OUTstanding landscapes: Is the RMA protecting New Zealand's heritage?

Thank you for the invitation to address the RMLA conference and to speak on the topic of 'OUTstanding landscapes: Is the RMA protecting New Zealand's heritage?'

Specifically to address:

(a) the extent of the protection afforded by section 6(b) as a matter of national importance, and

(b) the concept of what is an outstanding natural landscape.

At the time the invitation was extended, I was told that practitioners were still coming to grips with the *King Salmon*[1] decision and my thoughts on that decision would be appreciated.

I am very grateful for the opportunity to talk, not least because in answering the question this has required a great deal of reflection on the approach I adopt when decision-making. The opportunity to do so is timely in a post-*King Salmon* world.

What really sparked my interest was the short introduction to the speech in the conference brochure which asks "How can we retain what is outstanding about the top of the south, while balancing primary resource demand pressures and the tension this inevitably creates?"

I felt a sense of unease with the way that the question was framed, because broken down the questioner assumes:

(a) there is capacity in the resource available to meet demand;

(b) demand is to be balanced against retaining what is outstanding (including natural landscapes); or

(c) that meeting demand is something of a bottom line.

If I am right then the question could potentially strike at the heart of Part 2 of the Act, and s 5 in particular, and so it needs to be addressed in the context of *King Salmon*.

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[1] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38.

That said, how *King Salmon* is to be applied outside of its own factual context is a rapidly developing area of law and so nothing that I say here is to be taken as a settled view of the law. The talk is instead my unvarnished response to the questions posed by the RMLA.

The questions are also a reminder that environmental problems are 'hot' problems about which everything becomes controversial and the controversies are structural and foundational. These controversies indicate a lack of stabilised knowledge base. It is in this uncertain context that a wide and changing array of actors with mutually incompatible understandings of their world engage.[2]

So I have chosen to approach the RMLA's questions by talking about three distinct but overlapping segments:

(a) the concept of sustainable management;
(b) the quality of regional and district planning documents; and
(c) outstanding natural landscapes.

The concept of sustainable management

In this segment I will examine the concept of sustainable management with reference to:

(i) the *King Salmon* decision; and
(ii) what has changed in the approach to decision making following *King Salmon*.

How the purpose of the Act is achieved is fundamentally a question of policy for central and local government.

At the 2013 Salmon Lecture presented by Chief Justice Dame Sian Elias, concern was expressed that there may have been a misunderstanding of the meaning of sustainable management and the purpose of ss 6 and 7 of the Act.[3] The intention of giving greater freedom of action to development, provided the three "bottom-lines" of protection under s 5(2) were met, was not carried out as the architects of the Act intended.[4]

[2] Professor Elizabeth Fisher "Towards Environmental Constitutionalism: a different vision of the Resource Management Act 1991" (Address to Resource Management Law Association: Dunedin, 26 September 2014) at 3.
[3] Chief Justice Sian Elias "Righting Environmental Justice" (Address to Resource Management Law Association: Salmon Lecture, Auckland, 25 July 2013) at 8.
[4] Chief Justice Sian Elias "Righting Environmental Justice" (Address to Resource Management Law Association: Salmon Lecture, Auckland, 25 July 2013) at 9.

The Chief Justice may well be right as I doubt that the architects of the Act, including the Hon. Simon Upton and Sir Geoffrey Palmer QC, would have understood that meeting demand for natural resources was the bottom line.

While the courts are rightly cautious about attempts by former Ministers and commentators to breathe meaning into the words of statutes, the questions posed are evocative of the broader discussion that preceded *King Salmon*, including the debate that informed the first RM Bill.

This discussion will be well known to many and it was referenced by the Chief Justice in the Salmon Lecture. To frame the context for this talk, I will briefly address what was said.

