IN THE SUPREME COURT OF NEW ZEALAND SC 94/2007

IN THE MATTER of a Civil Appeal

BETWEEN **GREENPEACE NEW ZEALAND INCORPORATED**

Appellant

AND **GENESIS POWER LIMITED**

Respondent

Hearing 28 May 2008

Court Elias CJ
Blanchard J
Tipping J
McGrath J
Wilson J

Counsel D M Salmon and M Heard for Appellant
P F Majurey and T L Hovell for Respondent
D B Collins QC, B Arthur and J Kerr for the Attorney-General - Intervener

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CIVIL APPEAL

10.01am

Elias CJ Thank you.

Salmon May it please the Court, Salmon and Heard for the appellant.

Elias CJ Thank you Mr Salmon, Mr Heard.

Majurey May it please the Court Majurey and Hovell for the respondent.

Elias CJ Thank you Mr Majurey, Mr Hovell.

Collins If the Court pleases, Ms Arthur and Ms Kerr appear with me for the Intervener

Elias CJ Thank you Mr Solicitor, Ms Arthur, Ms Kerr. Yes Mr Salmon.

Salmon May it please the Court, this is a confined and narrow case. And the materials before you should be relatively limited, I think three small bundles of authorities and one volume of case on appeal. Why are we here? Genesis would like to build a gas fired power plant and there is a dispute between the parties as to whether, if at all, the impact on the greenhouse gases it produces on climate change can be considered by consent authorities. The reason that Genesis needs consent in part is that the gas that will be released from this plant it built is a contaminant, as defined under the Resource Management Act, everybody agrees about that. And accordingly consent is needed to discharge air under section 15 of the RMA. And everybody agrees about that.

The section in question, and I anticipate your Honours may have had the opportunity to look briefly at the submissions filed, the section in question for the purpose of today is 104E of the RMA, which contains what we are calling the prohibition on considering the effects of a discharge of such gases on climate change with an exception, and the question for today, and the question before the Court of Appeal, is simply the scope of that exception.

The Court of Appeal, having held that the exception as worded will only arise if the application before a consent authority is for a project involving the use of renewable energy. And that is essentially the issue. There is another parallel section in the Resource Management Act brought in by the same amendment legislation which mirrors the wording of that exception, and I will be speaking about that because it seems common ground that whatever the exception means and the consent stage section 104E context, it must also mean in the other context.

Tipping J Logically, is the Court of Appeal's conclusion confined, that it is confined to projects using renewable energy which themselves emit greenhouse, which source emits greenhouse gases.

Salmon It seems to be the way at least it is interpreted

Tipping J It must be mustn't it.

Salmon It seems to be, and certainly that seems to be the way that Genesis Power has interpreted the exception, because the submissions from Genesis say it is only geothermal and biomass production.

Tipping J If the renewable energy doesn't emit greenhouse gases, you wouldn't have the problem would you?

Salmon You wouldn't have a problem and you wouldn't, that's right, there would be nothing to consider. Except the general positive factors under section 7, that say you have got to look at all the great things about renewable energy.

Tipping J Yes

Salmon That's right and one of the things I will be coming to Sir is the fact that we need to keep in mind that in interpreting section 104E that the exception itself only carves out one aspect of the many factors that section 7 requires a consent authority to look at which relate to renewable energy. Because section 7 requires that the consent authority think about the good things about renewable energy, whether or not the application in front of it is renewable. For example, and I will come to this, but no consent authority can ignore the fact that there are renewable energy options out there when considering a non-renewable project under section 7 except in the greenhouse gas climate change context. So the fact that renewable energy is renewable, sustainable, more long term, more viable on a long term basis, those are all things consent authorities still have to look at whether or not it is a renewable or non-renewable project. But yes Sir the approach of the Court of Appeal does seem to be only if you are renewable and then only if you are producing greenhouse gases, do you get to that exception.

Tipping J Quite, that is what, that is how I read it, as a matter of logic.

Salmon Yes as a matter of logic and probably as a matter of the text of the judgment, although it is not specifically limited in that way, it is just a statement that it must involve renewable energy. And in that sense it might be that reading the Court of Appeal's judgment in a certain way you would say well a largely non-renewable project that involves some solar power might somehow bring you within the exception, because it involves solar power and thus involves renewable energy, to adopt the words of the Court of Appeal. Quite what you then do is unclear.

Elias CJ Well it is only to the extent of the reduction that is relevant

Salmon Yes to the extent that the use and development produces an absolute in relative terms. That's right. But that would seem to be on the Court of

Appeal's formulation of weigh-in and thus might be a slight caveat to the idea that it is only if

Elias CJ Well on the respondent's argument an applicant has no incentive to come up with a co-generation solution because that will bring the applicant within the exception. Is that right?

Salmon Well that's right your Honour and indeed on the respondent's argument, which I don't want to call a floodgates argument, but effectively the respondent is saying give Greenpeace their way and it is all back on, we turn back the clock to the cases my learned friend has referred to, we talk about climate change forever and so on,

Elias CJ But that is not your case.

Salmon That is not our case, never has been, never has been at all. But if

Elias CJ Because you don't get into measuring the effect on climate change on any view, on your argument.

Salmon Not on the submission that we run here or indeed that Greenpeace has run in lower Courts. The point I was going to make your Honour which ties into your question is this, if the Genesis Power formulation, including that characterisation of Greenpeace, the submission that says it is all back on, we get to have our scientists and everything, if that were right one of the perverse consequences of that is that the people with the hardest task appearing in front of a consent authority are the favoured class. Those renewable energy applicants. They are the ones who are going to have to talk forever about all of the things that we are told is legislative policy not to get into.

Elias CJ Yes, that was part of my suggestion that there would be no incentive to come up with a proposal that in part used renewable energy.

Salmon And I would agree with that your Honour. I would add to it that the fact there is a disincentive, obviously it is different if it is a huge huge project worth billions of dollars, but this is not just about energy, this is about the smaller stuff. Any emission on trade or industrial premises this will apply to. So if my project is a $100,000 project but there is a $200,000 compliance cost by going renewable because the huge bun fight of lawyers and scientists that we are told would happen is on, and that is Genesis' case. It is on but it is only on if you are renewable. You would be insane to buy into it, you would be much better off just burning some coal, and that is why I emphasised at the start, we need to begin by looking at section 7 not because it overrides the exception but because it tells us that despite the exception there are lots of reasons why a consent authority is

mandated to and required to give more a green light to renewable energy. It is not just about climate change in other words. And so it would be perverse if, because of this exception, life was very very hard for a renewable energy project. It just wouldn't be right.

Elias CJ Is it part, could your argument be put on the basis that there is, that consent authorities and local authorities are making rules never have to consider the greenhouse effect on climate change or the effect of emissions on climate change but there is a legislative judgment in these provisions that renewable energy is preferred to non-renewable energy.

Salmon When making rules or granting consents?

Elias CJ In both or can be taken into account I think is the expression.

Salmon Yes. Or having regard? You cannot have regard

Elias CJ Yes.

Salmon And I am only correcting your Honour because I have it in front of me. In a very general sense yes. The Greenpeace submission is, and at a caveat first, and this is something said later in the submissions, we are here in an appellate court having never had a first instance decision, never having had facts tested, boiled up and so on, so I am, as a lawyer, and this is not a position of instructions, I am cautious about trying to define the exact inquiry that an expert tribunal would undertake under the exception because we don't know what all the parties have never been served with this would say, what evidence they would put up. The submission that Greenpeace makes it is narrow, it is a narrow inquiry, Councils can't purport to say well the impact of this particular gas-fired power plant is 1 x 10 to the negative, 17% of the global warming burden, and that's heaps or something like that. They will never get into that.

The Court of Appeal used a phrase "generic factoring". It is a generic factoring of the relative reduction that would occur if renewable energy was used. And that would be a characterisation that we would broadly adopt. The Councils cannot in rule-making or in the consent process work out how much exact temperate change there is going to be, or any of those things that scientists will argue about for months. We all know how long a case like that could go for. It is more a generic acknowledgement that there is another option that would produce less CO2.

Tipping J Mr Salmon, just before we move on, and this has been most helpful, can I ask you this, as to the effect of your client's argument on the example I am about to give you. I want to build a coal-fired power station. I apply for whatever permit I am required to apply for, a discharge permit, because I

am going to be pushing a lot of greenhouse gases into air. Is it the consequence of your argument that the consent authority can say to me well we don't like this because if you had chosen a renewable energy source you would be putting in either no or less greenhouse gases into the air.

Salmon No or less or it would be, you would be putting in just as many in but they would be renewable because it is a plantation forest. Because one of the most likely is yes you are producing just as much CO2 but you are replanting, biomass being one of them.

Tipping J Subject to that, is that the effect, that is what consent authorities could do if your argument is correct, to say to me, who wants to build this coal-fired power station, sorry we don't like this because you should have been or it would have been better if you had used a renewable energy source. Is it as simple as that?

Salmon Not quite.

Elias CJ Or even ask the question why aren't you using a renewable energy source.

Salmon And that would be more in the line of what I would envisage would be the inquiry. Again, and it is not, an attempt to evade the question at all, but again there is that caveat that there is a reason why, generally speaking, cases on interpretation issues like this boil up from expert tribunals, and your Honours may have read ahead in submissions to see one of the submissions I will be making is we shouldn't be giving declarations in contexts

Tipping J Well leave all that aside.

Salmon All that aside I

Tipping J But am I broadly on the right track as far as the consequence of your client's argument being correct. That they can say, as the Chief Justice has put it, look why are you using coal, why aren't you using wind power.

Salmon And, as the Chief Justice has put it, that would be more akin to the question rather than we just don't like. And perhaps if I can answer with some examples

Tipping J Well inherent in the question though is the proposition that prima facie you shouldn't be using coal.

Salmon Yes and indeed, and I will come to why Sir, inherent in the way that this, in Greenpeace's submission, exception must work as a policy judgment by

our Parliament that that is to happen, and that is my section 70A submission, which I will come to in a moment, now might be a helpful time to do it. But if I, before that, Sir just

Tipping J I don't want to rush you at all. I just wanted to make sure that in my own mind that I had roughly speaking the consequence of your argument being correct.

Salmon Roughly speaking, that is right Sir. And perhaps if I can engage with it, with just one or two examples of what might be factual scenarios that might arise, one is let's say there is some area in New Zealand without connection to the grid. It is a valley, it has got no wind. It is always cloudy and there is no trees and you can't grow anything. It doesn't rain. You want to

Tipping J It sounds like Wellington.

Salmon It is a miserable place.

Elias CJ No wind?

Salmon Sort of Wellington but without the wind.

Tipping J Without the wind.

Salmon My point being your only option is to burn something you truck in and that is going to be coal or gas or oil, right? You would turn up in front of a consent authority and they are asked can we take account of the impact of burning all this, say coal, on climate change. No, except to the extent that the use and development of renewable energy would enable yada yada ya. Does it, no it doesn't because there is no option. There is no alternative. It is a one sentence discussion for the consent authority. To take an alternative you are looking at putting it in at a slight marginal cost benefit where there is also a river for which, which is capable of producing ample hydro-electric power or right beside, you are a forestry company wanting to burn gas because it is slightly cheaper than a co-generation plant, but it is clear that you have the wood waste to fire a co-gen plant.

In that second example you might be saying well the dialogue the consent authority would be having is we are taking into account the fact that the use and development of renewable energy here is possible and would reduce the burden. We are not going to talk about exactly how much for hours. All that science stuff is out. We don't need to decide whether climate change is good or bad or how fast it is happening because that's been acknowledged in the legislation. All we need to do is say, in my first example there is no extent but use and development of renewable energy

would reduce because there is no option. In the second example, there is an option and we generically factor it in as the Court of Appeal said.

So Your Honour that's a long winded answer but I think what I'm saying is it depends. It depends on the case. Yes a Consent Authority could say that, if the context was such where there was an impact on the grid.

Tipping J Are you really saying that this exclusion is abstract rather than specific to a particular case. In other words it's conceptual and is brought to bear on the particular case conceptually rather than the actual precise logistics if you like of that particular case.

Salmon The narrowest interpretation of it would be to say, the narrowest interpretation which vaguely goes in my favour, would be to say it's not restricted in terms of the types of applications it applies to, but the most you can do is say, how many tonnes of CO2 is the non-renewable plant going to put out, let's say a million a year. Now that won't require evidence because that will be stated in the application. How many would be avoided by some renewable prospect generally speaking and you'd generically factor that in. That's the narrowest. The argument Greenpeace ran in very general terms in the Mighty River Power context before the Consent Authority, and I wasn't involved in that, but as I understand it the argument there was, if you put this fossil fuel burning power plant in, that will negatively impact on the use and development of renewable energy connected to the grid. And that's relevant.

Now again the caveat about not having the facts and not having the proper shape of the submission to know how a Consent Authority would deal with that, whether that's a complicated inquiry or not, I think it's probably not. But what that means in answer to your question Sir I think is, it's an inquiry that depends on the facts of the particular case. It will always be generic and general and the legislation requires those sort of inquiries all the time. This is not the only section that requires something that looks a little bit amorphous in the Resource Management Act.

Tipping J In the end it's got to come to bite on a particular application for a discharge permit hasn't it.

Salmon Yes.

Tipping J And it's got to be administerable in practical terms in that context.

Salmon Yes.

Tipping J You know we can't get too amorphous.

Salmon Well that's right Sir. It does have to be administerable. But let me answer that with a proposition. However difficult it is to administer, however difficult that is, that difficulty already exists. Whatever the inquiry is, however muddy the task Parliament has handed down to consent authorities, anyone who wants to build something involving renewable energy, at least they are stuck with it.

So we can't stand back and say, that looks like a hard inquiry, therefore it shouldn't apply to certain categories. Parliament's decided to have this inquiry however hard it is and make it a burden or threshold for any renewable energy project and thus a burden to bear for any Consent Authority. They just have to deal with it. Just as they have to deal Sir with issues that a lot of black letter lawyers might struggle with working out how you'd even prove the spiritual values of land or the general benefits of renewable energy. Just casting one's eye down s 7 or s 6 of the RMA, there are a suite of factors that can't be weighed up in the way that a normal contract breach claim is run. These are amorphous issues.

So yes they might be hard Sir. Greenpeace's submission is they're not, it's just a generic factoring as the Court of Appeal said. But if they're hard, that, in my submission, doesn't bear on interpretation because we're energy stuck with that hardness in at least some of the cases. So Parliament must have intended it.

Elias CJ Your point is that it's not for the applicant to determine whether the Consent Authority can have regard to the relative benefits of renewable and non-renewable energy. That is always a factor to be weighed.

Salmon Put that way Your Honour, it's always a factor regardless of s 104E because all benefits of renewable energy have to be considered in all cases under s 7. Limited to the climate change related benefits of renewable energy my submission is the exception is there, it only bites to the extent that there is some relative or absolute benefit to be obtained by using renewable energy. And hence my artificial value with no other options example.

In that case there simply isn't a conceivable gain to be made. So that's a quick discussion and there's nothing. And that's why I would submit it's a case by case analysis.

Sir I said I'd come to s 70A because it bore on part of your question. I'm happy to do it now.

Tipping J No, I've taken enough of your time Mr Salmon. I just wanted to make sure broadly I was on the right mental track. Thank you.

Salmon Thank you Sir. Your Honours my sense is that it's not necessary for me to go through the Amendment Act in detail and that Your Honours appear to have had the chance to review it. I will very briefly turn to it because Your Honours might be forgiven for anticipating that the party who would want to refer to sweeping policy materials, post-enactment materials and statements by Cabinet or the executive would be Greenpeace and that it would be Greenpeace not taking a fairly narrow approach to statutory interpretation. Our start point is the words of the Amendment Act and in my submission that's all that the Court can and should look to in determining what Parliament intended.

So I will start by going to the Amendment Act. That doesn't mean I won't deal with the extrinsic materials that have been advanced in the Court of Appeal and here. But a primary submission is the way statutes should be interpreted is by reading them.

The Amendment Act is at tab 2 our slender bundle of authorities. Everybody is going to focus on s 3, the purpose provisions and I will now. The Amendment Act did two things broadly speaking. It brought in some additional mandatory requirements under s 7 and it brought in the s 70A and 104E provisions we're talking about here while also making provision for the implementation of national environmental standards which is s 70B and s 104F. The purpose provisions of the Act are very generally stated and for reasons I'll come to, they probably don't help us nearly as much as we might hope in determining the purpose of the exception.

Elias CJ I'm surprised you say that because I would have thought that 3A(3).

Salmon Helps.

Elias CJ Well is absolutely fundamental because on the argument for the respondents consent authorities would not be able to have particular regard to the benefits to be derived from the use and development of renewable energy.

Salmon That is what the respondents argue.

Elias CJ Unless the application was one for renewable energy.

Salmon Renewable energy. That's right Your Honour. I think what the respondents will say, and I don't want to presage it, and the point is right, but what they will say I think is, 3A generally is describing the additions to s 7 of the Act. So it's describing the new sections s7 (i) and s 7(j) which are at the top of the following page stamped 17. That introduced a s 7(i), the effects of climate change, not the effects on climate change but the effects of. So rising tide and so on. And J, the benefits to be derived from

the use and development of renewable energy. So s 7 which says you've got to look at efficient use of resources, you've got to look at maintaining amenity values, all these very general things, now has something reflecting 3A(3). What the respondents say is, yes, and that would apply but for 104E. Which is right. Absolutely in every case but for 104E you would have to look at the benefits of renewable energy whether or not it's a renewable energy application. And indeed in the Court of Appeal one of the declarations Genesis sought was a declaration that s 7(i) just didn't apply because it was non-renewable. And that fell away of course. Section 7(j) is mandatory.

So absolutely mandatory to consider the benefits of renewable energy generally, their job creation, sustainability and so on, regardless of type of application. What they say is, s 104B then reflects the second part of the purpose provision which is to require local authorities to plan for the effects of climate change, not build on low lying land or whatever that might be, but not to consider the effects on climate change of discharges into air of greenhouse gases. And it's 3(b)(ii) that my learned friends will point to in particular and say, there you go. Parliament did not want councils to look at the very thing Greenpeace wants them to look at.

Tipping J It's interesting that that is couched in a way that doesn't include any exceptions.

Salmon That's right and that's my submission Sir. It doesn't help us understand the exception.

Tipping J Well I'm not sure. It's an interesting feature. Very much the primary impression you get from this is that it's off-limits full stop. Then when you actually come to read the section, 104E, you see that it's not quite off-limits.

Salmon Yes Sir. Indeed if you interpret s 104E by never reading it at all, if you read the explanatory notes that came with the first Bill and read the purpose provisions of this, I've lost. Of course I've lost. You don't expect s 104E to have an exception when you get there. Certainly not one that favours me. But it's there. And to allow a purpose provision to negate an express exception of course can't happen.

Tipping J Well it enables you, it helps to interpret the exception, not to negate it.

Salmon It might, it might. That's right Sir. And this is a point I've tried to make in my submission because this was what troubled the President in the Court of Appeal as far as I could tell. His concern in the dialogue was, but if the exception's really big then that swallows the prohibition, you might recall the language in the judgment, the exception can't swallow the prohibition.

We agree with that. It can't be Parliament's intent that the exception is as big as the prohibition. And s 3(b)(ii) tells us that Parliament intended to take a lot of the greenhouse gas considerations away from local authorities.

Elias CJ Well it's saying that you're not to consider the effects on climate change.

Salmon Yes.

Elias CJ That's actually quite specific. You're not to go into those cases that I think the Solicitor-General has paraded helpfully in his submissions which have local authorities and the Environment Court having to grapple with what is the effect of this discharge on global warming generally. But that's not to say that the legislative judgment cannot be acted on. And by the legislative judgment I mean the preference for renewable over non-renewable energy.

Salmon Yes Your Honour indeed. And it's also I would submit the words of that, blanket words, perhaps not expecting the exception, don't help us interpret the substance of the exception. At most what they help us understand is Parliament obviously intended to prohibit some of the inquiry. Parliament intended to take away what councils seemed to be nervous they were required to do which is effectively to recreate the documentary "The Inconvenient Truth" or something. They were to talk about everything. And Parliament was clearly saying, no. That's not happening.

But that doesn't mean that the exception should be interpreted one way or the other because all it says is generally speaking they were taking a lot away. And that's my submission about 3(b)(ii) in particular in response to my learned friend's reliance on it. All it really tells us is that the general drive of this legislation was to take most of what the councils were doing in relation to climate change, not renewable energy generally, just impact on climate change, take it away. But there's an exception. And does the section help us decide the point here for determination today, does the exception relate to renewable energy projects only or to renewable and non-renewable.

And I referred to the President of the Court of Appeal's concern about the exception swallowing the prohibition. And that's an important point because we agree with that. It cannot be that the exception is as big as the prohibition. And in the written submissions we've made the point that there are two ways effectively of reflecting that concern when reading the exception. One is to say, Oh it only applies in a very limited number of cases, types of cases, ie renewable energy applications. Maybe they're not so limited, maybe they're half of all applications, I don't know. But that's one way of saying, There, I've made the exception smaller so it's clearly not going to swallow the prohibition.

The other way is to say, No it's narrow in it's terms. The exception, just on its natural meaning, and this is Greenpeace's submission, is very narrow. So that when we acknowledge that one of the mischiefs Parliament was endeavouring to address was that there was a huge potential bunfight in relation to climate change, if we properly read the exception it's saying, not that it's all back on, but that one small generic aspect of it is back on. And Your Honour referred to.

