OBJECTIVES OF THE ACT

Pursuant to s7.4(2) of the Act, the jurisdiction of the Court is exclusive. The Court held that this means that a consideration of the objectives of the Act and the powers conferred on the Court require an examination of the scheme of the legislation. This is substantially contained in s1.3, which sets out the objectives of the legislation. These objectives include the planning of an area to facilitate orderly development, and to provide an adequate framework for a person to apply for approval in respect of development proposals and to provide appropriate appeal rights in respect thereof. His Honour held that the scheme of the legislation does not include applications under the *Building Act*.

The relevant approval for construction of a dwelling house on the subject land was made under the *Building Act*, not the *Planning and Environment Act*. The words "use of land" in s2.24(3)(b) should be read in the context of the *Planning and Environment Act*. On a wide interpretation of the words "use of land", an action between a lessor and lessee in relation to a lease agreement would be brought within the declaratory jurisdiction of the Court.

Furthermore, the repetition in s2.24 of the phrase "in respect of" where it occurs in sub-s(1), (3) and (3)(b) does not enlarge the rights which are conferred thereby relative to the use of land. Undoubtedly the jurisdiction of the Court to hear and determine proceedings for declaration under s2.24(3)(a) is limited to construction issues arising under a Planning Scheme. "Planning Scheme" is defined in s1.4 of the Act and a reference to s2.1 of the Act establishes that "planning scheme" does not include the *Building Act*.

His Honour therefore held that s2.24(3)(b) did not give the Planning and Environment Court jurisdiction to hear and determine the originating application because the use of land in question was not brought within the *Planning and Environment Act*.

John Haydon
Barrister-at-Law
Brisbane

NEW ZEALAND

PROSECUTIONS UNDER THE RESOURCE MANAGEMENT ACT 1991

Two recent prosecutions under the *Resource Management Act* 1991 (RMA) illustrate the direction in which the New Zealand courts are moving in relation to environmental liability.

Both prosecutions arose from the same incident of chemical spillage. One prosecution involved the company hired to move drums containing hazardous chemicals, Machinery Movers, the second involved the company that hired them, Puketu Island Timber Co.

Machinery Movers were contracted by Puketu Island Timber Co to remove tanks containing chemicals. The Director of Machinery Movers sent two employees to the site to prepare the tanks for removal. On the basis of a letter that the Director showed them, the employees believed that the tanks contained stormwater. On the site, the employees were told that at least one tank contained chemicals. Contrary to instructions, they tipped the contents of the tanks on to the ground in the timber yard, instead of into the sewer. The chemicals then leaks into a nearby stream.

Over 100 ducks were killed. Members of the public were also treated for the effects of the chemicals, in some cases caused while attempting to assist the ducks.

The employees informed Machinery Movers director that the liquid was not being disposed of into the sewer, but took no action and the contamination continued over a period of two days.

The Auckland Regional Council brought proceedings under the RMA against Machinery Movers and Puketutu Island Timber Co who had engaged them.

In *Stanislau Jan Augustowicz v Machinery Movers Limited* (1993) 2 NZRMA 209, Machinery Movers pleaded not guilty to a number of charges including:

- discharging a contaminant into water;
- discharging a contaminant onto or into land in circumstances which might result in that contaminant entering water.

Defence

Machinery movers raised the defence of reasonable precaution created under ss340(2)(b) and 341(2)(b) of the *Resource Management Act* 1991. Section 340(2)(b) provides a defence where the defendant could not reasonably have known that the offence was being committed or took all reasonable steps to prevent the offence and took all reasonable steps to remedy the effects. Section 341(2)(b) provides a defence for acts beyond the control of the defendant.

Verdict

The Court concluded that Machinery Movers should have known that the discharge of the chemicals onto land was being carried out unlawfully. The directors had not taken all reasonable steps to prevent the commission of the offence given that it was revealed in evidence that he had become aware of the possibility that the tanks contained liquid other than stormwater.

