BEFORE THE WAIKATO REGIONAL

COUNCIL HEARING COMMISSIONERS

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	Proposed Plan Change 1 to the Waikato Regional Plan and Variation 1 to that Proposed Plan Change: Waikato and Waipā River Catchments

---

Legal Submissions on behalf of the Director-General of Conservation

Dated: 7 August 2019

Block 3 Hearings

Submission Number: 71759

Department of Conservation
Private Bag 3072
Hamilton
Counsel Acting: Victoria Tumai
Email: vtumai@doc.govt.nz
Telephone: 07 838 5687

MAY IT PLEASE THE COUNCIL HEARING COMMISSIONERS:

Evidence

1. For the Block 3 Hearings the following evidence has been lodged in relation to the Director-General of Conservation's (the **Director-General**) submission:
   a. In terms of rivers and streams, Ms McArthur's evidence-in-chief (**EIC**) focuses on diffuse discharge management as it relates to a future allocation regime, sub-catchment mitigation planning, implementation methods and Schedule 1 Farm Environmental Plan (**FEP**) requirements.
   b. In addition, Ms McArthur's supplementary evidence relates to Waikato Regional Council's (WRC) Response to the Hearings Panel Questions. Specifically, physico-chemical water quality monitoring, ecological monitoring, and mapping and protection of īnanga spawning habitat. Ms McArthur's further supplementary focuses on Mr McCullum-Clark's Erratum regarding īnanga spawning maps.
   c. In terms of wetlands, Dr Robertson's evidence considers the Officer's proposed amendments to Policy 15 relating to ecosystem health of Whangamarino Wetland (**WW**), the proposed implementation methods aimed at reducing phosphorus, nitrogen and sediment sources as well as the implementation methods for wetland accounting and monitoring.
   d. In terms of lakes, Dr Stewart's evidence discusses the plantation forestry practices within lake freshwater management units (**FMU**) and the Schedule 1 FEP requirements
   e. Ms Kissick's planning evidence covers commercial vegetation production, sub-catchment planning, non-regulatory implementation methods, FEP, wetlands and lakes as well as a brief discussion on the Joint Witness Statement.
   f. Ms Kissick's supplementary evidence responds to Mr McCullum-Clark's Erratum particularly in terms of his comments on the scope of the Director-General's submission relating to the identification of īnanga spawning habitat.

Legal Submissions

2. My legal submissions will focus on the following matters
   a. Inanga Spawning Habitat,
   b. Allocation Regime,
   c. Implementation Methods,
   d. Whangamarino Wetland (**WW**), Policy 15 and Implementation Method 3.11.4.4,
   e. National Environmental Standards for Plantation Forestry Regulations 2017 (**NES-PF**),
   f. Definition of 'Waikato and Waipā Rivers[1],
   g. Legal considerations under section 32AA RMA, and
   h. the Joint Witness Statement.

Inanga Spawning Habitat

3. The Director-General's submission sought additional policies and rules to protect īnanga spawning habitat.[2] Specifically, the Director-General sought the expansion of the extant broadly defined ecosystem health value to recognise īnanga spawning, native fish migration, threatened and at risk species and biodiversity hotspots, being areas that are particularly outstanding due to their high proportion of native species and their role as native species 'refuge'.[3]

4. The Director-General discusses[4] the fact that īnanga spawn in the lower Waikato River, among riparian vegetation at the upper tidal extent during high spring tides. Early records suggest that this occurs on the Waikato River downstream of Tuakau. Maintaining or restoring adequate and vegetated riparian margins is key to enabling successful spawning and recruitment of

[1] This was a question raised by Commissioner Ryder to Counsel during the Block 2 Hearings
[2] Refer pp 47-48 Director-General's (D-G) submission
[3] Refer pp 28 – 30 D-G submission
[4] Refer p 30 D-G submission

galaxiid fish in the Waikato and Waipā catchments and thereby providing for ecosystem health.[5]

5. To give effect to the Director-General's relief, Ms Kissick considered, in her Block 2 evidence, that the identification and protection of īnanga habitat through mapping may be required[6], and Ms McArthur's Block 2 evidence supported this.

6. In Mr McCullum-Clark's Erratum he discusses the identification of īnanga spawning habitat and states:

> *'Arguably, the reference to 'rules' in the submission could include mapping. However, while the submission raised rules, the content of a rule or the extent of any mapping is not indicated in the submission and the report referred to does not provide this'. I am concerned that a person who may be affected by this mapping and any specific controls may not have reasonably anticipated the nature of mapping or specific rules that could result from the submission.'* [7]

7. It appears Mr McCullum-Clark considers the identification and protection of īnanga spawning habitat in Plan Change 1 through mapping is out of scope of the Director-General's submission.

8. The methods used by the Canterbury Regional Council to identify īnanga spawning habitat shows locations of īnanga spawning habitats.[8] Ms Kissick states that, while the Director-General's submission does not specifically request mapping be included, it does reference the approach used in Canterbury, being a map-based approach to the protection of īnanga spawning habitat.

9. As stated, the Director-General's submission seeks an additional value to recognise īnanga spawning, native fish migration and threatened and at-risk

[5] Ms McArthur's EIC Block 2 [18]
[6] Ms Kissick's EIC Block 2 [92]
[7] Dated 17 July 2019 at [8]
[8] Ms Kissick's supplementary evidence [22] – [26]

species and biodiversity hotspots. Ms McArthur's Block 1 evidence confirmed that īnanga are at risk and are declining in population nationally.[9]

10. I submit the Director-General's submission provides the necessary scope to include mapping of īnanga spawning habitat in Plan Change 1. Furthermore, the reference in section 3 of the submission to *'any relief sought to include consequential amendments to other provisions... necessary to give effect to the relief',* reinforces the Director-General's scope. And as Ms McArthur confirms in her supplementary evidence, the technical report of Jones and Hamilton (2014), referenced in the Erratum[10], should be used to identify the most likely areas available for īnanga spawning habitat.[11]

11. Finally, I submit, identification and protection of īnanga spawning habitat through mapping gives effect to the Vision and Strategy as such mapping pursues the protection and enhancement of significant fisheries[12], which in turn recognises and provides for the protection of areas of significant habitats of indigenous fauna as required under s 6(c) of the RMA.

Allocation Regime

12. In his general submission[13], the Director-General states Plan Change 1 needs to implement an allocation regime that ensures natural and physical resources are managed in a way to achieve the sustainable management requirements set out in the RMA. The Director-General further states that, while the allocation regime can be amended and reassessed as time goes on to ensure it achieves what is required, the regime needs to begin work today towards the 80-year targets.

---

[9] Refer [72]

[10] The Jones and Hamilton Report carried out hydro-dynamic and inundation modelling using a high-resolution digital evaluation model or DEM, clipped (or amended) to account for current stop banks and flood protection schemes,

[11] Ms McArthur's supplementary evidence [9] and [16]

[12] Refer Schedule 2 (3)(i) Vision and Strategy

[13] Refer pp 8-9 D-G submission

13. To implement an efficient allocation regime, the Director-General considers Plan Change 1 should take the steps set out in paragraph 15 of the submission. That is, state the maximum catchment load of contaminants, allocate the maximum load among land uses in the most efficient way,[14] ensure activities which cause the maximum catchment load to be exceeded are avoided and in catchments likely to be overloaded, put in place methods to phase out over allocation.

14. The proposed allocation regime in policy 7, as notified, maintained the status quo for most waterbodies in terms of the level of contaminants entering the water, with little direction or incentive to reduce contaminant discharge or to change land use practices. The Officers Report for Block 3 recommends the deletion of policy 7.

15. Generally, the Director-General seeks policy 7 be amended, not deleted, to provide for an allocation regime that only permits the discharge of contaminants up to a level that ensures the limits and objectives for the FMU can be achieved. Where this has been exceeded, the targets need to be set with clear implementation methods to ensure water quality improves over the timeframe set.[15]

16. More specifically, the Director-General sought to retain implementation method 3.11.4.8[16], as notified, which seeks to develop discharge allocation frameworks for individual properties and enterprises based on information collected under implementation method 3.11.4.7, and that considers the best available data, knowledge and technology. The intent of implementation method 3.11.4.8 is to inform changes to the Waikato Regional Plan to manage

[14] The D-G considers using a Land Use Capability based approach where land type, slope, soil type, drainage and geology are determinants
[15] Refer p 9 para 17 D-G submission
[16] Refer p 90 D-G submission

the discharge of the four identified contaminants and to meet the targets in the Objectives.

17. In addition, the Director-General's submission specifically seeks amendments to implementation method 3.11.4.8 that would see the immediate introduction of an allocation regime, that would consider land type and that can be amended as further information becomes available. The Director-General's submission considers there is sufficient information available at the present time to provide for a land-based allocation regime.

18. However, Ms McArthur's evidence[17] is that, in order to determine an appropriate allocation regime to achieve the 80-year N and P targets, which may not necessarily be a land use capability allocation regime, more information is required. In order to obtain this information, Plan Change 1 and implementation methods are necessary to:

    a. Identify the target concentrations of N and P in Table 3.11-1 for each sub-catchment to ensure the sub-catchment effects of nutrients are managed and to ensure the N and P targets for the Waikato River mainstem will be met;
    b. Calculate sub-catchment loads to meet the instream N and P target concentrations; and
    c. Allocate N and P loads (losses) to land users in each sub-catchment to achieve sub-catchment loads and thereby the instream sub-catchments and mainstem targets.

19. While, in terms of implementation methods, the Director-General's submission specifically refers to a land-based allocation regime, at a general level the Director-General seeks the implementation of an allocation regime that ensures natural and physical resources are managed to achieve the sustainable management requirements of the RMA, and an amended policy 7

[17] Refer EIC Block 3 [8] to [9]

to provide for an allocation regime to ensure limits and objectives for the FMUs can be achieved.

20. Ms McArthur states that information needs to be gathered now to determine what an appropriate allocation regime should look like in a future plan change. Current information is not advanced enough to implement an allocation regime now that will achieve 80-year N and P targets. Implementation methods in Plan Change 1, setting out the information gathering steps as proposed by Ms McArthur, are essential and need to start as soon as possible if there is to be any chance of achieving the 80-year N and P targets, or for Plan Change 1 to give effect to the Vision and Strategy.

21. It is important to note that a land-based allocation regime may well be the appropriate regime to implement, or it may be some other regime.

22. In my submission, including implementation methods in Plan Change 1, as recommended by Ms McArthur, will aid in giving effect to the Vision and Strategy as the intent of the methods is to obtain the latest available science and information, to develop targets and to implement a programme of action to achieve targets for improving the health and wellbeing of the Waikato and Waipā Rivers.[18]

23. For the other contaminants, (sediment and e coli), I understand experts who attended expert conferencing did not discuss these contaminants in relation allocation. Rather, discussions on these contaminants more or less focused on sub-catchment targets concluding that further conferencing time would be required to reach any consensus on these targets.

[18] Visions and Strategy – Strategy 2(c) & (d)

Implementation Methods

24. The Officers recommend that the non-regulatory implementation methods contained in Plan Change 1 be deleted in their entirety. The Officers question the relevance and usefulness of the implementation methods over the life of the Plan Change and consider that many of the methods reflect regional council's 'business as usual'.[19]

25. While regional councils have a discretion under s 67(2) of the RMA on whether to state methods, other than rules, in their regional plans for implementing regional policies, I note that, under s 63(1) of the RMA, the purpose of regional plans is to assist a regional council to carry out any of its functions in order to achieve the purpose of the RMA.

26. Relevantly, one of the regional council's functions, for the purpose of giving effect to the RMA in its region, is to control the use of land in order to maintain and enhance the quality of water in water bodies, such as the Waikato and Waipā Rivers, and to maintain and enhance ecosystems in water bodies.[20]

27. Ms McArthur's evidence is that implementation methods are required to obtain the information necessary to develop an appropriate allocation regime.

28. Dr Robertson considers implementation method 3.11.4.4[21], which provides technical direction to council on working towards short and long term targets for WW, should be included in Plan Change 1 so options to reduce the impact of altered hydrological regimes, where they exacerbate water quality impacts on wetlands, can be considered. Flood events in WW are one of the main processes that control the delivery of sediment and nutrients across the wetland, and in highly sensitive raised bog habitat. Implementation method

[19] Refer Ms Kissick's EIC Block 3 [39]
[20] Refer s 30(1)(c)(ii) RMA
[21] The D-G sought the re-inclusion of, and amendments to, implementation method 3.11.4.4

3.11.4.4 needs to address the altered flood dynamics, where practical, to protect and restore the values of WW.[22]

29. Dr Stewart's evidence is that implementation method 3.11.4.4 enables the implementation of individual tailored lake management plans. Lake management plans are a critical component of lake restoration beyond the bottom lines currently set for lake FMUs. Dr Stewart's view is that lake management plans should be retained to enable outstanding characteristics and specific issues to be addressed on a lake-by-lake basis, as is best practice.[23]

30. I submit, Ms McArthur's, Dr Robertson's and Dr Stewart's evidence illustrates the need for implementation methods to be included in Plan Change 1. Such inclusion will enable WRC to exercise its statutory function to impose land use controls in order to maintain and enhance water quality in the Waikato and Waipā Rivers, and to pursue the restoration and protection of the health and wellbeing of the Rivers as the Vision and Strategy requires.

Whangamarino Wetland - Policy 15 and Implementation Method 3.11.4.4

31. Policy 15 seeks to; protect and to progress towards the restoration of WW by reducing the diffuse discharge of the four identified contaminants in sub-catchments that flow into WW, reduce and minimise further loss of the bog ecosystem, provide increased availability of mahinga kai, and support the implementation of any catchment plan prepared in future by WRC that covers WW.

32. The Director-General seeks the re-inclusion of this policy as it had been withdrawn while Variation 1 was being progressed. The Director-General also requests the policy is revised to recognise all important values of wetlands and the complex nature of WW, and that the policy direct short- and long-term

[22] Refer Dr Robertson's EIC Block 3 [30] to [32]
[23] Refer Dr Stewart's EIC Block 3 [14]

restoration. The Director-General further seeks that the wording of the policy be amended to ensure the protection and restoration of WW to avoid the further loss of bog ecosystem.[24]

33. As currently worded, Dr Robertson states policy 15 is inadequate because it simply seeks to reduce or minimise further loss to the bog ecosystem, does not seek to avoid loss to the bog ecosystem and is silent on protecting the ecological condition of the bog, fen, marsh or swamp wetland habitats.[25]

34. Dr Robertson's evidence is that avoiding further loss to the bog habitat is critical to protect the wetlands significant ecological values as the extent of representative bog habitat has declined substantially from covering 53% of wetland in 1963 to 35% in 2014. This decline is due to impacts associated with changes in catchment land use and altered hydrology.[26]

35. Policy 15 does not contain any mechanism to measure progress in reducing discharges of sediment or nutrients and is not clear on whether the Northern Outlet Control Gate which discharges water from Lake Waikare to the Pungarehu Canal and WW is considered a point-source or diffuse discharge for the purpose of the policy. Dr Robertson considers policy 15 should refer to both diffuse and point source discharges and should be tied to achieving the numeric targets for WW proposed for Table 3.11-1 in the Joint Witness Statement.[27]

36. As mentioned, Dr Robertson considers implementation method 3.11.4.4 should be retained in Plan Change 1 so options to reduce the impact of altered hydrological regimes, where they exacerbate water quality impacts on wetlands, can be considered.

[24] Refer p 22 – 24 D-G submission and Ms Kissick's EIC for Block 3 [168] to [169]
[25] Refer Dr Robertson's EIC for Block 3 [16]
[26] *ibid* at [18]
[27] Refer Dr Robertson's EIC for Block 3 [20]

37. Dr Robertson also considers implementation method 3.11.4.4 should be amended to provide further technical direction on the actions required to achieve short- and long-term targets for WW, including methods:

a. to urgently progress the implementation of the Catchment Management Plan for WW,
b. to direct investment in catchment programmes to reduce sediment, phosphorus and nitrogen sources to achieve targets proposed in Table 3.11-1,
c. requiring review of all consents that relate to the Lower Waikato Waipā Flood Control Scheme by 2021 to identify optimal approaches to address water quality, and
d. requiring council to implement options to reduce the impact of altered hydrological regimes, when they exacerbate water quality impacts.[28]

38. As already submitted, implementation methods will enable WRC to exercise its statutory function, under s 30(1)(c)(ii) of the RMA, to impose land use controls in order to maintain and enhance water quality in the Waikato and Waipā Rivers and will ultimately aid in giving effect to the Vision and Strategy.

Setbacks for Lakes and National Environmental Standards for Plantation Forestry Regulations 2017 (NES-PF)

39. Under the NES-PF, one of the permitted activity standards for earthworks is that they must not occur within 10m of a lake larger than 0.25 ha.[29] However, the 10m setback does not apply if the earthworks are for construction and maintenance of a sediment or water control measure or for a slash trap or debris retention structure. Nor does the setback apply if the earthworks within

[28] *ibid* at [27]
[29] Regulation 29(1)(c) NES-PF. Also refer Dr Phillips EIC for Block 1 [47] where it confirms lake sizes in the Waikato Region range from 1-33ha

the setback will result in less than 100m^2 of soil disturbance in any 3-month period and are not within 5m of a water body.

