IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2014-485-11253
[2015] NZHC 1991

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal under s 149V(1) of the Act against the Report and Decision of the Board of Inquiry into the Basin Bridge Proposal dated 29 August 2014
BETWEEN	NEW ZEALAND TRANSPORT AGENCY Appellant
AND	ARCHITECTURAL CENTRE INCORPORATED & ORS Parties to the appeal under s 302(1) of the Act

Hearing: 20-24, 27-31 July 2015

Counsel: M Casey QC, A F D Cameron, F Wedde and A Cameron for Appellant
K M Anderson and E Manohar for Wellington City Council (Interested Party)
P Milne for Architectural Centre Incorporated (Interested Party)
T Bennion for Mount Victoria Historical Society (Interested Party)
M S R Palmer QC for Save the Basin Campaign (Interested Party) and Mount Victoria Residents Association (Interested Party)

Judgment: 21 August 2015

JUDGMENT OF BROWN J

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Overview

[1] On 17 June 2013 the appellant (NZTA) lodged a Notice of Requirement (NoR) and applications for incidental resource consents for what is commonly referred to as the Basin Bridge Project (Project). The Project was to construct, operate and maintain a two lane one-way bridge on the north side of the Basin Reserve in Wellington City as part of State Highway 1 between Paterson Street and Taranaki Street.

[2] The key aspects of the Project were summarised in NZTA's submissions in this way:

> (a) The Basin Reserve is a key transport node within the Wellington network. [NZTA's] assessment is that the Project area is subject to congestion, delay and journey time variability, particularly during peak periods and weekends, and also has a high accident rate. These problems are predicted to get worse in the future as travel demand grows in the area for all transport modes, and changes in land use occur in the immediate vicinity (Adelaide Road) and the wider Wellington area (Wellington airport and the southern/eastern suburbs).
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> (b) The Project provides essential infrastructure by grade separating the westbound traffic movements at the Basin Reserve. Grade separation would be provided by way of a bridge (the Basin Bridge), located in the north of the Basin Reserve. The Basin Bridge would carry westbound traffic from the Mt Victoria tunnel to Buckle Street/Arras Tunnel. This would remove that traffic from the roads around the Basin Reserve, which frees up capacity on those roads for public transport improvements and north-south local traffic.
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> (c) The Project also includes a dedicated pedestrian/cycling path and enables improvements for those transportation modes around the Basin Reserve by reducing conflict between those modes and vehicular traffic.

[3] On 7 July 2013 the Minister for the Environment referred the Proposal to a Board of Inquiry appointed under s 149J of the Resource Management Act 1991 (RMA) to hear and determine the merits of the application. The Minister's reasons for directing the Proposal to a Board of Inquiry were as follows:

National significance

I consider the matters are a proposal of national significance because:

- The proposal is adjacent to and partially within the Basin Reserve Historic Area and international test cricket ground; in the vicinity of other historic places including the former Home of Compassion Crèche, the former Mount Cook Police Station, Government House and the former National Art Gallery and Dominion Museum; and is adjacent to the National War Memorial Park (Pukeahu). The proposal is likely to affect recreational, memorial, and heritage values associated with this area of national significance (including associated structures, features and places) which contribute to New Zealand's national identity.

- The proposal is likely to result in significant and irreversible changes to the urban environment around the Basin Reserve. In particular, the proposed elevating of westbound traffic on SH1 [State Highway 1] is likely to compete with the open space aspect that exists for the current ground level layout of the Basin Reserve roundabout.

- The proposal has aroused widespread public interest regarding its actual or likely effects on the environment, including on heritage values and experiential values associated with the Basin Reserve. This includes on-going media and public attention on the options for traffic improvement around the Basin Reserve, including local, national and international coverage.

- The proposal is intended to reduce journey time and variability for people and freight, thereby facilitating economic development. The proposal is also likely to provide for public transport, walking and cycling opportunities; reduce congestion and accident rates in the area; and improve emergency access to the Wellington Regional Hospital. If realised, these benefits will assist the Crown in fulfilling its public health, welfare, security, and safety functions.

- The proposal relates to a network utility operation (road) that, although physically contained within the boundaries of Wellington City, as a section of the Wellington Northern Corridor Road of National Significance will affect and extend to more than one district and region in its entirety.

[4] Section 149P(1) provides that the Board of Inquiry must have regard to the Minister's reasons for making a direction to refer the Proposal to the Board for decision.

[5] The scope of the hearing was described by the Board in its Final Report in this way:

> [79] The hearing took place in Wellington. It commenced on 3 February 2014 and finished on 4 June 2014. The hearing took 72 sitting days over four months. The length of the hearing was occasioned by the

> volume of material and the strength and perseverance of the opposition to the Project. No stone was left unturned. We make no apology for the length of the hearing. It was necessary to give the Applicant and the Parties the opportunity to fully present their cases.

[6] Having released a Draft Decision on 22 July 2014 in accordance with s 149Q(1) of the RMA, the Board released its Final Report and Decision on 29 August 2014 (Decision). The essence of the determination of the majority of the Board[1] is captured in the final few paragraphs:

> [1324] In the final outcome, we are required to evaluate the significant adverse effects taken together with the significance of the national and regional need for and benefit of the Project. In carrying out this evaluation, we are conscious of the dicta of the Privy Council in *McGuire* that relevantly Sections 6 and 7 are strong directions to be borne in mind, and if an alternative is available that is reasonably acceptable, though not ideal, it would accord with the spirit of the legislation to prefer that.
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> [1325] This tension between the anticipated benefits and the anticipated adverse effects is the crux of the issues that have been debated before us. It reflects the tensions in Part 2. It reflects the tensions inherent in the statutory documents.
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> [1326] We are conscious of our findings as to the manner in which the Project would be consistent with the integrated planning instruments and documents relating to transportation. We are also conscious of our findings on adverse effects, which are contrary to the themes in the planning instruments on heritage, landscape, visual amenity, open space and amenity. As the planners agreed, the statutory instruments give no guidance on how this conflict should be resolved.
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> [1327] While the RMA does not require that an (sic) NoR must set out to achieve the best quality outcome, in our view, there are compelling landscape, amenity and heritage reasons why this Project should not be confirmed. The Basin Bridge would be around for over 100 years. It would thus have enduring, and significant permanent adverse effects on this sensitive urban landscape and the surrounding streets. It would have adverse effects on the important symbol of Government House and the other historical and cultural values of the area.
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> [1328] Government House, like the Basin Reserve, has the important quality of rarity (there is only one such main residence of the Crown in New Zealand). The sensitivity of the area derives not just from Government House and the Basin Reserve but the overall national significance of the whole area from Taranaki Street to Government House.
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> [1329] The adverse effects are occasioned by the dominance of the Basin Bridge, resulting from its bulk and scale in relation to the present environment, and the future environment, which does not anticipate such a

[1] Retired Environment Judge G Whiting, D Collins and J Baynes: an alternate view was provided by D J McMahon.

> substantial elevated structure in this significant open space. The carefully crafted design of the Basin Bridge, together with the meticulously crafted landscape and amenity measures, while offering some offset, do not mitigate the bulk and scale of the Basin Bridge, exacerbated by the Northern Gateway Building.
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> [1330] The ultimate criterion is whether confirming the NoR for the Project would promote the sustainable management purpose of the RMA. On that criterion, we judge that, even with its transportation and economic benefits, confirming the NoR would not promote the sustainable management purpose described in Section 5. It follows that the requirement should be cancelled. The resource consents, being ancillary to the requirement, are declined.

Scope of appeal

[7] A right of appeal to the High Court against the Board's decision is provided in s 149V "but only on a question of law".

[8] NZTA filed an appeal on 24 September 2014 and the following parties (the respondents) gave notice under s 301 of the RMA of their wish to appear on the appeal:

(a) the Architectural Centre Inc (TAC);

(b) Mt Victoria Historical Society Inc (MVHS);

(c) Mt Victoria Residents' Association Inc (MVRA);

(d) Save the Basin Campaign Inc (STBC); and

(e) Wellington City Council (WCC).

[9] As noted in a Minute of MacKenzie J dated 12 November 2014, some of the respondents contended that aspects of the appeal were not focused on questions of law but related to factual conclusions or the weight which the Board had placed on certain evidence. Although NZTA did not accept those criticisms, it elected to review its notice of appeal in the light of the matters raised. MacKenzie J directed:

> [9] … The appellant should be given an opportunity to consider the issues raised by the respondents and, if thought appropriate, to amend the notice of appeal. If the parties are then still at odds over whether the issues

> raise (sic) in the appeal do all involve questions of law, a hearing on that question might assist in focusing the issues on appeal, in a way which could potentially save considerable time at the hearing itself.

Timetable directions were made for the filing of an amended notice of appeal and an interlocutory application challenging the scope of the notice of appeal.

[10] On 27 November 2014 NZTA filed an amended notice of appeal together with a memorandum summarising the changes in tabular form. Although the respondents continued to have concerns about the appropriateness of what they described as the "extensive factual related grounds", they advised that they would not be pursuing an interlocutory application because of their limited resources as local community groups.

[11] The scope of the appeal is conveyed in the first paragraph of the amended notice of appeal which divides the appeal into eight issues:

> Issue 1: Misapplication of s 171(1)(b) of the Act (adequacy of consideration given to alternatives);
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> Issue 2: Inquiring as to the outcome rather than the process of considering alternatives;
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> Issue 3: Misapplication of s 171(1) of the Act (requirement to have particular regard to matters in paragraphs (a) to (d));
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> Issue 4: Incorrect approach to the assessment of enabling benefits;
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> Issue 5: Incorrect approach to the assessment of transportation benefits;
>
> Issue 6: Failure to have particular regard to s 171(1)(a) and (d) matters in assessing heritage and amenity effects;
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> Issue 7: Incorrect approach to the assessment of the environment; and

Issue 8: Failure to consider options within the scope of the application to address amenity and heritage related effects of the Northern Gateway Building.

Issue 1 is divided into seven subissues and Issue 5 is divided into three subissues. In total 34 questions of law were specified in the amended notice of appeal. However each specified question of law was preceded by alleged "errors of law" and followed by "grounds of appeal". As a consequence of cross-references to those other parts, the number of questions of law expanded.

"A question of law"

[12] As noted above, the right of appeal provided by s 149V is "only on a question of law". Hence this appeal is not a general appeal. It is not the role of the High Court to conduct a rehearing of the application to the Board or to undertake an "on the merits" consideration of whether the Board's conclusion was correct. Nor is it the role of the High Court to determine whether or not the Project would be the best outcome to address the congestion problem at the Basin Reserve.

[13] To adapt the observation of Blanchard J in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* the questions for this Court are the more limited ones of:[2]

(a) has the Board misinterpreted what was required of it by the RMA and in particular under s 171?

(b) if not, are the Board's conclusions nevertheless so misconceived that they are unlawful conclusions?

[14] The nature of that more limited role was explained by the Supreme Court in *Bryson v Three Foot Six Ltd*:[3]

> [24] Appealable questions of law may nevertheless arise from the reasoning of the Court on the way to its ultimate conclusion. If the Court were, for example, to misinterpret the requirements of s 6 – to misdirect

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2 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50].

3 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

itself on the section, which incorporates the legal concept of contract of service – that would certainly be an error of law which could be corrected on appeal, either by the Court of Appeal or by this Court …

[25] An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.

[26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test …

[27] It must be emphasised that an intending appellant seeking to assert that there was no evidence to support a finding of the Employment Court or that, to use Lord Radcliffe's preferred phrase, "the true and only reasonable conclusion contradicts the determination", faces a very high hurdle. It is important that appellate Judges keep this firmly in mind. Lord Donaldson MR has pointed out in *Piggott Brothers & Co Ltd v Jackson* the danger that an appellate Court can very easily persuade itself that, as it would certainly not have reached the same conclusion, the tribunal which did so was certainly wrong:

> "It does not matter whether, with whatever degree of certainty, the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option. To answer that question in the negative in the context of employment law, the appeal tribunal will almost always have to be able to identify a finding of fact which was unsupported by *any* evidence or a clear self-misdirection in law by the Industrial Tribunal. If it cannot do this, it should re-examine with the greatest care its preliminary conclusion that the decision under appeal was not a permissible option …"

[28] It should also be understood that an error concerning a particular fact which is only one element in an overall factual finding, where there is support for that overall finding in other portions of the evidence, cannot be said to give rise to a finding on "no evidence". It could nonetheless lead or contribute to an outcome which is insupportable.

[15] In *Vodafone*, after reference to *Bryson*, Blanchard J elaborated on the point with particular reference to the nature of the interpretative problem:[4]

> [54] The nature of the interpretative problem in the present circumstances and the caution which must be exercised before it can be said that an interpretation is in error, or before it can be said that a statutory provision has been misapplied, is well illustrated in the judgment of Lord Mustill, speaking for the House of Lords in *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd*. What was in issue was much less complicated than "net cost" in the present case. It was the construction of the words "a substantial part of the United Kingdom" in statutory criteria applying to the investigation of mergers of transport services. Lord Mustill drew attention to the "protean nature" of the word "substantial", ranging from "not trifling" to "nearly complete". He cautioned against taking an inherently imprecise word and "by redefining it thrusting on it a spurious degree of precision". Accordingly, he concluded that the area referred to as "a substantial part" must only be "of such dimensions as to make it worthy of consideration for the purposes of the Act". Applying that test (the criterion) to the facts involved asking, first, whether the Monopolies Commission had misdirected itself, and, second, whether its decision could be overturned on the facts.
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> [55] His Lordship said that it was quite clear that the Commission had reached an appreciation of "substantial" which was "broadly correct". Speaking generally about how a question of the nature of the second question should be approached, his Lordship said:
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> > Once the criterion for a judgment has been properly understood, the fact that it was formerly part of a range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ becomes a matter of history. The judgment now proceeds unequivocally on the basis of the criterion as ascertained. So far, no room for controversy. But this clear-cut approach cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: *Edwards v Bairstow* [1956] AC 14.
>
> Lord Mustill said that *South Yorkshire* was such a case:
>
> > Even after eliminating inappropriate senses of "substantial" one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement. Approaching the matter in this light I am quite satisfied that there is no ground for interference by the court, since the conclusion at which the commission arrived was well within the permissible field of judgment.

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4 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, above n 2.

> [56] The issue about "net cost" involves an imprecise criterion where "different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case".
>
> [57] Some guidance is also to be obtained from this Court's decision in *Unison Networks Ltd v Commerce Commission*. That case was about a statutory regime for controlling electricity line companies. The Commission's task was to set thresholds for declarations of control. It differs from the present case because it involved the use of a broadly expressed power designed to achieve economic objectives, rather than, as here, the calculation of an amount of net cost. But it was alleged in *Unison* that the Commission had misconstrued the requirements of Part 4A of the Commerce Act 1986 and applied the wrong legal test when exercising its power. As to that, this Court said that the statute contemplated that the Commission, as a specialist body, would exercise judgment in constructing the thresholds. That requirement, the Court said, could have been lawfully tackled in one of two ways. Both approaches were within the terms of the provisions in the relevant subpart of Part 4A. The Commission chose one of them and that was lawful. Importantly, it can be added that if the Commission had chosen the other, it too would have been lawful.
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> [58] So there are two stages. First, whether the Commission has misinterpreted the language of the statute. This in part turns on its appreciation of the function of the word "unavoidable". And, secondly, whether, if its interpretation was correct, it has nonetheless exercised its judgment about what was "net cost" in a way that contradicts the true and only reasonable conclusion available on the facts and has thereby committed an error of law in terms of *Edwards v Bairstow*.

[16] Several of the questions of law in the amended notice of appeal utilise the formulation whether the Board made findings to which "it could reasonably have come on the evidence".[5]

[17] I recognise that in identifying the circumstances in which it is permissible to interfere with a tribunal's decision a number of High Court judgments have included the formula "a conclusion [the tribunal] could not reasonably have come to".[6] However I consider that there is significant potential for confusion when such a formulation is reframed without the inclusion of a negative with the consequence that the question becomes: is the conclusion one to which a tribunal could reasonably have come on the evidence?

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5 For example, the questions of law listed as 4(b), 7(b)(i)–(iii), 19(a) and (d), 22 and 36(b).

6 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC); *Ayrburn Farms Estate Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at [34].

[18] The potential for confusion is compounded when the ground of appeal is expressed as was ground 5(d) in the amended notice of appeal:

> … the finding that sufficiently careful consideration had not been given to alternatives was not a reasonable finding on the evidence.

In similar vein in NZTA's written reply it was contended that:

> A question of law can arise where a decision-maker has reached a finding without any reasonable evidential foundation.

[19] It is useful, I suggest, to recall why Lord Radcliffe preferred his third description in *Edwards v Bairstow*, namely one in which the true and only reasonable conclusion contradicts the determination:[7]

> … Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

[20] In my view paraphrasing the established tests by reference to "not a reasonable finding on the evidence" or "without any reasonable evidential foundation" does not advance the analysis and has the potential to extend the inquiry beyond the proper boundary of what constitutes a question of law.

[21] In the context of an appeal against the exercise of a discretion (which the present appeal is not) it has long been recognised that on the same evidence two different minds might reach widely different decisions without either being appealable.[8] The same point has been made employing the word "reasonably":[9]

> The reason for the limited role of the Court of Appeal in custody cases is not that appeals in such cases are subject to any special rules, but that there are often two or more possible decisions, any one of which might reasonably be thought to be the best, and any one of which therefore a judge may make without being held to be wrong.

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7 *Edwards v Bairstow* [1956] AC 14 (HL) at 36.
8 *Bellenden v Satterthwaite* [1948] 1 All ER 343 (CA) at 345.
9 *G v G* [1985] 2 All ER 225 (HL) at 228.

[22] However in the third of Lord Radcliffe's descriptions in *Edwards v Bairstow* where "reasonable" appears, it is quite clear that only one possible conclusion was in contemplation as being reasonable:

> one in which the true and only reasonable conclusion contradicts the determination.

[23] Consequently, in the interests of clarity, when addressing those questions of law in NZTA's amended notice of appeal which adopt the "could reasonably have come to on the evidence" formula, I propose to reframe the question to align precisely with Lord Radcliffe's third description.

[24] From time to time there was reference in the course of NZTA's submissions to another formula, namely a conclusion "where there is no reliable, probative evidence to support the determination". Authority for that formula as demonstrating an error of law was said to be found in *Chorus Ltd v Commerce Commission*.[10] Kós J there remarked:

> [177] Thirdly, I find the Commission did not fail to determine what inferences could reliably be drawn from the benchmark data about the likely cost of providing the UBA service in New Zealand. This was very much a tertiary argument to the two primary arguments. Had the Commission had reason to believe that the benchmark evidence was not reliable, probative evidence or that the proposed IPP outcome, based on the benchmark evidence and allowing for consideration of s 18, was irrational and likely to produce an outcome substantially removed from the likely ISLRIC found under the FPP, the Commission would have had a duty to inquire further. But those were not the circumstances here. The benchmark evidence was reliable and probative. The IPP outcome was not evidently irrational, however unpalatable it may have been to Chorus. The mechanism to correct the IPP price lay not in further protracted analysis to produce a more perfect IPP price. It lay in the statutory mechanism, under s 42, to obtain a full pricing review using the FPP.

[25] On appeal the Court of Appeal[11] endorsed the High Court's finding that there was no reason to believe that the benchmark evidence that the Commission obtained through its questionnaire was not reliable, probative evidence.[12] However I do not consider that the Court of Appeal's judgment is to be read as extending the grounds

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10 *Chorus Ltd v Commerce Commission* [2014] NZHC 690 at [154] and [177].
11 *Chorus Ltd v Commerce Commission* [2014] NZCA 440. References omitted.
12 At [121].

upon which a judgment may be challenged as wrong in law. Indeed it is apparent that the Court of Appeal was reiterating the traditional approach.

[26] The introductory paragraphs bear repeating. Having noted that the appeal was not a general appeal against the merits of the Commission's determination and that Chorus did not challenge the Commission's interpretation of any of the relevant statutory provisions, the Court said:

> [109] Instead Chorus challenges the Commission's determination on the basis that the proper application of the law required a different answer. Chorus does this by alleging, in the first five questions of law, that the Commission made factual errors and thereby erred in law.
>
> [110] It is well-established, however, that to succeed on the basis of allegations of this nature Chorus must show that the Commission has exercised its judgment about the application of the IPP:
>
> > … in a way that contradicts the true and only reasonable conclusion available on the facts and has thereby committed an error of law in terms of *Edwards v Bairstow*.
>
> [111] This is a high hurdle for Chorus to surmount. It is well-established that unless the Commission's application of the statutory provisions is factually "unsupportable" it will not have erred in law. It is for the Commission, as a specialist body, to exercise judgment in carrying out the requisite "benchmarking" exercise and in weighing up the relevant facts in that context. It will therefore having erred only if there is no evidence to support the factual findings it made in reaching its determination.
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> [112] In the absence of a right of general appeal, it is not the role of the Court in an appeal on a question of law to undertake a broad reappraisal of the Commission's factual findings or the exercise of its evaluative judgments. Care should also be taken to avoid a technical and overly semantic analysis of the Commission's determination in an endeavour to create a question of law. In making factual findings it is for the Commission, and not the Court, to decide what weight should be given to the relevant evidence and what inferences, if any, should be drawn from the evidence. An inference must be logically drawn from proven facts and not be mere speculation or guesswork. At the same time, as counsel for the Commission acknowledged, if the Commission has made a factual error that makes its application of the statutory provisions "unsupportable" it will have erred in law.

Section 171

[27] The Board was required to consider the NoR under s 149P(4) which provides:

(4) A board of inquiry considering a matter that is a notice of requirement for a designation or to alter a designation—

(a) must have regard to the matters set out in section 171(1) and comply with section 171(1A) as if it were a territorial authority; and

(b) may—

(i) cancel the requirement; or

(ii) confirm the requirement; or

(iii) confirm the requirement, but modify it or impose conditions on it as the board thinks fit; and

(c) may waive the requirement for an outline plan to be submitted under section 176A.

[28] Consequently the Board was required to make its decision on the NoR by applying s 171(1) which provides:

(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—

(a) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—

(i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(ii) it is likely that the work will have a significant adverse effect on the environment; and

(c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and

(d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

[29] Issues relating to the interpretation of s 171(1) comprised a significant part of the appeal. In this portion of the judgment I briefly traverse the legislative history of s 171 together with some relevant authorities. In the course of doing so I identify a number of the primary interpretation issues in contest. However it is convenient first to draw attention to s 171(1)(c), relating as it does to the objectives of a requirement.

Section 171(1)(c)

[30] NZTA's objectives for the Project were:[13]

> **Objective 1**: To improve the resilience, efficiency and reliability of the State network:
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> (i) By providing relief from congestion on SH1 between Paterson Street and Tory Street;
>
> (ii) By improving the safety for traffic and persons using this part of the SH1 corridor; and
>
> (iii) By increasing the capacity of the SH1 corridor between Paterson Street and Tory Street.
>
> **Objective 2**: To support regional economic growth and productivity:
>
> (i) By contributing to the enhanced movement of people and freight through Wellington City; and
>
> (ii) By, in particular, improving access to Wellington's CBD employment centres, airport and hospital.
>
> **Objective 3**: To support mobility and modal choices within Wellington City:
>
> (i) By providing opportunities for improved public transport, cycling and walking; and
>
> (ii) By not constraining opportunities for future transport developments.
>
> **Objective 4**: To facilitate improvement to the local road transport network in Wellington City in the vicinity of the Basin Reserve.

[31] The Board found that the works were reasonably necessary to achieve those objectives.[14] The Board also recorded that there was no real dispute that the NoR (i.e. designation) was reasonably necessary for achieving the objectives.[15]

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13 Final Decision, at [1225].
14 At [1230].

Original form of s 171(1)

[32] Section 171 as originally enacted in 1991 included Part 2 of the RMA as one of five matters to which a territorial authority was required to have particular regard:

> **171 Recommendation by territorial authority**–
>
> (1) When considering a requirement made under section 168, a territorial authority shall have regard to the matters set out in the notice given under section 168 (together with any further information supplied under section 169), and all submissions, and shall also have particular regard to–
>
> (a) Whether the designation is reasonably necessary for achieving the objectives of the public work or project or work for which the designation is sought; and
>
> (b) Whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work or project or work; and
>
> (c) Whether the nature of the public work or project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route, or method; and
>
> (d) All relevant provisions of national policy statements, New Zealand coastal policy statements, regional policy statements, regional plans, and district plans; and
>
> (e) Part II.

Section 104 concerning resource consent applications and s 191 concerning requirements for heritage orders had a similar structure.

1993 Amendment

[33] The reference to Part 2 was relocated in 1993[16] when the words "Subject to Part II" were placed at the commencement of the subsection. An equivalent amendment was made to both ss 104 and 191.

[34] The 1993 Amendment also introduced s 168A providing for the public notification of requirements. Under s 168A(3) a territorial authority was to have regard to the matters set out in s 171.

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15 At [1218] –[1219].

16 Resource Management Amendment Act 1993, s 87.

[35] The speech of the Minister of the Environment on the second reading of the bill explained the motivation for the amendments. Having noted that the RMA seeks to provide certainty to all parties and that the law must provide a clear framework for the courts and others to work with, the Hon Rob Storey said:[17]

> The Bill, therefore, addresses those sections of the Resource Management Act in which at present there is a lack of clarity. There are some who believe that the Act should be left untouched until case law demonstrates that, because of ambiguous wording, Parliament's intent has not been exactly converted into the law.
>
> If Parliament intends a particular policy direction, I think that direction has to be clearly expressed. To do otherwise would be a dereliction of the trust placed in us as members of Parliament. It is one thing to use language that allows a flexibility of outcomes, when Parliament probably knows what it intends as the result; it is quite another matter to have language that allows a variety of outcomes, when there is meant to be only one.
>
> Sorting out the ambiguities in a legal setting also puts a very large cost on everybody – citizens, local government, central government, and potentially on the environment itself. I think that the House would want to do better than that, and therefore it has to remove the necessary ambiguities and costs.

[36] Specifically in relation to references within the RMA to Part 2, the Minister said:

> As I said, the Bill makes a number of technical amendments and I certainly do not intend to go through all of them. Part II of the Resource Management Act sets out the purpose of the Act. The current references in the Act to Part II have been in danger of being interpreted as downgrading the status of Part II. Amendments in the Bill restore Part II to its proper overarching position.

[37] The significance of the "subject to" drafting method had been the subject of direct consideration some four years earlier in *Environmental Defence Society Inc v Mangonui County Council*.[18] Section 3 of the Town and Country Planning Act 1977, the predecessor of the RMA, related to matters of national importance which were in particular to be recognised and provided for in the implementation and administration of district schemes. Section 36, which related to the contents of district schemes, included the phrase "subject to section 3".

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17 (17 June 1993) 535 NZPD 15920.

18 *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA) at 260.

