6 at the time when it made its decision that the plan change be approved in its revised form.
>
> 2 The Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the first respondent performed the various legal duties imposed on it by s 32.
>
> 3 The Tribunal misconstrued s 32 and s 39(1)(a) of the Act and failed to apply the principles of natural justice by holding that the report of the first respondent's s 32 analysis did not need to be publicly disclosed before the first respondent held a hearing on proposed plan change 6.

These grounds are concerned with the council's duty under s 32 of the RMA and can be dealt with together by a consideration of the following topics —

- Was the council correct in not fulfilling its duties under s 32(1) of the RMA before it publicly notified the plan change and called for submissions? Put in another way, was the council right to carry out the s 32 analysis after the public hearing of submissions but before it published its decision?
- Should the council have made a s 32 report available to persons making submissions on the plan change?
- Was the council's actual s 32 report an adequate response to its statutory responsibility?
- If the council was in error in its timing of the s 32 report or in the adequacy of the report as eventually submitted, was the error cured by the extensive hearing before the Tribunal, an independent judicial body before which all relevant matters were canvassed?

Section 32 of the Act at material times read as follows —

> **32. Duties to consider alternatives, assess benefits and costs, etc. —** (1) In achieving the purpose of this Act, before adopting any objective, policy, rule, or other method in relation to any function described in subsection (2), any person described in that subsection shall —
>
> (a) Have regard to —
>
> (i) The extent (if any) to which any such objective policy, rule, or other method is necessary in achieving the purpose of this Act; and
>
> (ii) Other means in addition to or in place of such objective, policy rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision or information, services, or incentives, and the levying of charges (including rates); and
>
> (iii) The reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise; and
>
> (b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and
>
> (c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof) —
>
> (i) Is necessary in achieving the purpose of this Act, and
>
> (ii) Is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.
>
> (2) Subsection (1) applies to —
>
> (a) The Minister, in relation to —
>
> (i) The recommendation of the issue, change, or revocation of any national policy statement under sections 52 and 53:
>
> (ii) The recommendation of the making of any regulations under section 43:
>
> (b) The Minister of Conservation, in relation to —
>
> (i) The preparation and recommendation of New Zealand coastal policy statements under section 57:
>
> (ii) The approval of regional coastal plans in accordance with the First Schedule:
>
> (c) Every local authority, in relation to the setting of objectives, policies, and rules under Part V.
>
> (3) No person shall challenge any objective, policy, or rule in any plan or proposed plan on the grounds that subsection (1) has not been complied with, except —
>
> (a) In a submission made under clause 6 of the First Schedule in respect of a proposed plan or change to a plan; or
>
> (b) In an application or request to change a plan made under section 64(4) or section 65(4) or section 73(2) or clause 23 of the First Schedule.

Consideration must first be given to the method ordained by the RMA for implementing a plan change initiated by persons other than public bodies. Section 73(2) provides —

> Any person may request a territorial authority to change a district plan, and the plan may be changed in the manner set out in the First Schedule.

Clause 23 of the First Schedule requires a written request to the local authority to change a plan to define the proposed change with sufficient clarity for it to be readily understood and to describe the environmental results anticipated from the implementation of the change. An applicant is not required to provide any other assessments or evaluations, although Woolworths did so.

Under cl 24 of the First Schedule, the local authority is required to consider the request for a plan change. Within 20 working days it must either "agree to

the request" or "refuse to consider" it. The words "agree to the request" are unfortunate; on one reading, the local authority might be seen as being required to assent to the plan change (ie agree to the request for a plan change) within 20 working days. We accept counsel's submissions that the only sensible meaning to be given to the phrase "agree to the request" is "agree to process or consider the request". This interpretation is consistent with the remainder of the First Schedule. The local authority may refuse to consider the request on one of the narrow grounds specified in cl 24(b) or defer preparation or notification on the grounds stated in cl 25. The council's decision to refuse or defer a request for a plan change may be the subject of an appeal (not a "reference") to the Tribunal (cl 26).

Clause 28 requires the local authority to prepare the change in consultation with the applicant and to notify the change publicly within three months of the decision to agree to the request; (copies of the request must be served on persons considered to be affected). "Any person" is entitled to make submissions in writing; cl 6 details the matters which submissions should cover. In particular, a submitter must specify what it is he, she or it wants the council to do. There is no statutory restriction on who can make a submission.

It is doubtful whether the local authority can make a submission to itself under the RMA in its original form. The Court of Appeal in *Wellington City Council v Cowie* [1971] NZLR 1089 held that a local authority could not object to its own proposed scheme. The TCPA was changed to permit this. A similar provision was not found in the RMA; we were told by counsel that the 1993 amendment now permits the practice. In this case, the council's development planner lodged a submission which the Tribunal found was lodged in his personal capacity.

The local authority must prepare a summary of all submissions and then advertise the summary seeking further submissions in support or opposition. The applicant for the plan change is entitled to receive a copy of all submissions and has a right to appear at the hearing as if the applicant had made a submission and had requested to be heard. The local authority must fix a hearing date, notifying all persons who made a submission and hold a public hearing; the procedure at the hearing is outlined in s 39 of the RMA; notably, no cross examination is allowed.

After hearing all submissions, the local authority must give its decision "regarding the submissions" and state its reasons for accepting or rejecting the submissions. Any person who made a submission, dissatisfied with the decision of the local authority, has the right to seek a reference to the Tribunal.

As noted earlier, the words "refer" or "reference", refer to the way in which the jurisdiction of the Tribunal is invoked on plan changes by those unhappy with the council's decision on the submissions. We shall discuss the Tribunal's powers on a reference later in this judgment. The Tribunal, after holding a hearing, can confirm the plan change or direct the local authority to modify, delete or insert any provision or direct that no further action be taken on the proposed change (cl 27 of the First Schedule). The council may make amendments, of a minor updating and/or "slip" variety before resolving to approve the plan change (as amended as a result of the hearing of submissions or any reference to the Tribunal).

The Act does not define the phrase used in s 32(1) "before adopting". The word "adopting" is not used in the First Schedule, which in reference to plan changes uses the words "proposed" (cl 21), "prepared" (cl 28), "publicly notified" (cl 5), "considered" (cls 10 and 15), "amended" (cl 16), and "approved" (cls 17 and 20). Section 32 also uses "to set" which implies a sense of finality.

Accepted dictionary meanings of the word "adopt" are "to take up from another and use as one's own" or "to make one's own (an idea, belief, custom etc) that belongs to or comes from someone else". The Tribunal held that the meaning of the word adopting is "the act of the functionary accepting that the instrument being considered is worthy of the action that is appropriate to its nature".

The Tribunal's findings on the local authority's s 32 duties can be summarised thus:

(a) Read in the context of s 32(2) the word "adopting" as used in s 32(1) refers to the action of a local authority which, having heard and considered the submissions received in support of or in opposition to proposed objectives policies and rules, decides to change the measure from a proposal to an effective planning instrument.
(b) The duties imposed by s 32 are to be performed "before adopting", that is, before the change is made into an effective planning instrument.
(c) All that the RMA requires is that the duties be performed at some time before the act of adoption.
(d) If Parliament had intended that in every case s 32 duties were to be performed before public notification of a proposed measure, and that people would have been entitled to make submissions about the performance of them, then there would have been words to express that intention directly.
(e) A separate document of the local authority's conclusions on the various matters raised in s 32(1) is not required to be prepared, let alone published for representations or comments, before the decision is made.
(f) In relation to Change 6, the Council adopted the objectives, policies and rules of the change at the time when, having heard and deliberated on the submissions received, it made its decision that the planned change be approved in the revised form.

The essential argument for Foodstuffs and Countdown is that the Tribunal was wrong in law and that s 32 requires the council to prepare the report before advertising the plan change or at the latest before the hearing of submissions regarding a plan change; it cannot fulfil its obligations under s 32 after that point.

Interpreting the provisions of s 32 of the RMA must commence with an examination of the words used in the section having regard not only to their context, but also to the purposes of the Act. Section 32(2) describes the

persons to whom the duties it imposes shall apply. They are the Minister for the Environment, the Minister of Conservation and every local authority.

So far as the Ministers are concerned, the description relates only to "recommendations" or the "preparation and recommendation" of policy statements or approvals. A local authority is limited to "the setting" of objectives, policies and rules under Part V, which applies to regional policy statements, regional plans and district plans. A distinction has thus been made in the section between Ministers and local authorities. In relation to Ministers, the section expressly refers to recommendation or preparation and recommendation whereas with local authorities, the section refers to the setting of objectives, policies and rules.

