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PROTECTION FOR ARCHAEOLOGICAL SITES AND THE NZ HPT REGISTER OF HISTORIC PLACES, HISTORIC AREAS, WAHI TAPU AND WAHI TAPU AREAS

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INTRODUCTION

The Historic Places Act 1993 integrates the protection of historic places with the general planning provisions in the Resource Management Act 1991. Many aspects of the New Zealand Historic Places Trust's operations are now mediated through Territorial and Regional Authority hearings, while any conflicts within the Historic Places Act or in Trust decisions will be settled in the Planning Tribunal. It is important that the long term development of case law on heritage matters is favourable to the aims of heritage conservation. In particular, the different processes of regulation and arbitration must be made to work together.

A question of relevance here is to what extent can the same protective measures be applied to both sub-surface archaeological sites and to the built environment? Within the Historic Places Act 1993, the impact of development on archaeological sites is managed through Sections 9 to 21. In addition, protection is available for archaeological sites, and all other categories of historic place, through the heritage order procedure of the Resource Management Act 1991 (Section 5 of the HP Act) and through the Register of Historic Places (Sections 22 to 38). New policies are required which reduce the potential for conflict between these differing approaches. The existence of various and multiple conservation measures is recognised in the Resource Management Act which directs authorities (Section 32) to select the most appropriate and effective method of achieving their objectives[1].

Both the archaeological provisions of the HP Act and the Register of Historic Places achieve protection through the regulation of development proposals. The major diference is that the consent regulations for archaeological sites apply to all sites and decision making is through the Historic Places Trust whereas the Register represents a selection of historic places and resource applications must go through territorial authority hearings. It is argued that these differences represent a positive avenue by which these two approaches can compliment each other leading to a more effective use of the legislation.

These matters will also be relevant for the protection of historic places of Maori interest and wahi tapu in particular. A short discussion of the relationship between the protection given to archaeological sites and that available for wahi

tapu appears below. However, it is not appropriate for recommendations regarding wahi tapu to be made here. A major innovation in the 1993 Act is that the Trust can now turn to the Maori Heritage Council, and through it to the Maori community, for advice and guidance on these matters. Because prehistoric archaeological sites in New Zealand are of Maori origin, they will be of interest to the Maori community even if they are not wahi tapu in any strict sense. In putting forward suggestions for the protection of archaeological sites, it has been assumed that there will be proper consultation with local communities and the Maori Heritage Council *before* action is taken regarding any particular site (Challis 1992:238).

APPROACHES TO HERITAGE PROTECTION

It is possible to distinguish two major approaches to the protection of cultural heritage sites. The two approaches are used in tandem in most countries. The first provides protection through actual *ownership* of the heritage resource. In this approach, a public agency that wishes to protect historic places does this through the laws of private property by purchasing or gaining title to the historic place. It is then managed either as a museum or as part of a reserve or national park. Covenanting, or formally contracting to protect a site on one's own property might properly be seen within this category of protection.

The second approach is through heritage and planning laws that set up *consent procedures* for heritage protection. While these laws may establish conservation standards, they also include mechanisms for gaining permission to contravene the set regulations, e.g., resource consents in the Resource Management Act 1991.

Consent mechanisms and the method of selecting historic places for protection can take a number of forms. Firstly, some countries protect a *class* of historic places, such as archaeological sites, and demand an environmental assessment before any development projects can proceed. Secondly, protection might be gained through a list or *schedule* of places. Developers can consult this list when planning a project and can either avoid the listed place or else they must apply for permission if they wish to alter or destroy it. Finally, there is heritage protection through *zoning* where zones have rules and developers have to get permission to subdivide or to use land in a manner not already provided for.

Most countries use a variety of different methods to protect archaeological sites and buildings, often with procedures being located in different pieces of legislation. Denmark protects all visible archaeological sites on both private and public lands (including a buffer zone of 100 metres around them) but combines this with a system of registration and conservation planning zones (Kristiansen 1984:27-32). In Britain, it is against the law to modify without permission any site, or monument, scheduled under the Ancient Monuments and Archaeological

Areas Act 1979. Habitable buildings receive protection through designation or listing on District plans under the Town and Country Planning Act 1971 (Saunders 1989, Wainwright 1989, Cleere 1984) or by being graded (I,II or IIb) and listed through the Historic Buildings and Monuments Commission. There are over 400,000 listed buildings in England and Wales. At the same time, the National Trust and English Heritage own or manage a considerable number of reserves and buildings and they also carry out covenanting. In the US, the National Parks Service owns many historic properties and has a network of national parks where historic monuments are managed for their long term preservation. In addition, there is protection of all heritage sites on Federal lands under the Historic Preservation Act 1980, which makes Federal development projects subject to environmental impact reporting with either amelioration or investigation the usual outcome. Furthermore, city councils and state authorities can schedule buildings as landmarks (Doheny 1992) though questions of compensation can be thorny. Similarly the Australian 'Register of the National Estate' affects only the actions of Commonwealth authorities, not those of state or local governments (which can have their own regulations) nor does it affect private owners (Flood 1979:21).

Cleere (1984:61) notes that a major problem in Britain as far as heritage protection goes is 'the lack of integration in the legislative and administrative approach to the past'.

