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Parliamentary Commissioner
for the Environment
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REPORT ON THE PROTECTION OF THE WIRI LAVA CAVE

SUMMARY



Office of the
PARLIAMENTARY COMMISSIONER FOR THE ENVIRONMENT
Te Kaitiaki Taiao a Te Whare Pāremata

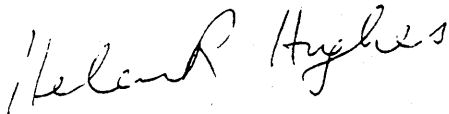
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PREFACE

The saga of the Wiri Lava Cave is a history of frustration experienced by many individuals and agencies who tried to achieve long term protection for an area of national environmental significance. The events described in this report illustrate the difficulties experienced when the Crown tries to divest itself of its property holdings when other than commercial values are involved. The rules that apply to Crown ownership of land and minerals are different from the rules that apply to private ownership. Passing assets from Crown to private ownership is a difficult and complex task and the requirements of relevant legislation are not always clear.

The New Zealand public require assurance that government will represent all interests in a fair and equitable manner. I am concerned that the onus to protect an area of national and possibly international significance has fallen on local government powers and resources. A suitable process for divesting railways land from Crown ownership is urgent in view of the possible sale of the NZ Railways Corporation.

I am confident that long term protection of the Wiri cave can be assured. The general goodwill of all parties has been clearly demonstrated in the past few months. There is now urgent action required to cement this goodwill and I look forward to hearing that a satisfactory solution has been negotiated.



Helen R Hughes
Parliamentary Commissioner for the Environment

March 1990

1.0 INTRODUCTION

1.1 Reasons for investigation

The Wiri Lava Cave, South Auckland, has been identified as a geological feature of national significance.

This investigation has been undertaken in response to public concern for the protection of the Cave. Danger to the Cave was perceived from:

- (1) the potential impact of an adjacent mining operation being carried out by, or on behalf of, the New Zealand Railways Corporation;
- (2) the circumstances under which the mining of scoria and basalt was taking place;
- (3) the implications of a proposal by the Corporation to sell the land containing the Cave to private interests.

The investigation is primarily concerned with the level of protection afforded the Cave, and the performance of public authorities in that regard. However, the Wiri situation raises some wider questions about the relationship between NZ Railways Corporation and the Crown, the responsibilities and accountability of NZ Railways Corporation, and mechanisms for the disposal of Railways land and other assets. Since these matters have environmental implications and are of considerable public interest, they are discussed in this report.

1.2 Jurisdiction of Parliamentary Commissioner for the Environment

The functions and powers of the Parliamentary Commissioner for the Environment are set out in Part I of the Environment Act 1986. Section 16(1)(c) of the Act enables the Commissioner to:

- "(i) Investigate any matter in respect of which, in the Commissioner's opinion, the environment may be or has been adversely affected, whether through natural causes or as a result of the acts or omissions of any person or body
- (ii) Advise, where necessary, the appropriate public authority and any other person or body the Commissioner thinks appropriate of the preventive measures or remedial action which the Commissioner thinks should be taken; and
- (iii) Report the results of the investigation to the House of Representatives".

'Public authority' is defined in s. 2 of the Act to mean (a) a Minister of the Crown; (b) a Government department; (c) any instrument of the Executive Government of New Zealand; (d) any local authority.

The matters to which the Commissioner must have regard in the performance of her functions are set out in s. 17 of the Act and include *inter alia*, areas, landscapes and structures of aesthetic, archaeological, cultural, historical, recreational, scenic and scientific value.

CONCLUSIONS

I have drawn the following conclusions:

- 1 Permanent protection of Wiri Lava Cave is of great importance as it has a high conservation status, being a scientific feature of national, if not international, significance.
- 2 The Cave and adjacent land and minerals are currently owned by the Crown. The land, under s.5 of the NZ Railways Corporation Act is to be "occupied and used by the Corporation for Railways Purposes". Land can be disposed of without the approval of the Minister of Railways. The rights of Railways to use and dispose of minerals are less clearly defined, although for the type of minerals around the Cave, the rights appear to be relatively unconstrained.
- 3 New Zealand Railways Corporation had entered into various agreements, with Refac Holdings Ltd, which would have resulted in the eventual transfer of land and minerals, including the Cave, to the private ownership of Refac Holdings. The Corporation recently cancelled its agreement with Refac and has entered into a new joint venture with Downers which does not result in eventual transfer of the land from the Crown. The agreement excludes the Cave area from mining and provides guarantees against accidental damage.
- 4 Although the prospects for long-term protection of Wiri Cave now look much brighter than they did several months ago, I am concerned that the situation arose where Crown land with recognised conservation values effectively passed into private ownership. This situation is in marked contrast to the circumstances of other State Owned Enterprises where land was evaluated prior to being allocated to the State Owned Enterprise and thus such a situation was less likely to arise. There is a similar anomaly relating to minerals ownership.
- 5 The advice that a mining licence was not necessary (apparently neither for Refac nor for Downers) means that the public has not had an opportunity to comment on the adequacy of environmental controls (including protection for the Wiri Cave) and the operation is not subject to the overview and control of the Mines Inspectorate, pursuant to the provisions of the Mining Act.