McGrath J Is it right then Mr Salmon, that you're not accepting it applies only to a subset of all applications, to use a term that appears in the respondent's submissions. You rather frame the narrowing aspect that overcomes the sort of exception subsuming the general, you rather frame it differently. You don't accept the subset argument.

Salmon Correct Sir. The Greenpeace submission is, and this is what the words say, and you could read the Court of Appeal's judgment and blink and you'd have missed the analysis of the text, and with respect to my learned friends, although Genesis has addressed the plain meaning of the words, my learned friend the Solicitor-General's submissions essentially do not. In large part they are submissions that point to all the policy pointers rather than the words. Those words don't say, and we've made the point you have to add them in, only when the application involves renewable energy and then only to the extent. They don't say that.

McGrath J Yes.

Salmon So yes Sir, my submission is it's got to be any application. It may be there's nothing to talk about if there's no extent to which.

McGrath J Yes.

Elias CJ Yes.

Salmon And my expectation is there'll be lots of cases where they'll say, 'Well that's not an issue here, there's no other way'. But there might be a case where it's clear that someone's choosing between two issues, where there's the wind verses whatever debate in South Canterbury/North Otago. Easy, generically factor it in. There's that we could be doing or there's this.

McGrath J Right thank you.

Salmon So it's every case, but how much you talk about will very much vary.

Tipping J What weight do you give it. I mean it's all very well to say you generically factor it in. But what actually do you do about it.

Salmon Sir this is.

Elias CJ It's like all the values.

Salmon That's right Your Honour. This is the wonder of the RMA. If I might turn to section.

Elias CJ Before you do I just wonder the extent to which it is artificial to divide up these provisions quite as much as the arguments of the parties are doing it. Because on one view, although we're talking about this as an exception, and it's expressed as an exception, that exception is necessary if your not to totally destroy s 7(j). Don't you really need to look at all of these together and on your argument isn't it the fact that you need that exception in order for the Consent Authority to assess the benefits to be derived from the use and development of renewable energy. They're not to go behind that because that's the legislative judgment. They're not to say renewable is better in terms of climate change because that's the assessment that Parliament has made. But in all applications, if s 7(j) has to apply in all applications, then the exception (ii) in 104E would seem to apply to all applications.

Salmon Yes Your Honour. I think anticipating somewhat, I think what my learned friend might say is, and perhaps if we can turn to s 7 while we talk about this because I think that might help, that's page 5 of the small Greenpeace bundle. What my learned friend will say I think is s 7(j) requires all benefits of renewable energy to be considered. And those are numerous and not just about climate change. For example pundits say we're going to run out of oil one day. It's obviously good for national security to have other energy options. But there's a benefit of renewable energy there that's not climate change. And so they would say, Let's say the benefits of renewable energy are economic generally. It's not going to go up in price like petrol. Labour creation, sustainability, less pollution somehow because of water. They'd say, Every single one of those is still on except for the benefits on climate.

Elias CJ I see, yes.

Salmon So that's what my learned friend will say to engage with Your Honour's point. So the exception, the prohibition must be taking away that part of the benefits of renewable energy. And the exception is bringing back in part of that part.

Elias CJ Yes, yes.

Salmon So there's lots of stuff you could talk about climate change about and most of it's out. In fact if I step back one further, under 7(j) all the benefits of renewable energy are mandatory and they're in.

Tipping J The reconciliation of 7 with 104E is not a very straightforward exercise. But would it be fair to say that 104E is a kind of procedural or quasi procedural directed at a certain type of person exercising functions and powers under this Act. Because 7 says all persons exercising functions and powers.

Salmon Yes. And 104E is directed at.

Tipping J 104E is directed at a certain class of person exercising functions and powers.

Salmon It is Sir.

Tipping J And that seems to me to be the only way to understand why they've said one thing, it all came in at the same time.

Salmon Yes.

Tipping J So they were saying, appearing to say one thing in 7 and then taking it away in 104E.

Salmon Yes. The two answers to that Sir I think are (1) the class of persons 104E is directed at are the class of decision-makers to consider pollutants that might cause climate change. Regional authorities consider discharge applications, therefore it's directed at them. It's not directed at other persons who don't bear on the decisions as to what's omitted. So that's the narrowing of class of persons to which 104E applies to if I understand Your Honour's question correctly.

Tipping J Yes.

Salmon The way I would characterise the steps of s 7 as amended with 104E is this. Section 7 says pretty much everything we think is good as common sense people: making sure things don't disappear, preserving things, stewardship, efficient use, efficient end use of energy, maintaining amenity values, eco-systems, benefits of renewable energy, every single one difficult and amorphous. Not one something you could get John Haigh in to do a report on and compare against Tony Frankham's and make a decision on all just factors.

Tipping J Well the effects of climate change is the negative. It's the one negative in the list of positives in 7.

Salmon Yes Sir but the point my learned friend is making is right, is the effects of climate change is not the same as the effects of a discharge on climate change. So they say, that's about the rising tides and so on.

Tipping J Oh I see what you mean.

Salmon So I'm not, I think I've been characterised.

Elias CJ That must be right.

Tipping J That must be right.

Salmon Yes it is right. And I think I've been characterised as attempting to say that s 7(i) is more than that and I'm not seeking to. That's not about considering the effects of discharges on climate change. 7(j) partly is. And to look at 104E in the scheme and to do my best to engage with Your Honour's question, s 7(j) says 10 or 20 possible factors, who knows how many, are on the table for renewable energy. If you want to build a coal plant, a consent authority will legitimately say, Well that's not renewable, that's going to run out one day. No-one can dispute that that's a legitimate factor to take into account and s 104E doesn't stop it. That won't produce as many jobs as forestry plantation and biomass burning, whatever they might look at. All of those come in under the benefits of renewable energy. So let's say there's 10 of those and number 4 is there'll be more climate change from your coal plant than if you did something else. 104E means that that fourth item under 7(j) can't be looked at unless it's within the exception.

And so out of s 7(j) we've plucked one of the many benefits of renewable energy, said that's out of the question. Under the exception we've said, But part of it's back in. And so you could say the exception just says the prohibition's not absolute. It's a package.

Elias CJ Just on the Court of Appeal decision, you don't have any problem with the Court of Appeal decision except on the determination that the exception only operates where the application is to use in whole or in part renewable energy.

Salmon Correct.

Elias CJ The only issue we have to determine is whether it applies to any application.

Salmon The only interpretation issue.

Elias CJ Yes.

Salmon I do have an appeal point about the declaration.

Elias CJ Yes.

Salmon And there are some admissibility issues. Affidavits were taken on the ultimate issue for the Ministry and things but on the interpretation yes. If that decision in *Stead* said "Whether you are renewal or not consent authorities have to undertake this generic factoring". That's what we say and indeed that's what I was endeavouring to say in the Court of Appeal, we are not seeking to bring back on the bun fight. We very much agree that the exception must be smaller than the prohibition. I was going to speak about that concern, because it seems to me that that's a very legitimate concern the Court of Appeal had and we should all have it. Whatever the exception means it can't be enormous. I talked about the extent to which it would shrink what was done before the amendment and the huge potential bun fight about climate change. If your Honours have Genesis's submissions to hand it might be helpful to speak about the submission made by Genesis. At page 21, paragraph 82 of Genesis's submissions. Now this is Genesis summarising and I have no issue with the summary. What happened in *Contact*, the decision before the Amendment Act and it's a fair inference that one of the mischiefs intended to be addressed by the Amendment Act was to stop the sort of detailed factual inquiry

Elias CJ None of this is permitted under the current legislation.

Salmon On either parties case?

Elias CJ Yes.

Salmon Well what in fact I should say under Genesis's case this is permitted but only for renewable energy applications and that's my point. This strawman that has to be set up for say Greenpeace's interpretation is dangerous is, it's all on.

Elias CJ Yes.

Salmon Greenpeace's interpretation means it's all on therefore you should make it only renewable so the competing views you have before you today your Honour, and I hope I'm not mischaracterising my learned friend is if Genesis is right, you have to look at all of this still but ironically only if its a renewable energy application or involving renewable energy. In other

words, unless you've got a deep deep pocket for lawyers and experts, don't put renewable energy in your project. That's the result of this strawman that is set up. Our case is every single one of these is out except (j) possibly which is not actually a Climate change issue perhaps. Effects on irrelevant region – maybe that's a section 7(i) issue on the relevant region of time or something but otherwise every single one of those is out. We are not saying they are in, not for a moment. We are not saying you go and get scientists to talk about temperatures. We are not saying you talk about Kyoto. Kyoto is just irrelevant, so when engaging with the President of the Court of Appeal's concern about the exceptions following the prohibition, my submission is no one can legitimately read s 104E and say that it's that big, that it does it. It's just not a concern. If you read it as being that big then it's swallowing the prohibition for the very class of applications that should be being favoured by Parliament and that can't be right.

Elias CJ Well the controlling provision really is effect on climate change and that's off.

Salmon Yes. Except to the extent that

Elias CJ Except to the extent that there's that judgment that the relative position is a matter that you can have regard to.

Salmon Yes and your Honour put the question of consent authority and it's a sincere submission that I don't think it is appropriate to prejudge everything that might be said that because good facts might emerge that create some good law about the exact scope of that exception but the question, the hypothetical put is why aren't you doing x? That might be a two second discussion but and in some cases it won't be a discussion at all it will be self evident that you can't do anything else. There is no other field power, a mobile generation plant or something, I don't know. But in other cases there will be.

Elias CJ All the economics of the enterprise require it or something like that.

Salmon Yes my value where you just can't get any other fuel source there economically. So it is a quick discussion.

Elias CJ Well it may not be a quick decision. I think you might be over egging us because I think it is quite a

Salmon Sorry Your Honour, I'm endeavouring to say it is a quick discussion in my valley, in my hypothetical valley. It's a hard discussion in some messier area, I would acknowledge that. It's hard. The answer to is it hard is, yes it is hard, but it's just as hard already for any renewable energy applicants

so Parliament obviously intended people and councils to be the burden of that.

Tipping J The bottom line of the argument must be, mustn't it that it is something you can take account against the application. If it's not using renewable energy.

Elias CJ Well if it hasn't been demonstrated that renewable energy could have been used.

Salmon Yes. If there is no interplay between the use of non-renewable and renewable there is nothing to discuss. If there is an interplay

Tipping J But won't everybody come over opposing this, come along and say you should be using renewable energy here.

Salmon They are going to say that anyway

Tipping J And that's what you say it legitimately on the table?

Salmon Yes people may come and make submissions. They can't come and run all the science that clearly as the Chief Justice has observed. The *Contact* sort of factors, the scary ones are all out. So no one can come and say any of those. No one can come and say I want to call this boffin from Sweden to talk about this factor of Climate change or this impact or how much worse methane is than CO2 or any of that stuff. But yes people could come along and say, if you build this, it will have this impact on the use and development of renewable energy. Or someone could say, as people are saying in the big wind farms today, in the reverse way, come and use this non-renewable solution instead because we don't like the look of it. Counsel are hearing these arguments anyway.

Wilson J Does that mean that they can make a submission without any evidential basis?

Salmon No, no it doesn't Your Honour. The tribunal would have to, the Authority would have to require what ever evidence it requires, but the point I make about what the Tribunals are going to hear is, they hear material submissions in evidence of a different nature from what we hear in a High Court trial. They just do. People make submissions in paper that are taken account of without going on oath, with comments, observations, lay people giving expert views that would never be admissible. So, there's that caveat about saying well unless someone, there's a caveat about judging the way a consent authority would run a hearing through the prism that we might bring to this of, this is how you do this in the High Court, it would be terrible. That's not how they do it. If we look at section 7 they

have to do things that would make any commercial High Court trial lawyer shudder. Just shudder and some of the ancillary legislation relating to Maori cultural values around the RMA introduces issues that you could never definitively prove in the way that you prove a loss or prove effective market existence, the existence of a market, it's just a different world. This is an expert tribunal that weighs up amorphous and imprecise considerations against each other everyday. Does this look okay, how do you measure that? Will this improve amenity value and do we weigh that up against the impact it will have on something else. It is a huge festival of competing factors, none of which we can measure. So Your Honours will put to me and have put to me, that sounds like a hard issue to talk about to the Consent Authority and it will be some times. But every single one of those under section 7 will be as well. I can legitimately turn up at the Consent Authority hearing for Genesis Powers lobby power plant and make all sorts of submissions under all the other parts of section 7. I could turn up and say the tide is going to rise 100 metres and you are not a hundred metres above sea level, no one can stop me, they will have to hear it. And they will have to deal with it and they will probably ignore me.

Salmon That's their job and they deal with a lot of submissions. So it's not a perfect life being a Consent Authority but they are good at it and again, I come back to that theme of that's why these issues are best dealt with having percolated up from a Consent Authority because we can sit here and say that horrifies me the thought of having to decide that, but we don't know. I've never appeared there. My learned friend has a lot and he will say it's really hard to do these issues of course a la *Contact* but we are not in the *Contact* phase. A Consent Authority, if we come up from a proper hearing might have said, yeah we've heard that, it's a generic factoring, that took a day. Definitely not three hundred days. But whatever it is they are the best at handling these issues. Just as a select committee is better at handling the submissions they receive than we would be, these guys are better at this. Your Honour put to me the proposition that it must be a corollary of what I am saying that it can be a negative cross for a non-renewable energy application. The corollary at my submissions is, as well as being a tick in the box and this is the President saying you can never tick without there being a cross. His Honour put to me there is nothing wrong with reading 104E as saying if you've got a renewable energy project, that's a tick, he gave an analogy to sentencing factors, good, but it's' not a cross if you are non renewable, right? And that may or may not be true.

Tipping J This is the President?

Salmon The President of the Court of Appeal. I'm just relaying the debate because I anticipate it might be efficient for me to engage with it now because it will come up I think. Dealing with the first in relation to section 104E, if

we just test that proposition. Imagine I have an application but for climate change issues is nearly across the line, council sees it, council sees it as nearly justifying consent, it burns coal. I have to ignore the impact of coal on climate change. I don't get my consent. I come back having changed coal to biomass. It's now renewable, it now has a relative benefit for the impact of greenhouse gas discharges on climate change. I now get my consent. Now in the Court of Appeal's interpretation that's how it would work. No cross in the first hypothetical, a tick in the box in the second, it gets me just across the line. Now in there inevitable is a ranking. There just is. One is going to better than the other. My learned friend submission to the President as I understood it was, if the misconception to see the consent process before a Consent Authority is a competition, it's not a race, you're never running alongside someone with renewable and you lose because they have got renewable and you don't, and that's right, it's not each application considered on it's merits but it must be that if you get a tick for having one feature, whether or not you undertake the mental gymnastics of saying I can't call it a cross but I know there's not tick. Whether or not you put your mind to it in that way, some how or other renewable has an advantage of non-renewable and is more likely to get through and what that means is that Parliament has intended on a climate change level that renewable have a slight advantage under 104E and that is relevant to any sort of policy argument that says Parliament has decided that there should be no consideration of the adverse effects of non-renewables.

Elias CJ That's why I suggested that there is a legislative judgment in here. That Parliament has decided that there are benefits to be obtained from renewable resources. The Consent Authority doesn't have to measure that benefit because that legislative judgment has been taken but it's irrelevant and it doesn't have to consider the effect of the particular application on climate change.

Salmon Yes and I embrace that characterisation of it Your Honour. The legislation is clear with pointers and so are the other packages of materials that have been sent up to you.

Elias CJ Yes.

Salmon And indeed the affidavit put in the Court of Appeal from the Ministry of Environment or they put through the IRC it's from effectively my learned friend's client. It says, yes it is clearly better but we want to just control exactly how it's all handled nationally. So, yes there is a clear legislative stare and no one is going to disagree with that today. I think that renewable is better and that the legislation acknowledges this and acknowledges it also in relation to climate change so hence you don't have any affidavits before you about whether or not it is better or climate

change or anything like that, that is a given. The argument simply is about whether any of that left with the councils or not when it is non-renewable. And I talked to Your Honour about that policy evidenced themselves in the way section 104E works or that value judgment. It's implicit in either my learned friend's case or the Court of Appeal's judgment in the application of 104E. But it is also and much more so evident in analysing how section 70A works. And this is why I began by saying they must be the same. This is the passage at paragraph 4.3(1) to 4.3(3) of my submissions on page 13 and this is in my submission an important point. It's easy for us to say that the Court of Appeal's decision is workable under s104E in that you can have a tick but not a cross basis. Or the basis advanced in my learned friend's submission which is effectively that you can look at the positives of a discharge but not the negatives vis a vis climate change. Section 70A is different. This is the section that governs what councils can do when they publish their plan, their rules. My learned friend has helpfully formulated in response to my submission which is you can't envisage a rule. You can't envisage a rule that doesn't effectively rank renewable against non-renewable as regards Climate change in a way that gives the mire so to speak to the Court of Appeal's interpretation. And the reason for that is, no common sense wording of any rule that a council might make under section 70A only deals with renewable energy and implicitly deals with non-renewable. My learned friend has posed a rule that Genesis submits answers that and this is in paragraph 38 of his submissions. And this is the only answer I believe given by Genesis to this proposition that section 70a is unworkable under the Court of Appeal's interpretation.

Elias CJ Sorry, which page of the submissions?

Salmon I've got an email version of the submissions. It's paragraph 38 which on my version is page 11 but I believe

Elias CJ Yes, yes that's fine.

Salmon My learned friend says the Court of Appeal's conclusions enable rules which promote biomass or geothermal energy on the basis of reduced GHG discharges. Now as well as the caveat that it shouldn't just be biomass and geothermal, it should be everything but they just might not object greenhouse gas discharges. The proposed rule that you can see in a regional plan under Genesis's case is the discharge of greenhouse gases from the generation of electricity using renewal energy in a manner which enables a reduction in the discharge of greenhouse gases is a permitted activity and in resource management terms that means it's an easy one, get that through. You don't need to seek consent. You can do it. The corollary of that rule and you must be a rule, an implied position that non-renewable is not permitted. It must be otherwise you are making a rule out

of nothing. And if that's the case then immediately you've got a big cross beside non-renewable energy. To give meaning and shape to the type of rules you might make, even under Genesis's case under what rules you might make under section 70A. We can see that there is a legislative judgment that for climate change reasons not just for general renewable energy ones, for climate change reasons non-renewable can be penalised in a rule. Now I'm not sure what answer my learned friend will give to that. He may say no you can have this rule saying go go go it's a plus to renewable but you can't say anything negative about non-renewable, because that with respect wouldn't mean anything. To say that renewable is permitted must mean that non-renewable is not otherwise section 70A is meaningless.

Elias CJ Well renewable really has no meaning in the statutory scheme except in relation to non-renewable. I mean there's, the legislation talks about relationship between the two and measuring the difference. It's a correlative on your submission.

Salmon Yes it does. That's right Your Honour inevitably.

Elias CJ A necessary correlative.

Salmon That's right Your Honour and I'm really here anticipating or engaging with the second major focus of the day in the Court of Appeal which after the acceptance following the prohibition one was this Greenpeace argument, again the President's concern was the outranking of renewable against non-renewable for climate change reasons which from somewhere a Parliamentary intention not to have is devised. And my submission is again starting with the actual words of the operative section which is a great place to start, that is exactly what Parliament intended. Because any rule, even the rule Genesis devises for section 70A sees that ranking and sees that ranking being undertaken by councils and that is the important part. Yes it's implicit in the legislation as a ranking, my learned friend says but that ranking is not to be dealt with by councils. We say look at section 70A and it can be seen that it is to be dealt with by councils, the types of rules that can be made will always rank.

Tipping J Is it of any significance that they have chosen the same language exactly to cover a rule making function which is a generic function, and a case where there is a specific application for a discharge permit? Does this underline the generic nature of the

Salmon Yes, yes.

Tipping J This is the point your making because a rule making function is necessarily generic.

Salmon Yes Your Honour.

Tipping J Whereas an application is a specific.

Salmon It supports the view it's generic. Again I am shy of guessing exactly what the generic would be applied in 104E, but that's right Your Honour and indeed more so, what's the biggest way a council can have an impact on, if a council got slightly toey about climate change and wanted to do good or bad depending on which side of the table one is on, it would be easy for, to pass the very rule my learned friend has proposed which he says can be passed right now. And that would have sweeping consequences way beyond any considerations of factors in a case by case context under 104E. In other words if they can do that it would be breathtakingly strange, if they couldn't do something similar under 104E.

Tipping J Well the point is this then, that the identity of the language for the two different purposes suggests that we are not looking at an activity based consideration in 104E, we are looking at a policy based consideration. Am I making myself clear? And this refers back to the point that you make that the words, the reference to an activity involving have actually been deliberately removed. So 104E is not directed to a specific activity and this is more of the Chief Justice's point. If goes more to a legislative guidance if you like as to this preference for renewable energy.

Salmon Yes resulting in possibly the view that there is a generic factoring. And that's my point about it being case by case to a degree Sir. I'm not suggesting it is all on but

Tipping J Well this is where you see, this is the trouble. You sort of, you've got this unholy mixture. Maybe legal minds are not the best people to grasp these sort of ridiculously amorphous

Salmon Your Honour might be buying into my submission that this should be dealt with by the expert tribunals first, but I suspect not. I understand what Your Honour is saying about the unholy mixture. I think I am explaining it badly but I'm also conscious that we are just one non-profit very partisan party

Tipping J Well never mind the violins Mr Salmon, let's just keep the minds focussed on what they were trying to get at here.