The Hon. Simon Upton was not being trite when he observed that resources are used by people and our view of resource use must inevitably be an anthropocentric one. Judgments under the Act about the importance of biophysical matters are judgments made by humans reflecting on human values.[5] The outcomes required under s 5, to be progressively implemented through the planning documents,[6] include the three discrete matters in s 5(2)(a-c) of sustaining the potential of the resources to meet the needs of future generations, safeguarding their life supporting capacity and then avoiding remedying or mitigating adverse effects of activities on the environment. Unless there is a bottom line, he said:

> … sustainable management ceases to be a fixed point or pre-eminent principle and sinks back into being a mealy-mouthed manifesto whose meaning is whatever decision-makers on the day want it to be.[7]

For Sir Geoffrey Palmer QC, the sustainability paradigm constitutes the key anchoring principle and the key policy for the whole Act. The core idea is that the development must take place within the capacity of the environment and ecosystems that support it.[8] The inspiration for the Act came from the report by the World Commission on Environment and Development entitled *Our Common Future.*[9] This report set out principles for environmental protection and sustainable development. Rather than viewing development and environment as competing values, one to be sacrificed for the other, the World Commission

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[5] Simon Upton, Helen Atkins and Gerard Willis “Section 5 re-visited: a critique of Skelton & Memon’s analysis” November 2002 RMJ 10 at 12.
[6] Simon Upton, Helen Atkins and Gerard Willis “Section 5 re-visited: a critique of Skelton & Memon’s analysis” November 2002 RMJ 10 at 15.
[7] Simon Upton “Purpose and Principle in the Resource Management Act” (1995) 3 Wai L Rev 17 at 16.
[8] Sir Geoffrey Palmer QC “Resource Management Act” Planning Quarterly, June 2016, issue 201, 5 at 12.
[9] Sir Geoffrey Palmer QC “Resource Management Act” Planning Quarterly, June 2016, issue 201, 5 at 12.

regarded the two as inseparable – needs could only be met within the limitations of the environment.

It is not the purpose of the Act to promote "sustainable development", rather "sustainable management". This phrasing too was deliberate and reflected a move away from planning for activities to one of enabling the market to meet demand within the sustainable limits of the country's resources. The focus under the first RM Bill was on externalities – the effects on the receiving environment, rather than attempting to direct or provide for economic or social outcomes.[10]

Returning to the theme of the conference and what is 'OUTstanding', in 2008 the Principal Environment Judge, the late Judge Bollard, spoke of the ever-present calls for environmental compromises and trade-offs at the individual level and of changes that all too often belatedly disclose mediocre environmental qualities, if not irreversible degrading outcomes.[11]

If correct, and several speakers at the conference suggest that he was, there are two possible [overlapping] explanations for this:

(a) it is the product of an overall judgment approach to decision-making or, I posit, of policies that are enabling of environmental compromises and trade-offs; together with

(b) belated, little or no recognition that taken by themselves the use or development or protection of natural and physical resources is inherently self-limiting.

Overall judgment approach

Turning next to the first of these explanations, until *King Salmon* decision-making was generally approached under s 5 by reaching an overall broad judgment about whether a proposal would promote the sustainable management purpose of the Act. The approach enabled a judgment to be made which allowed conflicting considerations to be compared and the scale or degree of them, and their relative significance or proportion, to be taken into account. On some issues a proposal could promote one or more aspects of sustainable

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[10] Environmental Defence Society Technical Advisory Group *On the review of sections 6 and 7 of the Resource Management Act* 1991 (April 2012) at 12 quoting Hon Simon Upton (4 July 1991) 516 NZPD. Also, Simon Upton, Helen Atkins and Gerard Willis "Section 5 re-visited: a critique of Skelton & Memon's analysis" November 2002 RMJ, 10 at 12.

[11] The address of Judge Bollard is cited by the Chief Justice in "Righting Environmental Justice" (Address to Resource Management Law Association: Salmon Lecture, Auckland, 25 July 2013) at 10.

management, and on others it might not attain, or fully attain, sustaining, safeguarding or avoid, remedy or mitigate adverse effects. The Environment Court held that to conclude the latter overrode the former would result in there being no room for the exercise of judgment.[12]

The approach has been criticised as opening the door for arbitrariness and inequality of treatment in decision-making.[13] If every decision under the Act is referable back to Part 2, the two-fold consequences are that there are:

(a) no guaranteed bottom lines; and

(b) the ultimate decision as to how to effect sustainable management rests with the decision-maker. The decision-maker's views can displace the collective community view of sustainable management [where these are expressed] and decision-makers have a wide discretion in selecting which values to prefer in the final analysis.[14]

Applied in the context of a plan change, an impression may be created that the overall judgment approach allows the decision-maker to cut across the inclusive and elaborate consultative and public participatory processes that originally created the policy statements and plans, thus creating uncertainty and undermining the strategic and region wide approach to planning.[15]

It was the Chief Justice's view that closer attention to the structure of the legislation may have brought about a different approach,[16] and this occurred in *King Salmon*. So, what did *King Salmon* have to say about this approach and how has the Court responded?

