Preston Russell Law

Incorporating Macalisters LAWYERS

31 August 2018

Refer Riki Donnelly / Georgia Woodward

The Registrar
Environment Court
CHRISTCHURCH

FOR: Christine McKee

ARATIATIA LIVESTOCK LIMITED & OTHERS v SOUTHLAND REGIONAL COUNCIL
OUR REFERENCE: 170461/1

1. Please find **enclosed** for filing in respect of the above matter:

   1.1. Section 274 submissions; and

   1.2. Supporting Affidavit of Paul David Marshall.

2. I confirm a copy of the same has been forwarded to the following counsel:

   2.1. Kirstie Wyss;

   2.2. Philip Maw;

   2.3. Stephen Christensen;

   2.4. Sally Gepp;

   2.5. Darryl Sycamore;

   2.6. James Winchester;

   2.7. Douglas Allan; and

   2.8. Clare Lenihan.

3. If you have any questions please contact the writer.

Yours faithfully
PRESTON RUSSELL LAW

Riki Donnelly / Georgia Woodward
Partner / Solicitor
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IN THE ENVIRONMENT COURT
AT INVERCARGILL

I MUA I TE KOOTI TAIAO O AOTEAROA

IN THE MATTER	Of the Resource Management Act 1991
AND	of appeals under clause 14 of the First Schedule of the Act
BETWEEN	**ARATIATIA LIVESTOCK LIMITED** (ENV-2018-CHC-29)
	MERIDIAN ENERGY LIMITED (ENV-2018-CHC-38)
	FEDERATED FARMERS OF NEW ZEALAND (ENV-2018-CHC-40)
	TE RUNANGA O NGAI TAHU, HOKONUI RUNAKA, WAIHOPAI RUNAKA, TE RUNANGA O AWARUA & TE RUNANGA O ORAKA APARIMA (ENV-2018-CHC-47)

WAIAU RIVERCARE GROUP SECTION 274 SUBMISSIONS

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INVERCARGILL

BETWEEN	**ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NZ** (ENV-2018-CHC-50) Appellants	
AND	**SOUTHLAND REGIONAL COUNCIL** Respondent	

MAY IT PLEASE YOUR HONOUR:

INTRODUCTION

1. The Waiau Rivercare Group have lodged s 274 Notices in respect of the above proceedings in order to become a party to the proceedings.

2. The Waiau Rivercare Group's interest in the proceedings centres on the following proposals in the Proposed Southland Water and Land Plan (pSWLP):

    2.1. Objective 10;

    2.2. Policy 26 Renewable energy;

    2.3. Rule 52 Water abstraction, damming, diversion and use from the Waiau catchment;

    2.4. Rule 52A Manapouri Hydro-electric Generation Scheme; and

    2.5. Appendix E Receiving Water Quality Standards.

3. The Waiau Rivercare Group is concerned of the impact of the above provisions on the following:

    3.1. The Waiau River;

    3.2. Te Wae Wae Lagoon and surrounding coastal marine area;

    3.3. Deep Cove; and

    3.4. The ability for the community to realise their aspirations for freshwater, both in terms of quality and quantity, including (but not exclusively) through the National Policy Statement for Freshwater Management (NPSFM).

4. The Waiau Rivercare Group initially did not make submissions because the group was only formed after the submission period had closed.

BACKGROUND

5. On 1 August 2016, the submissions period for the pSWLP closed.

6. On 7 June 2017 the Waiau Rivercare Group was formed. It does not have a constitution. Its members comprise individuals from the Lower Waiau River community – extending from Manapouri Lake Control (MLC) at Mararoa to the Tuatapere Township to Te Wae Wae Lagoon. The primary focus of the group is to improve the health of the Lower Waiau River.

7. On 9 October 2017, the Waiau Rivercare Group sent a letter to the Southland Regional Council and copied to the Minister for the Environment ("the Letter").[1] The Letter addressed the Waiau Rivercare Group's concern over the implementation of the NPSFM within the Waiau-Waiau Lagoon Freshwater Management Unit (FMU) in that it will proceed without taking proper account of the significant and on-going adverse impacts of power generation on the Lower Waiau River.

8. On 21 June 2018, the Waiau Rivercare Group lodged s 274 Notices to join the current proceedings.

9. On 17 July 2018 the Southland Regional Council (Council) filed a Memorandum of Counsel submitting the Waiau Rivercare Group does not meet the necessary test in s 274.

10. It is submitted the Waiau Rivercare Group have an interest in this proceeding greater than the general public, in particular, in the pSWLP proposals listed above, because of the direct impact the power generation has on the Lower Waiau River catchment that is beyond the understanding of the general public.

RELEVANT LAW

11. Section 274 of the Act states:

> **274 Representation at proceedings**
>
> (1) The following persons may be a party to any proceedings before the Environment Court:
>
> (d) a person who has an interest in the proceedings that is greater than the interest that the general public has, but the person's right to be a party is limited by section 308C if the person is a person A as defined in section 308A and the proceedings are an appeal against a decision under this Act in favour of a person B as defined in section 308A.

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1 Affidavit of Paul David Marshall sworn 31 August 2018, at annexure "A".

12. The Environment Court has established that the appropriate test to be applied under s 274(1)(d) is:[2]

    12.1. whether the interest of the Group is different (as in greater) than that of the general public; and

    12.2. whether the interest is specific when compared to that of the general public.

ANALYSIS

Greater interest than the general public

13. The first issue is whether the interest of the Waiau Rivercare Group is greater than that of the general public.

14. *Meadow 3 Limited v Queenstown Lakes District Council* defines this interest in the proceedings as being greater than that of the public if one has "some advantage or disadvantage, such as that arising from a right in property directly affected and which is not remote."[3] Whilst this is not solely restricted to property rights, it can include property rights.[4]

15. *Sandspit Yacht Club Marina Society Incorporated v Auckland Council* also establishes that any group representing individuals who are clearly disadvantaged, is similarly disadvantaged.[5]

16. It is submitted individual members of the Waiau Rivercare Group (and thus the group as a whole) face disadvantages from the Manapouri Power Scheme (MPS), and subsequently the proceedings.

