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**BEFORE THE HEARINGS COMMITTEE**

**IN THE MATTER**

**of hearings on  
submissions  
concerning the  
proposed One Plan  
notified by the  
Manawatu-Wanganui  
Regional Council**

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**SUPPLEMENTARY LEGAL REPORT  
RELATING TO HISTORIC HERITAGE**

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Dated 12 January 2009

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**COOPER RAPLEY**

MEMBERS OF THE LAW SOCIETY OF NEW ZEALAND

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## INTRODUCTION

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1. This report concerns historic heritage. The term 'historic heritage' in this report has the same meaning as in the Resource Management Act. Historic heritage encompasses archaeological sites, areas or places including wahi tapu.<sup>1</sup>
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## PERFORMANCE STANDARDS IN LAND USE RULES TO PROTECT HISTORIC HERITAGE

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2. The Hearing Panel is considering two questions:
  - (a) Should performance standards<sup>2</sup> be contained in land use rules to address effects on historic heritage and if so in what form? and
  - (b) How should performance standards in the POP be drafted?
3. This section of the report addresses the question whether or not HRC has the power to include performance standards in land use rules aimed at addressing potential effects on historic heritage.
4. The relevant statutory matrix is set out below. The key provisions from Parts 4 and 5 RMA are: s.30(1)(c), s.63(1), s.66(1) and s.68(1). These parts of the RMA are a code for the functions of regional councils and the content of plans. The important provisions relating to land use are:<sup>3</sup>

### **"30. Functions of regional councils under this Act**

- (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region: ...
- (c) The control of the use of land for the purpose of—
  - (i) Soil conservation:

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<sup>1</sup> There are various spellings of this Maori phrase and I have adopted the one from the definition of historic heritage.

<sup>2</sup> A performance standard is a condition, term or standard within the meaning of s.77B which must be met.

<sup>3</sup> Indigenous biodiversity is dealt with as a discrete function.

- (ii) The maintenance and enhancement of the quality of water in water bodies and coastal water:
- (iii) The maintenance of the quantity of water in water bodies and coastal water:
- [(iiia) the maintenance and enhancement of ecosystems in water bodies and coastal water:]
- (iv) The avoidance or mitigation of natural hazards:
- (v) The prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:..."

**63. Purpose of regional plans**

- (1) The purpose of the preparation, implementation, and administration of regional plans is to assist a regional council to carry out any of its functions in order to achieve the purpose of this Act." [emphasis added]

**66 Matters to be considered by regional council**

- (1) A regional council shall prepare and change any regional plan in accordance with its functions under section 30, the provisions of Part 2, [a direction given under section 25A(1),] its duty under section 32, and any regulations.

**68. Regional rules**

- (1) A regional council may, for the purpose of—
  - (a) Carrying out its functions under this Act (other than those described in paragraphs (a) and (b) of section 30(1)); and
  - (b) Achieving the objectives and policies of the plan,—

include [rules in a regional plan]."<sup>4</sup>

5. The Court of Appeal considered the relationship between regional and territorial authority powers in *Canterbury Regional Council v. Banks Peninsula District Council*<sup>5</sup>. The case concerned rules relating to hazards. This is a matter that both regional councils and territorial authorities may address. However, the declaration made by the Court is a succinct statement of the law which in my opinion has not changed.

<sup>4</sup> Note that there are cumulative elements

<sup>5</sup> [1995] NZRMA 453

6. At page 459 the Court of Appeal declared:

“A regional council may, to the extent allowed under s.68 of the Resource Management Act, include in a regional plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under s.30(1)(c) to (h). A territorial authority may, to the extent allowed under s.76, include in a district plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under s.31. Neither a regional council nor a territorial authority has power to make rules for purposes falling within the functions of the other, except to the extent that they fall within its own functions and for the purpose of carrying out its own functions. To that extent only, both have overlapping rule making powers, but the powers of a territorial authority are also subject to s.75(2).”

