SPACE, WATER, ENVIRONMENT & ACC

SPECIALIST AREAS OF LAW

FOUR AREAS OF SPECIALTY

In this issue of *LawTalk*, we look at four distinct practice specialties.

They range from the developing area of space law to areas of specialty that have been around for some time now, such as environmental law.

In *LawTalk* 798, we began the series with four disciplines we described as “developing areas of the law”. All areas of the law are, of course, continuing to develop and there are aspects of all specialties that are not new.

In this feature, the emphasis is changing to reflect the increase in specialisation that is happening within the law. The four specialities we feature are: space law, water law, environmental law and ACC.

The law around New Zealand's 'liquid gold'

BY FRANK NEILL

AS DEMAND FOR WATER INCREASES and as competition for this resource becomes more intense, so the importance of the law pertaining to water is rising too.

"We can't go past our abundance of water or New Zealand's 'liquid gold'," Minister for Primary Industries David Carter said as recently as 28 June.

"Water is possibly the biggest opportunity to grow the productive part of our economy," he continued, in his speech to Federated Farmers' national conference.

Unsurprisingly, water law is a major issue currently in New Zealand, as it is around the world. "It is definitely a specialist area in its own right," says Wellington resource management specialist Philip Milne.

"Water law is part of natural resource management law, which comprises areas such as water law, coastal law, marine farming, land management law and air quality – anything to do with land, water and air."

It combines elements of both environmental and property law. At the same time, Mr Milne says, a lot of it isn't just about law.

"Law is but a component. You cannot understand resource law without a basic grounding in science and, in particular, ecology. It is mainly about ecology and management. Water issues comprise a triangle. One side is ecology, another side is management and the third side is law.

"You can't be involved in arguing for an applicant or making a decision as an independent commissioner in adjudication without understanding the science and the management as well as the law.

"In fact, to be a specialist in water law, you also have to have a science background now. A large proportion of what I do is not law. It is common sense and weaving the facts into the law and understanding science. You need at least an interest in science, and preferably a qualification in that area."

One of the big issues in the area at the moment relates to the management of water, Mr Milne says.

On the question of management, the major areas are the allocation of what is, in some parts of the country at least, a scarce resource. That includes allocation of both surface water and ground water, and managing the quality of both resources as well as coastal water quality.

Mr Milne gives the examples of the Waimakariri and Rakaia Rivers.

> "AS DEMAND FOR WATER BEGINS TO EXCEED THE SUSTAINABLE SUPPLY, COMPETITION FOR WATER IS BECOMING INTENSE."
>
> JACINTA RURU

"These catchments, including ground water, are at or near the point of full allocation as are many other East Coast water resources. The rivers are pretty much allocated, apart from the higher flows. Natural or artificial storage of these higher flows will be a key to utilisation to use of higher flows."

The proposed Central Plains Irrigation scheme which has recently been consented (subject to appeals) is an example of the a move to utilise higher flows. Trust Power has also applied to vary the Rakaia Water Conservation Order for the same reason.

Another major area is water quality. Pollutants, including nutrients such as nitrates and phosphates in water, give rise to public health issues, ecological issues, aesthetic issues and reputational issues for New Zealand. That includes New Zealand's clean, green image, and its recreational values and resources: in trout fishing, for example.

"Water is essential for the welfare of people, plants, livestock, farming activities, industry and power generation," says Otago University academic Jacinta Ruru.

Co-director of the Otago University Research Cluster for Natural Resources Law, Ms Ruru's research focuses on exploring indigenous peoples' legal rights to own, manage and govern land and water and she organised the 2009 Indigenous Legal Water Forum.

"The new *National Policy for Freshwater 2011* describes water as an essential resource for New Zealand's economic, environmental, cultural and social well-being. The Resource Management Act 1991 (RMA) requires that water be safeguarded for its life-supporting capacity."

The RMA provides the rules for managing land, air and water. The general rule for water is that if the proposed activity – which might be to take, use, dam or divert water – is not expressly permitted in a regional plan, then a resource consent is required.

"As demand for water begins to exceed the sustainable supply, competition for water is becoming intense," Ms Ruru says.

"Key legal issues arise from these new realities, including what are the nature and content of these resource consents to take water, should those first in time with their resource consents have priority over other subsequent possible users and are these resource consents, in effect, property rights despite s122 of the RMA stating that resource consents are neither real nor personal property?"

One commentator who argues that resource consents have characteristics of property rights is North South Environmental Law director Robert Makgill.

"In simple terms, a water permit confers a right to take, use, dam and/or divert water subject to the availability of water," Mr Makgill states in a paper entitled *A New Start for Fresh Water: Allocation and Property Rights* (see **www.nsenvironmentallaw.com/resources/A_New_Start_for_Fresh_Water_Allocation_and_**

Property_Rights.pdf)

It does not constitute ownership of the resource.

"Nevertheless, when we consider the nature of resource consents that confer rights of allocation and use under the RMA, we find a number of characteristics that we would otherwise identify as belonging to the bundle of private property rights including (amongst others) the right to possess, use and transfer.

"The 'right to possess' is the right under which one may exercise control over something to the exclusion of all others," he says.