17. In the case of *Lindsay v Dunedin City Council* it was held the aspiring s 274 party had "a greater relationship with the potential advantages or disbenefit of the proceedings because at least five of its members are property owners who reside in or near the street".[6]

18. In application, a number of members of the Waiau Rivercare Group, including both co-chairs, own land immediately adjacent

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2 *Trustees of the Neville Crawford Family Trust v Far North District Council* [2013] NZEnvC 141 at [12]. (**Annexed** and marked "**A**").

3 *Purification Technologies Limited v Taupo District Council* [1995] NZRMA 197 at 7. (**Annexed** and marked "**B**").

4 *Meadow 3 Limited v Queenstown Lakes District Council* EnvC C001/08, 15 January 2008 at [22]. (**Annexed** and marked "**C**").

5 *Sandspit Yacht Club Marina Society Incorporated v Auckland Council* [2011] NZRMA 300 at [18]. (**Annexed** and marked "**D**").

6 *Lindsay v Dunedin City Council* [2013] NZEnvC 8 at [20]. (**Annexed** and marked "**E**").

to the Waiau River. Those who are farmers will experience a disadvantage as a result of the proceedings if the appeals the Waiau Rivercare Group support are unsuccessful. The Council has at alternate times described the Waiau Catchment as fully or over-allocated, and access to water for all users in the catchment has historically reflected this. The pSWLP states that the Waiau Catchment includes tributaries of the Waiau River and any hydraulically connected groundwater.

19. The proceedings will significantly reduce the ability for farming members of the Waiau Rivercare Group to have the impacts on their businesses considered when new resource consents for the MPS water take are sought. The greater consideration of the MPS in the pSWLP also significantly reduces the likelihood of these landowners gaining access to water in the future.

20. Water is an essential constraint on and enabler of agricultural production, and ultimately business profitability, resilience and value. Therefore, the impeded access to water, and reduced consideration of effects represented by the proceedings is a significant disadvantage to members of the Waiau Rivercare Group which is not remote.

21. From a group perspective, the Waiau Rivercare Group note the Te Wae Wae Lagoon is close to collapse, Blue Cliffs Beach has been stripped of its sand (impacts on recreational use, including food gathering), and Tuatapere's once pristine alpine water supply drawing from the Waiau is tainted and heavily chlorinated to the point where some of the elderly decline to drink it. These, together with erosion and flooding (a significant issue for farmers on land adjacent to the Waiau) are some of the adverse effects that stem from the Power Scheme's reduced flow regimes through the MLC structure.

22. The Waiau Rivercare Group is concerned that if the appeals the Waiau Rivercare Group support are unsuccessful, 're-consenting' of the MPS will proceed without taking proper account of these, and other adverse effects of power generation. Similarly, if the relief sought by the Meridian Energy Limited appeal is incorporated into the pSWLP, this will perpetuate the disadvantages.[7] The Waiau Rivercare Group is concerned that this will leave their Community and Members to bear the brunt of limits imposed through catchment limit setting.

23. The Letter states that "adequate account has not been taken of the costs that the generation has imposed on our Community and

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7 Meridian Energy Limited seek incorporation of the existing operations, including the water take, into the existing environment.

on the ecosystems of the Lower Waiau River."[8] At the time the Letter was written, the MPS water take was classified as a discretionary activity. Whilst the Letter is arguing for the alignment between the limit setting process and the MPS water take re-consenting, it clearly articulates some of the adverse effects on it members associated with the operation of the MPS, voices concern that planning processes will not adequately take these effects into account, and voices concern that limits will impact on the Community rather than the MPS. These same arguments equally apply to the change in classification to a controlled activity and increased consideration of the MPS in objectives and policies of the pSWLP (the proceedings).

24. It is submitted the proceedings will significantly reduce the consideration of the above adverse effects on members of the WRG considered and addressed in any meaningful way. Given the nature of the impacts on the members of the WRG, this is a significant disadvantage as a result of the proceedings which is not remote.

25. Therefore, based on all of these factors, the interest of the Waiau Rivercare Group is greater than that of the general public.[9]

More specific interest than the general public

26. The second issue is whether the interest is specific when compared to that of the general public?

27. In *Trustees of the Neville Crawford Family Trust v Far North District Council* it was held a party with a specific interest which can be clearly defined and identified is more likely to qualify.[10] A person with a direct personal interest in the amenities of an area comes within the section, and a society with specific objects about the amenity or environment of an area might also have a greater interest.

28. In *Lindsay v Dunedin City Council* the Court disagreed with part of the judgement in *Purification Technologies* where Judge Sheppard held that an interest in preservation of a particular environment would not meet the test in s 274.[11] The Judge in

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8 Affidavit of Paul David Marshall sworn 31 August 2018, annexure "A", at 3.

9 *Meadow 3 Limited v Queenstown Lakes District Council* ENC Christchurch C001/08, 15 January 2008 illustrates an interest pursuant to s 274 can be satisfied across a number of factors, not just one compelling factor.

10 *Trustees of the Neville Crawford Family Trust v Far North District Council*, above n 2, at [15].

11 *Purification Technologies Limited v Taupo District Council*, above n 3, at 7.

Lindsay considered this to be an "over-generalisation" and that it depends on what those interests are:[12]

> For example, if the objects are general, such as "... to protect the native forest and birds of New Zealand" or "to campaign for and support both rural communities and the agricultural industry" then any society with those objects could be seen as representing an aspect of the public interest and thus should not – in the absence of more specific purposes – be let in the back door under section 274 as having an interest greater than the general public.

29. The Judge concluded the issue by describing the Currie Road Residents and Friends Society Incorporated's interest as "very specific" compared with that of the general public and considered it "very unlikely that the general public knows (on average) where Outram is, let alone has an interest in the amenities of Currie Road."[13]

30. In application, the Waiau Rivercare Group's focus, outlined in the Letter, is to improve the health of the Lower Waiau River. It is submitted this is a specific stretch of the Waiau River from the MLC to Te Wae Wae Lagoon where the water flows to the ocean. While the Council appears to consider a river a less specific place than a road (paragraph 19 of their Memorandum of Counsel), it is not clear what the basis for this is.