7. The term ‘purpose’ in ss.30, 63 and 68 has the same meaning as the primary meaning of the noun ‘purpose’ in the Shorter Oxford English Dictionary. That meaning is as follows:

“Purpose means:

1. A thing to be done; an object to be attained, an intention, an aim.

8. In my opinion control of the use of land in a regional plan for the purpose of managing historic heritage is outside the jurisdiction of a regional council. It is not a function provided for in s.30(1)(c). I do not consider that the position is different if the rule is primarily aimed at controlling a matter within the jurisdiction of the regional council under s.30(1)(c) but includes a performance standard aimed at addressing the effects of historic heritage. The purpose or aim of the performance condition (even though subordinate) is not a purpose authorised by the Act. A performance condition related to landscape effects, for example, would also be unauthorised. I therefore consider that any performance condition directed at historic heritage would be unlawful.

9. I have read the report filed by NZHPT dated 4 December 2008<sup>6</sup>. The report is in response to a statement by the Chairperson of the Hearing Panel informing NZHPT of Mr Percy’s supplementary planning statement in which performance standards relating to historic heritage were deleted on jurisdictional grounds. NZHPT does not support that deletion and proposes the reinstatement of the standards together with an advice note. The advice note NZHPT proposes is borrowed from the EBOP’s proposed Water and Land plan. The advice note reads:

“The rules in this regional plan do not authorise the modification or disturbance of any archaeological or registered waahi tapu sites within the area of activity.

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<sup>6</sup> See memorandum by Rakesh Mistry dated 4 December 2008.

Written authority from the New Zealand Historic Places Trust is required prior to any destruction, damage or modification of an archaeological or registered waahi tapu site or an area where there is reasonable cause to suspect there is an archaeological site. Should any artefacts, bones or any other sites of archaeological or cultural significance be discovered within the area affected by the activity, written authorisation should be obtained from the Historic Places Trust before any damage, modification or destruction is undertaken."

10. I am unaware whether the plans from other regions referred to by Mr Mistry for NZHPT include controls on land use with the primary or ancillary purpose of protecting historic heritage. If they do, then in my opinion this is unlawful.
11. For the sake of completeness I should also mention s.66(2) RMA. That section requires a regional council to have regard to a relevant entry in the Historic Places Register. The subsection reads:

**"66. Matters to be considered by regional council**

(2) In addition to the requirements of [section 67(3) and (4)], when preparing or changing any regional plan, the regional council shall have regard to—

(c) Any—

(i) Management plans and strategies prepared under other Acts; and

(ii) *Repealed.*

[(iia) Relevant entry in the Historic Places Register; and]

[(iii) Regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial Maori customary fishing); and]

(iv) *Repealed.*

to the extent that their content has a bearing on resource management issues of the region; and"

12. S.66(2)(c)(iia) does not alter my opinion of the breadth of regional functions. It can be read in the manner consistent with s.66(1) which again refers back to the functions in s.30 without contradicting the plain wording of s.30(1)(c). It is also noted that

s.66(2)(c) refers to entries in an Historic Places Register. The mischief the Hearing Panel is concerned with is unidentified archaeological sites which are *ex hypothesi* not entered in the Register.

13. The Historic Places Act is a separate piece of legislation concerned with the protection and management of archaeological sites. While it is separate from the Resource Management Act it is nevertheless part of the wider statutory matrix. It is relevant therefore in determining amongst other things, (assuming there is jurisdiction) the effectiveness and efficiency of providing an additional layer of controls relating to the discovery of archaeological sites. Part 1 of the Historic Places Act and in particular s.9 to 21 provides a comprehensive code for the management and protection of archaeological sites. It is recommended that these provisions are considered by the Hearing Panel. The regime is a code that includes:
  - (a) A prohibition against the damage or disturbance of an archaeological site; and
  - (b) The power to obtain an authority to disturb or damage an archaeological site subject to any conditions imposed by NZHPT; and
  - (c) A right of appeal in respect of any decision by NZHPT concerning the granting or refusal of an authority and any conditions. The appeal is to the Environment Court.
14. This is a comprehensive code and serious consideration is required (even if jurisdiction existed) of the desirability of providing additional layers of control beyond those which Parliament has provided for in the Historic Places Act 1993 to address the possibility of unidentified sites being uncovered.
15. Historic heritage and its protection is a theme of part 1 POP. It is reflected in elements of chapters 4 and 7. I have therefore considered some options to be helpful. The options include:
  - (a) An advice note in chapter 5 Land that states:
 

