

REPORT ON

THE PROTECTION OF THE WIRI LAVA CAVE

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

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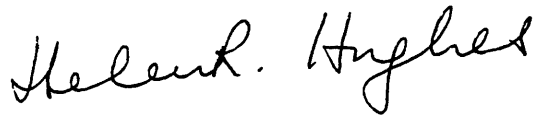
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PREFACE

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.

A handwritten signature in cursive script that reads "Helen R. Hughes".

Helen R Hughes
Parliamentary Commissioner for the Environment

March 1990

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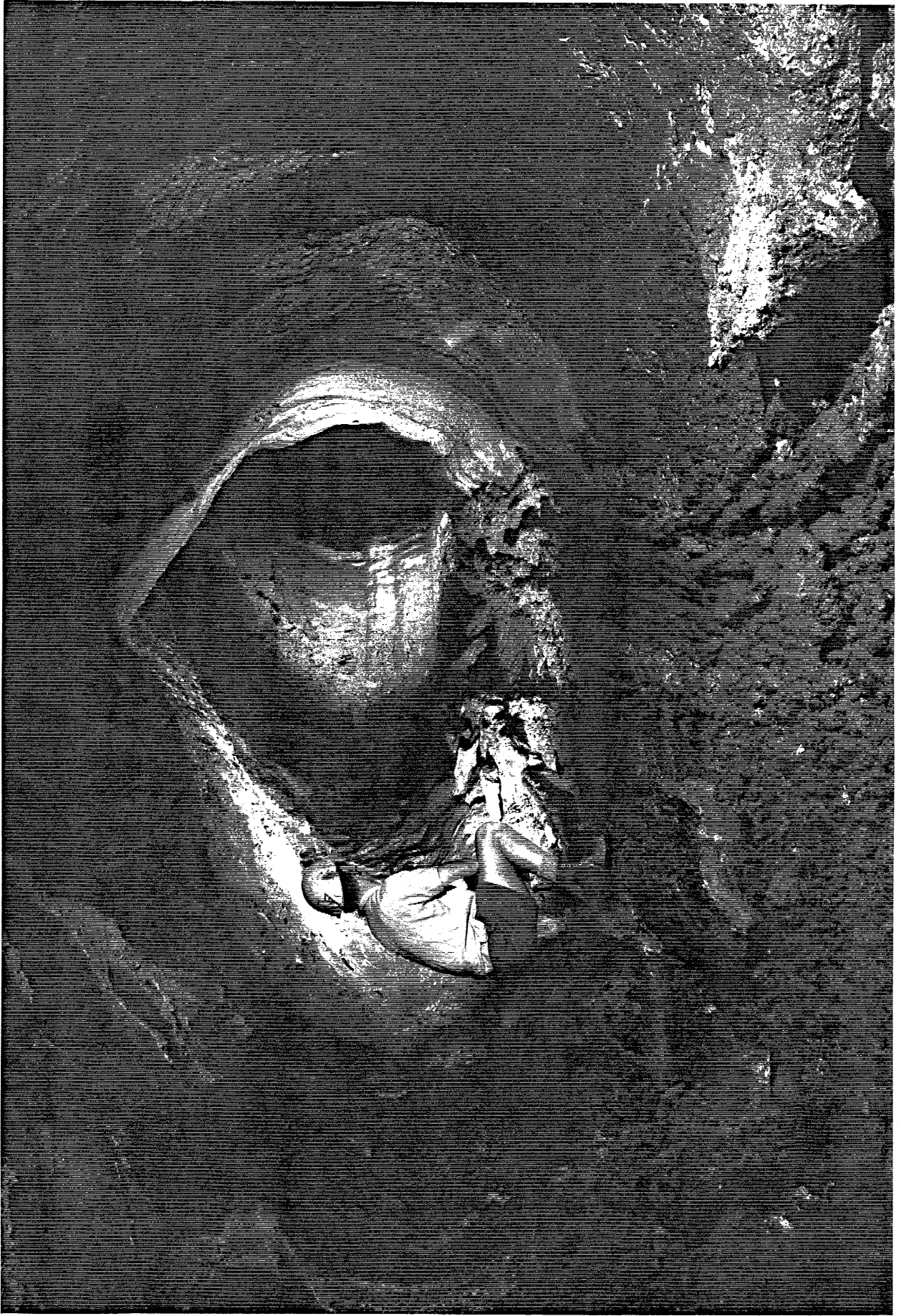
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1.0 INTRODUCTION

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.