31. It is submitted the Waiau Rivercare Group has just as specific an interest as the appellants in *Lindsay* when compared to that of the general public as outside of this community, the adverse impact of the MPS on the Lower Waiau Catchment is little known.[14]

32. The Council referred to the case of *Mangawhai Heads Holdings Limited v Kaipara District Council* where the Court held the aspiring s 274 party did not indicate a specific interest in resource management issues.

33. In contrast, whilst the Waiau Rivercare Group does not have a constitution, the Letter makes it clear that the Waiau Rivercare Group has an interest in resource management matters, illustrating the connection between positive outcomes for the Lower Waiau River, the MPS, and planning processes, throughout.

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12 *Lindsay v Dunedin City Council*, above n 6, at [11].
13 *Lindsay v Dunedin City Council*, above n 6, at [20].
14 Affidavit of Paul David Marshall sworn 31 August 2018.

34. In *Toomey v Thames-Coromandel District Court* it was stated at [30]:[15]

> It is also relevant to having a greater interest than the general public that WBGT did not exist when the proposed District Plan was notified and the period for making submissions was open. It came into existence subsequently on 24 May 2017/ it therefore lacks a record of participation in resource management matters that can give some organisations standing as true representatives of the public interest.

35. This case is distinguishable in that whilst the Waiau Rivercare Group was similarly formed after the close of submissions, they have since demonstrated participation in resource management issues as outlined in the Affidavit of Paul Marshall. The Waiau Rivercare Group have held regular meetings, since its formation on 7 June 2017, relating to resource management issues that affect the community.

36. Therefore, the Waiau Rivercare Group has a specific interest when compared to the general public.

CONCLUSION

37. Counsel submits the Waiau Rivercare Group meets the test pursuant to s 274 Resource Management Act 1991 and should be admitted as a party to the proceedings.

DATED at Invercargill this 31st day of August 2018

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Riki Donnelly
Counsel for the Waiau Rivercare Group

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15 *Toomey v Thames-Coromandel District Court* [2017] NZEnvC 199 at [30]. (**Annexed** and marked "**F**").

"A"

BEFORE THE ENVIRONMENT COURT

Decision [2013] NZEnvC 141

IN THE MATTER	of an appeal under section 120 of the Resource Management Act 1991 (**the Act**)
BETWEEN	TRUSTEES OF THE NEVILLE CRAWFORD FAMILY TRUST (ENV-2012-AKL-000092) Appellant
AND	FAR NORTH DISTRICT COUNCIL Respondent

Hearing on the papers

Court: Acting Principal Environment Judge L J Newhook

Submissions: Mr B Drey for the Russell Protection Society

Mr A Golightly for the Trustees of the Crawford Family Trust

Ms J Baguley for the Far North District Council

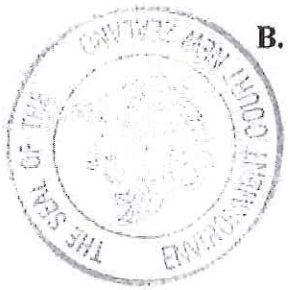
Mr D Nicolson and Mrs K Nicolson (section 274 parties)

Mr G Doyle (section 274 party)

DECISION OF THE ENVIRONMENT COURT ON RUSSELL PROTECTION SOCIETY'S STANDING TO BECOME A SECTION 274 PARTY

A. The Russell Protection Society has standing to join this appeal under section 274(1)(d).

B. The Russell Protection Society is joined to this appeal as an interested party under section 274.



REASONS FOR DECISION

Introduction

[1] This appeal was filed on 24 May 2012 in relation to the Council's decision to refuse a resource consent to subdivide lots 46 and 47 DP 19294 to create two allotments at Russell Heights Road and Long Beach Road, Russell.

[2] On 15 June 2012 the Russell Protection Society (**the Society**) filed a notice of intention to become a party to this appeal under section 274(1)(d) of the Act, on the grounds that it has an interest in the appeal that is greater than the interest the general public has.

[3] The appellants advised the Court that they objected to the Society becoming a party to this appeal.

[4] The issue of the Society's standing to join this appeal was placed on hold, to be dealt with after the parties had attended Court annexed mediation.

[5] The parties have since attended two such mediation sessions, and the matter is now to progress to hearing. Before the hearing takes place, however, this Court must first determine the issue of whether the Society has standing to join this appeal as a party under s274(1)(d).

The Society

[6] The Society was set up in 1986 and became a registered incorporated society on 30 June 1987. The Society has a current membership of some 85-90 individuals, families and organisations that represent a broad cross section of the Russell Community. The aims of the Society are set out below as follows:

a. To promote the preservation of the special nature, character and environment of the Russell area and surrounds, as well as the offshore islands. To maintain an appropriate setting for heritage buildings and places and protect the original town plan, as well as the visual character of the township and peninsula, and safeguarding all of them from inappropriate development and or other detrimental incursions.
b. To lobby, make representations and submissions and to use all available means in pursuit of these goals.
c. To keep the public informed of the society's aims and actions.
d. To support and promote actions by members of the association and other like minded groups.
e. To fund the association as necessary to enable it to perform and fulfil its functions and goals and promote wise and sustainable development.

The parties' submissions

[7] The Society submitted that it has an interest in this matter that is greater than the interest that the general public has based on the aims listed above and on the grounds that:

a. it participated in the appeal process during the formation of the Far North District Plan that established the pattern of zoning for the Russell Peninsula and the subdivision requirements for the Coastal Living Zone.

b. The Society has a direct interest in defending the integrity of these Coastal Living Zone provisions, as well as the objectives and policies of the District Plan generally.

c. The Society has a wider interest in the appeal that represents the broader community aspirations of Russell in terms of safeguarding the character and landscape amenity of our historic Township.

[8] The appellants oppose the Society becoming an interested party to this appeal because the Nicolsons (s274 parties to this appeal) also happen to be members of the Society, and they consider that to allow the Society to become a party to this matter in addition to the Nicolsons would result in repetition, additional time and cost.