Salmon Yes and what I am endeavouring to say in saying it is both generic and yet to some degree case by cases, the generic factoring in some cases will result in very little impact on an application. In my hypothetical valley

where there is clearly only one way of producing this little town's power and its fossil fuel. That factor

Tipping J I am trying to feel the weight with you of your reliance on the identical wording in 70A, and I think I have now got a good grasp of where you bring that to bear. So you can move on as far as I am concerned, thank you.

Salmon And I will, there are two points of relevance, there is the one I was making before that it tells us that Parliament intended this to play, to be at play, in both contexts and there is the one your Honours made, which is that generic factoring in section 70A, the very generic language my learned friend has proposed in a rule, helps us understand how it might work in 104E.

Tipping J Thank you.

Salmon Your Honour mentioned in passing my submission about the need to effectively insert wording in the section and the fact that that appeared in the first reading Bill, and I think it is appropriate, although perhaps not by going through everything that my learned friends rely on in terms of extrinsic materials, it is appropriate to talk about that briefly. Your Honours may have looked at the one piece of extrinsic material that we have put in our casebook at tab 3, which is the Select Committee Report annexing the second, annexing the amendments to the first reading of the Bill and this ties into paragraphs 4.26 to 4.30 of Greenpeace's submissions.

The submission here your Honours is the first reading of the Bill said what my learned friends want the second reading to say. If your Honours turn to stamped page 24 of that tab, section 70A, as it was and as it is now is, are put side by side. And the relevant paragraph on the right hand side of page 24, struck out unanimous, section 70A had a paragraph (b), which was the exception then, but may have regard to the effect on climate change of an activity involving the use and development of renewable energy. So it was specifically limited to applications that involved use and development of renewable energy. That was exactly what the Court of Appeal has found the new section says and it was removed.

Tipping J Is there any narrative in the Select Committee report helping us with the concept of the removal of the concept of activity, because activity is a very resource management focussed concept isn't it?

Salmon Yes, it is a point of contention whether the Select Committee said anything to help us with that. My learned friends have gone through in some detail what the Select Committee said beforehand in relation to the first reading,

and in the covering Select Committee report. That is under that tab also. It is arguable whether the change that we are concerned about is explained at all. I think my learned friend's submission is they were concerned about other issues. There was the use of the word "may" somewhere in there which suggested it was an optional consideration, it was wanted to make it mandatory. The answer as best as I can see it, is that the change was not clearly articulated in a way which helps us understand what it exactly was.

Tipping J But doesn't that suggest that they didn't really think they were making a significant change in that respect.

Salmon That is my learned friend for the Attorney-General submission.

Tipping J Is it?

Salmon His submission is first reading was described in the explanatory note as being specifically limited to applications involving renewable energy and that is right, it was. Because it did specifically restrict itself in that way. And that in the speech in the House I think it was described that way. My learned friend then says these things were said about the change but nothing else and, when introducing the second reading Bill into the House, the responsible Minister said something to the effect of there are no substantive changes. I will find the passage in my learned friend's submissions. Paragraph 24. That is if I address as against the Attorney-General's submissions, page 11 and 12.

Tipping J You see I regard this point as quite important, because in a sense the Court of Appeal have read back in this activity concept. And I see your point. I definitely see your point here. But it doesn't that anyone else thought it was significant.

Salmon My sense was one of the three thought it was quite a good point Sir but not the right one. It is an important point although, again, my starting point is this is at the limit of extrinsic evidence in itself. The material my learned friend is putting go a lot further.

Tipping J Never mind, but this is conventional the Select Committee report. And changes to the text of the Bill. I don't think

Salmon Changes to the text of the Bill, I am apprehensive about the Select Committee report just because this is MMP and we have a heated Select Committee here that took a lot of submissions. One can envisage that victory might have gained in the text of the Bill by, for example, Ms Fitzsimons, who knows, that are not necessarily fully described in a Select Committee report which might want to sell something to the public or the House.

Tipping J Are you suggesting that some cunning people on the Select Committee got this changed, and thought it best to keep quiet about it.

Salmon I have no idea Sir. I suppose I am coming from the perspective of some conservatism in looking beyond the words of the Act. I can see the

Elias CJ Well the House of Lords shares that view.

Salmon But not everybody else. And I accept that your Honour. If I were to rank them, I would say we should start with the Act and I hope there is an agreement on that.

Tipping J Of course we start with the Act. When all else fails, read the Act. It is a well known statutory dictum.

Salmon I sometimes wish I had never read this section. And ranking them from then on, a Bill before the House that every Member of Parliament sees, then changed is the next best thing in my submission. It is possibly the only thing that helps us really understand what the House was thinking. And you will hear a lot of material from my learned friends and if, given leave to address the submissions, the Attorney-General will say oh there is all this material including Cabinet reports and all of those things that help us understand what this means. Well those are well down the hierarchy of helpfulness or relevance. My submission is this is really the only thing that definitively helps us understand anything in an objective way and that is the House had before it a Bill which says what the law is that stands following the Court of Appeal is said to be, and changed it.

Tipping J I must say, when I first read these sections, or particularly 104E, I did think without having understood all the intricate lead-up, I did think it was activity based.

Salmon A number of, my understanding is the industry generally did in the resource management world your Honour and the decision, the position taken by Greenpeace initially was regarded as one that couldn't be right because it was activity-based but again we have to come back to the words.

Tipping J Well yes fair enough. You have to come back to the words.

Salmon And the High Court's decision did represent in that sense a sea-change for a number of the participants in the industry, hence this proceeding. But I don't know quite what it is about the words but that is a common reaction to it Sir is, but isn't it? And the answer is, no it isn't. The change to the Act, my learned friend for the Attorney-General submission at paragraph

24, and I hope I am putting this fairly, says well the Select Committee report says this this and this about what is being changed, and I won't read out what my learned friend says. It is there. Then but doesn't agree specifically why that apparently significant change was made. The passage at the end of paragraph 24 has the responsible Minister describing the amendments generally as adding clarity "without requiring substantive change".

Tipping J Well this of course completely removed clarity. If it had stood in the way it was originally, you would have no argument.

Salmon Exactly Sir. The way it has got originally is what my learned friends want. The fact that we can all see that it is a new meaning from the change of words, in my submission, should be the end of the matter.

McGrath J All of that and all of your caution in the MMP age on the Select Committee report in relation to the commentary, at some stage I hope you will actually address the passages at the other side are going to be relevant, tell us what you think we ought to make of them. It may just be that you say it is just not available in the text of the statute just passed and that it just doesn't bear with the comparison between the original and the alteration. You may just want to leave it at that but at some stage I think you have got to grapple with that.

Salmon Shall I do that now Sir. The starting point, two observations, and it might sound like a light-hearted one but it is not. It is really important on a very very fundamental level that materials of an extrinsic nature don't get given undue weight. Select Committee report, and we go well beyond Select Committee reports and my learned friend for the Attorney-General submissions

McGrath J Well they can only assist to the extent that they suggest a meaning that the text can support. And besides you say the text is clear the other way.

Salmon Yes Sir and it was changed.

McGrath J I am not discounting that. That is a very important and in principle soundly based submission. But on the other hand if we don't see it in quite as absolute terms as that, we will have to look at what the content of this report is.

Salmon And if this Court doesn't, then obviously we do need to address them. The general point I would make is section 5 of the relatively new Interpretation Act doesn't even mention materials like this.

McGrath Doesn't mention?

Salmon Mention materials like this. I know it is not exclusive as to the considerations

Tipping J But it says text in light of purpose.

Salmon That is right Sir.

Tipping J And making a distinction. You can go outside text.

Salmon In light of purpose but many decades Sir, with respect

McGrath J This is reading context Mr Salmon. This is context. Are you making the point that context is not included in section 5.

Salmon I am not Sir. Well in part I am. I am not for a moment saying that you have to interpret this and avoid.

McGrath J Good.

Salmon Decades and decades of good law tell us how to do this and I won't berate your Honours by telling you stuff you already know. But we look at the mischief and I will come to that. We look at, for example, if it is relevant, what the common law was before the Act and things like that. In terms of purpose it is not as I read the cases and the warnings, the flashing lights and some of the texts, it is not a matter of saying once you want to look at purpose look at anything you can find. We have got an affidavit from the Ministry here which expressly states views on what the Government thinks this section should mean, should mean.

Elias CJ I haven't read it.

Tipping J No I haven't read. I thought it was unsigned.

Salmon The first one was unsigned Sir but that didn't seem to trouble the Court which wasn't with me on the day. But it was, not unduly at least, it was re-sworn addressing a further additional matter.

Elias CJ I don't think you need to address this. So we are not going to, we are looking at this as a matter of statutory interpretation.

Tipping J Well let's confine ourselves for the moment to the Select Committee report, which is reasonably conventional in today's world.

Salmon And that is my other generic, I have two generic comments on it before I deal with the passages. One is the MMP submission. It is not a light

submission. It is one thing where Government and Parliament are effectively one voice to say well let's look at what Government was saying and working out what an Act means. This is not that world any more. We just don't live in that world. And things are sold to the House at political prices and in ways that they once weren't.

McGrath J But minority views can be expressed and indeed in this report a minority view was expressed but not by the forces whose interests you are representing.

Salmon Well I am envisaging Sir, and this is my point about the affidavit, we have got material in here, going outside the Select Committee, which I will never have access to as a lawyer advising a client. But the Attorney-General here is saying have it, would you like that. I am saying that has got to be out, it has got to be out.

McGrath J Well I think the Chief Justice has already said to you that you don't have to persuade us too much about that.

Salmon The next step is to say, how might, because it is entirely up to this Court, how to treat a Select Committee report in this environment but this is MMP and if I am putting myself in the position of a Green Party MP let's say, or let's say a New Zealand First MP, someone in a Select Committee and I want to get a victory in the Bill, where do I focus my energy. In the words of the Bill, or the way it is sold to the House and to the public? It is a no-brainer, with respect, that the focus goes into the meaning of the words and if we were helping a client get there that is what we would be saying, who cares what the press release says, the words of the contract are what matters. And this is the analogy here. So putting weight on the way a consensus document like a Select Committee report, percolated up from a Select Committee process which is heated, very very controversial area, the result of thousands of submissions, has in its body people with very polarised views on it, the consensus way that is presented to the House just might be wrong. Or, more particularly, it might be incomplete. And that is my first generic submission about it. It is a very very dangerous proposition to rely on a Select Committee report to say they can't have meant a material change of wording in an environment where possibly the most polarised issue, it is less so now, this is more of a consensus issue than it was. But that was an issue that would have been hard fought. And Ms Fitzsimons, who was on the Committee, has tried to bring in, you will have seen this in the other submissions, bring in a new Bill to reverse entirely the effect of this amendment Act. This would have been heated stuff. So when we say we can rely on a Select Committee report to deduce Parliamentary purpose, my primary submission would be, and there has been a lot of judicial sympathy with this historically, deduce purpose from the Act and I will close today on interpretation by talking about what seem

to be the demonstrable purposes of this Act because that, after all, is the cross-check to the plain meaning I am relying on. But that purpose can be ascertained from this Act. If we look at the Select Committee report, and the proposition is this change wasn't mentioned and the responsible Minister, well she said to the House there is no substantive change, if that is a reason for reading down express words, then my submission is we are in trouble in terms of that fundamental and age old concern that Judges and practitioners dealing with statutory interpretation issues, which is you should be able to go to the book and advise your client.
Dealing with the specific passages, my second submission and the word generic seems to pop up a lot

Elias CJ I really feel uneasy about it because I am not sure that I am understanding what everyone is talking about when they say generic, what do you mean by it?

Salmon In this case? In the Court of Appeal context

Elias CJ Well in the submission you are about to make, you are about to say something is generic.

Salmon The submission I am about to make is almost every passage in the Select Committee report and the Parliamentary debates. To the extent it bears on the issue we have, not just generally did Parliament intend to take this issue away from counsel, but in terms of the issue we have which is, is this an issue only for renewable or non-renewable. All the comments of relevance relate to the first Bill and they accurately describe what they changed, so they are irrelevant. Or they are generic, and by generic your Honour I mean to say they are just general statements of we don't want local authorities dealing with these issues fullstop. So by generic I mean general statements that signal that basically flinch from having local authorities deal with climate change. And that is, to answer your Honour's question, that is my essential submission on each of the passages relied on. They describe other changes or they, in a very generic or general way, say

Tipping J You mean really that there is nothing specifically here focused on this exception?

Salmon Correct. Focused on whether the exception applies to renewable or non-renewable.

Tipping J To the precise issue that we have to determine.

Salmon That is right, and again hypothesising, but it is important, if we are considering putting weight on a Select Committee report, everything said for the first reading was accurate and relevant to the exception. If that had

been passed the Act and the extrinsic materials would have lined up. The explanatory note, as my learned friend says, accurately describes the first draft. So that stuff is on point and then they went silent and hypothesising there could be a lot of reasons why someone thinking we got that through or we don't want to make a fuss about that, or that is the compromise or that's a possibility, I just don't know. But all of it says to me, with respect, be very very careful in deducing Parliamentary intention from a Select Committee report.

McGrath J Right, I think that caution is a fairly and a strong submission but, having said all that, there are one or two passages aren't there that we will need to look at as part of considering the whole of the submissions in the case.

Salmon Would it assist your Honour if you have ones you wish to identify for me to address or should I just go through my learned friend's submissions and comment on theirs.

McGrath J Well just for myself at page 19 of your materials, there was a passage that I think Genesis relied on, discussing section 104E(b) and what was being done. Do you see the passage that I

Salmon That we were advised that a new section 104E(b)

McGrath J This is, of the report, the commentary, of the Select Committee, page 19 of your materials, page 4 of the report, first full paragraph. It is just one that caught my eye. And that was the result of Genesis' submissions.

Salmon Sorry Sir I actually couldn't hear you over the paper.

McGrath J You have, we are looking at your tab 3, page 19 of your materials, right hand column, first full paragraph, that is what I am looking at. Do you have the passage I am referring to.

Salmon Yes Sir I do. Apologies Sir I need to read it. That is solely about geothermal Sir. That is driven by lobbying essentially as I understand it, and I don't want to give evidence from the bar having just said what I have said. But geothermal is a complicated and controversial item to be in the definition of renewable energy. The reason is, at the risk of boring you Sir, when you release geothermal energy from underground you almost certainly release a lot of CO2 that has been sequestered down there for millions of years. So that geothermal, while called renewable because it is fashionable politically, is actually a net greenhouse gas emitter, unlike burning trees that you replant, or you recapture if you don't. And so that passage, for example your Honour, might appear to bear on our issue but in fact it is just talking about whether, about the treatment of geothermal energy.

McGrath J But it a very, in fact a very narrow scope and shouldn't be given general significance.

Salmon Yes and indeed it suggests a reasonably substantive investigation because it is saying we consider it is important that geothermal developments with emissions higher than fossil fuels are not given higher planning status. What that means again is the consent authority will have to be slightly intelligent about 104E because it is going to have to say well it is not just that all renewable is good, geothermal might be bad. One of the technologies at the moment for geothermal which is really becoming viable is

McGrath J You are focusing on the second half of the paragraph, I think it may be the first half that

Salmon Only the first that you are interested in Sir.

McGrath J What I am really wanting is some help in what the report does actually say and whether it give us guidance. Your general comments on the high level of controversy surrounding these issues and the limited significance of the report are, I can assure you, fully taken aboard. But we are going to need some help with what the report says too. And I'm just directing you to, you should look at the, you should tell us the passages which you may think others will raise and any which you may think help you.

Salmon And perhaps I will do that against their submissions, as that presumably is the part they rely on. But to deal with the paragraph you have raised Sir in the first half of it I was responding to the second. Under anyone's interpretation that is accurate. And it tells us nothing more. Geothermal is defined as renewable so it is, and they are noting that in a consent authority when considering an application for geothermal energy development to take into account its effect on climate change compared with other possible sources of energy.

Elias CJ That is supportive of your argument isn't it, unless I am misunderstanding it, because it suggests that it was envisaged that there will be this comparative weighing and the argument was whether geothermal came into the renewable basket.

Salmon Perhaps, yes. Yes that's right. And the desire to have that weighing up so geothermal didn't get a necessary tick. I think that is right your Honour.

Tipping J Personally, just glancing through this, on the crucial point there doesn't really seem to be very much here one way or the other.

Salmon No there is not. And your Honour I haven't missed it out from my submissions because I didn't want to deal with it. I have missed it out in large part, I have referred to the change, but the submission is at the end of the day it doesn't help.

Tipping J But it is the change from the activity based approach to what appears, prima facie, to be a non activity based approach that for me is puzzling. But there is no apparent explanation for it.

Salmon That is right Sir there is none. And that is why I say, there is not a lot that can be said about it. I will go through the passages my friends rely on in a general way. I think Genesis' begin at paragraph 56 of my learned friend's synopsis.

Elias CJ Sorry, para?

Salmon Paragraph 56 which begins in fact by quoting the Court of Appeal. The Court of Appeal held that this material, if anything, went against me in relation to the change from the first reading to the second reading. And that is the passage quoted at Mr Majurey's paragraph 56. Dealing just very briefly your Honour, at 58 is the one we have already discussed in relation to geothermal. 59, the Bill as introduced removes the ability of regional councils to consider the effects on climate change from discharges into air, I think the missing words are there "from industrial or trade premises etc". And the debate on that page is about the removal or not of the qualifier in the original Bill from industrial or trade premises. The reason for that doesn't need to bother your Honours but very broadly section 15 only applies to industrial or trade premises, so they had a little argy bargy about whether or not to remove those words. The bolded part, the intent of this clause is to prevent consideration of effects on climate change of any discharge needing a consent. Again, just a generic statement that Councils aren't to touch this stuff but not one that helps us understand the application of the exception. So again not helpful.

The footnote of passages on that page, and my pagination may be different than your Honours, I am reading from an email version, we were sent two. But footnote 50 quotes passages relating to the first Bill, so again don't help. They accurately describe that. Footnote 53 again

Tipping J It is the 'except when considering', which I think is against you to the extent we should take it into account.

Salmon Where are you reading from Sir?

Tipping J The second reading records the Hon Judith Tizard, and then drop down to the paragraph commencing "Except when considering…".

Salmon Well Sir it might seem to but when we analyse that language it is not actually saying "Except when considering" in the context where the application is for renewable energy. It is just saying except when considering the benefits. And again I would submit that that is generic. In other words, I am saying that that is effectively just parroting the revised exception. You have got to consider the benefits, it ties in with section 7(j). It ties in with section 104E as we construe it and the exception as we construe it.
Paragraph 65 I think is the next substantive passage cited by Genesis. "We therefore recommend amending new sections 70A(b) and 104E(b) to clarify the scope of the consideration that is relevant. This amendment explicitly specifies that a reduction in the discharge of greenhouse gases may be either in absolute terms or relative to the use and development of non-renewable energy."

Elias CJ And it is the relativity that makes comparison with non-renewable essential?

Salmon Inevitable. Yes. And indeed that passage possibly helps Greenpeace. I struggle to see that the Select Committee report drafters, as opposed to the drafters of the Bill, put their minds to it or, to put it another way, it is unclear whether they deliberately chose to mention it or not. But there is no definitive statement, that they could have made a definitive statement about this is clear from all the supportive material for the first Bill. It is an issue that they accurately characterised in the explanatory note and the speeches to the House then, and didn't now. And gazing into the crystal ball and saying well why was that, was it because they were aware of the change and didn't want to mention it. Was it because they were worth the change and were quite happy with it. It is too speculative in my submission to be a safe avenue for inquiry. The only thing we know in this MMP environment, that the House saw, that Parliament saw, is the first Bill and the second.

Elias CJ Do you want to complete the submission before we take the adjournment.

Salmon I am in your Honour's hands.

Elias CJ Well we will take the adjournment now.

Court adjourns 11.28 am
Court resumes 11.45 am

Salmon Does it suit you for me to finish briefly going through the references to the Select Committee report? I'll continue with those. The next one I believe, if I'm right in where I was up to, is it's at paragraph 67 of my learned

friend Mr Majurey's submissions. That one is just talking about the use of the word "may" in the first Bill. It implied there was a discretion about factors. Para 70A(b) and 104E(b).

Elias CJ Is that accurate to say that it makes it mandatory.

Salmon I think it is Your Honour.

Elias CJ Yes.

Salmon Because s 7 is mandatory.

Elias CJ Ah yes.

Salmon So except to the extent that there's, effectively you might say that the exception brings back in parts of the mandatory s 7. I think it probably is correct to say it's mandatory although it's not necessarily correct to say that the first draft using the word "may" stopped it being mandatory given s 7.

Elias CJ Yes.

Salmon The next one is paragraph 69 of my learned friend's submissions. Again that's the "may". And I believe that deals with the extrinsic materials as covered by Genesis.

Turning to the Attorney-General's materials, and I'll slow down where Your Honours believe it will be helpful but I believe I can deal with these reasonably quickly. It's a fair summary and an accurate summary of the process I think. But starting at p 10 para 22, that entire paragraph related to the first reading. And so while accurately describing that Bill doesn't help us with the change, the second reading again, it's a fair and helpful summary of how it went.