1.3 Form of investigation

Information was obtained on an informal basis from representatives of a number of agencies including NZ Railways Corporation (Auckland and Wellington offices), the Auckland Regional Authority, Manukau City Council, Department of Conservation (Head Office, Auckland Regional Office, Hauraki District Office), the Ministry of Energy (Head Office, Wellington; Mines Inspectorate, Manukau), the Department of Survey and Land Information, the Department of Lands, the Ministry for the Environment and the NZ Geological Survey. Copies of relevant correspondence and reports were provided by these agencies.

The investigation then moved into a more formal phase with responses to specific questions being sought, in writing, from the Minister of Railways, the Department of Conservation and the Manukau City Council.

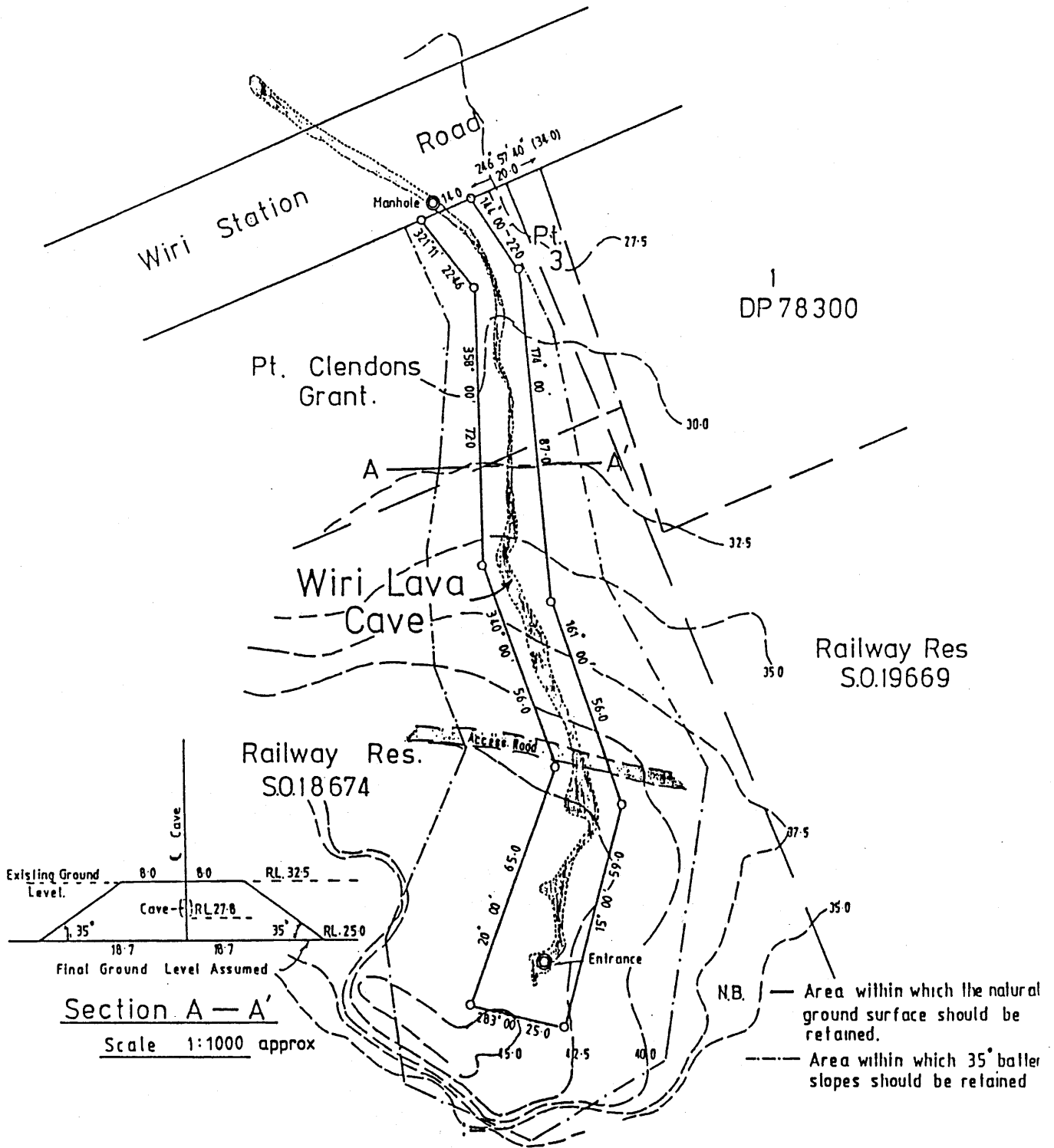
A first draft of this report was prepared and circulated for comment to many of the above agencies. NZ Railways Corporation was the only agency to formally respond in any detail.