[38] With reference to the significance of the inclusion of that phrase Cooke P said:

> The decision of the Tribunal now in question contains no discussion of the relationship between s 3 and the other sections, but Chilwell J observes in his judgment that the Tribunal has consistently held that the change in wording making certain sections subject to s 3 does no more than make explicit what was previously implicit and that the *Waimea* decision applies to the present Act. The High Court Judge also adopted that view and it may fairly be said, I think, to have been both an express basis of his decision and an underlying assumption of the Tribunal's decision. Read as a whole, their reasoning appears to involve an overall balancing of the various considerations in ss 3 and 4 on the lines approved in the *Waimea* judgment.
>
> With respect, I am unable to agree that this is a correct view. Rather I agree with the view taken by Dr K A Palmer in his *Planning and Development Law in New Zealand* (2nd ed, 1984) vol 1 at p 202 that the 1977 change was significant. **The qualification "Subject to" is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict.** This Court had occasion to say so expressly in a reported case the year before the 1977 Act: *Harding v Coburn* [1976] 2 NZLR 577, 582. **There was no need nor reason to insert those words in ss 4 and 36 of the 1977 Act if the legislature had intended that the s 3 matters were no more than matters to which regard was to be had, together with district considerations, in preparing a district scheme.** The explanation of the insertion of the words that leap to the eye, as it seems to me, is that the argument for the Minister of Works rejected in *Waimea* was henceforth to prevail. There is an analogy with the legislative guidelines provided by declaring a special object for the amending Act considered by this Court in *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc* [1988] 1 NZLR 78, 87-88; see also per Bisson J at pp 94–95 and per Chilwell J at pp 97–99.
>
> (emphasis added)

[39] Section 171 in its 1993–amended form was considered in a number of noteworthy judgments. Delivering the advice of the Privy Council in *McGuire v Hastings District Council* Lord Cooke of Thorndon said:[19]

> [22] … By s 171 particular regard is to be had to various matters, including (b) whether adequate consideration has been given to alternative routes and (c) whether it would be unreasonable to expect the authority to use an alternative route. …; but, by s 6(e), which their Lordships have mentioned earlier, [Hastings] is under a general duty to recognise and provide for the relationship of Maori with their ancestral lands. So, too, Hastings must have particular regard to kaitiakitanga (s 7) and it must take into account the principles of the Treaty (s 8). **Note that s 171 is expressly made subject to Part II, which includes ss 6, 7 and 8. This means that**

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19 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577.

> **the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.**
>
> (emphasis added)

[40] While strictly speaking those observations in relation to the operation of s 171 were obiter dicta, as *Auckland Volcanic Cones Society Inc v Transit New Zealand* recognised, they were "very strong obiter dicta".[20] The High Court there added:

> [59] … The specific considerations in s 171 (alternative methods or routes in particular) are subject to Part II of the RMA. Parties involved in the administration and application of the RMA are very familiar with the requirement to have regard to other considerations subject to Part II. On an application for resource consent, consent authorities and on appeal the Environment Court must have regard to the considerations in s 104 of the RMA. The s 104 considerations are expressed to be subject to Part II. There is a well-established body of case law confirming the primacy of Part II and how that is applied in relation to the s 104 considerations. The drafting technique used in s 171 to provide the considerations in that section are subject to Part II is not unique to s 171.
>
> [60] In the present case the effect of ss 171 and 174 is to require Transit and the Environment Court on appeal to have particular regard to the matters at s 171(1)(a), (b), (c) and (d) but always subject to Part II of the RMA.

2003 Amendment

[41] Section 171 was substantially redrafted in the 2003 Amendment.[21] One change was the relocation of the reference to "subject to Part II" from its location at the commencement of the subsection:

> 171 **Recommendation by territorial authority**
>
> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part II, consider the effects on the environment of allowing the requirement, having particular regard to–
>
> …

Although a similar change was made to s 104(1), there was no equivalent amendment to s 191(1) and consequently the phrase "Subject to Part 2" remains at the commencement of that subsection.

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[20] *Auckland Volcanic Cones Society Inc v Transit New Zealand* [2003] NZRMA 316 (HC).

[21] Resource Management Amendment Act 2003, s 63.

[42] Section 186A(3) was substantially redrafted in terms identical to s 171(1).

[43] One of the contested points of interpretation turns on the fact of that relocation of the phrase within s 171(1). Whereas TAC contended that the phrase continued to render the totality of the consideration of effects as being subject to Part 2, NZTA argued that the relocation had the consequence that the phrase related to the consideration of effects rather than to the (a) to (d) matters.

[44] Most recently s 171 was considered in *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council*.[22] Citing *McGuire*, Whata J said:

> [68] It will be seen that the focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. **The import of this is that the purpose, policies and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement. Indeed, in the event of conflict with the directions in s 171, Part 2 matters override them.** Paramount in this regard is s 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.
>
> [69] Part 2 also requires that in achieving the sustainable management purpose, all persons exercising functions shall recognise and provide for identified matters of national importance; shall have regard to other matters specified in s 7 and shall take into account the principles of the Treaty of Waitangi.
>
> [70] The reference at s 171(1)(d) to "any other matter" is qualified by the words "reasonably necessary". Given the Act's overarching purpose, however, the scope of the matters that may legitimately be considered as part of the effects assessment must be broad and consistent with securing the attainment of that purpose.
>
> (emphasis added)

Sections 171(1) and 104(1) compared

[45] It is convenient at this juncture to note the different structure of s 104 following the 2003 Amendment:[23]

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[22] *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 [*Queenstown Airport*]. References omitted.

[23] Section 104(1)(b) was replaced on 1 October 2009 by s 83(1) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

104 **Consideration of applications**

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

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

(b) any relevant provisions of–

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

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

[46] Two points of difference between ss 104 and 171 material to the statutory interpretation arguments in this case are:

(a) in s 104 the effects on the environment comprises one of the matters to which regard is to be had whereas in s 171 it is the focus of consideration;

(b) s 171 requires that the matters listed are to be the subject of "particular" regard.

[47] Having noted what it described as the "subtly different language" in the two sections, the Board concluded that the difference in wording did not require a substantively different approach to considering effects on the environment arising from NoRs from that for determining consent applications.[24] That conclusion is also in issue in contest on this appeal.[25]

[24] At [194] of the Final Decision.
[25] Question 28A: see [72] below.

The relevance of King Salmon

[48] The Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*[26] was released on 17 April 2014 part way through the hearing before the Board.[27] *King Salmon* involved an application for a change to the Marlborough Sounds Resource Management Plan under s 66 of the RMA. It did not concern s 171. The relevance of *King Salmon* to the present appeal arises from the Court's discussion of Part 2[28] and the decision-making process known as the "overall judgment" approach.

[49] NZTA's submissions stated that *King Salmon* has significantly modified the approach to decision-making under the RMA and in particular the meaning of "subject to Part 2". The respondents rejoined that the ratio of *King Salmon* was confined to plan changes and that the decision was of little moment in relation to designations.

Sequence of consideration of the Issues

[50] As earlier noted[29] the amended notice of appeal grouped the questions of law under eight broad issues by reference to subject matter.

[51] In its written submissions NZTA stated that it had "further refined" the questions of law comprised in Issues 3 and 6. Although these submissions were presented as filed, the redefinition provoked some debate which led to NZTA filing a memorandum on the fourth day of the hearing formally recording the intended "restatement" of the questions of law relevant to Issues 3 and 6 and summarising the principles relating to the Court's power to amend a notice of appeal.[30]

[52] The Issue 3 questions, being Q 28(a), (b) and (c), were refined as five questions which I will refer to as Q 28A to 28E. The Issue 6 question, being Q 45

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[26] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*].

[27] At [91] of the Final Decision.

[28] A change to a regional plan under s 66 must be "in accordance with [inter alia] the provisions of Part 2": s 66(1)(b).

[29] At [11] above.

[30] Memorandum of counsel for the Appellant in relation to questions of scope and the Court's power to amend (if necessary) dated 23 July 2015.

(albeit with the cross-reference to the errors of law listed in para 44 of the amended notice of appeal), was refined as five questions which I will refer to as Q 45A to 45E.

[53] It is convenient to set out the refined Issue 3 questions of law:

> 28A Does the difference in wording between s 104 and s 171 require a substantively different approach to considering effects on the environment arising from notices of requirement as that for determining consent applications?
>
> 28B Was the Board in error by considering the effects of the environment of allowing the requirement without having particular regard to the matters listed in s 171(1)(a)–(d)?
>
> 28C When considering a requirement under s 171(1) RMA, how are the words 'having particular regard' to be interpreted?
>
> 28D When considering a requirement under s 171(1) RMA, how are the words 'subject to Part 2' to be applied (in particular, following the recent Supreme Court decision in King Salmon)?
>
> 28E As a consequence of those errors, did the Board make findings of fact that it could not otherwise have come to on the evidence?

[54] That "refinement" of the Issue 3 questions of law was particularly significant as it introduced in an explicit way as Q 28C and 28D[31] fundamental questions concerning the interpretation of s 171(1). The answers to, or more accurately the discussion of, those two questions has significance for a number of the other specified questions of law.

[55] Consequently, although the structure of the parties' submissions helpfully tracked the sequence of the Issues in the amended notice of appeal, I propose to first address the key issues of statutory interpretation and the arguments concerning the implications of *King Salmon*. Having done so, the judgment will then traverse the remaining questions of law in the sequence of the identified Issues.

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[31] Q 28(a), (b) and (c) in the amended notice of appeal remained as Q 28A, 28B and 28E.

The meaning of "having particular regard to" in s 171

[56] NZTA's intention to call into question the interpretation of the phrase "having particular regard to" was arguably implicit in Q 28(a) and Q 28(b) in Issue 3. However the issue was squarely raised in the restated Q 28C:

> When considering a requirement under s 171(1) RMA, how are the words "having particular regard" to be interpreted?

The 23 July 2015 memorandum[32] explained that it was necessary to address Q 28C when determining the Q 28 questions in the amended notice of appeal.

[57] The phrase is used not only in s 171(1) (and relatedly in s 168A(3)) but it also appears in 191(1) and notably in s 7 in Part 2. By contrast what is usually viewed as the lesser obligation of "have regard to" is employed in s 104(1) and in a variety of other sections.[33]

[58] A curious interface between the two phrases is highlighted in s 149P which concerns the matters to be considered by a board of inquiry. As noted earlier a board is required to "have regard to" the Minister's reasons.[34] In the case of a notice of requirement for a designation or for a heritage order a board is required to "have regard to" the matters set out in s 171(1)[35] and s 191(1)[36] respectively. However both ss 171(1) and 191(1) direct that such matters are to be the subject of "particular regard". I raised with counsel the possibility that, given the terms of s 149P, the obligation on a board might be only to "have regard" to the matters in s 171(1). That would have the consequence of equality of treatment between the s 171(1) matters and the Minister's reasons. However neither side was attracted to that interpretation.

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32 At [51] above.
33 Resource Management Act 1991, ss 131(1), 138A and 142.
34 At [4] above.
35 Section 149P(4)(a).
36 Section 149B(5)(a).

"have regard to"

[59] Taking the phrase "have regard to" as the starting point, in *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* Wylie J (sitting with Mr R G Blunt) said:[37]

> We do not think there is any magic in the words "have regard to". They mean no more than they say. The tribunal may not ignore the statement. It must be given genuine attention and thought, and such weight as the tribunal considers appropriate. But having done that the tribunal is entitled to conclude it is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function[.]

[60] It follows that the phrase "have regard to" does not mean "to give effect to". In *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* Cooke P agreed with and adopted the following analysis of McGechan J at first instance:[38]

> … He is directed by s 107G(7) to 'have regard' to any submissions made. Such submissions are to be given genuine attention and thought. That does not mean that industry submissions after attention and thought necessarily must be accepted. The phrase is 'have regard to' not 'give effect to'. They may in the end be rejected, or accepted only in part. They are not, however, to be rebuffed at outset by a closed mind so as to make the statutory process some idle exercise.
>
> Section 107G(7) in its direction that the Minister 'have regard' to five stated criteria does not direct that any one or more be given greater weight than others. In particular it does not direct that (a) value of ITQ is to have greater or lesser regard paid than (b) net returns and likely net returns. Weight, in the end and provided he observes recognised principles of administrative law, is for the Minister.

[61] Specifically in an RMA context John Hansen J took a similar approach in *Foodstuffs (South Island) Ltd v Christchurch City Council*:[39]

> I do not consider the term "shall have regard to" in s 104 RMA should be given any different meaning from the cases referred to above. In my view, the appellant is seeking to elevate the term from "shall have regard to" to

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37 *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601 (HC) at 612.

38 *New Zealand Fishing Industry Association v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 551. Similarly see *R v Police Complaints Board, ex parte Madden* [1983] 2 All ER 353 (QBD) at 369–370 where a number of English decisions are discussed.

39 *Foodstuffs (South Island) Ltd v Christchurch City Council* (1999) 5 ELRNZ 308, [1999] NZRMA 481 (HC) at 487.

> "shall give effect to". The requirement for the decision-maker is to give genuine attention and thought to the matters set out in s 104, but they must not necessarily be accepted.

[62] One of the authorities cited by John Hansen J was *R v CD*,[40] a judgment of Somers J who expressed the view in the context of the Costs in Criminal Cases Act 1967 that the expression "shall have regard to" is not synonymous with "shall take into account". However I note that in a number of subsequent decisions in Australia the two phrases have been treated as equivalent.[41]

[63] In my view the expression "to take into account" is susceptible of different shades of meaning. I consider that the two phrases can be viewed as synonymous if the phrase "to take into account" is used in the sense referred to by Lord Hewart CJ in *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Maryleborne* "of paying attention to a matter in the course of an intellectual process".[42] The key point is that the decision-maker is free to attribute such weight as it thinks fit to the specified matter but can ultimately choose to reject the matter.

"having particular regard to"

[64] Plainly the phrase "shall have particular regard to" conveys a stronger direction than merely "to have regard to". Section 7 (which includes the phrase) is one of the four sections in Part 2 which *McGuire* described as being "strong directions".[43]

[65] The issue is most recently informed by the discussion of Part 2 in *King Salmon*.[44] Having observed that s 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA, which is given further elaboration by the remaining sections in Part 2 (ss 6, 7 and 8), Arnold J writing for the majority of the Supreme Court said:

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40 *R v CD* [1976] 1 NZLR 436 (SC) at 437.

41 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 25 ALR 497 (HCA); *Queensland Medical Laboratory Ltd v Blewett* (1988) 84 ALR 615 (FCA) at 623; *Minister for Immigration and Ethnic Affairs v Baker* (1997) 45 ALD 136 (FCA) at 142; *Friends of Hinchinbrook Society Inc v Minister for the Environment* (1997) 147 ALR 608 (FCA) at 627.

42 *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Maryleborne* [1923] 1 KB 86 (CA) at 99.

43 At [39] above.

44 *King Salmon*, above n 26.

> [26] Section 5 sets out the core purpose of the RMA – the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. **As between ss 6 and 7, the stronger direction is given by s 6 – decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters.** The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to "recognise and provide for" the specified matters as "matters of national importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management. **The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).**
>
> [27] Under s 8 decision-makers are required to "take into account" the principles of the Treaty of Waitangi. Section 8 is a different type of provision again, in the sense that the principles of the Treaty may have an additional relevance to decision-makers.
>
> (emphasis added)

[66] While NZTA submitted that the (a) to (d) matters in s 171(1) were to be carefully weighed in coming to a conclusion, no submission was advanced in the course of argument on the interpretation issue to the effect that the matters to which particular regard was to be had were required to be the subject of extra weight.[45] On that issue I share the view of Sir Andrew Morritt V-C in *Ashdown v Telegraph Group Ltd*:[46]

> It was submitted that the phrase 'must have particular regard to' indicates that the court should place extra weight on the matters to which the subsection refers. I do not so read it. Rather it points to the need for the court to consider the matters to which the subsection refers specifically and separately from other relevant considerations.

[67] In the event NZTA and the respondents appeared to be on the same page on the interpretation of the phrase. Both sides cited the decision of the Planning

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[45] However NZTA's submissions argued that the Project's enabling effect for future projects was a highly relevant effect that ought to have been considered and "given sufficient weight" by reason of the requirement to have particular regard in s 171(1).

[46] *Ashdown v Telegraph Group Ltd* [2001] 2 All ER 370 (Ch) at [34] where the phrase "must have particular regard to" in s 12 of the Copyright Act 1988 with reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms was considered.

Tribunal in *Marlborough District Council v Southern Ocean Seafoods Ltd* where the following view was expressed:[47]

> The duty to have particular regard to these matters has been described in one case as "a duty to be on inquiry" *Gill v Rotorua District Council* (1993) 2 NZRMA 604, 2 NZPTD Part 5. With respect in our view it goes further than the need to merely be on inquiry. To have particular regard to something in our view is an injunction to take the matter into account, recognising it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion.

[68] I agree that that is an appropriate interpretation provided that the reference to "take the matter into account" is understood in the sense explained at [63] above.

Did the Board adopt the correct approach?

[69] NZTA's real complaint was that the Board failed to adhere to the identified standard. It placed particular reliance on the Board's comments at [175]:[48]

> [175] What is required (subject to consideration of the *King Salmon* decision, which we address next) is a consideration of the effects on the environment of allowing the requirement having particular regard to the matters set out in sub-sections (a)–(d). This means that the matters in (a)–(d) need to be considered to the extent that our finding on these matters are to be heeded (or borne in mind) when considering our findings on the effects on the environment.

[70] I would agree with NZTA that merely to heed or bear in mind matters would fall below the requisite level of attention which the phrase "have particular regard to" imports. However I do not consider that the comments at [175], which were introductory in character, accurately reflect the Board's approach which is more evident at [181]–[182]:

> [181] By contrast, in considering the NoR we are required to have *particular regard to* the relevant instruments.
>
> [182] The phrase have *particular regard to* has been interpreted as requiring that we specifically turn our mind to each of the listed matters, and give them some greater weight than those to which we are only required to have *regard*. This is a different and lesser test than the requirement to *give effect to*, as was being considered in *King Salmon*. The Supreme Court interpreted *give effect to* as simply meaning *implement*, and considered that this requirement was *intended to constrain decision makers*.

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47 *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 at 228.

48 Attention was also drawn to the use of the verb "informed" in [196].

[71] That such turning of their minds was required separately in respect of each of the listed matters was acknowledged in the Board's subsequent endorsement at [194] of a passage from the Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project (NIGUP).[49]

[72] It is convenient at this point to address Q 28A which states:

> Does the difference in wording between s 104 and s 171 require a substantively different approach to considering effects on the environment arising from notices of requirement as that for determining consent applications?

[73] This ground of appeal was directed to the Board's statements at [193]–[194]:

> [193] … We acknowledge (as [NZTA] noted) that the obligation to assess effects with respect to NoRs under Section 171(1) is expressed in subtly different language from the equivalent obligation arising with respect to resource consents under Section 104(1). Specifically, Section 171(1) requires consideration of the effects on the environment having particular regard to the matters in sub-sections (a)–(d). Whereas under Section 104(1), the activity's actual and potential effects are instead listed as one of the matters to which a decision maker must *have regard*, alongside those in Section 104(1)(b) and (c). Both Sections 104(1) and 171(1) though, are subject to Part 2.
>
> [194] However, we do not consider that difference in wording requires a substantively different approach to considering effects on the environment arising from NoRs as that for determining consent applications, as counsel for [NZTA] claimed. Indeed in our experience, it does not. To the contrary, we adopt the findings of the *Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project*, that Section 171(1) is to be applied as follows:
>
> [a] The language … *consider the effects … having particular regard to …* expresses a duty to do both together, without necessarily giving one primacy over, or making one subordinate to, the other;
>
> [b] The language *having particular regard* expresses a duty for us to turn our mind separately to each of the matters listed, to consider and carefully weigh each one. The words do not carry a meaning that the matters listed in (a)–(d) are necessarily more or less important than the effects on the environment of allowing the requirement; and

[49] At [73] below.

> [c] We must make our own judgment, based on the evidence and in the circumstances of the case, about the effects on the environment, about the matters listed in (a)–(d), and about the relative importance of each in all the circumstances.

[74] NZTA's objection to that analysis was directed both to the equivalence of treatment of the two sections and to the issue of "subject to Part 2". That latter issue is addressed below in the context of my consideration of Part 2.

[75] NZTA's argument was that the Board misapplied s 171(1) by in effect inserting the word "and" into the subsection (presumably before the phrase "having particular regard to") so that it read to the same effect as s 104(1). As its written submissions stated:

> 28.7 … By inserting 'and' into s 171(1), the Majority has given it a different meaning. On the Majority's interpretation of s 171(1) a decision-maker is required to:
>
> a Make its own judgment, through Part 2, concerning the effects on the environment of allowing the requirement; and
>
> b Make a separate judgment concerning the matters listed in paragraphs (a)–(d); and
>
> c Make its own overall judgment, subject to Part 2, regarding the relative importance of each in all the circumstances.
>
> 28.8 This is not what s 171(1) requires. The correct approach to s 171(1) is to consider the effects of the proposed requirement 'having particular regard to' (in the sense of 'through the lens' of) the (a) to (d) matters and then come to a decision on the basis of that assessment of effects. Where there is a conflict in the (a) to (d) matters, the decision-maker will have recourse to Part 2 (we return to the meaning of 'subject to Part 2' in the section below).

[76] I accept the respondents' submission that, while there is a difference in wording between ss 104 and 171, in its analysis of those sections at [193]–[194] the Board has not misinterpreted s 171 in the manner suggested by NZTA. As noted above, in discharging the obligation to have "particular" regard to the specified matters the Board has recognised that each specified matter is to be the subject of separate attention.

[77] The Board transparently stated its intended decision-making process at [199]:

> [199] We therefore propose to structure this part of our decision (appropriately applying the guidance from *King Salmon*, as just identified) as follows:
>
> [a] To identify and set out the relevant provisions of the main RMA statutory instruments that **we must have particular regard to under Section 171(1)(a)**, and the relevant provisions of the main non-RMA statutory instruments and non-statutory documents that **we must have particular regard to under Section 171(1)(d)**;
>
> [b] To consider and evaluate the adverse and beneficial effects on the environment informed by the relevant provisions of Part 2; the relevant statutory instruments; and other relevant matters being the relevant conditions and the relevant non-statutory documents;
>
> [c] **To consider and evaluate the directions given in Section 171(1)(b)** as to whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work;
>
> [d] **To consider and evaluate the directions given in Section 171(1)(c)** as to whether the work and designation are reasonably necessary for achieving the objectives for which the designation is sought; and
>
> [e] In making our overall judgment subject to Part 2, to consider and evaluate our findings in (a) to (d) above, and to determine whether the requirement achieves the RMA's purpose of sustainability.

[78] I do not consider that that formulation is susceptible to challenge so far as the appropriate consideration of the 171(1)(a) to (d) matters is concerned.

[79] It is convenient at this point to address the contention at ground of appeal 29(b) that the matters listed in s 171(1)(a) to (d) ought to have been determined prior to the Board's substantive consideration of the Proposal's effects. This complaint is directed to the observation in the Decision at [197]:

> [197] In applying Section 171(1) of the RMA, there is also no explicit obligation that our determination regarding the matters in Section 171(1)(b) must be made in advance of our substantive consideration of effects.

[80] The Board proceeded to note that the Wiri Prison Board[50] had undertaken a substantive effects assessment, and determined that that project would result in some significant effects, before moving on to consider the s 171(1)(b) matters. The Board favoured that approach:

> [198] We adopt the same approach, as we consider it:
>
> [a] Allows us to fully consider all mitigation being offered by [NZTA], and whether there actually will be significant adverse effects remaining once that mitigation is taken into account;
>
> [b] Would be consistent with the High Court's comments in *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* that the greater the impact on private land (or similarly, the more significant the project's adverse effects), the more careful the assessment of alternative sites, routes and methods will need to be. We will have a better understanding of the significance of the Project's adverse effects (and therefore the robustness of the alternatives assessment required), if we undertake our substantive effects assessment before considering the adequacy of the [NZTA's] alternatives assessment; and
>
> [c] Would appropriately reflect the fact that as Section 171(1) is subject to Part 2, some consideration of the relevant matters from that Part is required in terms of forming a view on potential effects. As such, we consider we need to have some understanding of the evidence/effects assessments to reach a view on whether effects are in fact likely to be significant.

[81] Having made the argument at [75] above, on this issue NZTA's submission was:

> 28.21 The Majority was required to assess the effects having particular regard to the (a) to (d) matters as something important to be considered and carefully weighed in coming to a conclusion, rather than simply as matters that needed to be borne in mind. It was therefore necessary (inter alia) to have addressed the (a) to (d) matters before then considering the effects 'having particular regard to' those matters.

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[50] Final Report and Decision of the Board of Inquiry into the Proposed Men's Correctional Facility at Wiri, September 2011.

[82] I do not accept that the sequence of consideration is required to be as NZTA maintains. The Board's reasoning in [198] appears to me to be sound. As Burchett J remarked in *Friends of Hinchinbrook Society Inc v Minister for the Environment*:[51]

> … What is the effect of a requirement that "[i]n determining whether or not to give a consent … the Minister shall have regard only to the protection, conservation and presentation … of the property"? An instant's reflection shows that these words just cannot be applied mechanically. The minister must consider the application made to him and ascertain what it involves before he can have regard to the protection, conversation and presentation of the property in relation to it.

The effect of the phrase "subject to Part 2" in s 171

[83] The only question of law in the amended notice of appeal which specifically raised Part 2 was Q 13 [subissue 1D] which states:

> Does s 171(1)(b) require the requiring authority's consideration of alternatives to incorporate Part 2 considerations; including (in particular) the weight given to particular evaluation criteria.

[84] However the fundamental nature of NZTA's Part 2 argument emerged more clearly in the further refinement of the Issue 3 questions, in particular restated Q 28D:

> When considering a requirement under s 171(1) RMA, how are the words 'subject to Part 2' to be applied (in particular, following the recent Supreme Court decision in *King Salmon*)?

The issue of the capacity for the Board to "resort to Part 2" was also implicit in restated Q 45E:

> What is the correct approach to the application of the test of 'inappropriateness' in s 6(f) [should the Court consider resort to Part 2 of the RMA was available to the Board in the circumstances of this case]?

[85] As noted in the brief discussion of legislative history,[52] two primary arguments were advanced by NZTA concerning the role played by Part 2 in the s 171(1) consideration:

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51 *Friends of Hinchinbrook Society Inc v Minister for the Environment*, above n 41, at 627.

52 At [43] and [49] above.

(a) did the relocation of the phrase within s 171(1) have the consequence contended by NZTA that the phrase related to the consideration of effects rather than to the (a) to (d) matters?

(b) did *King Salmon* change the approach to the application of this phrase in s 171(1)?

The relocation of the phrase within s 171(1)

[86] It was not apparent either from NZTA's submissions to the Board or in the Board's Decision whether this line of argument had prominence. However the argument as developed before me is conveniently summarised in NZTA's written reply as follows:

> 11.22 The 2003 amendment separates the (a)–(d) matters from the overriding 'subject to Part 2' direction that was clear in the previous drafting. It is well established that differences in wording between repealed provisions and those enacted is an aid to statutory interpretation and may throw light on the intended meaning. It is submitted that if Parliament intended the whole of the s 171(1) assessment still to be 'subject to Part 2', it would have retained more of the previous wording, such as follows:
>
> > *(1) Subject to Part 2, when considering a requirement and any submissions received, a territorial authority must consider the effects on the environment of allowing the requirement and shall also have particular regard to–*
>
> 11.23 Parliament did not do this. Instead, it moved the position of the 'subject to Part 2' direction to relate to the assessment of effects and used the words 'having particular regard to' to qualify the consideration of effects such that the (a)–(d) matters are not directly made subject to Part 2.

[87] There appears to have been no judicial consideration of the implications of the relocation. Nor do the *travaux preparatoires* throw any express light on the question. If the implications of the movement of the phrase were as significant as NZTA's argument suggests, then one would have expected that there would have been some sign on the legislative trail. One would also expect that the same change as made to ss 104(1), 168A(3) and 171(1) would also have appeared in s 191(1).

[88] The first manifestation of the relocation was in the Resource Management Amendment Bill[53] which was the culmination of a review of the RMA which started in August 1997. The bill had its first reading on 13 July 1999 and was referred to the Local Government and Environment Committee. The bill made changes to ss 104, 168A and 171 but not to s 191 which may account for the fact of the current point of difference.