HOW PROTECTION IS ACHIEVED THROUGH OWNERSHIP OR CONSENT PROCEDURES

Guaranteed permanent protection of any historic place is impossible. Buildings and sites are constantly being destroyed by war and acts of God such as flood, fire or earthquake. In many instances it is impossible to prevent erosion and decay.

Ownership, whether by a state or community authority or a sympathetic private owner allows *direct* conservation management to take place. Historic buildings can be refurbished and strengthened, heritage gardens can be replanted, and archaeological sites can be managed to ensure their continued survival.

Consent procedures are an example of *indirect* conservation measures. For the most part they provide no protection against decay nor even against any injury associated with the existing use of the historic place. The Heritage Order provisions of the Resource Management Act 1991 are a typical example. A heritage order prevents any subdivision, or *change* in the character, intensity, or scale of the use of the land (Section 193) or the *alteration* of any building or land by removal, demolition or excavation (Section 9). Scheduling, listing or even making an entire class of historic place subject to a consent procedure provides protection in a number of ways. First, through public participation and through encouraging owners to look after the historic place in an appropriate

way. Secondly, through encouraging territorial or other consent authorities to take the status of the historic place into account when considering development proposals. Finally by encouraging developers to avoid historic places or reduce their impact on them as a means of minimising the expense involved in making an application.

All effective conservation regimes require a level of direct intervention through the ownership of historic places. This is generally achieved by managing properties and by having as many historic places as possible in national parks or on the conservation estate. This is an effective conservation measure only if the historic places in reserves are being actively managed to ensure the long term survival of their heritage values. On the other hand, there will rarely be enough money to enable a heritage protection agency to own or manage more than a small proportion of known historic places. Consequently, consent procedures play an important role in attempting to control the impact of development on historic places without totally prohibiting change.

THE EFFECT OF THE COMMON LAW ON HERITAGE PROTECTION

There are problems with both ownership and the consent procedures approaches to heritage protection in countries that are subject to the common law. In common law regimes, as Blackstone noted, the public good is nothing more than the protection of every individual's private rights. The effectiveness of any heritage protection regime consequently lies in the interplay between government legislation and funding on the one hand and the degree to which the courts will allow any infringement of property rights on the other.

The preoccupation of the law and the courts in general is with private rights and interests in land (Barton 1976:83). Rarely will a historic place be seen as having sufficient historical significance as to over-ride the interests of the private owner. Tremaine (1992:7) also notes the emphasis on private property rights in New Zealand courts and planning tribunals. He follows Vossler in suggesting that compensation or incentives are needed before the courts will allow further infringement of property development rights.

Heritage authorities find it very difficult to use consent procedures to achieve *permanent protection* for any historic place through the outright refusal of a developer's request. The reason is that, outside of zoning, consent procedures are slanted towards giving *consent* even if conditions are attached. A total refusal may result in an appeal to the Planning Tribunal with the conclusion that the heritage authority has to buy the property, thus shifting the mode of protection from consent procedure to ownership.

Both the Resource Management Act 1991 and the Historic Places Act 1993 are examples of Acts that provide protection for historic places through hearings and consent procedures on the one hand but uphold the rights of the private land owner on the other[2]. Thus under appeal to the Planning Tribunal, heritage

authorities may be forced to purchase any property subject to a heritage order if it cannot be sold or used in a reasonable manner (RM Act 1991, Section 198). Appeals against Sections 9 to 18 of the Historic Places Act 1993 can be made on the grounds that the actions of the Historic Places Trust prevent or *restrict* the existing or reasonable *future* use of the place *for any lawful purpose*!

It is important not to become too pessimistic or legalistic here. The legal requirements of a consent procedure may provide an opportunity for a satisfactory negotiated settlement. Consent procedure regulations might be most effective if they are used in tandem with mainstreet, townscape, historic precinct and heritage landscape zones that are included in district plans. Zoning is useful because it is one of the few legislative controls on landuse that the courts are willing to apply to landowners without compensation being payable.

NEW ZEALAND'S HISTORIC PLACES LEGISLATION

The interest in New Zealand's historic places legislation is that it incorporates a number of different methods of gaining protection for historic places. This is partly the outcome of the development of legislation through successive Historic Places Acts and partly through a changing planning and resource management environment.

The initial Historic Places Act 1954 gave the Trust the power to acquire, purchase or lease any land, buildings or places for the purpose of maintaining and preserving them. Consequently, the Trust has a portfolio of buildings and places which it owns and manages, e.g., Pompallier House.

Important changes in Historic Places legislation since 1954 are the result of a debate between the Historic Places Trust, the New Zealand Archaeological Association and the general community over the most appropriate methods to protect historic places. Leaving aside the question of property ownership for the moment, the poles of this debate are: First, the *land manager's view* which argues that only *a selection* of the most important sites[3] chosen through a system of ranking or assessment should be protected either by scheduling them (protection notice or heritage order) or by listing them in management or district plans which require a consent application. The second approach could be called *the archaeological researcher's view* which contends that *all* archaeological sites, defined as a class by the presence of information recoverable by archaeological techniques, should be subject to an authority consent procedure.

The 1975 and 1980 amendments to the Historic Places Act incorporated both these approaches considering the land manager's view as being appropriate for the protection of buildings while an *authority* procedure was installed for archaeological sites[4].