Under s 32(1) the local authority involved in the setting of objectives, policies and rules must complete certain duties before adopting such objectives, policies or rules. We see no reason to read the phrase "before adopting" other than in its plain and ordinary meaning. Adopting involves the local authority making an objective, policy or rule its own. The appellants submitted that the phrase requires the duties to be carried out prior to public notification of change. They argued that the local authority adopts a privately requested change prior to public notification because it had, by then, set or settled the substance of the requested change.

We do not accept this submission because the procedure in cls 21 to 28 (inclusive) of the First Schedule does not envisage the local authority making the change its own until after public notification, submissions, and decisions on submissions. It is inconsistent with that procedure to conclude that the local authority adopted (or made its own) the proposed change prior to the decision on submissions.

A local authority's obligation under cl 28 of the First Schedule is to prepare a requested change of plan in consultation with an applicant. The process relates to the form rather than the merits of the change. Even after public notification, the local authority has a discretion, on the application of an applicant, to convert the application to one for a resource consent rather than for a change to a plan (cl 28(5)(a)). To decide that a local authority is adopting a requested change to an objective, policy or rule prior to its decision on submissions requires a conclusion which limits the meaning of "adopting" to encompassing prescribed procedural steps. No decision or positive act of will by the local authority would be required.

Lord Esher MR in *Kirkham v Attenborough* [1897] 1 QB 201, 203 held that, with a contract for sale of goods, there must be some act which showed that a transaction was adopted, an act which was consistent only with the person being a purchaser. In this case, there is no act of the council which shows anything other than an initial acknowledgment that: (a) the proposed change has more than a little planning merit; and (b) a performance of prescribed duties to invest the proposed plan change with a form whereby its merits can be assessed by the public submission process. There can be no act or decision inconsistent with the performance of the obligations of the local authority until it has reached its decision upon the submissions.

During argument, two obstacles to this view were signposted. They concerned, first, s 32(3) and, second, s 19. It was submitted that s 32(3) clearly indicated that "before adopting" must mean "prior to public notification"; otherwise, the public would not have the right to challenge an objective policy or rule on the grounds of non-compliance with s 32. This conclusion followed, it was argued, from the necessity for the challenge to be in a submission under cl 6 in respect to a proposed plan or change to a plan.

The Tribunal accepted that s 32(3) was capable of giving that indication but concluded that, if Parliament had intended the s 32 duties to be performed before public notification, then there would have been express words to that effect.

The first point to consider is whether s 32(3) applies to a privately requested plan change. In the definition section of the RMA, "proposed plan" means "a proposed plan or change to a plan that has been notified under clause 5 of the First Schedule but has not become operative in terms of clause 20 of the First Schedule; but does not include a proposed plan or change originally requested by a person other than the local authority or a Minister of the Crown".

The Tribunal held: (a) there was no exclusion of privately requested changes in the words "change to a plan" in s 432(3)(a); (b) the use of the term "proposed plan" in the first phrase of s 32(3) does not preclude a challenge to the council's performance of its s 32 duties in a submission under cl 16 of the First Schedule.

With respect we do not agree. There is no reason to read down the second part of the definition of "proposed plan" which clearly indicates that the definition of proposed plan does not apply to privately requested plan changes; accordingly, there can be no restriction as to the time when persons making submissions on a privately requested plan change may raise non-compliance with s 32 by the Council. They do not have to do so in their submission.

This approach to s 32(3) supports our view on the timing of the "adopting" of the plan change by the local authority. The Tribunal held, in this case, that the plan was not "adopted" for the purposes of s 32 until it had heard and considered the submissions on the plan change. It was enough for it to provide the s 32 report at the time when it gave its decision on the submissions which it had heard and considered.

We agree with the Tribunal's decision in the result, although differing on the interpretation of s 32(3). We hold that the "adopting" by the local authority under s 32(1) takes place at a different time with a privately requested plan change than it does when the plan change is initiated by the local authority itself or at the request of another local authority or a Minister. This view follows from our interpretation of s 32(3). A person making a submission on a plan change instituted by a Minister or local authority can challenge the sufficiency of the s 32 report only in his or her submission on the plan change. We give this interpretation in the hope this important Act will prove workable for those who must administer it but at the same time preserve the rights of persons affected by a plan change.

When a private individual requests a scheme change, the local authority's options are fairly limited. It can only reject the application out of hand if a plan change is three months away or if the request is frivolous, vexatious or shows little or no planning merit or is unclear or inconsistent or affects a policy statement or plan which has been operative for less than two years. At the stage of the initial request, the local authority could not possibly have carried out a potentially onerous s 32 investigation. It may not have time to do so even within the three months required under cl 28 of the First Schedule before notifying publicly the plan change.

Whilst a privately-inspired plan change may pass the threshold test, as the investigative process unrolls, the local authority may come to the view that the requested change is not a good idea; it may wish to await the hearing and consideration of the submissions before deciding whether to "adopt" it. It will have to consider the wider implications of a proposed plan change during a period limited by cl 28 to three months. These considerations would often be canvassed at the hearing of submissions, as they were in this case, without a s 32 report being prepared. A local authority might not be therefore in a position to "adopt" the plan change until it had the s 32 report; it could need the public hearing and consideration of submissions to flesh out that report to its own satisfaction.

In response to the argument that those making submissions should have access to a s 32 report because the Act in s 32(3) clearly envisages their having the right to comment on a s 32 report, the answer lies in the interpretation we have given to s 32(3). There is no restriction on the time in which a s 32 report can be challenged on a privately requested plan change; therefore, persons wishing to refer the council's decisions or submissions to the Tribunal can criticise the s 32 report by means of a reference to the Tribunal.

However, the situation is different for those plan changes to which s 32(3) applies; ie plan changes initiated by the local authority itself or requested by a regional authority or another territorial authority or by a Minister. In those situations, the s 32 report would have to be available at the time the plan change is advertised because of the limitation contained in s 32(3) on the right to comment on the adequacy or otherwise of a s 32 report. For scheme changes requested by a Minister or a local authority, such comment may only be made in a submission on the plan change.

It is no answer to say that a person making a submission in advance of knowing the contents of a s 32 report should include as a precaution a statement that the s 32 report was inadequate; this was suggested in argument by counsel for the council. Such a course would make a mockery of the process and would imply little cause for confidence in the competence of the local authority.

In this scenario, the difference between "adopt" and "approval" is quite wide. The approval, which is the act of making a formal resolution about and affixing the seal to the text of the change may never happen; the result of the submissions to the council or of a Tribunal direction on a reference may cause the local authority to find that its "adopting" of the change was erroneous. However, with the plan change initiated privately, adopting comes at the time when the council decides after hearing all the submissions that it should adopt the change. Formal approval may follow later, depending on whether there are references to the Tribunal.

When the local authority itself initiates the plan change, the situation is simple; it should not do so unless it is then in a position to "adopt" a plan change.

In the case of a plan change requested by another authority or by the Minister to which s 32(3) applies, a council receiving the request will have to "adopt" the change prior to advertising the change and therefore complete its s 32 report by that stage. Again, the council may not ultimately "approve" the change because it may come to a different view on the wisdom of doing so after hearing the submissions or after a Tribunal direction.

As to the argument that time is needed for a s 32 report, one imagines that other local authorities or a Minister in requesting the change should be in a position to supply the territorial authority with most of the information needed for its s 32 evaluation of the proposal. If there were not time available within the three months, then there is power for the local authority under s 38(2) to increase the time to a maximum of double. One would not envisage, however, a regional council or a Minister requesting a change without providing sufficient prima facie information justifying the request which would make the adopting process simple.

The time for "adopting" the plan change therefore in terms of s 32, is a "moveable feast" depending on whether or not the plan change is initiated by a private individual.

Section 19 of the RMA is as follows —

> **19. Change to plans which will allow activities —**
> Where —
> (a) A new rule, or a change to a rule, has been publicly notified and will allow an activity that would otherwise not be allowed unless a resource consent was obtained; and
> (b) The time for making or lodging submissions or appeals against the new rule or change has expired and —
> (i) No such submissions or appeals have been made or lodged; or
> (ii) All such submissions have been withdrawn and all such appeals have been withdrawn or dismissed —
>
> then, notwithstanding any other provision of this Act, the activity may be undertaken in accordance with the new rule or change as if the new rule or change had become operative and the previous rule were inoperative.

This section allows activities to be undertaken in accordance with a new rule as if it had become operative, provided that the new rule has been publicly notified and the time for making submissions or appeals against the new rule has expired and no submissions or appeals have been made. The appellants argued that this section implies that consideration under s 32 must take place before the time for making or lodging submissions or appeals against the new rule have expired; otherwise, activity could be undertaken which was contrary to s 32.