[89] Because the form of s 171 proposed in 1999 was different from the section in its ultimate form in 2003, I set out its original terms:

> 171(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part II, consider the effects on the environment of allowing the requirement, having regard to–
>
> (a) Any relevant provisions of the plan or proposed plan; and
>
> (b) If the requiring authority does not own the land or it is likely that the designation will have a significant adverse effect on the environment, whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work; and
>
> (c) Whether the designation is reasonably necessary for achieving the objectives of the requiring authority; and
>
> (d) Any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.
>
> (2) A requirement must not conflict with any relevant provisions of a national policy statement or a New Zealand coastal policy statement.

An equivalent amendment was proposed as s 168A(3) and (4).

[90] However the structure of s 104 was substantially different, particularly inasmuch that a distinction was made in relation to the consideration of resource consents for controlled activities, restricted discretionary activities and discretionary activities. Only in relation to discretionary activities was there a reference to "Part II": that reference appeared in the first subparagraph:

> 104(3) When considering an application for a resource consent for a discretionary activity and any submissions received, a consent authority–

[53] Resource Management Amendment Bill 1999 (313–2) (Select Committee Report).

(a) Must, subject to Part II, consider the effects on the environment of allowing the application, having regard to–

(i) Any relevant provision in a plan or proposed plan:

(ii) Any other matter the consent authority considers reasonably necessary to decide the application; and

(b) May grant or refuse the application; and

(c) If it grants the application, may impose conditions.

[91] The fact and the implications of the different activities were usefully explored in the judgment of Randerson J in *Auckland City Council v John Woolley Trust*.[54]

[92] The Committee's report to the House on 8 May 2001[55] did not support the proposal that Part 2 of the Act would not be required to be considered in respect of controlled and restricted discretionary activities. While agreeing that s 104 should be simplified, the Committee said:

> … However, we are not prepared to remove explicit reference to Part II and significant planning documents such as national and regional policy statements and relevant or proposed plans. We recommend that a new, overarching subsection be added to new section 104, requiring consent authorities to consider all applications subject to Part II and to have regard to matters that include the above planning documents.

The amendment proposed as s 104(1A) was identical to s 104(1) in the 2003 Amendment.

[93] With reference to ss 168A and 171 the Committee's report said:

> Section 168A specifies the matters a territorial authority must consider on a notice of requirement for a designation in its own district for a work for which that territorial authority itself has financial responsibility. Section 171 specifies the matters a territorial authority is required to consider when assessing a notice of requirement for designation by another requiring authority. Proposed amendments to these two sections are set out in clauses 56 and 58 respectively. As introduced, the new provisions place greater emphasis on environmental effects when considering a requirement, and the need to consider alternatives is reduced. **These clauses also make sections 168A and 171 more consistent with the proposed new wording for the consideration of resource consents**. Finally, the emphasis is shifted

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54 *Auckland City Council v John Woolley Trust* (2008) 14 ELRNZ 106, [2008] NZRMA 260 (HC) at [24]–[29].

55 Above n 52.

> from considering whether a designation is necessary, to whether or not the work is necessary in achieving the objectives of the requiring authority.
>
> (emphasis added)

[94] No further progress was made on the 1999 bill in the House after the Committee had reported and the report was not debated by the House. The order of the day for consideration of the report was discharged on 24 March 2003. The Resource Management Amendment Bill (No 2) was introduced on 17 March 2003 and referred to the Committee on 20 March 2003. An instruction from the House stated that the Bill was referred to the Committee for the purpose only of the Committee receiving a briefing from officials and the Committee was required to report to the House by 28 April 2003.[56]

[95] With reference to s 171 the report stated:

> [it] requires a territorial authority to consider environmental effects when considering a requirement and to have particular regard to various other matters. Alternative sites, routes, or methods will now only need to be considered if the requiring authority does not have a legal interest in the land or it is likely that the designation will have a significant adverse effect on the environment. The application of the "reasonable necessity" test is clarified. This amendment complements the amendment to section 168A.

[96] A consideration of that history leads me to infer that:

(a) the catalyst for the relocation of the phrase was the proposed s 104(3),[57] the structure of which precluded the phrase being located at the commencement of the subsection;

(b) sections 168A(1) and 171(1) were amended for consistency with s 104;

(c) section 191(1) was left unchanged because it was not addressed in the 2003 Amendment.

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[56] Resource Management Amendment Bill 1999 (No 2) (39–2) (Select Committee Report).

[57] At [90] above.

[97] However there is nothing to suggest that the relocation of the phrase within s 171(1) (and similarly within s 168A) was for the significant purpose contended for by NZTA, namely to change the focus of application of Part 2 within s 171. I also note that such an argument could not logically be mounted in relation to s 104(1) given its structure (with effects on the environment being only one of the matters to which regard is to be had). Yet the phrase was also relocated within that subsection.

[98] For these reasons I do not accept that the relocation within s 171(1) of the phrase "subject to Part 2" had the purpose or effect of making any material change to the application of that section. I reject NZTA's contention at [86] above that the consequence of that amendment was that the phrase "subject to Part 2" related only to the assessment of effects and that the (a) to (d) matters were no longer directly subject to Part 2.

The implications of King Salmon

[99] It is fair to say that NZTA's approach to the role of Part 2 with reference to the NoR evolved not only throughout the course of the hearing before the Board but also on the appeal in this Court.

[100] Its opening position was recorded in the Decision in this way:

> [190] In opening, [NZTA] submitted that when considering its NoR, we must (*among other things*):
>
> > [a] Consider the effects on the environment of allowing the NoR; and
> >
> > [b] Have particular regard to the matters in Sections (sic) 171(1) as if we were a territorial authority, namely:
> >
> > > [i] The relevant provisions of planning instruments;
> > >
> > > [ii] Whether adequate consideration has been given to alternative sites, routes and methods of undertaking the work;
> > >
> > > [iii] Whether the work and designation are reasonably necessary for achieving [NZTA's] project objectives, as set out in the NoR;
> > >
> > > [iv] Any other matters we consider reasonably necessary to determine the NoR; and

[v] Above all, consider Part 2 matters.

[101] In closing before the Board NZTA submitted that, notwithstanding *King Salmon*, an "overall judgment" approach remained relevant in the consenting and designation context. It submitted that Part 2 was relevant to the Board primarily because of the presence in s 171 of the phrase "subject to Part 2", drawing attention to that part of *McGuire* highlighted in [39] above. It said:

> 16.12 It is submitted that the position as expressed in *McGuire* above, has not been upset by *King Salmon*. The Supreme Court did not consider sections 104 and 171 of the RMA, or the way in which Part 2 matters are approached in a consenting context.
>
> 16.13 Nonetheless, the Supreme Court's conclusions may in certain respects be taken as impacting on the approach taken to RMA decision-making more broadly. For instance, paragraph 151 of the Court's decision quoted above is noticeably broad in its language (it refers to "*planning decisions*" generally).
>
> …
>
> 16.16 It is submitted that, in the context of … the applications for this Project, and adopting the reasoning of the Supreme Court:
>
> a Sections 104 and 171 are expressly subject to Part 2, and the provisions in Part 2 remain relevant;
>
> b Section 6 elaborates on the guiding principle in section 5. It does not 'trump' it in the way suggested for TAC and NRA;
>
> c Section 5 supports the approval of this Project, but [NZTA] is not relying on this section alone;
>
> d The following discussion of effects will allow the Board to conclude as to each of the elements of Part 2, before undertaking an overall judgment.

[102] In the section of its Decision headed "Overview of the statutory and legal context" the Board recorded its understanding of the established framework for considering s 171(1) before addressing whether that framework had been modified by *King Salmon*. Its analysis commenced in this way:

> [169] We are required to consider the matters set out in Section 171(1) *subject to Part 2*. This has been interpreted as meaning that the directions in Part 2 are therefore paramount, and are overriding in the event of conflict. The relevant Part 2 directions therefore apply to:

[a] Our evaluation of specific effects on the environment; and

[b] Our evaluation in the final analysis.

> [170] The focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. The import of this is that the purpose, policy and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement. Paramount in this regard is Section 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.

[103] Having set out key passages from *McGuire*, the Decision stated:

> [174] The reference being *subject to Part 2* does not entitle us to ask whether some other project alignment or design better meets the requirements of Part 2, as the Act does not direct a particular use or require the best use of resources. All that is required is a careful assessment of the Project in and of itself to determine whether it achieves the RMA's purpose. A matter that we will consider in detail at the time of our overall judgment.

There then followed [175] previously quoted.[58]

[104] Having recorded its view that, where an evaluation under Part 2 (and in particular s 5) was required or permitted, that should continue to involve an overall broad judgment as held in *NZ Rail Ltd v Marlborough District Council*,[59] the Board stated its understanding of the *King Salmon* decision:

> [177] While the Supreme Court reviewed the previous *overall broad judgment* and *environmental bottom line* jurisprudence around the correct application of Section 5 (where required), it did not go on to substantively consider or evaluate that issue. We accordingly understand that where an evaluation under Part 2 (and in particular Section 5) is required (or permitted), this should continue to involve an *overall broad judgment* as held in *NZ Rail* and outlined above.
>
> [178] The majority of the Supreme Court in *King Salmon* found that the plan change at issue … *did not comply with [Section] 67(3)(b) … in that it did not give effect to the NZCPS.* In doing so, it found that in considering whether the New Zealand Coastal Policy Statement had *been given effect to*, and finally determining the plan change before it, that Board was not entitled by reference to the principles in Part 2, to carry out a balancing of all relevant interests in order to reach a decision. Rather, the plan change should have been dealt with in terms of the New Zealand Coastal Policy Statement, without reference back to Part 2. This was primarily because of what the Court considered to be *strongly worded directives* in two of the New Zealand Coastal Policy Statement policies that were particularly

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58 At [69] above.

59 *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

relevant in that case, which the Board found would not be *given effect to* if the plan change was granted.

[105] The Board then said:

> [179] Again, we consider that properly construed, this aspect of *King Salmon* does not directly affect our determination of [NZTA's] NoR, for the following reasons. *King Salmon* involved consideration of a plan change, and therefore different statutory tests from those applying to [NZTA's] NoR. Importantly, the Supreme Court observed that Section 67(3)(b) provides a *strong directive, creating a firm obligation on the part of those subject to it*, to give effect to the New Zealand Coastal Policy Statement.
>
> [180] Reading the majority decision as a whole, we consider that this specific statutory context was clearly central to the Supreme Court's decision. …
>
> [181] By contrast, in considering the NoR we are required to have *particular regard to* the relevant instruments.

There then followed [182] previously quoted.[60]

[106] NZTA disagreed with the Board's analysis of *King Salmon* and with its reliance on *McGuire*. Its principal written submissions on appeal stated:

> 29.7 *King Salmon* has significantly modified the approach to decision-making under the RMA and in particular, what 'subject to Part 2' means. In other words, when is recourse to be had to Part 2?
>
> …
>
> 29.11 While the decision was in the context of a plan change, the Supreme Court's findings in relation to the planning framework, and the application of Part 2 to decision-making generally, have wider application.
>
> …
>
> 29.13 We submit that the Supreme Court has given a clear direction that it is the planning documents that generally form the basis for decision-making under the RMA. Parliament has provided for a hierarchy of planning documents, relevant to planning decisions under the RMA. These documents are drafted 'in accordance with Part 2' and 'flesh out' the provisions of Part 2 in a manner that is increasingly detailed both as to content and location.

[107] Then, under a heading "Application of *King Salmon* to s 171(1)", NZTA contended:

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[60] At [70] above.

> 29.16 For the reasons summarised in para 29.13, the planning documents give effect to Part 2. Decisions made in reliance on those documents therefore achieve the sustainable management purpose of the Act, as provided for in Part 2.
>
> 29.17 The Supreme Court held that s 5 (the purpose of the Act) is not an operative provision. Nor therefore is Part 2 as a whole given that ss 6, 7 and 8 are a further elaboration of that purpose. Part 2 provisions are particularised (both as to substantive content and locality) by the planning documents, from national policy statements down to district plans.
>
> …
>
> 29.22 Section 171(1) directs that when considering a notice of requirement, a decision-maker's assessment of effects on the environment is 'subject to Part 2'. However, on the basis of the principles established by the Supreme Court in *King Salmon*, and consistent with *McGuire*, Part 2 will be relevant if one of the three caveats is established or there is a conflict in the exercise of the statutory duty under s 171(1)(a) to (d). In this case the planning framework did contemplate the Project and therefore there was no conflict so as to bring Part 2 into play.

[108] In response TAC maintained the primacy of Part 2 and criticised NZTA's submission for failing to address how the "subject to Part 2" direction is to be complied with. NZTA's reply submissions were interesting on both those points:

> 11.15 … We agree with the submissions of TAC to the effect that Part 2 retains primacy.
>
> 11.16 The approach by the Appellant to the application of Part 2, assumes primacy, but the question remains as to how that primacy is to be provided for. How it is provided for is cogently summarised at [30] of *King Salmon*. The crucial point is that the Supreme Court has determined that it is the planning documents which give effect to s 5 and Part 2 more generally unless one of the three caveats apply or there is a conflict. Following *King Salmon*, the primacy of Part 2 is maintained and applied through the planning documents; both as to substantive content and the locality to which those documents apply.
>
> 11.17 It follows that the phrase 'subject to Part 2' in s 171(1) (or in s 104 for that matter) does not imply the re-litigation of previously settled planning provisions where no caveats or conflict arise. This is why at [151] the Supreme Court determined that s 5 is not intended to be an operative provision in the sense that it is not a section under which particular planning decisions are made. It is the hierarchy (cascade) of planning documents which flesh out the principles in s 5 and the remainder of Part 2, and it is those documents which form the basis of decision-making; in this case being the framework in which effects are to be considered.

[109] It is only proper that I record that, when in the course of his oral reply I explored with Mr Casey QC the issue of the scope of NZTA's argument before the Board on the implications of *King Salmon*, Mr Casey acknowledged that the submission relating to caveats and conflicts had not been developed before the Board to the extent that it had on appeal. In particular para 16.16(a)[61] did not indicate how primacy was to be given whereas NZTA's current stance is that such primacy is via the plan in the absence of any conflict.

[110] While the provisions in Part 2 are not operative provisions (in the sense of being sections under which particular planning decisions are made),[62] they nevertheless comprise a guide for the performance of the specific legislative functions. As *King Salmon* said with reference to s 5:

> (a) [it] states a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation;[63]
>
> (b) [it] is a carefully formulated statement of principle intended to guide those who make decisions under the RMA.[64]

The other three sections supplement the core purpose in s 5 by stating the particular obligations of those administering the RMA in relation to the various matters identified.[65]

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61 At [101] above.
62 *King Salmon*, above n 26, at [151]; see also [129].
63 At [24(a)].
64 At [25].
65 At [26].

[111] Consistent with that view, in *John Woolley Trust* Randerson J observed:[66]

> [47] … Given the primacy of Part 2 in setting out the purpose and principles of the RMA, I do not accept the general proposition mentioned at para [94] of the decision in *Auckland City Council v Auckland Regional Council*, that the words "subject to Part 2" in s 104 mean that Part 2 matters only become engaged when there is a conflict between any of the matters in Part 2 and the matters in s 104. **Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the RMA**.
>
> (emphasis added)

[112] The role of Part 2 is reinforced and reiterated in certain sections (specifically s 104(1), 168A(3), 171(1) and 191(1)) by the presence of the phrase "subject to Part 2". As the Privy Council stated in *McGuire*:[67]

> [22] … Note that s 171 is expressly made subject to Part II, which includes ss 6, 7 and 8. This means that the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.

The meaning of the "subject to" drafting method had been previously explained by Cooke P in *Mangonui County Council*.[68]

[113] However the provisions with which *King Salmon* was concerned did not contain that phrase. Furthermore the role of Part 2 in s 66(1) had to be viewed in the light of the direction in s 67(3) which the Supreme Court described as follows:

> [85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) Part 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to Part 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" Part 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

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66 *Auckland City Council v John Woolley Trust*, above n 53, at [47]; the highlighted words were referred to in *Ayrburn Farms Estate Ltd v Queenstown Lakes District Council*, above n 6, at [99] and in *Man O'War Station Ltd v Auckland Regional Council* (2011) 16 ELRNZ 475, [2011] NZRMA 235 (HC) at [20].

67 *McGuire*, above n 19.

68 At [38] above.

[114] In a sense *King Salmon* might be viewed as a case where, to adopt the phrase of Randerson J in *John Woolley Trust*, Part 2 was limited in application by other specific provisions of the RMA although I consider that it would be more accurate to say that its application was provided for in a particular way.

[115] The Board's error in *King Salmon* lay in considering that it was entitled, by reference to the principles in Part 2, to carry out a balancing exercise of all relevant interests in order to reach a decision whereas it was obliged to deal with the plan change application in terms of the NZCPS and failed to do so.[69] The Supreme Court summarised the Board's approach in this way:

> [83] On the Board's approach, whether the NZCPS has been given effect to in determining a regional plan change application depends on an "overall judgment" reached after consideration of all relevant circumstances. The direction to "give effect to" the NZCPS is, then, essentially a requirement that the decision-maker consider the factors that are relevant in the particular case (given the objectives and policies stated in the NZCPS) before making a decision. While the weight given to particular factors may vary, no one factor has the capacity to create a veto – there is no bottom line, environmental or otherwise. The effect of the Board's view is that the NZCPS is essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations …

[116] I consider that the Decision in the present case demonstrates that the Board correctly analysed and well understood the ratio of the *King Salmon* decision.[70]

[117] However the Board's task in the present matter was different, as reflected in Mr Palmer QC's submission:

> 8.10 Rather, the Board is required by s 171, "subject to Part 2, to consider the effects on the environment of allowing the requirement", "having particular regard" to various factors including the adequacy of alternatives and the relevant provisions of the planning documents. So consideration of the effects, subject to Part 2, having particular regard to the stated matters is (as the Board said, at [170]) the "focal point of the assessment". Planning documents do not determine the outcome of a s 171 decision, unlike the NZCPS which can determine a plan change decision under s 67.

[118] It is apparent that the Board understood not only the different nature of its task in considering an application under s 171[71] but also the implications of the "subject to Part 2" component:

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69 *King Salmon*, above n 26, at [153]–[154].

70 [179]–[180] of the Final Decision at [105] above.

> [183] Further and perhaps more importantly, as we have already noted, Section 171(1) and the considerations it prescribes are expressed as being *subject to Part 2*. We accordingly have a *specific statutory direction* to appropriately consider and apply that part of the Act in making our determination. The closest corresponding requirement with respect to statutory planning documents is that those must be prepared and changed *in accordance with … the provisions of Part 2*.
>
> [184] For the above reasons, the statutory framework and expectation of Section 171(1) relevant to our current decision can be contrasted with the situation in *King Salmon*. The plan change being considered in that case was required to *give effect to* a higher order planning document which the Supreme Court considered should already *give substance to pt 2's provisions in relation to … [the] coastal environment*. By contrast, here we are required to consider the environmental effects of the NoR, *subject to Part 2* and having *particular regard to* the relevant statutory planning documents.

Consideration of alternative options – an overview

[119] The Decision recorded that NZTA acknowledged that both prerequisites in s 171(1)(b) applied with respect to the Project. In any event the Board concluded that the Project would have significant adverse effects, including heritage, amenity and landscape matters.[72]

[120] Consequently the Board was required in considering the effects on the environment under s 171(1) to have particular regard to whether adequate consideration had been given by NZTA to alternative sites, routes or methods of undertaking the work.

[121] As the Board noted in its introduction to the s 171(1)(b) issue,[73] a feature of the hearing process was the strong assertions by some of the parties that there had not been adequate consideration of alternative options. The Board recorded that an enormous amount of information had been put before it about the methodology of the option selection process and how that process took into account the significant effects of the Project.

[122] Opponents of the application presented alternative options to the Board in order to establish that such options were not suppositious and should have been

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71 [181]–[182] at [70] above.
72 At [1084(c)].
73 At [1082]–[1083].

explored as part of the option evaluation process. The Board's conclusion that there had been a failure to adequately assess non-suppositious options is the focus of Issue 1B.

Chronology

[123] In what the Board described as a "somewhat complex chronology"[74] the Decision provides a thorough review of the historical background and the chronology of the option process spanning [1097] to [1164] under the following headings:

(a) March 2001: Scheme assessment report by Meritec;

(b) 2006 to 2008: Ngauranga to Wellington Airport strategic study and the Corridor Plan;

(c) 2008 to 2009: Basin Reserve Inquiry-By-Design workshop;

(d) January 2011: Feasible Options Report;

(e) July and August 2011: Public engagement and refinement of the preferred option;

(f) Tunnel options;

(g) BRREO option.

[124] At the Inquiry-By-Design workshop five options were selected for further consideration comprising one at-grade option (with a variation) and four grade-separated bridge options. In order that the discussion below of the several Issue 1 questions may be comprehensible to those who may not read the Decision, I set out certain key passages from the Board's chronology:

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74 At [1165].

[1118] Between 2009 and 2010, the five options were subjected to further detailed analysis, which resulted in one of the at-grade variants being discarded. During this process, one more option was uncovered and added. During 2010, as a result of the government signalling a possibility of contributing financially to a tunnel under the proposed NWM Park, a tunnel option (Option F) was added, making six options in all.

…

[1122] The Feasible Options Report on page 67 sets out the conclusions and recommendations:

> Our team recommended options A and B as preferred options if more weight is given to urban design, social impacts, and long term strategic fit. Of those two options, option A is the better of the two when giving more weight to these criteria. Option A requires the relocation of the [former Home of Compassion] Crèche. We acknowledge that while relocating heritage buildings is not favoured, this may be mitigated to some extent by being able to relocate the Crèche building to provide improved connections to Buckle Street or to relocated the Crèche to a larger historic precinct closer to the War Memorial.

[1123] Following development of the options and before the evaluation of the options, the tunnel option (Option F) was removed and the explanation given was:

> Following development of the options the specialists received a data-pack containing a description of Options A to E together with sufficient information to enable them to undertake peer assessment. It is important to note that the specialists are only comparing the options which permit SH1 to be at-grade in front of the War Memorial: Options A to E. **Once the government makes a decision on whether to fund the War Memorial Tunnel, Option F will be assessed with other options which permit SH1 to be located in a tunnel in front of the War Memorial.**
>
> [*our emphasis*]

…

[1125] This suite of five options was assessed against evaluation criteria as reported in Section 5.3 of Technical Report 19. Using a pair-wise comparison and a weighting process, the workshop participants recommended Option A and Option B – both grade-separated bridge options. Option A eventually evolved into the Project.

…

[1138] In mid-2012, the government was exploring whether it would construct the NWM Park in time for the 100th Gallipoli Remembrance in 2015, including the idea of locating Buckle Street under the park. [NZTA] asked the Project team to reappraise the cost of Option F. This review was carried out with respect to both Options F and X. By letter dated

3 July 2012, Opus set out what it termed an *alternate review*. The letter concluded:

> **Conclusions**
>
> 1. NZTA has previously determined that Option F was unaffordable. A decision by the government to underground Buckle Street will not change this decision.
>
> 2. Option X is likely to be more expensive than Option A while having no more (possibly less) transportation benefits. It is unlikely that Option X would prove to be preferable to Option A.
>
> 3. A decision by the government to underground Buckle Street will not change the outcomes of the option evaluation process used to compare alternatives at the Basin Reserve.
>
> 4. Option A remains the preferred option even if the government decides to underground Buckle Street.

[1139] On 7 August 2012, the government announced that the NWM Park would be completed by April 2015 and that empowering legislation would be enacted and that it would be contributing $50m towards the costs of undergrounding Buckle Street.

…

[1132] On 17 August 2012, [NZTA] confirmed and announced Option A as the preferred option. They also confirmed that a pedestrian and cycling facility would be added to the Basin Bridge to provide a link between Mt Victoria Tunnel and Buckle Street.

…

[1151] In January 2013, Richard Reid and Associates supplied to the City Council conceptual drawings for improving the lane configuration around the Basin Reserve roundabout. Before us, Mr Reid produced an enhanced proposal he called the Basin Reserve Roundabout Enhancement Option (**the BRREO Option**). …

[1152] Essentially, but somewhat simplistically, the BRREO Option proposes an upgrading of the existing roundabout by widening Paterson Street westbound up to the Dufferin Street stop line and widening Dufferin Street to between Paterson Street and Rugby Street, in each case to three lanes. This would provide three continuous lanes westbound around the roundabout from the exit from the Mt Victoria Tunnel to Buckle Street. It also proposes to add a third lane on Paterson Street for westbound traffic in the event of the duplication of the Mt Victoria Tunnel.

The Board's general approach

[125] In a section of the Decision spanning [1085] to [1096] the Board directed itself on the proper approach to and the application of s 171(1)(b). After a discussion of aspects of *Queenstown Airport*[75] (which is the focus of the questions in Issues 1A and 1B) and after considering the meaning of adequate consideration, the Board described its task as follows:

> [1090] Subsection 1(b) requires a judgement on whether an adequate process has been followed, including an assessment of what consideration has been adopted. The enquiry is not into whether the best alternative has been chosen. It is not incumbent on a requiring authority to demonstrate that it has considered all possible alternatives or that it has selected the best of all available alternatives. Rather, it is for the requiring authority to establish an appropriate range of alternatives and properly consider them.

[126] The Board's findings on the consideration of alternatives stated:

> [1215] Clearly, the purpose of the statutory direction in Section 171(1)(b) of the RMA is to ensure that the decision to proceed with the preferred option is soundly based and other options (particularly those with reduced adverse environmental effects) have been dismissed for good reason. Adequate consideration becomes even more relevant when the Project, as here, involves significant adverse environmental effects.
>
> [1216] We find the consideration of alternatives has, in the circumstances of this case, been inadequate for the reasons set out above, which include:
>
> [a] A lack of transparency and replicability of the option evaluation; and
>
> [b] A failure to adequately assess non-suppositious options, particularly those with potentially reduced environmental effects.

[127] In Issues 1A to 1G addressed below NZTA challenges various aspects of the Board's approach in coming to the conclusion that NZTA had not given adequate consideration to alternatives to the proposed flyover. The questions of law which NZTA invites the Court to consider include several in the *Edwards v Bairstow* category.

[128] The respondents contend that most of NZTA's points of contention are dressed up in the legal language of "tests" and "thresholds" but are, in effect,

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[75] *Queenstown Airport*, above n 22.

challenges to the Board's view of the facts and hence beyond the proper ambit of this appeal.

Subissue 1A: Relating the measure of adequacy to the adversity of effects

[129] The general requirement in the original s 171[76] to have particular regard to whether adequate consideration had been given to alternative sites, routes or methods of achieving the work was confined in 2003 to two scenarios,[77] namely if:

(a) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(b) it is likely that the work will have a significant adverse effect on the environment.

[130] The former scenario was the subject of consideration in *Queenstown Airport.*[78] Queenstown Airport Corporation wished to provide for the expansion of Queenstown Airport and to achieve that objective it issued a notice of requirement seeking in effect to acquire approximately 19 hectares of land owned by Remarkables Park Ltd. The Environment Court rejected that part of the NoR seeking to provide for a precision instrument approach runway and a parallel taxiway and as a consequence the area of land subject to the NoR was reduced to 8.07 hectares.

[131] In the course of considering s 171(1)(b) on appeal Whata J said:

> [121] The section presupposes that where private land will be affected by a designation, adequate consideration of alternative sites not involving private land must be undertaken by the requiring authority. Furthermore, the measure of adequacy will depend on the extent of the land affected by the designation. The greater the impact on private land, the more careful the assessment of alternative sites not affecting private land will need to be.