40. For the purpose of the NES-PF, earthworks mean the disturbance of land by the movement, deposition, or the removal of earth (including soil, clay or rock) in relation to plantation forestry and includes cut and fill operations and the maintenance and upgrade of existing earthworks.

41. For harvesting[30] to be a permitted activity under the NES-PF, harvesting machinery must not be operated within 10m of a lake larger than 0.25ha.[31] However, as with earthwork setbacks, there are exceptions to this. Harvesting machinery may be operated within the 10m setbacks if disturbance to the water body is minimised and the machinery is being operated at water body crossing points, or where slash removal is necessary, or where it is essential for directional felling from within the 10m setback. Where harvesting occurs within the 10m setback, all disturbed soil must be deposited to avoid it entering water and to avoid degradation of any aquatic habitat or riparian zone.[32] The NES-PF, however, does not impose further standards to ensure adequate avoidance measures are implemented.

42. For mechanical land preparation to be a permitted activity under the NES-PF, a 10m setback from lakes larger than 0.25ha is also required. Mechanical land preparation means using machinery to prepare land for replanting trees, including root-raking, discing, ripping, roller crushing, clearing slash and mounding the soil into raised areas.

43. While the NES-PF only allows for a rule in a plan to be more stringent than the regulations if the rule gives effect to an objective in the NPS FM or the NZCPS, matters of national importance, or unique and sensitive environments,[33] s

[30] Includes feeling trees, processing trees into logs or loading on to trucks for processing.
[31] Regulation 68(4)(b)(ii) NES-PF
[32] *ibid* at (5) & (6)
[33] Regulation 6 NES-PF

12(4) of the River Act[34] requires that a rule included in a regional plan for the purpose of giving effect to the Vision and Strategy prevails over a national environmental standard, such as the NES-PF, if it is more stringent than the standard.

44. As noted in Counsel's previous legal submissions for Blocks 1 and 2, the Vision and Strategy is intended by Parliament to be the primary direction-setting document for the Waikato River and activities within its catchment affecting the Waikato and Waipā Rivers. In my submission, the Vision and Strategy, and the River Act, must prevail over the NES-PF.

45. The Officer's analysis, at paragraph 604 of the Block 3 s 42A Report, concludes that where conflicts arise between the Vision and Strategy and the NES-PF, the Vision and Strategy prevails. Given the requirement in s 12(4) of the River Act, I submit this conclusion is incorrectly focussed. It is not a matter of whether the Vision and Strategy conflicts with the NES-PF, but rather whether a rule in Plan Change 1, in this case a rule imposing adequate setbacks for plantation forestry activities, needs to be more stringent than the NES-PF in order to give effect to the Vision and Strategy.

46. Dr Stewart's evidence[35] is that the NES-PF does not provide adequate protection for lakes, particularly during harvest periods because the NES-PF is aimed at aquatic ecosystems impacts of fine sediment, such as smothering benthic habitat, and does not consider the lake-specific issue of bottom water deoxygenation (removal of oxygen) which is not dealt with in the NES-PF.

47. Dr Stewart states that bottom water deoxygenation is an impact specific to lakes and reservoirs where the water below the thermocline, that is water that is not in contact with the atmosphere, becomes depleted of oxygen due to excessive organic carbon loading. Significant adverse effects of bottom water

[34] Waikato-Tainui Raupatu Claims (Waikato River) Act 2010. Also relevant are Ngāti Tuwharetoa, Raukawa, and Te Arawa Iwi Waikato River Act 2010, and Nga Wai o Maniapoto (Waipā River) Act 2012. noting these latter two Acts contain identical/similar provisions to those contained in the River Act.
[35] Refer EIC Block 3 [19]

deoxygenation occur at lower rates of sediment input than the adverse effects of habitat smothering, for which the standards in the NES-PF were designed.[36]

48. Plantation forestry activities, such as earthworks, harvesting and mechanical land preparation, can result in elevated sediment loss to aquatic ecosystems. Catchment sediment loads can increase oxygen consumption, ultimately leading to eutrophication. Dr Stewart's evidence[37] is that lakes are vulnerable to eutrophication by sedimentation induced anoxia when the lakebed has large stores of legacy nutrients, as is the case in many Waikato lakes. Controlling oxygen consumption is a critical aspect to restoring lakes, particularly those with significant legacy nutrient loads.

49. Forestry land is acutely susceptible to sediment loss during forestry harvest. As explained above, the NES-PF, at most, only provides for 10m setbacks from lakes, and even then, there are some exceptions to when earthworks and harvesting can occur within the setback area with no actual avoidance measures to prevent sediment loss into lakes.

50. Ms McArthur considers a 10m setback is likely to be adequate for removing 80-90% of fine sediment under typical pastoral conditions, but substantially more fine sediment interception would be required to mitigate higher sediment yield.[38]

51. Dr Stewart recommends 20m setbacks for forestry activities from lakes be applied to forestry activities in the upper-and mid-river FMUs as the receiving environments are reservoir lakes which are known to be particularly vulnerable to bottom water anoxia.

52. While the Director-General did not make a submission specifically requesting setbacks from forestry activities, Fish and Game did. As such, the Director-General relies on Fish and Game's submission, as discussed in Ms Kissick's

[36] Refer Dr Stewart's EIC Block 3 [19]
[37] *ibid* [22]
[38] Refer Ms McArthur's Block 2 EIC [36]

evidence[39], for the necessary scope to include 20m setbacks from plantation forestry activities.

53. In my submission, a rule more stringent than the NES-PF, requiring 20m setbacks from forestry activities is necessary to give effect to the Vision and Strategy in order to recognise that the Waikato and Waipā Rivers, which includes lakes, are degraded and should not be required to absorb further degradation as a result of human activities.[40]

Definition of the Waikato and Waipā Rivers

54. At the presentation of the Director-General's submission for Block 2 Commissioner Ryder asked whether, for the purpose of Plan Change 1, lakes and wetlands were included in the definition of the Waikato River and Waipā River.

55. The definition of the Waikato River is set out in s 6 – the interpretation section, of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. Waikato River is defined to include lakes and wetlands within the Area marked "A" on SO plan 409144.

56. Waikato River is also defined in the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010, at s 7, and includes the lakes and wetlands within the area marked "B" on SO Plan 409144 but does not include any of the Te Arawa Lakes. Under this Act, Waikato River also includes the Waipā River from its source to its junction with the Puniu River to the extent to which the Waipā River is within the area marked "C" on SO Plan 409144, and includes lakes and wetlands to the extent they are within the same marked area.

[39] Refer [122]-[126]
[40] Refer Vision and Strategy, Schedule 2 (1)(h)

57. Attached as Appendix 1 to these submissions is a copy of SO Plan 409144 showing the areas marked as "A", "B" and "C".

58. Plan Change 1 must give effect to the Vision and Strategy. The Vision and Strategy are schedules contained within the River Act. The River Act defines the Waikato River and the Waipā River to include lakes and wetlands. Accordingly, for the purpose of Plan Change 1, I submit the definition of the Waikato and Waipā Rivers include lakes and wetlands.

Legal Considerations under Section 32AA RMA – Further Evaluation Reports

59. Section 32AA(1) RMA requires a further evaluation for any changes that have been made to, or proposed for, the proposal[41], or in this case Plan Change 1, since the evaluation report required under s 32 for Plan Change 1 was completed.

60. Pursuant to s 32AA(1)(b), the further evaluation must be undertaken in accordance with s 32(1) to (4) and must, despite s 32AA(1)(b) and s 32(1)(c), be undertaken at a level of detail that corresponds to the scale and significance of the changes.

61. Relevantly, a further evaluation report must:

a. Examine the extent to which the objectives[42] of Plan change 1 are the most appropriate way to achieve the purpose of the RMA,
b. Examine whether the provisions[43] in Plan Change 1 are the most appropriate way to achieve the objectives by –
    i. Identifying other reasonably practicable options for achieving the objectives, and

[41] Proposal means 'change' for which an evaluation report must be prepared
[42] Objectives means the purpose of the proposal
[43] Provisions mean the policies, rules, or other methods that implement, or give effect to, the objectives of the proposed change

ii. Assessing the efficiency and effectiveness of the provisions in achieving the objectives, and

iii. Summarising the reasons for deciding the provisions[44]

62. This efficiency and effectiveness assessment must identify and assess the benefits and costs of the environmental, economic, social and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for economic growth and employment anticipated to be provided or reduced. And, if practicable, quantify the anticipated benefits and costs of these anticipated effects. An assessment of the risk of acting or not acting if there is uncertain or insufficient information about the provisions is also required.[45]

63. While s 32AA requires an assessment of the social, environmental, economic and cultural effects that are anticipated from the implementation of Plan Change 1, the quantification of the benefits and costs of these anticipated effects is not required but, if practicable, is desirable.

64. The High Court in *Meridian Energy Limited v Central Otago District Council*[46] confirmed s 32 is the only section expressly requiring a cost benefit evaluation (of proposed policies or other methods before a decision is made on a plan or plan change). The Court specifically considered s 32(3) and (4) and noted that:

> *'[106] …Section 32(4)(a) does not carry any mandatory requirement for all the benefits and costs to be quantified in economic terms, and no such requirement can be reasonably inferred*
>
> *[107] The issue whether s 32 requires a strict economic theory of efficiency or a more holistic approach was raised before Woodhouse J in Contact Energy Limited v Waikato Regional Council. He declined to interfere with the Environment Court's conclusion that while economic evidence can be useful, a s 32 analysis requires a wider exercise of*

[44] Refer s 32(1)(a) and (b)
[45] Refer s 32(2)
[46] HC DUN CIV 2009 412 000980 [16 August 2010] or [2o10] 1 NZLR 482

judgment. This reflects that it is simply not possible to express some benefits or costs in dollar or economic terms. For example, the loss of an ecosystem such as a wetland hosting a large bird population which is going to be overwhelmed by land reclamation may not be capable of expression in dollar terms.

[108] Likewise it would be difficult, if not impossible, to express some of the criteria within Part 2 of the Act (ss5-8) in terms of quantitative values. We take by way of example the following paragraphs in s 7:

(c) The maintenance and enhancement of amenity values;

(d) Intrinsic values of ecosystems;

(e) Maintenance and enhancement of quality of the environment

If any of these matters are relevant, the consent authority "shall have particular regard to" them even if they are only capable of expression in qualitative, as opposed to quantitative, terms. As Dr Layton said, in this situation it is necessary for the consent authority to weigh market and non-market impacts as part of its broad judgment under Part 2 of the RMA. We have not been referred to any provision stating that this process should be exercised or expressed in dollar terms or by some other economic formula.'

65. While submitters, such as Federated Farmers, have provided evidence on the economic costs of implementing water body setbacks of 5m, 10m, 15m and 20m, with total costs[47] ranging between $527,799,886 to $1,687,074,636, there can really be no comparison or assessment against the environmental benefits of including, and costs of not implementing, the water body setbacks as proposed by the Director-General.

66. The *Meridian* decision makes it clear that impacts on the environment are often not capable of expression in dollar terms nor does the RMA make it a mandatory requirement for all benefits and costs to be quantified in economic terms.

67. Instead, the High Court in *Meridian* directs that, where matters such as those in s 6 or 7 of the RMA including, I would submit, the protection of īnanga

[47] This cost includes fencing, land value, riparian and maintenance.

spawning areas or the protection of lakes and wetlands, are relevant then they must be recognised and provided for or had particular regard to, even if they are only capable of expression in qualitative, as opposed to quantitative, terms.

68. Qualitative means *'measuring or measured by the quality of something rather than it's quantity'*.[48] And quality means, *'the standard of something as measured against other things of a similar kind; the degree of excellence of something'*.[49]

69. I submit the water body setbacks, as proposed by the Director-General, and described in the evidence of Ms McArthur, Dr Robertson and Dr Stewart, must be recognised and provided for, or had particular regard to, in qualitative terms, not quantitative terms.

70. In my submission, s 32AA requires particular regard to be given to what the quality of the rivers, lakes and wetlands, in terms of ecosystem health, would be if the water body setbacks, as proposed by the Director-General, were implemented. Equally, particular regard should also be given to what the state of the rivers, lakes and wetlands would be if these water body setbacks are not implemented.

71. The approach in *Meridian* to consider the costs and benefits on the environment in qualitative terms is, in my submission, consistent with giving effect to the Vision and Strategy.

Joint Witness Statement (JWS)

72. The Introduction Section of the JWS refers to the Code of Conduct where experts who attended conferencing confirmed they had read the Environment Court Practice Note 2014 Code of Conduct Appendix 3 – Protocols for Expert

[48] Google Search
[49] Google Search

Witness Conferencing (**Code of Conduct**) and agreed to abide by these protocols.

73. Paragraph 1(a) of the Code of Conduct states expert conferencing is a process in which expert witnesses confer and attempt to reach agreement on issues, or at least to clearly identify the issues on which they cannot agree, and reasons for that disagreement. Conferencing discussions are intended to narrow points of difference and to save hearing time.

74. On review of Table 1 – Summary of importance of each attribute – all experts agreed the proposed attributes identified in the table are important as a measure of value except for the riparian attribute. However, in terms of whether experts considered the identified attributes should be reflected as a narrative, or in a numeric table, there was a mixed result with some supporting both.

75. Table 2 – Summary of agreement and disagreement for each attribute – outlines whether each expert agrees to the option proposed in the JWS attachments for each identified attribute. Experts had the option to agree, agree in part, disagree or state N/A for each attribute. Ms Kissick's evidence[50] notes that, for those experts who agreed in part, it is not clear which aspects they agree to, or whether they agree with more than they disagree with in terms of the attribute statement. Ms Kissick's[51] view is that it is not clear from the JWS what the consensus view of the necessary attributes to be included in Plan Change 1 are.

76. When considering the intent of expert conferencing, as set out in the Code of Conduct, that is to '*attempt to reach agreement on issues, or at least to clearly identify the issues on which they cannot agree, and reasons for that disagreement'*, I submit the JWS has fallen short of achieving this intent. This

[50] Refer EIC Block 3 [203]
[51] *ibid* [204]

is evident in Tables 1 and 2 as discussed above, and as discussed in Ms Kissick's evidence.

77. Factors that can contribute to successful expert conferencing outcomes include allowing adequate time to reach an agreement.[52] While Counsel did not attend the JWS hearing on 18 July 2019, Counsel understands there was a general consensus among those experts who did attend that more time to conference was/is required in order to reach clear agreements, an therefore narrow down points of disagreement.

78. Ms Kissick's evidence concludes that further planning evidence at this stage on a JWS that appears incomplete and lacks certainty would be unhelpful to the Hearing Panel in terms of what implications the JWS would have for the framework and provisions of Plan Change 1.[53]

79. Instead, Ms Kissick states that the experts for the Director-General have provided comprehensive evidence throughout the hearings for Plan Change 1 on the need for additional attributes for rivers/streams/tributaries, lakes and wetlands and have gone to significant effort to provide comprehensive short, medium and long term water quality limits/targets for each attribute.[54]

80. Finally, a concern the Director-General wishes to raise with the JWS relates to Attachment 1 - Principles for Attribute Inclusion. Attachment 1 states:

> *'The scope of the Healthy Rivers: Wai Ora Plan Change is restricted to improving the management of nitrogen (N), phosphorus (P), sediment and faecal bacteria. This scope is considerably narrower than that covered by the NOF. Therefore, with some minor changes the principles above were made more relevant to the Healthy Rivers: Wai Ora process:'*

81. Attachment 1 then goes on to list the principles for attribute inclusion but with amendments to align with the narrow scope of Plan Change 1 as notified.

[52] Refer para 5(a)(iii)
[53] Refer EIC [206]
[54] Refer EIC [204]

82. Page 3 of the JWS sets out the Panel's directions for expert conferencing requiring the development of a brief for conferencing with the expectation that the brief would, among other requirements, give effect to the NPS-FM and the Vision and Strategy. The Panel also expected the brief to proceed on the basis that plan, and submission scope issues did not constrain the recommendations the experts made.

83. Given the basis on which the Principles for Attribute Inclusion were developed, that is that they were amended to align with the narrow scope of Plan Change 1, it appears the conferencing did not proceed in accordance with the Panel's directions and expectations. What is more concerning it that it also appears some of the experts JWS recommendations and conferencing discussions are likely to have also been constrained by the narrow scope of Plan Change 1 as notified.

Conclusion

84. It is essential to map īnanga spawning habitat to ensure the survival of the species particularly given its status as at risk and declining in population nationally and the constraints on remaining spawning habitat in the Waikato River as a result of flood protection schemes.

85. Implementation methods are necessary now to ensure sufficient information is available in a future plan change to determine an appropriate allocation regime to achieve 80-year N and P targets, to ensure wetlands, including WW, are restored and protected, and to ensure the restoration and protection of lakes.