The first passage cited at paragraph 23.3 is the one moving from the word "may" and just noting that implied discretion is removed, again not helpful. Paragraph 23.4, talks about amending those sections to clarify the scope of the consideration that's relevant. Doesn't say whether either way it's intended to renewable energy or non-renewable either. But I suppose I could argue that saying that it clarifies the scope has helpfully assisted me because it suggests there's been a conscious mind put to the cause. I'm not sure what the countervailing submission would be but my submission would be that it doesn't help. The guts of the extrinsic materials submission though, as I summarised before without referring directly to my learned friend in print, is at paragraph 24, the second sentence: Had the Committee considered the change I'm submitting was made to effect any

change in the substance of the provision, let alone reversal of the provision's original intent, that fact would have been mentioned in the report. And my submission is that's the highest that my learned friends can possibly put it. You'd think they would have said, and as I've endeavoured to submit, we can speculate on all sorts of reasons why that might not be there, including that it's obvious on first reading. But all the MMP ones as well. And I think that deals with the Select Committee report extrinsic materials.

If I understand your Honours correctly, you don't want a detailed soapbox speech about admissibility of more remote materials although I'm happy to address those in reply if that would be of assistance.

The only other point to note before summing up and answering any questions on the interpretation issue is that we shouldn't forget s 70B and s 104F. Those are the ones that relate to national environmental standards. I'm not sure I need to divert Your Honours by taking you to them except to note, and the Attorney-General's submissions make something of this, there might or might not be national environmental standards promulgated but the original legislation envisaged that there would be. So one of the purposes of this Act was to take away from councils but possibly give back the role of policing these things but in a way co-ordinated by national environmental standards. Now that's important any time anyone starts setting up the floodgates sort of arguments about how bad this could all get under the Greenpeace interpretation. There's an instant cure to any problems you might identify of a practical nature by promulgating under s 43 some national environment standards. Tell the councils how to do it. That's why the process is there. It's quick, it's reactive, it's what the mechanism of the legislation is. So pending national environment standards all councils can do in relation to greenhouse gas impacts on climate change is under the exception. Anything that the executive doesn't like can presumably be dealt with under national environment standards, any problems that arise. Any consistency that's needed.

But it's important that we recall that this Act was a bundled solution that did see councils having an enduring role. And it saw it being one that would be amended by national environment standards. So I note that because it would be wrong to assume when people talk about one of the purposes of this Act being to nationalise control of greenhouse gases, it would be wrong to assume that that meant someone in Parliament decided councils can't decide this stuff very well, they can't hear the evidence very well. They absolutely intended, evidently on the fact of the Act, to send more back out to the councils so to speak under national environment standards. So councils absolutely are intended to have a role, not just under the exception but on a wider basis. It's just the wider basis hasn't been developed.

Elias CJ Just explain the scheme to me. If national standards for emissions are made and mechanisms for controlling them, does the assessment of relative merit of renewable and non-renewable resources come into that at all or is it simply left to be determined under 104E.

Salmon In a rule-making context the councils effectively as I understand it under s 70B have to give effect to the national environment standards.

Elias CJ Yes.

Salmon So that if they said, Don't do that, that might be what the regional plan would have to say. In other words, national environment standards are promulgated, put them in place in your own regional plans. Under 104F.

Elias CJ What I meant was are the, I suppose it's not settled yet, what's the empowering provision for the standards, the national standards, just give me the reference.

Salmon It's s 43 I believe. But it's not in any of our three case books I noted last night.

Elias CJ No, I've got the statute here, s 43.

Salmon Yes 43 Your Honour. By order in council regulations to be known as national environment standards that prescribe any or all of the following technical standards etc etc. So they would have to be, to answer Your Honour's question, and I answered too quickly, they would be subject to the mandatory RMA under s 7 and you couldn't by order in council supervene the obligations under s 7 to have regard to the benefits of renewable energy for example. But it is s 43 Your Honour.

Elias CJ Well what I'm wondering is whether there is a mechanism for weighing projects according to whether they could have used renewable energy or not, whether that is only an assessment that can be made under 104E or whether the standards may deal with that.

Salmon Whether the standards once provided?

Elias CJ Yes.

Salmon Yes, I think the answer is yes once provided they could. So for example.

Elias CJ Well under what provision of s 43 or 43A.

Salmon They can prescribe technical standards, methods or requirements regarding contaminants, and this is a contaminant issue, the greenhouse gases are defined as contaminants. And they may include qualitative or quantitative standards, methods for classifying a resource, methods of processes to implement standards, exemptions from standards, transitional provisions. I would envisage, and if Your Honour looks at s 104F which refers to the ability provided not contravening other things to grant an application with or without conditions or decline it as necessary to implement the standard, but in making it be no more or less restrictive than is necessary to implement. It's clearly envisaged that the standard might give real shape to how this is done. And I believe that's common ground. The Crown's not saying this'll never be given back under national environment standards. The Gurnsey affidavit says it could be done but we're just not planning any right now.

So hypothetically if the first council, if Greenpeace's interpretation prevailed, if the first regional authority dealing with it does something that seems to be a little bit of a practical problem, it blows out somehow, a national environment standard could be promulgated which makes clear how these things are to be done as a matter of process, standards, thresholds, and it would be implemented.

Elias CJ I'll have a look at it later thank you.

Salmon But I believe Your Honour will see I believe in the materials filed by the.

Elias CJ Does, what I'm really asking is, does Part 5 authorise a mechanism for balancing renewable and non-renewable energy in determinations.

Salmon It couldn't reverse the clear favour given in s 7 Part 2 of course. But it could I would envisage, and I think everybody envisages, set out how the councils might undertake a more detailed inquiry than they presently can. The scheme is, as I understand the Crown advances, and I can be corrected on this, is at this point councils can do either nothing or not very much. Once NES's are promulgated, they'll do whatever they tell them to do. Obviously if one is ultra vires it's ultra vires. But short of that, they're required to simply implement it. And so a national environment standard would say, Well here's your role now in effecting these policy concerns, the primacy or preference to be given to renewable energy, sustainability or whatever. But I don't think there's anything in s 43 that limits the ability to govern how a council might weigh up what factors are relevant in giving primacy or what are permissible factors. It's envisaged instead, as I understand the focus on national environmental standards by my learned friends, as being the only way in which those issues could be delivered to councils.

Elias CJ Thank you.

Salmon I said earlier I'd conclude by referring to what seemed to me to be the identifiable purposes of the Amendment Act as it relates to this prohibition and exception. And I think there are three, looking at cases like *Contact* and looking at all the extrinsic material to the extent we do, but mainly looking at the Act, the three as I would respectfully suggest exist are: (1) moving to national control of a problem that broadly speaking is national; (2) seeking consistency, there was a concern about inconsistent council treatment; and (3) for want of a better phrase, avoiding the *Contact* case. Avoiding the huge bun fight.

Now those are the purposes as I see it emerge also from my learned friend's submissions. Nationalising, consistency and avoiding the bun flight. In my submission all three are actually more consistent with the more coherent in my submission reading that Greenpeace advances. National control, well that's happening under NES. But it's also happening in the sense that the nature of the inquiry allowed, and the Court of Appeal agreed with this, is that generic factoring which is not huge, there's not going to be huge inconsistency. There's going to be a balancing factor and it might be hard, it might be amorphous. But it's not going to be something that results in really uneven treatment by councils. And if it's uneven, national environment standards can fix it overnight. Easily. That's what regulations are for. Quick fixes of these things. So to the extent there's a policy concern that's said to go against Greenpeace of dealing with this at a national level, the package of provisions in the Amendment Act shows that that's actually consistent.

The second goal of consistency in my submission has the same answer. You achieve a consistent result because the exception's narrow and because the national environment standards enable the policing of consistency. If there's a problem it will be dealt with.

And the third, avoiding the *Contact* type case, it seems in my submission clear that no-one will be able to stand in front of a consent authority and get far beyond the Court of Appeal's indication that whatever the application of the section, the exception once it applies it's more a generic factoring than a chance to scream Al Gore's movie. It's just not. So it's not a situation where you have a bun fight.

In my submission those three purposes are all consistent with the natural meaning of the section. This is not a case where, when the Act is read with care, rather than beginning with extrinsic materials, one can say the plain meaning of the words is it holds with policy and purpose. Summarising from there, in my submission the converse is in fact the case. Once the sections are looked at with care, because what can be seen is a perverse

policy consequence under the Genesis interpretation, the perverse policy consequence is the straw man of the *Contact* case only applies to the favoured few. Those supposedly receiving affirmative action are the very ones who suffer a huge beauracratic and administrative burden. And in my submission that can't be right.

More so under the, again, and I don't want to be pejorative, under that straw man though, the consistency problem arises. Because the bigger the scope of inquiry, not the application but the scope, the bigger the scope of inquiry under the exception, the more chance of inconsistency, and the more chances of problems. Which means in my submission the natural way to deal with the exception swallowing the prohibition concern is to do what Greenpeace submits, read it as being narrow as it's words say rather than reading it as only applying to renewable energy projects.

Further, and again on the perverse policy consequences of the other interpretation, s 70A becomes unworkable. If there's an answer to that I'm not sure what it is. But as I see s 70A, the only way it can work is by effectively penalising non-renewable projects. You can't have a tick and not a cross in s 70A to the extent you can in 104E.

And finally, again concluding, the evidence of Parliamentary intention here is the Act. It is relevant but in my submission, although it favours me, not a major factor, that Parliament retreated from the first reading of the Bill in a very clear way. But nothing beyond that again when properly read helps us understand whether the distinction found by the Court of Appeal was intended or not.

And the result of that Your Honour, I think I answered poorly your question on s 3 in the purpose provisions of the Act and I'd just like to conclude on interpretation by coming back to that. Your Honour asked about the interplay of s 3(a)(iii) and (b)(ii), and I tendered the notion that I think will be put forward by my learned friends that s 3(a)(iii) is about s 70A, which is right. And s 3(b)(ii) is the purpose provision governing the prohibition, which is right.

The consistent reading of those purpose provisions which, as His Honour Justice Tipping pointed out, don't specifically address the distinction that ultimately occurs in 104E, you don't expect to see it having read s 3, the reconciliation of those two purpose provisions may simply be this, one of the benefits of renewable energy relates to climate change. Section 3(a)(iii) says you've got to look at all benefits of renewable energy and you do under s 7(j). That's removed under s 104E which reflects 3(b)(ii), don't look at climate change effects from discharges. The carve out to that, that doesn't affect those benefits of renewable energy that relate to climate change. In other words, benefits relating to renewable energy that

relate to climate change, the key purpose of the Act under s 3 survive through the exception. Nothing else does. None of the other climate change debates. None of the *Contact* stuff. But the benefits of renewable energy, again a generic question, survive. And that's a synchronised reading of the purpose provisions and of 104E and of 70A.

Your Honours unless you have any questions, that's all if have to say on the interpretation issue.

Elias CJ No thank you.

Salmon That leaves the declaratory relief point and which, unless Your Honours seek otherwise, I'll deal with relatively quickly.

Elias CJ Well yes, it seems quite candidly that if you don't succeed on the merits, this doesn't, the merits being the interpretation point, this argument doesn't really go anywhere.

Salmon If I don't succeed or if one doesn't succeed?

Elias CJ Yes.

Salmon As a matter of principle. Well that's what happened in the Court of Appeal and that's the main thing I was going to say. We got to the Court of Appeal in an environment where only Greenpeace of possible contradictors were served. And we went there without Greenpeace making a procedural fuss because Greenpeace.

Elias CJ Well you consented to it being removed into the Court of Appeal.

Salmon We consented to it being removed but as I've noted in my submissions.

Elias CJ It's a bit late isn't it to raise the procedural problem.

Salmon Well the Court of Appeal said that in the judgment that it was raised late and that.

Tipping J Are you saying that they should not have embarked on it at all or simply that they shouldn't have made a formal declaration.

Salmon The former Sir was the submission in the Court of Appeal. And I just wanted to engage with that suggestion in the judgment. I addressed it in my submissions that Greenpeace raised this issue late. It didn't. The issue was raised in the very first telephone conference with Justice Abbott. And it was raised in the first conference with Justice O'Regan in the Court of Appeal. Both of whom noted it was a live issue. Justice O'Regan, as

noted in my submissions, said it's to be dealt with by the Bench. It was left live.

Now the point I wanted to make is just a general one about principle. Greenpeace was the default contradictor here. Didn't ask to be. It's the only one. Who else might want to have been heard? Maybe a renewable energy generator, maybe Meridian, I don't know. But it wasn't served. Other councils, only some were served. So we were served, Mighty River Power, the company that wanted to build the coal fired power station, and a few councils. Genesis (sic) doesn't have the budget to fight these things. As Your Honours will know from what's before the Court, there's a.

Elias CJ Greenpeace.

Salmon Someone here doesn't have the budget to fight every issue. But it's a practical point. And it's a relevant point for the declaratory jurisdiction because there are two cases. And I won't bore Your Honours with them. I can sense it's not going to help. But the two cases I was going to go to, and we'll go to very briefly, show a concern that parties don't just steamroll in under the declaratory jurisdiction and get relief without the right and proper contradictors there. So did we raise it late, no we didn't. We signalled it. Did we have a compromise on cost which is the reason.

Tipping J Can I just interrupt you rather rudely I'm sorry.

Salmon Yes Sir.

Tipping J You have done as good a job as anyone could have done in contradiction of what Genesis. Now, the question really is costs isn't it. That was the cello that you resorted to just a second ago.

Salmon Well no Sir it's not costs, it's a concern that.

Elias CJ Better arguments perhaps.

Salmon The price of getting here Sir.

Tipping J Wider arguments?

Salmon Candidly, and this point was noted to the Court of Appeal and I don't think my learned friend will mind me noting it, it's in part before the Court now. Part of the price of getting here in a position where, as this Court knows because security for costs have been waived, Genesis is not seeking costs from Greenpeace regardless of outcome today. Part of the price of that was not fighting every issue along the way. That's the price of being able to be here at all. Now my point is not one of a sob story for Greenpeace.

We can cope. Of course we can stand here and argue. My point is that we are not the contradictor for all the world. The Attorney-General is the standard default contradictor for a declaratory judgment case void anyone else. But where you're in doubt you're meant to seek ex parte orders from the High Court as to who to serve. Fine. We have managed to argue it but it's not with respect fair.

Tipping J Do you want us to make some sort of warning noises. Because you are here, you are contradicting, you have got the deal on costs, just not to treat you as a sort of catch or contradictor.

Salmon No no it's a slightly different point. It's that the Court of Appeal took Greenpeace not taking every issue as effectively waiving a point of principle that wasn't Greenpeace to waive. Greenpeace said at the start there is an issue about the availability of declaratory relief about the appropriateness of the jurisdiction. The Court of Appeal the first Court to actually engage substantially with it at all, said deal with it on the day. So we did and we are told, you did it late. It's a point I am making because it's relevant and it's on the case law and it's something that's appropriately brought before the court. The Courts have shown concern about that, about just getting any old contradictor, making sure the appropriate people

Blanchard J But what are you asking us to do?

Salmon The point of appeal Sir, for which leave was granted and I can sense where it's going so I am not going to dwell on it, was that the declaration should not have been granted.

Blanchard J Well if a declaration isn't granted you are still left with a judgment.

Tipping J The reason which will be treated as the law. The fact that it hasn't ripened into a formal declaration doesn't make it

Blanchard J Read the Law Reports.

Salmon Well it's possible that there might just be a bunch of obiter comments and a declinature to provide a declaration, in which case the law as it would stand and this is the point made to the Court of Appeal. There is no uncertainty we are trying to deal with. The High Court had decided this point. We had law.

Tipping J I was with you until about a few minutes ago and now I think with great respect you are really clutching at straws.

Elias CJ You really need in order to make anything of this you have to make the submission, now we should embark upon the merits at all and give

reasons, we should simply say the Court of Appeal shouldn't have determined an application for declaration.

Salmon Well, apologies, I am not saying it should have given a judgment and in the Court of Appeal my submissions were the other way round and you can take something from the fact that a decoder at the end of my primary submissions on interpretation and perhaps that's the best tone to put on it. But it's a point that's made. In the Court of Appeal the first submission was don't hear this. And the Court decided to hear it. It decided to hear it taking evidence on a day on an unsworn affidavit but afterwards in an affidavit that was objected to and making factual findings that were very challenging as to mootness of relief. And the appeal relates to those. I absolutely accept that the reality is once you are there and a Courts engaged with the issues the practical course is to deal with them. It's a point of principle that in my submission, it should have been approached in a particular way in the Court of Appeal. The cases I put in I won't tie you onto them.

Blanchard J But it seems to me it doesn't do you any good to take this point, because if we set aside the Court of Appeal judgment on this ground, everyone knows what the Court of Appeal said.

Salmon It leads to a mess now if that's the only thing this Court says.

Blanchard J I don't have any sympathy for this argument.

Salmon I am sensing that nobody in the room has sympathy for this one. But I would submit it's an interesting point if I was still in the first instant court.

Blanchard J I think in a way you are just shooting yourself in the foot.

Salmon Well it's not a point that's getting anywhere now Sir.

McGrath J In the long term you're probably shooting yourself in the foot.

Salmon Yes it was a point in my submission, should have been dealt with in front, in a different way from what it was. Now the cat is out of the bag. I accept that it is a problem

Tipping J I agree with that. You should have attacked it at a much earlier stage, by that I don't mean that it was a valid criticism of you in the Court of Appeal but you should have applied to be taken out of the proceedings. You can hardly participate and then come along and say.

Salmon I accept Your Honours this is going nowhere but to engage it very briefly it's a two edged sword, what do you do when your named as the default

contradictor for a fight you didn't choose, if you don't defend it who knows, it could be bad, if you do, you are told you are the contradictor for everybody.

Elias CJ Well it is unusual because effectively it's a collateral challenge to another determination. But the Declaratory Judgments Act is a very useful jurisdiction for people to find out what or get an authoritated determination of points of law. I wouldn't have thought that the arguments could have been improved by having other contradictors present and that often is the case with declaratory judgments – you don't sort of advertise them to the whole world.

Salmon No and it depends what they are although here some of the interested parties could have been identified.

Elias CJ It's not a numbers game though.

Salmon No it's not.

Elias CJ It's not having more people supporting you it's are the arguments fully identified by people who have an incentive to run them.

Salmon Speaking separately from the appeal point which I think we let lie as you will have anticipated the primary focus today is the interpretation point. There are some points of interest where you have a Court saying that looks like a huge factual inquiry and I shudder at it, that means the prohibition swallowing the exception, but you have got them missing out that very expert tribunal that might have said "we can do that". And that was the case I was going to come to. In my submission that's an important issue about declaratory relief. You don't necessarily safely undertake all interpretation exercises in the same way when there is a value judgment about how hard something might be.

Tipping J But on this one every Court including perhaps, not quite, but almost the High Court would be bound by *Mighty River*, so you had to get into the Court of Appeal.

Salmon I didn't my learned friend

Tipping J Well I am sorry, they had to get into the Court of Appeal.

Salmon And that's the only thing I didn't oppose.

Tipping J If I were you I would quit while you are at least provisionally ahead.

Salmon I have quit on that one Sir. I quit about three or sentences in I think. But there it is your Honours, for what it's worth, that's how it would have been run in the Court of Appeal. The only remaining points are for good order the standing objections to some of the evidence that went into the stringent material, I understand I don't need to deal with that in detail and as far as I am aware unless your Honours have any questions the outstanding other issue is the Attorney-General's application to intervene, which is I recall was granted in terms of filing submissions but not in terms of being heard necessarily that's to be decided today. Do Your Honours want to hear me on that at all?

Blanchard J Well it's a matter for the Court whether we hear it.

Salmon And that's all I was going to say Sir we abide whatever will help the Court.

Elias CJ Mr Salmon we will hear from the Solicitor-General, but we will hear from him following the respondent and you will be able to reply to anything he raises.

Tipping J I just like to raise one point and I don't want a long repetitious debate Mr Salmon, I just want one point clarified in my mind if you don't mind on the interpretation point. Are you effectively saying that the exception to 104E and 70A is to make sure that 7(j) is for the avoidance of doubt in a sense, its to make sure that 7(j) doesn't get overtaken by s 104E.

Salmon Yes and that's a more elegant way of saying what I was intending to come back to by talking about s 3 in the purpose.

Tipping J In a sense that is the nutshell or the nub of your argument.

Salmon That's the reconciliation of the argument with the purpose section. Yes

Tipping J Thank you.

Elias CJ Yes thank you Mr Salmon. Yes Mr Majurey.

Majurey Thank you Ma'am. Please the Court now I have a hand out which I make reference to during my submissions. Perhaps when I come to them I will take the Court through them but they can be put to one side for now if that's appropriate.

Tipping J I don't think I can put this aside it looks too exciting.

Majurey Fair enough Sir. There are three pages or three papers, the first is a copy of the submission that Greenpeace had made in response the Rodney

applications. There were two purposes for producing this. One was on the argument on the declaration whether it's moot or not, but also in terms of what the scope of the hearing might be. The second is a visual to try and illustration to assist the Court how the scheme of how the Amendment Act may work, and the third is a colour Venn diagram that was produced in the Court of Appeal to visually, again demonstrate how the prohibition and exception may be operating. So hopefully that will be of assistance through the course of my submission.