The Tribunal did not place any weight on the argument under s 19. We have carefully considered the submissions and conclude that, while s 19 may appear to produce the possibility of an anomalous situation, it does not affect the powers of a local authority in setting objectives, policies or rules. In particular, it does not reflect upon the time at which the local authority adopts such an objective, policy or rule. Section 19 is concerned with activities which may be undertaken. It is not concerned, as s 32 is, with the rule-making process. Even if a person takes the risk of commencing activity before approval of a change, that activity does not affect the policy, objective or rule itself. Whatever the position about such activity, a local authority is still required to be satisfied of the matters arising under s 32(1)(a), (b) and (c). Certainly there are no words within s 19 which purport to affect the duty under s 32.

Our general approach is supported, we think, by the difference between officially promoted and privately requested changes in their interim effect. Section 9(1) of the RMA provides as follows:

> No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is —
> (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
> (b) An existing use allowed by section 10 (certain existing uses protected).

As noted "proposed district plan" includes a proposed change initiated by a local authority or Minister but not a privately requested change. Consequently an officially promoted plan has general planning effect from the date of public notification, whereas a privately requested plan has no general planning effect until approval. Section 19 bears to some extent on the question of effect before approval but it is limited to activities allowed by the new rule where there is no opposition to it; in our opinion, as previously discussed, it does not support the appellants' case.

In the result, we believe that the Tribunal came to the correct decision about the timing of the s 32 report; in the circumstances of this case, the report was properly "adopted" at the time when the Council gave its decision on the submissions.

In Ground 3 of the appeal it was argued that the principles of natural justice required persons making submissions to a local authority to have a s 32 report available to them prior to the hearing of submissions. Reference was made to s 39(1)(a) of the RMA requiring an appropriate and fair procedure at a hearing.

We did not consider that there is any merit in this submission. Section 39 requires a public hearing with appropriate and fair procedures. Such a hearing took place on this occasion. There was no report or analysis under s 32 available since the local authority had been under no duty to carry it out prior to that time. The applicant and those making submissions were able to call evidence. When the report did come into existence, it was circulated to the parties. Later, during the reference to the Tribunal, there was ample opportunity to criticise the content of the report and to make submissions and call evidence concerning all aspects of it. We reject Ground 3.

The adequacy of the report prepared by the first respondent is challenged in Ground 2. It was claimed that the council (a) had taken into account irrelevant considerations, namely, ss 6, 7 and 8 of the RMA; (b) had failed to take into account matters; and (c) had applied the wrong test.

These same criticisms were considered by the Tribunal which concluded that, while the council's s 32 analysis report did not scrupulously follow the language of s 32(1), it was not substantially deficient in any respect. After weighing the appellant's detailed criticisms, we are of the view that the Tribunal was correct in the robust and practical view that it took. It was suggested in submissions that the Tribunal incorrectly permitted an inadequate compliance by the council with its s 32 duties upon the basis that local authorities were still learning the extent of their responsibilities under the Act. We do not share that view. We note that the Tribunal stated [2 NZRMA 497, 521] —

> In our opinion failures to perform the s 32 duties in substance which are material to the outcome should not be excused. However deficiencies of form that are not material to the outcome may properly be tolerated, at least in the introductory period when functionaries are still learning the extent of their responsibilities under the Act.

Earlier it stated [2 NZRMA 497, 521] —

> Although functionaries are not to be encouraged in expecting that failure to comply with duties imposed by s 32 can be condoned, compliance needs to be considered in terms of a reasonable comparison of the material substance of what is done with what is required. If any deficiency that may be discovered from a punctilious scrutiny of a s 32 assessment results in a requirement to return to the starting point as in some board games, the Act will not provide a practical process of resource management addressing substance not form.

We agree with those views.

Since our conclusions are that the Tribunal was not in error in relation to either the timing of the s 32 exercise or the adequacy of the first respondent's s 32 analysis, there is no need to consider in depth the matter raised in the fourth question under this heading.

It is sufficient to note that the references to the Tribunal took place by way of a complete re-hearing. Any defect of substance in the council's decision and s 32 analysis was capable of exploration and resolution by the Tribunal. Even if there had been an error, we believe that it would have been corrected by the detailed, careful and extensive hearing by the Tribunal over a period of 16 days when detailed evidence was given by 19 witnesses and thorough submissions made by experienced counsel. We are conscious of the approach described in *Calvin v Carr* [1980] AC 574, *A J Burr Ltd v Blenheim Borough* [1980] 2 NZLR 1 and *Love v Porirua City Council* [1984] 2 NZLR 308.

We consider that this was one of those instances where any defects at the council stage of hearing were cured by the thorough and professional hearing

accorded to all parties by the Tribunal. Accordingly, grounds of appeal 1, 2 and 3 are dismissed.

> **Ground 4.** That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that the first respondent did not exceed its lawful authority in making the amendments to the proposed plan change that were incorporated in the revised version of the change appended to its decision.

A revised and expanded version of the plan change as advertised emerged when the council's decision was issued after hearing submissions. The appellants submitted that because many of the changes had not been specifically sought in the submissions lodged with and notified by the council, that the council's action in making many of the changes was ultra vires. Mr Wylie for Countdown presented detailed submissions comparing relevant segments of the change as advertised with the counterparts in the council's finished product.

Mr Marquet for the council helpfully provided a compilation which, in each case, demonstrated: (a) the provision as advertised; (b) the provision in the form settled by the council after the hearing of submissions; (c) the appellants' criticism of the alteration or addition; (d) (where applicable) the submission on which the alteration or addition was said by the Tribunal to have been based; (e) the Tribunal's decision in respect of each alteration or addition; and (f) other relevant references. We have found this compilation extremely helpful; we do not think it necessary to embark on the same detailed analysis of counsel's submissions, which occupied some 20 pages of the Tribunal's judgment, because we agree generally with the Tribunal's approach and its decision in respect of each individual challenge.

The Tribunal categorised the challenged variants into five groups: (a) those sought in written submissions; (b) those that corresponded to grounds stated in submissions; (c) those that addressed cases presented at the hearing of submissions; (d) amendments to wording not altering meaning or fact; (e) other amendments not in groups (a) to (d).

Clause 6 of the First Schedule refers to the making of submissions in writing on any proposed plan change. A person making a submission is required by cl 6 to state whether he/she wishes to be heard in respect of the submissions and to state the decision which the person wishes the local authority to make. A prescribed form requires the statement of grounds for the submission.

A summary of the submissions is advertised by the council under cl 7(a) and submissions for or against existing submissions are then called for by way of public advertisement. A summary of submissions can only be just that; persons interested in the content of submissions are entitled to inspect the text of the submissions at the council offices so that an informed decision on whether to support or object can be made. In this case, criticism was made of the adequacy of the summary but we see no merit in such a contention.

Many of the submissions did not specify the detailed relief or result sought. Many (such as Countdown's) pointed up deficiencies or omissions in the proposed plan. These alleged deficiencies or omissions were found in the body of the submissions. Countdown sought no relief other than rejection of the plan change. The Council in its decision accepted many of the criticisms made by Countdown and others and reflected these criticisms in the amendments found in the decision.

Clause 10 of the First Schedule states that, after hearing the submissions "the local authority concerned shall give its decision *regarding the submissions* and state its reasons for accepting or rejecting them". This is to be compared with reg 31 of the Town and Country Planning Regulations 1978 which stated that "the Council shall *allow or disallow each objection either wholly or in Part. . .*". (Emphasis added.)

Counsel for the appellants submitted that cl 10 was narrower in its scope than the TCP Regulations and did not permit the council to do other than accept or reject a submission.

Like the Tribunal, we cannot accept this submission. We agree with the Tribunal that the word "regarding" conveys no restriction on the kind of decision that could be given. We accept the Tribunal's remark that "in our experience a great variety of possible submissions would make it impracticable to confine a council to either accepting a submission in its entirety or rejecting it".

Councils customarily face multiple submissions, often conflicting, often prepared by persons without professional help. We agree with the Tribunal that councils need scope to deal with the realities of the situation. To take a legalistic view that a council can only accept or reject the relief sought in any given submission is unreal. As was the case here, many submissions traversed a wide variety of topics; many of these topics were addressed at the hearing and all fell for consideration by the council in its decision.

Counsel relied on *Meade v Wellington City Council* (1978) 6 NZTPA 400 and *Morrow v Tauranga City Council* (Decision 46/80, 13 December 1979) which emphasised that a council's role under a scheme change was to allow or disallow an objection.