The decision of King Salmon

The New Zealand King Salmon Co Ltd applied for a plan change and sought resource consent to authorise salmon farms at nine sites in the Marlborough Sounds. The application was referred to a Board of Inquiry. The Board approved four of the proposed sites, declining the necessary plan change and resource consents for the remaining five. The Board's

[12] *North Shore City Council & ors v Auckland Regional Council* 2 ELRNZ 305 at 346-347.
[13] Chief Justice Sian Elias "Righting Environmental Justice" (Address to Resource Management Law Association: Salmon Lecture, Auckland, 25 July 2013) at 12.
[14] Ceri Warnock "Reconceptualising the Role of the New Zealand Environment Court" (2014) 26(3) NZJE 507 at 512.
[15] Ceri Warnock "Reconceptualising the Role of the New Zealand Environment Court" (2014) 26(3) NZJE 507 at 515.
[16] Chief Justice Sian Elias "Righting Environmental Justice" (Address to Resource Management Law Association: Salmon Lecture, Auckland, 25 July 2013) at 12.

decision was the subject of two appeals; the appeal by the Environmental Defence Society (EDS) addresses the application of an overall judgment when making a decision under the Act.

The Board observed that planning instruments, particularly higher order ones, nearly always contain a wide range of provisions; provisions which are sometimes in conflict. The direction in s 67(3)(b) of the Act that the plan change is "to give effect to" the NZCPS does not mean that every policy must be met. This is not a simple check-box exercise. Requiring that every single policy must be given full effect would set an impossibly high threshold for any type of activity to occur within the coastal marine area.[17] Further, the Board found that there was a tension between NZCPS and the Regional Policy Statement as these instruments pulled in different directions.[18] Given this the Board applied an "overall broad judgment",[19] and considered whether the instruments as a whole were generally given effect to.[20]

The Board found the proposal would have significant adverse effects on the natural character and landscape of Port Gore. While policies 13(1)(i) and 15(a) of the NZCPS would not be complied with, the Board nevertheless approved the plan change for this area and granted the consent.

The Supreme Court picked up the concern that the planning documents were pulling in different directions.[21] In doing so, the Court agreed with EDS that the language of the relevant policies is significant. In the context of s 5(2)(c) and the relevant policies, "avoid" means to "not allow" or to "prevent the occurrence of" and in the Supreme Court's view these policies provide something in the nature of a bottom line.[22]

Whether "avoid" bites depends, however, on whether an overall judgment approach is adopted.[23]

In finding that the Board's decision was wrong in law[24] the Supreme Court rejected the application of the overall judgment approach in the context of a plan change required to give effect to the NZCPS. The overall judgment approach reduces the policies to a list of relevant

[17] *King Salmon* at [1181].
[18] *King Salmon* at [1180].
[19] *King Salmon* at [80].
[20] *King Salmon* at [1180].
[21] *King Salmon* at [38]-[63].
[22] *King Salmon* at [96] and [132].
[23] *King Salmon* at [97].
[24] *King Salmon* at [154].

factors that are to be considered. This approach is inconsistent with the process that led to the NZCPS's adoption;[25] it creates uncertainty and with it a complex and protracted decision-making process.[26]

Because the NZCPS builds on the principles set out in ss 5 and 6 of the Act, the Court held that it was not necessary or helpful on a plan change to resort to Part 2 to interpret the policies, particularly in the absence of any allegation of invalidity, incomplete coverage or uncertainty of meaning.[27]