Tipping J I don't think really you need to focus on the first one very much do you, in the light of what has just transpired.

Majurey My submissions here is yes because despite my friends tempting the Court in the strongest possible terms that this is all going to be very low key and of little issue in terms of the what I might term and perhaps the Happy Valley scenario, in my strong submission it's a lot more than that.

Elias CJ I think Mr Majurey that rather it was the, to the extent that you were going to address whether the declaration should have been granted - you don't need to proceed with that.

Tipping J The moot, sorry that's what I meant.

Majurey That side yes Sir absolutely I would take that as read. But there are some indicators in my respectful submission in terms of the perimeters in my learned friends submission to you that don't seem to square up and how if you like the real world may operate. May I please the Court we are all taught when we go through law school that when you assess or interpret the Amendment Act you seek to identify what the problem, what the evil, what the remedy is that the Amendment Act is focused on. In my submission of the aids that you have before you are quite clear in terms of what that problem was. Both are set out in the Amendment Act Explanatory Note. They have been touched on as lack of clarity, Environment Court debates, expensive and time consuming litigation, double controls and as an example the costs that the Taranaki Regional Council faced in being the respondent in that litigation. And in the second reading in the moving speech to the Amendment Act the Hon Judith Tizard referred to clarity and consistency, that's what was being aimed at. And that is why my submission local government in the form of the Auckland Regional Council at the Court of Appeal and now central government before you support the interpretation as determined by the Court of Appeal. My learned friend has made a very strong submission that the beginning point, the middle and the end point of your task is the four corners of the Amendment Act and I want to address the scheme of that Amendment Act and attempt to persuade you that the interpretation that has been reached by the Court of Appeal is entirely consistent with the

scheme of the Amendment Act. There has been discussion as to the scope of the purpose and my learned friend has correctly anticipated my submission in terms of the two parts of purpose. Section 3 (a)(iii) that that part of the purpose is fulfilled by s 7(j). The benefits to be derived from a use and development of renewable energy. And he also correctly apprehended that my submission in relation to the second part of the purpose or the second main part of the purpose that the reference to s 3 (b)(ii) is fulfilled by s 104 (e) and other of the sections in the Amendment Act requiring local authorities not to consider the effects on climate change of discharges where of greenhouse gases. So having addressed the purpose we move to the main parts of what the Amendment Act is seeking to do. And if I note that in relation to ss 7(j) and 104E they have an inter-relationship and that was picked up in some of the last discussion before the point on declaration in relation to how those two sections, those two important sections work together or don't as the case may be. And I want to come back to that inter-relationship in the final of my opening points to demonstrate how I say that that scheme is consistent with the interpretation reached by the Court of Appeal. So I will come back to that. Section 104F is an important provision in my submission and in my submission it counts against the interpretation urged upon you by Greenpeace. It reinforces the national policy approach to addressing the effects of greenhouse gas discharges on climate change. It lays out in the terms of 104F the only basis on which consent authorities or local decision makers can take that into account. Absence such a regulation we say the prohibition bites as Parliament intended it to bite. Subsections (a) and (b) are quite important in 104F in my respectful submission because unlike the case in 104E it actually gives local authorities consent authorities guidance as to how we are to approach that evaluative task. Because it says to consent authorities, when you are entitled to take into account the effects of greenhouse gas discharges of climate change, these are the things you may do. And those are important things the Consent Authorities are engaged with day to day around the country, they receive information, they place weight on those things and then something must come of that, they must make a decision one way or another. So 104F is telling them they may grant the application with or without conditions and conditions you might recall from the previous Environment Court litigation are important when submitters seek to have carbon offsets by tree planting, and it says that they made a climate as necessary to implement the regulations. That guidance is totally absent from 104E and we say that has significance. Just while I am on that point, the dialogue your Honour.

Elias CJ Sorry can you just expand on that or are you coming onto expand on that submission.

Majurey I am happy to expand now Ma'am. It comes back to what is the point of the comparative exercise urged upon you by Greenpeace. What do you do

with it? What is the weight you are going to place and what is the end result? If the absence of renewal energy counts as a negative what follows from that? Well in the normal type of Resource Management Act decision making in evaluating the benefits and the negatives, then you will either as a decision-maker decline the application or grant the application and impose conditions to deal with the adverse affects.

Elias CJ Or just weigh it in the whole mix.

Majurey Weigh it in the whole mix, but that has to

Elias CJ That may not lead you to decline it.

Majurey Absolutely correct Ma'am and all considerations under 104 for example, the list of part 2 matters, section 6, section 7, section 8, that is how the physician makers under the Resource Management Act do it on a daily basis. They will look at the positives, they will look at the negatives and they weigh. Parliament has mandated that they have the jurisdiction to make that merits evaluation. But at the end of it comes a purpose and that is a decision has to be made and it's declined or it's grant with conditions. 104F involves Parliament adding that part of the decision making process as a consequence of the imposition of national standards if they are ever enacted. They haven't been enacted and that is the sole means by which we say consent authorities are entitled to take into account to undertake the exercise that Greenpeace is urging upon you. Parliament has gone that extra step to provide guidance that is required in that context to say this is how you will undertake your task. You will undertake the evaluation and these are the things you can do with that evaluation, grant, decline.

Elias CJ Well what is the purpose of permitting a wider inquiry where the application involves renewal energy?

Majurey Under 104F Ma'am?

Elias CJ Yes, no under 104E. What's the purpose of such very different result? Because that is the only issue we are talking about here. Whether the scope of the inquiry is controlled by the application made or not.

Majurey With your leave Ma'am I was going to cover this later but I am happy to deal with it now.

Elias CJ Well I'm happy for you to do it in the order you want but if it is relevant to the submission you are making about 104F then I think I would be assisted to understand how they interact.

Majurey Yes Ma'am and it is relevant so I will

Elias CJ Because on the submission you are making, greenhouse gas emissions are only to be taken into account insofar as national standards have been set.

Majurey Unless the matter falls within the scope of the exemption in 104E.

Elias CJ Yes, yes.

Majurey Correct, Ma'am.

Elias CJ And that on your argument only applies to applications which entail the use of renewable energy sources and not to applications which entail only the use of non-renewable energy sources.

Majurey Perhaps if I refine that one step Ma'am and that is renewable energy sources that omit greenhouse gas discharges.

Elias CJ Yes, yes, yes accepted.

Majurey Yes Ma'am and could I refer the Court to the coloured in diagram. So in terms of the circles if you like to get your bearings. The heading at the top Greenhouse Gas Discharges and below Renewable Energy and we see that there are what might be called non-renewable or thermal sources in the red. The blue where they sit between the two types of energy and what was the green and is now the aqua if that is the right colour. Those which are renewables and do not emit greenhouse gas discharges. And in the lefthand column is one example under the words in the middle except to the extent that we see two colour boxes, one totally in blue and one in blue and green and we have labelled

Elias CJ Sorry, I have a query that is probably wrong, but an application is in respect of discharges. You could have discharges from a manufacturing process that utilises hydro for example.

Majurey Ma'am those wouldn't be as far as I understand it greenhouse gas discharges.

Elias CJ They wouldn't be?

Majurey Not for hydro Ma'am.

Elias CJ Well I was just thinking about thermal mechanical pulp mills for example, don't they put out greenhouse gases, I don't know.

Majurey Sorry Ma'am, I thought you said hydro.

Elias CJ Well no, well they use hydro. I mean this, these provisions have to, correct me if I am wrong, but these provisions have to apply to all applications for discharge.

Majurey For greenhouse gases, yes Ma'am.

Elias CJ Yes. But, so if I was a manufacturer wanting to do thermo mechanical pulp or something like that aren't I producing greenhouse gas emissions out of that manufacturing process.

Majurey Correct Ma'am. In other words there are more discharges than just electricity related discharges that discharge greenhouse gases and that is an important point to understand insofar as the effect of the interpretation urged upon you by my learned friend. For example many of the milk processing facilities that are operated by Fonterra will burn coal, they also burn gas but they'll burn coal and they do that to raise steam and if you had a chance to look at the Todd case, one of those Environment Court cases that have been referred to, it makes reference to the Hawera site in Taranaki. There it was gas but many Fonterra operation will burn coal, they aren't electricity and they don't involve renewable energy, so there is an important point in terms of what is the corollary of the Greenpeace interpretation, in other words there can be a negative of some sort not to involve a renewable component for the processing of this country's milk for export. So there are two types if you like for the present purposes. Those which involve electricity and those which do not. And that was a point that was made in the decision of the Court of Appeal. This relates to more than just renewable energy.

Elias CJ Yes now they did make that point but where does that take you in terms of the interpretation section 104E?

Majurey 104E yes Ma'am. So in terms of this Venn diagram to helpfully illustrate the point the Genesis Energy interpretation as supported by the regional council in the Court of Appeal and now the Attorney at this level says that the scope of inquiry under 104E is the top circle, the red and the blue. Greenpeace would say it's the blue and the green and that is shown by for example the discussion around the question that could be asked of a hearing, why aren't you involving a renewable component to your operation. That must apply by definition to either a Rodney power station or to a Fonterra boiler plant operation and the consequences when you think about that are quite important and I want to go through that for Rodney a bit later on but also talk about Fonterra as it's seriously being argued that when Fonterra appear before a regional council for a discharge consent from a coal boiler operation to raise steam to process milk, that weight can be placed on the absence of a renewable component.

Elias CJ Why not? Why shouldn't it be?

Majurey Because I say Ma'am that's not what the scheme or the Acts in Parliament have enacted it.

Elias CJ That's what I would like to be taken to.

Tipping J In looking at these semi-overlapping circles. The only one, there are two that would qualify for the exemption in your case.

Majurey Yes, yes.

Tipping J The two in the blue and that's as simple as that isn't it?

Majurey Yes Sir. And that's the case that was put before the Court of Appeal and at that level accepted and there is context which we say supports that outcome.

Wilson J Well just following on from the questions from the Chief Justice and Justice Tipping, if one looks at sections 70A and 104E in the isolation, is there anything in the wording of those sections to restrict their application in the way in which you are contending. Or do you have to rely on the wider context?

Majurey We rely as we understand the law to be the purpose and text and so we say that the outcome sought upon you by Greenpeace, were tried to have the sections read in a vacuum. And they can't be read in a vacuum. 104E and 70A don't work in a vacuum. There is an elaborate scheme here which involves 7(j) and that is important because of the interrelationship and also 104 in part 2.

Wilson J Yes, I'm not suggesting that the context isn't relevant, I just wanted to clarify my own thinking. If contrary your submission, one looks at those two sections in isolation, does their meaning support the Greenpeace argument?

Majurey In my submission Sir is that if the four corners of one's focus are the exact words themselves it's ambiguous as to whether it is a Greenpeace outcome or a Genesis Energy Attorney-General outcome. Nothing says exactly how that inquiry is to be undertaken. There are some complex concepts involved here which are ventilated somewhat in the Select Committee Report and that's why the wider context is absolutely necessary if this Court is to give affect to what Parliament intended.

Elias CJ Well just looking at section 104E the only trigger for it's application is an application for discharge permit.

Majurey Yes Ma'am and so the

Elias CJ So Fonterra or anybody has to make application for that.

Majurey That's what catches applications is the prohibition part of 104E, to be encompassed by 104E yes you have to be a discharge that involves a discharge of greenhouse gases and there was a, in the High Court there was some common building blocks if you like that I think were agreed between the parties and that is there are certain things that mean you are caught by 104E and the discharge of greenhouse gases regardless of their source is one of the essential building blocks.

Elias CJ Yes, yes.

Wilson J Yes, exactly.

Majurey But the essential, in a visual way, the essential difference between the parties is, is the exception to the prohibition found within the prohibition. In other words the blue or is the exception operate independent of the prohibition.

Wilson J I'm still struggling to see the ambiguity in 70A and 104E when looked at in isolation and I take entirely your point about looking a the wider context.

Majurey Yes.

Wilson J But just looking at those sections in isolation in the point the Chief Justice has made, don't they apply to any application re-permit whatever the source of the energy, renewable or otherwise.

Majurey Perhaps not as yet to directly answer the question but to give an example of how those provisions in A and B work because those are quite important to understand that task.

Wilson J Yes.

Majurey And as I undertook some of the exchange there could be a view that reference to the phrase relative to the use must as a necessary consequence involve this comparative exercise.

Wilson J Yes.

Majurey And we say that's not the case.

Elias CJ But actually, just because I think your overlapping circles are helpful here. Say Fonterra comes along and says we want to put out some greenhouse gases, on this basis if they come along and say and we are going to use hydro, that's a plus on us, if they say we're going to use the stuff in your blue diagram, we're going to use biomass, then you have to weigh the extent to which that's actually going to be more beneficial in terms of the greenhouse gas omissions. There's a more nuanced approach there. That's your comparative.

Majurey It is to the extent Ma'am that the blue is also a plus and if I

Elias CJ Yes, yes it's a plus and you are within the exception if you come within that, but what the exercise then is, some sort of assessment of the relative benefit to be obtained by using the renewable source.

Majurey Yes Ma'am and what's happened in practice in the RMA is using those two examples if you like and take it for what's it's worth in the way you describe to what I am about to say, the Parliamentary, the legislative judgment if you like when an application comes before a concerned authority if it is in the blue for example, is, is that an absolute reduction or is that a reduction relative to the use and development of non-renewable energy.

Elias CJ Yes.

Majurey Geothermal is a good example as to how that works in practice and why it is within the blue.

Elias CJ Now I understand that. Geothermal and biomass come under subparagraph B whereas if you are using hydro you are going to get an absolute reduction, is that right?

Majurey If the scheme allows that evaluation then that's correct Ma'am.

Elias CJ But why isn't that something that Parliament has said should be weighted. That if you want to put greenhouse gases into the environment it's something you can take into account that you can offset that by your choice of energy choice. Doesn't that fit with section 7(j) as well?

Majurey We say no Ma'am because what Parliament is trying to do is to do two things. One it's trying to get a leg up as it were to renewables, that's what section 7(j) is about but the contrary doesn't apply, in other words Parliament is not saying that there is a leg down to solely non-renewable energy and the interrelationship I was going to be going to is I think best raised here. Section 7(j) falls within part 2 of the RMA, it's part of the principles of the RMA. Section 104 is a section that deals with

applications regardless of their source, that's the general position. Section 104 is subject to part 2 expressly and so that scheme is well known as was commented on in the Court of Appeal section 104E stands alone.

Elias CJ Can you take us to that because does section 104 actually say subject to part 2 and section 104A doesn't.

Majurey Correct.

Elias CJ Okay, that's fine.

Majurey Shall I take you to the pages.

Elias CJ No, I'll look it up you carry on.

Majurey And legislative history wise the RMA did not start out that way, there was the famous case in the early 1900's of the *Batchelor* case and as a result of that ambiguity Parliament inserted the words subject to part 2 of 104 and weight is to be placed in my submission on the fact that 104E does not contain that reference and that is why it is a stand alone section.

Elias CJ What's the, but what about the scheme of the legislation? Part 2 is, what's it headed?

Majurey Purposes and Principles.

Elias CJ Purposes and Principles, well how can it not apply across the board?

Majurey The scheme is such Ma'am that 104E is stand alone within it's terms. It doesn't mean that part 2 in 104 doesn't come into play because it does. If you recall the A3 reproduction of the public notice for the Rodney applications before both the Regional Council and the District Council you might recall a large sweep of resource consent applications. Those involved land dunes, water applications, water discharges, discharges to air. So when Rodney is considered later in the hearing there are a sweep of applications. Almost all of those are going to be dealt with by 104 and part 2. Parliament has set out a bespoke regime for greenhouse gas discharges in the form of 104E. It is consciously in my submission, not inserted the words subject to part 2 for special reasons and those are best explained by the policy background to this enactment. I wanted to return back to this interrelationship I spoke about and

Elias CJ So on that submission, none of sections 104A to F are construed in the light of part 2?

Majurey Going through those matters Ma'am they each have their own context. So for example in terms of controlled activities those are the types of activities as the Court will be aware that there is a limited discretion on how they are to be dealt with. Controlled activities are considered under 104 because

Tipping J 104 applies to applications to resource consent. It's those that are subject to part 2. 104E applies to an application to a discharge permit or a coastal permit.

Majurey Yes Sir.

Tipping J Which is a different beast isn't it?

Majurey It's a type of application.

Tipping J But is it a resource consent.

Elias CJ Yes.

Majurey Yes.

Tipping J It is, okay. It's a type of resource consent, right.

Majurey It's, a discharge permit is a species of resource consent as defined in the Act. But what I was trying to say is that

Elias CJ But then why doesn't part 2 come in by virtue of 104(1). There's a pretty bold submission you are making Mr Majurey because you've tried to carve out an alsatia which doesn't fit within the scheme of the overall legislation.

Majurey It's a bold submission, it's one that was accepted at the Court of Appeal and it simply reflects the policy context of where this country has been for a number of years. It also reflects

Elias CJ It's much more than greenhouse gases though that are in 104A to F isn't it.

Majurey F is also greenhouse gases, correct.

Tipping J Surely 104(1) which makes consideration of a resource consent subject to part 2 must carry on through all the subsets.

Elias CJ Yes.

Majurey It does carry through but insofar as that part of an application which involves greenhouse gas discharges 104E and F has a specific, a bespoke regime for it.

Tipping J Well you're trying at the moment to uncouple that regime from part 2, it's that that I am demurring as.

Majurey Not in terms of the final analysis. In other words when you grant a consent you can't for a discharge permit involving greenhouse gas discharges, you can't do that entirely with 104E, it doesn't take you anywhere. So the relationship is there in terms of how the regime works. What I am saying

Tipping J Are you saying the Court of Appeal said that 104E was not governed by part 2?

Elias CJ They did say that.

Majurey 104E insofar as greenhouse gas discharges are concerned is not governed by part 2 and there is a very simple reason for that in my respectful submission and that is, if you set section 7(j) side by side with 104E and you put a blank piece of paper over the exemption, the exception in 104E, you have attention. Because on the one hand section 7(j) says you look at the positive effects of renewable energy and that's quite clear in terms of wind farms and the like, that's a provision that is relied upon invariably. 104E would overlap with that provision without the exemption. The reason for that is, that the word effects is used in 104E in the prohibition. Effects include both positive and negative effects and so if the exemption wasn't there, the decision makers would be in a quandary. On the one hand section 7(j) it telling us something, on another hand a specific bespoke provision dealing with greenhouse gases says you can't take account of the effects, positive and negative on

Elias CJ On global warming, on climate change.

Majurey On climate change yes and clearly

Elias CJ Not other effects, it's only effects on climate change.

Majurey Correct Ma'am but when you look at 7(j) while there are a wide raft of benefits of renewable energy clearly the number one ranking benefit is positive effects on climate change. So that gives context of why and perhaps inelegantly, that is why we have an exemption in 104E. It's to say something as exemptions do and that's why we say the scope of the inquiry for this interpretation is inside the red and the blue circle or the red and blue parts of the circle. Because it's to bring back the situation that

there are two types of greenhouse gas discharges that are renewable , that's how the are defined. There is a legislative register for that that started back in 2002 and but for the exemption you would have attention, if not a direct conflict for decision makers in two types of renewable energy. 7(j) and 104 the prohibition doesn't work for those blue sources. So the exemption has been brought in we say to save that situation. That's not that clear in terms of the evolution of the process that is seen through the Select Committee but that's what this is about.

Tipping J And it's to save those cases which involve geothermal and biomass energy sources.

Majurey Yes Sir. Now could the enactment have said that more clearly, certainly. And my learned friend would say that's where things may have started because the word activity was used in the first reading of the Bill and for somewhat unclear reasons the word activity was deleted in the second reason and I will come to deal with that. As I say there is nothing that really hangs on that. There was no express, there was no conscious decision involving the deletion of the word activity.

Elias CJ But just coming back to your example of Fonterra coming along and seeking a resource consent for a discharge.

Majurey Yes Ma'am.

Elias CJ Why is it not entirely consistent with the scheme of the legislation that if it proposes to use hydro that is something that can be taken into account.

Majurey And if I can refer to the visual Ma'am that is what 104E is doing, it is saying in reference to renewable energy we can give it a tick so that.

Tipping J The sources of energy in the aqua-marine colour, the bottom of this second circle, they don't produce greenhouse gases do they.

Majurey No they don't Sir. That's why we say they can't be involved in the exemption.

Elias CJ But they are offsetting the greenhouse submissions that Fonterra is producing from it's process.

Majurey From hydro Ma'am.

Elias CJ No not from hydro, from it's manufacturing. I thought you had indicated that they do actually produce greenhouse.

Majurey Well they do, they use coal.

Elias CJ Oh I see through using coal.

Tipping J Not through using hydro.

Majurey They burn, but I will come back to hydro cause it's a good example. They burn coal and gas but quite a lot of coal to raise steam. Steam to dry the milk. If Fonterra were to use hydro 7(j) is the route by which a tick is given, not 104E. 104E is for this example, for biomass. That's why there is a tick there and a neutral line for gas. And if you substitute biomass for geothermal the same result ensues.

Tipping J Well I have to say that that's the way I read it at first blush, when you are talking about in ambic when we were discussing with my brother Wilson the question of ambiguity, that is how I would have understood it, were it not for all this additional learning that has been thrown into the mix.