The 1975 Amendment to the Historic Places Act generally followed McFadgen's (1966) ideas regarding the protection of the information in archaeological sites through a consent procedure that meant that developers could apply for an authority to modify or destroy any site provided they were willing to pay for an investigation that would save the site's information content. Furthermore, the amendment allowed archaeological sites to be listed on district plans, under the Town and Country Planning Act 1977, and to be noted on the certificate of title of the land involved.

The 1980 amendment and consolidation of the HP Act instituted a classification for buildings, the most important of which could then be protected through a protection notice or designation[5].

Buildings through section 35 of the Historic Places Act,1980 were classified into:

(a) Those buildings having such historical significance or architectural quality that their permanent preservation is regarded as essential:
(b) Those buildings which merit permanent preservation because of their very great historical significance or architectural quality:
(c) Those buildings which merit preservation because of their historical significance or architectural quality:
(d) Those buildings which merit *recording* because of their historical significance or architectural quality.

Under this scheme, buildings with a 'D' classification merited recording but not preservation. Buildings which did not merit even a 'D' were beyond the pale of consideration by the Trust or by territorial authorities (the Trust in the 17 years between 1972 and 1989 classified 4,520 buildings; 91 A's, 390 B's, 3,310 C's and 729 D's. Historic Places Legislative Review 1988:10). It is estimated that 422 classified C and D buildings and 10 B buildings have been demolished since 1980.

The classification of buildings within the Historic Places Act, 1980 set out a system where buildings are formally classified, with owners being able to object, without actually regulating a building's use. This feature has been carried into the 1993 Act where registered historic places are not directly subject to any regulation. Protection comes through the operation of the Building Act 1991 and the Local Government Official Information and Meetings Act 1987 which Councils can, if they wish, take notice of and apply regulations to historic places. The reasoning behind this seems to be two-fold. Firstly, by recognising the historical significance or architectural quality of a building, the Trust can alert the public without taking away any of the owners rights, and secondly, regulatory measures need only to be applied to a threatened historic place, i.e., one requiring consent for a change in the existing use of an individual property, not to the entire inventory. Similar thinking has also guided

the archaeologists. By protecting the information content of archaeological sites rather than an area of land, it can be argued that owners have not lost their private property rights. Also, in conserving New Zealand's 40,000 archaeological sites only those actually threatened by destruction and subject to an authority application have to be assessed. Thus, outside the classification procedures, the regulations for both buildings and archaeological sites were threat driven.

The archaeological provisions of the various Historic Places Acts were not designed to provide permanent physical protection for any site (McFadgen 1966:98) but rather they to protect the information in sites through a consent procedure that would generally require an excavation before an authority application was approved. This emphasis on saving the information in an archaeological site rather than the physical site itself meant that *salvage excavation* was the outcome of many applications. Not all conservationists and archaeologists were happy about the emphasis on salvage or rescue (the information) archaeology (Greeves 1989, Pryor 1990) and policy changes within the Historic Places Trust since the 1980s have placed greater stress on *in situ* protection. This concern was also expressed by the committee which reviewed the 1980 legislation (Historic Places Legislation Review 1988:18). It should be noted, however, that consent regulations cannot provide permanent protection for any historic place and furthermore that this is as true for registered buildings as for sites.

The major difference between the consent procedures for archaeological sites and those applicable to all other categories of historic place is that the archaeological provisions apply to *all* sites whereas registration is selective relying on a system of assessment and ranking. A number of reasons have been put forward in support of the contention that a system of site ranking is an inappropriate way to select archaeological sites covered by the authority procedures. These are i) that many sites have not yet been discovered and cannot therefore be assessed, ii) that as research aims change so will the ranking or assessment of the importance of historic places, and iii) most archaeological sites cannot be adequately assessed before they are excavated (as most of the evidence is below the ground).

A good example of the difficulties associated with the assessment of archaeological sites comes from Papahinau, adjacent to Auckland airport. Development proposals across Pukaki Creek, associated with the runway extension, showed some impact on site R11/229, recorded as a midden scatter and a ? [pit] structure, and the adjacent R11/1800, recorded as a ? terrace. It is unlikely that surface indications of a midden scatter of cockles and two *possible* structures would ever qualify for registration under a selective system. Excavations carried out by the Department of Conservation under a Historic Places Trust Authority, however, revealed an extensive settlement consisting of 14 houses or stores and 8 pits covering the entire headland at R11/229, while

the adjacent R11/1800 revealed 24 large, deep storage pits (R.Forster *pers comm.* 1994). The excavations at Papahinau have added greatly to the knowledge of prehistoric Maori settlement in South Auckland. It is likely that similar extensive settlement sites occur along this shore of the Manukau which is under considerable pressure for development.

In contrast to the consent procedures available for archaeological sites, the Historic Places Act 1980 provided little direct protection for Maori traditional sites. The fact that sites defined scientifically should be given a higher priority than places of Maori historical or spiritual significance has long been a matter for complaint (Historic Places Legislation Review 1988:33-35, Report of the Maori Delegation 1991: 3.3.5).

Given that the archaeological provisions of the Historic Places Act do not generally lead to permanent protection but have excavation and subsequent development as a frequent outcome, it is questionable if a consent procedure of this type is appropriate for traditional sites or wahi tapu. The majority of archaeological sites in New Zealand are of Maori origin. Consequently the archaeological provisions of the Act provide a *de facto* consent procedure for a proportion of the sites of Maori interest. The Maori Heritage Council can make recommendations on any authority application (Historic Places Act 1993 Sections 14 (3), 84 and 85). As noted previously, in practice it is extraordinarily difficult to use a consent procedure to permanently stop a development proposal.