The Supreme Court concluded by observing that the definition of sustainable management is general in nature, and that, standing alone, its application in particular contexts will often, perhaps generally, be uncertain and difficult.[28] Section 5 is not an operative section; it is not the section under which particular planning decisions are made. Parliament has provided for a hierarchy of planning documents for the purpose of fleshing out Part 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making.[29] "Sustainable management" is instead a guiding principle to be applied by persons performing functions under the Act.[30]

What has changed in the approach to decision making following King Salmon

Particularly in the context of a resource consent application, if it is suggested that Councils or the Court should approach decision-making or, for that matter Part 2 generally, in a way so as to allow:

(a) the proposal's benefits to be balanced, weighed or traded off against any adverse environmental effects;[31] and
(b) the use, development, and protection of physical and natural resources to be regarded as alternatives uninformed by policy; or
(c) benefits, or an absence of any adverse effects, to be weighed over clear and contrary directive policy in the planning instruments

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[25] *King Salmon* at [136].
[26] *King Salmon* at [137]-[138] there is discussion of this in the context of the outcomes on appeals against decisions on resource consent applications.
[27] *King Salmon* at [90].
[28] *King Salmon* at [150].
[29] *King Salmon* at [150]-[151].
[30] *King Salmon* at [24(a)].
[31] *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433 at 444, particularly when done without reference to policy.

— this approach would appear not to have survived *King Salmon*.

I say this for two reasons. First, this approach would not be decision-making that is informed by policy. Second, a discretion exercised for this purpose would not promote the sustainable management of natural and physical resources, as it does not respect the definition of sustainable management. The arrangement of words in a statute matters.[32] The definition does not address two sets of interests; one developmental and the other environmental. The definition of "sustainable management" recognises that taken by themselves the use or development or protection of natural and physical resources is self-limiting: in order for them to be sustained resources are managed as an integrated whole.

Several Environment and High Court decisions have considered *King Salmon*, including decisions which engage with matters of national importance. This is a rapidly developing area of law, and this development is much in evidence in the decisions of the Environment Court as it responds to those of the higher Courts. There are two cases, *Man O' War Station v Auckland City Council* and *R J Davidson Family Trust v Marlborough District Council & Ors*[33] on appeal before the higher courts which, if the appellants are successful, will see further and significant development in the law.

A third decision, the *Board of Inquiry – Basin Bridge,*[34] appears to confirm the continued application of the overall judgment in the context of a requirement for a designation. Justice Brown distinguishes *King Salmon,* commenting that *King Salmon* may be viewed as applying Part 2 in a particular way.[35] In *King Salmon* the NZCPS had already given substance to the Part 2 provisions, in contrast the Board was required under s 171 to consider the environmental effects of the notice of requirement, subject to Part 2 and having particular regard to the relevant planning documents.[36] Importantly, the planning documents do not determine the outcome of a s 171 decision.

My understanding of the law as it presently stands is this.

The exercise of any decision-making discretion is to be undertaken in a principled manner. The discretion is to be exercised for the purpose that it was conferred. Unless the context

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[32] Letter from Sir Geoffrey Palmer QC to NZ Fish and Game Council re: Implication of King Salmon and Ruataniwha Dam decisions (5 May 2014) at 7.

[33] *Man O' War Station v Auckland City Council* [2015] NZHC 767 *and R J Davidson Family Trust v Marlborough District Council & Ors* [2016] NZEnvC 81.

[34] *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991.

[35] *Basin Bridge* at [114].

[36] *Basin Bridge* at [118].

clearly indicates otherwise, under the Act this will be for the purpose of promoting the sustainable management of natural and physical resources.

When considering an application for resource consent under s 104 the planning documents are the basis for decision-making;[37] these give substance to Part 2 of the Act.[38]

While the particular effects of an activity on the environment may differ in scale and proportion, the significance of those effects is informed by the policy in the planning documents.[39] On a resource consent application, the final judgment will depend on the weight attached to the various policies of the planning documents and to the planning documents themselves; this requires careful attention to be paid to the way that the policies are expressed. Policies that are expressed in more directive terms will carry greater weight than those expressed in less directive terms.[40]

If after careful analysis it is found that the policies conflict, then recourse may be had to Part 2 of the Act to determine which of them is to be given greater weight.