Majurey Sir, just to give a context as to, this may be sounding somewhat of a convenient explanation of what poem it was doing. The New Zealand energy strategy that you are aware of through the documents has said to this country and as supported in a Bill before the House at the moment in the Select Committee stage, has said as a country we want to achieve 90% renewable generation of electricity by the year 2025. In that New Zealand energy strategy it sets out the types of renewable energy that are going to achieve that outcome. Geothermal is a very important part of that mix. Geothermal as set out in the energy strategy could be responsible for some 900 mega watts of new capacity in the future and for reference points that's generating capacity of Huntly Power Station, the original Huntly Power Station, the largest thermal power station in the country, that's a 1000 mega watt nominal station, so you have geothermal in the future as hoped in the strategy, that's almost as big as Huntly, and in terms of the amount of electricity generated from geothermal there is a figure in the energy strategy of some 8000 gigawat hours. And to give again some context at the moment annually is produced around 40,000 gigawat hours. So if that scenario comes to pass you are nearly going to have a situation of a quarter of our country being derived from geothermal. That's a context that we say in forms and interpretation why it's vitally important in terms of what Parliament was trying to achieve that the exemption is contained as set out in that visual and relates to geothermal and biomass.

Tipping J In absolute terms it relates to the aqua marine, the hydro etc, doesn't it? In relation to the use and development of non-renewable energy it relates to the top half of the top circle, am I right in thinking that?

Majurey No Sir in so far as we say the exemption is limited it's a subset of the whole, the whole is the discharge.

Tipping J But I thought this was in your favour this proposition that I am putting to you. The reason why they split it was that the stuff in the middle, the hydro etc is a reduction in absolute terms because it doesn't produce any greenhouse gas. The biomass and geothermal are a relative reduction because they produce some greenhouse gases but less than the ones in the top.

Majurey The reason I started with that proposition and I want to come to a second proposition is that, if the corollary of that approach allows a consent authority when they are faced by a Fonterra using coal, where Rodney Power Station (inaudible) share at a hearing, the consent authority says "you haven't come before us with a renewable component to the operation, why haven't you and if we are not satisfied it's going to be a negative against you".

Tipping J Well I don't think that follows. This allows you 104E to give you a tick. A relatively small or relatively large depending whether you are in the aqua marine or the blue.

Majurey The second part of my answer Sir is what you are saying matters in relation to the comparison between geothermal and biomass against hydro that's absolutely right.

Tipping J That's an absolute gain, the others are a irrelevant gain.

Majurey Correct Sir and what I am saying is that what's vitally important is what is the context for that comparison. If it's comparing the blue against the aqua marine and no adverse corollary comes the absence of the aqua marine, that is what Genesis Energy says.

Elias CJ But hang on I don't understand this, so you will have to go a bit more slowly, why isn't it a comparison, a relative comparison of the green and the blue against the red?

Majurey It's all context Ma'am.

Elias CJ Because doesn't (a), subparagraph (a) refers to an absolute term so that must be a reference to the green, it seems to me and (b) refers to the aqua green to the blue sorry and both of those really have to have as there comparata non-renewable greenhouse gas producing energy sources.

Majurey If your starting point Ma'am is when you start in front of the Consent Authority with your greenhouse gas discharge application and if you have one of the blues you can show that there is a relative saving, if you like, of greenhouse gas discharges.

Elias CJ The relativity though is to your red.

Majurey It is Ma'am. But it's the scope of that inquiry. Because what my learned friends say is that the absence of a blue in your application is a negative and you can spin it what ever way you want to say, this is a narrow consideration, there is a small valley that's going to take care of it. But if there is a negative by the absence of an aqua marine then that undoes the intention of Parliament as to what that exemption is about. If the comparison is by a blue component to the application verses the red or the aqua marine that's fine. It's at worst a neutral as per that visual. Greenpeace would say for instance on this example that the biomass is a tick, I think I am right in understanding that. They would say the gas is a cross and we say that is not what Parliaments trying to do. It's a lead up but not a lead down.

Tipping J But they can give you a tick but they can't give you a cross.

Majurey Correct Sir.

Tipping J It's as simple as that.

Majurey It's as simple as that. So when the word effect is used in s 104E in terms of the exemption, sorry Sir, when the term effect is used in the prohibition component of 104E, the reference is to not having regard to negative effects. It can only ever be a tick if you fall within the exemption. And that may sound counter-intuitive in terms of how the RMA works but remembering the context and as set out in the purpose, Parliament was trying to take something away as part of an inquiry by a decision-maker and that's clearly set out in s 3. It was to require local authorities not to consider the effects on climate change or discharges of greenhouse gases. The prohibition does that and the exemption sets out the perimeters by which that inquiry can do something slightly different to the prohibition.

Tipping J The reason I felt that this was relatively straightforward on it's terms is the focus on the word reduction. A reduction is a tick, a non-reduction isn't a cross.

Majurey Correct Sir. My respective submissions say that's what Parliament intend.

Elias CJ But we are not really talking about ticks and crosses we are talking about the ability to have regard to these effects.

Majurey Ma'am we are talking about ticks and crosses, or neutrals, because when the evaluation is undertaken by the consent authority on Rodney or Fonterra they are either going to use this approach in terms of greenhouse

gases charges of ticks if there are ticks or neutrals or they are going to have a cross and the necessary corollary of my learned friends argument is that he wants the ability for a consent authority to have a cross, to give a cross against the absence of renewable energy in the aqua marine. The evaluation by consent authorities has a purpose, it's to in the final analysis by reference to Part 2 when you go back to the application, what are the positives, what are the negatives and where as I as a consent authority find the balance to be. That's how thermal cases work, that's how wind farm cases work.

Tipping J Having regard to something presumably means having regard to it in a way where you say that's good, that's bad, or that doesn't count either way. I don't see you could have any other purpose in having regard to.

Majurey And after the adjournment I will try and attempt to address my learned friend so far as this apparently narrow consideration, how narrow was it and what does it mean when an evaluation is taken by consent authority on a Rodney Power Station or a Fonterra energy plant.

Elias CJ Alright we will take the lunch adjournment now. Thank you.

Court adjourned until 2.15.

Majurey Two quick points I want to come back to on the discussion that occurred before lunchtime. The first is in relation to my submission so far as the absence of the word subject to Part 2 in 104E, there was the discussion I had about that in, as your Honour Chief Justice indicated a bold submission. I just want to be clear that I am perhaps being clear and not loose in how I explain that. What I am saying is that in so far as the adverse affects of greenhouse gases on climate change is concerned that's outside the scope of Part 2. For those other affects it may be relevant whether positive or negative in terms of a discharge permit application, those are at large and perhaps to give one example of why I say that's the case and using my learned friends bundle to give you reference to provisions – can I refer the court to page 13 of the large numbers in the bundle, that sets out s 104 on the right column and that's in Tab 1 of the Greenpeace Bundle. 104(1)(a) makes it mandatory to have regard to any actual and potential effects on the environment of allowing the activity. So if that provision, sorry Sir do you have that.

McGrath J Not quite – page 14.

Majurey Page 13. So my point there is that 104 is 104(1)(a) is addressing all effects, positive and negative, whatever the application. So there is a real reason for having 104E stand separate from 104(1)(a) for the clear reason and so far as what Parliament is mandating in the inquiry on the effects of

greenhouse gases and climate change. And going upstream as it were, can I refer the Court to page 5 of the Bundle, large numbers and on the left hand side there is the heading Part 2 Purpose and principles that was referred to before and again part of a general inquiry for applications is s 5(2)(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment. So again the usual position with applications is to have that focus on effects and so the specific reference to those effects from greenhouse gases on climate change stand apart from the general inquiry on to effects whatever they might be. Other than that Part 2 operates in the usual way. If that weren't the case, if 104(1)(a) were operating and s 5(2)(c) were operating on the sort of application that's in the red part of the circle then you have got a real conflict in terms of trying to give effect to what Parliament has intended.

Elias CJ Well does this submission go further than simply saying that you have got a specific provision which prevails over a general.

Majurey Yes Ma'am.

Elias CJ But it isn't to say that Part 2 is excluded because it's not express to be subject to Part 2.

Majurey It's probably a much better way to put it ma'am. Because it does invite an immediate reaction to here that might be outside of Part 2s I think occurred.

The other point I wanted to come back to you was to try and assist the Court with the examples of how 104E is working. There has been discussion from my learned friend and myself in terms of what that part of 104E(b) is talking about relative to the use and development and geothermal is an example of that. It's a relevant position. In terms of the absolute position there is another example that shows how the statutory scheme can work as it's being contended for by Unisys Energy and that is in relation to biomass. Biomass is not a term that's defined in the RMA or in the Amendment Act but it's generally understood to involve organic matter. If one refers to the shorter Oxford Dictionary that's the sort of theme you would be finding in there. So in terms of biomass, landfills are one example that occur in Auckland. When the gas from landfills are used for electricity generation as occurs in Auckland, in some cases, the burning of the gas from landfills are specifically methane, involves an absolute reduction in a greenhouse gas being methane. There are still other components to the discharge CO2 is one example, water is another example. So there is an example of how that part of the exception works and that fits within the scheme that we say is incorporated by the Court of Appeal's interpretation.

Elias CJ Just looking at this over lunchtime, it seems to me that it can be readily accepted the impact of the different sources of energy that you have described to us and it fits within the way in which reduction in greenhouse gases can properly be taken into account under 104E but the critical question is whether it's only if an application proposes to use one of these renewable energy sources which enables a reduction. That's the only critical issue that we have to consider and it seems to me that it requires you to read, except to the extent, that the use and development of a renewable energy enables a reduction very narrowly that you are confining it to except to the extent that the applicant proposes to use renewable energy sources which could reduce the greenhouse effects. Whereas it's perfectly capable of reading that and in a way which doesn't undercut, I think, the thrust of the general background submissions you are making to us. It's perfectly possible to read that as saying that the authority is entitled to take into account whether a renewable energy source enables a reduction in the discharge. I mean it's not specific to the application in the way that's critical to your argument. And I would be assisted if you could explain to me why, either the policy or the words of this provision in the scheme of the Act don't bear that interpretation.

Majurey It's only applications that fall within the red or the blue that are initially caught by the prohibition, that is common ground. Those are the only applications that involve the discharge of greenhouse gases. If Fonterra makes an application for a hydro scheme it's not a 15(b) application. So your starting point is the red and the blue within the circle.

Elias CJ But if somebody comes along and they have a proposal interest in red, why isn't the consent authority able to consider whether the use and development of renewable energy enables a reduction of discharge of greenhouse gases.

Majurey Because it's not part of the application Ma'am.

Elias CJ Well why do you say it has to be part of the application.

Majurey I say it has to be part because that's the starting point for the prohibition and if the proviso the exception is to fit as a subset of what the applications about then the corollary must be that it's those types of renewable applications that involve greenhouse gas discharges.

Elias CJ But it's capable of being read quite differently it's just when considering an application for a discharge permit, then it goes on to explain what the consent authority can consider.

Majurey And I go back to the scheme of the Amendment Act and especially the purpose ma'am because it's to be remembered that there is not only a 104E

there is a 7(j) and so Parliament has enabled decision makers to take account of the renewable benefits of applications that are for wind, for hydro, for solar etc. So 7(j) is the home for that.

Elias CJ But why does 7(j) preclude considering whether, there's the word development too which is odd if it's an application which the application must propose the use, why is the word development there?

Majurey Just trying to remember a similar vision provision ma'am to,

Elias CJ It's expressed very widely you can't consider the effect on climate change accept to the extent that the use and development of renewable energy enables a reduction. I mean that's it doesn't seem to be tied to the particular application.

Majurey The phrase use and development, for background Ma'am, is the same sort of phraseology that is used in s 5(2) in terms of the purpose, use, development and protection of natural and physical resources. So in my submission use and development are some elements.

Elias CJ Well you see it's also in the purpose in 3(A)(3) which you say is only concerned or is spent with s 7(j).

Majurey That's a good example Ma'am with respect. If you are applying for a wind farm you are using the wind resource and the question becomes what's development part about, in terms of wind. In my submission those are synonymous terms in terms of trying to be all embracing for the different types of activities that can be applied for – be they renewables or be they non-renewables. In my submission nothing hangs on that in the sense of how you are to interpret the parameters of s 104E. What I do say as to the inter-relationship between 7(j) and 104E, 7(j) does give life to s 3(A)(3) of the purpose, the benefits of renewables. If that's the home for renewables in the sense of hydro, wind, solar and marine related, then 104E is doing something different. And 104E is doing something differently because Parliament has said as part of it's purpose we are not allowing consent authorities to consider the effects on climate change of discharges into air of greenhouse gases. And I have addressed you on why add the exception over and above that and that's because without the exception you have an impossible tension between 7(j) and 104E for two types of renewable sources, being geothermal and biomass. That's how these things can be harmonised and reconciled.

Elias CJ Well I don't see that they can't be reconciled in any event without reading 104E. It entails accepting that it means except to the extent that the applicant proposes to use renewable energy which enables a reduction. I

cannot see that it's tied to the form of the application, this consideration on the wording of the provision and read in context.

Majurey I'm at the risk of repeating myself Ma'am in the sense it is understandable if the exception falls within the prohibition as per the coloured circles. And insofar as what is the upshot of all that, what is the point if Greenpeace can come along to the Rodney hearing and say, if this is where the Supreme Court were to decide, that I am able to address the consent authority. I am able to say they haven't included an aquamarine component of a renewable proposal in this application. And in terms of the weight you the decision-maker are entitled to place on that, that is a cross. This case ultimately comes down to, is it ticks and crosses or neutral lines and the rejoinder if you like Ma'am is, and my friend can address this in reply, that Greenpeace needs to front up to on a Rodney or a Fonterra using coal, does it want one of these boxes to have a cross next to it. If it's saying it can only ever be a neutral at worst, then we're agreed. But I don't apprehend that to be their case. And that's borne out by the Rodney submission that's been made by Greenpeace. And there are a number of crosses that they have in their submission. There are things they want the decision-maker to have a cross against. So come the time of the evaluation and the decision, the hope is, as the Greenpeace submission says, that they oppose the application in it's entirety. They want that turned down because of climate change reasons.

So unless there is something of an academic exercise about does the Rodney application, does the Fonterra coal application have a renewable component over and above an academic exercise.

Elias CJ Well it's not academic though, it's promoting a policy that is recognised by the legislation.

Majurey To get to a point of saying that the exercise, the evaluation that Greenpeace urges upon the Court is promoting a policy necessarily implies that a decision-maker can count as a cross, as a negative, the absence of Rodney having a windfarm component in it or a hydro component.

Elias CJ I would be assisted if we didn't talk in metaphors. I find all these ticks and crosses, I really am concerned with construing the meaning of this text in the light of the purpose and in the context of the statute. And I'm having trouble understanding why it's confined to the application put forward when the text doesn't really confine it to that.

Majurey And therein in my respectful submission lies the issue Ma'am. Because the text is not clear one way or the other. Yes it's open to say you can have access in the consideration in the evaluation to the absence of an aquamarine to a hydro or wind. That's what Greenpeace says the words

allow you to say and in a vacuum, within s 104E, that is available. But it's also available on the norms of statutory construction to say, if you start with a prohibition and there is an exception within it, that does reside within the scope of your starting point being the application for greenhouse gas discharges.

Elias CJ Well the prohibition is not directed at applications. The prohibition is directed at considerations.

Majurey You don't fall within the prohibition unless you are an application for greenhouse gas discharges. That's the common ground between the parties.

Elias CJ Oh I understand that. But it's not really answering the point that I'm putting to you. However, I think we've probably ground to a halt on it.

Majurey Yes Ma'am. In a related way though, in terms of what this does mean for decision-making, my learned friend has indicated that by reference to paragraph 82 of the Genesis Energy submissions, and that is a summary of the types of factors that were at large in the *Contact* case. As I apprehend it, he says, yes all of those are at the table. The floodgates aren't opened, it's not about these technical debates. He did though, as I understood it, reserve his position over (j).

Elias CJ On what?

Majurey Subparagraph (j) Ma'am. My notes record that he left open the question of whether 82(j) would be at large under the interpretation that Greenpeace advocates for. I'm obliged to my learned friend, I think he's saying that (j) is at the table too in terms of the discussion that we're having. It's related to other parts of s 7 like 7(i). So that's certainly an advance on where we've been in some of the litigation. But what I want to assist the Court in illustrating is the point that was made by His Honour Justice Tipping I think it was, and that is, the Amendment Act needs to be administratable. It needs to work. We need to avoid the situation that local Government was in prior to the Amendment Act. And again, because it's a real example, I want to use Rodney as the sort of example of how the interpretation that Greenpeace urges could occur and what that would involve.

So an application has been made to discharge greenhouse gases into the environment. It's a s 15 application. If a decision-maker is entitled under s 104E to have regard and put weight on the absence of a renewable component, be it hydro or wind, that is going to invite necessarily an inquiry that's going to be wide-ranging and is quite involved in terms of the sorts of issues that come up as I understand it.

So for example, for Rodney, in relation to hydro as one of the forms of renewable energy, if the decision-maker can say, why haven't you got that component of renewable and we'll place weight on the answer that you give, yes or no, that necessarily invites.

Elias CJ Well it's not yes or no, the question. The question doesn't invite a yes or no response. It invites an explanation that on your argument that explanation is choked off.

Majurey Yes Ma'am. That's what Parliament wanted to occur. It didn't want to have decision-makers diverted.

Elias CJ Alright, okay. I understand that that's the conclusion you say. I just need to understand why you're saying it.

Majurey Yes Ma'am. And it comes back to, and I appreciate the point you're making Ma'am, it comes back to what was the problem, the evil, the defect.

Elias CJ Well the evil was local authorities trying to decide what was going to bring about climate change from particular discharges. And I think you don't need to fight that fight.

Majurey No Ma'am.

Elias CJ It's conceded and clearly authorities can't get into that assessment.

Majurey And part of why that was an evil, if you like, is that it took decision-makers into territory that was complex and the courts especially were having real discomfort with. And what's important to appreciate or understand is what's the parameters of the result if Greenpeace are successful in persuading this Court.

And so, coming back to my submission that a consideration ultimately is going to be one form of evaluation, positive, negative or neutral in terms of the balancing exercise that goes on, if and when the decision-maker says where is the renewable component and why haven't you done that, that requires the applicant to provide evidence to address that. Because failing that, there is the real risk of a negative component of evaluation. So in Rodney, the Rodney proposal resides near to the Kokapakapa River. That potentially leaves open the ability to undertake hydro electricity. And then the question, there's a contest at.

Elias CJ It's not much of a river.

Majurey That's one example Ma'am. And so, as an applicant is wanting to do when so much is at stake, it's going to give the best case it can. So that potentially has technical arguments over is there enough gradient in that river for a head of energy, is there enough energy in that river, and for those who know it, no there's probably not. But that's the sort of evidence that needs to be lead as to show why it is in a persuasive way there isn't a hydro component. There are other effects from hydro as the Court will be aware. Many of the hydro cases are very contentious. There are recreational values, there are tangata whenua values. So that's the sort of evidence that would be at large.

Wind is another type of renewable as we know. And there is wind in Auckland. How much wind is the question. Because there are in one sense wind resources that are of a commercial quantity or a commercial viability. So there is a range as far as I can recall of about 8 to 12 metres a second, in other words strength of wind. Again, Genesis Energy, to ensure that its case is going to receive the best consideration it can, is going to call wind experts. It's going to say why there is not enough of a wind resource to have gone down that track. It has to call evidence to show what the visual effects were going to be of those various number of 120 metre tall turbines. That's why it hasn't gone to the lengths to produce that part of its programme for wind. So there's another component of technical evidence which has got nothing to do with the merits of the greenhouse gas discharge application itself. It's a side-event if you like.

Same thing for biomass. What are the effects of the transportation of organic material, the storage of wood. Is that going to have a visual effect when there are, to be somewhat evocative, mountains of wood stored on site to be available to biomass generation.

Solar, why is there not solar at Rodney? Again, what is the commercial amount of sun that's available. How many mirrors have to be on the site. What's the visual impact of that. That's the sort of technical evidence that's going to have to be lead.

Marine related. The Kaipara Harbour is nearby. Why is there not marine turbines as part of this project that lead back to the same site. What's the amount of energy in the sea that's required. How many structures do there have to be. What's the effects of those structures on fish. What's the effects on the values of tangata whenua in that marine area.

Tipping J You're saying that you're going to have to close almost every other possibility off.

Majurey Well when you're faced with a submission from Greenpeace as one example, without trying to conduct a merits hearing but to give it a reality

check, it has a number of negative allegations in it. And as an applicant wanting to do the best job it can, if that comparative evaluation is available, then the answer is yes, there is going to have to be evidence on each and every one of those things. And again none of those bear anything at all on the application itself. So in terms of administratability, that's a nightmare in my respectful submission for local authorities. It's not the same type of floodgates that the Environment Court in the *Contact* case was concerned with, but it's of a very high level. A different type of floodgates.

Elias CJ It's the sort of gate shutting though that does go on in resource management inquiries generally. People have to demonstrate that there isn't a resource, an aggregate resource for example, closer at hand. It's not a huge exercise very often. And I would have thought that in most cases it could simply be demonstrated that it's going to affect the economics of what is proposed and that that will be the end of the story.