Since the preparation of the draft report, actions by NZ Railways Corporation have resulted in a major change in circumstances which has considerably improved the situation regarding the long-term protection of the cave. However, the legislative problems which led to the initiation of the investigation have not changed and are still of concern. Also, there is still a need for continuing communication and coordination amongst bodies with environmental and administrative responsibilities relating to protection of the cave.

2.0 BACKGROUND

2.1 Description of Wiri Lava Cave

The Wiri Lava Cave is contained within the remnants of a small volcanic cone near Wiri Railway Station, about 2.5 km south west of Manukau City Centre. The scoria cone was originally referred to as Manurewa but has more recently become known as Wiri Mountain. The Cave is essentially a 280 m long tube formed by consolidation of cooling lava, through which hot lava then continued to flow downslope and out onto the lava field. The cross section of the Cave varies in size from 1.1 x 0.2 m to 7.6 x 3.6 m. The roof rock is 3-4 m thick (Fig. 1).



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PROPOSED SECOND REVIEWED DISTRICT SCHEME 1989

FIG 1

The special features and significance of the Wiri Lava Cave have been described in detail by L.O. Kermode of the NZ Geological Survey. In an article entitled *Wiri Lava Cave, Auckland - A Geological Site of National Importance*, Kermode¹ describes the significant features of Wiri Lava Cave.

- * "the Cave contains features that are now rare in New Zealand:
 - a 'gothic arch' cross-section;
 - curved, parallel 'festoon' ridges on the floor;
 - smooth (pahoehoe) surfaces on some of the flow rock;
 - a small side tube of almost circular cross-section;
 - kerbs of lava along the floor at the base of the walls.
- * the Cave contains features better displayed than in other caves:
 - partings between the floor rock and the walls;
 - a very long simple plan;
 - benches or terraces along the walls.
- * the Cave contains other features of geological interest:
 - many small lava stalactites;
 - vertical shafts formed by hot gas;
 - remelting of the walls after initial solidification;
 - a rough 'aa' (blocky lava) surface on some of the flow rock".

This paper also notes:

- * "the Cave is still accessible: most of the lava caves that have been discovered near Auckland have now been sealed by buildings or streets, filled with industrial or household rubbish, or completely quarried away.
- * the Cave is negotiable: the parts of the Cave that are scientifically interesting are large enough for comfortable walking. The somewhat restricted vertical entrance is easily negotiated by fit and agile persons."

2.2 Rights to land and minerals

A search of relevant Certificates of Title and Gazette Notices² shows that the land containing the Cave is vested in the Crown for railways purposes. The areas were taken at various times under Public Works Acts (1908, 1928). An exception is part which is road vested in the Manukau City Council³. The land appears never to have been designated for Railways Purposes in the appropriate district scheme.

Under section 5(1) of the New Zealand Railways Corporation Act 1981, rights to use and occupy real property or interests in land vested in the Crown for railways purposes were transferred to the Corporation.

The Corporation has the right, pursuant to s. 24 of this Act, to dispose of any property vested in the Crown for railway purposes, subject to the approval of the Minister of Railways.

The land is made up of scoria, or gravel, which is a 'mineral' within the definition in s.5 of the Mining Act 1971.

The Railways Corporation Act 1981 is not precise as to the vesting of mineral rights with the land as part of the "real property or interests in land vested in the Crown", with NZ Railways Corporation. However the Act does include a number of references to relevant activities such as the "operation of metal and gravel producing works" (s.23), rights to "take away earth, clay, rock, limestone, ballast, gravel, or sand" (s.35), and the right to lease out "the whole or any portion of the subsoil " (s.33). These imply that mineral rights (at least rights to non-precious and non-metallic minerals), are vested with NZ Railways Corporation, and that the Corporation in effect "owns" the minerals.

2.3 Land use

The scoria and basalt of Wiri Mountain are valuable commodities in the Auckland region. Quarrying at Wiri, to obtain gravel for road and rail construction, commenced prior to 1859.⁴

Currently, the Wiri Mountain land is zoned as a quarry in the Manukau City District Scheme. The quarry is surrounded by industrial land and the District Scheme provides for eventual rezoning of the quarry area for industrial use.

New Zealand Railways (now NZ Railways Corporation) has for many years intermittently operated a quarry at Wiri Mountain for its own purposes. In recent times, it has sold some of the product.

The Corporation has allowed public access to the Cave subject to the obtaining of a permit. Geologists and speleologists visit the Cave as the best example of its kind in New Zealand.