[132] In its closing statement to the Board NZTA contended that *Queenstown Airport* was relevant for three purposes, the first of which was:

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76 At [32] above.
77 At [95] above.
78 *Queenstown Airport*, above n 22.

> … it establishes that the concept of adequacy in section 171(1)(b) is a sliding scale, with the measure of adequacy depending on the extent of private land affected by the designation. The extent of land required for the Basin Bridge Project is shown on the preliminary land requirement plans and schedule (sheets 2A.01–03). These show that, of the 46 titles affected by the NOR footprint, only 8 are privately owned. Expressed in land area, 0.3 ha of the 2 ha to which the NOR relates is privately owned. Applying the reasoning in the *Queenstown Airport Corporation Limited* decision, this would suggest that a less careful assessment of alternative sites is required. However, [NZTA] has not sought to undertake a less careful assessment of alternatives. Instead, it considers that the assessment it has undertaken is thorough and robust.

[133] After setting out para [121] of *Queenstown Airport*, the Board said:

> [1087] In this case, the extent of private land subject to the proposed designation is not significant. However, as we have said, [NZTA] acknowledged (and our assessment confirms) that the work would be likely to have a significant adverse effect on the environment. While Justice Whata's comments applied to the impact on private land, the same logic must apply to the extent of the Project's adverse effects. The measure of adequacy of the consideration of alternatives will depend on the impact on the environment of adverse effects.
>
> [1088] Accordingly, we must be satisfied that the assessment of alternative sites was adequate, in light of our findings as to the Project's effects on the environment. The more significant the adverse effects (as we have found them to be), the more careful the assessment of alternatives that is required.

[134] On appeal NZTA seeks to resile from its stance before the Board, proposing to argue that the Board erred in law by adopting the logic of *Queenstown Airport* and extending it to s 171(1)(b)(ii). It seeks to argue first that different considerations apply according to whether the designation will impose restrictions on private land and secondly that there is no "sliding scale" according to the degree of adverse effect. NZTA accordingly invites the Court to consider the following question of law:

> Does s 171(1)(b) of the Act require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement?

[135] NZTA's change in stance was resisted by Mr Palmer who cited an impressive list of authorities deprecating reversals of position in lower courts.[79] While mindful

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[79] *Ihaka Te Rou v Love* (1891) 10 NZLR 529 (CA); *Grobbelaar v News Group Newspaper* [2002] 1 WLR 3024 (HL); *TV3 Network Services Ltd v ECPAT New Zealand Inc* [2003] NZAR 501 (HC); *Wymondley against the Motorway Action Group Inc v Transit New Zealand* [2004] NZRMA 162

of the reasons that have been advanced over time, I consider in the circumstances of this case where the issue involved is a question of law that it is in the broader interest to consider the argument which NZTA wishes to advance. In doing so I am particularly influenced by the approach of the Privy Council in *Foodstuffs (Auckland) Ltd v Commerce Commission*:[80]

> Their Lordships gave leave to do so on the basis of this lack of material prejudice and also because they considered it important, albeit the issue is now essentially spent, to determine the case on the correct legal footing. Not only does that accord with justice between the parties, but it also seemed appropriate from the point of view of ascertaining the true intention of Parliament when the amending legislation was enacted.

Q 4(a): Does s 171(1)(b) of the Act require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement?

[136] NZTA's argument was structured as follows:

(a) the two scenarios in s 171(1)(b)(i) and (ii) are thresholds for any consideration of alternatives and do not give rise to a need for "closer" scrutiny;

(b) the RMA does not mandate any "hard-look" or "anxious scrutiny" concept such as have been considered in the context of judicial review and applied where fundamental human rights are at stake;

(c) Whata J erred in introducing the concept of a different measure of adequacy according to the level of impact of the designation on private land;

(d) the Board was equally, if not more, wrong to extend that logic to the degree of adverse effects;

(e) if *Queenstown Airport* was correct in importing a sliding scale of adequacy, then such should only apply to the first limb of s 171(1)(b).

(HC); *New Zealand Meat Board v Paramount Export Ltd (in liq)* [2005] 2 NZLR 447 (PC); *Patcroft Properties Ltd v Ingram* [2010] NZCA 275, [2010] 3 NZLR 681.

80 *Foodstuffs (Auckland) Ltd v Commerce Commission* [2004] 1 NZLR 145 (PC) at [9].

[137] The section requires that where either scenario exists not only must there be consideration of alternative sites but that such consideration should be "adequate". It appeared to be common ground that the meaning of "adequate" was as stated by the Environment Court in *Te Runanga O Ati Awa Ki Whakarongotai Inc v Kapiti District Council*:[81]

> … The word 'adequate' is a perfectly simple word and we have no doubt has been deliberately used in this context. It does not mean 'meticulous'. It does not mean '*exhaustive*'. It means 'sufficient' or 'satisfactory'.

No challenge was made to the Board's analysis of the meaning of adequate at [1089].

[138] It was the respondents' contention that the adequacy (or sufficiency) of consideration in any given case must be circumstances dependent and that that must be so for both scenarios, given that the phrase "adequate consideration" appears in the chapeau to subparagraphs (i) and (ii).

[139] Mr Palmer drew attention to the decision of the Supreme Court in *King Salmon*,[82] in particular to the highlighted part of the following passage:

> [170] This brings us back to the question when consideration of alternative sites may be necessary. This will be determined by the nature and circumstances of the particular site-specific plan change application. For example, an applicant may claim that that (sic) a particular activity needs to occur in part of the coast environment. If that activity would adversely affect the preservation of natural character in the coast environment, the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will involve the consideration of alternative localities. Similarly, even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites, **particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site**. In short, the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it, as Mr Nolan went some way to accepting in oral argument.

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81 *Te Runanga O Ati Awa Ki Whakarongotai Inc v Kapiti District Council* (2002) 8 ELRNZ 265 (EnvC) at [153].

82 *King Salmon*, above n 26.

[140] In my view the analysis in *Queenstown Airport* is correct. I consider that it must logically apply to both the scenarios described in s 171(1)(b). It is simply common sense that what will amount to sufficient consideration of alternative sites will be influenced to some degree by the extent of the consequences of the scenarios in s 171(1)(b)(i) and (ii). That said, I doubt the utility of the expression "sliding scale" as a description of the extent of the consequences because it conveys an unduly mechanical approach to the extent of consideration required.

[141] Accordingly I consider that the Board's approach at [1087] to [1088] is not vulnerable to criticism.

[142] So far as Q 4 is concerned, the word "require" is problematic. A more careful consideration of alternatives may or may not be required: it will be very much circumstances dependent. I would answer in the affirmative either of the following rephrased questions of law:[83]

(a) *May* s 171(1)(b) of the Act require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement?

(b) Does s 171(1)(b) of the Act *permit* a more careful consideration of alternatives when there are more significant adverse effects of allowing the requirement?

[143] In the context of Subissue 1A NZTA poses a second and alternative question of law:

> Q 4(b) In the alternative, was the finding that [NZTA] had not given sufficient careful consideration to alternatives a finding to what the Board could reasonably have come on the evidence?

[144] Mr Casey addressed this question in conjunction with the similarly expressed Q 22 in Subissue 1G. I adopt the same approach.

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[83] Although I have retained the word "careful", because that word is employed in *Queenstown Airport* and hence in the question posed, I suggest that it may be preferable to avoid the notion of degrees of "care". My preference would be a phrase such as "greater scrutiny".

Subissue 1B: The requirement to consider all non-suppositious options with potentially less adverse effects

[145] Following paragraph [121] addressed in Subissue 1A above, Whata J further said:

> [122] It is beyond doubt that the extent of private land subject to the proposed designation is significant. As notified 19 ha would be affected. The modified version still encompasses 8 ha. The Court had to be satisfied that the assessment of alternative sites was adequate having regard to this impact. There is authority however that a suppositious or hypothetical alternative need not be considered. But given the statutory requirement to have particular regard to the adequacy of the consideration given to alternatives, it is not sufficient to rely on the absence of a merits assessment of an alternative or on the assertion of the requiring authority. Provided there is some evidence that the alternative is not merely suppositious or hypothetical, then the Court must have particular regard to whether it was adequately considered.

[146] The third respect in which NZTA contended before the Board that *Queenstown Airport* was relevant concerned this issue:

> 11.2(c) Third, should the Board find that any alternative suggested by a submitter (such as BRREO) is not hypothetical or suppositious, then the Board must have particular regard to whether it was adequately considered.

[147] Specifically in the context of the assessment of alternatives NZTA recorded that the parties were in agreement that:

> Speculative, suppositious or hypothetical alternatives need not be considered. However, provided there is some evidence that an alternative is not merely suppositious or hypothetical, then the Board must have particular regard to whether it was adequately considered.

NZTA's case was that all relevant alternatives had been adequately considered.

[148] Under the heading "Non-Suppositious Options, with Potentially Reduced Environmental Effects" the Board said:

> [1182] Because of the Project's significant adverse environmental effects (as we have found them to be) it was necessary for [NZTA] to give adequate consideration to alternatives, particularly those options with reduced environmental effects. As we have said, the measure of that adequacy would depend on how significant the adverse effects would be. In this case, we have found that there would be significant adverse effects.

> [1183] A number of options were referred to in the evidence. The option evaluation team considered some of them at various stages of the process. The Architectural Centre and Richard Reid and Associates, on behalf of the Mt Victoria Residents Association, put options before us. This was not for the purpose of persuading us that their options were better, but to establish that these options were not suppositious, would potentially have reduced environmental effects than the Project before us, and should have been explored as part of the option evaluation process.
>
> [1184] The evaluation teams considered both tunnel and at-grade options. The tunnel options were synthesised down to a tunnel option known as Option F. The Architectural Centre's Option X, proffered during 2011, was another variant of a tunnel option.
>
> …
>
> [1186] The BRREO Option consisted of improving the lane configuration around the Basin Reserve. When introducing his concept, Mr Reid told us:
>
> > 19. The existing network has sustained NZTA's many attempts to engineer a motorway 'solution' over the past 50 years. These 'solutions' have almost always diverted highway traffic northwards from its current route around the Basin Reserve roundabout and involve a flyover or tunnel structure which invariably destroys the amenity of the Basin Reserve and the urban structure of the city.
> >
> > 20. I believe the existing network will continue to have sufficient flexibility, tolerance and resilience to serve the city well into the future. The objectives to the project can be met without the need for the Basin Bridge proposal.
>
> [1187] We heard a considerable amount of evidence on these options. The evidence reached the threshold of requiring our careful consideration. We propose to consider first the tunnel options and secondly the at-grade options.

[149] In concluding its discussion of certain options the Board then said:

> [1213] As we have said, it is not for us to determine which is the best option. The statutory requirement directs us to have particular regard to the adequacy of consideration of alternatives. Mr Justice Whata said in the *Queenstown* case that, where there is evidence that the alternative is not merely suppositious or hypothetical, then the Court (or in this case this Board) must have particular regard to whether it was adequately considered.

The Board concluded that NZTA's consideration of alternatives had been inadequate for reasons which included a failure to adequately assess non-suppositious options, particularly those with potentially reduced environment effects.[84]

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[84] At [126] above.

[150] NZTA acknowledged that before the Board it had accepted the proposition which is reflected in [1213]. However it submitted that on reflection the proposition at [122] of *Queenstown Airport* goes too far or should be limited to the first limb of s 171(1)(b). NZTA again sought on appeal to reverse its stance before the Board and it proposed for consideration the following question of law:

> Q 7(a) Does s 171(1)(b) require the requiring authority to fully evaluate every non-suppositious alternative with potentially reduced environmental effects?

[151] On this issue also I am prepared to consider the question of law, thereby permitting NZTA to reverse its stance below, for the same reasons as stated in the context of Subissue 1A at [135] above.

Q 7(a): Does s 171(1)(b) require the requiring authority to fully evaluate every non-suppositious alternative with potentially reduced environmental effects?

[152] As is apparent from ground of appeal 8(b), NZTA's contention is that the Board had required NZTA to demonstrate that it had considered every non-suppositious option with potentially less adverse effects. NZTA's argument was that in so doing the Board had elevated the standard of consideration beyond "adequacy".

[153] Referring to what it described as the classic approach, namely that a requiring authority is not required to eliminate speculative alternatives or suppositious outcomes, NZTA submitted:

> 16.7 In *Queenstown Airport* and the Majority's decision, this test has been inverted to require *every* non-suppositious option to have been considered. Indeed, the Majority's decision takes the test a step further and requires other options with potentially less adverse effects to have been dismissed only for good reason.
>
> 16.8 This takes the test of adequacy too far. In any significant project there are likely to be any number of options and variations of options that could be considered. It is unreasonable to expect a requiring authority to give detailed consideration to every permutation of the non-suppositious. That is, there may be any number of permutations of the (for example) at-grade option; [NZTA] does not have to show that it specifically addressed each and every one.

[154] I do not accept that the Board approached its task in the manner suggested by NZTA. On the contrary (as NZTA acknowledged) the Board said:

> [1090] Subsection 1(b) requires a judgement on whether an adequate process has been followed, including an assessment of what consideration has been adopted. The enquiry is not into whether the best alternative has been chosen. It is not incumbent on a requiring authority to demonstrate that it has considered all possible alternatives or that it has selected the best of all available alternatives. Rather, it is for the requiring authority to establish an appropriate range of alternatives and properly consider them.

[155] Mr Palmer neatly captured the point here when he submitted:

> NZTA appears to wish to elide the point that witnesses identified non-suppositious options with reduced environmental effects with the point that NZTA's consideration of alternatives was not adequate, to create a straw man that the Board required NZTA to examine every possible alternative. It certainly did not.

[156] The answer to Q 7(a) is, therefore, in the negative.

[157] While not accepting that s 171(1)(b) creates a duty to consider all non-suppositious options, in section 17 of its primary submissions NZTA mounted a reasonably extensive argument that it had in fact considered the options identified by the Board as non-suppositious and that its consideration had been adequate.

[158] The respondents attacked this argument as being blatantly a disagreement with the Board's assessment of the facts and not a question of law as required by s 149V(1).

[159] As noted in the discussion of "a question of law"[85] the Board's conclusions on fact can only be challenged on an *Edwards v Bairstow* basis. NZTA recognises that reality by the formulation of the questions comprising Q 7(b)(i), (ii) and (iii). I proceed to address them, albeit reframed to align precisely with Lord Radcliffe's third description for the reasons explained at [16] to [23] above.

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[85] At [12]–[15] above.

Q 7(b)(i): Is the case one in which the true and only reasonable conclusion contradicts the determination that BRREO was a non-suppositious option?

[160] With reference to at-grade options (including BRREO) NZTA first submitted that the Board's finding, that such options had not been adequately considered, "was not a finding that it could reasonably have come to on the evidence". That, of course, was not the nature of the *Edwards v Bairstow* question framed in relation to BRREO.

[161] The argument was then developed in this way:

(a) the Majority failed to evaluate the evidence of the independent peer reviewers and to determine whether an at-grade solution, such as BRREO, could meet the Project objectives;

(b) in the absence of a finding from the Majority to the contrary, the Minority's finding that an at-grade option could not meet the Project objectives must stand;

(c) an option that does not meet the Project objectives should be considered to be a suppositious option.

[162] However the issue which I am required to determine is not whether BRREO was or was not a suppositious option but whether the true and only reasonable conclusion contradicts the Board's conclusion. In addressing the reframed question I remind myself of the Supreme Court's direction in *Bryson* that appellate judges must keep firmly in mind that on a challenge of this nature an appellant faces a very high hurdle.[86]

[163] The nature of the Board's consideration of and conclusion on the BRREO option is apparent from the following paragraphs:[87]

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86 At [14] above.

87 The issue is also touched on at [1210] and [1214].

> [1162] We do not propose to resolve the apparent conflicts in the evidence relating to BRREO. It is not for us to determine the best option. The question is whether this less-harmful option is hypothetical or suppositious. We bear in mind that BRREO is still at an indicative stage and could be subject to more detailed analysis, such as to geometry and intersection control phasing, by an option evaluation process.
>
> [1163] At its worst, Mr Dunlop acknowledged that general traffic and freight would receive some benefit from the BRREO Option, now and following duplication of the Mt Victoria Tunnel, but he quantifies that the transport benefits (over 40 years) would be approximately 40% less than the benefits the Project can achieve. However, following a detailed assessment, he noted that both the Project and BRREO displayed significant journey time savings over the do-minimum scenario, which includes improvements to the Vivian Street/Pirie Street and Taranaki Street/Buckle Street intersections.
>
> [1164] We are satisfied the BRREO Option, particularly having regard to the adverse effects we have identified with regard to the Project, is not so suppositional that it is not worthy of consideration as an option to be evaluated.

[164] Given the preliminary nature of the Board's appraisal and the material to which it referred I do not consider that it could fairly be said that the Board's finding on the BRREO option was insupportable. The answer to Q 7(b)(i) is No.

Q 7(b)(ii): Is the case one in which the true and only reasonable conclusion contradicts the determination that Option X was an option with potentially less adverse effects?

[165] NZTA's submissions on Option X echoed its BRREO submission in combining different points of complaint:

(a) in the absence of an explicit finding by the Majority, the Minority's finding that Option X had been adequately considered must stand;

(b) a finding that Option X had not been adequately considered was not a finding that could reasonably be reached on the evidence;

(c) there was no evidence to support a finding that Option X was an option with potentially less adverse effects.

Only the third of those points of criticism engages with Q 7(b)(ii).

[166] The genesis of Option X was described at [1135]:[88]

> [1135] During the period from 2007–2009, the Architectural Centre developed a concept that later became known as Option X. It provided for westbound State Highway 1 traffic to travel at grade in front of the Basin Reserve northern entrance. All vehicles travelling between Adelaide Road and Kent and Cambridge Terraces would be diverted around the western sides of the Basin Reserve along Sussex Street. Local traffic would pass over a War Memorial Tunnel providing grade separation. The removal of circulatory traffic on the eastern side of the Basin Reserve would enable the Dufferin/Rugby Street corner to be developed into a park area.

[167] In the course of its conclusions the Board at [1319][89] stated that it was satisfied on the evidence that similar transportation benefits as those from the Project could be achieved by a tunnel option or variant similar to Option X and that such should have been included in a robust option evaluation process.

[168] Mr Palmer contended that the Board did not make a finding that Option X was an option with potentially less adverse effects. Neither the amended notice of appeal nor NZTA's submissions indicated where in the Decision such a finding was made.

[169] While I was unable to identify a specific finding to that effect, I inferred that the basis for the allegation was the second of the two overarching themes which the Board at [1171] described as being worthy of careful consideration, namely "the consideration given to non-suppositious options, with potentially reduced environmental effects".[90] As Option X was discussed in the section which followed, then it could fairly be assumed that it met that description.

[170] It was Mr Milne's submission by reference to several items in the transcript that there was evidence from which it could have been found that Option X or a variant of it, if it had been properly considered within the context of the National War Memorial Tunnel, might have less adverse effects. He also made the point that NZTA had found Option X to have sufficient merit to warrant preliminary and later more detailed consideration, as had WCC. He submitted that that of itself was

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88 It is then discussed at several points in the Board's analysis: [1136]–[1138], [1143]–[1146], [1191], [1195]–[1196], [1199]–[1200].

89 At [234] below.

90 At [178] below. Essentially the same statement was made at [1183].

indicative that both entities accepted that an Option X variant could potentially have lesser environmental effects.

[171] On the basis of that material I consider that there was evidence which warranted the Board including Option X within the category of options which had "potentially" reduced environmental effects. NZTA has not demonstrated that a different view was the true and only reasonable conclusion.

Q 7(b)(iii): Is the case one in which the true and only reasonable conclusion contradicts the determination that a long tunnel option was a non-suppositious option?

[172] Ground of appeal 8(a)(iii) asserted that the evidence showed that NZTA considered the long tunnel option to be unaffordable, that the Board acknowledged at [1206] that affordability is properly a matter for the requiring authority and that consequently the Board could not reasonably conclude that the long tunnel option was non-suppositious.

[173] While cost can be exclusionary, it was apparent the Board had reservations about the consistency in the assessment of cost among the options and the omission to undertake a reassessment subsequent to the government's decision to underground Buckle Street. Under the heading "Affordability" the Board observed with reference to Option F:[91]

> [1204] As we have said, notwithstanding that Option F provided better overall outcomes than Option A in respect of the simplified evaluation criteria, Option F was dismissed on the basis of being unaffordable. Mr Durdin pointed out in the Abey Peer Review Report that the additional weighting given to economic efficiency, when comparing Option A to Option F, was inconsistent with the approach used to identify Options A and B as being preferred to Options C and D, in the evaluation of the initial options. In that instance, the assessment concluded that a difference in Benefit-Cost Ratio of approximately 0.5 was insignificant for a project of this scale, yet the difference in BCR between Option A and Option F is of a similar magnitude given the additional costs of Option F and the similar level of benefits generated by each option. He concluded:

[91] At [1184] the Board noted that the tunnel options were synthesised down to a tunnel option known as Option F.

> The apparent inconsistency and lack of transparency in the underlying process by which options have been compared in different stages of the project is a significant concern of the reviewers.

[1205] In his concise summary of evidence, Mr Durdin again said:

> My concern is that Technical Report 19 provides its recommendation on preferring Option A over Option F on the basis of affordability. The lack of transparency around this process has led me to question the extent to which this can be considered a substantive assessment of alternatives.

[1206] We agree with Mr Cameron that the question of affordability is a matter for [NZTA]. As pointed out by Mr Cameron, the cost of an option could make the option unrealistic. However, affordability is a relative term. In the context of this case, where we have found that there would be significant adverse effects, there is a greater need to test the cost against the adverse effects in a transparent and comparative evaluation against other options. This should have been done at the Feasible Options Report stage. It was not.

[1207] Option F was removed from that process on the grounds of affordability. At the time it was removed there was a clear statement of intent in the Feasible Options Report to assess Option F once the Government made a decision whether to fund the NWM Park and Buckle Street Underpass. This was not done once that decision was made by the Government. Rather, an ex post facto comparison of Options A, F and X was appended as Appendix B to Technical Report 19. At this stage [NZTA] had indicated a preference for the Basin Bridge (Option A) and were preparing to lodge the application documents.

[174] Although a number of items of evidence were cited by the respondents in their opposition on this issue, in my view those observations of the Board suffice to repel the argument that a different determination on the non-suppositious nature of Option F was the true and only reasonable conclusion.

Subissue 1C: Interpreting adequacy as requiring transparency and replicability

Context

[175] To comprehend the nature of NZTA's complaint it will assist to refer in a little more detail to aspects of the chronology of events and the Board's discussion.

[176] With reference to the suite of five options referred to in [1125][92] the Board said:

> [1125] This suite of five options was assessed against evaluation criteria as reported in Section 5.3 of Technical Report 19. Using a pair-wise comparison and a weighting process, the workshop participants recommended Option A and Option B – both grade-separated bridge options. Option A eventually evolved into the Project.
>
> [1126] The option evaluation did not identify whether certain evaluation criteria were given more weight than others until the end of the process. This made following the process to arrive at the preferred option difficult to follow.
>
> [1127] Mr Milne's cross-examination of Dr Stewart focused on this apparent lack of transparency at some length. While it became apparent that weighting was applied at different stages of the process, just how those weightings were applied was not explained. A clear expression of the weighting factors would have made it much easier to follow and would have enabled a replication of the selection process.
>
> [1128] Abley Transportation Consultants, instructed by the Board to peer review aspects of the transportation issues including alternatives, attempted to replicate the selection process used to arrive at the preferred options. Several scoring systems were applied to the negative and positive effects ratings presented in Technical Report 19. By assuming equal weighting for each criteria, their analysis concluded that the at-grade Option D should receive the highest ranking. This highlights the sensitivity of the outcome to the relative weightings of the criteria.
>
> [1129] Of note also are the following comments from page 65 of the Feasible Options Report:
>
> 3. If we give more weight to the built heritage then we should select Options C, D or B but not A.
>
> 4. If we give more weight to social impacts and urban design then we should select Options A or B and not C or D.

[177] After discussing the March 2013 option evaluation recorded in Technical Report 19, the Board referred to the Traffic and Transportation Effects Peer Review of 25 November 2013 by Abley Transport Consultants which concluded with the observation:

> The apparent inconsistency and a lack of transparency in the underlying process by which options have been compared at different stages of the project is a significant concern of the reviewers.

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92 At [124] above.

[178] In turning to address the many criticisms levelled at the process and its underlying methodology, the Board reminded itself of the limitation on its function:

> [1167] At this stage, it is important to remind ourselves that Parliament has stopped short of giving this Board the jurisdiction to direct that any other alternative must be selected. It would thus become an exercise in futility if we were required to examine, in detail, and adjudicate upon, in detail, the merits of the various alternatives.
>
> [1168] While there were numerous criticisms made, we propose to identify those that we consider cogent to an overall appraisal of the process …
>
> [1171] From these criticisms, we distil two overarching themes that we consider worthy of our careful consideration:
>
> [a] The transparency and replicability of the option evaluation; and
>
> [b] The consideration given to non-suppositious options, with potentially reduced environmental effects.

The transparency and replicability of the option evaluation

[179] While [1172] is the primary focus of NZTA's complaint, NZTA's submissions analysed the Board's observations in several subsequent paragraphs. It is useful to record them:

> [1172] It was accepted that any evaluation process needed to be transparent. Dr Stewart acknowledged the need for this during his cross-examination by Mr Milne. Mr Durdin was also of the same view. This is necessary in order that what occurred during the option evaluation process can be fully understood, particularly if weightings are given to evaluation criteria. Mr Durdin also considered it is important that any process be replicable so that its robustness can be tested. Thus, transparency and replicability go hand in hand.
>
> [1173] It was clear from the questioning of Mr Stewart and other witnesses that each specialist applied weighting at various stages of the process. However, this was not explicit and was not documented. We have already expressed our concern about how the option evaluation, particularly as summarised in Technical Report 19, did not identify whether certain evaluation criteria were given more weight than others. This made it difficult to follow.
>
> [1174] The problem manifested itself by the fact that Mr Durdin was unable to replicate the selection process used to arrive at the preferred options in the Feasible Options Report. The November 2013 Peer Review (Report 1) included a test of the decision-making process using a non-weighted multi-criteria analysis approach. As Mr Durdin pointed out in his evidence-in-chief, the test was completed to check the robustness of identifying Option A as the preferred option. That process showed that

> Option A could have been selected, but equally Options B, C or D could have been selected using that approach.
>
> [1175] Dr Stewart has accepted, both in the Joint Witness Statement – Transportation, February 2014 and in cross-examination that:
>
> > Put simply, if a different process was used, a different recommendation may have resulted.
>
> [1176] All of the experts at that conference agreed.
>
> [1177] As Mr Durdin pointed out, this demonstrated the selection is highly reliant on the assessment technique used. He said:
>
> > Ideally, the preferred option would be identified independent of the assessment technique thereby providing greater confidence in the robustness of selecting one option over another. That is not the case in this instance, as Option A was selected using the pair-wise analysis method, Option D would be selected using the NZTA incremental BCR method and Option A, B, C or D could have been selected using multi-criteria analysis.
>
> [1178] This emphasises, or highlights, the need for transparency in explicitly setting out the weightings that are used, and the reason why they have been used, in any multi-criteria analysis. This would enable a decision-maker, in this case this Board, to adequately carry out its statutory functions under Section 171(1)(b). Parliament has directed decision makers to have particular regard to whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work. We take that explicit direction seriously.