[9] The Society and the Nicolsons responded to this assertion and maintain that the Nicolsons do not represent the Society in respect of this appeal. The Nicolsons have a specific interest in the appeal because of the impacts that this proposed subdivision could have on their adjoining property. Although there is a closeness of purpose between the Nicolsons and the Society, they submitted that this is not a reason for the Society not to be a party to the appeal.

[10] It is noted that the Council and G Doyle, a section 274 party, have both advised that they will abide the decision of the Court on this issue.

Discussion

[11] Section 274 of the Act states:

> **274 Representation at proceedings**
>
> (1) The following persons may be a party to any proceedings before the Environment Court:
>
> (d) a person who has an interest in the proceedings that is greater than the interest that the general public has, but the person's right to be a party is limited by section 308C if the person is a person A as defined in section 308A and the proceedings are an appeal against a decision under this Act in favour of a person B as defined in section 308A

[12] In recent decisions such as ***Sandspit Yacht Club Marina Society Inc v Auckland Council,***[1] and ***Lindsay v Dunedin City Council***[2] the Court has established that the appropriate test to be applied under section 274(1)(d) is whether the interest of the society is different from (as in greater than) that of the general public, and whether this interest is specific when compared to that of the general public.

[13] In ***Sandspit*** a Society that was formed to establish and maintain access and enhance access to, over and around Kawau Island was found to not have a greater interest than that of the general public in relation to a proposal for a marina on the coast of greater Auckland.

[14] In ***Lindsay*** the Society's object was to protect the amenity values of Currie Road. Currie Road was to be directly affected by the resource consent application in question, and Judge Jackson held that the Society's interest was very specific when compared with that of the general public. As a result, the Society was found to have an interest in the appeal that was greater than the general public has.

[1] [2011] NZRMA 300.
[2] [2013] NZEnvC 8.

[15] In this case I consider that the Society has shown, through its registered aims and goals, that it has a specific interest in Russell and development in that area. It no doubt has an interest in Russell that is greater than the general public has when the Society is compared to a cross section of greater New Zealand. However, even within Russell, it is still fair to say that the Society and its members have a greater interest than that of the general public living there. The Society's interest is a specific one, and can be clearly defined and identified. On this basis, I consider that its aims and goals are specific enough to satisfy the criteria under section 274(1)(d), and the Society should be permitted to join this appeal.

[16] Furthermore, the fact that the Nicolsons may have similar issues and are involved in the Society are not reasons for the Society not to become a party to this appeal.

Decision

[17] Russell Protection Society has standing, and is authorised to join this appeal under section 274(1)(d) on the grounds that it has an interest in the proceedings that is greater than the interest that the general public has.

SIGNED at AUCKLAND this 26th day of June 2013

L J Newhook
Acting Principal Environment Judge

"B"

Decision No. W 10/95

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal pursuant to section 120

BETWEEN PURIFICATION TECHNOLOGIES LIMITED

(Appeal: RMA 553/94)

Appellant

AND TAUPO DISTRICT COUNCIL

Respondent

BEFORE THE PLANNING TRIBUNAL

His Honour Judge Sheppard presiding
Mr P A Catchpole
Mr F Easdale

HEARING at TAUPO on 31 January and 1 February 1995

APPEARANCES

Mr R W Worth for the appellant
Mr A Dormer and Mr A F S Vane for the respondent
Mr M J Cameron for Anchor Products Limited and the New Zealand Co-operative Dairy Company Limited
Mr J Milne for the South Waikato District Council
Mr P R Wills for Greenpeace New Zealand Incorporated
Mr G W Cruickshank for Reject Irradiation Plant (R.I.P)
Ms T M Goldsmith for Mangakino Concerned Citizens Incorporated
Mr R E Tait for Friends of the Earth (NZ) Limited
Mr M A Hemi and Mr R H Himona for the Pou a Kani Marae Committee
Mr G K Stevenson for the Waikato Conservation Board
Mrs M A Richards in person
Mrs M M Brownsey in person
Mrs P J White in person
Mrs A Greed in person

RECORD OF ORAL DECISION GIVEN ON 1 FEBRUARY 1995

This is an appeal against refusal of a certificate of compliance under section 139 of the Resource Management Act 1991. A number of persons and bodies not being parties wish to take part in the hearing of the appeal. It is important that we make clear that whether or not they should be allowed to do so is not a matter for our own preference. The decision whether each of them is to be allowed to take part must be made according to law.

The appellant contends that it is entitled to a certificate of compliance in respect of its proposed activity (a commercial gamma irradiation plant proposed to be set up at Mangakino). Although a certificate of compliance is deemed to be a resource consent, section 139 makes no provision at all for participation by third parties on requests for certificates of compliance. It does not matter how gravely anyone else might consider that they would be affected by the proposed activity. Even if they considered that the request contains an inadequate or misleading description of the proposal or its likely effects, or that the relevant district rule is invalid, or that they could present evidence or information that nobody else has, that might lead to a better decision. There is no opportunity at all for submissions or evidence by them to be considered by the consent authority.

The only parties to this appeal are the appellant, Purification Technologies Limited, and the respondent, the Taupo District Council, which is the consent authority that made the decision refusing the request.

It is also important that we recognise that the issue in this appeal is whether or not the activity the subject of the request is described in the relevant district plan as a permitted activity in respect of the particular location, or that the activity could lawfully be carried out without a resource consent. In that respect this appeal is to be distinguished from the more familiar kind of appeal against grant or refusal of resource consent. The important distinction is that in that kind of appeal the Tribunal, having had regard to the requisite considerations (see section 104) and to the statutory purpose (see section 5), has the same discretion as the respondent had (see sections 290 and 105) to grant or refuse consent. By contrast, on an appeal against refusal of a certificate of compliance, if it is established that under the relevant plan the activity is a permitted activity or it could lawfully be carried out without a resource consent, the Tribunal does not have a discretion or choice to exercise. If it finds either of those conditions established the Tribunal must allow the appeal and direct the issue of a certificate of compliance. In this case that would be our duty whatever we thought about the desirability or otherwise of the proposed activity. Even if we considered that the activity would be inconsistent

with achieving the purpose described in section 5 of the Resource Management Act, or that it would have grave detrimental effects on public safety or on the environment, we would still have no choice. We would have to allow the appeal and direct the issue of a certificate of compliance which would have the effect of a resource consent.

