PAUL RADICH QC

CLIFTONCHAMBERS

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By email

Buddle Findlay
Solicitors
PO Box 2694
WELLINGTON 6140

Attention: Paul Beverley

Westpower Limited — Proposed Waitaha Hydro Scheme — Recommendations of the Hearing Panel to the Decision-maker

1. Unfortunately, while Westpower Limited ("Westpower") presented detailed and comprehensive submissions and evidence to the Hearing Panel in Hokitika during the week of 5 December 2016, the Hearing Chairman's report ("the Report"):[1]

   (a) Is founded upon material errors of law on the statutory scheme;

   (b) Fails to record accurately the case that was presented to the Hearing Panel for Westpower;

   (c) Does not explain adequately, or on occasions at all, the reasons for having reached certain conclusions;

Error of law

2. If a decision-maker misinterprets the requirements or provisions of a statute; if it fails to appreciate the true nature of the questions it had to address; if it fails to ask the right questions, then it will have erred in law.[2]

3. There are two legal errors in the Report. The first is that, on pages 14–15 of the Report it is said that *"the Hearing Chairman is not satisfied that [the submissions on increased reliability of supply] are relevant under the Conservation Act and therefore recommends that they not be allowed*". Similarly, on page 17 it is said, in relation to a submission from NZ Energy, that consistency with New Zealand's energy strategy goal is something that the decision-maker should *"give little weight to"*. And, on page 18, it is said that *"the Hearing Chairman considers that the submissions in regard to economic justification/benefits both in support of the application and in opposition are not relevant"*.

4. These comments (which are in part directed to points under these heads made by submitters but also to points made by Westpower) are consistent with the fact that the Report makes virtually no

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1 Report from David Newey as delegate of Director-General of Conservation to the Minister of Conservation dated June 2017.

2 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24], *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [28], *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [44]–[46].

L1, Solnet House, 70 The Terrace
PO Box 10731, Wellington 6143
New Zealand

P 64-4-974 5951
M 64-21-673 777

E paul.radich@cliftonchambers.co.nz
F 64-4-974 5955

www.cliftonchambers.co.nz

mention whatsoever of essential aspects of Westpower's case that were covered in detail at the commencement of its submissions in reply.[3]

5. A central tenet in Westpower's case was that the net position when looking at section 17U of the Conservation Act 1987 ("the Act"), which requires an assessment of the nature of the activity and its effects, is that the positive effects of the proposal – the benefits it brings – outweigh any other effects.

6. As was explained to the Hearing Panel, section 17U of the Act requires the Minister to have regard to the "effects" of the activity. "Effect" is defined in section 2 of the Act as having the same meaning as it has in the Resource Management Act 1991. The Resource Management Act defines "effect" broadly so as to include both positive and adverse effects. As was pointed out to the Hearing Panel, it is material that the definition of "effect" in section 2 of the Act was inserted by the Conservation Amendment Act 1996, which also inserted Part 3B of the Act, dealing with concessions. Clearly, therefore, it was intended that regard be had to both positive and negative effects when considering concessions.

7. The Hearing Panel was referred to *Reay v Minister of Conservation* which supports the point that the definition of "effects" is not so narrow as to exclude the consideration of a broad range of effects.[4]

8. The point is that, as was explained in the paper entitled "Statutory Assessment", which form part of Westpower's submissions to the Hearing Panel, the Act strikes a balance between protection, on the one hand, and use, on the other. The Act is not premised on absolute preservation/protection with no provision for use of conservation land or resources. Rather, the terms "preservation" and "protection" in section 2 of the Act use the words *"so far as is practicable"*. The concession scheme itself was introduced to provide a framework for the use of conservation land for infrastructure such that, while there will invariably be effects, they need to be balanced bearing in mind steps taken to mitigate them and bearing in mind the positive effects of a scheme of this sort.

9. The submissions in reply detailed carefully the positive effects:

   (a) They looked at the Brown Copeland & Co report on the economic effects of the scheme[5] which noted the profits generated by the scheme would pass back to the community given that Westpower is 100 per cent community owned, considered the improvements that would be achieved in terms of electricity supply, self-sufficiency and reliability and the way in which a confined set of effects on a short stretch of river cannot dominate those considerations.