The issue

[180] NZTA contended that the Board erred in law in finding that, in order to be adequate under s 171(1)(b), the consideration of alternatives must also be "transparent and replicable". It framed the following question of law:

> Q 10 Does the inquiry into adequacy under s 171(1)(b) require that the consideration of alternatives be transparent and replicable; or is it sufficient that the consideration is apparent?

[181] NZTA contended that the paragraphs quoted above demonstrated that the Board descended into a level of enquiry that is neither permitted nor appropriate under s 171(1)(b). It argued that, by requiring "replicability", the Board sought to audit NZTA's consideration of alternatives and in doing so engaged with the outcome as opposed to the process, which is not its role. In its primary submissions NZTA said:

> 18.7 While the consideration of alternatives must be apparent in order for the adequacy of the consideration to be assessed, the Majority erred in law by requiring that the consideration be 'transparent and replicable'. The Majority heard detailed and lengthy evidence regarding the consideration of alternatives, such that the consideration given was readily apparent.
>
> 18.8 The Act does not require that the consideration given to alternatives be replicable, or mandate the Board to conduct an audit of the requiring authority's selection process. It clearly contemplates that the requiring authority will have exercised judgement in selecting the preferred option.
>
> …
>
> 18.11 … the correct approach under s 171(1)(b) … recognises that it is for the requiring authority to exercise judgement and make a policy decision as to which option to pursue. The decision-maker should not seek to ensure that the 'best' option has been selected by auditing the consideration of alternatives, in particular, by seeking to replicate the selection process.

[182] As with some of NZTA's other specified questions of law, I consider that the inclusion of the verb "require" misdirects the inquiry. Certainly the Board did not suggest that in all cases a conclusion on the adequacy of consideration of alternatives will necessitate demonstrating replicability. If the question is viewed as importing such a general requirement the answer would be No.

[183] The issue of replicability has arisen in this case because of the fact that weightings were applied to various evaluation criteria at various stages of the process.[93] The Board's complaint was that the selection process is in effect opaque in the absence of information about the different weightings applied. Given the Board's perception that NZTA's preference for Option A had become entrenched,[94] the Board was not satisfied that the consideration of other non-suppositious options had been adequate. It felt the need to state that it viewed its obligation "seriously".

[184] NZTA's complaint is that the Board took its role too seriously. Both the form of the question and its submissions emphasised that the inquiry is whether the requiring authority's consideration of alternatives is "apparent". Mr Milne's submissions for TAC construed that approach as being:

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93 At [176] above.
94 At [1200].

> trust us … measure adequacy by the volume of paper we produce not the quality of the process.

[185] I do not accept NZTA's submission[95] that the Board was seeking to ensure that the "best" option had been selected by auditing the consideration of alternatives. I consider that the Board had a clear understanding of the confined nature of its role: see [1090][96] and [1167].[97] While I can understand how NZTA might perceive the Board's concern about weightings as approximating to an audit, it is clear in my view that that was not the Board's objective. The Board's concern as expressed at [1181] was that, absent an understanding of the weightings applied, it was not possible to determine that adequate consideration had been given to relevant alternative options.

[186] In my view in some, but by no means in all, cases it may be necessary for the decision-maker to gain access to the weightings in a multi-criteria analysis in order to be satisfied that adequate consideration has been given to alternatives. The cases will inevitably be circumstances dependent. I do not consider that that is an unreasonable approach given the context of s 171(1)(b) where:

(a) as I have held with reference to Issue 1A above, the measure of adequacy of the consideration of alternatives will depend on the impact on the environment of adverse effects; and

(b) the subject of s 171(1)(b) is one of the matters to which particular regard is to be had.

[187] I am unable to discern an error of law in the Board's approach to this question. Indeed I perceive that this is another instance where NZTA is in effect inviting the Court, under the guise of a question of law, to second-guess the Board's conclusions. There is force in Mr Palmer's submission that NZTA's argument at para 18.9 of its primary submissions, that the Board placed "too much weight on the opinion evidence of Mr Durdin", serves to illustrate that NZTA's real complaint amounts to a disagreement about a matter of factual inference and assessment.

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95 At para 18.11 in [181] above.
96 At [125] above.
97 At [178] above.

Subissue 1D: Requiring the assessment methodology to incorporate Part 2 weightings

[188] NZTA's challenge on this issue is directed at the Board's concluding observations following those considered in Issue 1C above, in particular the emphasised words:

> [1180] A failure to explain the reasons for any weighting (if any) can create difficulty for us in exercising our statutory function by making it difficult for us to assess any such weightings against Part 2 and the objectives of the Project. **While we accept that each alternative does not need to be assessed against Part 2, nevertheless, Part 2 considerations should be reflected in any weight given to a particular evaluation criteria (sic) over another, as is clear from the North Island Grid Upgrade Project Board of Inquiry decision, quoted earlier.** Furthermore, as was pointed out in the Feasible Options Report, a key focus of the evaluation process was that the preferred option can be considered as that option that best meets the Project objectives with the least overall social, community and environmental impacts.
>
> [1181] The failure for either the evidence or the reports to explicitly explain what weightings were given at each of the option evaluation stages makes it difficult, if not impossible, to determine if adequate consideration was given to alternative options.
>
> (emphasis added)

[189] The amended notice of appeal at paragraph 12 contended that the Board erred in law by finding at [1180] that considerations under Part 2 of the Act should be reflected in the weight given to particular evaluation criteria, and consequently in finding at [1181] that the failure explicitly to explain the weightings given to criteria made it difficult, if not impossible, to determine if adequate consideration was given to alternative options.

[190] NZTA posed the following question of law:

> Q 13 Does s 171(1)(b) require the requiring authority's consideration of alternatives to incorporate Part 2 considerations; including (in particular) the weight given to particular evaluation criteria?

[191] NZTA criticised the highlighted passage on two counts. First it contended that the second sentence contained inconsistent findings. Secondly it said that the NIGUP decision was not authority for the proposition that Part 2 considerations must

be reflected in any weight given to a particular evaluation criterion over another during the consideration of alternatives.

[192] NZTA submitted that each alternative does not have to be tested against Part 2, citing *Volcanic Cones Society*[98] and *Queenstown Airport*.[99] The Board acknowledged that that is so. Indeed the Board had emphasised that point in the quotation from the NIGUP decision at [1094].

[193] NZTA developed the argument in this way:

> 19.3 The only purpose of requiring Part 2 to be reflected in weightings could be to ensure that the alternative met the requirements of Part 2 – in other words, to test the alternative against Part 2. Thus, by finding that Part 2 considerations should be reflected in any weight given to a particular evaluation criteria over another, the Majority effectively required alternatives to be tested against Part 2 (which the Majority was obliged to acknowledge is not the legal test). These findings are inconsistent.

[194] NZTA's argument was that, by recognising a requirement for evaluation criteria weightings to reflect Part 2 considerations, the Board was in effect requiring each individual alternative to be assessed against Part 2 despite the Board disclaiming such an intention.

[195] The issue is a subtle one. The Board's statement needs to be read in context, namely its consideration of the transparency and replicability of the option evaluation. The passage at [1180] follows the discussion at [1173] to [1177][100] of the significance for the outcome of the weighting of the evaluation criteria and the fact that it was not known whether certain evaluation criteria had been given more weight than others.

[196] That discussion had prompted the Board's observation at [1178] about the need for transparency in explicitly setting out the weightings used in any multi-criteria analysis. All of that had been preceded by the chronology which had

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98 *Volcanic Cones Society*, above n 20, at [61].
99 *Queenstown Airport*, above n 22, at [50].
100 At [179] above.

included the significant paragraphs [1128] and [1129][101] where the sensitivity of the outcome to the relative weightings of the criteria had been noted.

[197] I do not consider that the Board's intention was to subvert the established position, which it clearly recognised, that each alternative does not have to be tested against Part 2. My impression is that the Board was saying that, if a range of alternatives are to be the subject of evaluation by criteria which are to be variably weighted, then the selection of the different weightings should "reflect" Part 2 considerations.

[198] In view of the discussion of the role of Part 2 in both *McGuire* and *King Salmon* I do not view that suggestion as controversial. While each alternative does not need to be measured against Part 2, it is not unreasonable that a mechanism which provides the basis for the comparison of alternatives *inter se* should not be subject to the infusion of Part 2. Consequently I do not consider that the second ("nevertheless") part of the highlighted sentence of paragraph [1180] is erroneous in law.

[199] NZTA's second point was that the Board misapplied the NIGUP decision. The answer to this criticism is simpler. As Mr Palmer acknowledged, the sentence structure is a little puzzling. I agree that the NIGUP decision is not authority for the "nevertheless" proposition. However, as the Board had already recognised at [1094], it is clear authority for the first statement that each alternative does not need to be assessed against Part 2. In my view the Board was intending to say no more than that. Although located at the end of the sentence, its reference to the NIGUP decision was not intended as support for the observation about weightings reflecting Part 2 considerations.

[200] Reverting to Q 13, I do not consider that the question as framed is sufficiently precise to permit an answer reflecting my reasons above. An affirmative answer could be construed as departing from the established position that individual alternatives do not have to be separately tested against Part 2. I consider that a more accurate way of encapsulating my view of this aspect of the Board's decision is to

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[101] At [176] above.

say that, in circumstances where the requiring authority's consideration of alternatives involves the application of evaluation criteria which are variably weighted, the decision to allocate the variable weightings should be subject to Part 2.

Subissue 1E: Conflation of s 171(1)(b) and (c) considerations

[201] The question of law posed under this heading is:

> Q16 Does the test of adequacy under s 171(1)(b) require a requiring authority to select the option that best meets the transportation objectives while minimising environment effects?

[202] In relation to that question the amended notice of appeal at paragraph 15 states that the Board erred:

> (a) By inferring at [1180] that the assessment of alternatives must result in selecting the alternative ("the preferred option") that best meets the project objectives with the least overall social, community and environmental impacts.
>
> (b) By inferring at [961] that the project objectives ought to have included an environmental objective so that the Proposal could be tested against transportation effects and adverse environmental effects.

[203] Paragraph [961] appears in a discussion of the marked conflict of evidence between NZTA's expert witnesses and the witnesses called by the opposing parties. It states:

> [961] Both at the Feasible Options Report stage and at the hearing before us, there appeared to have been an overemphasis on transport and related benefits (which reflects the Project's objectives) rather than an assessment of the relevant amenity and environmental effects of the Project (which are absent from the objectives), assessed by reference to what is sought to be protected, maintained or enhanced in the statutory instruments.

[204] With reference to that paragraph NZTA submitted:

> 20.2 This comment is provided against the context of the Majority's assessment that the urban design and landscape evidence called by [NZTA] was influenced by the transportation objectives of the Project and the acceptance that grade separation by way of a bridge

> is the only way of achieving those objectives. However, it is submitted that this criticism has also permeated the Majority's assessment of the Appellant's consideration of alternatives.

[205] Then, after referring to [1180][102] and [1198], NZTA submitted that, while NZTA's aim throughout the process of considering alternatives was to select the option that best met the project objectives with the least environmental effects, NZTA did not accept that s 171(1)(b) required that test to be applied or met. NZTA argued that the Board's approach unnecessarily conflated ss 171(1)(b) and (c).

[206] I do not consider that the Board made any error of law as suggested. I agree with Mr Palmer that [961], read in the context of the relevant discussion, is simply designed to explain why there might have been a conflict of evidence between the witnesses on the opposing sides. I also accept his submission that the final sentence of [1180] on what NZTA relies is an attribution to NZTA's own Feasible Options Report. I am unable to discern a conflation error of the nature advanced.

[207] While in those circumstances I consider that Q 16 is inapt, the answer is in the negative.

Subissue 1F: Finding that adequate consideration was not given to alternatives following the Government's decision to underground Buckle Street

Context

[208] The short chronology in the overview of the consideration of alternative options referred to the letter from Opus to NZTA dated 3 July 2012.[103] The Decision continued in this way:

> [1196] The five-page document was essentially a brief summary or overview of Option F and Option X. It briefly referred to the decision being made that Option A was preferred over Option B. It touched on other options. It was not a careful evaluation of options in light of the decision by the government to underground Buckle Street. It could not be compared to the rigour of the Feasible Options Report stage. At most it could be called nothing but a cursory review of the situation.

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102 At [188] above.
103 In [1138] at [124] above.

[1197] Following its public announcement on 17 August 2012 that Option A was the preferred option, [NZTA] then proceeded to prepare its documentation for lodging its application with the EPA. The application was lodged on 17 June 2013.

[1198] Our concern is that the playing field changed with the likelihood of the Buckle Street Underpass and the bringing forward of Mt Victoria Tunnel duplication options. These should have resulted in re-evaluation of the options, including Option F, against the Project objectives. The Feasible Options Report, as we have said, itself specifically states the need to reconsider the ability of options to work in with a possible underpass. This was not done. There was no proper reconsideration of options once the underpass became a certainty.

[1199] Nothing further was done until the City Council decided on 19 December 2012 to order an assessment of Option RR (the precursor of the BRREO Option), Option X and Option A. An Option X transportation assessment was prepared by Opus for the City Council and was published on 20 February 2013. The overall assessment was completed on 28 March 2013. It concluded:

> **Overall Conclusions**
>
> From an urban design perspective, the preference would be for an at-grade solution – that is, a solution that does not require any elevated structures. However, it may not be possible to achieve the required transport benefits with an at-grade option.
>
> In that case, the preference is for the simplest structure – one does not make this part of the city harder for people to find their way around, or compromise access to neighbouring facilities.

[1200] It was not until late March that [NZTA] acted. In late March 2013, the Project team carried out an option evaluation of Options A, F and X. According to the introduction of the Comparison of Options, the evaluation was undertaken to confirm the decision previously made by [NZTA] that Option A was the preferred option. The document is dated June 2013, and by this time, the application documents for Option A would have been well advanced, as they would have been in late March when the evaluation commenced. Furthermore, it would appear from the letter dated 19 December from Mr Dangerfield, the CEO of [NZTA], to the CEO of the City Council that [NZTA] had become entrenched with Option A well before November 2012. It had, as we have said, made its decision, making Option A its preferred option on 17 August 2012.

[1201] We were not provided with any documentation or evidence as to why the Project team was asked to do its assessment in March 2013. Nor was any reason given for the failure to carry out a feasible option type assessment soon after the Government's decision to underground Buckle Street, as was foreshadowed in the Feasible Options Report.

> [1202] The chronology of events and the failure to carry out the clear statement of intent to reassess options in the event of the undergrounding of Buckle Street raises doubts as to the adequacy of consideration of alternatives. This is particularly so having regard to Mr Durdin's comments on the March 2013 comparison of options:
>
> > 37. The simplified decision matrix for the comparison between Options A and F consolidates down to four evaluation criteria, mainly Built Heritage, CPTED, Transportation and Visual. That process shows Option A as considered positive against two criteria (CPTED and Transportation) and negative against the other two. In comparison, Option F is considered positive against all four criteria.
> >
> > 38. Given that the decision-making process is premised around selecting the option "… with the least social, community and environmental impacts" it would follow that Option F should have been selected.

Issues

[209] NZTA asserted that in those paragraphs the Board made three errors of law:

(a) By finding at [1196] that the review of alternatives carried out in July 2012 was "cursory".

(b) By inferring at [1200] that NZTA's consideration of alternatives in March 2013 was too late because the application documentation would have been well advanced, and NZTA appeared to have been entrenched with its preferred option by that time.

(c) By finding at [1201] that NZTA was required to carry out a "feasible option type assessment" following the Government's decision.

[210] Those errors translated into four different questions of law:

> 19(a) Was the Board's finding that the review of alternatives carried out in July 2012 was 'cursory' a finding to which it could reasonably have come on the evidence, including in relation to suppositious options (refer Subissue 1B)?
>
> 19(b) In order for the consideration of alternatives to be relevant must the consideration be completed before the application documentation is well advanced?

19(c) Is a requiring authority required to prepare a 'feasible option type assessment' when the environment changes? Or is it entitled to rely on earlier work?

19(d) Was the Board's finding that adequate consideration was not given to alternatives following the Government's decision a finding to which it could reasonably have come on the evidence?

Q 19(a) [recast]: Is this a case in which the true and only reasonable conclusion contradicts the determination that the review of alternatives carried out in July 2012 was cursory?

[211] Referring to the Opus letter and an undated cost estimate for Option F of 19 July 2012, NZTA's short submission was that, while those documents were not a "feasible options type assessment", they reflected a level of consideration appropriate to the circumstances. In particular it was said that the two documents provided expert advice that:

(a) Option F remained significantly more expensive than the Project; and

(b) Option X remained a less desirable option due to cost and other concerns.

[212] The question whether the 3 July 2012 review of alternatives was cursory is to be viewed, as NZTA says, in the context of the circumstances. Those circumstances included the stance earlier taken that Option F was to be assessed with other options which permitted SH1 to be located in a tunnel in front of the War Memorial once the government had made a decision on whether to fund the War Memorial Tunnel.[104]

[213] The Opus letter set out what it termed an alternate review.[105] The Board did not view it as a careful evaluation of options in light of the government's decision to underground Buckle Street, observing that it could not be compared with the vigour of the Feasible Options Report stage. It is apparent that the Board regarded the letter as superficial.

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[104] [1123] at [124] above.
[105] [1138] at [124] above.

[214] It may be that an alternative view was available. However, on the facts as recited in the Decision such an alternative view could not be said to be compelling. There was ample basis for the Board's assessment of the situation. Consequently it cannot be concluded that the true and only reasonable conclusion contradicted the Board's view.

Q 19(b): In order for the consideration of alternatives to be relevant must the consideration be completed before the application documentation is well advanced?

[215] NZTA submitted that s 171(1)(b) does not set a deadline by which alternatives must have been considered in order for that consideration to have been adequate. I agree. However, whether the consideration of alternatives, which occurs comparatively late in the process, will be adequate or not is a matter of fact.

[216] That point is illustrated by the authority cited by NZTA, *Nelson Intermediate School v Transit New Zealand*.[106] As NZTA notes, the Environment Court there did not find that alternatives needed to have been considered prior to a particular date. However it found that Transit's development and consideration of alternatives during an appeal hearing was not adequate.

[217] That was not a finding of law. Nor was the view reached by the Board in the present case, that NZTA had become entrenched with Option A well before November 2012, a finding which contains an error of law. For that reason I do not answer the question which, in any event, is inappropriately vague.

[218] Any attack on the Board's view would need to resort to an *Edwards v Bairstow* type challenge. That is the nature of NZTA's fourth question in Issue 1F to which I now turn.

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106 *Nelson Intermediate School v Transit New Zealand* (2010) 10 ELRNZ 369 (EnvC).

Q19(d) [recast]: Is this a case in which the true and only reasonable conclusion contradicts the determination that adequate consideration was not given to alternatives following the Government's decision?

[219] NZTA's primary submissions stated:

> 22.1 … on 20 February 2013, Opus briefed [NZTA's] specialists to assess Options A, F and X for the purposes of Technical Report 19: Alternative Options Omnibus. The results of that exercise are summarised in Technical Report 19: Alternative Options Omnibus at Appendix B.
>
> 22.2 The Majority gave this exercise little or no weight in its assessment of [NZTA's] consideration of alternatives. No explicit reason for this is given. However, at [1200] the Majority stated that it would appear that [NZTA] was "entrenched with Option A well before November 2012".
>
> 22.3 Absent an explicit finding of bias or predetermination, there was no reasonable basis on the evidence for the Majority to find or infer that [NZTA's] consideration of alternatives in March 2013 was too late.

[220] In my view NZTA falls well short of the high hurdle of establishing that the Board's view was insupportable. Indeed, with reference to NZTA's submission at para 22.3, I consider that there were ample grounds for the Board's view on the basis of the 19 December 2012 letter alone.

[221] Accordingly the answer to Q 19(d) is No.

Q 19(c): Is a requiring authority required to prepare a "feasible option type assessment" when the environment changes? Or is it entitled to rely on earlier work?

[222] In the heading to this issue in its primary submissions NZTA posed the question: was NZTA required to "start again" following the Government's decision? It acknowledged that the Opus letter and the updated cost estimate[107] were not a feasible option type assessment but submitted:

> 21.6 It is appropriate (and economically responsible) for a requiring authority to rely on its earlier consideration of alternatives when the environment for a project changes. It is not required to carry out a new 'feasible option type assessment' whenever the environment for receiving the project changes.

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[107] At [211] above.

[223] The response (it is obviously not an "answer") to this question is: it depends. It is dependent on the nature and extent of the change to the environment and the extent of the reconsideration that such change necessitates. A comparatively minor change would be unlikely to require a requiring authority to "start again". The earlier work could no doubt be relied upon in large part. However a significant change to the environment might require a substantial revisiting of the prior work.

[224] The relevant event here was the government's decision concerning funding of the War Memorial Tunnel. Whether that event was of such significance as to require a more thorough-going reconsideration than was reflected in the 3 July 2012 letter is essentially a question of fact. There is no question of law to be answered.

Subissue 1G: Adequacy of the consideration

[225] In support of an alleged error of law in finding that adequate consideration was not given to alternatives, NZTA advances the following grounds of appeal:

(a) The evidence was of a lengthy, detailed and thorough consideration of a range of alternatives.

(b) For the reasons set out under Issues 1A to 1F, the Board applied the wrong legal tests to what was required of NZTA in its consideration of alternatives. Had the Board applied the correct test it should have found on the evidence before it that the consideration was adequate.

(c) Further, the Board allowed itself to be distracted by the merits of alternatives preferred by submitters (including BRREO, Option X and the long tunnel option) and failed to properly consider the evidence of the consideration given by NZTA to alternatives. Section 171(1)(b) requires decision-makers to inquire as to the process, rather than the outcome of the consideration given to alternatives.

[226] From that footing NZTA proposed the following question of law:

> Q 22 Is the Board's finding that adequate consideration was not given to alternatives a finding that it could reasonably have come to on the evidence?

[227] For the reasons explained at [16] to [23] that question is reframed in this way:

> Is the case one in which the true and only reasonable conclusion contradicts the determination that adequate consideration was not given to alternatives?

As earlier noted[108] that question effectively subsumes the alternative question in Issue 1A which reframed is:

> Is the case one in which the true and only reasonable conclusion contradicts the determination that NZTA had not given sufficiently careful consideration to alternatives?

[228] NZTA's argument relied on Annexure A to its primary submissions which traversed the history of events from the Meritec Scheme Assessment Report in March 2001 to the lodgement of the NoR in June 2013.

[229] Clearly there was a large volume of evidence before the Board which it appears to have diligently considered. Further, given that Mr McMahon, in his alternate view at Part 2 of the Report, accepted that adequate consideration had been given to alternative sites, routes and methods of undertaking the work, it may well be that this is a case where different decision-makers, each acting rationally, might reach differing conclusions.[109]

[230] However the issue for me is whether the Board's decision is within the category of rare cases where its conclusion is so clearly untenable as to amount to an error of law because the proper application of the law requires a different answer.[110]

[231] If the law is as I have found in the course of my consideration of the earlier parts of Issue 1, then I consider that, on the basis of the Board's consideration of the

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108 At [144] above.
109 *Vodafone*, above n 2, at [56].
110 At [52].

dual issues of transparency/replicability and assessment of non-suppositious options, the answer to the questions in their reframed form can only be in the negative.

Issue 2: Inquiring as to the outcome rather than the process of considering alternatives

[232] In the course of considering Issue 1C reference was made to NZTA's contention that the Board had engaged inappropriately with the outcome rather than the process.[111] That theme is developed in Issue 2 where two errors of law are alleged:

> (a) When exercising its overall judgement in accordance with s 5, applying *McGuire v Hastings District Council* [2001] NZRMA 557 to hold that if an alternative is available that is reasonably acceptable, though not ideal, it would accord with the spirit of the legislation to prefer that (at [1324]. See also [1319] and [1182]–[1187]).
>
> (b) By assessing the effects of the Proposal by reference to alternatives that the Board considered would have less adverse effects on the environment (in particular, BRREO, Option X and tunnel options). (See [403], [510], [643], [1241], [1319]).

[233] Those dual errors give rise to a single question of law, Q 25, which incorporates two alternatives:

> Q 25 Is a decision-maker (in this case the Board) permitted to compare an option against other alternatives that it considers would have less adverse effects on the environment, either in assessing the effects of the Proposal under s 171(1), or in exercising its overall judgment in accordance with s 5?

[234] In Issue 1B reference was made to the circumstances in which and the reason why various options were put before the Board.[112] Those paragraphs, together with the following two paragraphs from that part of the Decision headed "Exercise of judgment in accordance with Section 5", are referred to in the first of the alleged errors of law:

> [1319] Having said that, we are satisfied on the evidence that similar transportation benefits that would give effect to such integrated management could be achieved by a tunnel option or variant similar to Option X. We are also satisfied on the evidence that an at-grade option, along the lines of the

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111 At [181] above.
112 [1182]–[1187] at [148] above.

> BRREO Option, could facilitate some benefits, albeit not as well as the Project, at least until the Mt Victoria Tunnel duplication and possibly well beyond. We consider such options should have been included as part of a robust option evaluation process.
>
> …
>
> [1324] In the final outcome, we are required to evaluate the significant adverse effects taken together with the significance of the national and regional need for and benefit of the Project. In carrying out this evaluation, we are conscious of the dicta of the Privy Council in *McGuire* that relevantly Sections 6 and 7 are strong directions to be borne in mind, and if an alternative is available that is reasonably acceptable, though not ideal, it would accord with the spirit of the legislation to prefer that.

[235] NZTA noted that *McGuire* was focused on Māori land rights and jurisprudence around the Treaty of Waitangi, including the processes in ss 6(e), 7(a) and 8 of the RMA. It said that the Privy Council's reference to "the spirit of the legislation" can only be read as referring to the particular discussion of Treaty jurisprudence and its place in the RMA. It argued that the Board was wrong in [1324] to extend those observations more generally.

[236] NZTA also relied on *Quay Property Management Ltd v Transit NZ*[113] in support of the proposition that a decision-maker should not cross the line into adjudication of the merits of the options and by that measure determine whether the chosen route was reasonable.[114] Hence it submitted:

> 23.6 The Majority therefore erred by comparing the Project to alternatives when assessing the Proposal's effects under s 171(1) or exercising its overall judgement in accordance with s 5. (See [403], [510], [643], [1241], [1319] and [1324].

[237] I do not consider that the Board was purporting or attempting to "cross the line" as described in *Quay Property*. The Board's understanding of the nature of its task is readily apparent from paragraphs to which reference has already been made. I consider that the respondents are correct when they say that a comparison of the relative effects of various aspects of the Project with those of alternatives was a natural corollary of the Board's considering whether NZTA had given adequate consideration to those alternatives.

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113 *Quay Property Management Ltd v Transit NZ* EnvC Wellington W28/00, 29 May 2000 at [152] applied in *Queenstown Airport*, above n 22, at [50].

114 [1090] at [125] above and [1167] at [178] above.

[238] I consider that the analysis of Mr Milne for TAC fairly responds to NZTA's complaint:

> 156. The Board did not assess the overall merits or effects of the alternatives. The Board did not draw a conclusion as to whether the alternatives referred to would have been *better* options overall. Rather, it considered whether Option X-type options, tunnel options and BRREO-type options were non-suppositious and whether it was likely that they might have less impact on heritage and amenity values. It reached the inevitable conclusion that such options would potentially have fewer adverse effects on amenity values and heritage values. It was necessary for the Board to understand the extent to which the various alternatives which submitters claimed had not been properly considered, had the potential to address project objectives with lesser environmental effects; so that it could reach a conclusion as to whether those alternatives should have been adequately considered.

[239] Consequently for these reasons I answer Q 25 in the affirmative.