By section 274 of the Resource Management Act, Parliament has described the classes of people who may appear and call evidence in proceedings before the Planning Tribunal under that Act. They are the Minister for the Environment, any local authority, any person having any interest in the proceedings greater than the public generally, and any parties to the proceedings. The intention is clear that only people in those classes are entitled to be heard in Tribunal proceedings. The Tribunal is not given authority to alter that list. Nor does the Tribunal have a discretion to hear anyone who is not within one or another of those classes, even if it considers that the statutory purpose, or the interests of justice, would be advanced by considering submissions or evidence that could be presented by someone else.

In this respect, as in others, the Resource Management Act regime differs from that provided by the previous statutes that it replaces. Under the Town and Country Planning Act 1977 nearly all applications for planning consent were notified and liberal rights of making submissions and being heard by the local authority were assured. Rights to object to applications for water rights under the Water and Soil Conservation Act 1967 were unrestricted. However under the Resource Management Act, Parliament has chosen not to follow those measures and has provided more confined rights of making submissions in respect of applications for resource consent. It is important that we adjust to the new regime and faithfully apply the new provisions. It would not be appropriate for us to apply them so liberally that the effects would be similar to that of the former legislation which Parliament has chosen not to continue.

In the case of *Waitutu Incorporation* v *Southland District Council* (Decision C 68/94) the Tribunal recognised that because section 139 of the Resource Management Act does not contemplate or allow for third party intervention, the Tribunal should be careful about allowing third parties to intervene when a request made under that section comes before it on appeal. We agree. In these proceedings we will wish to hear everyone who asks to be heard on the appeal and who is entitled to be heard. But we should decline to hear anyone who is not entitled to be heard. Otherwise we would be failing to give effect to the new regime.

None of the persons and bodies seeking to be heard is a party to the present appeal because, as the Act contemplates, no opportunities are given for making submissions on the appellant's request for a certificate of compliance. Each of them will only be eligible to appear and take part in the appeal proceedings if he, she or it establishes eligibility as a local authority, or a person having an interest in the proceedings greater than the public generally.

We are not aware of any decision explaining what is meant by those words in the Resource Management Act. In *Waitutu Incorporation* v *Southland District Council* the question arose whether the Minister of Conservation could be heard on the appeal pursuant to section 274 as a person having an interest in the proceedings greater than the public generally. The Tribunal found that the Minister's department had responsibility for adjoining land that could be materially affected by the proposed activities. It observed that a situation should be avoided in which a Minister might independently raise the same issues on an application for a declaration, and it held that he had the requisite interest and should be heard on the appeal. However, in that case the Tribunal did not have occasion to consider in general the kind of interest contemplated by the section.

Similar language to that in section 274 was used in a corresponding provision in section 157 of the former Town and Country Planning Act 1977, but we are not aware of any decision construing those words in that provision either. We were referred to the decision of the Tribunal under that Act in *Remarkables Protection Committee* v *Lake County* (1980) 7 NZTPA 273. Mr Dormer submitted that although the test in that case was whether the committee was representing a relevant aspect of the public interest, a body representing some relevant aspect of the public interest must be one that has a greater interest in the proceedings than the public generally. However, in passing the Resource Management Act, Parliament continued the standing formerly given under the Town and Country Planning Act, to persons having an interest in proceedings greater than the public generally, but chose not to continue the standing formerly given by that Act to bodies which represent an aspect of the public interest. The *Remarkables Protection Committee* case turned on the latter class, and does not bear on the qualification we have now to apply. Similarly, decisions about standing to appear on proceedings under the former Water and Soil Conservation Act 1967 such as *Water Resources Council* v *Southland Skindivers Club* [1976] 1 NZLR 1, turn on the different status provisions of that Act which Parliament had not brought forward into the present regime.

However, there are judgments of superior court judges on similar statutes in other jurisdictions which have persuasive value to guide us in this case.

In a well known Australian environmental law case, *Australian Conservation Foundation* v *The Commonwealth of Australia* (1980) 146 CLR 493; 28 ALR 257, a full bench of the High Court of Australia considered whether the Foundation had a special interest in the subject matter of the proceedings. In his judgment, Justice Gibbs (as he then was) observed that the subject matter did not affect the interests of the Foundation in any material way, but that "*the Foundation seeks to enforce the public law as a matter of principle as part of an endeavour to achieve its object and to uphold the values which it was formed to promote*" (28 ALR 267). The learned Judge said (28 ALR 270):

"I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the

meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a consent, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor claims of standing. If that were not so, the rule requiring special interest would be meaningless."

And later:

"The fact that the Foundation is incorporated with particular object does not strengthen its claims of standing. A natural person does not acquire standing simply by reason of the fact that he holds certain beliefs and wishes to translate them into action, and a body corporate formed to advance the same beliefs is in no stronger position ... a corporation does not acquire standing because some of its members possess it."

There are passages to the same effect in the judgments of Justices Stephen and Mason. The majority of the High Court, in dismissing an appeal against a judgment by Justice Aickin found that there was a consistent attitude in other common law jurisdictions. Justice Murphy dissented from the other members of the Court but the majority regarded the law as settled.

Both Mr Tait and Mr Dormer submitted that we should not apply the approach taken by the majority in that case. Mr Tait contended that it turned on Australian law, and did not apply to the Resource Management Act. Mr Dormer submitted that the *Conservation Federation* case turned on a different premise, whether the Federation had standing to bring proceedings to contest the validity of government action without the Attorney-General being a party. Counsel reminded us that in this case, the people who seek to be heard on this appeal do not themselves seek relief in the proceedings, but merely seek the right to appear and call evidence.

We accept the validity of those submissions. However, in the absence of any New Zealand decision which explains what is meant by the use, in legislation about participation in judicial proceedings, of language referring to a person having an interest in proceedings, we are entitled to look for guidance to the opinions on the subject of superior court judges in other common law countries.

Mr Worth informed us that the opinions of the majority in the High Court have been followed in other Australian cases, including recently *QIW Retailers* v *David Holdings* (1992) 109 ALR 377; but we have not had access to the report to confirm this.