Furthermore, the liberal compensation clauses of the Resource Management Act 1991 and the Historic Places Act 1993 will force heritage authorities to either withdraw the prohibition or to compulsorily acquire the property[6]. If, in the future, the Maori Heritage Council wishes to stop a development proposal for any site this can probably only be achieved through interim registration, negotiation with the owner or outright purchase.

Although archaeological sites as a class are largely defined by the presence of physical evidence indicating recoverable information, the existence of a traditional site or wahi tapu does not require any physical presence. Oral traditions or written accounts are sufficient (whether or not the evidence is made public). In this case, registration, interim registration protection and the consent procedures for wahi tapu and wahi tapu areas (Historic Places Act 1993, Sections 25, 26, 30, 32, 33, 34, 84, and 85) provide for as high a level of protection as archaeological sites with similar allowance for Maori input into the decision making process. Permanent protection for wahi tapu or archaeological sites cannot normally come from any of these procedures. It may, however, be achieved through ownership, covenants or joint management agreements between Maori organisations, Maori and other landowners, territorial authorities and government departments.

CAN THE REGISTER BE BOTH SELECTIVE AND COMPREHENSIVE?

A difficulty with most schedules is the lack of systematic and objective procedures for the nomination of monuments. This generally results in a biased and unrepresentative list that does not achieve its stated purpose despite the continued expenditure of funds (Darvill *et al.*, 1987:394). In 1981, the New Zealand Historic Places Trust placed a moratorium on the acquisition of new properties for these reasons and it can be concluded that the Trust's list of A, B, C and D buildings is similarly the result of an *ad hoc* approach.

It is possible to devise a Register that is both comprehensive in the sense that it *would eventually* include all the (definable) historic places within a country and selective in that only places which met established criteria are included. The places registered each year would then represent another step towards the comprehensive goal. The emphasis, however, must be on systematic and objective procedures. Such an approach would assume knowledge of the different types of historic place present, their relative frequency, and current management status as the basis for decision making.

However, the classification and registration approaches adopted by the Historic Places Trust to date have not been along these lines. The conventional understanding is that as it is impossible to protect all historic places only 'what is best and most important' should be preserved (Historic Places Legislation Review 1988:9)[7]. This immediately creates problems of assessement particularly for archaeological sites where there might be little or no documentary evidence available for a site, and where most of the evidence necessary to make the assessment is below the surface and might only become available after the site has been excavated.

While there might be considerable agreement amongst archaeologists about the need to register a small number of exceptional or monumental archaeological sites (the best and most important approach), difficulties appear when trying to process the many archaeological sites which are not amenable to this type of selection and assessment (Cordy 1982, see also note[4]).

RANKING HISTORIC PLACES

The crucial division in ranking systems is between those which assume that significance is an *inherent, immutable quality* and those which assume that significance is *relative*.

The measurement of the significance of a historic place in terms of an *essential, intrinsic* and *immutable* quality provides a fixed ranking of places, generally in terms of their *association* with great persons or great events and/or their architectural or aesthetic quality (Tainter and Lucas 1983:707). This is a

commonsense approach that assumes that significance is observable and recordable in much the same way as a building's dimensions. Significance can be lost or destroyed if the building is altered or moved. Such systems work well when there is a generally accepted standard against which the historic place can be measured, for example, the assessment of architectural merit in terms of architectural history and aesthetics. Ranking here attempts to separate out the unique and remarkable from the run-of-the mill. Once an agency decides that its role is to protect and conserve unique aspects of the cultural resource then it follows that conservation decisions are dependent on assessments of historical significance. Because each historic place is assumed to be unique it can only be assessed in terms of itself as a one-off procedure. Where a historic place does not qualify for ranking it is assumed that it lacks the qualities necessary for inclusion and is therefore of little or no importance.

Ranking systems based on *relative* measures assume that significance is an *assigned* value, one that is dependant on the assumptions of the person or authority ranking the site or place. In these cases, the significance of a historic place will vary as social and scientific values change, and as information about other places increases. Different authorities could end up with quite separate lists of significant historic resources for the same area. A place that is not regarded as significant at one time could well become highly ranked at another. Threatened sites might be given a high ranking irrespective of other measures.

Relative systems work when a number of different classes of historic place are involved, or where regional or district assessments are made. Accepting that all agencies will wish to protect the unique and special, a relative approach to site significance might also concern itself with protecting a representative sample of *all* historic places used at a particular time, with regional or local variations.

Cleere (1989:11) notes that, as most countries are constrained by legal, political or financial considerations from protecting all sites, some system of selection is necessary. He argues that a culturally and scientifically valid selection should consist of a *representative sample* drawn from a known totality of the national heritage.