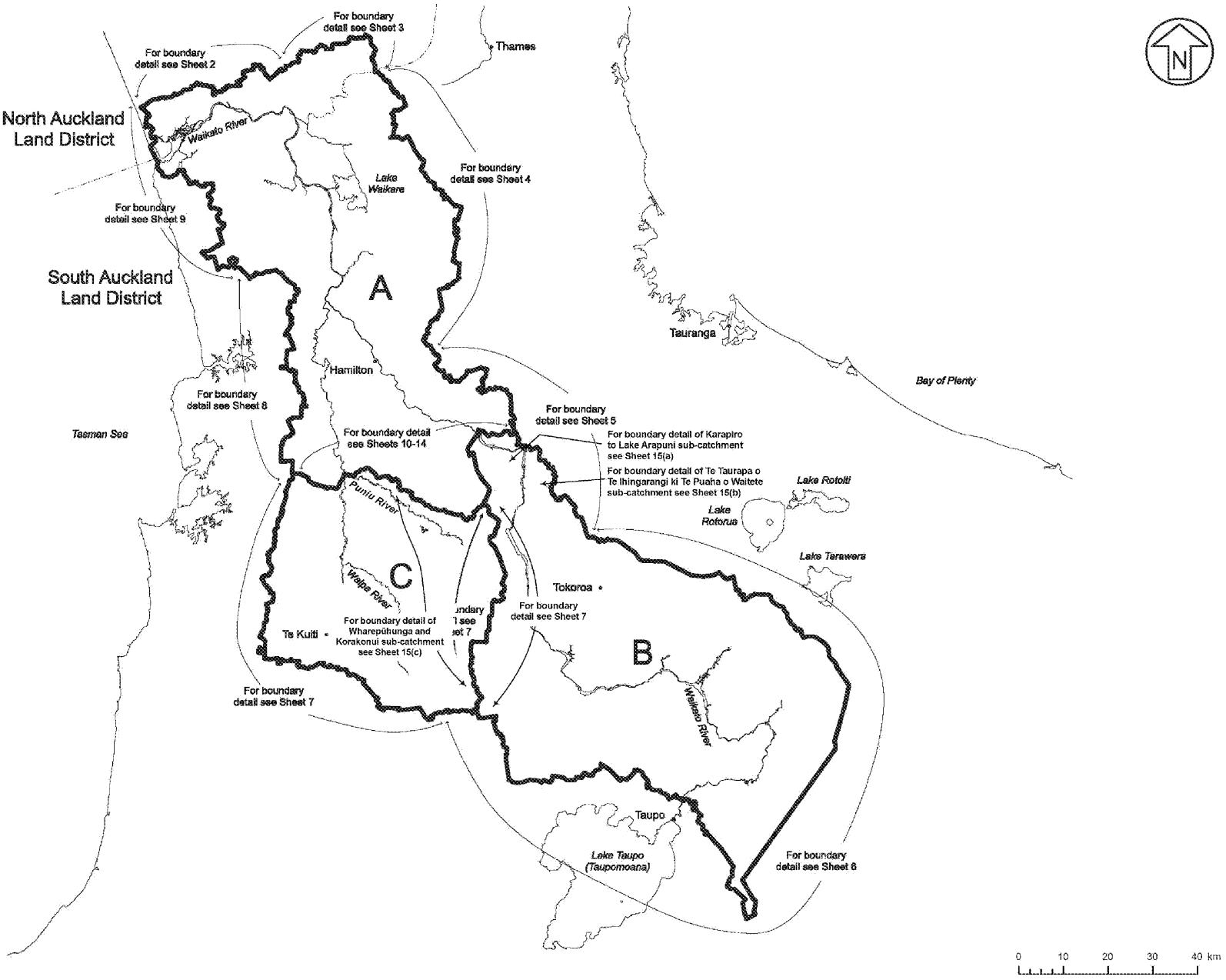
86. Any assessment under s 32AA should have particular regard to both quantitative and qualitative costs and benefits to the environment.

87. The JWS should comply with the Panel's direction and conferencing discussions and recommendations should not be constrained by the narrow scope of Plan Change 1 as notified.

Legal counsel for the Director-General of Conservation

7 August 2019.

ATTACHMENT A



Notes:
Where the boundary is shown along a river or road it follows the middle line of legal road or physical river unless shown otherwise.

Land Districts: South Auckland and North Auckland
Regional Authority: Waikato Regional Council

WAIPA RIVER AND WAIKATO RIVER CO-GOVERNANCE AREAS

Prepared by Sinclair Knight Merz Limited
Date: August 2008

Sheet 1 of 15

File AE03929.02
Received
Instructions

SO 409144

ATTACHMENT B

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV 2009 412 000980

IN THE MATTER OF the Resource Management Act 1991
AND IN THE MATTER OF an appeal under section 299 of the Act

BETWEEN	MERIDIAN ENERGY LIMITED Appellant
AND	CENTRAL OTAGO DISTRICT COUNCIL First Respondent
AND	OTAGO REGIONAL COUNCIL Second Respondent
AND	MANIOTOTO ENVIRONMENTAL SOCIETY INCORPORATED Third Respondent
AND	UPLAND LANDSCAPE PROTECTION SOCIETY INC (IN LIQUIDATION) Fourth Respondent
AND	J, S AND A DOUGLAS Fifth Respondents
AND	E AND C LAURENSON AND THE ERIC AND CATE LAURENSON FAMILY TRUST Sixth Respondents
AND	I & S MANSON AND RIVERVIEW SETTLEMENT TRUST Seventh Respondents
AND	GAELLE SOGUEL DIT-PIQUARD Eighth Respondent
AND	E R CARR Ninth Respondent
AND	R P SULLIVAN Tenth Respondent

Hearing: 21, 22, 23, and 24 June 2010

Court: Chisholm J
Fogarty J

Appearances: H B Rennie QC, AJL Beatson and H J Tapper for Appellant
A J Logan for Central Otago District Council and Otago Regional Council
JBM Smith, M C Holm and M J Slyfield for Maniototo Environmental Society Inc, Upland Landscape Protection Society Inc, J S and A Douglas, G S Dit-Piquard and E R Carr
M J Fisher and K S Muston for R P Sullivan

Judgment: 16 August 2010

JUDGMENT OF THE COURT

A. Meridian appeal allowed.

B. Remitted back to the Environment Court for reconsideration in accordance with the directions in [144] – [149].

C. Mr Sullivan's cross-appeal dismissed.

D. Costs to be resolved in terms of [167].

REASONS

Table of Contents

Introduction

[1] Meridian Energy Limited, a state owned enterprise and major energy company, applied to the Central Otago District Council (CODC) and Otago Regional Council (ORC) for resource consents to establish and operate a substantial wind farm for the generation of electricity in Central Otago. Consents were granted. The third to tenth respondents appealed to the Environment Court. Although Meridian cross-appealed about some conditions, its cross-appeal is irrelevant in the present context.

[2] By a majority (Judge Jackson and Commissioners McConachy and Fletcher) the Environment Court decided that the project was inappropriate, being in an outstanding natural landscape under consideration, and that it did not achieve sustainable management in terms of s 5 of the Resource Management Act 1991 (RMA). This was principally because the nationally important positive factor of providing a very large quantity of renewable energy was outweighed by adverse considerations including the substantial impact on the outstanding natural

landscape.[1] The appeals were allowed and the resource consents were cancelled. Commissioner Sutherland, who dissented, would have upheld the consents.

[3] Meridian appeals to this Court on points of law pursuant to s 299 of the RMA. It alleges that the Environment Court erred in law by:

(i) Applying a "new test" for consent applicants where s 6 of the RMA is involved which requires an applicant to demonstrate to the satisfaction of the Court that the project is "the best" in net benefit terms.

(ii) Requiring a comprehensive and explicit cost benefit analysis of the proposal.

(iii) Requiring consideration of alternatives to the Meridian site.

(iv) Denying Meridian a fair hearing by virtue of the process it adopted when reaching its decision.

(v) Arrving at conclusions when there was no evidence to support those conclusions and/or disregarding evidence that conflicted with those conclusions.

(vi) Failing to take into account the Court's ability to impose conditions to avoid, remedy or mitigate certain effects.

An order setting aside the Environment Court decision and granting the consents is sought. Alternatively Meridian seeks to have the matter referred back to the Environment Court for reconsideration, preferably by a different division of that Court.

[4] CODC and ORC support Meridian's appeal. It is opposed by the third to ninth respondents. Mr Sullivan, the tenth respondent, has cross-appealed in relation

[1] *Maniototo Environmental Society Incorporated & Ors v Meridian Energy Limited & Ors* C103/2009, 6 November 2009 at [757].

to the Environment Court's approach to climate change. His argument before us was limited to that issue.

Background

[5] The Meridian site (which is also referred to as the Hayes site and Hayes Project) is approximately 70 kms to the north west of Dunedin, 40 kms to the south of Ranfurly and 15 kms west of Middlemarch. It comprises the uplands section of five high country stations (of which one is now owned by Meridian). The site is generally more than 900 m above sea level. In total the site envelope of the proposed wind farm is about 135 km^2. This land is zoned rural under the operative District Plan and is used for low level sheep and cattle grazing.

[6] Meridian's proposed wind farm would have up to 176 wind turbines which, depending on the type of turbine finally selected, would be capable of generating up to 630 megawatts of electricity. This would be sufficient to supply power for 280,000 average homes. Each turbine would have a maximum height of 160 metres to the tip of the rotor. Five sub stations would be required to connect the wind turbines to the transmission grid. Electricity produced by the wind farm would be fed into the existing transmission line that runs across the southern end of the site. The estimated cost of the project is $2 billion.

[7] On 12 July 2006 Meridian applied to CODC for land use consents to construct and operate a wind farm of up to 176 turbines and related infrastructure on the Meridian site. This was the company's fourth application for development of a wind farm in New Zealand. It had already commissioned a wind farm in Manawatu, obtained consent for another project in Southland, and had made application for a further project near Wellington.

[8] At the time the application was made the CODC Proposed District Plan had passed the stage where it could be subject to submissions or references. Thus it was regarded as the primary district planning instrument. The Proposed Plan became operative on 1 April 2008 (shortly before the Environment Court hearing began). Under that Plan the proposed activity is an unrestricted discretionary activity.

[9] Outstanding landscapes are identified in the Plan that became operative on 1 April 2008. It is common ground that the Meridian site does not come within the landscapes identified in the Plan.

[10] During the hearing before the Environment Court Plan Change 5 was notified by CODC. This proposed Plan Change did not alter the status (discretionary) of the wind farm. However, it adds to the description of features and landscapes in the District Plan by identifying a number of landscapes which are areas of "extreme or high sensitivity". These constitute outstanding natural landscapes in terms of s 6(b) of the RMA. The Meridian site does not come within these areas.

[11] Plan Change 5 also identified landscapes of "significant sensitivity". Under the proposed Plan Change these landscapes are protected from the adverse effects of inappropriate subdivision, use and development. The Lammermoor range, which includes the Meridian site, is a landscape of significant sensitivity in terms of this Plan Change.

[12] On 1 November 2006 Meridian sought consents from ORC pursuant to the Regional Council's Water Plan which had become operative on 1 January 2004. In broad terms these consents related to construction activities that were capable of affecting water bodies. Land use consents, discharge permits, and water permits to take and divert water were sought. These proposed activities fell to be considered (depending on the particular activity) as controlled activities, restricted discretionary activities or unrestricted discretionary activities.

[13] We pause to note that after these applications had been lodged, and before they were considered, TrustPower (a competitor of Meridian) lodged an application with the Clutha District Council and ORC for consent to establish a wind farm (the Mahinerangi wind farm) at the southern end of the Lammermoor Range. At its closest point the Mahinerangi site is 15 kms from the Meridian site. It was proposed that the Mahinerangi wind farm would have up to 100 turbines. A District Council decision granting consent for that wind farm was released about a month before the District Council decision granting consent for the Meridian wind farm.

Subsequently the Mahinerangi consents were confirmed by the Environment Court (not the same division that heard the Meridian appeal).

[14] Returning to the Meridian applications, the two consent authorities appointed five Commissioners to hear and determine the applications. The applications were supported by an "all of Government" submission by the Minister for the Environment and opposed by the third to tenth respondents. On 30 October 2007 the Commissioners released their decision granting the consents, subject to conditions. The chairman, Mr J G Matthews, dissented. He would have refused consent primarily because of the effect of the activity on the landscape.

[15] The third to tenth respondents then appealed to the Environment Court. In addition several parties, including the Minister for the Environment, gave notice pursuant to s 274 of the RMA that they intended to appear.

[16] Parties to the appeal were required to specify the issues they wished to pursue on appeal and those issues were recorded in a Minute issued by Judge Jackson on 31 January 2008. A further Minute issued on 10 April 2008 required each party to lodge a memorandum finalising its list of experts and the issues on which they were to give evidence. On 8 August 2008 (part way through the hearing) leave was granted for further evidence to be called, following which there was an exchange between Counsel for Meridian and Judge Jackson as what evidence the Court was seeking in relation to efficiency in terms of s 7(b). We mention these matters because they are relevant to Meridian's fourth ground of appeal alleging that it was denied a fair hearing.

[17] The hearing before the Environment Court commenced on 19 May 2008. It occupied three blocks of time totalling more than seven weeks and concluded on 17 February 2009. Site inspections were also undertaken. Numerous witnesses, many of them expert, were called.

Environment Court decision

[18] The Environment Court's decision was delivered on 6 November 2009. Except for [34] below, we confine this summary to the judgment of the majority which occupies 348 pages divided into eight chapters.

[19] After providing an introductory background and description of the facts in the first two chapters, the Court addresses "The Law" in Chapter 3. Obviously this chapter is particularly relevant. Having addressed s 104(1) of the RMA, provisions of the District Plan, and various other matters, the Court focused on Part 2 of the Act, especially s 6(b) - the protection of outstanding features and landscapes - and s 7(b) - the efficient use and development of natural and physical resources.

[20] The Court was critical of earlier Environment Court decisions which had reasoned that because wind energy is presently an untapped resource, use of that resource to produce electricity by a non polluting process is an efficient use of the resource in terms of s 7(b). Having indicated[2] that it was uncomfortable with "a cherry-picking approach to efficiency", the Court said that it preferred to follow *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council*[3] in which it was stated:

> [196] ... efficiency in section 7(b) of the RMA requires a consent authority to consider the use of all the relevant resources and, preferably, their benefits and costs. It is nearly meaningless to consider the benefits of only some of the resources involved in the proceeding because the artificial weighting created by sections 5 to 8 of the Act will not be kept within the statutory proportions if the only matters given the 'particular regard to' multiplier (see *Baker Boys Limited v Christchurch City Council*) in section 7(b) are those which are not identified elsewhere in section 7. Further, it is very helpful if the benefits and costs can be quantified because otherwise the section 7(b) analysis merely repeats the qualitative analysis carried out elsewhere in respect of sections 5 to 8 of the Act.

Then the Court focussed on two matters: first, how efficiency in terms of s 7(b) is to be determined; secondly, whether alternative locations are relevant.

---

[2] At [226]

[3] Decision C380/2009. This decision was issued by the Environment Court on 24 September 2008 after the Meridian hearing had concluded. Judge Jackson also presided in the *Lower Waitaki* case.

[21] As to the first matter the Court said that for economic reasons the "specific costs and benefits of a proposal should be examined and if possible quantified", especially where a matter of national importance is raised under s 6.[4] It concluded:

> [230] While in an engineering sense efficiency means the ratio of outputs to inputs, in economic terms it is not an absolute but a relative concept. We hold that under section 7(b) of the Act there are two questions to answer when determining the efficiency of the use of resources:
>
> (1) is the value achieved from the resources utilised the greatest benefit that could be achieved from those resources?
>
> (2) could that same benefit be produced utilising resources of lower value if they were organised differently, or if a different set of resources was used?
>
> The first point is about maximising the benefits achieved from the resources being utilised; and the second is about minimising the resource costs of achieving a given benefit. ...

This analysis, coupled with [242], which is mentioned in the next paragraph, has given rise to the first ground of appeal alleging that the Court adopted a "new test" requiring an applicant to demonstrate that its project is "the best" in net benefit terms.

[22] Then the Court considered the second point - whether alternative locations are relevant. After discussing relevant case law the Environment Court summarised its conclusions:

> [242] ... section 7(b) requires a comprehensive and explicit cost-benefit analysis of the proposal. In that analysis:
>
> (a) where market valuations are not available, non-market techniques maybe used; and
>
> (b) where the values of the market are different from those of society, alternative societal values may be applied.
>
> The idea behind the cost-benefit analysis is to assess, firstly, whether the proposal has a positive net benefit, and then whether there are credible alternative uses of the resources, or credible alternative resources that could produce the desired output, which have a greater net benefit. In doing so, we need to have regard for whether (environmental) compensation is being given, and the adequacy of that

[4] At [229]

> compensation. The outcome of this assessment of efficiency is then one matter in the overall assessment under section 5. We hold that alternatives can be considered where section 6 matters are concerned. It is possible, but we do not decide, that alternatives should also be considered in other cases where there are significant environmental effects.