In another Australian case, *Re McHatton and Collector of Customs* (1977) 18 ALR 154, Justice Brennan, who was then president of the Administrative Appeals Tribunal, held that the interests of a customs agent for the giving of right advice were not

affected by the making of a demand for payment in that payment would be due only if the agent's advice had been erroneous. The learned Judge cited a case in the Texas Court of Civil Appeals, *Empire Gas & Fuel Co* v *Railroad Commission of Texas* (1936) 90 So West Rep (2d) 1240. The report of that case is not available to us. However we can rely on Justice Brennan's quotation from the judgment, that whether such an exception affects the interest of a leaseholder depended on the facts of the particular case, and that the Court did not think that the statute contemplated the inclusion of those only remotely interested and affected.

Another Australian case on the topic was *Re Control Investment and Australian Broadcasting Tribunal (No. 1)* (1980) 3 ALD 74. In that case Justice Davies (who had succeeded Justice Brennan as president of the Administrative Appeals Tribunal) said (at page 79):

> *"In their context in ss 27 and 30 the words 'interests are affected' denote interests which a person has other than as a member of the general public and other than as a person merely holding a belief that a particular type of conduct should be prevented or a particular law observed. The interest affected need not be a legal interest nor need the person seeking joinder establish legal ownership of the interest."*

After referring to *Re McHatton and Collector of Customs*, Justice Davies continued:

> *"However a person seeking joinder must be able to identify a relevant interest which is his. In other contexts, dicta in cases have used the adjectives 'real', 'genuine' and 'direct' to describe the relationship required between the decision and the interest. Sections 27 and 30 do not make use of adjectives but they do require that the applicant demonstrates genuine affection of an interest which attaches to him. The nature of an interest required in a particular case will be influenced by the subject matter and context of the decision under review."*

The opinions of those eminent Australian Judges Gibbs, Stephen, Mason, Brennan and Davies, Justices, all command high respect.

In a case in the British Columbia Supreme Court, *Re Crippenden and City of Vancouver* (1984) 14 DLR (4th) 599, Justice McLachlin had to consider whether owners of property in the neighbourhood of a proposed subdivision were "*interested parties*" under legislation which required all parties interested to be served with a petition. The learned Judge said (at page 601):

> *"At law, the word 'interest' is typically used to connote legal concern, title or right in property, rather than in the larger sense of concern or curiosity. The objectors in the case at bar claim no legal interest, title or right in the property, although as neighbours they are generally concerned in the outcome of this application. In my opinion they are not 'parties interested' within the meaning of s.293.*
>
> *I am satisfied that it cannot have been the intention of the Legislature that all persons interested, in the sense of being concerned because of their interest in nearby properties, must be served with a petition and the supporting documentation for an*

application such as this. The class of persons required to be served would be vague and uncertain. The cost and delay might be great. While the court might order such other persons to be served under s.293 if it thinks just, they are not entitled as a matter of right to be served."

Although none of those judgments is binding on us, in the absence of any authority that is binding, we find persuasive the reasoning given by those superior court judges in cases having some similarity with the present.

Parliament has chosen to limit those who may be heard in Planning Tribunal proceedings to the classes of persons described in section 274. Parliament is to be taken to have intended the established meaning at law of reference to an interest in proceedings. The section has to be construed to give meaning to Parliament's evident intent to restrict the classes of persons entitled to appear and call evidence in proceedings before the Tribunal.

Applying those decision to the context of a decision refusing a certificate of compliance where there was no provision for third party intervention at first instance, we hold that on the true interpretation of the section, the interest in the proceedings greater than that of the public generally which qualifies a person to appear and call evidence must be one of some advantage or disadvantage, such as that arising from a right in property directly affected, and which is not remote. We also hold that an interest in proceedings in seeking to enforce the public law as a matter of principle, a belief that activity of a particular kind ought to be prevented, or as part of an endeavour to achieve the objects of an association, or uphold the values which it was formed to promote, would not be an interest in the proceedings greater than that of the public generally. Nor would an interest in the preservation of a particular environment, or an intellectual or emotional concern, the satisfaction of righting a wrong, an interest in upholding a principle, a sense of grievance or the risk of being ordered to pay costs. In our view a more liberal interpretation of the phrase "*interest in the proceedings*" would not be giving effect to the new regime of the Resource Management Act but would be reverting to the more liberal regime of the former legislation which Parliament has chosen not to continue.

Each person seeking to appear and call evidence in this appeal is entitled to have eligibility according to the statutory tests judged on his, her or its individual circumstances. It is the responsibility of each person seeking to be heard to provide evidence of that eligibility. We now therefore turn to consider separately the case of each of them.

<u>The South Waikato District Council</u>

The South Waikato District Council is a local authority, being a territorial authority within the definition in section 2(1) of the Local Government Act 1974. As such it is entitled by section 274 to appear and call evidence in any proceedings

before the Tribunal. That was not challenged. We admit the South Waikato District Council to these proceedings accordingly.

The Waikato Conservation Board

Conservation Boards are constituted under section 6L of the Conservation Act 1987. Their functions are broadly described in section 6M as including aspects of conservation management. Section 6N(2)(a) of that Act provides that each Board may advocate its interests at any public forum or in any statutory planning process, and subsection (3) explains that that includes the right to appear before courts and tribunals and be heard on matters affecting or relating to the Board's functions.

We assume that the case which the Waikato Conservation Board as a statutory body would make on this appeal would be limited to advocating its interests on conservation management. As such, it would be entitled to be heard under the special extension of the provisions of section 274 created by section 6N of the Conservation Act. Nobody contended otherwise. We therefore admit the Board to be heard and call evidence in the proceedings before the Tribunal on this appeal.

Pou a Kani Marae Committee

The Marae Committee had given the prescribed notice of its wish to appear on this appeal. The Committee's representatives asserted that they spoke for the tangata whenua of the area in which the appellant's site is situated. They referred to the duty imposed by section 6 on all persons exercising functions and powers under the Resource Management Act, in managing the use, development and protection of natural and physical resources, to recognise and provide for certain state of matters of national importance, including the relationship of Maori and their culture and traditions with their ancestral land. They asserted that the duty gave the Marae Committee an interest greater than the public generally. In answer to a question from the Tribunal they told us that both the marae and the appellant's site are on Lake Road, between 300 metres and 500 metres apart.