The Tribunal held that a test formulated by Holland J in *Nelson Pine Forest Ltd v Waimea County Council* (1988) 13 NZTPA 69, 73 applied. In that case the Tribunal on appeal had added conditions to ordinances which made certain uses "conditional uses". The Tribunal had dismissed the appellant's appeal from the council scheme change whereby the logging of native forests on private land became a conditional rather than a predominant use. The Judge held that this extension of ordinances articulating conditions for the conditional use, was within the jurisdiction of the council and accordingly of the Tribunal, although no objector had expressly sought it. He said —

> . . . that an informed and reasonable owner of land on which there was native forest should have appreciated that, if NFAC's objection was allowed and the logging or clearing of any areas of native forest became a conditional use, then either conditions would need to be introduced into the ordinance relating to conditional use applications, or at some stage or other the Council would adopt a practice of requiring certain information to be supplied prior to considering such

> applications. Had the Council adopted the conditions to the ordinances that it presented to the Tribunal at the time of the hearing of the objection, I am quite satisfied that no one could reasonably have been heard to complain that they had been prejudiced by lack of notice. Such a decision would accordingly have been lawful.

The Tribunal noted and applied this test in *Noel Leeming Ltd v North Shore City (No 2)* (1993) 2 NZRMA 243, 249.

Counsel for Countdown submitted that Holland J's observations were obiter and made in the context of the TCPA rather than of cls 10 and 16 of the First Schedule. Counsel contended that Holland J's decision meant no more than that the Judge would have been prepared to find that the amendments ultimately made would have been within the parameters of (and by implication envisaged by) the objection as lodged.

There is some force in this submission. Indeed, a close reading of the decision in the *Nelson Pine Forest* case, the Tribunal's decision in *Noel Leeming Ltd v North Shore City (No 2)* and the Tribunal's decision in this case confirms that the paramount test applied was whether or not the amendments are ones which are raised by and within the ambit of the submissions. Holland J's reference to what an informed and reasonable owner of land should have appreciated was included within the context of his previous statement (p 73):

> . . . it is important to observe that the whole scheme of the Act contemplates notice before changes are made by a local authority to the scheme statement and ordinances in its plan. It follows that when an authority is considering objections to its plan or a review of its plan it should not amend the provisions of the plan or the review beyond what is specifically raised in the objections to the plan have been previously advertised.

The same point was made by the Tribunal in *Noel Leeming Ltd v North Shore City (No 2)* at p 249 and the Tribunal in this case at p 59 of the decision.

Adopting the standpoint of the informed and reasonable owner is only one test of deciding whether the amendment lies fairly and reasonably within the submissions filed. In our view, it would neither be correct nor helpful to elevate the "reasonable appreciation" test to an independent or isolated test. The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. In effect, that is what the Tribunal did on this occasion. It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.

The danger of substituting a test which relies solely upon the Court endeavouring to ascertain the mind or appreciation of a hypothetical person is illustrated by the argument recorded in a decision of the Tribunal in *Haslam v Selwyn District Council* (1993) 2 NZRMA 628. The Tribunal was asked to decide whether it was either "plausible" or "certain" that a person would have appreciated the ambit of submissions and consequently the need to lodge a submission in support or opposition. We believe such articulations are unhelpful and that the local authority or Tribunal must make a decision based upon its own view of the extent of the submissions and whether the amendments come fairly and reasonably within them.

The view propounded by the appellants is unreal in practical terms. Persons making submissions in many instances are unlikely to fill in the forms exactly as required by the First Schedule and the Regulations, even when the forms are provided to them by the local authority. The Act encourages public participation in the resource management process; the ways whereby citizens participate in that process should not be bound by formality.

In the present case, we find it difficult to see how anyone was prejudiced by the alterations in the council's finished version. The appellants did not (nor could they) assert that they had not received a fair hearing from either the council or the Tribunal. They expressed a touching concern that a wider public had been disadvantaged by the unheralded additions to the plan. We find it difficult to see exactly who could have been affected significantly other than those 81 who made submissions to the council. More importantly, it is hard to envisage that any person who had not participated in the council hearing and the Tribunal hearing could have offered any fresh insight into the wisdom of the proposed plan change. We make this observation considering the exhaustive scrutiny given to the proposal by a range of professionals.

We have considered the detailed arguments addressed to us concerning each of the changes in the policy statement and rules. On the whole we agree with the classifications of the Tribunal into the categories which it created itself. Mr Marquet pointed out a few instances where the Tribunal may have wrongly categorised a particular variation. Even if he were correct, that does not alter our overall view. We broadly agree with the Tribunal's assessment of each variation, many of which were cosmetic.

There is only one variation which requires specific mention. That is the change to Rule 4. After the hearing of objections, the Council added a Rule to the effect that "any activity not specified in the preceding rules or permitted by the Act is not permitted within the zone unless consent is obtained by way of resource consent".

We find that there was no submission which could have justified that insertion. Nor is the fact that the omission may have been mentioned in evidence appropriate; because the jurisdiction to amend must have some foundation in the submissions.

We do not see this omission as fatal. The Tribunal held, correctly, that there is power to excise offending variations without imperilling the scheme change as a whole. If Rule 4 can be excised, then s 373(3) Of the RMA would apply; that subsection provides as follows —

> Where a plan is deemed to be constituted under subsection (1), or where a proposed plan or change is deemed to be constituted under subsection (2), the plan shall be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity.

We say generally that no-one seems to have been disadvantaged by the amendments. Even where the relationship to the submissions was somewhat

tenuous, it seems quite clear that at the extensive hearing before the council most of the matters were discussed. If they were not discussed before the council, they were certainly discussed before the Tribunal at great length.

In fact the whole of the appellant's case can hardly be based on any lack of due process. Their objections to the plan were considered at great length and fairness by the Tribunal. Any complaints now (such as those under this ground) are of the most technical nature. We see nothing in this ground of appeal which is also rejected.

> **Ground 5.** The Tribunal erred in law when it determined the status of the written submission on plan change No 6 made by an employee of the first respondent Mr J Chandra, and its decision thereon was so unreasonable that no reasonable Tribunal properly directing itself in law and considering the evidence could have reached such a decision.

This ground was struck out by Barker ACJ at a preliminary hearing.

> **Ground 6.** The Tribunal applied the wrong legal test and misconstrued the Act when it declined to defer a decision on the merits of proposed plan change No 6 pending review by the first respondent of its transitional district plan.

> **Ground 7.** The Tribunal misdirected itself when it determined that the Act restricts the authority of a territorial authority to decline to approve a plan change where it raises issues that have implications beyond the area encompassed by the plan change and which, in the instant case, should more appropriately be dealt with at a review of the transitional district plan.

Although these two grounds relate to discrete findings by the Tribunal, they cover similar ground and will be considered together. The appellants claimed that significant resource management issues involving the whole Dunedin City area arise when a council is addressing a plan change involving only part of the district; consequently, any change to the district plan must have implications for other parts of the district. The appellants asserted that the Tribunal should have referred the proposed plan change back to the council with the direction that it should be cancelled because the forthcoming review of the whole district plan was a more appropriate way of managing the resource management issues involved.

The Tribunal heard evidence from witnesses giving reasons why it was preferable to pursue integrated management for all parts of the district and that the best time to do that was at the time of the review. The Tribunal rejected this evidence. Its decision is succinctly stated thus 2 NZRMA 497, 532]:

> Although we accept that issues raised by plan change 6 would have implications for a wider area than the subject block, these proceedings are not inappropriate for addressing those issues. The proposed plan change was publicly notified; a number of submissions were received, and they were publicly notified; further submissions were received; the respondent's committee held a public hearing at which evidence was given; it made a full decision which was given to the parties; five parties exercised their rights to refer the change to the Tribunal; the Tribunal conducted a three week hearing in public at which public and private interests were represented, evidence was given by 19 witnesses, and full submissions were made. No one could be prejudiced by the Tribunal making decisions on matters in issue in the proceedings on the merits. On the contrary, the applicants would be prejudiced, and would be deprived of what they were entitled to expect, if the Tribunal were to withhold decisions on the merits on questions properly at issue before it. If we have a discretion in the matter, we decline to exercise it for those reasons.

The Tribunal went on to point out that cl 25 of the First Schedule provides that a local authority may defer preparation or notification of a privately requested change only where a plan review is due within three months; the review was due to be publicly notified at the end of 1994 at the earliest; it was not likely to be operative before 1997. The Tribunal further held that this was not the unusual case where a change should be deferred and that the express provision for deferment in the First Schedule shows an intent by the legislature that deferment is not intended for reviews that are more remote.