"Plan users should be aware that there are separate controls under the Historic Places Act regarding the modification or disturbance of any archaeological site. Consent holders should ensure that if an archaeological site is discovered (including disturbance of any waahi tapu or koiwi) then they must immediately inform the New Zealand Historic Places Trust and cease activity until an authority is obtained from the New Zealand Historic Places Trust.
  - (b) In addition to (a) above the Hearing Panel may introduce an additional non-regulatory method at the end of Chapter 5

that provides that when consents are granted under chapter 12 the following advice note is included with the consent:

"This consent does not authorise the modification or disturbance of any archaeological or registered waahi tapu sites within the area of the activity. That modification or disturbance will be precluded by the Historic Places Act. Written authority from the New Zealand Historic Places Trust is required prior to any destruction, damage or modification of an archaeological or registered waahi tapu site or an area where there is reasonable cause to suspect there is an archaeological site. Should any artefacts, bones or any other sites of archaeological or cultural significance be discovered within the area affected by the activity, written authorisation should be obtained from the Historic Places Trust before any damage, modification or destruction is undertaken."

This method serves two purposes:

- (i) It is educational for consent holders; and
  - (ii) Provides clarity that a consent does not override the provisions of the Historic Places Act; and
- (c) The Hearing Panel may if it considers the matter is of sufficient regional significance provide direction in part 1 POP regarding the preparation of plans to control land use effects associated with the discovery of unidentified archaeological sites. I have not considered the question of scope.

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## **PERFORMANCE STANDARDS TO MANAGE EFFECTS OF ACTIVITIES OTHER THAN LAND USE**

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16. In respect of other activities such as discharges, control of the CMA and control of the take, use, damming or diversion of water (which are classical regional council functions) the power of control in s.30 is broad. There is no jurisdictional impediment to including performance conditions for permitted and controlled activities that have the purpose of controlling effects on historic heritage.
17. Performance conditions for permitted activities should meet the following tests according to the recent decision *Carter Holt Harvey Ltd v. Waikato Regional Council*<sup>7</sup>:
- "a) Be comprehensible to a reasonably informed, but not necessarily expert person;

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<sup>7</sup> Decision: A123/2008

- b) Not reserve to a council the discretion to decide by subjective formulation whether a proposed activity is permitted or not;
- c) Be sufficiently certain to be capable of objective ascertainment."

18. I am not satisfied that the performance standards proposed in the supplementary report by Fiona Gordon meet those requirements. The assessment of what is an archaeological site or wahi tapu and its extent is often difficult. Therefore, the standard as presently framed is uncertain. This can be a serious matter where breach of a standard constitutes an offence. Furthermore, the effect of the recommended standard is the cessation of an activity when, until approval is given by NZHPT. In contrast the Historic Places Act 1993 provides a detailed regime that includes:

- (a) prohibition against the damage or disturbance of an archaeological site which is broadly defined;
- (b) the power to obtain an authority to affect an archaeological site subject to any conditions from the NZHPT;
- (c) a right of appeal in respect of any decision by NZHPT concerning the granting or refusal of an authority and any conditions to the Environment Court.

In light of this detailed code, it does not appear to be either effective or efficient to use performance standards as a means for managing impacts on archaeological sites to which Historic Places Act applies.

19. Nevertheless, recognition of historic heritage and related provisions of the RPS eg *Te Ao Maori* may lead the Hearing Panel to conclude some performance conditions are warranted. I support the recommendation by Fiona Gordon in paragraph 3.1.1 of her End of Hearing Report regarding a possible performance condition. I would however amend the wording. My suggested wording is:

"If koiwi remains are discovered or disturbed while undertaking the activity then the Regional Council shall be notified as soon as practicable to enable the Regional Council to identify the appropriate authorities that should be contacted and those authorities shall be contacted by the person carrying out the activity. Any further disturbance of koiwi remains must cease until an appropriate and culturally sensitive management plan for the koiwi is approved by the Regional Council"

Such a condition may also be inserted consents for activities requiring Regional Council consent other than land use.



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## GENERAL MATTERS

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20. Some discussion occurred as to whether or not the Plan should be 'site', 'place' or 'area' or a combination of those terms. These terms are defined in the Shorter Oxford Dictionary as follows:

**site:** 1 . a The place occupied by something; (a) position. LME–E18. . b Attitude, posture (of the body etc.). E17–E18.