The appellant accepted the Marae Committee's claim to have an interest in the proceedings greater than the public generally. That acceptance does not relieve us of the duty to make our own decision in the circumstances of the case. However the decision whether or not the proposed irradiation plant is in terms of the district plan a permitted activity which may lawfully be carried out without a resource consent is a question that is an aspect of managing the use of natural resources, particularly land. If the Marae Committee has evidence to call which bears on that issue in respect of the relationship of Maori and their culture and traditions with their ancestral land, that would give them an interest in the proceedings greater than the public generally. It is an interest that is particular to

the tangata whenua, and the group chosen by them to express that interest, the Marae Committee. That is the basis on which we find that it has an interest in the proceedings greater than the public generally. We therefore admit the Committee to appear and call evidence in this appeal.

New Zealand Co-operative Dairy Company Limited and Anchor Products Limited

Anchor Products Limited is a wholly owned subsidiary of New Zealand Co-operative Dairy Company Limited and is constructing an export cheese factory at Lichfield, about 27 kilometres from Mangakino on a direct line, or about 40 kilometres by road. New Zealand Co-operative Dairy Company Limited is a dairy - farmers' co-operative responsible for nearly half of this country's dairy product exports, worth about $4 billion per year. It has three other dairy factories within 60 kilometres of Mangakino. The companies claimed to have an interest in the proceedings greater than the public generally in two respects. The first was that the impact on them of an unauthorised escape from the proposed plant would be disastrous for their business interests. The second was adverse perception by overseas markets for their products arising from risk of contamination.

For the Taupo District Council Mr Dormer submitted that the companies are economically affected by the proposal in the manner held in the case *Blencraft Manufacturing* v *Fletcher Developments* [1974] 1 NZLR 295 to qualify as a party affected; and that the test for being affected had been effect greater than or different from the public generally. He contended that the test is the same although the words have changed.

For the appellant, Mr Worth observed that the new premises at Lichfield are a long way from the site at Mangakino; and submitted that alleged hazards are not relevant in the context of an application under section 139; and that any hazards of transporting material to and from the plant are covered by regulations; and that perceptions by unknown third parties fall short of the required interest.

In reply Mr Cameron urged us to consider that in the circumstances a proximity of 27 kilometres gives standing.

In other decisions the Tribunal has declined to accept as relevant claimed perceptions of contamination of primary exports arising from proximity of export factories to a rubbish tip, (*Affco* v *Hamilton City* - Decision A 3/84) and a saleyard *Northland Wairoa Dairy Company* v *Dargaville Borough Council* (Decision A 181/82). In our opinion the claim in this case based on export market perceptions is even more remote and does not qualify.

However we do accept that the possibility of economic effects on the companies from a proposed activity would be relevant, and we bear in mind that at this stage we have not heard the substantive appeal, and cannot judge how plausible might be the companies' claims that their economic interests would be affected. We recognise that their milk collection districts extend to the Mangakino area.

The district rule which is relied on by the appellant to support its claim that the activity is a permitted activity classifies as predominant uses any industry where the council is satisfied that provision has been made to prevent noxious or dangerous aspects. It is not a cut-and-dried standard, but involves a judgment about prevention of noxious or dangerous aspects. If the relevant rule had specified an absolute standard requiring only a finding of primary fact and no other judgment, it may well be that the companies' interests would not have been sufficient. However their economic vulnerability to noxious or dangerous aspects, and to a judgment about the sufficiency of provisions to prevent them, gives them the extra quality of an interest in these proceedings greater than the public generally.

We so find and hold that the companies are entitled to be heard and to call evidence on this appeal.

Reject Irradiation Plant

A body calling itself Reject Irradiation Plant had given notice that it wished to be heard on the appeal. It was represented at the appeal hearing by its chairman, Mr G W Cruickshank, who gave evidence that it is a regionally based body, to be compared with the locally-based separate body Mangakino Concerned Citizens. Reject Irradiation Plant has about 20 members who live at Taupo and others at Tokoroa, Putaruru and Tirau. Mr Cruickshank deposed that the body's policy was to ensure that procedures for the proposed irradiation plant adhered to procedures outlined in a government policy statement issued in March 1989, and would include assessment of the need for the plant; need for siting in a heavily used area (where applicable); evaluation of the route of radioactive source material to the site; community concerns and values and acceptance of risks; and contingency plans; the assessment to be available prior to hearing of any application for consent.

The witness stated that the body had amassed much information on the application which had been analysed by people with technical expertise, and claimed that the application has a large number of faults, both technical and factual, and at least six breaches of the district scheme; and that its expert witnesses had analysed supporting documents for the application and found them wanting. In cross-examination Mr Cruickshank accepted that the body has no assets.

For the respondent Mr Dormer submitted that the body having been formally set up with a policy in writing sets it apart from the public generally and gave it a greater interest than the public generally in that representing a relevant aspect of the public interest must be a greater interest than the public generally.

We accept that the body called Reject Irradiation Plant has worthy objectives and a genuine wish to present material to the Tribunal that could bear on the issues to be decided. We should not be influenced by the claim that its policy amounts to adoption of a policy statement said to have been issued by the Government in 1989. Under the doctrine of the separation of powers government policy as such is not the source of law; and we are not aware of any way in which the policy has been incorporated into law. We assume (without deciding) that the evidence that the body would call would be relevant for the relatively narrow issues in this appeal.

Even so, there was no evidence on which we could find that Reject Irradiation Plant has an interest in the appeal proceedings of some advantage or disadvantage to it as a body. Its policy about the kind of assessment desirable before a hearing of a proposal for an irradiation plant seems sensible; but it does not bear on the issues in this appeal, which are confined to whether the respondent's district plan describes the proposed plant as a permitted activity, or whether the activity could lawfully be carried out without resource consent.