We entirely agree with the approach of the Tribunal. Clearly, the legislature was indicating that plan changes which had more than minimal planning worth should be considered on their merits, even although sponsored by private individuals, unless they were sought within a limited period before a review. We see no reason to differ from the view of the experienced Tribunal. This ground of appeal is also rejected.

> **Ground 8.** The Tribunal wrongly construed the ambit of the first respondent's lawful functions under Part V of the Act and in particular, misconstrued ss 5(2), 9, 31(a), 31(b) and 76 by allowing the first respondent to direct and control the use and development of natural and physical resources within the subject block.

Under this ground, the appellants mounted a challenge to the way in which the council used zoning in the proposed plan change. The appellants acknowledged that zoning was an appropriate resource management technique under the RMA. They did not accept that the RMA provides for zoning to restrict activities according to type or category unless it can be shown that the effects associated with a particular category breach "effects-based" standards. According to this argument, if any use is able to meet the environmental standards relating to that zone, it is not lawful for rules under a plan to prevent any such use on the basis of type or description.

Counsel submitted that the plan change should have created a framework intended to enable people in communities to provide for their own social, economic and cultural well-being (the words of s 5 of the RMA). Much was made of the difference between the RMA and the TCPA. Section 5 was said to be either or both "anthropocentric" and "eccentric".

Consideration of s 76 is required —

> **76. District rules** — (1) A territorial authority may, for the purpose of —
> (a) Carrying out its functions under this Act; and
> (b) Achieving the objectives and policies of the plan, —
> include in its district plan rules which prohibit, regulate, or allow activities.

> (2) Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.
>
> (3) In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect; and rules may accordingly specify permitted activities, controlled activities, discretionary activities, non-complying activities, and prohibited activities.
>
> (4) A rule may —
> (a) Apply throughout a district or a part of a district;
> (b) Make different provision for—
> (i) Different parts of the district; or
> (ii) Different classes of effects arising from an activity:
> (c) Apply all the time or for stated periods or seasons:
> (d) Be specific or general in its application:
> (e) Require a resource consent to be obtained for any activity not specifically referred to in the plan.

The Tribunal considered that the plan change represented a reasonable and practical accommodation of the new plan with the old scheme which was acceptable for the remainder of the life of the transitional plan. It rejected the various contentions that the change was inconsistent with the transitional district plan and saw no legal obstacle to approval of the change. It characterised the council's method of managing possible effects by requiring resource consent as a "rather unsophisticated response" to the new philosophies of the RMA but it held the response was only a temporary expedient, capable of being responsive in the circumstances .

We think that the Tribunal's approach was entirely correct. Section 76(3) enables a local authority to provide for permitted activities, controlled activities, discretionary activities, non-complying activities and prohibited activities. The scheme change has done exactly this.

Similar submissions about s 5, the new philosophies of the RMA, and the need to abandon the mindset of TCPA procedures were given to the Full Court in *Batchelor v Tauranga District Council (No 2)* [1993] 2 NZLR 84; (1992) 2 NZRMA 137. That was an appeal against a refusal by the Tribunal to grant consent to a non-complying activity. The Court said at 89; 142, quoting the Tribunal —

> Our conclusion on the competing submissions about the application of s 5 to this case is that the section does not in general disclose a preference for or against zoning as such; or a preference for or against councils making provision for people; or a preference for or against allowing people to make provision for themselves. Depending on the circumstances, any measures of those kinds may be capable of serving the purpose of promoting sustainable management of natural and physical resources.

As in *Batchelor's* case, reference was made in the appellants' submissions to the speech in *Hansard* of the Minister in charge introducing the RMA as a Bill. We find no occasion here to resort to our rather limited ability to use statements in parliamentary debates in aid of statutory interpretation. *Wellington International Airport Ltd v Air New Zealand Ltd* [1993] 1 NZLR 671, 675 sets limits for resort to such debates.

To similar effect to *Batchelor's* case is a decision of Thorp J in *K B Furniture Ltd v Tauranga District Council* [1993] 3 NZLR 197; (1993) 2 NZRMA 291. He too noted that the aims and objects of the RMA represent a major change in policy in that the RMA moved away from the concept of protection and control of development towards a more permissive system of management of resource focused on control and the adverse effects of activities on the environment.

We find the *Batchelor* and *KB Furniture* cases of great relevance when considering this ground of appeal; they looked at the underlying philosophy between the two Acts and, in particular, the application of s 5 of the RMA. In *Batchelor's* case, the Tribunal had taken a similar pragmatic view to that taken by the Tribunal in this case. The Full Court held that there was no general error in an approach which recognised the difficulty of operating with a transitional plan, conceived as a scheme under the TCPA, yet deemed to be a plan under the RMA. Zoning is a method of resource management, albeit a rather blunt instrument in an RMA context; under a transitional plan, activities may still be regulated by that means.

In the *K B Furniture* case, Thorp J characterised *Batchelor's* case as pointing to —

> . . . the need to construe transitional plans in a pragmatic way during the transitional period, and in that consideration to have regard to the "integrity" of such plans, must have at least persuasive authority in this Court: and with respect must be right. It would be an extraordinary position if a clear statement of legislative policy as to the regulation of land use by territorial local authorities were to have no significance in the interpretation of "transitional plans". At the same time, it would in my view be equally difficult to support the contention that such plans must now be re-interpreted in such a fashion as to ensure that they accord fully with, and promote only, the new and very different purposes of the 1991 Act. That endeavour would be a recipe for discontinuity and chaos in the planning process.

We agree with this statement entirely. This ground of appeal is also dismissed.

> **Ground 9.** That the Tribunal applied the wrong legal tests and misconstrued the Act when it concluded that the incorporation of Rule 4 in plan change No 6 is intra vires the Act, and in particular by concluding that Rule 4 is within the bounds of s 76 of the Act and by determining that Rule 4 is necessary with reference to the transitional plan rather than the provisions and purposes of the Act.

This ground is rather similar to Ground 4.

Rule 4 of plan change 6 provides: "Any activity not specified in rules 1-3 above or permitted by the Act is not permitted within the zone unless consent is obtained by way of a resource consent". The contention of the appellants is that this rule purports to require persons undertaking a number of activities

expressly referred to in the district plan to acquire a resource consent before they can proceed. It was submitted that this rule was ultra vires the rule-making power of s 76 (cited above).

Counsel for the appellants drew on the well-known principles that a Court is reluctant to interpret a statute as restricting the rights of land-owners to utilise their property unless that interpretation is necessary to give effect to the express words of the RMA; in a planning context, this principle is demonstrated by such authorities as *Ashburton Borough v Clifford* [1969] NZLR 927, 943. Counsel submitted that s 9 introduced a permissive regime and that the ability of the local authority to reverse that presumption is prescribed by s 74(4)(e); that normal principles of statutory interpretation should properly have applied to the construction of s 76.

The Tribunal held that there must be one coherent planning instrument in the context of a hybrid transitional district plan and for the purposes of marrying provisions prepared under one Act which are to change a plan prepared under another Act.

> We infer that the need in such circumstances for a rule requiring resource consent to be obtained for activities in one zone that are specifically referred to elsewhere in the plan has on balance more probably been overlooked from the list in s 76(4) than deliberately excluded. The rule is clearly within the general scope of s 76(1) and we do not consider that it was ultra vires respondent's powers.

The Tribunal did not find helpful (and neither do we) various maxims of statutory interpretation advanced by the appellants. The Tribunal could not believe that the legislature intended, by providing expressly for such rules in the circumstances referred to in s 76(4)(e), to preclude similar rules in other cases where they are needed. We think the Tribunal's reasoning sound and find no reason to depart from it.

Mr Marquet referred to a decision of the Tribunal in *Auckland City Council v Auckland Heritage Trust* (1993) 1 NZRMA 69 where Judge Sheppard held that a reference anywhere in a plan to a particular activity was sufficient to preclude the application of s 373 to a zone which did not permit that activity. We agree with the criticisms of Mr Marquet of this decision in that no reference was made in it to the ability of a council to make different provisions for different parts of a district.

In that case, there had been a provision protecting buildings specified in the schedule from alteration or destruction. As alteration or destruction was referred to in the plan, the Judge held that other buildings were not constrained by the rule that demolition and construction can only take place with a resource consent because that requirement was limited only to the scheduled buildings. Such a view could have the effect of taking away control formerly had under the district scheme. However, we are not concerned with the correctness of the *Auckland Heritage Trust* decision.