In the Historic Places Act 1980, the classification of buildings worked on the basis that only *what is best* should be subject to a consent procedure. By contrast the archaeological provisions which made a consent procedure applicable to all sites, only required an assessment for that small number of sites under imminent threat of destruction (i.e., those for which an authority application has been made). A number of archaeologists have suggested that where archaeological sites are subject to a consent procedure it should be assumed that all sites are significant, in terms of their potential for scientific analysis, until proven otherwise. If an authority to modify a site is to be

approved without conditions then its scientific irrelevance or *unimportance* should be demonstrated (Schaafsma 1989:49, Tainter and Lucas 1983:716). Schaafsma (1989:49) notes, however, that this approach is the mirror-image of what might be appropriate for historic buildings.

The different selection and consent regulations for sites and buildings lived side by side in the 1980 Act (if not entirely happily within the organisation of the HPT itself). However, the 1993 legislation has sought to integrate the two approaches by including archaeological sites within the general category of historic places, assessing and ranking them in order to place them on the Register of historic places, historic areas, wahi tapu and wahi tapu areas. At the same time the legislation maintains the separate authority procedure for archaeological sites. The changes introduced in the 1993 legislation have brought two consent procedures and methods of site selection together. This makes it essential that policies be adopted to enable the two to complement each other. Accepting that the difficulties of assessment make it essential that the authority procedures should continue to apply to all archaeological sites, does not solve the problem of which method of assessment should be applied to select archaeological sites for the Register.

New Zealand archaeologists have been willing to rank and assess archaeological sites. Jones (1981) lists a number of different systems of assessment applied locally or overseas. In general, site assessment has been used in land management situations. Examples are sites on areas of land kept out of production in forestry projects (Coster 1979, Pierce 1982). Where sites are to be assessed against a standard it is generally accepted that scientific significance in terms of the potential of the place to answer timely and specific research questions should be the measure chosen (Schiffer and Gumerman 1977:241, Schiffer and House 1977:249-251, Jones 1981:177) though this does not avoid the problem of assessing subsurface features. Many schemes also make some allowance for other measures, such as rarity, educational or visual values. When questions of a strategy for site preservation are part of an assessment procedure, then representativeness, usually in the form of a representative sample of a known universe of archaeological sites, is added. This approach gets over the dual problems of assessing the sub-surface value of sites and of the fluid nature of contemporary research questions.

While an essentialist approach can work for a minority of recognised and highly visible archaeological sites, such an approach is inadequate when questions of scientific relevance and representativeness are considered, for these require relative assessment. As sites under a relative system are given an assigned value, it cannot be assumed that sites *not on the register* lack historic significance only that they have either not yet been considered or else they do not fit the *current* criteria.

Essentialist systems of ranking are entirely appropriate for unique historic places but, as they work through one-off assessments, they are difficult to use as the basis for any systematic programme of recording and registration. If used on their own, they inevitably produce an ad hoc collection as did the classification of buildings under the 1980 Act.

Land managers, when dealing with historic places, tend to favour highly selective assessment procedures based on essentialist criteria. The setting of management priorities, however, through the drawing together of ecological, biological, archaeological, recreational and historical values, requires them to work in relative terms. Relative systems of ranking and assessment are, in fact, the most useful and appropriate tools for land management and planning (e.g., ecosystem, land inventory or GIS approaches, see Allen 1988).

SIGNIFICANCE ASSESSMENT IN THE HISTORIC PLACES ACT

The sections in the Historic Places Act, 1993, which deal with the Register show a lack of consistency between their stated purposes, the qualities that places eligible for registration should possess, and the criteria for assigning either Category I or Category II status.

The purpose of the Register (Section 22 (2) a,b and c) is to create a document that will inform the public about historic places, notify the owners of historic places, and assist the protection of historic places under the Resource Management Act, 1991. These purposes are concerned with advocacy and heritage management issues.

Places which possess aesthetic, archaeological, architectural, cultural, historical, scientific, social, spiritual, technological or traditional significance or value, can be entered in the Register (Section 23 (1)). These qualities are largely incommensurable, they cannot be ranked or summed in any easy manner.

The criteria for ranking historic places in order to decide whether they should have Category I or Category II status quite naturally mix both essential and relative approaches to significance assessment. Thus, the various criteria (Section 23, (2)a-k) range between historical importance, representativeness, scientific or educational potential, ethnic or community associations, rarity, and associational or landscape integrity. While it might be possible to rank historic places within any of these categories, they are again difficult to compare.

The essentialist approach to significance assessment appears in those sections which define Category I and II status (Sections 22 (3)a and 23 (2)) differentiating between Category I places, i.e., those with 'special or outstanding historical or cultural heritage significance or value' and Category II places, i.e.,

those with [somewhat less ?] 'historical or cultural heritage significance or value'. While the *division* between Category I or II is essentialist, *the criteria* for deciding whether a place should be either Category I or II span both the essential and relative approaches to significance assessment. This makes actual ranking very difficult. As noted above, architectural merit based on aesthetic criteria fits in well with an essentialist approach while places which take their value from ethnic, social or scientific considerations do not.

The ranking of historic places into Category I and II in the register leaves the status of *unregistered* historic places up in the air. Unless clear policy to the contrary is clearly set out, this will inevitably create an additional *defacto* Category III that is equivalent to the D's of the old buildings classification in the 1980 Act, i.e., those places which do not qualify for inclusion on the list which are consequently interpreted as being without 'historical significance or value'[8]. This could have disastrous consequences for the protection of archaeological sites many of which, because of their sub-surface nature, will be difficult to assess for registration.