Ultimately a judgment is to be made whether, in light of the relevant policies, properly weighted, the application promotes the purpose of the Act. This does not call for a judgment based on the balancing of the proposal's benefits with its adverse effects as such an exercise is not one informed by policy.

Quality of regional and district planning documents

In this second segment I wish to briefly address the quality of regional and district planning documents.

In 2012 John Hassan (now Judge Hassan) and Louise Cooney said that the elephant in the room, which may have been there since the inception of the Environment Court to hear merit

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[37] The relevant effects, and what is to be done about them, should be identified in those documents; per *R J Davidson Family Trust v Marlborough District Council & Ors* [2016] NZEnvC 81. Decision-makers are entitled to rely on a settled plan as giving effect to the purpose and principles of the Act; *Thumb Point Station v Auckland City Council* [2015] NZHC 1053 at [31]. While the specific context of the Thumb Point appeal is a plan change, the observation made is of general application.

[38] See *King Salmon* at [30].

[39] See Judge Kirkpatrick's commentary in "Section 32 RMA – A Brief Introduction" (11 August 2014) www. Planning.org.nz at [6] that a close review of the RMA does not support its description of an "effects-based statute. The position is more complicated. A proposal cannot be assessed simply in terms of its effects; it must be assessed in terms of the relevant planning documents which in turn must be prepared in light of higher order policy statements and environmental standards.

[40] Applying *King Salmon* at [129]. For an exemplar case on a plan change appeal where careful attention was paid to the language used in the planning instruments and subsequent weighting of policies see *Opoutere Ratepayers & Residents Association v Waikato Regional Council* [2015] EnvC at 105.

appeals on administrative decisions, is a lack of confidence in some Councils to formulate policy and regulation that is well informed and based on fair and robust processes.[41]

King Salmon anticipates that the planning documents which form an integral part of the framework of the Act, and in giving substance to its purpose, will identify objectives, policies and methods with increasing particularity both as to substantive content and locality.[42] Yet in my experience this is not always done in district or regional plans.

I posit many plans have embedded policy which invites environmental compromise and trade-offs at the level of an individual consent application. Some commentators suggest that policy is itself a product of an overall judgment approach.

Again, in my experience, policies often fail to give explicit recognition to what is valued in the resource with a consequence that there may be little direction as to how the resource is to be sustainably managed. Like a mantra policies state that the effects on the resource are to be avoided, remedied or mitigated – thus conferring a wide discretion in relation to their use, and development or protection. The consequence of this is that the applicant and the public have no way of knowing what sustainable management (success) looks like.

On the topic of outstanding natural landscapes Simon Swaffield, a professor of landscape architecture at Lincoln University, sympathetically observes local councils are largely left to their own devices with little guidance and smaller councils lack the necessary skills and resources.[43] More pointedly Sir Geoffrey Palmer QC says local authorities have been left wandering in the wilderness, not appreciating the nature of their duties under the Act.[44]

The Principal Environment Judge, Judge Newhook, comments that plan drafting and preparation invariably fall short at Council level and often to a notable extent. Appeals are an opportunity for the public to improve the planning documents by suggesting wording that provides greater internal consistency and clarity, removing unlawful content, and ensuring the policy direction of the more hierarchical planning instruments or even the provisions of the RMA are adhered to.[45]

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[41] John Hassan and Louise Cooney "Review of sections 6 and 7: principles, processes and confidence in decision-makers" (2012) 9 BRMB Issue 14, 167 at 170. See also Lindsay Gow "The Resource Management Act: Origins, context and intentions" November 2014 RMJ 27 at 31.
[42] At [31]-[47].
[43] S Swaffield and C Swanwick "Opinion Piece".
[44] Sir Geoffrey Palmer QC "Resource Management Act" Planning Quarterly, June 2016, issue 201, 5 at 6.
[45] Principal Judge Laurie Newhook "Effectiveness and Legitimacy of Dispute Resolution in the New Zealand Environment Court" (14th Annual Colloquium of the IUCN Academy of Environmental Law, Oslo, June 2016) at 14.