Issue 3: Misapplication of s 171(1) of the Act

[240] The refined Issue 3 questions of law are recorded at [53] above. Three of those questions have been addressed in the course of the analysis of the statutory interpretation issues, namely:

- Q 28A at [72] to [76];
- Q 28C at [64] to [68];
- Q 28D at [99] to [118].

[241] It remains to address Q 28B which states:

> Was the Board in error by considering the effects of the environment of allowing the requirement without having particular regard to the matters listed in s 171(1)(a) to (d)?

[242] No light is shone on that very general question by reference to the error of law pleaded at paragraph 27(c) of the amended notice of appeal which simply alleges a failure by the Board to assess the effects of the environment of allowing the requirement having particular regard to the matters in s 171(1)(a) to (d).

[243] However some clarification is derived from the following grounds of appeal at paragraph 29:

> (c) In terms of the matters in s 171(1)(a) and (d), the Board failed to have particular regard to the following relevant matters when assessing the Proposal's effects:
>
> (i) the Proposal's consistency with regional/city transportation strategies, as discussed by the Board at [520]–[526], in particular, when considering what weight to give to the Proposal's 'enabling benefits' for future transportation developments (see below under Issue 3); and
>
> (ii) relevant matters in the District Plan when assessing the Proposal's effects on historic heritage and amenity values (see below under Issue 6).
>
> (d) In terms of s 171(1)(b), for the reasons set out above under Issue 1, the Board ought to have found that adequate consideration had been given to alternatives and assessed the Proposal's effects having particular regard to this finding.
>
> (e) In terms of s 171(1)(c), when assessing the Proposal's effects, the Board failed to have particular regard to its finding at [1230] that the work is reasonably necessary to achieve the objectives of the requiring authority.

[244] With reference to the s 171(1)(a), (b) and (d) matters, it will be observed that the grounds of appeal incorporate cross-references to other issues, namely Issues 1, 4[115] and 6. I did not receive discrete argument on these matters in the context of Issue 3 and consequently, like counsel, I treat these matters as addressed in the context of those other Issues. The point concerning s 171(1)(c) is addressed in the context of Q 45B at [356] below.

Issue 4: Incorrect approach to assessment of enabling benefits

A stand-alone project

[245] The Decision notes that a consistent issue during the hearing was the implications of NZTA's having sought approvals for the project separately from those for related parts of the network, particularly the Mt Victoria Tunnel

[115] The reference to Issue 3 in para 29(c)(i) should be a reference to Issue 4 which relates to enabling benefits.

duplication, and in advance of details of the Public Transport Spine Study and its outcomes being finalised.[116]

[246] NZTA's closing statement to the Board of 3 June 2014 explained its reasons for the Project being pursued on a stand-alone basis:[117]

> 12.9 It is for [NZTA], together with WCC and GWRC, to decide when applications for its various projects are lodged, and the make-up of each project. It would be ridiculous to suggest that, in Auckland for example, applications for all Auckland State highway and local roading improvements should be lodged at the same time, so that their inter-relationships can be explored. For Wellington, the Ngauranga to Wellington Airport Corridor Plan signalled in 2008 that the Basin Bridge Project is to be implemented before 2018, whereas the Mt Victoria and Terrace Tunnel duplication projects are described as "*measures that may be implemented (beyond 10 years)*". [NZTA] has structured the Project (and sought approvals for that Project) in a manner which is entirely consistent with that description.
>
> 12.10 Mr Blackmore's evidence is that one of the reasons for separating the Basin Bridge and Mt Victoria Tunnel Duplication Projects was [NZTA's] wish to improve the Basin Reserve road network and thereby facilitate public transport improvements (and increased use) prior to the duplication of the Mt Victoria and Terrace Tunnels. This is supported by the GWRC. In addition, [NZTA's] view was that the environmental and social aspects of both Projects were sufficiently different in nature that there was no need to combine the two Projects for consenting purposes. Mr Blackmore's evidence was that the Basin Bridge Project is a standalone project which is not dependent on the Mt Victoria Tunnel Project proceeding, and will have benefits for north-south traffic regardless of what happens at Mt Victoria. By comparison, the Mt Victoria and Terrace Tunnel Duplication Projects, and the Bus Rapid Transport Project, are reliant on the Basin Bridge Project being in place.

[247] The Board said:

> [232] We accept [NZTA's] submission that this is not a case where the Project itself requires further consents or authorisations under the RMA which are not currently before us. Rather, the issue is the extent to which the Project and its effects, can be properly understood and assessed having regard to the current status of the Public Transport Spine Study, and in isolation from the Mt Victoria Tunnel duplication project in particular.

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116 At [225].
117 Noted at [230].

> [233] The power to defer a matter lodged with the EPA under Part 6AA while other related applications are made lies with the Minister, not the Board. Further, this power is to be exercised before notification of the original applications. The matter now having been referred in accordance with Section 147(1)(a), we are required to make a determination on the Project before us, having regard to the effects of the Project (both positive and negative), and that Project alone. We address the scope of the relevant future state of the environment and effects (including additive and cumulative effects) we can consider (particularly with respect to the Mt Victoria Tunnel duplication) elsewhere in our decision.

[248] The Board accepted TAC's submission that it must take the position "as it is". It said:

> [234] … we must determine whether the project before us meets the Act's sustainable management purpose as a stand-alone Project (i.e. in the absence of the Mt Victoria Tunnel duplication), and on the basis of the information regarding the outcomes of the Public Transport Spine Study available to us. That is the key consequence of [NZTA's] decision to seek approval for the Project as a stand-alone project separate from that of the Mt Victoria Tunnel duplication, and in advance of the Public Transport Spine Study and its outcomes being finalised.

Effects and benefits – terminology and meaning

[249] The fact of the stand-alone nature of the Project was the catalyst for a significant debate about the benefits which could fairly be attributed to the Project, including contingent benefits and enabling effects. As Mr Cameron observed in the course of closing arguments before the Board, these are elusive concepts.[118]

[250] "Effects" are defined in s 3 of the RMA:

> In this Act, unless the context otherwise requires, the term **effect** includes–
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects–

[118] Transcript page 8146 line 27, 4 June 2014.

> regardless of the scale, intensity, duration, or frequency of the effect, and also includes–
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

[251] In its written closing statement to the Board NZTA stated that future effects, cumulative effects arising over time or in combination with other effects, and uncertain effects, are all relevant effects. Challenging the opposing contention that contingent benefits (being those benefits reliant on another consenting process or event in order to materialise) should not be taken into account by the Board, NZTA contended that the cumulative and in-combination effects to be considered by the Board included the Project's effects in combination with contingent benefits of works which are yet to receive RMA or another type of approval, citing as examples the Mt Victoria and Terrace Tunnel duplications.

[252] TAC's submissions on appeal argued that NZTA had shifted its emphasis on appeal from "strategic fit" with objectives to "enabling benefits". Although NZTA's closing statement used the phrase "facilitate/enable", as the Decision recognises, in oral submissions NZTA had submitted that "enabling effects" were a separate and identifiable benefit of the Project and that the Board should treat them as such.[119]

[253] In its written reply submissions NZTA maintained that there is a difference between the strategic fit of a project and its enabling benefits. It explained:

> 22.12 To be clear, in response to the submissions of TAC, [NZTA] considers that there is a difference between 'strategic fit' of a project and 'enabling benefits'. An 'enabling benefit' is an effect of a proposal that facilitates or creates an opportunity for the achievement of an outcome. Such an effect is an identifiable positive benefit of a project. Of course, what that might be is dependent on context.
>
> 22.13 In the context of this Project, the positive enabling effect is how the Project facilitates (will not frustrate) the development and potential implementation of related projects, particularly the Mt Victoria Tunnel duplication and the Public Transport Spine Study ('PTTS'). [NZTA] is not referring to the benefits from the actual implementation of the wider Roads of National Significance

[119] At [507] in [256] below.

> ('RoNS') programme or the PTSS. Rather, it is the fact that this Project enables/facilitates/provides the opportunity for those other projects to be implemented.

The Board's Decision

[254] The Board accepted as correct NZTA's final analysis of the existing or future state of the environment.[120] In addition it stated that the approved sections of the Wellington Northern Corridor RoNS should appropriately be considered as part of the environment for assessment of the Project, being the Transmission Gully and the Mackays to Peka Peka and Peka Peka to Otaki (Kapiti Expressway) sections of the Wellington Northern Corridor.

[255] At [343] to [346] the Board considered the issue whether contingent benefits, (benefits flowing from related projects which are intended but not consented) should be attributed as flowing from the Project. It recorded that at the end of the hearing it was agreed that the benefits from a second Mt Victoria Tunnel and a third lane as part of the Buckle Street Underpass should not be attributed to the Project because the tunnel duplication had yet to be consented to and the Buckle Street Underpass was part of the existing environment.

[256] At [506] to [519] the Board proceeded to address the issue of "enabling effects", namely the consequence that the Project facilitates (or at least does not frustrate) the development of related projects, particularly the Mt Victoria Tunnel duplication and the Public Transport Spine Study. The following paragraphs provide the context for and are referred to in the discussion of the several questions of law posed in Issue 4:

> [506] One of the issues raised before us was whether (and if so, how) we are able to take into account the *enabling effect* of the Project. That is, how should we deal with [NZTA's] argument that the Project facilitates (or at least does not frustrate) the development of related projects, particularly the Mt Victoria tunnel duplication and Public Transport Spine Study.
>
> [507] In closing, Mr Cameron submitted that such effects are a separate and identifiable benefit of the Project, and we should treat them as such. We were not provided with any case law authority to support this submission. Nor are we aware of any.

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120 At [336].

[508] We acknowledge that the Project *enabling* element may arguably be viewed as a potential positive future effect which arises from the NoR before us, and thus is within the scope of what we are tasked to consider under Sections 149P(4) and 171(1). The RMA's definition of effects in Section 3 may also be wide enough to encapsulate or incorporate such effects. In particular, it includes any positive effects – although notably, unless the context otherwise requires. As the High Court held in *Elderslie* in the context of a resource consent application:

> … To ignore **real** benefits that an activity for which consent is sought would bring necessarily produces an artificial and unbalanced picture of the real effect of the activity.
>
> [*our emphasis*]

[509] However, even if we accept (without finally determining the matter) that we can treat the project's enabling element as a separate and identifiable positive benefit, we consider this is largely a moot point. That is because in our view, any such *benefit* can be given little (if any) weight, primarily for the reasons set out below.

[510] Even if we assume that some modifications to the Basin Reserve gyratory are required in order for the Mt Victoria Tunnel duplication and Public Transport Study to proceed, the Basin Bridge Project is only one of potentially several solutions that might be put in place for that purpose. Such solutions could equally (or to a greater or lesser degree) facilitate (or not frustrate) the progression of those projects.

[511] We do not consider the evidence before us sufficiently establishes that the *enabling* element of the Project is something unique to, or which can only be achieved by, [NZTA's] current NoR.

[512] Perhaps more importantly, we have no guarantee that either (or both) of those projects would in fact go ahead. Indeed, as outlined elsewhere in our decision, we are required to make our determination on the basis that the Mt Victoria Tunnel duplication does *not* form part of the future state of the environment, and on the basis of the limited information currently available to us regarding the Public Transport Spine Study outcomes.

[513] That is the key result of [NZTA's] election to seek approval for the Project separately from that for the Mt Victoria Tunnel duplication, and in advance of the Public Transport Spine Study and its outcomes being finalised. In having made that strategic decision, [NZTA] must now accept the consequences of doing so. Put simply, and using the wording from *Elderslie*, we cannot place any significant weight on a supposed (but not quantified) Project benefit which is not real – in that we have no certainty or assurance it would actually materialise.

…

[516] As we have already found, the Mt Victoria Tunnel duplication should not be assumed to occur for the purposes of evaluating the Project. Further, we do not see our approach in this regard as inconsistent (nor do we in any way disagree) with the Environment Court's observations in *Cammack* (cited to us by [NZTA] in opening) that the RMA's:

> … concept of sustainable management does not require the status quo to simply continue. Provided the imperatives contained in s 5(a)–(c) can be justified, RMA contemplates management of use, development and protection, not just retention of the status quo.

[517] Rather, it is a reflection of our view that it would not be sustainable, or provide for sustainable management, to approve projects such as this, primarily because they were necessary to facilitate future developments, which may (or may not) proceed.

[518] Accordingly, we consider the most appropriate way to take into account the Project's facilitating or enabling element is not as an identifiable benefit in and of itself, but in the context of Section 171(1), and particular sub-sections (a) and (d). That is, the extent to which the Project is consistent with the strategies identified and in the context of the other RoNS related projects.

[257] In that part of the Decision headed "Exercise of Judgment in accordance with Section 5" the Board said:

> [1318] The Project would have an enabling element to the extent that it would fit well with the proposed works planned to implement the City Council's Growth Spine form Ngauranga to the Airport. To this extent, it would be consistent with the transportation theme identified by the planning caucus and the integration of land use and transport planning.

There followed [1319][121] which has been discussed already in the context of Issue 2.

[258] On this aspect of the appeal it is appropriate to also note the distinctly different view of Mr McMahon:

> [1510] In my consideration, the Project's *enabling effect* is of considerable importance and should be acknowledged as an important and determinative transportation benefit of the Project.
>
> [1511] For the record, I should clarify that I am not referring to the other benefits that may result from the actual implementation of the wider RoNS programme or Public Transport Spine Study that are not part of this Project. Those are contingent benefits and I wholly accept that these should not form part of the Board's substantive consideration of this Project. Rather, what I am referring to is how the Project facilitates (or at least does not frustrate) the development and potential implementation of related Projects, particularly the Mt Victoria Tunnel duplication and the Public Transport Spine Study.

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[121] At [234] above.

The parties' positions

[259] NZTA mounted a comprehensive attack on this aspect of the Decision which is encapsulated in the following extract from its primary written submissions:

> 31.7 There are significant errors of law in this aspect of the Majority's decision, including:
>
> a It has failed to treat enabling benefits as separate and identifiable positive effects of the Project that properly fall within the scope of 'effect' as defined by s 3 RMA.
>
> b It has failed to assess the effects of the Project 'having particular regard to' the fact that the Project is part of a programme of works set out in the relevant statutory and non-statutory documents under s 171(1)(a) and (d).
>
> c It has failed to access the effects of the Project 'having particular regard to' the requiring authority's objectives, which explicitly include 'not constraining opportunities for future transport developments'.
>
> d By requiring that a project's enable effects be 'unique' to the project (and to the particular option), it has failed to assess the effects of allowing the requirement and has instead engaged in a comparative exercise with other alternatives.
>
> e It has required the Appellant to demonstrate the certainty of benefits, when the RMA does not require this standard.
>
> f It has conflated the concepts of 'environment' and 'effects'.
>
> g Although it claims to have taken into account the enabling elements of the Project as a relevant factor under s 7(b) when exercising its overall judgment, the rest of the Majority's decision shows that this effect has been given little, if any, weight.
>
> 31.8 As a result of these errors of law, the Board wrongly attributed little, if any, weight to this highly relevant positive effect of the Project.

Seven questions of law were posed with reference to the Board's consideration of enabling benefits.

[260] While the burden of the opposition on this topic was carried by Mr Milne, Mr Palmer took the fundamental point that the seven different instances of alleged error all suffered from the same difficulty that the Board did treat enabling effects as relevant. He maintained that NZTA's real objection was that the Board did not give those enabling effects sufficient weight, a point which he reinforced by listing the

repeated references to weight in the relevant part of NZTA's primary written submissions.

Q 31(a): Is a project's enabling benefit an effect in terms of s 3 that can and should be taken into account under s 171(1) and/or s 5?

[261] There is no doubt that the Board took into account and gave at least some weight to the enabling element of the Project. NZTA's complaint concerns the manner in which the Board did so, as explained in ground of appeal 30(a):

> (a) At [506]–[519], by failing to treat and/or give weight to the enabling benefits of the Proposal as a positive effect in terms of s 3 and/or s 171(1) of the Act; and instead finding:
>
> (i) at [518] that the most appropriate way to take into account the Proposal's enabling element is by considering the extent to which the Proposal is consistent with the strategies identified in relevant documents identified under s 171(1)(a) and (d);
>
> (ii) at [519] that the enabling component is a matter which could be taken into account under s 7(b) (noting that this did not appear in the Board's reasoning in its draft Decision).

[262] It is apparent that the approach which the Board should adopt was traversed in oral closing submissions before the Board. NZTA's written reply submissions on appeal explained:

> 22.3 TAC submits that [NZTA] has shifted its emphasis from 'strategic fit' with objectives and transport plans, to 'enabling benefits'. This is incorrect. [NZTA's] closing submissions before the Board asked the Board to count the contingent benefits of the Project as relevant effects. This was the subject of some discussion between counsel and the Board. Counsel accepted that the Board may choose to consider the enabling aspect of the project as a relevant matter under s 171(1)(a) and (d), however, in doing so, it was anticipated that this aspect of the Project would be given appropriate weight. However, the effect of the Board's approach is to relegate the enabling benefit to an almost irrelevant 'other matter'.
>
> 22.4 It is of considerable importance that this issue is corrected as a matter of law. As discussed in [NZTA's] Primary Submissions, the Majority has made findings in relation to the 'enabling element' of the Project that [NZTA] says are wrong in law. The Minority has not. This appeal seeks to address those errors.[122]

[122] The reference to the Minority was to [1511] at [258] above.

[263] Both ground of appeal 30(a) and that extract from NZTA's reply submission provide traction for Mr Palmer's criticism that NZTA's real objection concerns the weight which the Board accorded to enabling benefits, a view with which I agree.

[264] However Q 31(a) as framed does appear to raise a question of law, at least with reference to the "can" rather than the "should" component. That said, I do not consider that the Board made an error of law of the nature implied. It did not reject the contention that an enabling benefit could be a potential positive future effect in terms of s 3.[123] In fact, it did not actually determine the point as it expressly acknowledges at [509]. Instead, it proceeded to take the enabling element into account at [518] in the manner which counsel had agreed was acceptable.[124]

[265] The enabling effect or benefits of a project will inevitably be circumstances specific. As the Board recognised in relation to this particular Project, in some cases the enabling element may properly be viewed as a potential positive future effect. In that sense I consider that an affirmative answer can be given to the question whether a project's enabling element "can" constitute an effect to be taken into account under s 171(1) and/or s 5.

[266] However, whether it will be appropriate to do so or instead to proceed as the Board did in this case at [518] will turn on the particular circumstances. The "should" component of Q 31(a) does not raise a question of law and is not susceptible of answer in abstract terms.

Q 31(b): Where a project's enabling benefits are consistent with a programme of infrastructure development that is recognised in relevant documents under s 171(1)(a) and (d), should those enabling benefits be given considerable weight as an effect of the project under s 171(1) and/or s 5?

[267] This question, which is directed to the weight to be given to a project's enabling benefits, does not involve a question of law. In any event a question framed in terms of "considerable" weight is too imprecise to sound in a useful answer.

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123 At [508].

124 In paragraph 22.3 at [262] above.

Q 31(c): In order to be taken into account, must a project's enabling benefits be unique to that project, guaranteed to go ahead, and able to be quantified?

[268] In my view the answer to this question is No. Nor do I consider that the Board made the erroneous finding alleged, namely that in order to be given weight, enabling benefits must be unique to a project, guaranteed to go ahead and able to be quantified.

[269] The Board certainly observed at [511]–[512] that the Project did not incorporate those characteristics. However I do not construe the Board's decision as stipulating that such characteristics were prerequisites to enabling elements being taken into account. If it had viewed such features as necessary pre-conditions, then the Board would not have taken the enabling element into account at all. Yet the Board did so. In my view the Board referred to those matters as bearing on the weight to be attributed to the enabling effects. Because those features were not present, the weight which the Board allocated to enabling elements was correspondingly less.

Q 31(d): Does the definition of the future environment constrain the ability of a decision-maker to consider the enabling benefits of a project?

[270] The concern which prompted this question is revealed in the relevant ground of appeal:

> 30(c) At [512] by wrongly conflating the environment with effects, and thereby finding that because the Mt Victoria Tunnel duplication and Public Transport Spine Study outcomes do not form part of the future state of the environment, the Board is prevented from giving weight to the enabling benefits of the Proposal for those future projects.

[271] Noting that s 171(1) directs a decision-maker to "consider the effects on the environment of allowing the requirement", NZTA drew attention to the direction of the Court of Appeal in *Royal Forest and Bird Protection Society of New Zealand v Buller District Council*[125] that decision-makers are required to distinguish the environment from the effects of a proposal:

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[125] *Royal Forest and Bird Protection Society of New Zealand v Buller District Council* [2013] NZCA 496, (2013) 17 ELRNZ 616 at [23].

> [W]e cannot see how s 3(f) comes into play at all in determining what is the "environment" against which the actual and potential effects of allowing the activity for which consent is sought are to be considered. In determining what the "environment" is, the attention of the consent authority or a court on appeal is directed toward the physical environment as it exists at the relevant time, modified by those considerations required to be taken into account by the Act and applying *Hawthorn*, treating any permitted activity or any activity for which resource consent has been granted and which is likely to be implemented as included in the "environment". None of this has anything to do with the definition of "effect" in s 3. The definition of "environment" is a prior question to consideration of the effects of the proposed activity on the environment.

[272] Submitting that the two exercises must be kept separate, NZTA contended:

> 31.32 The Majority has wrongly conflated the concept of 'environment' with the meaning of 'effect' by determining that the enabling benefit of the Project should not be considered to be/or attributed any weight as an 'effect' because the Mt Victoria Tunnel duplication is not considered to be part of the future state of the environment. In doing so, the Board unduly limited the meaning of 'effect' to the Board's assessment of what constitutes the environment, rather than ensuring that effects of the Project are properly identified and considered. This is a fundamental error of law.
>
> 31.33 With respect, what is considered to be part of the future state of the environment (whether that includes the Mt Victoria Tunnel Duplication or the Public Transport Spine outcomes) has nothing to do with the identification of the effects of the Project. What is important is that the evidence shows that the enabling benefit of the Project (being what this infrastructure project facilitates) is an effect attributable to the Project. As we have submitted, the evidence established that the Project will facilitate planned developments (whatever their final form may take) and that without this Project, future development will be frustrated/not enabled.

[273] Mr Milne observed that NZTA did not take issue with the Board's conclusion that the tunnel duplication process did not form part of the future state of the environment while at the same time it suggested that the Board should have treated the facilitation of such a project as a positive effect on the environment. In his submission the fatal flaw in NZTA's argument was that s 171 is concerned with effects on the environment, and an effect which does not affect the environment is not a relevant effect.

[274] I agree with Mr Milne that the Board decided as a first step what the environment was by resolving the contest about the existing, permitted and reasonably foreseeable future environment and concluding that the Mt Victoria

Tunnel duplication was not part of that environment. I do not consider that it is fair to say, as NZTA contends, that the Board conflated the environment with effects.

[275] The Board recognised the Project's enabling element.[126] However it considered that the most appropriate way to take that enabling benefit into account was in the manner explained at [518].

[276] Reverting to the content of Q 31(d), if "constrain" is given the same meaning as "prevent" (in ground of appeal 30(c)), then, as the Board's Decision demonstrates, a decision-maker is not precluded by the definition of the future environment from considering the enabling effect of a project. However, again as the Board's Decision demonstrates, the decision-maker's conclusion on the state of the future environment may influence the manner in which the decision-maker chooses to take an enabling benefit into account.

[277] Consequently I do not consider that Q 31(d) is susceptible of a simple Yes or No answer. As the explanation above indicates, the finding as to the state of the future environment is likely to be material to, and even influential on, the way in which a decision-maker considers and weighs a project's enabling elements.

Q 31(e): In order for the positive effects of a future development to be taken into account must the approvals for that development be sought at the same time as (or in advance of) the project?

[278] The answer to that question (which refers to the positive effects "of" a future development) must be in the affirmative. On that point I apprehend the Board was unanimous.[127]

[279] The error of law alleged in the amended notice of appeal read:

> 30(d) By finding at [513] that in order for the positive effects of a future development to be taken into account the approvals for that development must be sought at the same time or in advance of a project.

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126 [1318] at [257] above.

127 The majority at [233] at [247] above; Mr McMahon at [1511] at [258] above.

[280] However in the course of presentation of NZTA's submissions Mr Casey indicated that the preposition "of" should in fact have read "on". The consequence of that amendment was to significantly change the meaning of the question. Indeed, to make sense I consider that the question needs to be redrafted to introduce a reference to the project into the subject of the sentence.

[281] In my view a negative answer applies to the following reframed question:

> In order for a prior project's enabling effects on a future development to be taken into account on the prior project, must the approvals for the future development be sought at the same time or in advance of the project?

[282] In any event I do not discern any error in the Board's approach. It clearly did take into account the Project's facilitating or enabling element.[128]

Q 31(f): Is it consistent with sustainable management (in terms of s 5) to approve an infrastructure project because it is necessary to facilitate future developments; and does it make a difference if the project is primarily necessary to facilitate those future infrastructure developments?

[283] This question reflected what was said to be the Board's error in allegedly finding at [517] that it was not sustainable management to approve a project primarily because the project is necessary to facilitate future developments.

[284] Neither this question, nor Q 31(g) below, received attention in NZTA's presentation of its case. It was not a matter included in the list of significant errors of law listed in paragraph 31.7 at [259] above.

[285] The Board's statement at [517] was by way of explanation for its previously expressed view that the Mt Victoria Tunnel duplication should not be assumed to occur for the purposes of evaluating the Project,[129] which also appeared to be the view of Mr McMahon.[130] In [517] the Board stated that that approach was "a reflection" of the view criticised in the current question.

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128 At [518].
129 [234] at [248] above.
130 [1511] at [258] above.

[286] I do not consider that at [517] the Board was purporting to formulate any statement of general principle. It was an expression of view about a particular category of projects, namely those necessary to facilitate future developments which may or may not proceed. I do not discern an error of law in the Board's observation.

[287] In any event I do not consider that Q 31(f) aligns with, and hence is responsive to, the Board's statement at [517]. The question does not incorporate the component that the future development may or may not proceed.

Q 31(g): In the alternative, given its conclusion that the Proposal was necessary primarily to enable future roading projects, did the Board err in law by failing to consider conditions to address this concern?

[288] Although an error of law was alleged at para 30(f) in essentially the same terms as Q 31(g), there was no suggestion in NZTA's submission either that relevant conditions had been proposed to the Board or that the Board had failed to consider conditions which had been proposed. Indeed it is not apparent to me how a condition could be crafted which would address the issues the subject of Issue 4. In those circumstances I do not consider that Q 31(g) requires a response.

Issue 5: Assessment of transportation benefits – an overview

[289] It will be recalled that improvements in transportation featured prominently in the Project Objectives recorded at [30] above.

[290] The subject of transportation is addressed at length in the Decision from [260] to [505]. The breadth and structure of that consideration is conveyed in the opening paragraph:

> [260] The Project is a transport infrastructure project and the transportation effects are central to our consideration. In this part of our decision we set out the central transportation issues, briefly identify the key provisions of relevant statutory and other documents which provide guidance for our consideration of transport effects, then discuss the existing situation and appropriate baseline against which to assess the transport effects. We then discuss those transport effects, and assess them in terms of the stated objectives of the Project and the intended outcomes of the relevant statutory instruments and non-statutory documents, and the purpose of the RMA set out in Part 2 of the Act.

[291] The Board noted that regard had also been had to the fourth matter in the Minister's reasons for referring the Project to the Board:[131]

> The proposal is intended to reduce journey time and variability for people and freight, thereby facilitating economic development. The proposal is also likely to provide for public transport, walking and cycling opportunities; reduce congestion and accident rates in the area; and improve emergency access to the Wellington Regional Hospital. If realised, these benefits will assist the Crown in fulfilling its public health, welfare, security, and safety functions.