Many of the current policies and procedures for classification and registration continue to be based on assumptions of preserving only the top-rank of historic places, as if this is an uncomplicated task. Historical importance and value are relative measures, which if unconsciously applied, will inevitably lead to cultural or class biases in the Register and a loss of usefulness and credibility.

The question that arises is 'how can the conservation measures in the 1993 Historic Places Act be used to achieve the best outcome?' Firstly, as eligibilty for registration (Section 23) does not depend on the *degree* or *amount* of the historical, ethnic, educational or scientific importance, any place with these qualities can qualify. The Register should be a *comprehensive* listing. Secondly, this does not mean that any and every historic place must be included, as the Register should be the outcome of a systematic and objective programme of *selection*. Thirdly, it is necessary to go beyond the understanding that the purpose of registration and of assigning Category I or II status is to rank New Zealand's historic places in terms of their historical importance as the *sole* basis for decisions on protection. The Register is but one of a number of protection measures. An effective Register requires assessment procedures that are responsive to the needs of all sections of the community. Finally, the Register must be created and used in a manner that does not diminish the protection available for unregistered historic places and archaeological sites.

DIFFERENT CRITERIA/APPROACHES FOR ARCHAEOLOGICAL SITES?

Other legislatures have grappled with these problems. The State of Vermont (1986) criteria for listing on the State Register of Historic Places takes

note of the fact that historic and prehistoric sites have quite different levels of information available for their assessment. Archaeological sites and buildings therefore have different criteria for their inclusion on the state register.

The existence of the archaeological sections in the Historic Places Act, 1993, continuing an authority procedure for all archaeological sites whether they are registered or not, means that archaeological sites are not in the same category as other registered historic places. Parliament clearly accepts that the difficulties of accurate assessment make a separate consent procedure necessary for archaeological sites, otherwise it would have amended these sections in 1980 or 1993 when the Historic Places bills were examined in select committees.

Given that any plan to develop or damage an archaeological site requires the permission of the Historic Places Trust, what then is the purpose of placing an archaeological site on the Register? The purpose of placing an archaeological site on the Register must follow the purposes of the Register itself (Section 22 (2)) i.e., to inform the public, to notify owners, and to assist the protection of an archaeological site through the instruments provided in the Resource Management Act 1991, i.e., through national policy statements, regional and district plans, territorial authority hearings, and heritage orders.

An integrated approach would be to adopt a policy that the regulation of impacts on archaeological sites, using the Historic Places Act 1993, involves deciding which part of the Act provides the greatest degree of protection. This could be either through registering a site as a Category I historic Place (archaeological monuments or highly regarded sites), or as a Category II historic Place (those sites which the Trust has chosen to regulate through registration in order to achieve specific aims such as the mitigation of the effects of likely development or the preservation of a regional sample of known sites). *Unregistered archaeological sites* will be those sites which have either not yet been considered or which the Trust has chosen to protect through the Archaeological Sections of the Act (Sections 10-21). Such an approach would make explicit recognition of the existence of both the Register and the Archaeological Sections of the Act and would make their application consistent and complementary. Registration of archaeological sites has an important role to play in alerting both territorial authorities and developers to the existence of sites during the earliest phases of project planning.

Given that archaeological sites are protected through sections 9 to 21 of the Historic Places Act 1993, and as registration is intended to notify rather than alienate owners, there might, in some cases, be little point in registering an archaeological site against an individual private land owner's wishes (companies and institutions might be a different category). Many rural sites have survived until now through the agency of sympathetic landowners. The Kentucky

Archaeological Registry has a scheme of landowner participation in site preservation (U.S. National Park Service 1989) which aims to assist and educate landowners rather than subject them to additional regulation.

A REPRESENTATIVE SAMPLE OF ARCHAEOLOGICAL SITES AND LANDSCAPES?

At a paper presented to the Conference of New Zealand Archaeological Association held in New Plymouth in 1982, McKinlay reported that a new and selective approach to the protection of New Zealand's archaeological heritage had been adopted by the Board of the Trust (18 March 1982) stating that '..The basic goal must be the preservation of an adequate sample of New Zealand's archaeological resource so that archaeological information is not lost forever' (McKinlay 1982:1).

Consent procedures, including the assessment and ranking procedures for the Register of historic places, on their own cannot ensure the long term survival of a representative sample of archaeological sites and landscapes. The control of land-use they offer, does not lead to the active management of sites necessary to diminish the effects of natural erosion nor the damage stemming from existing use.

Regional or district assessments are the basis for an efficient approach to the goal of preserving a representative sample of archaeological sites and for deciding which archaeological sites should be registered and which should remain subject to the authority procedures of the Act. Regional assessments are necessary for heritage managers to make the appropriate choices. Regional approaches have been explored in a number of recent publications put out by the Department of Conservation (Challis 1991, Sheppard 1989) and by regional councils (Lawlor 1989, Mosen 1993). Whether or not a class or category of historic place is under specific threat would also be a factor of importance. A major concern must be the current inadequacy of the New Zealand Archaeological Association Site Record File to act as an accurate and up-to-date management data base.

A first step in any regional or district assessment must be to take into account those sites and landscapes which are currently on the Department of Conservation or regional or district council estates or in some other form of public ownership. It cannot be assumed, however, that because a historic place is on protected land that the approved existing use of the land might not be as detrimental to the survival of the site as any commercial usage. A second step is to create renewed pressure on those authorities to *actively manage* a greater proportion of the sites in their care in order to preserve their heritage and scientific values. The Historic Places Trust might have to reexamine its property acquisition policies from this point of view.