   (b) The Brown Copeland & Co report discussed the way in which the scheme would align with the government's energy policy; moreover, with its obligations under the Climate Change Response Act 2002. Handouts on the government's 2011–2021 Energy Strategy and on the National Policy Statement on Renewable Electricity Generation were discussed. An analysis in terms of the operation of the emissions trading market was provided.

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3 Paragraphs 1–27 of the submissions presented for Westpower at the hearing entitled *Submissions in Reply for Westpower – Introduction*, dated 8 December 2016.

4 *Reay v Minister of Conservation* [2015] NZCA 461 at [21].

5 Brown Copeland & Co *Assessment of Economic Effects of the Proposed Waitaha River Hydro Scheme* (31 March 2014).

(c) The point was made that it is only through schemes like this that these legislative targets and obligations can be met and that it would be an alarming outcome if measures such as this scheme, essential in achieving those objectives, were not able to proceed because of regulatory constrains in circumstances where any adverse effects are, on balance, able to be managed appropriately.

(d) There was discussion of New Zealand's electricity market and the importance of reducing reliance on generation from geothermal energy and coal.

(e) There was a discussion of the way in which the scheme would reduce electricity prices in the region, provide sustainability and security of supply (generally and in times of national disaster).[6]

(f) The economic benefits from construction, employment and expenditure for suppliers were analysed.

(g) 'Perspective' was emphasised in the sense that the scheme removes only 3.62 ha of vegetation; a very small percentage of the conservation land on the West Coast and of the Waitaha Forest Stewardship area; a large portion of the scheme being underground.

10. These features and positive effects were discussed in some detail. Yet they are not mentioned at all in the Report. At one level, this shows the Hearing Panel failed to take into account relevant considerations (a flaw in its own right) and, equally, underlines an error of law in its approach to the Act; in looking only at negative effects and saying, without any reason, that the Hearing Chairman *"is not satisfied that these submissions are relevant under the Conservation Act"*.[7]

11. The points made during the hearing (and mentioned above) on compliance with the Government's energy efficiency targets are underlined by the fact that only a week ago the Minister of Energy announced the release of the New Zealand Energy Efficiency and Conservation Act Strategy 2017 to 2022, entitled *Unlocking Our Energy Productivity and Renewable Potential*. The key target for one of the three priority areas – the "innovative and efficient use of electricity" is "90% of electricity will be generated from renewable sources by 2025 (in an average hydrological year)." This is an existing target but it has been restated in this new strategy document, showing that it remains front of mind. It really would be incongruous for the government to promote a target of this sort, on the one hand, and then to place barriers in the way of achieving it in an appropriate case like this, on the other. Achieving compliance with these targets, and with the Energy Efficiency and Conservation Act 2000, is a key positive environmental effect that was advanced at the hearing but which has not been addressed in the Report.

12. The second error of law in the Report is related to the first. On pages 78–79, 83–85 and 90–91, the Hearing Chairman concluded that, because of the findings that adverse effects on natural character, tramping and kayaking could not be mitigated adequately, this would *"lead inevitably to his recommending also that you accept submissions that the activity would be contrary to the Act's purpose"*. The same reasoning was used to support findings that the activity must inevitably be contrary to the Act and to certain provisions of the Conservation Management Strategy.[8]

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6 Noting that the transmission lines from the national grid, coming to the region may be severed in the event of a natural disaster.

7 Report, recommendation column on pages 14–15, 17 and 18.

8 Report, pages 79 and 84.

13. The conclusions fail to identify or discuss the provisions of the Act that the scheme is said to be contrary to, or the purposes for which the land is held. A careful analysis of the purposes of the Act, of the purposes for which the land is held and of the Conservation Management Strategy was provided to the Hearing Panel. That analysis considered the way in which the Act, and the concession provisions in particular, are focused on striking an appropriate balance; on the fact that positive effects can be considered and that avoidance of adverse effects is not absolute; the phrases *"so far as is practicable"* and *"reasonably and practicably"* are used throughout the relevant provisions.

14. To say simply that, because adverse effects were identified, the proposal must be contrary to the provisions of the Act, contrary to the purposes for which the land is held and/or contrary to the Conservation Management Strategy, is at odds with the statutory scheme; a scheme that was not considered or addressed in the Report.