Majurey My experience Ma'am, for what it's worth, is that economics is not a consideration that consent authorities are impressed by. They want to know what the environmental effects are. So the various wind farms that appear before the courts as they are now, there is little interest in what the economics are. They want to know the visual effects from those 120 metre turbines, how they're energy going to be addressed. Do they need to be located in the ridgelines that they are? If one reads the transcript of a windfarm hearing, as one component of the renewable comparison, those are very large exercises.

Elias CJ So to summarise your submission on this, you're saying that there is a substantial practical problem if this provision is construed to require general consideration of energy options which aren't present if it's the single system that the proponent is putting forward because then you can just focus on that.

Majurey Very much so Ma'am.

Tipping J In that context, I've been looking at s 105, the one that immediately follows 104F. And it has something in it which I'd be interested in your assistance with. It says that if the application is for a discharge permit, the consent authority must in addition to the matters in s 104(1) have regard to, and then (b), the applicant's reasons for the proposed choice.

Majurey Yes Sir.

Tipping J Now that seems to be getting at the sort of thing that the Chief Justice has been exploring with you, but separate if you like from, I don't quite know what proposed choice means, but it's separate from this 104E business.

Majurey Yes. What I can say in relation to the Rodney example, again to help assist in the understanding of that provision, what's been the case in Rodney with the assessment of environmental effects which is a necessary part of applications, that provision has been addressed by saying, in locating the, or deciding the location of the Rodney site, insofar as locating a thermal power station, regard has been had to what is the location of the grid, the 220KV. And that's been one of the considerations. In other words you need to connect your power station to the transmission grid. So that's one of the reasons it's located where it.

Tipping J Proposed choice of what.

Majurey Proposed choice of location of the application.

Tipping J Is that what it means?

Majurey Sorry, proposed choice in terms of if you go through those elements Sir, in addition to 104(1) there is the nature and discharge of the sensitivity to the environment effects, the applicant's reasons for the proposed choice. So it's locating that proposal in a way that is going to have potential effects upon it which is the discharge. So it's, in my submission, a shorthand way of saying, why are you putting your proposal there? And because that relates back to, that comes back to assisting the decision-maker as to why you're there. So in Rodney.

Tipping J It's a pretty sloppy piece of drafting isn't it.

Majurey One can say it's not the only one in this Act Sir. So the transmission grid is an example. The location of the gas pipeline is an example. The location of traffic routes. But importantly those matters are all related to the application itself. They don't involve a diversion into matters outside of that particular application.

Tipping J Is there any authority on the meaning of the words "proposed choice" in this immediate context. It's a bit of a far (inaudible) Mr Majurey I appreciate.

Majurey Yes. Sir, there is a lot of case law where it has addressed, as part of the evaluation, the reasons why a proposal is located and designed where it is. I just can't.

Tipping J Well you're assuming that it's location.

Majurey Well that's been the practice Sir in terms of what decision-makers have looked at.

Tipping J I see.

Majurey Because proposed choice is what has been proposed by the applicant.

Tipping J But it might be choice of energy source.

Majurey Well that's relevant too. Because I mentioned the location of the gas line. And Genesis Energy has proposed a gas fired power station and there are reasons why it's done that and those have been addressed in the environmental assessment as well. But importantly you need.

Tipping J But the alternatives, the reasons for the proposed choice are then followed only by alternative methods of discharge.

Majurey Yes Sir.

Tipping J Not locations of discharge or.

Majurey That's the next level of inquiry.

Tipping J Yes but it's all very very.

Majurey And again Sir, to try and assist you Sir, having dealt with the proposed choice of what you're wanting to do, what are, for a thermal power station, the possible alternative methods of discharge. Well there aren't any alternatives and so the document would say simply that. Because if you're having a gas fired power station, as night follows day there's a stack involved and there are emissions that come from it.

Tipping J Well this may be a complete diversion but just reading on in the legislation.

Elias CJ It's a good idea to read on.

Tipping J And the words "proposed choice" just leapt out at me as though, you know, what on earth is all this about. Because it could be the sort of thing the Chief Justice has been discussing with you.

Majurey It also applies to wind farms Sir. There is, as the media would tell you, a real concern in some cases of the ridge lines that wind farms are located on. And what comes into sharp focus is, well why are you on that ridge line and not lower down. And the answer is always, it is my experience with wind farms is, the best wind is on the ridge lines. So that's the sort of analysis that does on under 105.

Tipping J Okay, thank you.

Majurey Just coming back then to that submission I was making as to the sorts of inquiries that would occur, could I refer the Court to the Greenpeace submission. Again just to try and illustrate how these things work in practice and go back to the issue of administratability.

Elias CJ You're not talking about inconsiderable plants. I mean these are sort of substantial undertakings you're looking at.

Majurey Yes Ma'am.

Elias CJ In many other areas of course, I'm just thinking about your very good argument about the impracticality of closing off all the possibilities. But my recollection is that in fact that is often the sort of thing that is looked at when there are resource consents about whether a big manufacturing plant should be established in a particular site. You look at the alternatives in terms of location and it's not just driven because you're looking at the effect on the overall environment. You're not just driven by the particular application that's put up.

Majurey There is case law at the Environment Court level which I'd emphasise, and I'll use the Awhitu Wind Farm as an example which I'll talk about shortly, where the Environment Court was saying effectively the opposite Ma'am in the sense of, when an application comes before us, we are receiving evidence on it and people have made submissions on it. So the Awhitu Wind Farm on the Peninsula, a Genesis Energy proposal, there were submitters who were saying, this is the wrong place for it, you can put it somewhere else. In fact there were some sites in another region that they were focusing on. In the Awhitu Wind Farm case, where incidentally Greenpeace and Genesis Energy were on the same side so it's not always that we're on opposite sides of the pew, where the Court said a theoretical location for another wind farm which we do not have evidence on and is theoretical, we can't make a decision on. We are here to assess the merits of this proposal and it fails or wins on the merits of that proposal. So at the specialist level, that's the approach that's taken. And I can provide the site for that Ma'am.

And that's understandable because when you think through the submission process and remembering this *Discount Brands* case when applications are notified, when people have made submissions on a particular proposal, if the decision-maker is going to look at alternative sites and make decisions about those sites, then people who would have made submissions on that are disenfranchised. They haven't had the opportunity to address the pros and cons of those alternative sites.

Tipping J Well you have to draw the line somewhere don't you.

Wilson J Sure it's not a matter about making decisions on other sites, it's looking at the possible availability of other sites as a relevant consideration in considering the application before the authority.

Majurey What seems to influence RMA decision-makers Sir is, you're quite right, there's not going to be a binding decision on that other site but by inference and I think this is what troubles RMA decision-makers, is that somehow by saying this site is not good and that site's probably better, there is some basis for an expectation by someone else that they can go there with a leg up already before they even have a merits hearing. That's the sort of dynamic that's going on Sir.

Tipping J Well to make these cases manageable, you've got to have a line drawn somewhere as to how far you go in looking at alternatives and in what detail you look at alternatives. Otherwise you're going to be there for a year.

Majurey And this Court faces a difficult choice in the sense of how it could give effect to the cases that have been put to it. If the Genesis Energy case is accepted, in other words the interpretation that was reached by the Court of Appeal, there is certainty. It's known what can and can't be considered. It's been difficult to try and understand what the limits are going to be on a successful Greenpeace interpretation. Because what it invites is the Court to write in a decision effectively an interpretation of the RMA that tries to set those boundaries and to give an analogy where that can provide real difficulty and cause real difficulty for consent authorities. The cases about priority of water allocation, sorry priority of applications, the Fleet Wing cases. There is a case that I think might be coming to this Court from the Court of Appeal in the Central Plains where the courts have been foolish to write fairly detailed rules as it were as to how a regional council is going to make a decision on priority. And there's been a real outcry and this is obviously from the bar as it were, but a real outcry from consent authorities as to how are we to implement the priority rule with such an elaborate set of rules that have been imposed in terms of what comes first. And in my respectful submission, the same policy consideration applies here. How is the Court to write for cases that apply across the country, for all types of applications, be they Rodney Power Stations, be they Fonterra coal applications, be they Wholesome Cement applications which are greenhouse gas cases, a one-stop rule for all those cases without making life very difficult for consent authorities.

If it's of assistance to the Court, I can briefly point to a few of the paragraphs in the Rodney submission that give force in my submission to the dilemma that's involved here. And at the start, the top of the page, this

is the second page of that two-page submission that I handed up. There are three bullet points at the top, this comes from the standard form document from the ARC.

Elias CJ What is this?

Majurey This is the submission that had been lodged with Auckland Regional Council by Greenpeace in opposition to the Rodney application. Do you have that Ma'am?

Elias CJ Yes.

Majurey Just wanting to try and provide an example of what this all means. And here we have the, if I can say, the very competent contradictor in terms of what they are seeking for the Rodney decision. So they're opposing it in its entirety. They're saying in the second sentence of the paragraph below that, "The proposal is incompatible with sustainable management under the Resource Management Act for the following reasons. It fails to safeguard the life supporting capacity of ecosystems, in particular the life supporting capacity of the climate system. It will discourage the development of renewable electricity generation within the region and nationally. It will have significant adverse effects on the local environment." And below that, "Permitting New Zealand's greenhouse gas emissions to increase when sound scientific evidence shows New Zealand's emissions need to dramatically decrease is inconsistent with sustainable management." That is a submission that is seeking to have the consent authority in it's evaluation make.

Tipping J That must be donkey deep against the law on any view of it.

Majurey Absolutely Sir in my respectful submission. That gives force to what the implication is of the interpretation.

Tipping J And they're still trying to do this.

Majurey Yes Sir. Well this is a submission on the recently closed public submission period for the Rodney Power Station. This is the step prior to the hearing of those applications.

Elias CJ But what is the status of this. I mean they might throw it out.

Majurey Well therein lies the issue Ma'am.

Tipping J It might be a good idea if they did.

Majurey Because that's what's going to be brought to the consent authority, that's the sort of thing that Genesis Energy will be needing to deal with come the time of the merits hearing. Those are the types of, I'm sorry to keep using it Ma'am, but the crosses and the ticks but in terms of the negative findings that have been sought, those are firmly based in climate change. So I apologise if that's taking yourselves into the merits. But to try and illustrate from the party that's urging that interpretation on you, what that's going to mean at the hearing, what Genesis Energy has to face and deal with and what the consent authority has to deal with.

Would it assist the Court if I briefly address, and I'm conscious of time, briefly address the extrinsic aids in terms of the Select Committee etc. Or is that a path that's been well trod?

Elias CJ What are you relying on.

Majurey I would refer to one Ma'am. So this is the Select Committees report and Hansard.

Elias CJ You want to draw our attention to something that's not in the submissions or just reinforce?

Majurey It's in the submission but it's one that I don't think.

Elias CJ Yes of course, go ahead.

Majurey Just the one Ma'am. It's the Genesis bundle of authorities. It's tab 6. This is the second reading of the Bill. Genesis Bundle, tab 6, and large numbers 55. So page 55 is into the speech that's been given by the Hon Judith Tizard. And I want to draw the Court's attention, or note the paragraph which is the third complete paragraph. It begins, "The amendments provided by the committee are constructive and helpful." Do you have that?

Elias CJ Yes.

Majurey So before focusing on the key words, in terms of context, this is the introduction of the second reading. This is post the Select Committee, as those words indicate. And so it's with the benefit of having the amended version from the first reading. And in the last part of the final sentence, it's the third line from the bottom, the Honourable Member is saying, in reference to the amendments provided by the Committee, and clarifying that in considering the benefit of lower greenhouse gas emissions from renewable energy, consideration should be given in both the absolute and the comparative sense. So there the reference keywords of "benefits of lower greenhouse gas emissions from renewable energy," in my

submission that is clearly a reference to geothermal and biomass, because they are only lower because those are the two types involved.

So, as much as weight can be placed on a reference from the moving speech for the second reading, that seems to, at least in that speech,

Elias CJ Reading on Mr Smith…

Tipping J We were just diverted by the following helpful discussion of the principles and analysis.

Majurey Two final points if I may. The first is that my learned friend made reference to the hypothetical rule that we had provided in our submissions to give you an example of how a rule could be framed and my respectful submission is that more was made of that than is there, in the sense of there was no exhaustive provision of proposed rules or types of rules. It was one example of how that can work. So, by saying that geothermal activities or geothermal discharge could be a permitted activity, is not trying to draw comparisons with any other type of activity or where they sit in the scale of permitted through to prohibited. That is just one example of how a rule can reflect the leg-up that I have referred to of what Parliament was intending with renewables. The same could be done with a wind farm. Wind activities could be permitted activities but I have never seen one of those, for the visual effects side of things. So my response to my learned friend is that as an example, that is all it is, there is nothing that hangs on that, there are other sorts of examples, because there are other effects from geothermal activities. It could easily be a controlled activity or a restrictive discretionary. That is one type of example.

And finally, Ma'am you had asked a question about the environmental standards.

Elias CJ Did I?

Majurey I think you were trying to understand the regime for

Elias CJ Oh yes, yes.

Tipping National standards.

Majurey Sorry national standards. National standards or there colloquially called as well, environmental standards. I just want to refer to provisions, to perhaps give some context to that and you won't have these unfortunately in the bundle. But section 43, that one might be there, section 43 talks about how regulations can be prescribed for national environmental standards and what is important about standards, as the legislature

suggests, it is not policy. These things are quite tight. So if one looks at section 43(2) it gives an idea of that. It says regulations may include qualitative or quantitative standards, standards for any discharge, methods for classifying etc. So these are things that have specificity about them. The other provision to follow that through, in terms of what is the upshot of something being prescribed as a standard, I refer you to section 104(3), and that actually is in the bundle. It is at page 13 of the Greenpeace bundle. Subsection (3) says that a consent authority must not, and then at subparagraph (c) grant a resource consent contrary to and at (iii) any regulations. So, the sorts of provisions that are intended by Parliament there, are very specific matters which are not policy.

Just to give an example of one standard, because there are in existence already a number of standards, there is something with a long title called the Resource Management National Environmental Standards Relating to Certain Air Pollutants, Dioxins and Other Toxins Regulations 2004, and in clause 26 there is reference to a standard for landfill gas, and 26(2)(a) says, in terms of what is encompassed, that is designed and operated to ensure that any discharge of gas from the surface of the landfill does not exceed 5000 parts of methane per million parts of air. It is that type of specificity that occurs with standards, and there are many other examples.

Elias CJ Yes, which leaves the question that prompted this, because I had assumed that that was right, that how in relation to proposals to use non-renewable greenhouse emitting energy sources the balance that is permitted, or the consideration that is permitted in relation to you would have it geothermal energy and biomass is undertaken, because it doesn't seem a suitable consideration for prescription in regulations. So there would be an ability to balance in relation to proposals which are proposed using renewable biomass or geothermal on your submission. But there isn't any rule being run over proposals to use non-renewable energy sources.

Majurey Ma'am as I understand how these regulations would work and no doubt my learned friend the Solicitor-General can address you on that but the scheme that is sought to be put before the Supreme Court in terms of the renewables, the red and the blue if you like, lends very nicely to that approach. So, for example, a regulation can be enacted that says up to a certain number of units per geothermal to make sure that there is a limit within which the discharges can occur. Below that number, consent authorities cannot consider it. Above that number, consent authorities can consider it. Likewise with biomass.

Elias CJ No I understand that, that it will set standards which must be observed. But what I am inquiring about is the sort of comparative approach which is mandated under 104E if, on your submission, an application specifies that it will use a renewable energy source. Where is that sort of rule going to

be put over a proposal to use a non-renewable resource? That comparative assessment.

Majurey Ma'am just to get clarity, would that be of a type of the aqua-marine type renewables? Hydro-wind marine lake related solar, ie non greenhouse gas discharges.

Elias CJ Well either really, aqua blue or whatever. But

Majurey Yes, well in my submission, in terms of the approach which Greenpeace, sorry that Genesis Energy promotes, it is a case that for those renewables that don't involve greenhouse gases, this is not the mechanism that will address those.

Elias CJ Oh, but there doesn't seem to be any mechanism which entails a comparative approach, such as is required under section 104E.

Majurey Looking at the words of 104F(b), that seems to be saying that whatever the number might be in the regulation, that is the number. In other words, the consent authority is prescribed from, in making this determination, doing something that would require something less than the number or more than the number. It is again not the clearest wording but, in making its determination, must be no more or less restrictive than is necessary to implement the regulations. Again, it is difficult to deal with it in the abstract but that does make sense in terms of the standard for the types of examples that I am referring to.

Elias CJ Well that is the quantitative

Majurey That is the quantitative, of which standards are amenable to. To give an example of the true renewables, if I can call it that, I shouldn't say that, they are all renewables. But for wind and hydro, the Government has announced that it is likely by the end of June to produce a proposed national policy statement on renewable energy. That is the type of regime in the RMA to deal with the non greenhouse gas matters especially because that assists decision-makers with the application of 7(j). These standards are very quantitative in that sense Ma'am. Unless I can give any further assistance to the Court, those are my submissions.

Elias CJ Thank you Mr Majurey. Yes Mr Solicitor.

Collins Thank you very much your Honours. Just by way of very general introduction I wanted to emphasise from the outset that the Attorney-General sought leave to intervene in this case for one very specific purposes and that was to do whatever I could do to assist the Court in this statutory interpretation exercise. We don't have a partisan role to play.

We thought we had information that might assist you in your task and wished to put that before the Court.

The second general observation I wish to make was this. The amendments to the Resource Management Act which occurred in 2004 were a small part of a very wide suite of legislative and national instruments that are designed to try and give force to the Government's policies on climate change. And whilst it is very easy to focus on the potential negative aspects of the way in which section 104E has been phrased, sight must not be lost of the fact that when it comes to non renewable energy and the impacts of non renewable energy on climate change, there are a suite of other policies and other instruments, some of which are before the House at the moment, which are designed to try and address those concerns. So what I propose to do is to take you to the decisions which the policy-makers made. I then wish to take you through the Parliamentary evolution of section 104E and by implication section 70A and then finish off very briefly by reference to how it works and in particular how it works in relation to section 70A, a matter which has been touched upon already today. And of course I am happy to try and assist the Court in any way I can on any other matters.

Elias CJ Mr Solicitor I don't suggest that you deviate from the approach that you have just outlined but as you will have heard I think we are principally concerned with the text of the legislation and it might help if you were to start there rather than take us through how we got there, except where you think it necessary to illustrate the meaning.

Collins Right. Well to that extent your Honour I have listened very very carefully to the submissions that have been put forward on behalf of Genesis, in relation to the interpretation of section 104E and, with respect, I do agree with and the reason why the emphasis is upon, and the exception is only upon renewable energy and applications that only involve renewable energy is because the policy makers made a decision, which I can take you to, in December of 2002 which made a special exception for applications involving renewable energy in order to give recognition to the advantages of renewable energy and nothing else. Nothing else was in contemplation at the time that decision was made. And, in my submission, that policy decision was very very clear in the Bill as it was introduced into Parliament and there appears to be absolutely no disagreement amongst anyone on that point. And the same policy decision is reflected after the Bill was reported back from the Select Committee. And that the changes which were made between the first and second reading of the Bill do not impact upon that significant policy decision which was made in December of 2002.

McGrath J If it is clear in the first version of the Bill, does it really help for you to take us back to the policy prior to that. It just raises issues of the proprietary of our looking at that material to interpret the statute and it seems to me that you don't need it if in fact you have it clear in the first version of the Bill, and no-one seems to have doubted that it was clear in the first version of the Bill.

Collins I accept what your Honour is saying and I only wished to do so to reinforce the point, perhaps unnecessarily, over labour the point but there should be no doubt in this Court's mind that as at December 2002

Elias CJ What is that the date of?

Collins It was the date of the Cabinet decision.

Elias CJ Well I really don't think it is proper for us to go back to that. I would have thought that we need to start with the Bill, if you say that that demonstrates the policy, then you don't need to go back behind that. It is just that we are really muddling up whose word we are looking at if we go behind the Parliamentary process.

Collins I accept what your Honour is saying and I won't labour the point at all. Can I just simply place one small caveat on that acknowledgement. The documents that I was going to refer to are public documents, they are available on the Ministry for Environment website.

Elias CJ They may be, but there is an issue as to their status once Parliament has spoken Mr Solicitor which is why I think it is much safer for us to look at the Bill as introduced and what happened to it.

Collins So if we just go to the Bill as introduced. Both the language of the Bill and the explanatory note to the Bill clearly spell out two objectives. The first is clear that decisions relating, that consent authorities are not to have any power to make decisions that take into account the impacts on climate change of the emission of greenhouse gases. Having said it, I don't think I ever have to repeat it again.

Elias CJ No, I think that is accepted all round.

Collins And the second objective was to give an exception a recognition that in those instances where the application involved a renewable energy source, to the extent that those, that that application and that renewable energy source had a positive impact upon climate change, then that was a factor that local authorities, consent authorities could take into account. Now

Tipping J Of course if they couldn't, presumably there would be another perverse incentive not to strive to do it.

Collins Correct. Yes.

McGrath J That is 70A(b) of the original version that you are speaking of there.

Collins Yes I am Sir.

McGrath J Right.

Tipping J And similarly 104E(b). This is a reference to the activity involving.

Collins Yes it is. Yes indeed.

Tipping J That seems to me to be the key, at least at this point of the journey.

Collins Yes. So then one looks at what, I am sorry I didn't mean to terminate the exchange your Honour.

Tipping J No no I have finished.