A difficulty for the Department of Conservation is that the greater proportion of its estate is on scenic mountainous land, particularly in the South Island. The majority of archaeological sites, however, are on the productive lowlands of the North Island of which only a small proportion is in reserves[9]. Increased public ownership of highly productive lowland areas is an unlikely scenario.

Apart from public ownership, the best chance for the medium term preservation of a representative sample of archaeological sites on lands that are curently in production lies within those parts of the Resource Management Act 1993 that control land use through *zoning*. This is particularly the case for historic areas or archaeological landscapes. To this end national policy statements, regional policy statements and rules, and regional heritage plans are instruments available in the Resource Management Act, 1991, which should be more actively pursued. This approach to the regulation of land use is one that should be dealt with more favourably by the courts than are refusals for consent applications, or heritage orders affecting a single property or owner. With one or two exceptions, however, regional and district councils have not yet come to terms with the fact that the new planning regime, based on an ecosystem approach, requires the avoidance and mitigation of adverse affects rather than the simple spatial separation of incompatible land uses. Regional assessments should also take inventories created by other bodies into account.

THE STATUS OF THE TRUST BEFORE THE PLANNING TRIBUNAL AND THE REGISTER AS A LIST OF LEGALLY SIGNIFICANT HISTORIC PLACES

The usefulness of setting out explicit policies regarding the status of archaeological sites on and off the Register is that these matters will eventually come before regional authority and Planning Tribunal hearings.

An authority to destroy, damage or modify an archaeological site can be declined, or approved with conditions, under sections 14, 15 and 16 of the Historic Places Act 1993. Any person directly affected by these decisions can appeal to the Planning Tribunal. Unless the Trust adopts policy that determines the relative status of registered and unregistered sites, there will be no answer to the Planning Tribunal's inevitable question 'if the site is so important as to decline an authority application why is it not registered?'.

A question likely to interest the courts is whether the Register represents the list of *all* the historic places the Trust considers worthy of protection? Such an interpretation of the Register would seriously diminish the protection available for unregistered archaeological sites and for historic places (the D's of the 1980 Act) that might be listed in other inventories. A preferable alternative is for the Trust to explicitly recognise the Register as a listing of historic places, whose *legal significance* is determined by Sections 22 to 37 of the Historic Places Act 1993. Registration here is recognised as being but one legal instrument (within

a battery of other measures) which can be used to achieve the best possible protection for a historic place. Unregistered archaeological sites, then, are those whose *legal significance* is determined by the archaeological provisions of the Act. The legal significance of other historic places will be determined by whatever statutory regulations they have been listed under.

The Historic Places Trust is the body that has been set up to identify and protect historic places. Adopting the explicit policy that the Register is but one of a number of strategies that the Trust might adopt to regulate the impact of development on a historic place would direct territorial authorities and the Planning Tribunal away from questions of historical importance and towards an examination of Trust policies and procedures as part of its overall legislative brief to 'promote the identification, protection, preservation and conservation of the historical and cultural heritage of New Zealand'.

In a discussion of legal significance Hammond (1981:60) concluded

> 'When a court of law is eventually faced with determining a question of significance, or any other archaeological issue, it will decide the question in accordance with traditional legal practice. Thus the rules as to standing will limit the possible plaintiffs and bodies able to intervene in the proceedings and the rights of the parties will be ascertained in terms of interests in land and public rights. The evidence as to a site will be determined by the rules of evidence and not the dictates of archaeological theory...As well as these problems judicial approaches to statutory interpretation tend to be narrow and literal'.

Tremaine (1992:14) suggests that too much reliance is being placed on regulatory mechanisms when the courts continue to be reluctant to find for the Trust unless there is compensation for the landowners or acquisition of the land. In any case, hearings and appeals are very expensive and time-consuming using money that could be put to better purpose. Tremaine, echoing McFadgen 1966, advocates that heritage authorities should look again at the various legislative approaches to negotiations, management agreements, covenants and property acquisition made possible through the Reserves Act 1977, Conservation Act 1987, Queen Elizabeth II National Trust Act 1977, and Section 439 of the Maori Affairs Act 1953. He (1992:14) concluded,

> 'No one approach will be appropriate in all circumstance. The main challenge therefore remains for central, regional and local government [and the HPT] to devise a range of methodologies and processes which will further advance an understanding and acceptance of heritage issues and which will protect, conserve, maintain and promote heritage for both the present and the future. Central,

regional and local government must continue to work across all fronts through: 1) the negotiation of property rights; 2) regulation; 3) advice and information; 4) economic instruments and incentives and 5) advocacy. If we are to be more effective in New Zealand, a greater lead must come from central government through national policy statements and by achieving a better integration of heritage legislation..'