The failure to record the case for Westpower accurately

15. In 1980, Cooke J (as he then was) stressed the point that it is a longstanding principle that, if a decision-maker has another person ascertain and report upon facts for the decision-maker, the decision-maker is responsible for anything that is misleading or inadequate in the report.[9] Inaccurate information in a report in that case saw a deportation order being set aside. These are principles that have been applied repeatedly.

16. For example, a report to a decision-maker can taint the decision-maker's ultimate decision where the report:

    (a) Does not summarise accurately the submissions that were made;[10]

    (b) Omits relevant material;[11]

    (c) Is not fair, accurate or adequate.[12]

17. It is of real concern that the Report does not explain for the decision-maker Westpower's case on material points. This is in part due to the table format that the Report takes. The approach to explaining the evidence and material provided by Westpower in the "Westpower's response" column varies. On occasions, some paragraphs, but not others, in written material used by Westpower is identified. Sometimes the name of one of Westpower's witnesses is included. But no mention is made of the person's expertise and qualifications (as against the unqualified and unsubstantiated opinions of submitters). Isolated parts of evidence and submissions are referred to without reference being made to the overall views expressed in the evidence or submission and in many instances, relevant evidence and submissions have been left out altogether.

18. The tables that have been prepared by Westpower in response to the Report identify in detail the material and information provided by Westpower to the Hearing Panel (before and during the

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9 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 149.

10 *SmithKline Beecham (NZ) Ltd v Minister of Health* [1992] NZAR 357 (HC) at 374 — where departmental officials did not properly communicate to the Minister the submissions of a person affected by the Minister's decision.

11 *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries* HC, Wellington CIV-2008-485-2016, 23 February 2010 at [22], [242]–[244] — where a Minister made a decision about fisheries matters based on incomplete and potentially misleading official advice.

12 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [40], [51] and [53] — where a Minister relied on a report which did not mention the opposition of an interested party to a proposed course of action.

hearing) on effects and mitigation relating to natural character, tramping and kayaking[13] but which were not referenced or included in the draft report. The omissions are so stark as to cause grave concerns about the Hearing Chairman's process in preparing his report and about the conclusions reached as a consequence.

19. The following are some examples of the issues here:

    (a) In the "Westpower's response" column on the submissions relating to section 17U(2)(b) on page 44 of the Report, it is frequently said *"Westpower states"* or *"Westpower responds"* without explaining to the decision-maker where that information came from or whether it is a summary. On these key points, Westpower made legal and factual submissions, presented expert reports and some of its experts gave oral evidence at the hearing.

    (b) On occasions, the source of the information is referred to. For example, on page 46, there is mention of *"AEE and recreation report"*. But the nature of the report and the credentials of its author, as against those of submitters, is not explained. As another example, mention is made of James Bentley on page 47 but again his expertise and the nature of his evidence as a whole is not identified.

    (c) The analysis of Westpower's case on effects on natural character is represented in an incomplete and fragmented way.[14] Evidence about Morgan Gorge or the Upper Waitaha is identified without reference to the overall conclusions presented for Westpower on the scheme's effects on landscape in the catchment.

    (d) The legal submissions presented on why methods for remedying, avoiding or mitigating adverse effects are reasonable are not identified.

Insufficient reasons

20. It is not enough to express a conclusion in the words of a statutory provision. Reasons must be proper, adequate reasons dealing with the point in contention, providing appropriate findings on material questions of fact, referring to the relevant law or legal principles and applying the law to the facts as found.[15]

21. An applicant must be able to understand the basis for the decision — the decision-maker must explain 'why' a conclusion was reached.[16]

22. It is an error of law not to address all relevant and material aspects of a submission.[17]

23. Despite detailed expert evidence and legal submissions on the nature of the scheme's effects and on mitigation, the reasons for the Hearing Panel's conclusion that there are adverse effects that cannot adequately be mitigated are largely non-existent. For example:

    (a) In relation to natural character, landscape and visual amenity, it is simply said *"the area that would be affected by the activity holds very high natural character, landscape and visual amenity values including intrinsic values. The activity would have significant adverse effects*

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13 Being the three factual areas in which the Hearing Chairman considered that adverse effects exist which cannot adequately or reasonably be mitigated – see Pages 8 to 10 of the Report.