In the meantime Derek Nolan QC suggests that clearly interpreting and applying the Supreme Court's approach to existing planning documents will present challenges. He suggests policies which have applied a blanket approach of "avoiding" adverse effects may dictate outcomes in particular circumstances that do not in fact achieve the purpose of the Act.[46] I agree with Mr Nolan that at the very least the public are entitled to expect that planning authorities and the courts on appeal will adopt provisions that are clearly expressed, and say what they are intended to mean.[47] In the meantime the Court does not assume a policy making role and will implement policies according to their tenor.

Outstanding natural landscapes

In the third and final segment I come back to the question asked at the outset: OUTstanding natural landscapes: is the RMA protecting New Zealand's heritage?

Specifically to address:

(a) the extent of the protection afforded by s 6(b) as a matter of national importance; and

(b) the concept of what is an outstanding natural landscape.

Lost in the reporting of the sometimes polarised and divisive discourse is the fact that Parliament through the legislation has determined the matters of national importance which are to be recognised and provided for in planning instruments. Parliament set the agenda when it passed s 6 of the Act.

We forget also that "landscape", as a concept used by landscape architects and related disciplines, is a cultural construct as are "justice", "arts", "language" and "nature". We come to know the landscape through the values and perceptions held by people, be they landscape professionals, people who have an attachment to a place or those who have knowledge and experience of a region, area or site and its natural and physical resources –

[46] Derek Nolan & James Gardner-Hopkins "EDS v New Zealand King Salmon – the implications" November 2014 RMJ 1 at 4.

[47] Derek Nolan & James Gardner-Hopkins "EDS v New Zealand King Salmon – the implications" November 2014 RMJ 1 at 5.

seen in that way "landscape is a conduit and a symbol for a wide range of attitudes and concerns".[48]

In common with other environmental problems there are no simple and self-executing solutions to the question of how to recognise and then provide for outstanding natural landscapes, and I do not offer any. After all environmental law is a fundamentally difficult subject which cuts across traditional legal structures and across ideas of property ownership and ideas of public power.[49]

The Environment Court often becomes engaged where there is a failure to identify outstanding natural landscapes in a local planning document or a failure to identify the values which qualified them as outstanding. The failure to identify outstanding natural landscapes (if any) is rightly regarded as a breach of duty in s 6 to recognise and provide for the same.[50]

Before the Court this almost invariably leads to evidence supporting a full evaluation or re-evaluation of the landscape. There is nothing efficient or effective about this process. In many instances it simply transfers the costs of landscape assessment from the local Council to the parties and increases the time spent decision-making. The risk in proceeding this way is that the importance people and communities attach to particular landscapes and their values may be inadequately conveyed (the parties' own views may or may not be representative of the community).

The extent of protection afforded by s 6(b)

The Act is clear about what is to be achieved in terms of the protection of outstanding natural landscapes. The s 6(b) direction is to protect them from inappropriate development. This

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[48] *MainPower Ltd v Hurunui District Council* [2011] NZEnvC 384 at [292].

[49] Professor Elizabeth Fisher "Towards Environmental Constitutionalism: a different vision of the Resource Management Act 1991" (Address to Resource Management Law Association, Dunedin, 26 September 2014).

[50] See *Environmental Defence Society v Kaipara District Council* [2010] NZEnvC 284 where the Court declined to make a declaration that the failure to include provisions that recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development is contrary to s 6(b) of the Act. The Court was critical of the District Council which it observed had not yet got to the point of meeting its obligations under s 6(b), s 31, and to give effect to relevant policies in the NZCPS and objectives and policies in the NRPS but adjourned the proceedings in the face of an undertaking by the Council to move promptly to meets its obligations. In contrast, *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 210 the Court declared that the District Council has a duty to recognise and provide for the protection of significant areas of indigenous vegetation and/or significant habitats of for the purpose of s 6(c) of the Act.

does not mean protection against any development;[51] the Act allows for the possibility of appropriate development.

Instead the Act protects against "inappropriate" development. What is inappropriate is to be assessed by reference to what it is that is sought to be protected.[52]

King Salmon answers the first question posed by RMLA this way: the extent to which protection is afforded by s 6(b) depends on what is sought to be protected.[53] It is this simple, and (it seems) this difficult.