The statement that s 7(b) requires a comprehensive and explicit cost benefit analysis gives rise to the second ground of appeal. And the conclusion reached later in the judgment that in this case alternatives should have been considered by Meridian has triggered the third ground of appeal.

[23] Chapter 4 is devoted to a detailed analysis of landscape issues. As already mentioned, the District Plan specifically identified outstanding landscapes within its district and it is common ground that the Meridian site does not fall within the areas so identified. Nevertheless the Environment Court decided that it was not bound by the categorisations in the District Plan and concluded that the site was part of an outstanding natural landscape for the purposes of s 6(b) of the RMA. In that respect the Court's decision is consistent with the decision of this Court in *Unison Networks Limited v Hastings District Council*[5]. Meridian accepts this finding, and does not seek to challenge it in this appeal.

[24] The next chapter addresses potential effects (both positive and negative) of the proposed wind farm. Positive effects in terms of meeting the demand for more electricity, placing downward pressure on electricity prices, reducing carbon emissions, complementing hydro-power, and providing employment (during the construction phase) were accepted. On the negative side the Court saw the effect of the proposed wind farm on the landscape as "[p]ossibly the most important single question in these proceedings".[6] It considered that the wind farm "is so large that it will have the effect of creating a new, not unattractive, wind farm landscape of much less naturalness than the larger landscape ..."[7] and that the wind farm could not be absorbed into the landscape.[8] The Court also considered that the visual effects on the amenities of the users of the landscape would be major and that the proposed

[5] HC WN CIV 2007-485-896 11 December 2007, Potter J
[6] At [424]
[7] At [492]
[8] At [493] – [500]

wind farm would have a significant negative impact on the heritage surrounding or associated with the area.[9]

[25] In chapter 6 the Environment Court attempts to quantify the potential costs and benefits of the Meridian proposal. The Court summarised the "measured net benefit" of the wind farm:[10]

> - A regional benefit from construction activity with a medium likelihood of being about $800m (one-off), and a very likely regional benefit of about $13m/year from on-going operation, although these have no net benefit at a national level.
>
> - A one-off cost to the economy of upgrading the electricity grid in the lower South Island very likely to be about $100m.
>
> - A benefit to the economy very likely to be about $107m/year from the generation of electricity, and from reduced CO_2 emissions with a medium likelihood of being about $20m/year, for the 30 year life of the wind farm.
>
> - A cost to the economy with a medium likelihood of about $16m/year to accommodate the variability of wind energy.

Against those measured benefits, the Court said it had to put "the very real, but unmeasured, costs in terms of landscape, heritage and recreation and tourism that will not be remedied or mitigated".[11] Although the Court accepted that there was a net benefit, it considered that the unmeasured costs were significant and that the net benefit was not nearly as substantial as the numbers might indicate.

[26] The next chapter (Chapter 7) is also important to most, if not all, the grounds of appeal. It addressed the issue: "Should the power generation facility be approved under the operative district plan?"

[27] After a detailed discussion of the objectives and policies of the District Plan, the Regional Policy Statement, the decision of the hearing Commissioners, and "other matters" under s 104(1)(c) of the Act, the judgment provides a summary to that point:

---

[9] At [507] and [532]
[10] At [649]
[11] At [650]

> [693] If the matters in the previous sections of this chapter were all we had to consider we would agree with the planner called by the District Council ... that we should grant consent to Meridian ...

But the Court then found it necessary to further assess the proposal under ss 5-8 of the Act (the purpose and principles in Part 2). It did so under three heads: whether the proposal would be an efficient use of resources in terms of s 7(b); "other matters" that the Court was required to have particular regard to under s 7; and, finally, a weighing of all relevant matters.

[28] As to whether the proposal would be an efficient use of resources in terms of s 7(b), the Court found[12] that the evidence on the benefits and costs to recreation "was inadequate" and for tourism was "minimal"; there was an absence of evidence "quantifying the value of the landscape ... or of the costs of the project to the heritage values of the Old Dunstan Road"; there were "large gaps" in the Court's cost benefit analysis; it was extraordinary that in a $2 billion project more effort had not been made by Meridian and the two government departments "to value more of the costs and benefits much more thoroughly"; and given the scale of the project the Court would have expected proportionate evidence "on what were clearly always going to be key issues – the potential adverse effects on heritage and, especially, landscape values".

[29] Then the Court discussed[13] whether it should consider alternatives when assessing efficiency in terms of s 7(b). It concluded that alternatives needed to be considered in this case because costs in terms of landscape and heritage values had not been "internalised" to Meridian, there was no "competitive market" and "an outstanding natural landscape and historic heritage" constituted "matters of national importance" which the Court was obliged to "recognise and provide for".

[30] Having reached that conclusion the Court then considered whether alternatives existed. It decided that realistic alternatives to Meridian's wind farm "do exist and should have been considered" and that failure to do so would be taken into account later in the judgment.[14] The Court noted that New Zealand is a "wind

---

[12] At [697] and [701]
[13] At [702] - [704]
[14] At [706]

rich country" with "many 'untapped' wind resources of specific places" as shown on a plan attached to the judgment.[15] Given that the proposal affected matters of national importance under s 6(b) and the concept of stewardship under s 7(aa), the Court considered that the Meridian proposal should be "put on hold until other wind resources with lesser potential effects on landscape and heritage have been considered" and that the "failure to consider alternatives properly is a factor going towards turning the proposal down".[16] The Court commented that on the evidence before it the question "is the proposal an efficient use of resources?" could not be answered.[17]

[31] Several s 7 matters were then addressed by the Court:[18] stewardship under s 7(aa); maintenance and enhancement of amenity values under s 7(c); intrinsic values of eco-systems under s 7(d); maintenance and enhancement of the quality of the environment under s 7(f); any finite characteristics of natural and physical resources under s 7(g); and the effects of climate change and the benefits of renewal energy under s 7(i) and (j). The weight attached to each factor was indicated. The evaluation by the Court was truncated in part by the fact that some of these criteria had already been incorporated in its s 7(b) analysis.[19]

[32] Then the Court concluded its analysis by weighing all matters. It found that the Meridian proposal achieved the District Plan policy for development of power generation facilities.[20] However, it did not meet a District Plan policy seeking to reduce the environmental impact of power generation.[21] Proposed Plan Change 5 was seen as neutral, as were the provisions of the Otago Regional Policy Statement.[22] Although substantial weight was given to the likely contribution to the national grid, it was "not as much as we would if we had been given a thorough cost

[15] At [707]
[16] At [709]
[17] At [710]
[18] At [711] – [722]
[19] At [717] – s 7(c), [720] – s 7(f), [722] – s 7(i) and (j)
[20] At [653] and [725]
[21] At [654] and [725]
[22] At [728] – [729]

benefit analysis".[23] Other positive effects were given weight according to their net contribution.[24]

[33] On the negative side, effects on the landscape in terms of s 6(b) were a "very large factor against the proposal" and were given "very substantial weight".[25] This reflected the Court's assessment that the Lammermoor was "nearly unique"[26] within New Zealand and "worthy of protection".[27] The need to protect heritage values under s 6(f) was also taken into account on the negative side, albeit to "a much lesser extent".[28]

[34] Those considerations led the majority to the conclusion that the scales came down on the side of refusing consent.[29] While the dissenting member of the Court agreed with the majority that Meridian's s 7(b) analysis was inadequate, his overall assessment favoured granting the application "by a small margin".[30]

[35] We only need to make brief reference to chapter 8 at this stage. It records the conclusion of the majority that the Meridian project was inappropriate in the outstanding natural landscape and did not achieve sustainable management in terms of s 5.[31] That reflected the majority's view that the positive benefit of supplying a very large quantity of renewable energy was outweighed by five adverse consequences: substantial impact on the outstanding natural landscape; uniqueness of the landscape; possibility of alternative sites not located in outstanding natural landscapes; the site is nearly surrounded by public land; and failure to put full evidence before the Court in respect of the efficient use of all the natural and physical resources and the likely benefits and costs of "reasonable" alternatives.[32]

---

[23] At [732]
[24] At [732]
[25] At [734]
[26] At [739]
[27] At [746]
[28] At [744]
[29] At [750]
[30] At [763]
[31] At [757]
[32] At [757]

The Meridian appeal

[36] As set out in paragraph [3] of this judgment, Meridian has advanced six grounds of appeal. Oral argument was dominated by grounds (ii) and (iii), centering on the Environment Court's conclusion in paragraph [242] of its decision which is quoted at [22] above. This is the Court's finding that s 7(b) requires a comprehensive and explicit cost benefit analysis of the proposal and that alternatives can be considered where s 6 matters are involved. Ground (i) arises from that paragraph and paragraph [230] which is set out in at [21] above. In relation to that ground Meridian claims that it was required to demonstrate to the satisfaction of the Court that its project was "the best" in net benefit terms.

[37] The second, but lesser, part of the oral argument focussed on the contention that Meridian was denied a fair hearing. This was in three respects. First, no opponent raised the issue of alternatives in its appeal or notice of issues. Secondly, the Court applied the efficiency test developed in the *Lower Waitaki* case even though that decision was delivered after the Meridian hearing had concluded and without Meridian being warned that the Court intended to adopt the *Lower Waitaki* approach. Thirdly, the way the Environment Court applied the consent granted for the Mahinerangi wind farm.

[38] There was little to no argument on the fifth and sixth grounds of appeal.

First three grounds of appeal

[39] We have grouped these grounds because they are interwoven. But we find it convenient to alter the order. After considering a number of preliminary matters we will address the issue of alternatives (ground (iii)), then consider the issue of the cost benefit analysis (ground (ii)), and conclude by considering Meridian's allegation that it was required to demonstrate that its project was "the best" (ground (i)).

Respondents' primary arguments in relation to all three grounds

[40] The third to ninth respondents' principal argument is that it should not be the role of the High Court in an appeal on points of law to revisit issues which are primarily contested factual matters upon which the Environment Court has made findings. They argue that the Meridian appeal does not identify specific points of law. Rather, Meridian's argument is essentially a complaint about losing consents that Meridian believes it should have secured. The respondents argue that in reality the case was decided on factual landscape issues.

[41] Inasmuch as there might be any legal errors in the application of the efficiency consideration in s 7(b), the respondents' overarching case is that the errors do not matter. They say the Environment Court found the Hayes landscape to be such an outstanding landscape, and the proposed "huge" wind farm to be so adverse to that landscape, that the landscape was worthy of protection on its own merits. Their submission is that even if this Court found that Meridian was not obliged to provide a more thorough net benefit analysis or to have canvassed alternatives, that conclusion would not be material because the Court's evaluation was driven by the need to protect this landscape.

[42] With specific reference to the issue of alternative sites, the respondents contend that the Environment Court did not find that alternatives must, as a matter of law, be considered. Rather it found that they *could* be considered. Although the Court received some evidence about other sites that Meridian had investigated, in the end the Court was unable to test possible alternatives meaningfully because Meridian elected not to provide any contestable evidence about the portfolio of sites it had evaluated.

[43] As to the cost benefit analysis, the respondents claim that Meridian has misconstrued what the Court actually did. They say that the Court properly weighed the landscape matters against other positive factors. Sustainable management, rather than efficiency, ultimately guided the Court's decision. Rather than laying down any hard and fast approach, the Court was indicating a preferred approach. And in the circumstances of Project Hayes there was no reason in law why a cost benefit

approach could not be utilised under s 7(b) to ensure that the "negative" side of the ledger was properly weighed.

[44] Finally, the respondents deny that the Environment Court required Meridian to demonstrate that its site was "the best". They say that nowhere in its judgment did the Court enunciate or apply that test.

The Environment Court's summation

[45] In support of their argument the respondents rely on the Environment Court's summation in paragraph [757] of its decision:

> [757] After weighing all the relevant matters identified in earlier chapters, we judge that the Meridian project is inappropriate in the outstanding natural landscape of the Eastern Central Otago Upland Landscape and does not achieve sustainable management of the Lammermoor's resources in terms of section 5 of the Act. That is principally because the nationally important positive factors of enabling economic and social welfare by providing a very large quantity of renewable energy are outweighed by the most important adverse consequences, that:
>
> (1) a wind farm with a site envelope of about 135 km^2 with 176 turbines each up to 160 metres high spread over a length of over 20 kilometres must on most objective measures have a substantial impact on the outstanding natural landscape of the Lammermoor and the heritage surroundings of the Old Dunstan Road across it. We have found it is likely to create its own wind farm landscape, which will be within 17 kilometres of, and sometimes visible with, another (approved) wind farm (Mahinerangi);
>
> (2) the Eastern Central Otago Upland Landscape is one of the very few places in New Zealand where citizens can experience a wide, high peneplain under a big sky (a relatively common experience in Australia and on other continents) in a highly natural and near endemic environment that also contains a heritage trail;
>
> (3) wind farms are in their comparative youth in New Zealand and there may still be many potential sites which are not located in outstanding natural landscapes. We consider that it would be preferable for current wellbeing and for future generations and would give effect to the RPS if other sites were to be investigated more fully first. In the regional context it would also be preferable for the communities of Otago if sites which have a resource consent and do not affect section 6 values were implemented first – especially the Mahinerangi site;

(4) the Meridian site is nearly surrounded by the public land we identified in Chapter 2.0, especially the Rock and Pillar Conservation Park and its recent extensions, the Logan Burn Reservoir, Te Papanui and the various Taieri River reserves, so the effect of the wind farm on landscape and amenities is even more important than it would have been if surrounded by private land;

(5) As we have analysed in detail Meridian, the Central Otago District Council, and the Crown failed to put full evidence before the Court in respect of the efficient use of all the relevant natural and physical resources of the Lammermoor. Such an examination not only of all the benefits of the proposal (which we did receive) but also of all the costs would have further increased the objectivity of this decision, as would have an analysis of the likely benefits and costs of reasonable alternatives to the Meridian proposal.

Is Meridian's appeal simply revisiting issues of fact?

[46] For a number of reasons it is appropriate to deal with this, one of the respondents' key arguments, at the outset. First, it is potentially determinative of the appeal, for there is a longstanding policy not to set aside decisions for errors of law which are not material. Secondly, it is the principal argument in opposition to the appeal. It reflects, we think, an implicit acknowledgment that the Environment Court's approach to the s 7(b) efficiency criterion was novel and potentially in error of law. Finally, whether or not that approach is in error of law is in itself a question of considerable complexity and importance. Such an issue should not be examined and pronounced on by this Court if it is essentially a moot point because of immateriality. Rather, in that situation such issues should await a day when they are clearly going to be central to the determination of the appeal.

[47] We are left with no doubt that paragraph [757] accurately summarises the reasons behind the Environment Court's decision that the various consents and permits should be cancelled. We infer that points (1) and (2) listed by the Court are at the forefront of its summary because for it they loomed largest. We therefore accept the respondents' underlying argument that the case was primarily decided upon landscape issues, which were factual and evaluative.

[48] That said, we think that the third conclusion that there might be other potential sites was of considerable importance to the Environment Court's final determination. Moreover, on the face of that Court's decision this issue assumed such importance that on appeal this Court could not responsibly conclude that it was an immaterial consideration. As the Court said in its decision,[33] alternatives properly was a factor going towards turning the proposal down. If errors of law are embedded in a significant aspect of the Court's reasoning they must be addressed. And if they are upheld they will provide grounds for at least sending the case back to the Environment Court for further consideration.

[49] Point (4) effectively supports the first and second points and does not warrant any further comment. On the other hand, the fifth point reflects the many criticisms recorded earlier in the Court's decision about the failure of Meridian to provide a comprehensive cost benefit analysis, including an analysis of alternative sites. It is not just an afterthought. Indeed, the topic of alternative sites/cost benefit analysis occupies a significant part of the 348 pages of reasoning. Again, it cannot be dismissed as immaterial to the decision.

Was it an error of law for the Environment Court to call for a consideration of alternative locations?

[50] We turn then to the contentions of legal error, starting with whether or not the Environment Court erred in law by severely criticising Meridian for not providing evidence about alternative locations. (As a separate issue, we will later consider Meridian's subordinate argument that, if it was obliged to consider alternative locations, there was a breach of natural justice because the Court did not adequately inform Meridian, before the Court reached its decision, that this was considered to be a requirement.)

[51] Section 104(1) of the RMA sets out the matters that consent authorities are obliged to have regard to when considering applications for resource consents:

---

[33] At [709]

104 Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to-

(a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of-

(i) a national environmental standard:

(ii) other regulations:

(iii) a national policy statement:

(iv) a New Zealand coastal policy statement:

(v) a regional policy statement or proposed regional policy statement

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application. ...

This section does not require a consent authority to have regard to alternatives to the proposed activity. However, s 104(1)(c) enables a consent authority to have regard to any other matter that it considers relevant and reasonably necessary to determine the application.

[52] Before a consent authority can consider any application for a resource consent under s 104, the application must comply with the requirements of s 88 which relevantly provides:

88 Making an application

…

(2) An application must—

…

(b) include, in accordance with Schedule 4, an assessment of environmental effects in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment.