Even if the Tribunal were wrong in that decision, then our view, already discussed under Ground 4, is that s 373(3) applies; a transitional district plan must be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity.

We reject this ground of appeal.

> **Ground 10.** The Tribunal incorrectly applied the law relating to uncertainty and vagueness, and came to a decision which was so unreasonable in the circumstances, that no reasonable tribunal could reach the same, by holding that certain phrases in the rules in change No 6 are valid and have the requisite measure of certainty.

At the hearing before the Tribunal it was argued by the appellants that the rules contained a number of phrases which were vague and uncertain. The Tribunal listed a number of expressions so attacked, discussed relevant authorities and ruled on the matters listed. In some cases, it upheld the submission and either severed and deleted the phrase objected to or held the whole provision invalid. In other cases it rejected the submission made and upheld the validity of the phrase concerned.

In its decision, the Tribunal dealt with this aspect of the case as part of a wider group of matters under the heading "Whether rules 4 and 6 are ultra vires".

Countdown's notice of appeal para 7, under the same heading, specified a number of respects (including the present point) in which the Tribunal is alleged to be in error in that section of the decision.

As a result of pre-trial conferences and argument before Barker ACJ, the grounds of appeal were re-stated by the appellants jointly in 24 propositions or grounds and these were the bases on which (with some excisions and amalgamations) the appeal came before us.

In submissions for the appellant, Mr Wylie covered a number of matters raised in para 7 of the notice of appeal which are outside the ambit of ground 10. We confine ourselves to the specific issue raised by the ground as framed; ie whether in respect of the phrases upheld as valid by the Tribunal, it incorrectly applied the law and came to a decision which was so unreasonable in the circumstances that no reasonable tribunal could reach it.

As to the law, the Tribunal cited and quoted passages from the judgments of Davison CJ in *Bitumix Ltd v Mt Wellington Borough* [1979] 2 NZLR 57, and McGechan J in *McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362. The Tribunal then said (p 81) —

> With those judgments to guide us, and bearing in mind that unlike the former legislation the Resource Management Act does not stipulate that conditions for permitted use be "specified" we return to consider the phrases challenged . . .

Mr Wylie questioned the validity of the distinction that the RMA, unlike the former legislation, does not stipulate that conditions for permitted uses be "specified". No submissions were made by other counsel in this respect and we are unclear about this step in the Tribunal's reasoning. We consider, however, that the correct approach was as indicated by the judgments cited; in our opinion the Tribunal would have reached the same result even if it had

applied them alone and had not borne in mind the further factor derived from the absence of the word "specified".

The Tribunal held, for example, that the phrase "appropriate design" and the limitation of signs to those "of a size related to the scale of the building . . .". were too vague and could not stand. On the other hand it determined that whether an existing sign is "of historic or architectural merit" and whether an odour is "objectionable", although matters on which opinions may differ, are questions of fact and degree which are capable of judgment and were upheld.

We do not consider that the Tribunal incorrectly applied the law or came to a decision that was so unreasonable that it could not stand. This ground of appeal is also dismissed.

> **Ground 11.** That the Tribunal's conclusion that the land in the block the subject of Plan Change No 6 is in general an appropriate location for large scale vehicle orientated retailing is a conclusion which on the evidence it could not reasonably come to.

This ground was withdrawn at the hearing and is therefore dismissed.

> **Ground 12.** That the Tribunal's decision accepting the evidence adduced by the second respondent about the economic effects of proposed change No 6 was so unreasonable, that no reasonable Tribunal, properly considering the evidence, and directing itself in law, could have made such a decision.

This ground relates to the evidence of a statistical retail consultant, Mr M G Tansley, who generally supported the plan change. No witness was called to contradict his evidence. The appellants made detailed and sustained criticisms of his evidence before the Tribunal and claimed that Mr Tansley did not have the relevant expertise to predict economic effects of the proposed change. The Tribunal held that an economist's analysis would not have assisted it any more than did Mr Tansley's.

In a close analysis of Mr Tansley's evidence, counsel for Countdown examined the witness's qualifications and his approach to a cost and benefit consideration of the proposed plan change; they alleged deficiencies in his predictions about the economic effects of the change. These matters were before the Tribunal when they made their assessment of the evidence. Its decision (p 34) records the Tribunal's appreciation of such criticisms.

The Court is dealing with the decision of a specialist Tribunal, well used to assessing evidence of the sort given by Mr Tansley, who was accepted by the Tribunal as an expert. We see no reason for holding that the Tribunal should not have accepted his evidence. Although it is possible for this Court to hold in an appropriate case that there was no evidence to justify a finding of fact, it should be very loath to do so after the Tribunal's exhaustive hearing. The Tribunal is not bound by the strict rules of evidence. Even if it were, the acceptance or rejection of Mr Tansley's evidence is a question of fact. We see this ground of appeal as an attempt to mount an appeal to this Court against a finding of fact by the Tribunal — which is not permitted by the RMA. We therefore reject this ground of appeal.

> **Ground 24.** The Tribunal erred in law and acted unreasonably by failing to consider either in whole or in part the evidence of the appellants and by reaching a decision regarding the merits of the plan change that no reasonable tribunal considering that evidence before it and directing itself properly in law could reasonably have reached. In particular the Tribunal failed to consider the evidence of the following — Anderson, Page, Nieper, Cosgrove, Hawthorne, Bryce, Chandrakumaran, Constantine, Edmonds.

This ground is similar to ground 12, so we consider it next. The appellants complaint here is that the Tribunal took considerable time to analyse the Council's and Woolworths' witnesses' views on the appropriateness of the location for the commercial zone and on the economic and social effects of allowing the proposed change. They claim, in contrast, that the witnesses called by the appellants on the same topics were not considered at all or not given the same degree of attention. The Tribunal heard full submissions by the appellants as to reliability of opposing witnesses, but, the appellants submitted before us, it failed to place any weight at all on the evidence given by the appellants' witnesses. The Tribunal was said to have been unfairly selective and that, therefore, its decision was against the weight of evidence and one which no reasonable tribunal could have reached.

Again, this submission must be considered in the light of the Tribunal's expertise. Even a cursory consideration of the extensive record shows that the hearing was extremely thorough; every facet and implication of the proposed scheme change appears to have been debated at length. The Tribunal conducted a site visit and a tour of suburban shopping centres. An analysis presented by Mr Gould shows that the witnesses whom the appellants claim were ignored in the decision were questioned by the presiding Judge. In the course of its decision (p 86), the Tribunal expressly confirmed that it was reaching a conclusion after "hearing the witnesses for the respondent and applicant cross-examined and hearing the witnesses for Foodstuffs and Countdown . . .". The Tribunal was not required in its judgment to refer to the evidence of each witness.

Once again, we are totally unable to hold that the Tribunal erred in law just because its thorough decision omitted to mention these witnesses by name. It is impossible for us to say that their evidence was not considered. Again, this ground comes close to be an appeal on fact masquerading as an appeal on a point of law. There is nothing to this ground of appeal which is accordingly dismissed.

> **Ground 13.** That the Tribunal applied the wrong legal tests and misconstrued the Act when it held that Change No 6 assisted the first respondent in carrying out its functions in order to achieve the statutory purpose contained in Part II of promoting sustainable management of natural and physical resources and that the change is in accordance with the function of s 31.

> **Ground 14.** The Tribunal misdirected itself in law by concluding that the content and provisions of Plan Change 6 promulgated under Part V of the Act are subject to the framework and legal premises of the first respondent's transitional district plan created under the Town and Country Planning Act 1977.

These grounds were included in the arguments on Grounds 8 and 9 and do not need to be considered separately.

> **Ground 15.** That the Tribunal erred in law by holding that s 290 of the Act did not apply to the references in Plan Change No 6.
>
> **Ground 16.** That the Tribunal misconstrued the statute when it held that it did not have the same duty as the first respondent to carry out the duties listed in s 32(1).
>
> **Ground 17.** That the Tribunal misconstrued the Act when it held that it has the powers conferred by s 293, when considering a reference pursuant to clause 14.
>
> **Ground 18.** That the Tribunal misdirected itself by failing to apply the correct legal test when it purported to confirm Plan Change 6, namely by deciding that it was satisfied on balance that implementing the proposal would more fully serve the statutory purpose than would cancelling it.