Concept of outstanding natural landscapes

Before I address what is to be protected, I touch briefly on the concept of "outstanding" natural landscapes. The term has three distinct elements, and each of these is not without controversy.

First, the definition of landscape. How we define landscape is important for the reason given by Dr Marion Read – it determines what we can know about it and thus how it can be investigated and assessed.[54] Subject to the definition adopted a landscape will generally make itself known by its distinctive attributes which gives the area identity.

Second, for a landscape to be recognised it must be a *natural* landscape. The enquiry is whether the landscape is *natural enough*.[55]

Third, the natural landscape must be outstanding. The Act does not contain a threshold for "outstandingness", and the enquiry is whether the natural landscape stands out among the other landscapes of the district or region.[56] Until 2015 the Court said that when formulating policy, the assessment of landscape was to be undertaken on a district or region-wide basis.[57] The correctness of this approach is under challenge in *Man O' War Station v Auckland City Council,* now before the Court of Appeal, where the appellant is arguing that a

[51] *King Salmon* at [29(a)].
[52] *King Salmon* at [101].
[53] *King Salmon* at [101] and [105].
[54] Marion Read "Landscape Boundaries: An examination of the influence of Environment Court Decisions on the Practice of Landscape Assessment in Aotearoa/New Zealand" at 33 (MRP, Massey University, 2012).
[55] See Institute of Landscape Architects Best Practice Guide for definitions of "landscape attributes" and landscape character"
[56] *Waiareka Valley Preservation Soc Inc v Waitaki District Council* EnvC C058/09.
[57] See for example *Opoutere Ratepayers and Residents Association v Waikato Regional Council* [2015] NZEnvC 105 at [99]; *Unison Networks Ltd v Hastings District Council* W 011/2009 at [81]; *Motorimu Wind Farm Ltd v Palmerston North City Council* W067/2008 at [106]; *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* C129/2001, 9 August 2001 at [95].

landscape may only qualify as an outstanding natural landscape following a nationwide assessment.

Without losing sight of *Man O' War* I suggest that what is to be protected from inappropriate development are values which cause the landscape to stand out and qualify it as an outstanding natural landscape.

"Landscape values" are derived from the importance that people and communities attach to particular landscapes and landscape attributes.[58] The determination as to whether a landscape's values are outstanding necessarily involves a judgment which is both subjective (cultural preferences) and objective (the landscape's natural elements, patterns and processes).[59] The judgment is an expression of the communities' landscape preferences which may well be hardwired into our culture,[60] but this is not to the exclusion of a judgment about the natural landscape which our preferences are a product. To qualify, these landscapes will necessarily be a repository of the nation's biophysical heritage. Both are to be recognised in order for policy to be formulated.

There needs to be a hard look at the manner in which landscape assessments are undertaken and translated into policy. This is for the reason that where the landscapes and features are identified (typically on a map) it is not uncommon for planning documents to say nothing about the values which qualified them as outstanding.

Policy is an informed response to the landscape's outstanding values. Knowing what is of value in a landscape is crucial when determining the *ability* of the landscape to adapt to change whilst retaining its particular character and values ('landscape resilience') and the *amount of change* a landscape can accommodate without substantially altering or compromising its existing character or values ('landscape capacity').[61]

Knowing what values qualified the natural landscape as outstanding would ensure landowners are well informed and better equipped to make decisions about use of land with particular reference to effects on those values.[62] It would target the aspects of change that

[58] Institute of Landscape Architects Best Practice Guide, definition of "landscape values".
[59] *MainPower v Marlborough District Council* [2011] NZEnvC 384 at [290]-[292].
[60] Marion Read "Landscape Boundaries: An examination of the influence of Environment Court Decisions on the Practice of Landscape Assessment in Aotearoa/New Zealand" at 44-45 (MRP, Massey University, 2012).
[61] See Best Practice Guide definition of terms.
[62] Hawkes Bay Federated Farmers comments on the Natural Areas Discussion Document to the Hastings District Council (29 February 2012) at 2. See also Judge J R Jackson "Recognising outstanding natural landscapes under the RMA" Resource Management Theory and Practice 2014, 116 at 133.

really matter, avoiding unnecessary constraints upon everyday rural land management.[63] And so as a minimum, the planning documents should contain a description of the values that led to the classification of the landscape as outstanding. And in response policies and rules should encourage or discourage activities, as appropriate, in the particular circumstances.