14 Report, Pages 44–48.

15 *Singh v Chief Executive Officer of the Department of Labour* [1999] NZAR 258 (CA) at 263.

16 *Kelsey v Minister of Trade* [2015] NZHC 2497, [2015] 2 NZLR 218 at [131].

17 *Ngati Maru v Thames-Coromandel District Council* HC Hamilton CIV-2004-485-330, 27 August 2004 at [92].

on those values. Those adverse effects cannot be mitigated".[18] There is no explanation as to why, in the face of the evidence and submissions, that finding was made.

(b) The same is so of the Hearing Panel's conclusions on effects on tramping. The conclusion is simply that there are no adequate or reasonable methods for remedying, avoiding or mitigating adverse effects on trampers.[19] There is no explanation as to why that conclusion has been reached.

(c) On kayaking effects, the finding is that the effects on kayaking would be significant and *"'no take' days (even if that number were increased) would not be adequate mitigation for these effects"*.[20] There is no explanation as to why that is so, having regard, for example, to Westpower's evidence that, depending on the flow range (whether 17.5 – 22.5 or 16 – 24 cumecs) there would be likely to be a range of 20 – 37 minimum five-hour kayaking windows and 10 – 24 minimum seven-hour kayaking windows over a six year period[21], in addition to the proposed no take days; all of which provides more opportunity for kayaking than there is current demand or usage.

(d) A conclusion is expressed that the activity would be contrary to the Conservation Act.[22] But neither here, nor elsewhere, is there an explanation of why that is the case; other than by a cross-reference to findings on adverse effects, which is a different matter.

The effect of these flaws in the Report

24. Each of these flaws — the errors of law and inadequacies in explaining Westpower's case and the conclusions reached — is a reviewable error that would enable any decision based upon the Report to be set aside.

25. It will not be enough for the writers of the Report to simply "backfill" based upon these comments. The errors in understanding the legal framework, and understanding Westpower's case and in being able to draw reasoned conclusions are manifest. To simply include new material now while arriving at the same conclusions would be likely to raise issues of predetermination.

26. The only tenable approach it is suggested from this point, with these flaws in mind, would be for the decision-maker to give genuine independent consideration to the submissions, evidence and statutory criteria, having given Westpower an opportunity to explain its position where the Hearing Panel has failed to do so.

27. It will always be tenable for a decision-maker to differ from the conclusions in a report that has been commissioned if there is a reasonable basis for doing so.[23] The following principles are relevant:

(a) While generally a decision-maker is entitled to act on officials' advice, it does not follow that the officials' judgement as to the significance of relevant factors and the weighing of those factors is that which the decision-maker would or should apply after consideration of

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18 Report, pages 45–46 in the Recommendations column.

19 Report, pages 56–57.

20 Report, pages 61–62.

21 Report, pages 63 – 64

22 Report, page 79.

23 *Akaroa Marine Protection Society Inc v Minister of Conservation* [2012] NZHC 933, [2012] NZAR 655 at [66].

submissions. If a statute gives a decision-maker the power to decide, the decision is for the decision-maker, and not his or her officials.[24]

(b) Relevant matters (such as submissions) must be given genuine attention and thought by the decision-maker.[25]

(c) Unless the person with the decision-making power turns an independent mind to the issues, a Court cannot be satisfied that a decision has been made properly.[26]

28. For these reasons, it would be unsafe for the decision-maker to proceed without addressing these flaws, through hearing from Westpower and giving genuine consideration to the evidence and submissions it has made (evidence and submissions that can be identified for the decision-maker) and the areas in which the Hearing Panel has expressed concern.

Yours faithfully

Paul Radich QC

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24 *New Zealand Fishing Industry Association Inc v Ministry of Agriculture & Fisheries* [1998] 1 NZLR 544 (CA) at 567. See also *Jeffs v New Zealand Dairy Production Board* [1967] NZLR 1047 (PC).

25 *New Zealand Fishing Industry Association Inc v Minister of Agriculture & Fisheries* [1988] 1 NZLR 544 (CA) at 552, per Cooke P.

26 *Videbeck v Auckland City Council* [2002] 3 NZLR 842 (HC) at [70(a)] per Heath J – where a Council decision-maker had effectively rubberstamped the decision of a de facto delegate regarding notification of a resource consent application