The first step in the appellant's argument to the Tribunal on this part of the hearing was that s 290 of the RMA applied to the proceedings. That section reads:

> **Powers of Tribunal in regard to appeals and inquiries —** (1) The Planning Tribunal has the same power, duty, and discretion in respect of a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal or inquiry is brought.
>
> (2) The Planning Tribunal may confirm, amend, or cancel a decision to which an appeal relates.
>
> (3) The Planning Tribunal may recommend the confirmation, amendment or cancellation of a decision to which an inquiry relates.
>
> (4) Nothing in this section affects any specific power or duty the Planning Tribunal has under this Act or under any other Act or regulation.

The second step in the argument was that pursuant to s 290(1) the Tribunal had a duty to carry out a s 32(1) analysis in the same way as the council had.

The Tribunal held that s 290 did not apply because the proceedings were not an appeal against the council's decision as such and that the Tribunal was not under the same duty as the council to carry out the duties listed in s 32(1). It went on to say [2 NZRMA 497, 541] —

> However the Tribunal's function is to decide whether the plan change should be confirmed, modified, amended, or deleted. To perform that function, the matters listed in s 32(1) are relevant. We therefore address those matters as a useful method to assist us to perform the Tribunal's functions on these references.

The Tribunal then considered those matters in detail.

The appellant's submission to this Court is that the Tribunal was wrong as a matter of law in holding that s 290 did not apply and in determining that it was not itself required to discharge the s 32 duties.

The Tribunal also held that s 293 of the RMA, unlike s 290, was applicable and that it had the powers conferred thereby. Section 293 (in part) is as follows:

> **Tribunal may order change to policy statements and plans —** (1) On the hearing of any appeal against, or inquiry into, the provisions of any policy statement or plan, the Planning Tribunal may direct that changes be made to the policy statement or plan.
>
> (2) If on the hearing of any such appeal or inquiry, the Tribunal considers that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity should be given to interested parties to consider the proposed change or revocation, it may adjourn the hearing until such time as interested parties can be heard.

Although s 293 refers to "plan" which (by the relevant definition) means the operative district plan and changes thereto, the Tribunal considered that, because there is no mechanism by which there could be an appeal to the Tribunal against the provisions of an operative plan, for s 293 to have any application to plans, therefore, it must apply to appeals against provisions of proposed plans and proposed changes to plans. It accordingly held that the context requires that the defined meanings do not apply and that it has the powers conferred by s 293 in respect of a proposed change as well as those conferred by cl 15(2) of the First Schedule. That clause is as follows —

> (2) Where the Tribunal holds a hearing into any provision of a proposed policy statement or plan (other than a regional coastal plan) that reference is an appeal, and the Tribunal may confirm, or direct the local authority to modify, delete, or insert, any provision which is referred to it.

The appellants submit that the Tribunal was wrong as a matter of law in holding that it had the powers conferred by s 293 in the present case.

Mr Marquet accepted (as he had before the Tribunal) that ss 290 and 293 both applied and that the Tribunal had the powers set out in those provisions but contended, for reasons amplified in his submissions, that there had been no error of law.

Mr Gould supported the Tribunal's findings. He argued, however, that on a careful reading of the decision the Tribunal did not rely upon the powers contained in s 293 but instead on its jurisdiction under cl 15(2) of the First Schedule. It had correctly defined its function, he contended, and in the performance of that function, had reviewed all the elements of s 32. He submitted that even if the Tribunal had the duties under s 32 of the council (but in a manner relevant to an appeal process), the steps it would have taken in its deliberation and judgment would have been no different. No material effect would arise, he submitted, if the Tribunal were found to be technically in error in its views as to ss 290 and 293.

We consider that, for the reasons given by the Planning Tribunal, it

correctly determined that it had the powers conferred by s 293 although we accept Mr Gould's submission that, in the end, the Tribunal did not exercise those powers and acted only pursuant to cl 15(2) of the First Schedule.

We differ from the Tribunal's conclusion as to s 290. In our view, the nature of the process before the Tribunal, although called a reference, is also, in effect, an appeal, from the decision of the council. In addition, the provisions in cl 15(2) that a reference of the sort involved here is an "appeal" and a reference into a regional coastal plan pursuant to cl 15(3) is an "inquiry" link, by the terminology used, cl 15 in the First Schedule with s 290.

The general approach that the Tribunal has the same duties, powers and discretions as the council is not novel. Section 150(1) and (2) of the TCPA conferred upon the Tribunal substantially the same powers as s 290(1) and (2) of the RMA; in particular, s 150(1) provided that the Tribunal has the same "powers, duties, functions and discretions" as the body at first instance. Under that legislation, the Tribunal's approach to plan changes was that the Tribunal is an appellate authority and not involved in the planning process as such. This principle was discussed in this Court in *Waimea Residents Association Inc v Chelsea Investments Ltd* (High Court, Wellington M 616/81, 16 December 1981, Davison CJ). There was no provision in the TCPA corresponding to s 32 of the RMA but the judgment of Davison CJ is relevant as confirming the judicial and appellate elements of the Tribunal's function even though it had the same powers and duties as the council.

We accept Mr Gould's submission that even if the Tribunal had decided that s 290 applied and it had the same duties as the council (in a manner relevant to its appellate jurisdiction) the steps it would have taken in its deliberation and judgment would have been no different from those set out in detail in pp 121 to 125 of the decision.

The appellants argue next, in respect of ground 18, that the test required is not simply to decide whether on balance the provisions achieve the purpose of the RMA but whether they are in fact necessary. Alternatively, it is submitted that its construction of the word "necessary" was not stringent enough in the context.

We deal with the alternative point first. The Tribunal in its decision discussed the submissions made by counsel and the judgments of the Court of Appeal in *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257; (1989) 13 NZTPA 197 and of Greig J in *Wainuiomata District Council v Local Government Commission* (High Court, Wellington CP 546/89, 20 September 1989).

The Tribunal considered that in s 32(1), "necessary" requires to be considered in relation to achieving the purpose of the Act and the range of functions of Ministers and local authorities listed in s 32(2). In this context, it held that the word has a meaning similar to expedient or desirable rather than essential. We agree with that view and do not consider that the Tribunal was in error in law. We return now to the appellants' primary submission. It is true that the Tribunal said (at p 128) —

> On balance we are satisfied that implementing the proposal would more fully serve the statutory purpose than would cancelling it, and that the respondent should be free to approve the plan change.

But we do not think it is correct that the Tribunal adopted this test in place of the more rigorous requirement that it be satisfied that the provisions are necessary. Section 32 is part only of the statutory framework; by s 74, a territorial authority is to prepare and change its district plan in accordance with its functions under s 31, the provisions of Part II, its duty under s 32 and any regulations. This was fully apprehended; and dealt with appropriately by the Tribunal. It said at p 127 —

> We have found that the content of proposed Plan Change 6 would, if implemented, serve the statutory purpose of promoting sustainable management of natural and physical resources in several respects; and that the proposal would reasonably serve that purpose; and would serve the aims of efficient use and development of natural and physical resources, the maintenance and enhancement of amenity values, the recognition and protection of the heritage values of building and areas; and the maintenance and enhancement of the quality of the environment.
>
> We have also found that the measure is capable of assisting the respondent to carry out its functions in order to achieve that purpose, and is in accordance with those functions under s 31; that its objectives, policies and rules are necessary, in the sense of expedient, for achieving the purpose of the Act; that the proposed rules are as likely to be effective as such rules are able to be; and that the objectives, policies and rules of the plan change are in general the most appropriate means of exercising the respondent's function.

The Tribunal went on to deal with possible alternative locations, the road system, pedestrian safety, the obstruction of fire appliances leaving the fire station, non-customers' use of carparking, and adverse economic and social effects. It then concluded with the passage which, the appellants contend, shows that the Tribunal adopted the wrong test by saying that on balance it was satisfied that implementing the proposal would more fully serve the statutory purpose than cancelling it.

In our view, the Tribunal applied the correct test when considering the relevant part of s 32; it asked itself whether it was satisfied that the change was necessary and held, after a full examination, that it was. On the basis of that and numerous other findings, it then proceeded to the broader and ultimate issue of whether it should confirm the change or direct the council to modify, delete or insert any provision which had been referred to it. It determined that, on balance, implementing the proposal would more fully serve the statutory purpose than would cancelling it and that the council should accordingly be free to approve the plan change. Reading the relevant part of the Tribunal's decision as a whole we consider that its approach was correct and that it did not err in law as the appellants contend. This ground of appeal is dismissed.

> **Ground 19.** That the Tribunal misdirected itself when it determined that the onus of proof rested with the appellant Transit to establish a case that approving Plan Change No 6 would result in adverse effects on the traffic environment.