…

From this point in the judgment we will refer to the assessment of environmental effects as the "AEE".

[53] In the present context cl 1(b) of Schedule 4 has particular significance. It provides:

> **1 Matters that should be included in an assessment of effects on the environment**
>
> Subject to the provisions of any policy statement or plan, an assessment of effects on the environment for the purposes of section 88 should include -
>
> …
>
> (b) Where it is likely that an activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking the activity:

We note the imperative is "should", in the sense of imposing an obligation. The sub-paragraph contains within it a judgment as to whether "it is likely" that the activity will result in "any significant adverse effect on the environment". If so, a description of any possible alternative locations or methods for undertaking the activity should be included.

[54] Section 92 of the RMA enables the consent authority to request further information (in addition to that supplied with the application for a resource consent):

> **92 Further information, or agreement, may be requested**
>
> (1) A consent authority may, at any reasonable time before the hearing of an application for a resource consent or before the decision to grant or refuse the application (if there is no hearing), by written notice, request the applicant for the consent to provide further information relating to the application.

Subsection (3) of that section requires the consent authority to notify the applicant in writing of the reasons for its request. Unless the applicant refuses to provide the information, subs (3A) requires the information to be provided no later than 10 days before the hearing.

[55] An applicant is permitted by s 92A(1)(c) to refuse a request for further information:

> **92A Responses to request**
>
> (1) An applicant who receives a request under section 92(1) must, within 15 working days of the date of the request, take 1 of the following options:
>
> …

> (c) tell the consent authority in a written notice that the applicant refuses to provide the information.
>
> …

Even if the applicant refuses to provide the information sought, the consent authority is nevertheless obliged to consider the application: subs (3).

[56] With the benefit of that summary of the statutory background we turn to the requests for further information in this case.

[57] In the AEE accompanying its application Meridian made three key points with reference to alternatives (as summarised to us by its counsel):

> (a) In terms of site selection, the most important factor is high and consistent wind speeds, which at the Hayes site are exceptionally good even by world standards. Over time, Meridian has collected extensive wind meteorological monitoring mast data throughout New Zealand. This data indicates that there are few (if any) alternative sites available to any applicant to match Project Hayes in terms of wind speed, duration and scale.
>
> (b) Wind speed is not the only criterion that is applicable to the development of a viable wind farm. Other factors include: a smooth laminar air flow (low turbulence); proximity to the local electricity grid; site accessibility; proximity to load centre; availability of privately-owned, cleared, freehold land with supportive landowners; national landscape classifications; and elevation.
>
> (c) Once these factors are considered in total, the Project Hayes site is one of the few areas within the Otago region which is appropriate for development and in Meridian's assessment (not contradicted in evidence) the best.

After considering Meridian's application and the accompanying AEE, CODC made two s 92 requests for further information.

[58] The first request noted that alternatives were only briefly discussed in the AEE and asked Meridian to address alternative methods for renewable energy generation and alternative locations for wind farms "elsewhere in New Zealand". Meridian responded, stating (relevantly):

Response

Meridian advises pursuant to section 92A(1)(a) and (c) that it refuses to provide this information to the extent it is not provided below.

Comment

Meridian, as above, cannot see how this request is relevant to undertaking an assessment of this proposal. The RMA envisages that an applicant may seek consent for any particular proposal. That proposal must then be considered by a consent authority. A comparative assessment of hypothetical alternatives that are not being pursued by the applicant is of no assistance, nor are the details of such "alternatives" known to the consent applicant or Council. In the abstract it is impossible to provide a meaningful assessment of the effects of such hypothetical alternatives.

In addition, Meridian considers it is incorrect to describe other locations as "alternatives" to the present proposal. There is a substantial and increasing demand for electricity in New Zealand, including the South Island and there needs to be generation of electricity from many renewable energy sources.

Where a potential wind farm site has all of the necessary attributes for consenting it is able to be progressed through the consent process. Where another site has attributes that also make it suitable for consenting it cannot be described as "an alternative" site – it is in fact "another" potential site.

This response led to the second request. It asked Meridian to provide an explanation of its process of evaluation and site selection, and to give the reason why the Hayes site was preferred to others.

[59] In its response to the second request Meridian emphasised three points:

(a) Meridian would provide further elaboration of the process it followed to identify potential sites and how those sites are selected and shaped for development;

(b) Meridian would include an outline of the key factors in the selection and development of Project Hayes; and

(c) There was no obligation on an applicant to provide a consent authority with alternatives.

Several attachments were forwarded with this response. Attachment 1 relates to the consideration of alternative locations and the suitability of the Project Hayes site. This was presented in the form of a short report (the Report).

[60] The Report provided an overview, outlining the following key points:

(a) Over 17 years of investigating and evaluating the potential for wind generation in New Zealand, Meridian has investigated over 100 sites and holds data from 90 historic wind monitoring masts and approximately 30 existing masts throughout New Zealand.

(b) Meridian is currently carrying out detailed analysis on approximately 25 sites with the best generation potential known to Meridian. Some or all of these will be progressively advanced through to consent based on a detailed assessment of their performance against a range of parameters including constructability, commercial viability and consentability. The decision to advance Project Hayes was made against this background of knowledge arising from all sites known to Meridian over New Zealand;

(c) Proposals were advanced based on the results of that analysis coupled with further assessments of the environmental and factors associated with each site. Meridian advanced the sites that were expected to perform most highly across this range of environmental, social and economic factors; and

(d) Project Hayes had a number of characteristics (quality of wind resource, proximity to transmission and scale) that in combination made it the best site Meridian is aware of in the South Island for wind energy generation.

These points were supplemented by a history of studies involving the Project Hayes site and reference to a number of additional parameters that led Meridian to conclude that the Project Hayes site was “exceptional” in the South Island.

[61] However, at no time did Meridian specifically provide information about alternative locations. In this respect Meridian effectively refused the first request by CODC for further information. Arguably, however, Meridian complied with the second request.

[62] The failure to provide information about alternative locations was not significantly addressed by Meridian's evidence in the Environment Court. Mr Muldoon, the wind development manager of Meridian whose role included the evaluation of other locations, acknowledged that an evaluation of the other locations was not referred to in his brief of evidence. Nor was this information included in the evidence of other witnesses called by Meridian, or, for that matter, by opponents of the application.

[63] Having concluded[34] that alternatives could be considered, the Environment Court ultimately decided[35] that they should have been considered in this case and that failure to do so was a factor going towards turning down the application. Was the Environment Court entitled to call for consideration of alternative locations in this case?

[64] Meridian contends that if an applicant refuses to provide further information pursuant to s 92A then its application will stand or fall on the evidence before the consent authority. It says that in this case there was evidence that Meridian had considered alternative locations before deciding on the Hayes site and that its application should have been determined on the strength of that evidence. That approach, which Mr Smith described as a "trust us" approach, was challenged by the respondents. They contend that the Environment Court was entitled to test the validity of Meridian's assessment of alternative locations and that it could only do so by obtaining further information about the alternative locations.

[65] In our view the critical issue is whether, in terms of s 104(1)(c), consideration of alternative locations was "relevant and reasonably necessary to determine the application". Given the history and circumstances of the Meridian application,

---

[34] At [242]
[35] At [702] – [704]

including the size of the project, we are satisfied that the issue of alternative locations came within those words. We will now explain how we have arrived at that conclusion.

[66] Upon receiving Meridian's application CODC was entitled to proceed on the basis that for the purposes of cl 1(b) of the Fourth Schedule it was likely that the wind farm would result in a significant adverse effect on the environment and that under those circumstances the AEE should have included a description of any possible alternative locations for undertaking the activity. Thus it was entitled to make a s 92 request for the applicant to supply "a description of any possible alternative locations ... for undertaking the activity".[36] Even though this request was effectively refused by Meridian, CODC was nevertheless required by s 92A(3) to consider Meridian's application under s 104, and it did so.

[67] Once the matter was appealed to it, the Environment Court had the same powers and discretions as CODC: s 290(1). Consequently it was entitled to revisit the alternative locations issue. Having done so, it was open to the Court to conclude that the Meridian application triggered cl 1(b) of the Fourth Schedule and that under those circumstances the Court could seek a description of any alternative locations under s 92(1). Given that context further information about alternative locations was both relevant and reasonably necessary to determine the application in terms of s 104(1)(c).

[68] We are therefore satisfied that, subject to a qualification we are about to mention, the Environment Court did not err in law when it called for consideration of alternative locations. A qualification is that as a creature of statute the Court was confined to the powers conferred by the RMA. With reference to alternative locations, cl 1(b) of Schedule 4 (in conjunction with s 104(1)(c)) only permitted the Court to seek from Meridian *a description* of any possible alternative locations. We will have more to say about this later in the judgment.

[36] For reasons that will we will give later at [93] we believe that CODC overstepped the mark when it asked for alternative locations "elsewhere in New Zealand", but that is of no immediate moment.

[69] However, the point of law raised by Meridian in relation to alternatives has a different focus. It challenges the Court's approach to alternatives *in the context of s 7(b)*.

Was it an error of law for the Environment Court to call for an analysis of alternative locations as part of its examination of the efficiency criterion in s 7(b)?

[70] Meridian's argument challenges the underlying purpose behind the Environment Court seeking an assessment of alternatives, namely, for use as part of a cost benefit analysis under s 7(b). We should explain at the outset why we accept that the Court was seeking the information for the purpose of applying s 7(b) notwithstanding the references it had made to s 6.

[71] The Environment Court started with the proposition at both [234][37] and [242][38] that "alternatives can be considered where s 6 matters are concerned".[39] Later this was interpreted by the Court on two occasions. First, at [696] the Court referred to "the requirement we identified in chapter 3.0 to look at alternative sites under s 7(b)" and at [702] it said "in chapter 3.0 (The law) we decided that in certain circumstances s 7(b) leads to a requirement to consider alternatives". Thus it is clear that by the time the Court came to applying s 7(b) it did so on the basis that in the circumstances of this case it was *required* to consider alternatives, the existence of a s 6 matter (outstanding natural landscape) having been one of the triggers for that requirement.

[72] Thus we are brought squarely to Meridian's principal complaint, that the Environment Court fell into error of law in the way it sought to apply the efficiency criterion contained in s 7(b), which provides:

> **7 Other matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

[37] which we quote at [75]
[38] which we quoted at [22]
[39] At [242]

…

(b) The efficient use and development of natural and physical resources:

While that alleged error of law has two interwoven dimensions (cost benefit analysis and alternative locations), the discussion that follows will be confined to the issue of alternative locations.

[73] We begin our discussions by examining the Court's reasoning.

[74] Under the sub-heading "Are alternative locations relevant?", the Court explained its starting point:

> [234] We note what the Environment Court recently stated in *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council*[40]:
>
> > Economic efficiency generally requires that all credible alternatives to a proposal should be identified and included within a cost-benefit analysis[41] to reduce the risk of choosing projects ahead of alternatives that contribute more to society. Not only should the benefits of a project be greater than the costs, but the least cost way of producing those benefits should be implemented[42]. However, there is a real issue as to whether that is required by the RMA.
>
> The Court then went on to find that the RMA does require consideration of alternatives in certain circumstances. It concluded[43]:
>
> > … it is not usually necessary to consider alternative uses of the resources in question, or the use of alternative resources to obtain a similar benefit. However, there are at least three exceptions:
> >
> > (1) where the costs cannot be fully internalised to the consent holder;
> >
> > (2) where there is no competitive market (e.g., in congestion on roads where the relevant resource is the land near those roads; we also note there is a very limited market in water permits); or
> >
> > (3) where there is a matter of national importance in Part 2 of the Act involved and the cost benefit analysis requires comparing measured and unmeasured benefits and costs (as is usually the case) so that the consent authority has to rely principally on its qualitative assessment, e.g. *TV 3 Network Services Limited v Waikato District Counci*l.

---

[40] *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council* Decision C80/2009 at para [197].

[41] Kahn, James R. The Economic Approach to Environmental & Natural Resources, 3rd ed. Thompson South-Western, Ohio, USA. (2005) p. 155.

[42] Kahn, James R. (2005) pp 154-155.

[43] *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council* Decision C80/2009 at para [201].

> We take that as a starting point, but in these proceedings we heard rather more legal argument on the issue. So we now turn to consider the case law.

Although the *Lower Waitaki* case was described as the starting point, it effectively became the finishing point as well.

[75] The next paragraph of the decision under appeal refers to cl 1(b) of Schedule 4 and then goes on to cite *TV3 Network Services Limited v Waikato District Council*[44] to support the proposition that where matters of national importance are raised, the question whether there are viable alternative sites for the prospective activity can be relevant. After discussing some other decisions the Environment Court commented "if an alternative site does not raise any matter of national importance then a fine grained analysis may not be necessary",[45] which suggests that the Court was looking for a "fine grained" analysis on this occasion. Later Meridian was criticised for not providing such an analysis. Ultimately the Court concluded[46] that Meridian should have provided an analysis of "the likely benefits and costs of reasonable alternatives to the Meridian proposal".

[76] We find it significant that the Environment Court approached the issue of alternatives on the basis that if any of the three situations described in *Lower Waitaki* arise, s 7(b) imposes *a requirement* to consider alternatives. Thus the Environment Court has superimposed on s 7(b) an imperative that alternatives *must* be considered if any of the three situations arise. For the following reasons we consider that this interpretation of s 7(b) is erroneous in law.

[77] First, it seems to us that the Environment Court's approach is incompatible with the approach to alternatives expressly adopted by the RMA. We consider that by imposing a requirement to consider alternatives in terms of *Lower Waitaki*, the Environment Court has not paid sufficient regard to the scheme of the Act. On each occasion the RMA has imposed an obligation on a consent authority to consider alternative locations or methods, that obligation has been carefully spelled out in the Act. We will now make brief reference to those occasions.

---

[44] *TV 3 Network Services Limited v Waikato District Council* [1997] NZRMA 539: [1998] 1 NZLR 360 (HC).
[45] At [241]
[46] At [757] which we quoted at [45] above.

[78] We have already quoted cl 1(b) of Schedule 4[47] which states that an AEE should include a description of any possible alternative locations or methods for undertaking the activity when it is likely that the activity will result in any significant adverse effect on the environment. This is a very precise statement of the circumstances triggering the requirement (where it is likely that an activity will result in *any significant adverse effect on the environment*) and what is required (*a description* of any possible alternative locations or methods for undertaking the activity). That can be contrasted with the three triggers adopted by the Environment Court in *Lower Waitaki* (and in this case) and the requirement for a "fine grained" analysis of the likely benefits and costs of reasonable alternatives.

[79] Another example is s 105(1)(c) which requires that in the case of discharge or coastal permits the consent authority must, in addition to the matters in s 104(1), have regard to:

> (c) Any possible alternative methods of discharge, including discharge into any other receiving environment

Once again there is a very precise description of the circumstances triggering the obligation (an application for a discharge or coastal permit) which can be contrasted with the triggers used by the Environment Court. We also find it significant that the legislature has spelled out that this requirement is in addition to the matters in s 104.

[80] Section 107A provides a further example. It imposes restrictions on the granting of resource consents that will, or are likely to, have a significant adverse effect on a recognised customary activity. Under s 107A(2)(f) the consent authority must consider whether an alternative location or method would avoid, remedy or mitigate any significant adverse effects. Again we note the precise description of the circumstances where the obligation arises and the matters are to be considered.

[81] Next we have ss 168A(3) and 171(1)(b) concerning designations. These are mirror provisions and it will suffice if we quote the relevant parts of s 171(1)(b):

---

[47] See [53] above

> **171 Recommendation by territorial authority**
>
> ...
>
> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—
>
> …
>
> (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—
>
> (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
>
> (ii) it is likely that the work will have a significant adverse effect on the environment; and ...

Over time the Courts have taken a relatively narrow approach to this provision. If the Environment Court is called upon to review the decision of the territorial authority, it is required to consider whether alternatives have been properly considered rather than whether all possible alternatives have been excluded or the best alternative has been chosen. See, for example, the decision of this Court in *Friends and Community of Ngawha Inc v Minister of Corrections*.[48]

[82] Finally, there is s 32 which carries the heading "Consideration of alternatives, benefits, and costs". We will discuss that section in greater detail with reference to the requirement for a cost benefit analysis.

[83] The second matter that counts against the Environment Court's interpretation is the wording of s 7(b) itself. The section requires particular regard to be had to "the efficient use and development *of natural and physical resources*" (our emphasis) which are defined in s 2:

> **Natural and physical resources** includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures

[48] [2002] NZRMA 401 at [20]

While the definition is not exhaustive, it clearly focuses on *tangibles.* Thus the issue is whether there will be an efficient use of the (tangible) natural and physical resources involved in the application, namely, the wind and land.

[84] This analysis can be contrasted with what we perceive to be the Environment Court's approach. When criticising Meridian for failing to provide an analysis of the likely benefits and costs of reasonable alternatives, landscape values (which the Environment Court saw as possibly the most important single question in the proceeding)[49] were clearly at the forefront of the Court's thinking. We infer that the Court was expecting an analysis that would include a comparison of intangible landscape values. In our view this misconstrues the intended focus of s 7(b).