We therefore hold that Reject Irradiation Plant does not have an interest in the proceedings in the legal sense of those words that is greater than the public generally; and consequently the Resource Management Act does not allow it to be heard or call evidence in this appeal. That does not imply any criticism of the body or its officers or adherents, or of the policies that they have committed themselves to. Nor does this imply a conclusion that the technical information that it has obtained would not be helpful. It is simply a matter of our performing our duty to apply the law as we understand it. Accordingly we decline to allow Reject Irradiation Plant to be heard and call evidence on this appeal.

Mangakino Concerned Citizens Incorporated

This body was represented by Mrs T M Goldsmith, who deposed that it is a residents' group for the betterment of the community of Mangakino and surrounding districts, and had been incorporated on 27 January 1995 (which was just before the appeal hearing). The objectives in its rules include review of proposals and decisions of councils and others and taking action to protect Mangakino for the benefit of its community; and specifically active opposition to any facility using radiation for any purpose. The association has 34 members.

Mrs Goldsmith explained that the members of the association believed that the Taupo District Council had not fought for their interests as forcefully as it might have, and that they have concerns that should be aired which the District Council was not raising. Mrs Goldsmith reminded us that no-one would be more affected

by the proposed irradiation plant than the residents of Mangakino, who would be living within one kilometre of it and as close as 100 metres to it; "*they would be living with the risk*". She told us that they had evidence to give about the instability of the site due to the geothermal nature of the area; that is not a predominant use; that the application is full of anomalies; and that the proposed sewage disposal would not meet the regulations. She also asserted that Mangakino Concerned Citizens Incorporated represented the citizens of Mangakino and their interests. In cross-examination she agreed that some members of the association are to be called as witnesses for the Taupo District Council on this appeal, and although they would be able to give the views of residents of Mangakino opposed to the proposal, she understood that the District Council's case would be more limited than that which the association would present. It was established that the association has no assets that might be affected by the plant.

For the District Council, Mr Dormer submitted that the views held by the society may not otherwise be represented to the Tribunal. For the appellant, Mr Worth submitted that the association is not entitled to be heard and that its members' interests can be sufficiently articulated by the Mangakino residents to be called by the Council.

Even so, the society claims a representative role separate from that of the Council. It claims to represent people, some at least of whom would themselves qualify to be heard. At the least, the society's submissions on whether the proposal would be a predominant use, and on claimed anomalies in the application, could be relevant to the issues on this appeal. On an appeal arising from a notified resource consent application where such a society has made a submission, we have often found its representations helpful in deciding whether resource consent should be granted or refused, and if granted, what conditions should be imposed.

However, Parliament has chosen not to continue in the new regime the provision in the former Town and Country Planning Act for submissions by a body representing a relevant aspect of the public interest. Under the new regime such a body could make a submission on a notified resource consent application and subsequently could be heard on an appeal arising from that application. But as mentioned already, section 139 makes no provision for third-party intervention at all; and the society's wish to be heard on this appeal can only depend on itself being a person having an interest in the proceedings greater than the public generally.

Although it is a main purpose of the society's existence to oppose proposals such as the present, that does not give the association itself any advantage or disadvantage from the outcome of these proceedings. Rather, its motive in taking part is belief of its members that the proposed activity ought to be prevented. On our understanding of the meaning of reference to "*an interest in proceedings*", informed by the senior judicial opinions we have cited, the society's purpose does not qualify. In the absence of provision for a body or person to represent a relevant aspect of the public interest, or the interests of members of the

community, there does not appear to be an opportunity for that kind of contribution to an appeal where, as in this case, there was no opportunity for submissions to be lodged at first instance.

We find that Mangakino Concerned Citizens Incorporated does not have an interest in these proceedings greater than the public generally, and hold that it is not entitled to make submissions or call evidence on this appeal. Again we declare that this should not be understood as critical in any way of the association's members or objectives, or any unwillingness on our part to consider any relevant matters that it may have raised if it could have been heard.

Greenpeace New Zealand Incorporated and Friends of the Earth New Zealand Limited

These well known societies have worthy objectives and genuine beliefs that they have knowledge about irradiation plants that would assist sound decision-making on this appeal. However on our understanding of the meaning of the provision about having an interest in the proceedings, we find that neither of them has such an interest. In proceedings arising from a notified application where either of them have lodged a submission, we would willingly hear its case. That is not the position here, and we must decline to hear them.

Mesdames Richards, Brownsey, White and Greed

Mrs Richards is a dairy-farmer near Putaruru, and has long-term concerns about transporting hazardous waste by road, and about fumigation gases and irradiation treatment. Milk from her farm is sold to the New Zealand Co-operative Dairy Company. She agreed that she had no knowledge about the routes that would be used for transporting materials to the proposed site.

Mrs Brownsey lives at Tokoroa and her concern is that Mangakino should be aligned with Tokoroa. She claimed to be speaking for 1,888 who had signed a petition for a proposal about an irradiation plant at Tokoroa.

Mrs White and her husband have an export game-packing house at Tirau where they process products from throughout the region. She had been part of a group at Tokoroa which had researched radiation emissions.

Mrs Greed lives at Tirau and has a concern in local body reorganisation, particularly in a proposal that Mangakino be included in the South Waikato District. Mrs Greed was also concerned about scientific aspects of the proposal, and had obtained an evaluation of the application which she wished to present to the Tribunal. She claimed that as a ratepayer of the South Waikato District she had an interest greater than that of the public generally.

We are grateful that these people have taken the trouble to attend the Tribunal sitting and to prepare to give evidence at the hearing. The sincerity of each of them is not in question.

However none of them has shown that she would derive any advantage or disadvantage from the outcome of this appeal either way, which is greater than that of the public generally. We have not been persuaded that Mrs Richards' farm near Putaruru, or Mrs White's business at Tirau, stands to be affected by whether the proposal is a permitted activity that can be carried on without a resource consent, to an extent greater than that of the public generally.

In effect each of them, from her own viewpoint, is concerned about the proposal as a matter of principle to pursue and represent to us the value that harm to the community should be avoided. Their attention to these matters is to be commended. Even so, none of them has established that she has an interest in these proceedings in the meaning that we understand has to be given to that phrase, let alone an interest greater than that of the public generally. We hold that we are not free to allow any of them to appear and call evidence in these proceedings.

R N Ogilvie
for Registrar