Coming back to *Man O' War*, the High Court affirmed that the identification of the landscapes should drive policies, not the other way round.[64] While *Man O' War* had appealed the location of the landscapes, it had not challenged the related objectives and policies. On appeal is the point of law whether the identification of an ONL for the purpose of s 6(b) is informed by or is dependent upon the protection afforded to that landscape under the RMA and/or planning instrument.

Finally, and to touch on consistency of landscape assessment methodology, the Court in undertaking a merit review of administrative decisions can and does provide leadership by formulating and applying principles of general application which may be used to evaluate the integrity of future decisions. The Court does so within the constraints of its jurisdiction and in response to the evidence.

This is difficult where there is presently no common assessment methodology recognised by the landscape profession. Consistency in the assessment methodology employed is very important, not least because the outcomes of the decision-making can be more certain and predictable, and decisions maybe more likely to receive a wider public support and ultimately will be less costly to the participants. I personally do not find it substantially helpful to receive irreconcilable opinion evidence where the differences arise out of the witnesses' choice of assessment methodology.

The 'Best Practice Guide' developed by the Institute of Landscape Architects has been widely adopted by many landscape experts. From my perspective as an Environment Judge, the Best Practice Guide is useful because it defines essential terms and in doing so admits to the possibility that landscape assessment is a very structured exercise. However, the Guide does not go far enough in exploring and promoting the consistency of its application by individuals. With this in mind, the Institute is embarking on a new initiative to provide significantly more detailed guidance. Led by the President of the Institute, I

[63] S Swaffield and C Swanwick "Opinion Piece".
[64] *Man O' War Station v Auckland City Council* [2015] NZHC 767; *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council* C 180/99 at [97].

understand the initiative support of senior representatives of the profession, as well as involvement from the Ministry for the Environment, Department of Conservation, Local Government New Zealand and other stakeholders. It aims to deliver both a technical document for landscape experts, and broader guidance for related professions. The Court's Principal Judge has welcomed the news and has offered support for the initiative.[65]

If this cannot be achieved there remains the possibility that a National Policy Statement for landscape evaluation will be developed. While a National Policy Statement or even an agreed assessment methodology is unlikely to be a full panacea, it might at least provide a sturdier platform on which to mediate properly informed but competing interests.

In conclusion

It is a poverty of imagination (and understanding) to value an outstanding natural landscape solely because it is aesthetically pleasing. When landscapes are discussed in this way the public discourse becomes polarised and descends into an enquiry as to “who is to pay for all this splendour”?

These landscapes are also a repository of the nation’s biophysical heritage.

And they are recognised by Maori because for them the land may be the embodiment of their ancestors.[66]

The protection of outstanding natural landscapes from inappropriate development as a matter of national importance meets the anthropocentric values attached to the landscape, while, at the same time sustaining the potential of the resources to meet the needs of future generations, safeguarding their life supporting capacity and avoiding remedying or mitigating adverse effects of activities on the environment.

In doing so the Act responds to the inalienable premise that all of life is interconnected and the ecosystems of people and communities are not at the centre of, nor ecologically separate from, the environment. The challenge laid down in s 5 of the Act is to manage resources as an integrated whole, and to resist the seemingly easier course which is to silo and manage resources discretely and without recognition of the synergy which exists between them and with the wider environment. The challenge to RM professionals is to

[65] The support is not of a substantive kind, but to encourage the relevant professionals to move forward.
[66] As distinct from the considerations in s 6(e) d the relationships of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

resist reading down s 5 such that it becomes limited to a concern about avoiding remedying or mitigating adverse effects.

How this is done necessarily entails judgment, albeit one that is informed by policy.

If we are to meet the imminent changes to the environment including those induced by global warming, then perhaps we need to get back to thinking of sustainable management, as the architects of the Act conceived it to be, and to regard the use, development and protection of natural and physical resources not as alternatives but as a cumulative whole.

J E Borthwick
Environment Judge