2 . a The position of a town, building, etc., esp. with reference to the surrounding district or locality; (a) location, (a) setting. LME. . b Science. A position or location in or on a molecule, gene, etc., esp. one where a specific activity takes place. M20.

**place:** 1. Orig., an open space in a town, a marketplace. Now, a small square or a side street, esp. a cul-de-sac, lined with houses (freq. in proper names), OE.

2. a Available room or space. arch. ME. . b Space as opp. to time. Chiefly poet. & rhet. M17.

**area:** 1. A piece of ground, or space within a building, that is not built on or occupied, or is enclosed or reserved for a particular purpose. M16. . b A sunken enclosure giving access to the basement of a house. E18.

2. A particular tract of the earth's (or another planet's) surface; a region; a neighbourhood, a vicinity. M18."

21. In the Resource Management Act the definition of 'historic heritage' refers to "historic sites, structures, places and areas"
22. While there is an overlap in the meaning of the terms there are different shades of meaning. Given the wide coverage of the term historic heritage no single word is ideal. Where there is the need to refer to a site, area or place my preference is to use the word 'site'. However, the term site should be included in the glossary with the following meaning:

"Site includes, where in the context it is appropriate, an area or place."

23. NZHPT proposed an additional policy in Part I, POP along the following lines:

“Regional and district plans shall include objectives, policies, methods and rules to protect places of national significance. These are places of special or outstanding heritage value which include registered Category 1 historic places, wahi tapu and wahi tapu area under the Historic Places Act 1993.”

24. My notes of the answers by NZHPT to questions from the Hearing Panel at the biodiversity hearing are as follows:

- (a) Mr Mistry said that the reference to category 1 historic places could be an advice note, and
- (b) Mr McLean said that it is not the intention of the suggested policy to require territorial authorities to list category 1 buildings as buildings of national significance in their district plans.

25. In my opinion, in light of:

- (a) the plain and ordinary words of the NZHPT suggested policy; and
- (b) the requirement for TAs to give effect to an RPS;

the incorporation of the additional policy is likely to lead to the unqualified protection of category 1 buildings in district plans. I have three concerns with that outcome:

- (a) If a site is regionally significant or nationally significant, why has it not been identified at the point of notification of POP; and why have sites not been identified in the submission of NZHPT. I have reservations whether a general policy of this type is procedurally fair to present and future land owners; and
- (b) Incorporating a list which may change by decision of a separate agency appears to be an inappropriate delegation of HRC’s regional planning function. This is more significant because the process of registration Historic Places Act is not one that provides for natural justice (including a hearing)<sup>8</sup> or any right of appeal; and
- (c) Such a proposal runs contrary to the philosophy of the HRC (as articulated by HRC staff) that decisions on historic heritage are best left to TAs.

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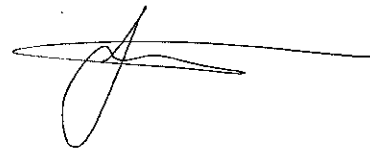
<sup>8</sup> See also NZ Bill of Rights and the principle of *audi alteram partem*

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**Hearing Panel Minute dated 11 December 2008**

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26. I have considered the questions in paragraphs 7 and 8 of the Minute by the Hearing Panel dated 11 December 2008.
27. I do not consider that there is any potential unfairness that needs to be remedied in light of the advice contained in this report. The report of Mr Percy signalled the jurisdictional issue prior to the re-hearing of the land chapter. This is the key chapter as it contains the rules including performance standards associated with historic heritage. There may be some virtue in inviting the Historic Places Trust to make specific comment on this report within a specified time. However, the Historic Places Trust did have the opportunity to address the jurisdictional issue in its oral submission.
28. I am not aware of any authority that relates specifically to the matters addressed in this report. The contrary view would be the regional plans can contain land use rules that manage by means of performance conditions effects on historic heritage. If that view is correct, then there is no logical reason why (as a matter of statutory interpretation) land use rules could not address other effects arising from land use such as landscape effects. Such a result in my opinion runs contrary to the specific wording in Part 4 and 5 of the RMA and the clear delineation of functions between regional councils and territorial authorities. I do not consider in light of the advice contained in this report that it is appropriate to include a policy promoting conditions on land use consents administered by the Regional Council managing effects on historic heritage. Objectives and policies in a plan are for the purpose of fulfilling regional council functions.



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John Maassen