> **Ground 20.** In considering Plan Change No 6 in terms of the Act the Tribunal erred in failing to consider the effects of the Plan Change on the sustainable management of the State Highway, on the reasonably foreseeable transportation needs of future generations, and on the needs of the people of the district, pedestrians, and road users, as to their health and safety, and on the need to avoid, remedy or mitigate adverse effects of the plan change on the transportation environment of the Dunedin District.
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> **Ground 21.** The Tribunal erred in determining that the Plan Change would create no adverse effects on the State Highway and on persons using and crossing the State Highway.
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> **Ground 22.** In considering the effectiveness of the rules contained in the plan change the Tribunal erred in failing to take account of the fact that in respect of permitted and controlled activities allowed by the plan change the general ordinances of the transitional district plan as to vehicle access are ultra vires and of no effect.
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> **Ground 23.** The Tribunal erred in considering the effectiveness of the rules contained in the Plan Change, and in particular wrongly determined that the issue of what are appropriate rules for vehicle access should be resolved by the appellant and the first respondent through the process of proposed draft plan change 7 or some informal process.

These grounds were not argued because of the settlement reached by Transit with the Council and Woolworths. However, because all the other appellants' grounds of appeal have been dismissed, we have now to consider submissions from those appellants as to why the settlement should not be implemented in the manner suggested.

The settlement arrived at amongst Transit, the Council and Woolworths provided for certain rules as to access to the site to be incorporated in the plan change. Details of these rules were annexed to the parties' agreement and submitted to the Court. Counsel for Transit sought an order that the now agreed rules be referred back to the Tribunal where the parties would seek appropriate orders by consent incorporating the new rules. Such a procedure was only to be necessary if the appeals by Countdown and Foodstuffs alleging the invalidity of the planning change were unsuccessful. We have ruled that they are. We therefore consider the viability of implementing the Transit settlement.

Counsel for Countdown who submitted that the new rules contained within the settlement agreement required public notification before the local authority or Tribunal could proceed to include them in the plan change. Further, it was contended that the Tribunal had refused such proposed amendments sought by Transit upon the basis that Transit's submission to the council had not specifically stated the amendments sought and that was final because it had not been appealed. Reference was made to s 295 of the RMA, viz: "A decision of the Planning Tribunal . . . is final unless it is reheard under section 294 or appealed under section 299." It was further agreed that Transit's grounds of appeal did not embrace the new rules but rather dealt with the procedure adopted by the Tribunal in advising both Transit and the Council actively to consider the issues raised by Transit's proposed amendments.

All parties accepted that the Tribunal had power under cl 15(2) of the First Schedule to confirm or to direct the local authority to modify, delete or insert any provision which had been referred to it; as well, it had powers to direct changes under s 293 of the RMA. The latter power includes a specific power to adjourn a hearing if it considers that some opportunity should be given to interested parties to be notified of and to consider the proposed change. The detailed procedure is contained in s 293(3).

On the penultimate page of its decision the Tribunal stated —

> The other two amendments sought by Transit would replace general provisions about the design of vehicle accesses to car parking and service and loading areas with detailed rules containing specific standards. However, although Transit's submission to the respondent on the plan change referred to pedestrians crossing Cumberland Street mid-block, and to the design and location of accesses and exits, it did not state that the submitter wished the respondent specifically to make the amendments that were sought in Transit's reference to the Tribunal. Further, those amendments were not put to the respondent's traffic engineering witness, Mr N S Read, in cross-examination by Transit's counsel.
>
> The applicants' traffic engineering witness, Mr Tuohey, proposed a different rule about design and location of vehicle accesses, and that is also a topic currently being considered within the Council administration, focusing on a draft Plan Change 7. In all those circumstances, we do not feel confident that the specific provisions sought by Transit would necessarily be the most appropriate means of addressing the concern raised by it. We are content to know that both Transit and the respondent are actively considering the issues which the amendments sought by Transit are intended to address.

We do not read those paragraphs, in the context of the Tribunal's decision as a whole, as a concluded finding upon Transit's reference to the Tribunal. We accept that these amendments, now settled upon, may be within the Tribunal's jurisdiction under s 293 or cl 15(2) of the First Schedule.

In *Port Otago Limited v Dunedin City Council* (High Court, Dunedin AP 112/93) Tipping J expressed the view that it would be a rare case in an appeal on a point of law where this Court could substitute its own conclusions on the factual matters underlying the point of law for that of the Tribunal. He considered, and we agree, that unless the correctly legal approach could lead to only one substitute result, the proper course is to remit the matter to the Tribunal as R 718A(2) of the High Court Rules empowers.

Accordingly, we allow Transit's appeal by consent and remit to the Tribunal for its further consideration and determination the possible exercise of its powers under s 293 or cl 15(2) of the First Schedule in relation to the rules forming part of the settlement.

Since this judgment may have interest beyond the facts of this case and because we have mentioned R 718A of the High Court Rules, we make some comments about the scheme of the Act relating to appeals to this Court.

Sections 300 to 307 of the RMA provide detailed procedure for the institution of appeals to this Court under s 299 and for the procedure up to the

date of hearing. In our view, it is unfortunate that such detailed matters of procedure are fixed by statute. Our reasons are: (a) statutes are far more difficult to alter than Rules of Court should some procedural amendment be considered desirable; (b) most statutes are content to leave procedural aspects to the Rules once the statute has conferred the right of appeal; (c) the High Court Rules in Part X aim for a uniform procedure for all appeals to this Court other than appeals from the District Court. There is much to be said for having the same rules for similar kinds of appeals.

Although the RMA goes into considerable detail on procedure, it is silent on the powers of the Court upon hearing an appeal from the Tribunal. One might have thought that the power of the Court on hearing an appeal might have been a better candidate for legislative precision than detailed provisions which are similar to but not identical to well-understood and commonly used rules of Court . We hope that, at the next revision of the Act, consideration be given to reducing the procedural detail in ss 300 to 307 and that the same measure of confidence be reposed in the Rules of Court as can be found in other legislation granting appeal rights from various tribunals or administrative bodies.

Result

The appeals of Countdown and Foodtown are dismissed. The appeal of Transit is allowed by consent in the manner indicated. Woolworths and the council are both entitled to costs. We shall receive memoranda from counsel if agreement can not be reached.

Solicitors for Foodstuffs: *Gallaway Haggitt Sinclair* (Dunedin)
for Countdown: *Duncan Cotterill* (Christchurch)
for Transit: *Timpany Walton* (Timaru)
for Woolworths: *Ellis Gould* (Auckland)
for Dunedin City Council: *Ross Dowling Marquet & Griffin* (Dunedin)

Lim v Hutt City Council

The Planning Tribunal: His Honour Planning Judge Treadwell, presiding; Mr T W Smallfield and Ms J D Rowan.

18-20 October; 26 November 1993 — Decision W 102/93

Land use consent — Non-complying activity — Construction of K-Mart Discount Department Store and speciality shops — Whether Tribunal should have regard to objectives and policies of Operative Transitional District Plan or Proposed District Plan — Whether activity in non-conforming building contrary to objectives and policies of relevant plan — Resource Management Act 1991, ss 19, 104, 105(2)(b), 373(3).

District plan — Relevant instrument — Whether Operative Transitional District Plan or Proposed District Plan dominant instrument for purposes of s 105(2)(b)(ii) — Resource Management Act 1991, ss 19, 105(2)(b)(ii).

This was an appeal by Mr Lim against a resource consent granted to Retail Holdings Management Ltd to enable the construction of a K-Mart Discount Department Store of 7,445 m^2 plus specialty shops of 2,450 m^2. The proposed complex was to be situated at 19 Queensgate Road and was designed to integrate with the existing Queensgate shopping complex. This integration was to be facilitated by the use of the airspace over Queensgate Road, which would also allow improved access to existing parking areas and to the 590 parking spaces to be provided as part of the project.

There were two plans which the appellant submitted were relevant to the appeal: the Operative Transitional District Plan and a Proposed District Plan (a review). It was therefore necessary, for the purposes of having regard to the objectives and policies "of the plan or proposed plan" under s 105(2)(b)(ii) of the Resource Management Act 1991 (RM Act), to determine which was the dominant document. The proposal fell to be considered as a non-complying activity because of the excessive site coverage of the building and because of the use of the air space above the street (the latter aspect being deemed non-complying under s 373(3) of the RM Act because it was not mentioned at all in the plan).

It was accepted by the parties that the effects of the proposal on the environment were more than minor. It became crucial, therefore, under the threshold tests in s 105(2)(b), to determine whether the proposal was contrary to the objectives of the plan or proposed plan.