[85] The third matter concerns earlier Court decisions. We were not referred to any decisions supporting the proposition that s 7(b) requires consideration of alternative locations in the circumstances envisaged by the Environment Court. Clearly the Environment Court's approach on this occasion is novel.

[86] Of the decisions cited, *TV3 Network Services* probably offers the greatest support for the Environment Court's approach. In that case Hammond J accepted that as "a matter of commonsense" consideration of alternatives "strikes me" as a fundamental planning concern.[50] He went on to say:

> I can understand Mr Brabant's practical concern that an applicant for a resource consent should not have to clear off all the possible alternatives. But I do not think that that is what the Court was suggesting. It is simply that, when an objection is raised as to a matter being of "national importance" on one site, the question of whether there are other viable alternative sites for the prospective activity is of relevance.[51]

Those observations did not reflect any analysis of the RMA and in our view they fall well short of supporting the proposition that a consent authority is *obliged* to consider alternative locations as part of its efficiency analysis under s 7(b) in the circumstances envisaged by the Environment Court. Indeed, s 7(b) was not in issue. We will have more to say about the *TV3 Network Services* decision later.

---

[49] At [424]
[50] At 373
[51] At 373

[87] A decision of the Court of Appeal, *McLaurin v Hexton Holdings Ltd*,[52] was used by the Environment Court[53] to support the proposition that the Court of Appeal appeared to be comfortable with alternatives being looked at in RMA proceedings. We make two observations. First, that case involved questions of access to landlocked land and can have little, if any, relevance to the situation under consideration. Secondly, at best that case supports the proposition that alternatives *can* be looked at in some situations, not that they *must* be used as part of the s 7(b) analysis if any of the three situations described in *Lower Waitaki* arise.

[88] On the other side of the ledger, and at odds with the Environment Court's approach, are the other Environment Court decisions concerning wind farms.[54] We make the following observations about those decisions. First, none interpreted s 7(b) in the way that it was interpreted in the Meridian appeal. Secondly, there were no less than five different Environment Court Judges involved in those cases. Thirdly, in most of the cases there were landscape issues. Fourthly, on the occasions that s 7(b) has been specifically addressed, efficiency was considered with reference to the otherwise wasted wind resource, and on some occasions with reference to the underlying use of the land. So the s 7(b) efficiency criterion came down to a relatively straightforward exercise in all of those cases.

[89] The question of alternative locations was only considered in three of the wind farm cases. In *Genesis Power* the Court considered that the issue of alternatives was "not really an important issue in the present case".[55] The Court accepted that Meridian had "clearly explored" alternative locations in *Meridian Energy Limited*[56] and did not seek to examine that aspect any further. A similar approach was adopted

---

[52] [2008] NZCA 570
[53] At [239]
[54] *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541 (EnvC), Judge Whiting; *Unison Networks Limited v Hastings District Council ("Unison Stage One")* W058/2006 (EnvC), Judge C J Thompson; *Outstanding Landscape Protection Society Inc v Hastings District Council ("Unison Stage Two")* [2008] NZRMA 8 (EnvC), Judge C J Thompson; *Meridian Energy Limited v Wellington City Council* W31/2007 (EnvC), Judges Kenderdine and Thompson; *Motorimu Wind Farm Limited v Palmerston North City Council* W067/2008 (EnvC), Judge B P Dwyer; *Upland Landscape Protection Society Incorporated v Clutha District Council ("Mahinerangi")* C85/2008 (EnvC), Judge J A Smith; *Unison Networks Ltd v Hastings District Council* W011/2009 (EnvC), Judge R J Bollard; and *Rangitikei Guardians Society Inc v Manawatu-Wanganui Regional Council ("Central Wind")* [2010] NZEnvC 14 (EnvC), Judge B P Dwyer
[55] At [211]
[56] At [341]

in *Unison Networks Limited* with the Court accepting the evidence of the Unison chief executive that the company had "duly investigated possible alternatives to the present site".[57] It should be added that alternatives were not considered as part of the s 7(b) analysis in any of those cases.

[90] Supporting those wind farm cases is the decision of this Court in *The Dome Valley District Residents Society Incorporated v Rodney District Council*.[58] In that case Priestley J said that he was not aware of any authority suggesting that "as part and parcel of the consideration of a resource consent application, alternative sites have to be considered or cleared out".[59] And when refusing leave to appeal[60] he repeated that both he and the Environment Court rejected the proposition that there was any obligation on Skywork (the applicant for a resource consent in that case) to search for and clear out alternative sites.[61]

[91] Our fourth matter arises from the observations of Greig J in *NZ Rail Ltd v Marlborough District Council*.[62] With reference to Part 2 of the RMA his Honour stated at 86:

> This Part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way.

It is difficult to reconcile the Environment Court's approach of superimposing an alternative location factor on s 7(b) with the approach to Part 2 matters described by Greig J.

[92] Finally, we are troubled by the wider implications of the Environment Court's approach. It seems that the analysis of "reasonable" alternatives the Court was expecting would not be restricted to the CODC district. The Court said:

---

[57] W011/2009 at [70]
[58] [2008] NZRMA 534.
[59] At [98]
[60] At HC Auckland CIV 2008 404 587, 8 December 2008
[61] At [33]
[62] [1994] NZRMA 70

> [671] The Commissioners concluded that if a wind farm was not allowed on this site '…[we] find it hard to see where in Central Otago a wind farm' might locate. That is despite having as evidence a report from the Planner for the CODC – Mr Whitney – in which he wrote that he considered there were potentially suitable sites "elsewhere in the Central Otago District **and elsewhere in Otago** including in locations south and west of the Clutha River" ... (Our emphasis)

Later[63] the Court concluded that realistic alternatives to the Meridian wind farm did exist and should have been considered. It then went on to say that "New Zealand is a wind rich country and that there are still many untapped wind resources of specific places as shown on attachment 'B'".[64] That attachment is a wind resources study for the whole of the South Island.

[93] Given that the functions of territorial authorities listed in s 31 are "for the purpose of giving effect to this Act *in its district*" (our emphasis) we do not think that Parliament intended that applicants could be called upon to describe alternative sites beyond the relevant district. We should also add that while we doubt that the Environment Court had in mind that alternatives throughout the country would have to be considered, if that was in fact the intention there would be further problems. For a company like Meridian seeking a major wind farm site *in the South Island* (because the bulk of its customers are located in that island) a comparison of alternative sites in the North Island would be largely meaningless.

[94] We therefore conclude that the Environment Court erred in law when it decided that in this case s 7(b) required alternatives to be considered. In our view no such requirement can be lawfully superimposed on that provision. Now we turn to the other component of Merdian's argument based on s 7(b).

---

[63] At [706] and [707]
[64] At [707]

Was it an error of law for the Environment Court to call for a comprehensive and explicit cost benefit analysis of the proposal as part of its examination of the efficiency criterion in s 7(b)?

[95] Building on the formulation in *Lower Waitaki* that economic efficiency generally requires all credible alternatives to a proposal to be identified and included within a cost benefit analysis, the Court decided:

> [242] ... section 7(b) requires a comprehensive and explicit cost-benefit analysis of the proposal. In that analysis:
>
> (a) where market valuations are not available, non-market techniques may be used; and
>
> (b) where the values of the market are different from those of society, alternative societal values may be applied.
>
> The idea behind the cost-benefit analysis is to assess, firstly, whether the proposal has a positive net benefit, and then whether there are credible alternative uses of the resources, or credible alternative resources that could produce the desired output, which have a greater net benefit. …

According to Meridian that interpretation of s 7(b) is not only novel, it is also wrong in law.

[96] It is not, of course, an error of law to adopt a novel approach. It can take many years for a statute to be fully understood. While the approach adopted by the Environment Court in this case can be described as novel, we are also aware that divisions of the Environment Court chaired by Judge Jackson have been pursuing the underlying theme for some time, but with less specificity. Evolution of this thinking can be traced back to *Baker Boys Ltd v Christchurch City Council*.[65]

[97] The fact that other divisions of the Environment Court have not endorsed that approach does not mean, or demonstrate, that the Meridian decision involves an error of law. Indeed, counsel for Meridian could not point to any cases examining and despatching this approach as an error of law. So we need to examine whether the Environment Court's proposition that s 7(b) requires a comprehensive and explicit cost benefit analysis is in conformity with the Act.

---

[65] [1998] NZRMA 433

[98] A theme of seeking to maximise the *quantification* of values through s 7(b) can be traced through the Environment Court's decision. The Court explained:

> [226] We are uncomfortable with a cherry-picking approach to efficiency. We prefer to follow the decision of the Court (slightly differently composed) in *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council*[66]:
>
> > We consider that efficiency in section 7(b) of the RMA requires a consent authority to consider the use of all the relevant resources and, preferably, their benefits and costs. It is nearly meaningless to consider the benefits of only some of the resources involved in the proceeding because the artificial weighting created by sections 5 to 8 of the Act will not be kept within the statutory proportions if the only matters given the 'particular regard to' multiplier (see *Baker Boys Limited v Christchurch City Council*[67]) in section 7(b) are those which are not identified elsewhere in section 7. **Further, it is very helpful if the benefits and costs can be quantified because otherwise the section 7(b) analysis merely repeats the qualitative analysis carried out elsewhere in respect of sections 5 to 8 of the Act** (Emphasis added).

In the *Lower Waitaki* case the Court had gone on to say in the next paragraph that "the potential power of s 7(b) is in giving a relatively more objective measure of the efficiency of the proposal."[68]

[99] Later in its judgment in this case[69] the Environment Court recorded an acknowledgment by Dr Layton (a Meridian expert witness) that the impact of the wind farm on recreational activities and the loss of flora, fauna, heritage sites and landscape values would not be revealed by markets and that the value of these impacts could only be inferred indirectly by non-market techniques. Dr Layton had described such techniques. The Court also noted that Dr Layton had stated such techniques are "complex and often contentious" and that he had not made any attempt to utilise the non-market techniques he had identified.

[100] Then the Court went on to lament the lack of quantitative evidence, including: "... in the absence of any quantitative assessment of the costs to recreation, tourism and the environment in general we can only make a qualitative

---

[66] *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council* Decision C80/2009 at [196].
[67] *Baker Boys Limited v Christchurch City Council* [1998] 433 at para [98].
[68] At [197]
[69] At [623]

assessment ...";[70] "The qualitative assessments by Meridian's experts should have been supported by the quantitative assessments of the costs through the methods that Dr Layton identified are available";[71] "There are significant costs that we have not been able to quantitatively assess due to lack of appropriate evidence (costs in terms of recreation and tourism) and others that are less amenable to quantitative assessment (heritage and intrinsic landscape costs)";[72] and "We neither read evidence in chief nor heard further evidence quantifying the value of the landscape in which the proposed wind farm is to be placed, or of the costs of the project to heritage values …".[73]

[101] Finally, when deciding whether the wind farm should be approved under the operative District Plan the Court said:

> [745] The most objective way of testing whether the wind farm would be sustainable management of the Lammermoor's resources is whether it would be an efficient use of those resources under section 7(b) of the Act. On the evidence that has been presented, we find that the use of the wind resource is efficient, but consider it of at least medium likelihood that addressing the evidential deficiencies identified would lead us to conclude that a wind farm on the Lammermoor was not an efficient use and development of natural and physical resources. Further, Meridian has also failed in the backup to that, in that it has not sufficiently analysed relevant alternatives.

The application was refused. In part this reflected the Court's view that Meridian, CODC and the Crown had failed to put full evidence before the Court about all the costs of the proposal which "would have further increased the objectivity of this decision".[74]

[102] The Environment Court's comments at [745] provide considerable insight into the Court's thinking. Clearly its desire for quantification and objectivity had significantly influenced its approach to the s 7(b) efficiency criterion (and to the ultimate issue of sustainable management). On the evidence actually presented the Court would have found that the use of the Lammermoor wind resource *was efficient*. Nevertheless the Court decided that if the evidential deficiencies (which

---

[70] At [625]
[71] At [639]
[72] At [649]
[73] At [697]
[74] At [757] (5)

we interpret as the lack of evidence applying the non-market techniques and alternative societal values mentioned by Dr Layton) had been remedied there was at least a "medium likelihood" the Court would have concluded that the wind farm was *not efficient*.

[103] This reasoning prompts us to look at Dr Layton's evidence more closely. In his supplementary evidence Dr Layton told the Environment Court:

> 8.24 Because the displacement of recreational activities or other environmental impacts, such as on flora or fauna, are intangible and not traded in markets, the value of such impacts is not revealed in market prices and can only be inferred indirectly through other means. Non-market valuation techniques include:
>
> (a) Cost-based valuation – for example, valuing environmental attributies at the cost of preventing or repairing damage to them;
>
> (b) Revealed preference methods – for example, inferring the value of parks, views or other desirable environmental attributes by identifying a premium in nearby house prices or by analysing the travel costs people incur in visiting a park; and
>
> (c) Stated preference methods – for example, direct questioning of a sample of respondents on how much they would pay to secure a given outcome, as if it could be secured through market transactions.
>
> 8.25 Non-market valuation techniques are complex and often contentious. Where there are no such valuations available, the weighting of market and non-market impacts is undertaken by consent authorities as part of their broad overall judgement of applications under Part II of the RMA. My understanding is that the relevant experts providing evidence for Meridian Energy have assessed the environmental effects of the wind farm as having an acceptable impact.

No doubt this is the source of the Court's statement at [242][75] that the comprehensive and explicit cost benefit analysis it had in mind should use non-market techniques where market values are not available and that alternative societal values could be applied when the values of the market differ from those of society.

[104] As the Environment Court noted, Dr Layton had not carried out a cost benefit analysis utilising non-market techniques. Nor had any other expert witness. When

[75] Quoted at [22] above

Judge Jackson questioned Dr Layton about paragraph 8.24 of his evidence with reference to recreational and landscape values Dr Layton said:

> DR LAYTON: The answer in this particular method and you will notice I have not pursued them because they all end up contentious.
>
> HIS HONOUR: Yes.
>
> DR LAYTON: Are complex and often contentious what I describe them as, because people will say, "well, is that really the value?"

Given that the Environment Court appears to have been relying on Dr Layton to justify its call for a cost benefit analysis utilising non-market valuation techniques, Dr Layton's answers (coupled with paragraph 8.25 of his supplementary evidence) must call into question the potential utility of such evidence, had it been presented.

[105] On the evidence before it, the Court had extensive *qualitative* evidence from various experts about the potential adverse effects of the wind farm. But it did not have the *quantitative* evidence that it would have liked. Obviously this counted heavily against Meridian when the Court came to apply the s 7(b) efficiency criterion. In our view this approach to s 7(b) was not in conformity with the RMA, as we will now explain.

[106] Section 32 of the Act is the only section expressly requiring a cost benefit evaluation (of proposed policies or other methods before a decision is made on a plan or plan change). Subsections(3) and (4) of s 32 are of particular relevance:

> **32 Consideration of alternatives, benefits, and costs**
>
> …
>
> (3) An evaluation must examine—
>
> (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
>
> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.
>
> ...

(4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account -

(a) the benefits and costs of policies, rules, or other methods; and

(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

…

(Emphasis added)

Section 32(4)(a) does not carry any mandatory requirement for all the benefits and costs to be quantified in economic terms, and no such requirement can be reasonably inferred.

[107] The issue whether s 32 requires a strict economic theory of efficiency or a more holistic approach was raised before Woodhouse J in *Contact Energy Limited v Waikato Regional Council*.[76] He declined to interfere with the Environment Court's conclusion that while economic evidence can be useful, a s 32 analysis requires a wider exercise of judgment. This reflects that it is simply not possible to express some benefits or costs in dollar or economic terms. For example, the loss of an ecosystem such as a wetland hosting a large bird population which is going to be overwhelmed by land reclamation may not be capable of expression in dollar terms.

[108] Likewise it would be difficult, if not impossible, to express some of the criteria within Part 2 of the Act (ss 5 – 8) in terms of quantitative values. We take by way of example the following paragraphs in s 7:

(c) The maintenance and enhancement of amenity values:

(d) Intrinsic values of ecosystems:

(f) Maintenance and enhancement of the quality of the environment:

If any of these matters are relevant, the consent authority "shall have particular regard to" them even if they are only capable of expression in *qualitative,* as opposed to *quantitative,* terms. As Dr Layton said, in this situation it is necessary for the

consent authority to weigh market and non-market impacts as part of its broad overall judgment under Part 2 of the RMA. We have not been referred to any provision stating that this process should be exercised or expressed in dollar terms or by some other economic formula.

[109] While it is true that resource consent decisions under the RMA might be described as subjective, that is inherent in the statutory process. In this respect we note that in *Canterbury Regional Council v Banks Peninsula District Council*[77] the Court of Appeal said:[78]

> ... the Act provides what may be described as a hierarchy of instruments, to the extent that regional policy statements must not be inconsistent with national policy statements and certain other instruments (s 62(2)), and district plans must not be inconsistent with national policy statements and the other instruments, nor with a regional policy statement or regional plan (s 75(2)). It does not follow, however, that there can be no overlap between the functions of regional authorities and territorial authorities. The functions of the latter are set out in section 31, and there is no need to read that section in any restricted way. To the extent that matters have been dealt with by an instrument of higher authority, the territorial authority's plan must not be inconsistent with the instrument. Beyond that, the territorial authority has full authority in respect of the matters set out in section 31. …

Decisions relating to resource consents are within the "full authority" vested in territorial authorities.