Collins We then look at what happened at the Select Committee and at the Select Committee I think it is a total of five changes were made to sections 70A and 104E. And you have already been taken to those but it is worth looking at what those changes were. And an explanation for the changes is set out in the Select Committee Report back to Parliament. I am working off the Intervener's Bundle of Authorities, tab 5. I am sorry I am working off the wrong one. Tab 6. And in particular page 6 and the first full paragraph of page 7. There we have an explanation of the changes that were made between the Bill as introduce and the Bill as reported back. And the explanation that is provided by the Select Committee is that the changes which are made to get rid of some superfluous words, I am sorry your Honour Justice McGrath do you not have

McGrath J Are we looking at the Bill now.

Collins No the commentary your Honour.

McGrath J The commentary at page 7.

Collins Page 6 and the first full paragraph on page 7 your Honour.

McGrath J Thank you I am now with you.

Collins An explanation provided by the Select Committee when it reports back to Parliament is that there are a number of very minor changes that are to be made to clauses 70A and 104E. Those changes are of a cosmetic nature, I am paraphrasing what the Committee is telling Parliament.

Elias CJ Well except what really is being said is that they are being made to align with section 7(j), by removing any implication that this is a discretionary, that it makes section 7(j) discretionary, is that not what is being said there.

Collins That is one of the changes yes, and that is under that heading of "Mandatory consideration" your Honour.

Elias CJ Yes. But just in terms of some of the discussion earlier, it is important I think that it is taken back to section 7(j) and a concern not to undermine it appears section 7(j).

Collins Correct because 7(j) is putting that focus upon the promotion of renewable energy.

Elias CJ Yes.

Collins And that is what, that was the original policy decision and again to repeat exactly what everyone agrees the Bill as it was introduced achieved and the only issue before the Court is did the changes turn that policy about completely 180 degrees because that is what the argument is from Greenpeace. And taking into account the explanation that is provided by the House by the Select Committee, that is responsible for making these changes in the Bill, it is, with the greatest of respect, impossible to reach the conclusion that when the Select Committee reported back to the House it was making a 180 degree change.

Elias CJ Why do you say a 180 degree change? What is that based on, the reference to application?

Collins No, it is based upon what is meant by application, namely an application to cover both renewable and non renewable energy. That is what Greenpeace is arguing and what Genesis is arguing and with respect it is the position that the Crown agrees with, is that the application has always only intended to apply to applications for non renewable energy. That is the way it was when the Bill was introduced

Elias CJ For renewable energy.

Collins Sorry renewable energy. That is the way it was when the Bill was introduced, and the changes which were made did not turn that policy on its head.

Tipping J When they had to get rid of, because they thought this was problematical, they may have regard to, they had to recast the structure and the syntax of that set of words, and what they have done is they have re-arranged it but the point is simply this by doing that have they completely reversed, if you like, or expanded is perhaps a better word, the compass of it. And there is no suggestion in the Report that that is what they were doing.

Collins You are absolutely right your Honour and indeed if we go to the next phase and see how the second reading is presented, we have the Minister responsible saying, and again I can take you to her exact words but I am paraphrasing

Elias CJ We have just been to it.

Tipping J We have just been there.

Collins No significant change. These are just changes to clarify and I accept we can all have some issue about that.

Tipping J We had this in the holiday pay case, where they started off brilliantly and then messed it up.

Wilson J I see the Minister's words were actually "the legislation provides clarity" about what counsel [inaudible] be considering in this regard. It seems a somewhat over-optimistic assessment.

Collins Yes and of course in this environment we can joke and laugh and say well that was a very unfortunate choice of words but doesn't it really underscore the fact that when Parliament was considering this matter, they didn't think there had been some dramatic policy change between the first and second reading. They thought that what was intended when the Bill was introduced in terms of it applying that section 104E only applying to applications to renewable energy was going to continue.

Elias CJ Well where in the, sorry in the, where is there emphasis in the introduction of the Bill in its normal, in its original form, on its application to applications or to activities involving. I mean I am just wondering how significant that aspect was in the overall scheme of things, because the policy seems to have been to provide some preference for renewable resources. So that was the focus, so how, what apart from the wording of the section 70A as introduced are you relying on?

Collins If your Honour goes to the Hansard address of Mr Hodgson when he was introducing the Bill, it is in all sorts of places now, but my copy is under Interveners tab 7 I think it is. Yes under tab 7. There are five parts of this

address on page 7584 that I particularly draw to your attention, culminating in the final paragraph with the words "The second exception". Before I get to the second exception, can I just re-emphasis the language that is used by the Minister.

First in the fourth line, he emphasises that the Bill recognises the Government's preference for national co-ordination of controls on greenhouse gas emissions. At the beginning of the next paragraph, again re-emphasises the national direction rather than a regional direction. And then in the middle of the third paragraph, after the word "however", we see that the emphasis is on the Bill reflecting the fact that some discharges of greenhouse gases are best dealt with using again national mechanisms. And then that point is re-emphasised again at the end of that paragraph. And then the final paragraph on that page, it really does emphasise the second exception as it appeared in clause 104E.

Elias CJ Well it just uses the same wording. What I was really looking for is there anything that indicates any appreciation that the consideration to be given to the comparative benefits was to be driven off an application using non-renewable resources. Because when you say that there has been a 180 degree turnaround, I don't know how significant it was thought to be.

Tipping J As I read it, and this may or may not assist, as originally drafted the exception could not apply unless you were dealing with an activity involving

Elias CJ Yes no I understand that.

Wilson J It is not about that.

Tipping J Yes, and the whole point is whether that was fundamentally altered so as to bring in the non renewable.

Elias CJ Well though the point that I am raising is was it fundamental. You are suggesting it was fundamental to the whole thrust. But this simply repeats the language in there, and you can make the submission from that. But I was looking for anything additional which suggests any appreciation that councils are not going to be asked to look at the comparative effect.

Collins Sure. Well can I take your Honour then to the explanatory note of the Bill under tab 5 of the Intervener's Bundle. Can I just simply take your Honour to what I think are the key points which touch upon the point that your Honour has raised. First, on page 1, under the heading "The Bill has 3 objectives as follows", and then the first bullet point. And then the third bullet point. And then can I take your Honour

McGrath J Sorry Mr Collins, you will have to bear with me. Just where are you, you are under tab 5.

Collins We are under tab 5 yes your Honour.

McGrath J Page 1.

Collins Yes page 1. The Bill has three objectives. Now what your Honour the Chief Justice has asked me is to take you to extraneous matters that assist in this interpretation and what I propose to do is to just take you to about four or five parts of the Bill, of the explanatory note, which I think are all consistent with the interpretation which I am advancing. First, then is the broad objectives of the Bill set out in page 1. Secondly, on page 7, the explanation as to what the amendment is to achieve. And that is under the paragraph commencing "An amendment to the RMA to remove explicitly the ability of regional councils…". And then I think the perhaps convenient explanation is the whole explanation as to how these matters will come before consent authorities and the obligations which will be put upon applicants and the impacts upon emitters, and that I think is most conveniently set out in pages 9, 10 and 11, under the headings of "Industrial greenhouse gas emissions", "Source of compliance costs" and then on page 11 the "Assessment of risks associated with estimates and level of confidence that can be placed on the compliance cost assessment". All of this leads only to one conclusion, that everything was being placed upon an application, the cost upon an application, the cost to an emitter, the cost to a consent authority in assessing an application, and all of the language is directed towards the only exception being where the application involved a renewable energy source.

Now my friend really urged you not to place much emphasis at all on the explanatory note or the commentary from the Select Committee and suggested that there could be all sorts of reasons why a Bill might be reported back to the House and not to have an accurate explanation for the contents of the Bill conveyed to the House. I, with respect, would urge this Court not to be lured down that path. What it really is, is a submission which invites this Court to conclude that when a Minister provides an explanation to the House about the effects of changes that have been made to a Bill, that the Minister is misleading the House, not perhaps intentionally but unintentionally.

Wilson J It would go further than that wouldn't it? Every member of the Select Committee would be complicit in that misleading on that thesis.

Collins Yeah. I am pleased to hear your Honour say that because it was I thought a submission that I hoped would not find much attraction in this Court because it is not, with the greatest respect, appropriate to suggest that when

Parliament receives an explanation of changes that are made that the explanation is in some way misleading of the House.

Elias CJ No it may be mistaken. I mean I don't think it was suggested that it was deliberately misleading or anything like that. And you really can't take the submission as far as saying that the explanation given is determinative of the meaning. I mean there is, but we understand the point you are making.

Collins Yes, well I just wanted to counteract the suggestion that somehow an explanation might not be as full and as frank, because there might be all sorts of nefarious political machinations going on in the background that you, as my friend put it, don't worry about what the press release says just look at the words of the contract, that was his analogy. And that I think would be a very unfortunate path for this Court to walk down.

Elias CJ Although in other jurisdictions Courts of very high authority have expressed similar concerns about legislative statements being made or statements being made with the Courts as an audience. But we are way away from that sort of case here.

Collins Yes indeed. Here is at one level a very straightforward case of statutory interpretation. There have been some changes made between the first and second reading, and the Court has to focus upon what was Parliament's intention when those changes were made.

Elias CJ Yes.

Collins My respectful submission to this Court is that the intention was not to make such a dramatic change in policy between the first and second versions of the Bill.

Elias CJ What is the policy for confining, what would you say from the legislative scheme, is the policy for confining consideration of reductions in emissions to applications.

Collins Twofold, one it was thought to be manageable and two

Elias CJ Mr Majurey's point about the

Collins Precisely. And two that the adverse effects of greenhouse gas emissions on climate change from non renewable energy sources are better dealt with in other instruments and not by way of a change to the RMA.

Tipping J Well that leads me to suggest Mr Solicitor that there is I think a possible clue, not a very clear one, but a positive clue when one tries to harmonise the purpose section in this legislation, and that's 3, which talks about not

to consider the effects on climate change of discharges. That I think, by implication, means the negative effects.

Elias CJ No no because effects is defined under the RMA to include negative and positive effects.

Tipping J I know it does and that is why I said in effect I think what they are driving at there must be negative effects, because you could hardly have a positive effect from pouring lots of carbon emissions into the air. But when you come to the exception, trying to look at this as a whole, it seems to me that what they are saying is the negative effects will be controlled nationally but if there are reductions creating a positive effect they can be taken into account regionally.

Collins Yes I think that that's right.

Elias CJ Locally.

Tipping J Or locally. So the word "effect", although the Chief Justice is entirely correct, the definition is both positive, but the context must here suggest that it is the negative effects on climate change that are off-limits for the local people but what they are saying in the exception is except, in other words, they are making it clear that it is not, they are not precluding positive effects from being taken into account by the local fellows.

Collins Yes.

Tipping J That seemed to me to be the only way to harmonise the potentially diverse or conflicting language.

Collins Yes and I agree with your Honour. I wasn't going to go through the inter-relationship between the various parts of the Act because I think you have had submissions that have covered all of that. There was one matter though that I did want to address the Court on and that concerned how does Section 70A work. A challenge was put down about how to make this work consistently with section 104E. And I would suggest that it can be done in this way. Regional councils or the consent authorities can make rules to control the discharge of greenhouse gases into the air, provided it doesn't so by having regard to the effects of the emissions on climate change. Now it has to be borne in mind that greenhouse gases cover a variety of gases, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride. And the Council may wish to have control over the discharge of air of such gases for a whole lot of reasons that have nothing to do with possible impact on climate change, for example odour, or environmental impacts, amenity values,

Elias CJ Or Christchurch's pollution.

Collins Yes, and so if a regional [inaudible] somebody is going something to say about everyone's home town on a case like this. So if a regional authority, I mean a consent authority decides to control emissions for such purposes it can't for example make it more difficult to obtain resource consent because of the added factor of the effects on climate change. It can only provide the appropriate control for the RMA concerns by seeking to deal with it. If, however, when making the rule the council provides a positive incentive for renewable energy on the basis that that reduces negative impacts on climate, in absolute or relative terms, then such a rule is to be made under section 70A. And the effects on the environment are able to be considered under section 68(3) which means that regional authorities are to have regard to the effects on the environment of rules that are to be promulgated under, amongst other provisions, section 70A. So I think that analysis provides a way in which section 70A can be made to work and to be made complete sense of in a way which is consistent with the interpretation of section 104E, that has been proposed, that has been settled upon by the Court of Appeal and argued for by Genesis.

Now unless I can assist the Court further, that was all I was proposing to say.

Elias CJ No, thank you very much Mr Solicitor. Yes Mr Salmon.

Salmon Thank you your Honour. I will be brief. The first point is just to confirm that I am not for a moment suggesting the Select Committee was complicit in deception, merely underscoring the unreliability of something written for one purpose when everybody writing it knows that the document that matters is another one and, as your Honour the Chief Justice noted, there is a lot of good reminders and good law about the danger of incautious use of Parliamentary history and a very brief quaint passage from an old text, one danger of incautious use of Parliamentary history is the likelihood of confusing what the legislature intended to bring about with its meaning. Talking about a case in which Lord Halsbury declined to be a decision-maker in a case about interpretation because he had been involved. Real arms length stuff but the point remains there is a big difference between what someone meant and what they wrote down in the Act. And that is all I am saying about the Select Committee Report.

The only other points, your Honour raised some hypotheticals using the three circle graph, and the position as I understand reached in the Genesis submissions was, only geothermal and biomass renewable energy will ever be part of a 104E consideration. It may not be relevant to the way this goes but in my submission it is probably not right. If you want to

discharge anything, let's say you are a cement company making cement and you will discharge CO2 from the production process, which is the sort of example your Honour was giving, you will need a consent for the discharge. You might power it from hydro electricity or a co-generation plant that burns some biomass and some coal. You are in the door on section 104E and you are in the door on the exception on our interpretation regardless. Under the Genesis interpretation, you are in the door on the exception only in relation to the biomass aspect but you are producing, even if you, for example, only power your cement plant off hydro electricity, you are still producing greenhouse gases from the production process. If the form of power is hydro electricity, that would seem to be relevant in terms of the use of renewable energy. So that is just a note that there are contexts in which it must be that more than just geothermal or biomass are in the door on the exception.

The next point is just to address

Elias CJ I must say I think that that must be right, that it can't simply be, and indeed the specific provision in the section which acknowledge absolute reduction would seem to point to that.

Salmon Yes you are absolutely right your Honour. And it's

Elias CJ But it may be though I just haven't thought through Mr Majurey's point properly.

Salmon I think it is right for Mr Majurey to say at this point in science as we understand it the most likely renewable technology is to produce CO2, geothermal and biomass. It is wrong for us to assume geothermal is necessarily good because that CO2 might not be able to be captured but that clouds it, the point is there are many scenarios that we might not have in mind now that might arise. The hottest power production technology right now is mirrors concentrating light, they are being built in deserts in North America and in Morocco I believe. They run them at night with coal or gas to keep them warm. They would be within the clause. They would be something that the legislation would say was great, using solar power. But they are in the clause needing a decontaminant discharge consent, they are within the exception for the solar part, and there is just some arbitration there about how much weight might be put on the trade-off. But it would be unsafe in my submission to assume that that is all we are looking at.

Elias CJ Yes, it doesn't bear on the critical issue though for the case.

Salmon No it doesn't. I am just bearing in mind that any judgment might comment on the scope of the section and those people who do have to appear in the

specialists courts might be bound by or effectively be bound by language that appears to restrict it. The second point is just to address a point your Honour Justice Tipping noted, which was surely the only effects that can be precluded are negative effects are section 104E. Again, with respect, I am cautious about us purporting to predict science. For example, one of the greenhouse gases that can be produced from landfill, not just from biomass as I understand it, from landfill generally, is methane and it is 27 times worse than CO2. If you seek an application saying I want to burn methane produced from some non-biomass landfill, to turn it into CO2, you need a discharge consent and you are within the exception. The effect of you producing the CO2 which is the discharge you are making, you are burning a bad greenhouse gas to make a slightly less bad one, the effect of it is positive for the environment because methane which is so much worse, is no longer being released, CO2 is. So it may be that some greenhouse gas emissions are positive because they are taking worse ones out of the environment. I have put that badly but does that make sense.

Tipping J Yes it makes sense. But do you accept that in the purpose section 3(b)(ii) that the not to consider the effects on climate change of discharges into air of greenhouse gases must in context mean the negative effect?

Salmon No, with respect your Honour I think it just says don't consider the effects. It is a purpose provision, the way it is implemented is section 104E. If someone turns up and says hey I have got a great project that will burn non renewable methane on a non renewable basis therefore, and make it into CO2, it is good for the environment. That might be excluded under the Act, even though it is positive.

Tipping J But when you read the two together, I agree with you, viewed in isolation the word "effects" in the purpose section would obvious have to be regarded as capable of going both ways but in order to harmonise it, I know you are going to say I am begging the question here, but in order to try and make some, there is a risk of circulatory here. But I would have thought, in order to make some sense of this, what they are trying to do is to say "hands off the negative effects but if there is a positive effect, even if it is making a bad thing slightly less bad, you may take that into account as a plus."

Salmon I would say you should be able to, if it is making a bad thing less bad, but on my learned friend's submission we can't because making a bad thing anything is out fullstop under 104E, that is the Genesis case. And your Honour it is circular, there is no way to get on that circle. I just wanted to note that scientific

Tipping J Well I would be the last one who would be either capable of predicting science

Elias CJ No I would be the last one.

Tipping J Well the Chief Justice and I would be close competitors for that exercise. But I take your point but I just, we have got to somehow or other try and harmonise what they were trying to carve out, haven't we?

Salmon Yes

Tipping J With the primary thrust of this legislation.

Salmon But my respectful submission would be implying the word bad anywhere as

Elias CJ Bad.

Tipping J As bad.

Salmon As non renewable. It is unsafe. And I Sir don't purport to be a voice on the science of this either. I know just enough to be unreliable and dangerous I think.

Tipping J A little.

Salmon But it underscores what was not intended to be a cheap submission about the dangers of predicting too much fact that might bear on interpretation.

Tipping J Yes thank you.

Salmon The third point was just to briefly comment on the dialogue about how hard this might be for a consent authority to deal with. And my learned friend Mr Majurey spoke about that. The first point is nothing about what I have now seen to be Greenpeace's submission for the Rodney proposal seems to say we need to go off and work out whether you can dam a small stream or put in hydro or anything like that. That is not suggested in this Court that that can be done. But importantly, when talking about renewable energy alternatives and all of those things, not only under section 105(1)(b) which your Honours addressed from my learned friend and which mustn't be restricted just to location, that requires looking at why this, why this way, but also under section 7(j) any applicant will have questions that they will need to engage with about renewable energy when they are non renewable, because renewable energy's benefits are not just climate change. So when you are doing a Rodney and you are standing in front of the consent authority, there will be questions "why not something renewable because renewable also is long-term or viable" and all of those things. So that is already going to be before the consent authority, those

questions, those ostensibly difficult hypotheticals. My submission is they are short but they are in no way significantly greater because of the Greenpeace interpretation of 104E, that stuffs in anyway just in relation to

Tipping J Can I just ask you to give me a little bit more help on what you're saying about 105(1)(b). This rather bald reference to the applicant's reasons for the proposed choice. It is not for the choice, it is for the proposed choice. This really is a very puzzling phrase. Is it talking about, choice of what?

Salmon It must be the choice of the project they are seeking consent for. It could not, with respect to my learned friend, be just location, it would have to say that to mean that. It can't just be something like the type of gas.

Tipping J This is a two-edged sword for you isn't it. If it goes that wide, the point can be addressed under here, under this 105(1)(b). It doesn't have to be pressed into 104E?

Salmon It could but for the prohibition but the prohibition says that aspect of why you chose it can't be in unless it is within the exception. So why gas powered Genesis, we can ask you all sorts of questions about why except we can't talk about why these vis-à-vis climate change, unless we are within the exception. With respect your Honour, and I hadn't identified that section, it hadn't to my recollection come up in the lower Court, so this is a first. But it does seem to me to support one submission in particular, which is a lot of stuff is going to be already before these consent authorities, they are going to have to have this material there and have these debates. And thus that detracts further from the submission that it is going to be hard dealing with one further question.

And the other point your Honour in which I have been prompted to read on and I won't take you to it, just make a general observation, is Hansard. Once the speech of the moving responsible Minister ended, a bunch of Opposition MPs stood up and said more than just I believe it was Dr Nick Smith's outburst about the problems of this legislation and how expensive it was. Other speakers complained about the huge burden

Elias CJ I really don't think we want to get into this at all Mr Salmon. We rather discouraged the Solicitor-General from going into what may have gone on

Salmon And I do embrace that your Honour. As I started out saying, my submission is that none of its helps and the sentence was about to end. It shows that they saw this as being a hugely costly piece of legislation that will make life hard for councils. That's it. So it is no surprise in a sense. The final point and my last point was my learned friend's closing comments about the section 70A potential for a rule, the rule might be focused on stopping pollutants that aren't greenhouse gases, used the

Christchurch pollution or something like that. But having a positive statement about renewable energy, again I make the point that inevitably as a negative otherwise the rule, the repudiated rule, would be you cannot discharge contaminants in inner Christchurch unless they are renewable and inevitably there is that ranking. And unless your Honours have any questions that is all I have to say.

Elias CJ No, thank you. Thank you all counsel. We will reserve our decision.

Court adjourns 3:54 pm