The defences failed because the Court was not satisfied that the discharge was beyond the control of Machinery Movers. This was because the director should have investigated the situation when he was alerted of the form of disposal, should have sought to stop the continuing discharge, and should have ensured proper supervision of employees.

Sentence

Machinery Movers were found to have taken all steps reasonably available to it to remedy the adverse effects of the discharge. Taking into account these mitigating actions and the financial position of the company, the Court fined Machinery Movers $25000 plus costs.

The second prosecution is of particular interest because it is the first prosecution brought under the RMA against a party who engages an agent to carry out work in its behalf. In *Stanislau Jan Augustowicz v Puketutu Timber Company Ltd* (CR No. 2090012515 - 16), the prosecution had to establish that Machinery Movers were acting a "agent or employee" of Puketutu within section 340 of the Act. Section 340 provides that where an offence is committed under the Act by any person acting as the agent or employee of another person, that other person will be liable to the same extent as if he or she had personally committed the offence.

On the facts of the case, the Court was satisfied that an agency relationship had arisen because Puketutu had organised the contract with Machinery Movers, even though a third company had paid for the removal costs.

Defence

Puketutu was successful in raising the s340(2)(b) defence. The Court held that the directors of Puketutu could not reasonably be expected to have known that the offence was to be, or was being, committed.

On the question of whether Puketutu took all reasonable steps to remedy any adverse effects, the prosecution contended that because Machinery Movers had met all expenses incurred in the clean-up process, Puktetutu could not raise the defence. The Court rejected this contention and held that Puketutu had taken all reasonable steps by concerning itself with the clean up, ensuring that steps were being taken,

and assisting in developing long-term solutions. Any obligation to share costs was moral and a matter between the companies.

Puketutu was acquitted.

DISCRETION TO NOTIFY RESOURCE CONSENT APPLICATION

Section 94 of the *Resource Management Act* defines those classes of applications for resource consents which do not need to be publicly notified. This is important because if an application is dealt with on a non-notified basis, potential objectors are not able to become involved or appeal any grant of consent to the Planning Tribunal.

In general, applications may be non-notified if they involve activities which the consent authority considers will have a minor effect on the environment and where people who may be adversely affected have given their written consent.

Section 94(5) provides that a consent authority may require any application to be notified even if a plan expressly provides that such an application need not be so notified.

A recent decisions of the Planning Tribunal confirms that consent authorities are within their powers to notify applications even where the requirements in section 95 have been met.

In *Foodstuffs (South Island) Limited v Christchurch City Council* (1992) 2 NZRMA 134, the defendant applicant wanted to expand an existing supermarket. It obtained the appropriate written consents from people affected, only to have the application publicly notified by the consent authority on the basis that the proposal was contrary to the objectives and policies of the district plan.

The defendant argued that s94(5) was not intended to confer a general discretion to require notification independently of the preceding tests in the section. In other words, a blanket justification for inviting intervention through public notification was not intended.

While the Tribunal accepted that section 94(5) is not open-ended, it upheld the authority's decision as consistent with s5 RMA i.e. as giving a council a discretion to require public notification in cases where it wants to have the benefit of submission from a wider section of the community to assist it in reaching a final decision.

ENFORCEMENT POWERS ON THE FORESHORE

Another recent Planning Tribunal decision - *Auckland City Council v Moulton* (1992) 2 NZRMA 202 - illustrates the varied uses of the RMA. In this case, the respondent lived on board a vessel moored on an island foreshore within the coastal marine area.

Residents with a view of the bay complained and the Council made an application under s316 for an enforcement order requiring the respondent to cease occupation of the foreshore contrary to s12(2).

Section 12 provides that:

(2) No person may do any of the following in relation to land in the coastal marine area of the Crown or land vested in the regional council:

(a) Occupy the land...

unless expressly allowed to do so by a rule in a regional plan or a resource consent.

The Tribunal found that although the vessel's position was satisfactory, the occupation contravened section 12(2)(a) and local by-laws, because the vessels were not within reserved mooring areas.