[292] NZTA's challenge to this part of the Decision was presented as three subissues:

(a) standard of proof required to demonstrate transportation benefits: subissue 5A;

(b) assessment of immediate transportation benefits: subissue 5B;

(c) requiring the proposal to demonstrate benefits that go beyond NZTA's objectives: subissue 5C.

Subissue 5A: Standard of proof required to demonstrate transportation benefits

[293] The focus of this aspect of the appeal was on two paragraphs in that part of the Decision which addressed underlying assumptions about traffic growth:

> [484] We have no doubt that the assumptions fed into the traffic models are the best estimates of competent and experienced people. The point rightly made by critics however is that these assumptions largely determine the outcomes of the complex modelling exercise. Any errors in the assumptions compound when they are used to project traffic flows beyond the immediate future.
>
> [485] The issue would not be important if we were considering infrastructure improvements with minimal adverse environmental effects. In that situation it would not be important from an RMA perspective if the works proved to be premature or not needed at all. The situation here is that, as discussed later in this decision, the Basin Bridge would have significant adverse effects, so the level of confidence we can have in the modelled need and benefits, which depend on the underlying assumptions, is important.

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131 At [3] above.

[294] NZTA asserted that the Board had erred in law in two respects:

- By inferring at [485] that a higher standard of proof (in relation to transportation modelling) is required if the adverse effects of a project are more than minimal.

- By requiring a higher standard of proof to demonstrate the transportation benefits of the Proposal.

[295] It was apparent from the grounds of appeal that NZTA maintained that the Board had effectively required it to demonstrate the transportation benefits of the Proposal beyond reasonable doubt.

[296] Two questions of law were proposed:

> Q 36(a) Is a higher standard of proof required to demonstrate the transportation benefits of a project where it will have adverse effects that are more than minimal?
>
> Q 36(b) If the Board applied the wrong standard of proof, were the Board's findings regarding the transportation benefits of the Proposal ones that the Board could reasonably have come to on the evidence?

Q 36(a): Is a higher standard of proof required to demonstrate the transportation benefits of a project where it will have adverse effects that are more than minimal?

[297] In support of its contention that the Board erred in law by effectively requiring NZTA to demonstrate the transportation benefits of the Project beyond reasonable doubt, NZTA first referred to the following decisions:

- *Genesis Power Ltd v Manawatu-Wanganui Regional Council*;[132]

- *Shirley Primary School v Telecom Mobile Communications Ltd*;[133]

- *McIntyre v Christchurch City Council*.[134]

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132 *Genesis Power Ltd v Manawatu-Wanganui Regional Council* (2006) 12 ELRNZ 241, [2006] NZRMA 536 (HC).

133 *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 (EnvC).

134 *McIntyre v Christchurch City Council* (1996) 2 ELRNZ 84, [1996] NZRMA 289 (Planning Tribunal).

[298] It will suffice to refer to the decision of the Court of Appeal in *Ngati Rangi Trust v Genesis Power Ltd*[135] which was an appeal from *Genesis Power* above. Although dissenting in the result, the following statement of Ellen France J reflected the view of the Court:

> [23] On [the question of the onus of proof], it need only be noted I see no difficulty with the statement in *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 at para [121] that "[i]n a basic way there is always a persuasive burden" on an applicant for a resource consent. As the Environment Court said in *Shirley*, that approach reflects the requirement that a person who wants the Court to take action must prove his or her case. In addition, as the Court observed, there are also statutory reasons for speaking of a legal burden on an applicant:
>
> > [122] Since the ultimate issue in each case is always whether granting the consent will meet the single purpose of sustainable management, even if the Court hears no evidence from anyone other than the applicant it would still be entitled to decline consent.

[299] It is clear, and I did not understand the respondents to suggest otherwise, that the criminal standard of proof does not apply in RMA matters. The answer to Q 36(a) is plainly No.

[300] I do not accept NZTA's submission that an inference can be drawn that at [485] the Board was applying a standard of proof higher than the recognised standard. I find myself in agreement with Mr Palmer's submission on this point:

> 7.17 The Board simply said the level of confidence it could have in the assumptions of the model is important. So it focussed on them. Witnesses cast doubt on the assumptions (e.g. at [497]) and NZTA kept revising them (e.g. [386]) and the Board commissioned its own review by Abley. The Board simply made its own fair assessment of the assumptions and modelling outcomes. This was an important element of discharging its obligation to consider the effects of the proposed flyover requirement.

[301] In the course of its submission NZTA drew attention to a number of places in the Board's reasons which it said showed that the Board had required NZTA to demonstrate certain matters to a higher standard or to a level of "certainty". However none of those matters suggested to me that the Board was applying anything other than a conventional civil standard of proof.

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135 *Ngati Rangi Trust v Genesis Power Ltd* [2009] NZCA 222, (2009) 15 ELRNZ 164.

Q 36(b): If the Board applied the wrong standard of proof, were the Board's findings regarding the transportation benefits of the Proposal ones that the Board could reasonably have come to on the evidence?

[302] Given my view that the Board did not apply the wrong standard of proof, this question is otiose.

Subissue 5B: Assessment of immediate transportation benefits

[303] Under this heading the amended notice of appeal asserted a single error of law:

> The Board erred in law by finding at [517] that the Proposal is *primarily* necessary to facilitate future developments, and thereby failing to have regard to the immediate transportation benefits of the Proposal as a stand-alone project. (See also [466]).

[304] Paragraph [466], which was located in the Board's summary of transportation effects,[136] stated:

> [466] The Project has been put forward on the basis that it is a multi-modal, long term, integrated solution and is part of a sequence of road improvements along the Wellington Northern Corridor, most of which are consented and some of which are under construction. The evidence was that much or even most of the transport benefits from the Basin Bridge Project depend on completion of that sequence of road improvements and can be regarded as *contingent benefits*.

[305] Although paragraph [517] has already been noted in the consideration of enabling benefits it will be convenient to set it out again:

> [517] Rather, it is a reflection of our view that it would not be sustainable, or provide for sustainable management, to approve projects such as this, primarily because they were necessary to facilitate future developments, which may (or may not) proceed.

[306] The question of law framed under this heading contained two limbs:

> Q39 Did the Board fail to have regard to immediate transportation benefits of the Proposal, such that:

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136 [464]–[476].

(a) it failed to take into account relevant matters; and/or

(b) its decision regarding the immediate transportation benefits of the Proposal is not a decision that it could reasonably have come to on the evidence?

Q 39(a): Did the Board fail to take into account a relevant matter in failing to have regard to the immediate transportation benefits of the Proposal?

[307] NZTA submitted that the passages at [466] and [517] showed that the Board decided that the Project did not offer "any significant or worthwhile immediate benefit". It argued that that finding stemmed from the Board's "reductive approach" to the transportation benefits of the Project, which failed to have regard to the following matters said to be relevant under s 171(1)(a) to (d):

– a planning framework that recognises the importance of the Basin Reserve transportation node;

– a planning framework that provides for the immediate implementation of bus priority; and

– NZTA's objectives for the Project.

[308] NZTA advanced this aspect of its case by reference to three matters to which it contended the Board had failed to have regard or given any weight:

– the failure to resolve the critical issue of congestion;

– bus priority; and

– economic criteria.

[309] Each of these matters was addressed succinctly but comprehensively by Mr Palmer. Rather than attempting to paraphrase his responses I believe it is useful to recite them in full:

7.8 First, NZTA says (at 32.7) the Board gave no weight to the relief of congestion from Paterson St to Tory St but "analysed the time travel savings only". But the Board was explicit (at [329]) that is

considered congestion in terms of indicators that the consensus of experts agreed on, including "difficulties getting through controlled intersections in a single phase and major variability in travel times". It considered these benefits extensively, in particular at [305]–[316] and [359]–[381] and in its overall summary at [1242], [1244]–[1247] (noting the time savings were substantially less than originally put forward when the third lane at Buckle Street and the effect of the Mt Victoria tunnel duplication are accounted for). It noted that the proposed flyover requirement would provide a time saving for the west-bound journey of 90 seconds in 2021 (at [330], [365], [1244]).

7.9 Second, NZTA says (at 32.15) the Board failed to have regard to the immediate benefit of providing for bus priority. But one of the paragraphs NZTA cites (at 32.12) in the Board's report ([405]) demonstrates the opposite:

> We are satisfied the improved journey times discussed earlier would improve journey times for buses passing through the Basin Reserve area. [NZTA's] modelling shows that the partial bus lanes proposed as part of the Project would not prevent other vehicular traffic also gaining similar time savings. We can accept that the increased priority for public transport provided by the Project could be viewed as a precursor to BRT promoted by the Regional Council, but we have no evidence about the effect of what is proposed here on mode share, which is an objective of the planning documents.

…

7.11 Finally NZTA says (at 32.16, 32.19) that the Board failed to reference the quantification of economic benefits. The Board did (at [536], [539], [543], [545]–[550] and [552]), noting (at [543]) that "[a] number of Benefit-Cost Ratio figures were presented to us in the application documents and in the evidence". If the Board hadn't referenced specific evidence that would not justify NZTA's complaint. But it did even that, citing (at [542] the evidence of NZTA's expert, Mr Copeland, whose economic assessment of the project relied upon the BCRs developed by Mr Dunlop upon which NZTA now seeks to rely. The Board's conclusion (at [550]) is reached after seeing how contested were the BCR assumptions. Again the objection is to weight.

[310] I accept the respondents' argument on these three points. Mr Palmer made the further point that much of NZTA's complaint concerned the weight accorded to the relevant factors, drawing attention for example to NZTA's submission in the context of bus priority that it was a matter to which the Board should have given "considerable weight". I agree that the Board did not err in the manner asserted. The answer to Q 39(a) is in the negative.

The meaning of Q 39(b)?

[311] Question 39(b) attempts to combine an error in failing to have regard to a matter (immediate transportation benefits) with an *Edwards v Bairstow* type question directed to the conclusion on that same matter. As such, it does not make sense. That can be demonstrated by my attempt to reframe the *Edwards v Bairstow* question by reference to Lord Radcliffe's third formulation:

> Is this case one in which the true and only reasonable conclusion contradicts the determination that there were no immediate transportation benefits of the Proposal?

[312] Once it is accepted, as I have found in relation to Q 39(a), that the Board did not fail to have regard to the immediate transportation benefits of the Proposal, I have difficulty seeing how an *Edwards v Bairstow* type question can be appropriately framed.

Subissue 5C: Requiring the Proposal to demonstrate benefits that go beyond the requiring authority's objections

[313] The question of law posed under this heading is:

> 42 Did the Board err in requiring [NZTA] to demonstrate that the Proposal would achieve specific benefits that were not part of the project objectives (namely, mode shift and providing a long-term solution for eastbound State Highway traffic)?

Mode shift

[314] It will be recalled that Project Objective 3 stated:

> To support mobility and modal choices within Wellington City:
>
> (i) by providing opportunities for improved public transport, cycling and walking; …

[315] With reference to that objective, NZTA's grounds of appeal stated that the project objectives did not include an objective "actually to achieve mode shift" and that the Board erred in requiring NZTA to demonstrate that the Proposal would achieve mode shift/mode share. Two errors of law were alleged:

(a) By finding at [405] that [NZTA] was required to establish (and quantify) the extent and benefits of mode share (or mode shift) that would be achieved by the Proposal when the project objectives were to support modal choices, inter alia, by providing *opportunities* for improved public transport.

(b) By finding at [441] that the Proposal is not a truly multi-modal, integrated long-term solution for cycling and walking in the project area, when the project objectives were to support modal choices, inter alia, by providing *opportunities* for improved cycling and walking.

[316] The two paragraphs to which reference was made stated:

> [405] We are satisfied the improved journey times discussed earlier would improve journey times for buses passing through the Basin Reserve area. [NZTA's] modelling shows that the partial bus lanes proposed as part of the Project would not prevent other vehicular traffic also gaining similar time savings. We can accept that the increased priority for public transport provided by the Project could be viewed as a precursor to BRT promoted by the Regional Council, but we have no evidence about the effect of what is proposed here on mode share, which is an objective of the planning documents.
>
> …
>
> [441] In summary, the Project would make some improvements for circulation of cyclists and pedestrians in the Basin Reserve area, but as these are mostly in the form of shared paths they would introduce potential conflicts between these modes, especially if these modes continue to increase in popularity. We do not see this package of proposals as a truly multi-modal, integrated, long term solution for cycling and walking in the project area. …

[317] Specifically with reference to the provision of "opportunities" in Objective 3(i) NZTA argued:

> 33.7 It is submitted that framing its objectives in this way is appropriate. In this context, [NZTA] has requiring authority status under s 167 RMA for the construction and operation of any State highway or motorway. While [NZTA] has a significant role under the LTMA investing in outcomes for public transport, cycling and walking; in its capacity as requiring authority its role is to provide infrastructure which assists or facilitates such outcomes rather than providing them directly.

[318] To my mind the distinction which NZTA seeks to draw is excessively fine. I consider that the sense of the word "opportunities" (which is the plural) in Objective 3(i) means a state of affairs favourable for a particular action or aim. It was in that sense that I consider that the Board considered the implications for

improved cycling and walking. It noted that, like the shared pathway on the bridge itself, all of the proposed facilities for pedestrians and cyclists were shared paths[137] in relation to which the Board had a general concern about safety.[138]

[319] I do not consider that the Board can be criticised for its consideration (and rejection) at [441] of the package of proposals as amounting to a truly multi-modal, integrated long term solution for cycling and walking in the area when, as recorded in [418], it was NZTA's own case that the proposed pedestrian and cycling facilities would have significant benefits, with the phrase "multi-modal solution" featuring often in submissions and cross-examination.

[320] Finally there is the point made by Mr Milne that the Board was obliged to consider certain RMA and non-RMA documents under s 171(1)(a) and (d). By way of example he pointed to the Wellington RLTS's key outcomes which include increased mode share for pedestrians and cyclists. Mr Milne submitted, and I accept, that consideration of the extent to which the Project would contribute to mode shift was therefore necessary in order for the Board to consider the Project against those documents.

[321] For these reasons I do not consider that the Board erred in law in its consideration of mode shift.

The issue of a long-term solution

[322] The Board's lengthy discussion of transportation issues[139] concluded with the following comments:

> **A Long Term Solution?**
>
> [498] Counsel for [NZTA] made frequent reference to the Project being a *long term* and *enduring* solution. The first objective for the Project is: *To improve the* ***resilience****, efficiency and reliability of the State Highway network*. [our emphasis], although the methods then listed for achieving this refer only to the section of the westbound part of State Highway 1 from Paterson Street to Tory Street. We have a concern about the longer term

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137 At [433].
138 At [1252].
139 At [290] above.

resilience (ability to cope with change) of the eastbound part of State Highway 1 through the central city.

…

[502] The City Council's report: *Basin Reserve – Assessment of Alternative Options for Transport Improvements* notes that if the Project proceeds, in addition to the mitigation measures proposed by [NZTA] there should be:

> Commitment to consolidating state highway traffic away from Vivian Street and into a single east-west corridor.
>
> and:
>
> Consideration of how consolidating state highway traffic away from Vivian Street can be accommodated.

[503] This raises the question of whether the Basin Bridge would facilitate or impede that long term option. Only Mr Reid commented on this and his view was that a bridge in the position proposed would make it more difficult to bring the State Highway one-way pair together into a single corridor.

[504] There is of course no obligation for [NZTA] to convince us otherwise. The evidence is that Vivian Street would have to be revisited in about five years time (to allow time for planning another upgrade), and that the creation of additional eastbound capacity, especially at intersections, can be expected to have significant environmental implications.

[505] Thus we do not consider the Project can be credited with being a long term solution.

[323] With reference to those observations NZTA's ground of appeal stated:

> c The project objectives included 'to improve the resilience, efficiency and reliability of the State Highway network' inter alia, 'by providing relief from congestion on State Highway 1 between Paterson Street and Tory Street'.
>
> d The project objectives clearly related to the westbound section of the State Highway in this location.
>
> e The project objectives did not include providing a long-term solution for eastbound State Highway traffic in this location. The Board erred in requiring [NZTA] to demonstrate that the Proposal would address this issue.

[324] Mr Milne suggested a different interpretation of the relevant objectives. Noting that the identified section of SH1 did not specify a direction of travel, he contended that the objectives identified two roads (Paterson Street and Tory Street) between which two sections of SH1 lie, one eastbound and the other westbound. I

do not accept that interpretation. I note that at [498] the Board construed the objective as referring to the section of the westbound part of SH1 "from Paterson Street to Tory Street".

[325] Consequently I accept NZTA's submission that the project objectives clearly related to the westbound section of SH1 in this location. That view is reinforced by the reference to westbound traffic in the Minister's direction.

[326] However, if the Board had considered the eastbound part of SH1 through the central city to be part of its brief, then I am sure that the topic would have received much greater attention than in the closing paragraphs of the transportation discussion. In my view that very limited discussion was in the nature of a postscript which was responsive to what the Board referred to at [498] as NZTA's frequent references to the project being a long term and enduring solution. At [505] the Board rejected that proposition for the reasons given in that short discussion.

[327] While it may be thought to have been unnecessary for the Board to engage at all with NZTA's "solution" proposition, the fact that it did so does not suggest to me that the Board was requiring NZTA to demonstrate such a "solution" as a prerequisite for the approval of the NoR. Consequently I do not consider that the Board made the error alleged of wrongly interpreting the objective as applying to the eastbound part of SH1.

[328] For these reasons I answer Q 42 in the negative.

Issues 6, 7 and 8: Questions of law relevant to heritage and amenity

The refinement of the questions of law

[329] Issue 6 in the amended notice of appeal contained a single question:

> Q 45 For all or some of the reasons outlined above under paragraph 44, did the Board fail to have particular regard to relevant matters under s 171(1)(a) and (d) in assessing the effects of the Proposal on historic heritage and amenity?

[330] Paragraph 44 recited a series of alleged errors of law and para 46 listed 16 quite detailed grounds of appeal, including the contention at 46(e) that:

> The Board's finding at [782]–[783] that the Proposal constitutes an inappropriate development of historic heritage in terms of s 6(f) of the Act is based on the Board's finding that the environment constitutes a heritage area.

[331] Issue 7 posed questions Q 48(a) and Q 48(b) while Issue 8 specified a single question, Q 51.

[332] Although the amended notice of appeal contained distinct Issues 6, 7 and 8, NZTA's principal written submissions stated at para 35.2 that the questions of law relevant to heritage and amenity identified in those three issues had been refined to six questions which were set out and addressed in the submissions. Those refined questions were revised still further in the memorandum of 23 July 2015[140] as follows:

> In relation to Issue 6, we seek to refine the questions of law as outlined at para 35.2 of [NZTA's] Primary Submissions:
>
> [45A] When assessing the heritage or amenity effects on the environment under s 171(1), must the decision-maker do so 'through the lens' of the relevant plans under s 171(1)(a) and, if relevant, s 171(1)(d) documents? That is, should the effects be assessed 'through the lens' of the recognition and protection provided by those plans and/or documents?
>
> [45B] Further, should the Board have assessed the effects having particular regard to its finding at [1230] that the works were reasonably necessary to achieve the objectives under s 171(1)(c)?
>
> [45C] When there is no 'invalidity, incomplete coverage or uncertainty of meaning' in the relevant plans under s 171(1)(a), is it appropriate for a decision-maker to assess effects against s 6(f) (for historic heritage) and s 7(c) (for amenity values)?
>
> [45D] Did the Board correctly apply the definition of 'historic heritage' under s 2?
>
> [45E] What is the correct approach to the application of the test of 'inappropriateness' in s 6(f) [should the Court consider resort to Part 2 of the RMA was available to the Board in the circumstances of this case]?

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[140] At [51] above.

Q 45A: When assessing the heritage or amenity effects on the environment under s 171(1), must the decision-maker do so 'through the lens' of the relevant plans under s 171(1)(a) and, if relevant, s 171(1)(d) documents? That is, should the effects be assessed 'through the lens' of the recognition and protection provided by those plans and/or documents?

[333] This question invokes NZTA's *King Salmon* argument. NZTA contends that the effects on the Project of heritage and amenity must be assessed having particular regard to the recognition and protection provided for in the Regional Policy Statement and the District Plan because those documents were prepared in accordance with and to give effect to Part 2. Consequently it argues that the correct approach to the assessment of heritage and amenity effects was:

> not within the framework of Part 2, rather it is through the lens of s 171.

The nub of the respondents' rejoinder is that planning documents do not determine the outcome of a s 171 decision.[141]

The planning framework

[334] The current Regional Policy Statement became operative in 2013 and the District Plan has been the subject of two plan changes in the last decade. Within that process new heritage items were added and the District Plan's objectives, policies and rules were amended in response to heritage becoming a matter of national importance under the RMA.

[335] The heritage items within the vicinity of the Basin Reserve and the wider bounds of the Project listed in the District Plan are:

(a) The Museum Stand;

(b) The Memorial Fountain;

(c) Government House;

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[141] At [117] above.

(d) Former Home of Compassion Crèche; and

(e) The Carillon.

As Mr McMahon noted,[142] neither the Basin Reserve generally nor its surrounds have been recognised in the planning documents as a listed heritage item or area.

[336] The District Plan recognises and provides for the protection of historic heritage in particular ways. Policy 20.2.1.4 is to ensure that the effects of subdivision and development on the same site as any listed building or object are avoided, remedied or mitigated. Other policies are to discourage demolition or relocation and to promote conservation and sustainable use (policies 20.2.1.1 and 20.2.1.3).

The Board's decision

[337] The Board suggested that in terms of heritage issues the case was somewhat unusual in that the Project did not result in the actual loss of any listed heritage fabric. However it considered that the geographical and historical context for the Project contained an unusual concentration of buildings, structures and places of heritage interest.[143]

[338] It recognised that the primary means for giving effect to the recognition of historic heritage is to include items of historic heritage in the District Plan under Schedule 1. However it stated that even if a place or area is not so scheduled, the requirement in s 6(f) would still apply.[144]

[339] The Board proceeded to recognise a "wider heritage area"[145] which it considered could be affected by the Project, which stretched from Taranaki Street in the west through the Basin Reserve and Council Reserve areas to Government House and the Town Belt in the east.[146]

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142 At [1603].
143 At [566].
144 At [556].
145 At [577].
146 At [588].

[340] In its summary of findings on heritage effects across the wider heritage area of interest it said:

> [757] Regarding adverse effects on historic heritage, we find that two issues stand out:
>
> (a) The risk to the status of the Basin Reserve as a venue for test cricket is confounded by the significance of the adverse effects on the heritage setting that arise from the mitigation required to address the risk to test-cricket status; and
>
> (b) The cumulative adverse effects of dominance and severance caused by the proposed transportation structure and associated mitigation structure in this sensitive heritage precinct, particularly on the northern and northeastern sectors of the Basin Reserve Historic Area setting.

[341] It is useful also to record Mr McMahon's different view on which NZTA placed emphasis:

> [1600] In respect of Section 6(f), I fully accept and support that the protection of historic heritage from inappropriate development is inextricably linked with sustainable management practice. In making an overall determination on any particular proposal's ability to fit with this strategic aim, I also find that the significance of the heritage resource(s) relevant in this case must also be factored in. In this respect, the settled provisions of the District Plan provide – for me – a critical filter through which significance is defined; and, in turn through which accordance with Section 6(f) can ultimately be determined.
>
> [1601] In this respect, I reiterate that there was agreement that there is no direct adverse effect arising from the Project on any heritage items currently identified (as significant and worthy of protection) in the operative District Plan. The evidence strongly suggests, therefore, that the Project is most certainly consistent with Section 6(f) as it relates to those listed items.

[342] After discussing the District Plan, the changes made to it and the non-inclusion of the Basin Reserve and its surrounds as a listed heritage item or area, Mr McMahon said:

> [1604] I am inclined, for this reason, not to afford the wider site the same significance that would otherwise be afforded to listed items. To do so would (in my view) undermine the integrity of the District Plan and the inherent effectiveness of the listing method as the primary tool to implement the District Plan's objectives and policies relating to the protection of historic heritage. This implementation role is important as it enables a process to test development against those policies and objectives which have already been deemed to be the most effective provisions to give effect to Section 6(f) and the Act's purpose.

He concluded that the Project did not represent inappropriate development in terms of s 6(f).

The parties' contentions

[343] NZTA submitted that, particularly in light of *King Salmon*, there was no mandate for a decision-maker on either a resource consent or designation to "re-write" the District Plan, citing the Supreme Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd*:[147]

> The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed.

[344] NZTA developed that theme in this way:

> 36.15 There is a comprehensive suite of rules and criteria in Chapters 20 and 21 by which the District Plan recognises and provides for the protection of historic heritage from inappropriate use and development. This must be assumed to be a deliberate choice, tested and confirmed by the public participatory process. It is entirely appropriate in a built up, central city environment. Not only has the Majority failed to have particular regard to these provisions when considering the effects of the Project, it has imposed a wholly different regime for the recognition and protection of unlisted historic heritage well beyond what the Plan itself does.
>
> 36.16 Just as it would not have been permissible for the Board to find that any of the listed items was not a historic heritage value, nor is it open to the Board to substantially rewrite the Plan by adding items or, as in this case, whole 'precincts', which the Plan does not contemplate.
>
> …
>
> 36.19 [NZTA] submits that the Majority was wrong to undertake a sand-alone assessment of heritage within the Part 2 framework, as discussed above. Further, the Majority failed to have particular regard to the relevant planning documents when assessing the effects of the Project on historic heritage by finding heritage features in this location requiring protection under s 6(f); these being features

[147] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [10].

> beyond what the District Plan protects. This also led to the Majority finding that the Project was 'inappropriate' in relation to historic heritage without addressing that in the context of the District Plan and its regime for protection against inappropriate use and development.

[345] In his notes for oral reply Mr Casey emphasised that resort to Part 2 is only required in the case of conflict (or where a caveat applies, to which Q 45C relates). The point was made that there is no conflict between the planning documents and Part 2 and no conflict between the Project and the planning documents (including the derivative documents). It was submitted:

> The Board is required (before resorting to Part 2) to first assess effects having particular regard to the (a)–(d) matters and then consider whether a conflict exists that requires resolution. A 'thoroughgoing attempt' to resolve any apparent conflict must be made. If a conflict cannot be resolved, resort to Part 2 will be required.

[346] NZTA's position derived significant support from WCC on whose behalf Ms Anderson presented a thoughtful submission confined to the Issue 6 questions. Although aligned with NZTA's position on the historic heritage issue, WCC's submissions were not partisan in nature but reflected the fact that, as creator and regulator of the District Plan, WCC has a particular interest in how the District Plan is applied and interpreted.

[347] Key points made by WCC were:

- The effects of allowing the requirement must be considered "through the lens" or "in light of" the s 171(1)(a) to (d) matters. That means that the District Plan is a key "filter" of whether the effects that arise from a proposal are acceptable or appropriate;

- That analysis is supported by the requirement in s 171(1) to have "particular regard" to the listed matters which include the District Plan. That is to be contrasted with the lesser obligation to "have regard to" in s 104(1), albeit that both are subject to Part 2;

– Because of the lack of recognition of the Basin Reserve in the District Plan, the Board could not resort to Part 2 as justification for its elevated treatment of unlisted heritage items and views;

– The Board erred in recognising an extended important heritage area which was inconsistent with the significance the District Plan gives to the heritage values in the area.

[348] Although, like NZTA, WCC accepted that simply because the Basin Reserve or the view along Kent and Cambridge Terraces is not listed or specifically identified in the District Plan did not mean that they were not of any heritage value or importance, nevertheless the decision-maker cannot resort to Part 2 as justification for the elevated treatment of unlisted heritage items and views.