[110] Such decisions involve an evaluation of the merits by committees of elected councillors, or a panel of commissioners (as here), and, if there is an appeal, by the Environment Court. A degree, even a relatively high degree, of subjectivity is virtually inevitable. It needs to be kept in mind that the scheme of the RMA is that decisions are made by a number of persons acting together. Persons on the Regional or District Council, or Committee, or panel of the Environment Court, discuss these "subjective" evaluations and reach a consensus. The outcome is not one person's evaluation, except in simple cases of delegation to a single commissioner.

[111] Parliament has not mandated that the decisions of consent authorities should be "objectified" by some kind of quantification process. Nor does it disparage, as a

---

[76] (2007)14 ELRNZ 128 at [47] – [51] and [88] – [92]
[77] [1995] 3 NZLR 189

lesser means of decision making, the need for duly authorised decision makers to reach decisions which are ultimately an evaluation of the merits of the proposal against relevant provisions of policy statements and plans and the criteria arrayed in Part 2. That process cannot be criticised as "subjective". It is not inferior to a cost benefit analysis. Consent authorities, be they councillors, commissioners or the Environment Court, and upon appeal the High Court Judges, have to respect that reality and approach decision making in accordance with the process mandated by the statute. It is not a good or bad process, it simply is the statutory process.

[112] Before leaving this cost benefit issue we should briefly comment on the Environment Court's approach to internalising costs. The Court found[79] that costs in terms of landscape and various other matters had not been internalised to Meridian.

[113] With this concept of internalisation comes the notion that external costs arising from the private use of natural and physical resources should be internalised and reflected in the cost and benefit analysis. Externalities are those consequences, both beneficial and adverse, which flow from the use of the resources. Regulatory statutes controlling private use of land developed from the common law of nuisance, which has long understood and responded to the fact that private use of land can cause a nuisance to the neighbourhood. Reforms culminating in the RMA are discussed in this Court's decision *Wilson v Selwyn District Council*.[80]

[114] The underlying purpose of internalising these externalities is to enable all the benefits and costs to be quantified so that a net benefit or net loss, as the case may be, can be calculated. The problem is that where all the benefits and costs are not the subject of market transactions there is no readily quantifiable financial sum reflecting the demand or price to be paid for such benefits or the imposition of detriments. To put dollars on them requires some sort of imputing of demand. Sometimes this can be achieved by way of surveys: "*How much would you pay to visit a national park*?" Sometimes it is not possible to put dollar terms on them.

---

[78] At 194
[79] At [703]
[80] [2005] NZRMA 76 at [66] to [68]

[115] But it is all very controversial, as Dr Layton confirmed. We cannot accept that it was within the contemplation of the RMA that failure to fully internalise costs would carry the consequences that the Environment Court contemplated.

[116] While we can understand the Environment Court's desire to maximise objectivity in the decision making process, it is our view that the Court went too far when it decided that s 7(b) required a comprehensive and explicit cost benefit analysis in this case. We believe this resulted in s 7(b) being overplayed. Rather than dominating any other relevant Part 2 criteria, s 7(b) was intended to be weighed and balanced alongside them. In particular Parliament did not intend other criteria in s 7 to receive a truncated evaluation because the subject matter had already been evaluated in the s 7(b) analysis.

Did the Environment Court require Meridian to demonstrate that its project was "the best" in net benefit terms, and if so was this an error of law?

[117] When discussing alternatives the Environment Court said:

> [230] While in an engineering sense efficiency means the ratio of outputs to inputs, in economic terms it is not an absolute but a relative concept. We hold that under section 7(b) of the Act there are two questions to answer when determining the efficiency of the use of resources:
>
> (1) is the value achieved from the resources utilised the greatest benefit that could be achieved from those resources?
>
> (2) could that same benefit be produced utilising resources of lower value if they were organised differently, or if a different set of resources was used?
>
> The first point is about maximising the benefits achieved from the resources being utilised; and the second is about minimising the resource costs of achieving a given benefit.

As we have already said, Meridian contends that this concept was applied in a way that required it to demonstrate that its project was "the best" in net benefit terms and that this was wrong in law.

[118] The RMA is a regulatory statute restraining full rights of private property ownership and freedom of contract. Amongst other things the Act limits the exercise

of those rights by requiring certain conduct to have resource consents. But it would be extremely surprising if the statute granted to agencies, be they elected councils or the Courts, the power to impose upon owners of resources and parties to contracts some duty to make *the best use* of the subject resources, as construed by a council or Court.

[119] We think the correct interpretation of the RMA is that it is up to individuals and groups of individuals to decide what they want to do with their resources (where those resources are in private hands). However, that right is tempered by the fact that private use of resources can impose adverse effects on neighbours and upon the wider community. Hence the justification for the national, regional and district planning instruments, and the associated concept of resource consents, all of which lie at the heart of the RMA.

[120] In addition to those matters are the principles and purposes in Part 2 of the Act, including s 7(b). However, we do not think s 7(b) (or Part 2 generally) was intended to give to decision makers under the RMA the power to make judgments about whether the value achieved from the resources that are being utilised is the greatest benefit that could be achieved from those resources or whether greater benefits could be achieved by utilising resources of lower value or a different set of resources. To go that far would be to assert a planning function beyond the scope of the RMA. The Act effectively represents a compromise between values of planning and respect for private developments.

[121] Having concluded that as a matter of statutory interpretation it was not open to the Environment Court to require Meridian to demonstrate that its project was "the best" in net benefit terms, we have to decide whether the Environment Court actually imposed that requirement on Meridian. We agree with the respondents that this ground has not been made out. Nowhere in the judgment has the Court stated in explicit terms that it expected Meridian to demonstrate that the Hayes site was the best. Nor can this be safely inferred from the judgment as a whole. While the question of alternative sites loomed large in the Court's reasoning, we do not believe the Court has gone as far as Meridian contends.

[122] This ground has not been made out.

Summary

[123] In the circumstances of this case the Environment Court was, subject to the qualifications mentioned in this judgment, authorised to call for a description of alternative sites as part of its s 104 analysis. But it erred in law when it went further and proceeded on the basis that s 7(b) required consideration of alternative locations and an explicit and comprehensive cost benefit analysis. These errors led the Court to apply s 7(b) in a way that was not intended by Parliament. This resulted in the Court not analysing the merits of the application in the way intended by Parliament. The issue of relief will be addressed shortly.

Fourth ground

[124] As already mentioned, this ground of appeal alleges that the Environment Court denied Meridian a fair hearing by virtue of three matters: the issue of alternatives was not raised by opponents; there was no forewarning that the Court intended to apply *Lower Waitaki*; and the Court took into account the Mahinerangi wind farm consent. Given that the first matter is effectively a component of the second, we will go straight to the second matter.

Did the Court's application of Lower Waitaki impose an obligation to hear further from Meridian?

[125] It was in the *Lower Waitaki* decision that the Environment Court first specifically advanced the proposition that s 7(b) might require a cost benefit analysis. That proposition was then utilised in the case under appeal, with the Court reasoning:

> [702] In Chapter 3.0 (The law) we decided that in certain circumstances section 7(b) leads to a requirement to consider alternatives. After considering the submissions and cases, we held that we should follow the

recent Waitaki North Bank Tunnel Concept decision[81] where the Court concluded[82]:

> … that the consideration of alternative uses of resources, or the use of alternative resources to achieve the same or similar benefit, is not usually required under the RMA, and, secondly that there are at least three exceptional situations where considerations of efficiency under section 7 (b) may require consideration of alternatives. These situations are:
>
> 1. where the costs cannot be fully internalised to the consent holder;
>
> 2. where there is no competitive market for the relevant resources; or
>
> 3. where there are matters of national importance in Part 2 of the Act involved and the cost benefit analysis requires comparing measured and unmeasured benefits and costs, such that the consent authority has to rely principally on a qualitative assessment.

Although the consideration of alternatives may be required, this does not necessarily mean that alternatives should be considered in all cases. The Waitaki NBTC decision stated[83] that whether and which alternatives should be considered can only be decided in the context of the specific facts of each case.

[703] Considering the extent to which the situations 1-3 above apply to a Lammermoor wind farm we find:

1. The costs in terms of landscape, heritage in respect of the Old Dunstan Road and the heritage surroundings in which it sits, and recreation and tourism have not been internalised to the consent holder. There may be some possible remedy or mitigation in respect of recreation and tourism, although none has been proposed to us. The evidence before us was that the landscape and the Old Dunstan Road heritage costs could not be remedied or mitigated. Therefore they have not been (and in respect of landscape and the heritage of the Old Dunstan Road, cannot be) internalised to the consent holder.

2. There is no competitive market for the landscape or heritage resources. The 'market' for recreation or tourism resources has not been adequately explored by the applicant. The issue of alternative recreational opportunities was mentioned in evidence and discussed (briefly) in cross-examination. The issue of tourism was barely mentioned.

3. There are two matters of national importance involved: an outstanding natural landscape[84] and historic heritage[85] –

---

[81] *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council* Decision C80/2009.
[82] *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council* Decision C80/2009 para [201].
[83] Decision C80/2009 para [548]
[84] Section 6(b) of the Act.
[85] Section 6(f) of the Act.

> which we must recognise and provide for their protection from inappropriate use and development.
>
> We have considered whether in the interests of fairness we should hear from the parties further on the issue of categories 2 and 3 since the *Lower Waitaki* decision has only recently been issued. However, we have decided that there is no need to do so because *TV3 Network* applies – matters of national importance are raised – and we heard argument about that.

We do not accept that the decision of the High Court in *TV3 Networks Services* put Meridian on notice that the test deployed in *Lower Waitaki* would be utilised in the decision under appeal. This reflects the particular issues in *TV3 Network Services* and the way they were addressed by this Court.

[126] TV3 wanted to install a television translator on a hill on the west side of Raglan Harbour. Its application for a resource consent was granted by the District Council. An opponent, Tainui, then appealed to the Environment Court on the grounds that the hill was sacred to Maori and the presence of the translator would offend Maori heritage and waahi tapu. The Environment Court reversed the Council's decision on the basis that granting the consent would not respond to the strong direction in s 6(c) to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands and waahi tapu. On the question of alternative sites the Environment Court considered that "other possible translator sites may be nearly as effective even though they may involve greater costs".[86]

[127] An appeal to this Court followed.[87] In support of TV3's appeal Mr Brabant argued that the Environment Court had erred by considering whether the proposed activity might be undertaken on another site where it would not offend a matter of national importance. He argued that the Act is "effects based" and that s 92(1) and Schedule 4 identify when alternative sites can be considered (where it is likely that an activity will result in a significant adverse effect on the environment). Thus, Mr Brabant submitted, it was wrong in law to consider alternative sites when the Court had not found that there were any adverse effects.

---

[86] [1998] 1 NZLR 360 at 367
[87] [1998] 1 NZLR 360

[128] Hammond J did not directly respond to Mr Brabant's argument. Rather he proceeded on the basis that the Environment Court was not requiring the applicant for resource consent to clear off all possible alternatives:

> But I do not think that is what the Court was suggesting. It is simply that, when an objection is raised as to a matter being of "national importance" on one site, the question of whether there are other viable alternative sites of the prospective activity is of relevance.[88]

On our reading of the *TV3 Network Services* decision there was nothing in it to alert Meridian to the possibility that the Environment Court would interpret and apply s 7(b) in the way that it did.

[129] Nor had the previous history of the Meridian proceeding foreshadowed that possibility. The issue of alternatives had not been included in the list of issues provided by any of the parties in response to the pre-hearing directions issued by the Court on 31 January 2008 and 10 April 2008. While it is true that there was some cross-examination on the issue of alternatives, we do not consider that this should have alerted Meridian to the s 7(b) test that the Court ultimately adopted.

[130] On 8 August (well into the hearing which had started on 19 May) the Maniototo Environmental Society sought to call further evidence, first, on the cumulative effects of the Mahinerangi wind farm and Project Hayes and, secondly, on efficiency issues. Maniototo's application had been made after another division of the Environment Court released its decision upholding planning consent for the windfarm at Mahinerangi.

[131] When granting the adjournment,[89] the Environment Court concluded with these comments:

> [16] … To the extent that this proceeding is about efficiency, it is about the overall efficiency in terms of section 7(b) and section 7(ba) of the Resource Management Act of Project Hayes, and we ask that the evidence reflects that, …

---

[88] At 373
[89] Decision C89/2008, 8 August 2008

Later the following exchange took place between Judge Jackson, and Mr Beatson, counsel for Meridian:

> HIS HONOUR: Mr Beatson, what are your thoughts on the way forward please?
>
> [discussion about how to proceed with aspects of the case not affected by the request to call new evidence]
>
> HIS HONOUR: Thank you. And a timetable?
>
> MR BEATSON: I have not thought about specific dates but I would request a simultaneous exchange giving time for rebuttal rather than a three stage timeframe.
>
> I would seek some further guidance from the Court about the question of efficiency that it is interested in.
>
> HIS HONOUR: Well, we need help from you on that.
>
> MR BEATSON: Well, we have outlined the benefits of the project from a broader perspective and we have signalled that, from Meridian's perspective, it is the next best option available to it. We have had an explanation from the Crown about how the market works and that it is competitive and it is up to generators to make commercially sensible decisions about where they locate next.
>
> And we have talked about the benefits to, or we will be talking about, the benefits to the individual landowners and the benefits to the system as a whole and we have deliberately indicated we think the viability question is one for Meridian but we are saying that there is checks and balances on that as well.
>
> I think there is no (sic) much more than can really be said about transmission either.
>
> HIS HONOUR: Fine, well, if there is no more to be said you do not have to say it, do you?
>
> MR BEATSON: No, but I am seeking some guidance about what it is that that Court is ---
>
> HIS HONOUR: Well, we have said what we have said, I am not going to elaborate.
>
> All right, so you want simultaneous exchange?
>
> MR BEATSON: Yes.
>
> HIS HONOUR: All right, thank you.
>
> …

We do not know how advanced Judge Jackson's thinking on the efficiency test was when that exchange took place.

[132] Had Mr Beatson known about the *Lower Waitaki* decision at this time he would have been alerted to the possibility that the Court might apply that decision. In that event it is likely that Meridian would have responded by providing more evidence about alternative sites and/or legal argument about the scope of s 7(b). As matters developed, however, there was nothing at that stage to alert Meridian to the possibility that the Court would adopt the novel approach to s 7(b) that it did.

[133] We accept that as a matter of fairness the Court should have heard further from the parties after the *Lower Waitaki* decision was delivered. If further information about alternatives was required, the Environment Court should have then provided a reasonable opportunity for further evidence to be presented. Thus we are satisfied that this ground has also been made out. We will shortly address the consequences of this conclusion.

The Mahinerangi issue

[134] For the Environment Court the relevance of the wind farm consent at Mahinerangi was one of cumulative effects:

> [482] We have described how the hearing was further adjourned so that the Court could hear evidence about any impact of a wind farm at Mahinerangi on this proposal. At the 2009 resumption of the hearing Meridian produced some new photosimulations[90] of the area. These included those views in which both a Meridian wind farm and a Mahinerangi wind farm, 15 kilometres apart at the closest points and with some 28 kilometres between their centroids, could both be seen.
>
> [483] There is some doubt as to whether Mahinerangi will proceed. Mr Gleadow said in answer to Mr Todd that TrustPower had been quoted in the media as stating that "… under the present policy settings [it] may well not construct Mahinerangi". That is of course hearsay, and we do not know what current settings are of concern to them. Further, it has taken us so long to finalise this decision that more recent media reports suggest that Mahinerangi is likely to proceed. We make no finding either way: as we stated (in Chapter 3.0) if Mahinerangi proceeds then the Meridian project

[90] Mr C G Coggan, part of his evidence-in-chief [Environment Court document 49].

> may cause accumulative effects, and if it does not then the Mahinerangi site may be an alternative which we should consider.
>
> …
>
> [490] In our view the likely strength of the cumulative effects is somewhere between Mr Rough's and Ms Steven's views. We consider that the addition of the Meridian wind farm to a Mahinerangi wind farm will have a moderate adverse extra effect on the natural qualities of the landscape. Having said that, it is clearly the placement of the huge Meridian wind farm in the landscape which generates the major effects to be considered.