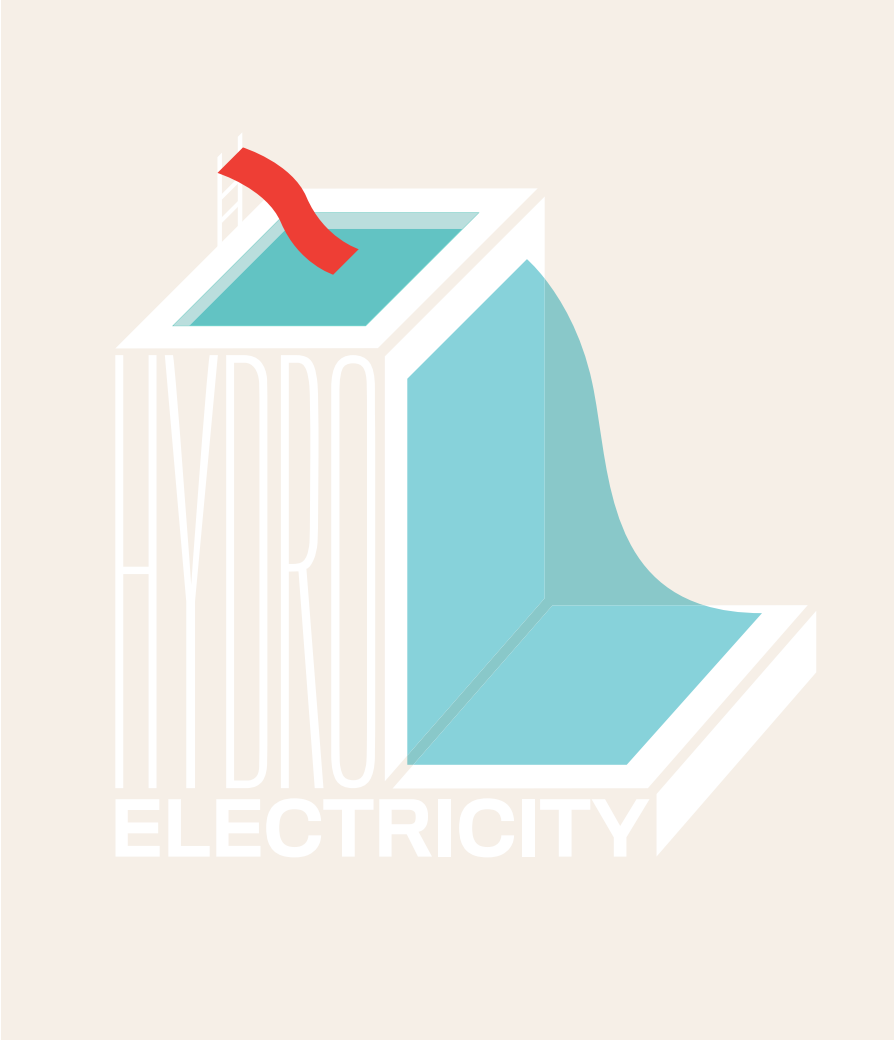
"In *Aoraki Water Trust v Meridian Energy Limited* ([2005] 2 NZLR 268 (HC)), Aoraki sought a declaration that water permits, held by Meridian entitling it to the full allocation of water from Lake Tekapo, did not operate as a legal constraint on the ability of the regional council to grant others consents to the same water under the RMA.

"However, the High Court held that where a resource is already fully allocated in a physical sense to a permit holder, a consent authority cannot lawfully grant another party a permit to use the same resource unless specifically empowered by the RMA.

"The court found that Aoraki's argument overlooked the fact that a water permit confers a right to use the subject resource. Indeed the fact that Meridian's consents were of considerable value was seen as explicable only on the basis that such value derives from the holder's right to use the property in accordance with its permit. It followed that granting a permit to Aoraki would reduce Meridian's ability to make full use of the water thereby devaluing its grant.

"The court held [at 279] that: 'The principle of non-derogation from grant is applicable to all legal relationships which confer a right in property'.

"The court held that the principle of non-derogation is based on an implied obligation on a grantor not to act in such a way as to injure property rights granted by the grantor to the grantee. It considered that Meridian must have assumed that the council would not take any steps during the term of the consents to interfere with, erode or destroy the valuable economic right which the grants had created. Granting



Aoraki consent to the water 'would either frustrate or destroy the purpose for which Meridian's permits were granted' [at 280]."

Cases since *Aoraki* have further developed this area of law, Mr Milne notes, "and I'm sure that it's not the end of the matter by any means."

One of the "big issues" New Zealand is currently facing is around the Treaty issues relating to water, he says.

"It is an issue that has been politically acute for a decade now but is one that has been real for Māori for more than 100 years," Ms Ruru says.

"A 2009 *New Start for Fresh Water* Cabinet paper accepts that 'the rights and interests of Māori in New Zealand's freshwater resources remain undefined and unresolved, which is both a challenge and an opportunity in developing [a] new water management and allocation model'.

"The government-commissioned *Land and Water Forum* report of 2010 accepts that 'Water is a taonga which is central to Māori life [and] ... fundamental to iwi identity'.

"There have been notable legal solutions, mostly concerning the milestone Treaty of Waitangi claim settlements with several iwi for the co-management of the Waikato River.

"But it is the wider issue of who owns water that is currently in the news. This is because the Waitangi Tribunal is presently hearing an urgent claim brought by the New Zealand Māori Council that the Government should suspend its planned partial sale of water dependent state-owned enterprise electricity companies until the legal issue of who owns water is clarified," Ms Ruru said on 18 July.

"Some iwi argue that they do in accordance with the Treaty of Waitangi. If the case goes to the High Court then the issue will become whether the common law doctrine of native title that potentially recognises Māori customary title to water trumps the common law doctrine that water cannot be owned." LT