[349] WCC's position was that the District Plan is a key basis for decision-making under the RMA and its provisions "must be applied as written". In response to my question whether the District Plan is exhaustive on the topic of historic heritage, Ms Anderson replied in the affirmative.

[350] The respondents' submissions in response were no less comprehensive. In summary they submitted:

(a) NZTA's argument was based on an erroneous application of *King Salmon* to the present circumstances;[148]

(b) the adverse effects which the Board identified at [757][149] were directly relevant to the inquiry not only because they were environmental effects under s 171 but also under s 149P because concerns about them were an important part of the Minister's decision to refer the proposal to the Board;

(c) all that the Board was required to do was to have particular regard to the various plans, and it duly did so;

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148 See at [117] above.
149 At [340] above.

(d) the Board's concern about the adverse effects was consistent with the guidelines in Part 2 to which its s 171 consideration was subject.

Analysis

[351] The extensive argument which I heard convinced me that phrasing the question by reference to "through the lens" or by way of a "filter"[150] is more likely to confuse than to clarify.[151] The search for meaning inevitably invites elaboration of the theme, an example of which appeared in TAC's submissions:

> … Contrary to the Appellant's submissions, s 171 the (a–d) matters do not form themselves into a combined *lens* which magnify the benefit of a proposed designation and diminish or blur its adverse effects.

I prefer to focus on the words of the statute.

[352] It is plain that the Board was required to have particular regard to inter alia the District Plan including the heritage items listed in Schedule 1. As NZTA says, it would not have been permissible for the Board to purport to find that any of the listed items was not of historic heritage value. Nor would it have been permissible for the Board to ignore them. The Board was required to consider the s 171(1)(a) matters specifically and separately from other considerations.[152] That said, the obligation on the Board in a s 171(1) context is to have "particular regard to", not "to give effect to".

[353] How much weight the Board gives to an item to which it is required to have regard or particular regard is a matter solely for the Board in the context of an appeal that is confined to questions of law, subject of course to any *Edwards v Bairstow* challenge. The issue which I am required to decide is whether as a matter of law the Board was permitted to have regard to other areas or items of historic heritage beyond that specified by the District Plan. In other words: Is the Plan exhaustive on the topic?

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150 At [341] and [347] above.
151 Kim Lewison *Metaphors and Legal Reasoning*, The Chancery Bar Association Lecture 2015.
152 See [66] above.

[354] In my view the Board was not so confined. Its consideration of Part 2 considerations was not restricted to instances of unresolvable conflict. Provided it discharged the obligation to have particular regard to the specified matters, in pursuance of its Part 2 obligation the Board was not precluded from also taking into consideration as effects on the environment the adverse effects of the requirement on other items it identified as being of significant historic heritage. In doing so it did not inevitably fail to have particular regard to the Plan as a s 171(1)(a) matter.

[355] NZTA's submission was that the Board had imposed a wholly different regime for the recognition and protection of unlisted historic heritage that went "well beyond what the Plan itself does". However it is not the function of the Court on an appeal such as this to undertake a qualitative assessment. The question to be answered must be confined to whether the Board made an error of law in reaching its conclusion. In my view it did not do so.

Q 45B: Further, should the Board have assessed the effects having particular regard to its finding at [1230] that the works were reasonably necessary to achieve the objectives under s 171(1)(c)?

[356] This question was derived from ground of appeal 29(e) (in the context of Issue 3) which asserted that the Board had failed to have particular regard to the finding at [1230] that the work was reasonably necessary to achieve NZTA's objectives. The 23 July 2015 memorandum described Q 45B as a development of Q 28(b) in its application to the original Q 45.

[357] The answer to Q 45B is plainly in the affirmative. That is simply the statutory obligation.

[358] However the reality is that NZTA's contention is directed not to the nature of the obligation but to whether the obligation was in fact discharged. While such an inquiry could be pursued on a general right of appeal, I do not consider that it is properly the subject of an appeal limited to questions of law only. However, in the event that my analysis is incorrect, I make the following further observations.

[359] I apprehend that at least one of the reasons for the contention that the Board did not have "particular" regard to the finding at [1230] is that in its description of its proposed decision structure at [199][153] the Board did not include the word "particular" in its reference to s 171(1)(c) in subpara (d).[154] NZTA's submissions stated that one of three noteworthy aspects of [199] was:

> 28.5(b) The Majority explicitly separates the s 171(1)(b) and (c) considerations from the consideration of effects. That is, it says that it will consider the effects of the requirement; then consider the (b) and (c) matters separately. It does not say that it will consider the effects of the requirement, having particular regard to whether [NZTA] has adequately considered alternatives (s 171(1)(b)); or whether the designation and the work is reasonably necessary for [NZTA] to achieve its objectives (s 171(1)(c)).

[360] However it is quite apparent that the Board did have particular regard to the s 171(1)(c) consideration. In addition to the discussion spanning [1217] to [1230] under the heading "Reasonably necessary for achieving objectives (s 171(1)(c))", the Board touched again on the issue of [1277] to [1278] and implicitly in the course of its ultimate conclusion at [1317].

Q 45C: When there is no 'invalidity, incomplete coverage or uncertainty of meaning' in the relevant plans under s 171(1)(a), is it appropriate for a decision-maker to assess effects against s 6(f) (for historic heritage) and s 7(c) (for amenity values)?

[361] This question also invokes NZTA's *King Salmon* argument. In essence it asks whether it is appropriate to address Part 2 considerations in the absence of one of the three caveats explained in *King Salmon*,[155] namely:

(a) if the relevant plan is invalid;

(b) if the relevant plan does not "cover the field";

(c) if there are uncertainties as to the meaning of the particular policies in the plan.

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153 At [77] above.
154 The same is true in relation to the reference to s 171(1)(b) in subpara (c).
155 *King Salmon*, above n 26, at [88].

[362] WCC supported NZTA's case on this point, submitting that the key findings in *King Salmon* at [84]–[85] were as applicable to District Plans as to Regional Plans. It contended that *King Salmon* removed the ability for a decision-maker to have recourse to Part 2 when giving effect to or interpreting a plan unless one of the three specific caveats applied. This, it was said, was significantly different from the previous treatment of Part 2 as the "engine room"[156] of the RMA. Its submissions also explained why the second and third caveats were not of application in this case.

[363] I am unable to accept that submission. The role of the caveats identified in *King Salmon* was to address the situation where there was, what one might describe generically as, some inadequacy in the plan. The caveats accordingly qualified the obligation to give effect to such an inadequate plan and preserved the avenue of reference back to Part 2 which the "give effect to" formula had removed.

[364] As explained earlier, the manner of recourse to Part 2 in the context of s 171 (and other sections stated to be "subject to Part 2") is not limited in the manner described in *King Salmon*.[157] Of course the three caveats may still have application in relation to inadequate plans so far as concerns the obligation to have particular regard to them.

[365] I have some reservation about the formulation of the question so far as it incorporates the word "appropriate". As the Supreme Court remarked in *King Salmon*,[158] the scope of that word is heavily affected by context. I tend to think that the words "permissible" or "legitimate" would have been preferable.

[366] However, assuming that the consideration of an application under s 171 does in fact engage historic heritage or amenity values, for the reasons above the answer to Q 45C is in the affirmative.

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156 *Auckland City Council v John Woolley Trust*, above n 54; see also [111] above.
157 At [85] in [113] above.
158 *King Salmon*, above n 26, at [100].

Q 45D: Did the Board correctly apply the definition of 'historic heritage' under s 2?

[367] One of the matters of national importance listed in s 6 as (f) is the protection of historic heritage from inappropriate subdivision, use and development. "Historic heritage" is defined in s 2 of the RMA as follows:

> **historic heritage**–
> (a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:
> (i) archaeological:
> (ii) architectural:
> (iii) cultural:
> (iv) historic:
> (v) scientific:
> (vi) technological; and
> (b) includes–
> (i) historic sites, structures, places, and areas; and
> (ii) archaeological sites; and
> (iii) sites of significance to Māori, including wāhi tapu; and
> (iv) surroundings associated with the natural and physical resources.

[368] The nature of the Board's alleged error in its interpretation of s 2 was described in ground of appeal 40(c) as follows:

> The Board wrongly applied paragraph (b)(iv) of the definition of 'historic heritage' in s 2 of the Act and thereby extended its consideration beyond the surroundings associated with the natural and physical resources constituting the historic heritage within the project area (being the Basin Reserve and listed heritage items) to conclude that the wider setting to those resources was of itself a heritage area.

The parties' contentions

[369] NZTA's primary written submissions developed the argument in this way:

> 37.3 While the definition includes 'historic' places and areas it does not specifically provide for heritage precincts or landscapes. The fact that there may be a collection of heritage items within the locality does not make it an historic place or area, unless that locality is a place or area of historic significance in its own right. As a matter of law it was not open to the Majority to conclude that the wider Project area is a heritage precinct/landscape.
>
> 37.4 By establishing a heritage precinct at this location, the Majority has developed a heritage landscape construct which it found stretches from Taranaki Street in the west through the Basin Reserve and Canal Reserve areas to Government House and the Town Belt in the

> east and applied it to the wider Project site. It did so on the basis that there is an unusual concentration of heritage buildings, sites and places at this location, such that the Project is contained within what it describes as an important heritage area.
>
> 37.5 By establishing a heritage landscape of this scale in this location, the Majority has purported to confer s 6(f) protection over the entire landscape rather than the particular heritage items within it. This level of protection is not provided for in the District Plan which, as noted, protects scheduled sites and features while ensuring that the diversity of development provided for within the planning framework relevant to this location is not constrained.

[370] NZTA acknowledged that the Environment Court in *Waiareka Valley Preservation Society Inc v Waitaki District Council*[159] had been satisfied that a purposive interpretation of s 6(f) enabled that provision to describe a collection of historic sites, places or areas as a heritage landscape and had concluded that the nomenclature 'landscape' could easily be substituted by 'area' or 'surrounds', depending on the particular context.

[371] However NZTA noted that the Court has since expressed considerable caution regarding the extension of (b)(i) of the definition to include a collection of historic sites, places or areas as a "heritage landscape". In *Maniototo Environment Society Inc v Central Otago District Council*,[160] the Environment Court noted that such usage:

> … may be dangerous under the RMA where the word "landscape" is used only in s 6(b). Further, the concept of a landscape includes heritage values, so there is a danger of double-counting as well as of confusion if the word "landscape" is used generally in respect of section 6(f) of the Act.

Similarly in *Gavin H Wallace Ltd v Auckland Council*[161] the Court also expressed caution over the use of the term and its inclusion in the lexicon of the RMA.

[372] Consequently NZTA submitted, having regard to the definition of "historic heritage", the case law and the District Plan, that the RMA does not envisage protection being extended under s 6(f) to a central city urban landscape of the scale

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159 *Waiareka Valley Preservation Society Inc v Waitaki District Council* EnvC Christchurch C058/2009, 13 August 2009 at [230]–[231].

160 *Maniototo Environment Society Inc v Central Otago District Council* EnvC Christchurch 103/09, 28 October 2009 at [208].

161 *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120 at [66]–[67].

determined by the Board. To do so would result in all activities within that location being "effectively trapped" within a special heritage landscape thereby "locking up" future urban development contemplated by the planning framework.

[373] In brief summary the respondents submitted that:

(a) the definition of "historic heritage" is broad and explicitly "includes" historic sites, structures, place and areas as well as surroundings associated with physical resources;

(b) NZTA's interpretation is unduly narrow and at odds with the text and purpose of the RMA;

(c) the Board examined whether there was an area of historic heritage, as the definition permits, but NZTA wrongly suggests that the Board concluded that there was some formal heritage precinct or landscape.

Analysis

[374] The competing perspectives in the contest before the Board are captured in the following paragraphs:

> [614] Some heritage experts have chosen to focus their assessments on individual heritage items, particularly listed or registered items, while others give attention to considerations of heritage setting as well. With reference to terminology, this is partly a distinction between *built heritage* and *historic heritage*.
>
> …
>
> [616] The Assessment of Environmental Effects prepared by [NZTA] refers explicitly to *Built Heritage* as the title for Section 26 of the document, and Technical Report 12 is similarly entitled *Assessments of Effects on Built Heritage*. [NZTA's] closing submissions confirmed this thematic focus.
>
> …
>
> [617] … The City Council's closing submissions made no reference at all to section 6(f) of the RMA, nor to *historic heritage*, choosing rather to focus on issues related specifically to listed or registered heritage items.
>
> …

> [622] Mr Milne, in his closing submissions, made numerous references to *historic heritage* and argued explicitly that the focus of [NZTA's] case on heritage matters *was wrongly limited to built heritage*. Mr Bennion, in his closing submissions, having cited explicitly the relevant RMA sections, similarly made numerous references to *historic heritage* and argued for the proper recognition of *setting* when assessing effects on historic heritage.

[375] As earlier noted,[162] while the Board recognised the District Plan as the primary means of giving effect to the recognition of historic heritage, it proceeded on the basis that even if a place or area was not scheduled s 6(f) still applied.

[376] There are a number of reasons why it is not easy to attribute to the Board a particular interpretation of the definition of "historic heritage" in s 2. First, the Board's discussion under the heading "Heritage, Cultural and Archaeological" is extensive, spanning [535] to [783], and the evidence is exhaustively analysed. That said, within that thorough review there are certainly references to precincts and landscapes, which are the focus of NZTA's submission.

[377] Secondly, the protection of particular sites or areas is not confined to the District Plan. Although the Basin Reserve is not included in the schedule to the Plan, it is registered as an historic area under the Heritage New Zealand Pouhere Taonga Act 2014.[163] Similarly the Board viewed the fact of the creation of the National War Memorial Park under its own empowering legislation[164] as an indicator of its national significance.

[378] Thirdly, the mosaic which the Board was required to consider was augmented by the Minister's reasons for direction to which the Board was directed by s 149P(1)(a) to have regard. Relevant to the issue of historic heritage those reasons stated:

> • The proposal is adjacent to and partially within the Basin Reserve Historic Area and international test cricket ground; in the vicinity of other historic places including the former Home of Compassion Crèche, the former Mount Cook Police Station, Government House and the former National Art Gallery and Dominion Museum; and is adjacent to

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162 At [338] above.

163 At [562]. The definition of "historic area" in s 6 means an area of land that contains an inter-related group of historic places and forms part of the historical and cultural heritage of New Zealand.

164 National War Memorial Park (Pukeahu) Empowering Act 2012.

> the National War Memorial Park (Pukeahu). The proposal is likely to affect recreational, memorial, and heritage values associated with this area of national significance (including associated structures, features and places) which contribute to New Zealand's national identity.

[379] There is force in the respondents' submission that it is difficult to see how the Board could have complied with its obligation to have regard to the reasons of the Minister in referring the proposal to it without taking the approach it did to the "area" of historic heritage.

[380] Indeed one of the instances of the Board's use of "precinct" was with reference to three of those places of importance when, in relation to an anticipated Anzac Day centenary celebration, it said:[165]

> Such an event would clearly link the NWM Park, the Basin Reserve, and Government House – covering the entire precinct we have described.

[381] In seeking to identify from the Board's broad review the interpretation which the Board placed on s 2, there are three paragraphs which I consider are particularly instructive:

> [557] The protection given by Section 6(f) extends to the curtilage of the heritage item and the surrounding area that is significant for retaining and interpreting the heritage significance of the heritage item. This may include the land on which a heritage building is sited, its precincts and the relationship of the heritage item with its built context and other surroundings.
>
> …
>
> [615] In defining *historic heritage*, the RMA makes a clear distinction between historic sites and historic heritage. At their conferencing, the experts drew attention to *the definition of historic heritage in the RMA – which includes (b)(iv) surroundings associated with the natural and physical (historic heritage) resources.*
>
> …
>
> [623] We agree that we are obliged to consider the effects on historic heritage and that historic heritage includes not only built heritage but the surroundings and setting in which the built heritage exists. In our view, the explicit focus of [NZTA], Wellington City Council and Heritage NZ heritage assessments on *built heritage*, as distinct from *historic heritage*, unduly limited the scope of those assessments.

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165 At [589].

The third of those paragraphs represented the Board's conclusion on the competing contentions in the extracts at [374] above.

[382] While for the reasons in [376] to [379] above Q 45D has proved to be one of the more difficult issues in the case, my conclusion is that there was no error in the Board's interpretation of the definition of "historic heritage". I do not accept NZTA's submission that in its application of the definition the Board "went well beyond the surrounds and setting of historic heritage".[166]

[383] NZTA's submissions further argued that if s 6(f) protection as found by the Board was unobjectionable, then the Board had erred in law "by applying this concept to the Project area without any methodology being identified or followed on which to base such a significant finding". I do not address that submission because I do not consider that it involves either a question of law or an issue sufficiently connected to Q 45D.

Q 45E: What is the correct approach to the application of the test of 'inappropriateness' in s 6(f) [should the Court consider resort to Part 2 of the RMA was available to the Board in the circumstances of this case]?

[384] The bracketed words in the question reflect the fact that this question is conditional upon an affirmative answer to Q 45C and a rejection of NZTA's argument that it was not appropriate for the Board to assess historic heritage under Part 2.

[385] NZTA's argument in summary form was:

(a) prior to *King Salmon*, "inappropriate" in the context of s 6 was understood as having a wider meaning than "unnecessary" and was to be considered on a case by case basis;

(b) *King Salmon* held that the former approach did not accurately reflect the proper relationship between ss 5 and 6;

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[166] See [757] in [340] above.

(c) *King Salmon* held that "inappropriateness" is heavily affected by context and that the standard relates back to the attributes to be preserved or protected rather than the activity proposed;

(d) *King Salmon* also gave a clear direction that it is the relevant planning documents that provide the basis for decision-making under the RMA. This includes a decision-maker's evaluation of "inappropriateness" in the context of s 6.

[386] Consequently NZTA submitted:

> 38.6 … Therefore, in the absence of any allegation of invalidity, incomplete coverage or uncertainty of meaning; a decision-maker is required to assess s 6(f) matters as particularised by the relevant planning documents before them, from National Policy Statements down to district plans.
>
> 38.7 Even if the Majority was right to go beyond the District Plan in determining what constituted historic heritage, it should still have assessed what was appropriate by having particular regard to the scale and nature of the protection conferred by the District Plan. It did not do so.

[387] Mr Palmer raised the objection that this argument did not appear in the amended notice of appeal. However in my view the proposition advanced is in essence a variation on the theme reflected in Q 45A and Q 45C, in particular the "through the lens" argument.

[388] I first note that the Board explicitly recognised the guidance of *King Salmon* on the meaning of "inappropriate" in s 6(f):

> [558] Importantly, for this matter, we are guided by the Supreme Court in *King Salmon* as to the application of the word *inappropriate* as it is used in Section 6(f). Where the term inappropriate is used in the context of protecting historic heritage, the natural meaning is that inappropriateness should be assessed by reference to what it is that is being protected. That is, within the context of the heritage elements that exist within and around the Basin Reserve area, their value and the effects of the project on those values.

[389] In support of its conclusion at [783] that the Project was not consistent with s 6(f) the Board said:

> [780] Our overall evaluation is not simply a matter of considering effects on listed heritage items or confining our evaluation to a consideration only of the loss or restoration of heritage fabric, although such historic heritage

> effects are part of the cumulative picture. We must consider the character and significance of the whole wider heritage area and the appropriateness of such a structure within it.
>
> [781] We noted in our introduction to this section that the common theme in the relevant statutory documents – the RMA, Regional Policy Statement and District Plan – is to protect heritage from inappropriate use and development. We concluded in our findings from the sub-area analysis reported earlier in this decision two important issues: the inherent conflict in mitigating adverse effects, and the cumulative adverse effects of severance within the heritage setting. It appears to us that those conclusions align clearly with the final assessment of Mr Salmond on *appropriateness* and the findings of Ms Poff from her Part 2 assessment.
>
> [782] Consequently, we find that the evidence of historic heritage supports the conclusion that the Project before us constitutes an inappropriate development within this significant heritage area of the city.

[390] It is apparent in my view from [781] and a number of other paragraphs that the Board did have particular regard to the District Plan and other relevant documents. NZTA's complaint is with the Board's ultimate conclusion, as reflected in the submission:

> 38.8 … the Majority should have concluded that, because there was no direct adverse effect arising from the Project on any heritage items identified as significant and worthy of protection in the District Plan, the Project is consistent with s 6(f) as it relates to those listed items and therefore does not represent inappropriate development in terms of s 6(f).

[391] In effect NZTA's case is that the Board erred in not reaching a conclusion in accordance with (ie by giving effect to) the District Plan. As my earlier findings reflect, I do not agree that the Board's task under s 171(1) was so confined.

[392] I do not consider that there was any error of law in the Board's consideration of inappropriateness in s 6(f). In this context it is desirable to reiterate that this is not a general appeal by way rehearing and I am not sitting in judgment on the merits of the Board's conclusion.

Issue 8: Failure to consider options within the scope of the application to address amenity and heritage related effects to the Gateway Building

[393] Although this item was omitted from the memorandum of 23 July 2015[167] there was no issue that it remained live and the parties' written submissions addressed the following question:

> Q 51 Did the Board fail to have regard to a relevant matter, being options within the scope of the application that could balance the effects of the Proposal on the playing of cricket with other effects (heritage and amenity)?

[394] NZTA's grounds of appeal were:

> 52 The grounds of appeal in relation to this issue are:
>
> (a) The Board found at [965] that the cricketing experts were of the uncontested view that the 65m Northern Gateway Building was necessary to mitigate the effects on cricket when the evidence of Dr Sanderson was that a Northern Gateway Building of 45m would be sufficient to mitigate the risk of visual distraction to batters.
>
> (b) As a consequence, the Board found at [758] to [761] that there is an inherent conflict in mitigating the adverse effects on heritage. In particular, by finding that a Northern Gateway Building of 65m is required to mitigate the effects on cricket, but that mitigation has of itself other adverse heritage-related effects, including effects on views and amenity.
>
> (c) Consequently, the Board failed to consider as a relevant matter, options within the scope of the application to balance the needs of cricket with any other effects (historic heritage or amenity) of a longer structure, in particular by:
>
> (i) failing to consider a Northern Gateway Building of 45m or 55m;
>
> (ii) failing to consider a Northern Gateway Building of 65m together with conditions to ensure that the Building remain a sense of openness between 45 and 65 metres.
>
> (d) In the alternative, by rejecting the evidence of Dr Sanderson, the Board implicitly found that the evidence of the cricketers was more persuasive in assessing the Proposal's effects on the Basin Reserve. The Board therefore could only have reasonably found in accordance with the cricketers' evidence on amenity effects that the Northern Gateway

[167] At [332] above.

> Building would appropriately protect the ambience of the Basin Reserve (contrary to the Board's finding at [653]).

[395] It is quite apparent that the Board was cognisant of the options involving a Northern Gateway Building (NGB) of reduced length. At [36] the Board notes that the key elements of the Project included:

> (f) A new structure, known as the Northern Gateway Building, approximately 65m long and 13m high at or about the northern end of the Basin Reserve, adjacent and to the east of the R.A. Vance Stand. Shorter alternatives to the proposed structure within the same approximate 65m long and 13m high envelope/area are also proposed, together with landscaping;

[396] The primary function of the NGB was to screen the moving traffic on the Basin Bridge from views within the Basin Reserve so as to mitigate the effects of the Basin Bridge on cricket and amenity within the Basin Reserve. NZTA made it clear that it had no interest in developing the building, except as mitigation for the effects of the Basin Bridge.[168]

[397] Hence the longest option was naturally the focus of the Board's consideration because the cricketing experts were of the universal view that that option was necessary to mitigate the effects on cricket. So far as Dr Sanderson's evidence was concerned, Mr McMahon noted:[169]

> [1383] … The cricket evidence from the Basin Reserve Trust is preferred to the evidence of Dr Sanderson for the Applicant, who generously acknowledged that, despite his technical evidence in respect to ophthalmology, he should defer to cricket experts on the extent of the length of screening necessary to avoid distracting movement on the Basin Bridge for cricket players.

[398] I agree with Mr Palmer's submission that it is apparent from the Decision and from the Draft Decision (which included proposed conditions regarding design) that the Board did not fail to have regard to other options or conditions. I note the irony in his closing observation that NZTA appeared to be complaining that the Board did not consider options which would have had an even greater impact on historic heritage than the option it did focus on.

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168 [1424].
169 [1383].

Summary

[399] A decision on an appeal "only on a question of law" which raises more than 35 questions of law is not well-suited to a succinct summary. That is especially so when ten of the questions asked whether the Board's conclusions on various issues were findings to which it could reasonably have come on the evidence, that is, whether those conclusions were so insupportable that they amounted to errors of law.

The judgment finds that the Board's Decision does not contain any of the errors of law alleged. Although it is not practicable to recite each finding, attention is drawn to the following points of general application.

The meaning of s 171(1)

The provision in s 171(1) to have "particular regard to" the matters specified in (a) to (d) required the Board to consider these matters specifically and separately from other relevant considerations but did not indicate that extra weight should be placed on those matters.[170]

The relocation of "subject to Part 2" did not change the meaning of s 171(1).[171] The Board's role under s 171(1) was different from that in *King Salmon* where the obligation under s 67(3) was to give effect to the NZCPS. *King Salmon* did not change the import of Part 2 for the consideration under s 171(1) of the effects on the environment of a requirement.[172]

Adequate consideration of alternative options

Section 171(1)(b):

> (a) permits a more careful consideration of alternatives when there are more significant adverse effects of allowing a requirement;[173] and

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170 [64]–]68] above.
171 [86]–[98] above.
172 [99]–[118] above.
173 [140]–[142].

(b) does not require a requiring authority to fully evaluate every non-suppositious alternative with potentially reduced environment effects.[174]

In some, but by no means in all, cases it may be necessary for the decision-maker to gain access to the weightings in a multi-criteria analysis in order to be satisfied that adequate consideration has been given to alternatives.

Enabling effects

A project's enabling benefit can constitute an effect to be taken into account under s 171(1) and/or s 5.[175] In order to be given weight the enabling benefit need not be unique to a project, guaranteed to go ahead or able to be quantified.[176]

Transportation benefits

Where a project will have more than minimal adverse effects no higher standard of proof is required to demonstrate the project's transportation benefits.[177]

Heritage and amenity

On a s 171(1) application a District Plan is not exhaustive concerning items of historic heritage. The decision-maker's consideration of Part 2 considerations is neither restricted to instances of unresolvable conflict[178] nor confined to situations where one of the three *King Salmon* caveats is applicable.[179]

The Board did not err either in its interpretation of the definition of "historic heritage" in s 2[180] or in its approach to the application of "inappropriateness" in s 6(f).[181]

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174 [156].
175 [265]–[266].
176 [268].
177 [299].
178 [354].
179 [363]–[364].
180 [382].
181 [392].

Disposition

[400] For the reasons above, NZTA has not established that in its Decision the Board made any error of law of the nature reflected in the several questions of law in the amended notice of appeal, as revised by the 23 July 2015 memorandum. Consequently NZTA's appeal under s 149V(1) is dismissed.

[401] The parties requested the opportunity to make submissions on costs. In view of the outcome of the appeal:

(a) the respondents are to file any costs memoranda by 11 September 2015;

(b) NZTA is to file a costs memorandum by 2 October 2015; and

(c) the respondents may file any memoranda strictly in reply by 16 October 2015.

Leave is reserved to apply to amend that timetable if necessary.

[402] Finally I record my appreciation to all counsel for the quality of their submissions and the assistance which they provided to the Court in navigating a course through this complex matter.

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Brown J

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