CONCLUSION

There are limitations on the usefulness of consent procedure legislation in common law countries where liberal avenues for appeals and compensation apply. Consequently, the effectiveness of either the Register of historic places or the archaeological provisions of the Historic Places Act should not be overestimated. At their best, they may ameliorate the effects of development or facilitate negotiations between the different parties. The Register of historic places, historic areas, wahi tapu and wahi tapu areas, and the archaeological provisions should be considered single weapons in an armoury that also includes property ownership and management agreements. The act itself refers to additional measures available through the Resource Management Act 1991. Other agencies and other pieces of legislation are also involved in the protection of cultural heritage resources. Additional policies are required to make the different sections of the HP Act compatible with each other and with the various conservation instruments available elsewhere. In the selection and assessment of historic places for registration, it would be beneficial if the Register is seen to include both top-of-the-range monuments and a variety of other places selected in terms of the Trust's relative criteria.

A concerted effort should be made to broaden the Historic Places Trust's advocacy in four essential areas. These are, firstly, government acceptance of the need for greater financial involvement, both in terms of property acquisition and compensation for private owners, to achieve the requirements of the historic places statutes it has placed on the books[10]. Secondly, the encouragement of public authorities to actively manage the historic places in their care so as to ensure the long term survival of their intrinsic heritage values. Thirdly, the effective use of policy statements, plans, negotiations, and agreements by the Historic Places Trust and other agencies involved in heritage protection. Finally, the exploration of the ecosystem approach to zoning embodied in the Resource Management Act 1991, especially as regards historic areas, wahi tapu areas and archaeological landscapes as an approach that might be more favourably received by the courts.

If the Register and other instruments of regulation are to be effective there must be systematic and objective procedures for the nomination and selection of historic places. The most appropriate mechanism is within the context of

comprehensive regional and district assessments. The New Zealand Historic Places Trust should set the standards and methodology for historic resource inventories for the entire country as the basis for effective conservation decisions and for the integration of the conservation efforts of territorial and Maori authorities, and the public.

Notes

1. This is a revised version of a paper given at the NZAA conference, Whangarei. The ideas presented here are not original but have stemmed from discussions with and articles written by Bulmer (1989), Aidan Challis (1992), Kaye Green, Roger Green (1989) and others. Aidan Challis, Janet Davidson, Sarah McCready, Rod Clough, John Daniels, Brett Jones and Ian Smith provided comments but are not responsible for any errors of fact or judgement.

2. Perkins *et.al.,* (1993:25-6) note that conflicts between economic development and environmental protection have generally favoured the developer. They suggest that the Resource Management Act 1991, does not represent an advance on previous planning legislation.

3. As a major manager of lands, the Department of Conservation continues to press for a system of selection where 'key sites' of national significance are identified for permanent protection within their plans of management (Hosking 1987:27).

4. The 1980 Historic Places Act also contained provision for a *Register of Archaeological Sites* (Section 43). However, this Register was operated in a manner quite differently to the Register of Historic Places created by the Historic Places Act,1993 (Section 22). In order to avoid potential confusion, the 1980 Register will not be discussed in detail. It was a single list which could include any site which met the legal definition of an archaeological site and where the owner was notified (Challis 1992:230). While sites recognised as important were registered under this system, registration *did not* depend on any system of ranking or significance assessment. The most salutary thing about the 1980 Register is Bruce McFadgen's estimate that, despite the notification of owners and territorial authorities, about 50% of the registered sites in the Athenree area of the Bay of Plenty had been destroyed within 5 years. Challis (1992:238) argues that registration might thus be an ineffective site protection measure but it is one that allows monitoring of the resource and the reassessment of strategies.

5. John Daniels (*pers.comm 1994)* suggests that Protection notices were an effective conservation measure. Buildings, such as Courtville in Auckland and the Public Trust Building in Wellington, were preserved and very few notices were appealed. There have been no cases where an appeal to the Planning

Tribunal resulted in the Trust having to purchase.

6. It has been suggested (Manatu Maori 1991:8) that as Heritage Orders involve a long and costly process of litigation, Maori Authorities would be reluctant to use them to protect wahi tapu. Rennie (1993:164) observes that under the RM Act, Maori heritage management plans have to be considered by territorial authorities when setting out regional, district and coastal rules and plans. The High Court finding that the Planning Tribunal was wrong to restrict its interpretation of 'ancestral lands' in the Town and Country Planning Act 1977 to Maori Land or Maori freehold land must give hope of success for Maori objections in consent hearings (Holland. J.in the High Court, April 1st, 1987).

7. The rate at which the Historic Places Trust intends to register sites is quite low. It is proposed (NZHPT Business Plan) that 50 historic places be registered during the 1994/5 period. While this is admittedly a period of transition, registered archaeological sites in New Zealand will only represent a minute fraction of the 46,000 recorded sites. This stands poor comparison with the 10% of sites that the English Heritage Monuments Protection Plan aims for. If it is ever intended to entirely replace the present (cheap) consent procedures with Registration, then approximately 1000 sites should be registered each year, for the next five years, to achieve a credible national Register by the year 2000 (Challis *pers comm.*1994).

8. Trust District Committee members raised this as a concern during the 1987 Trust conference i.e., that places of local importance were regarded as 'unimportant' when given a C or D classification (Quirk and Thornton 1987:61).

9. Manatu Maori (1991:6) notes that only a small proportion of wahi tapu are located in National Parks or other protected areas.

10. It is a scandal that the Crown which generates statutory requirements for the identification, protection, preservation and conservation of the country's cultural heritage only funds 38% of the HPT's current annual budget. The rest comes from an annual Lottery Board Grant (39%) and from self generated funds (23%) with one-half coming from private membership subscriptions.

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