- 6 It is not clear whether the Crown is bound by the provisions of the Mining Act 1971, and the powers relating to the ability of those who own both land and minerals to mine land may require amendment. It appears that the Resource Management Bill may resolve these issues.
- 7 The Minister of Railways acted within his legal rights when he authorised the sale of the land to Refac Holdings but, under the circumstances outlined in this Report, he did not in my view have adequate regard for the wider social and community responsibilities of the NZ Railways Corporation as a State Owned Enterprise.
- 8 The Cave currently receives protection under the provisions of the Manukau District Scheme, the Auckland Regional Planning Scheme and under the terms of the agreement between Railways Corporation and Downers.
- 9 None of the current forms of protection is considered to provide adequate long-term protection, commensurate with the Cave's conservation status;
- 10 The Cave should ideally receive permanent legal protection as a scientific reserve under the Reserves Act 1977. There are several ways of achieving this aim but, because the need for certainty and equity and responsibility considerations, these must be negotiated by all parties.

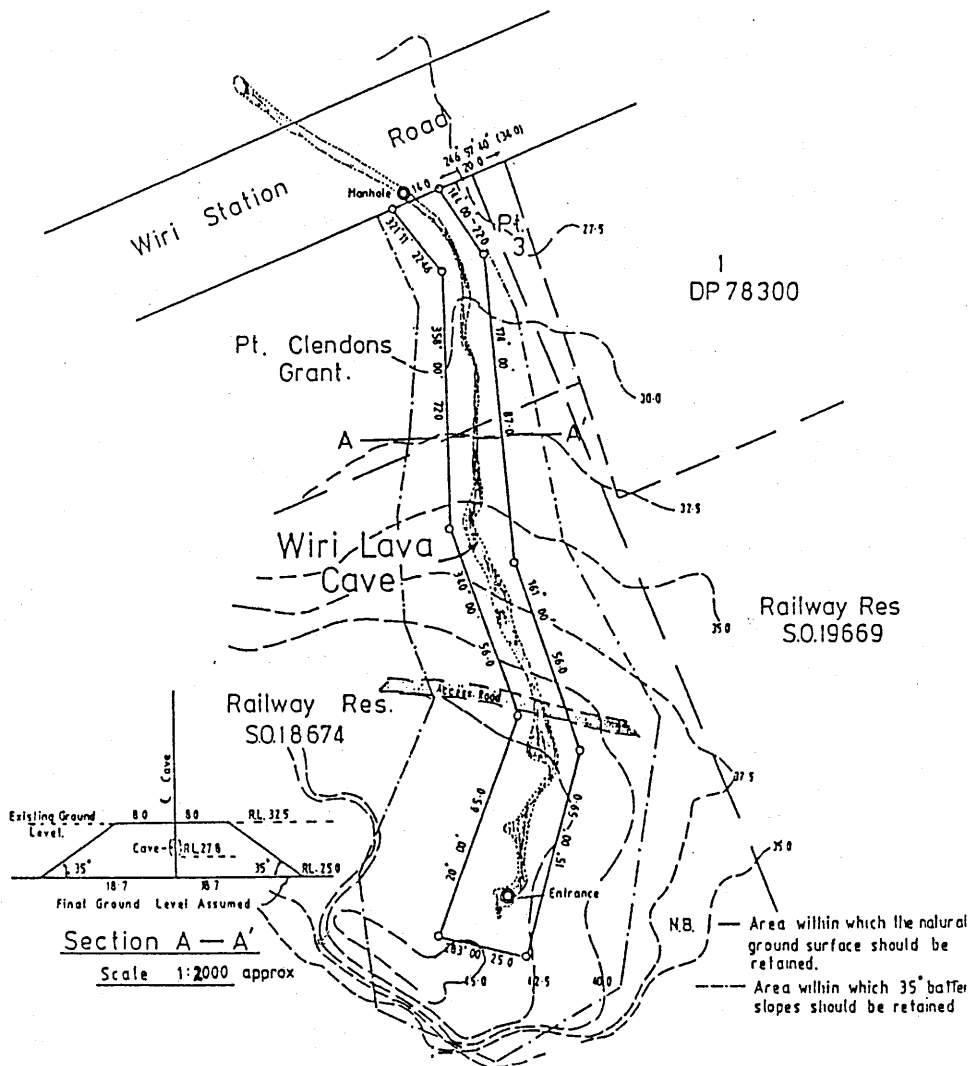
RECOMMENDATIONS

In view of the possible sale of parts or all of NZ Railways Corporation, there is some urgency to implement the following recommendations:

- 1 That the Minister for the Environment reconvene the Ministerial Committee on Land Allocation and
- (1) where Railways Corporation land is to be sold, establish a procedure whereby land with conservation values is retained by the Crown under the stewardship of the Department of Conservation, as already agreed by the Committee, and/or
 - (2) where land is to be retained by Railways Corporation in Crown ownership, determine whether legislative amendments are needed to achieve the necessary reallocation of land with conservation values, and
 - (3) confirm criteria for identifying land with conservation values, to be applied to the reallocation process.
- 2 That amendments be made to the NZ Railways Corporation Act 1981, to clarify the power of the Corporation relating to minerals: in particular, the extent to which the use or disposal of minerals must relate to "railways purposes", and the mining of minerals other than those specified in the Act.

- 3 That the Minister of Energy ensure that unresolved questions identified in the investigation relating to minerals ownership and whether or not the Crown is bound by mining legislation, are clarified in the minerals section of the Resource Management Act or amending legislation.

- 4 That the Minister of Conservation instruct his Department to determine an acceptable mechanism for the permanent protection of Wiri Lava Cave and to negotiate a means of achieving it with NZ Railways Corporation, the ARC, and Manukau City Council.



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