[135] Later the Court returned to Mahinerangi in the context of a permitted baseline analysis:

> [674] In relation to the existing environment there are various suggestions[91] that Meridian may have been disadvantaged because (a different division of) the Court heard and decided the smaller Mahinerangi application by TrustPower Limited first (see *Upland Landscape Protection Society v Clutha District Council*[92]), even though TrustPower's application was lodged with the relevant local authorities later than Meridian's. We consider there is no disadvantage. First, we hope it is unnecessary to point out that this is not a "priority of hearing" case under the principle (first in time, first in right) in *Fleetwing Farms Limited v Marlborough District Council*[93]. From a procedural point of view this case involves different resources within two different districts. Secondly, we consider the point is irrelevant. The possibility of generating energy from wind at Mahinerangi is, for the reasons we stated in Chapter 3.0, relevant as:
>
> - either a part of the existing environment as it falls within the definition allowed by *Queenstown Lakes District Council v Hawthorn Estate Limited*[94] (or as an accumulative effect); or
>
> - an alternative.
>
> [675] We hold that the existing environment must include the potential effects of a wind farm above Lake Mahinerangi. We consider the accumulative effects of adding a wind farm on the Lammermoor to those effects will be at least moderate on the heritage surroundings about the Old Dunstan Road even on the scale of the two landscapes being considered.

With particular reference to paragraphs [674] and [675] Meridian submits that the Environment Court was wrong in law when it declined to apply the *Fleetwing* principle and that it should not have taken the Mahinerangi wind farm into account.

---

[91] For example, Mr Todd, submissions 16 February 2009, [Environment Court document 85].
[92] *Upland Landscape Protection Society v Clutha District Council* Decision C85/2008.
[93] *Fleetwing Farms Limited v Marlborough District Council* [1997] 3 NZLR 257; 3 ELRNZ 249; [1997] NZRMA 385.
[94] *Queenstown Lakes District Council v Hawthorn Estates Limited* [2006] NZRMA 424.

[136] The *Fleetwing* principle is that where there are competing applications for a resource the priority of the hearings will be determined in favour of the first applicant to file a complete application. Once the priority of hearings has been determined the application having priority is decided on its merits and without having regard to the other application/s.

[137] The Court of Appeal developed the *Fleetwing* principle on the basis that the members of the Court thought it implicit:

> …[T]hat if another applicant applies for a similar resource consent while the first application remains undecided, that does not justify comparing one against the other and failing to give a timely decision on the first application on its merits and without regard to the other.[95]

Then the Court identified five possible policies which might reflect that implicit policy and concluded that on its reading of the RMA Parliament had used the approach of "first come first served".[96]

[138] As far as we aware the *Fleetwing* principle has never been applied so as to require a consent authority to disregard *an existing* resource consent for the reason that the application resulting in the existing consent was not completed until after the application under consideration. Nor has it been applied as part of a baseline analysis where there are effectively different resources (the Meridian site is 15 kms from the Mahinerangi site).

[139] Currently there is considerable uncertainty surrounding the future of the *Fleetwing* principle. It has been challenged in *Central Plains Water Trust v Ngai Tahu Properties Ltd* [97] and *Central Plains Water Trust v Synlait Ltd*[98] both of which involved competing claims for the same water resource. The Supreme Court granted leave for both decisions to be appealed to it. In *Ngai Tahu Properties* the Supreme Court invited a reconsideration of *Fleetwing* and appointed an amicus curiae. The case then settled. Although leave to appeal *Central Plains Water Trust* was granted,

---

[95] [1997] 3 NZLR 257 at 264
[96] [1997] 3 NZLR 257 at 265
[97] [2008] NZCA 71
[98] [2009] NZCA 609

it also settled. There can be little doubt that the Supreme Court wished to hear argument about whether the *Fleetwing* principle is sound.

[140] Under those circumstances we do not think this Court could responsibly extend the ratio of *Fleetwing* in the way sought by Meridian, especially in a novel situation like this. We therefore reject Meridian's proposition that the Environment Court erred in law when it declined to apply *Fleetwing* vis-à-vis the Mahinerangi windfarm consent.

[141] It follows that the Mahinerangi windfarm was potentially a relevant consideration in the baseline analysis. Meridian criticised the Environment Court for relying on post hearing media reports suggesting that the Mahinerangi project might go ahead.[99] We will take that matter up when considering the relief that should be granted.

Grounds 5 and 6

[142] Given the conclusions that we have already reached in relation to grounds (ii), (iii) and (iv) and the directions that will follow in the next section of our judgment, we find it unnecessary to comment further on these grounds.

Relief

[143] Meridian not only seeks to have the Environment Court decision quashed, it also wants the consents and permits originally granted by the Councils to be reinstated by this Court without any further consideration by the Environment Court. We are unaware of this step ever having been taken previously.

[144] Meridian relies on two findings in its favour which, it contends, demonstrate that the benefits of the project outweigh the costs and that the project is worthy of consent:

> [650] Against these measured benefits must be put the very real, but unmeasured, costs in terms of landscape, heritage and recreation and tourism

[99] See [483] already quoted at [134] above

> that will not be remedied or mitigated. We note that the large regional benefits will be at the expense of some other region that does not gain, at this time, a large electricity construction project if Lammermoor goes ahead. The landscape, heritage and tourism costs of the project will be both national and regional. Although our cost benefit analysis is on a national basis, the regional effects are a part of this. **On balance we conclude that there is a net benefit arising from the Lammermoor wind farm**. However, we consider that the unmeasured costs are significant and that the size of the net benefit is not nearly as substantial as the numbers above might indicate.
>
> ...
>
> [693] **If the matters in the previous sections of this chapter were all we had to consider we would agree with the planner[100] called by the District Council, Mr D R Anderson, that we should grant consent to Meridian**. However, section 104(1) of the RMA begins:
>
> > When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to –
> >
> > …
>
> We now consider whether we should look at Part 2 of the Act. (Our emphasis).

For the respondents Mr Smith claims that these paragraphs cannot be construed as a finding in favour of Meridian justifying reinstatement of the consents/permits by this Court.

[145] We agree with Mr Smith. Paragraphs [650] and [693] cannot be read in isolation. In our view it is too simplistic to say that because the benefits of the project outweigh its costs, the project must therefore be worthy of consent. While that might be a very significant step towards gaining consent, a wider assessment is required. On its wider assessment of the Meridian application the Environment Court concluded that the project did not achieve sustainable management in terms of s 5 of the Act. Under those circumstances the proper course is for the Court to reconsider that conclusion in light of the errors of law that we have identified.

[146] Meridian's alternative submission was that if the case is to be referred back to the Environment Court, it should be referred to a different division of that Court. This suggestion was opposed by the third to ninth respondents. The Councils

---

100 Mr D R Anderson, evidence-in-chief [Environment Court document 62].

adopted a relatively neutral stance. We accept that this option would again be most unusual, and that it would impose a considerable burden on the parties opposing the Meridian application. It is our judgment that the appropriate course is to follow normal practice and refer the case back to the same division of the Court that heard the application, with specific directions.

[147] The principal direction must, of course, be to reconsider the matter in the light of our findings as to error of law in the decision. But that is insufficient on its own. It is important that the corollaries to our findings are also taken into account on the reconsideration.

[148] We will therefore set out specific directions for the Environment Court's reconsideration of the matter:

(a) Meridian is to be given a reasonable opportunity to present further evidence on the question of alternative locations. The respondents are also to be given a reasonable opportunity to call evidence in response to Meridian's evidence.

(b) Once any further evidence has been presented all parties are to be given a reasonable opportunity to present further submissions about the evidence referred to in (a) as well as the overall implications of this decision for the findings and conclusions reached by the Environment Court.

(c) Meridian is not obliged to go beyond *a description* of any possible alternative locations for undertaking the proposed wind farm (in terms of cl 1(b) of Schedule 4). As indicated in [93] these locations will need to be within the CODC district. Given the size of the Meridian proposal and its potential impact on the environment, we anticipate that a reasonably detailed description of alternative sites would be provided by Meridian.

(d) Any further evidence concerning alternative locations will form part of the Court's s 104 analysis of the Meridian proposal (not part of the s 7(b) assessment). The inquiry will be whether, if the same or a similar wind farm could be placed on any identified alternative site/s, it would generate less adverse effects on the environment. That consideration will, however, need to be weighed against any diminution in the benefits of the project (e.g. poorer quality of mean wind velocity, distance from the grid etc), and any other relevant considerations such as the availability of the alternative site/s to Meridian.

(e) As the Environment Court acknowledged, and our analysis of the other wind farm cases demonstrates, consideration of alternative sites is relatively unusual. While it will be for the Environment Court to undertake any further analysis of the evidence before it, we emphasise that consideration of alternative sites should not be pushed too far. We have rejected the proposition that Meridian must demonstrate that the Hayes site is "the best". Rather than being a search for "the best" site, consideration of alternative sites is only part of the evaluation of the merits of the application in the context of s 104 and the focus needs to be on the merits of *Meridian's proposal*.

(f) The Court is also to reconsider the application of the efficiency criterion on the basis that s 7(b) requires an assessment of the efficient use and development of the natural and physical resources involved in the application, namely, the wind and the land. In other words, the Environment Court is to apply the s 7(b) test utilised in the other wind farm cases in which s 7(b) has featured.

(g) Given the opportunity that is now available for the Court to receive further evidence about whether the Mahinerangi wind farm project is likely to proceed, the parties will also be entitled to present further evidence to the Environment Court on that topic.

(h) Nothing that we have said is intended to indicate that the Environment Court is precluded from utilising the cost benefit findings that it reached as part of its s 104 evaluation. However, that evaluation is not to penalise Meridian for failing to provide non market valuation evidence in relation to landscape or heritage values.

(i) The parties will also be entitled to make submissions about any conditions that might be lawfully imposed by the Environment Court to avoid, remedy, or mitigate adverse effects on the environment if the application is granted. The Court will also have power to impose such conditions.

[149] We will take the precaution of reserving leave for the parties to seek clarification of any of these directions. Any such request, containing a description of the clarification sought, must however, be filed and served within 28 days of the date of this judgment.

Mr Sullivan's cross-appeal – climate change

[150] In 2004 s 7 of the RMA was amended by requiring all persons exercising functions and powers under the Act to have particular regard to –

...

(i) the effects of climate change;

(j) the benefits to be derived from the use and development of renewable energy;

These amendments were made by the Resource Management (Energy and Climate Change) Amendment Act 2004 (the amendment Act).

[151] Additional definitions were included in the RMA by the amendment Act. At the heart of the cross-appeal is the definition of "climate change":

> **climate change** means a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods

A definition of "renewable energy" was also added by the amendment Act. Energy produced from wind comes within that definition.

Environment Court decision with reference to climate change

[152] When analysing its role in relation to climate change, the Court proceeded on the basis that Parliament had directed persons exercising functions and powers under the Act to assume there is climate change attributable to human causes "and to move on from there".[101] This reflected the Court's analysis of the definition of climate change and its assumption that Parliament intended scientific discussion about the existence and extent of anthropogenic changes (from human activities) was to be avoided.[102]

[153] Then the Court considered whether there was evidence indicating changes to the site envelope and the surrounding area as a result of climate change. It concluded that there was none. On the other hand, the Court accepted that anthropogenic induced increases in carbon dioxide concentrations in the atmosphere contribute to climate change and that using wind generation rather than carbon emitting generation would reduce climate change and its effects. This led the Court to conclude that Meridian's proposal would contribute to reducing the effects of climate change as defined in the Act.[103] Reduction in CO_2 emissions was later factored into the Court's cost benefit analysis.[104]

Mr Sullivan's cross-appeal

[154] Two grounds of appeal were advanced by Mr Sullivan:

> 1. the Environment Court erred in its interpretation of section 7 of the Resource Management Act by determining that section 7 requires the

[101] At [351]
[102] At [221]
[103] At [354]
[104] At [641]

> decision maker to exclude from its consideration and evaluation of the effects of climate change a consideration of the causes of climate change;
>
> 2. the Environment Court erred by ignoring the uncontested evidence of Dr Kesten Green when evaluating the integrity of the IPCC's Climate Models.

His cross-appeal is advanced on the basis that if Meridian's appeal succeeds and the matter is remitted for a rehearing, then at the rehearing the Environment Court should be directed to reconsider the climate change issues "in accordance with the law".

First ground of cross-appeal

[155] For Mr Sullivan, Mr Fisher argued that before a consent authority can have particular regard to the effects of climate change, as required by s 7(i):

> ... it must first determine that it is satisfied in terms of the definition of "climate change" that a party has *reasonably attributed* human activity to alterations in the composition of the global atmosphere that is in addition to natural climate variability observed over comparable periods;

Having failed to take that step, submitted Mr Fisher, the Environment Court had no jurisdiction to take into account the effects of climate change or to include the benefits arising from the savings in CO_2 emissions in its cost benefit analysis.

[156] We are satisfied that the Environment Court did not err in law and that this ground of appeal is untenable. This reflects a number of matters.

[157] First, the definition of climate change. Like the Environment Court we find it significant that Parliament has used the word "attributed" rather than "caused by". We consider that the definition has been framed in this way to reflect the statutory assumption that climate change is occurring. We also agree with the Environment Court's comment[105] that climate change is an extremely complex subject and that in the absence of a clear direction from Parliament the Court should not enter into a discussion of its causes, directions and magnitude.

---

[105] At [351]

[158] Secondly, it is significant that the definition of "climate change" comes from the 1992 United Nations Framework Convention on Climate Change (to which New Zealand is a signatory). That Convention is incorporated in the Climate Change Response Act 2002: see the First Schedule to that Act. In that Convention it is abundantly clear that climate change *as defined* is assumed to exist. For example, clause 1 of Article 3 states that "... developed country Parties should take the lead in combating climate change and the adverse effects thereof", and clause 3 of the same Article states that the Parties to the Convention "... should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects". The commitments entered into by the parties under Article 4 includes taking steps "to mitigate climate change".[106] There are numerous other examples.

[159] Thirdly, the stated purpose of the amendment Act is only explicable on the basis that climate change exists:

> **3 Purpose**
>
> The purpose of this Act is to amend the principal Act-
>
> (a) to make explicit provision for all persons exercising functions and powers under the principal Act to have particular regard to-
>
> ...
>
> (ii) the effects of climate change;
>
> ...
>
> (b) to require local authorities-
>
> (i) to plan for the effects of climate change;
>
> ...

[106] Article 1(b)

Similarly the new paragraph 7(i) requiring those exercising functions and powers under the RMA to have particular regard to the effects of climate change only makes sense if the underlying premise is that climate change exists.

[160] Fourthly, we see major practical difficulties with the interpretation advanced on behalf of Mr Sullivan. It would mean that scientific evidence would have to be adduced on the complex issue of climate change every time persons exercising functions and powers under the RMA were obliged to have particular regard to s 7(i). In the context of resource consents an impossible burden would be imposed on applicants. Climate change issues would be endlessly relitigated and inconsistencies would be virtually inevitable. And if a consent authority (or the Environment Court) found that there was insufficient evidence to enable it to have particular regard to effects of climate change, how would it discharge its obligation under s 7(i)?

[161] Finally, Mr Sullivan's argument is not supported by *Genesis Power Ltd v Greenpeace New Zealand Inc*[107] in which William Young P stated when delivering the judgment of the Court:

> [37] Section 7(i) anticipates that there will be climate change and requires regional councils to take into account, in exercising their functions under the Act, the effects of climate change. ...

While that appeal involved a discharge permit and s 7(i) was not directly in issue, the observation of the Court justifies considerable weight.

[162] This ground of cross-appeal fails.

Second ground of cross-appeal

[163] The allegation that the Environment Court overlooked Dr Green's evidence arises from the following paragraph of the Environment Court's decision:

> [133] Evidence on climate change was presented principally by Dr D S Wratt for Meridian and Professor R M Carter for the appellant Mr Sullivan. Others who

[107] [2008] 1 NZLR 803 (CA)

> addressed climate change were Professor C R de Freitas for Mr Sullivan and Mr P F Gurnsey for the Crown.

Given that Dr Green is not mentioned in that paragraph or, as far as we can see, elsewhere it is certainly possible that his evidence was overlooked. In this regard we were told from the Bar that Dr Green's statement of evidence on behalf of Mr Sullivan was admitted by consent and Dr Green did not appear in person.

[164] Dr Green gave scientific evidence about whether forecasts of dangerous manmade global warming are valid. He concluded that they were not valid and there is currently no more reason to believe that temperatures will increase over the coming century than there is to believe that they will decrease. However, even if his evidence has been overlooked, our conclusions in relation to the first ground of appeal means that it could not have materially affected the outcome.

[165] Under those circumstances this ground of cross-appeal must also fail.

Result

[166] Meridian's appeal is allowed. The matter is referred to the Environment Court for reconsideration in accordance with the directions at [148]. The cross-appeal by Mr Sullivan is dismissed.

[167] If agreement cannot be reached as to costs counsel should file and serve memoranda so that that issue can be determined by the Court.

Solicitors:
Bell Gully, Wellington, for Appellant
Macalister Todd Phillips, Queenstown for Central Otago District Council
Ross Dowling Marquet Griffin, Dunedin, for Otago Regional Council, Laurenson Family Trust and Manson and Riverview Settlement Trust
Atkins Holm Joseph Majurey, Auckland, for Maniototo Environmental Society Inc, Central Otago Environmental Society and Upland Landscape Protection Society Inc