2.4 Conservation significance of Wiri Lava Cave

The scientific significance of the Cave was formally drawn to the attention of the Manukau City Council in 1970 by the Historic Places Trust.

The Geological Society of New Zealand has described the Wiri Cave as 'the best remaining lava cave in New Zealand and an irreplaceable part of our regional and natural heritage'.⁵

Kermode, in the paper referred to in s. 2.1 above, makes the case for the Cave being formally recognised as a geological site of national significance.

The New Zealand Geological Survey, DSIR, has stated that it "strongly supports" preservation of the Cave for the reasons given in Kermode's paper, as it is "by far the best example of a lava cave in New Zealand, with rare features."⁶

The scoria cone and surrounding lava fields were intensively gardened by Maori occupants during the 14th to 17th centuries. The Huakina Development Trust has indicated that it considers the Cave, as a last remnant of the original cone, to be *taonga* requiring protection.⁷

The operative Auckland Regional Scheme identifies the Cave as a nationally significant area.

The Department of Conservation has agreed that the Cave is of national significance, warranting permanent legal protection.^{8,9}

2.5 Chronology of events relating to this investigation

In 1970, submissions to the Manukau District Scheme Review by the Historic Places Trust, supported by the Auckland Museum, the Nature Conservation Council, the NZ Geological Society and the NZ Speleological Society resulted in the scheme recognising and protecting the Cave as a 'place of scientific interest'. The Ministry of Works objected to the protection on behalf of the Railways Department, but the objection was not upheld by Manukau City Council. At the time, the Crown was not bound by the provisions of the District Scheme and the matter was not taken to appeal.

In 1978, the Manukau City Council spent \$25,000 to divert Wiri Station Road over, rather than through, the Cave.

In 1985, the NZ Geological Survey (NZGS) urged the Railways Corporation, through the Minister of Railways, to prepare a management plan for the protection of the Cave.

In 1986, the Department of Lands and Survey, through the District Commissioner of Works, formally sought Railways Corporation's response to a proposal to acquire the land enclosing the Cave for a scientific reserve, or to covenant the land. The Corporation's response was that its long term intention was to maximise quarrying of the available resource.⁹

On 10 June 1987 and 8 July 1987, the Auckland Branch of the Geological Society of New Zealand wrote to Hon Roger Douglas MP (Manurewa) and Hon Philip Goff (then Minister for the Environment) seeking their support for the protection of the Cave. Mr Goff subsequently referred the Society's letter to the Minister of Conservation (Hon Helen Clark).

On 15 June 1987, the Auckland Branch's parent body, the Geological Society of New Zealand, wrote to the Director General of Conservation noting that the Society had been seeking permanent protection for the Cave since 1970 but with little concrete success and submitting that the value of the Cave to science and education is such that

the area involved should be transferred from Railways Corporation to the custodianship of the Department of Conservation. The letter was copied to the Minister of Conservation (Hon Helen Clark) and the Minister of Railways (Hon Richard Prebble).

On 13 July 1987, the District Commissioner of Works, Auckland convened a meeting of officials from local, regional and central government to discuss the preservation of the Cave. The meeting was attended by representatives of the Manukau City Council, Auckland Regional Authority, Geological Survey (DSIR), Department of Conservation, NZ Railways Corporation and the Ministry of Works and Development. At that meeting, the Railways Corporation representative indicated that the Corporation had recently put the quarrying rights up for tender. He tabled a tender document showing that the Cave was to be protected for a period of some three years. The meeting agreed that the Cave warranted full protection by way of reserve status but the representative of the Department of Conservation indicated that there was no ready source of money to buy the Cave. It was agreed that the Department should examine the implications of providing interim management for the Cave through a management agreement with NZ Railways Corporation.

On 23 July 1987, the Minister of Railways, Hon Richard Prebble, wrote to Hon Roger Douglas MP (Manurewa) that "Railcorp is faced with a classic conflict of interests in that it needs to exploit commercially the very valuable deposits in the quarry but at the same time the Corporation recognises the conservation aspects to protect the cave". After noting the 13 July agreement that 'short term' development of the quarry area would exclude that portion around the Cave, Mr Prebble stated "it is apparent that there is going to need to be further discussion about longer term solutions".

On 29 July 1987, as a follow-up to the 13 July meeting, the District Commissioner of Works, Auckland stated, in a memo to the ARA's regional planning committee, that ideally the cave area should have reserve status. He noted that an obvious solution would be for the Manukau City to acquire the area by way of reserve contribution (under Part II of the Local Government Act 1974), but that this contribution may be too small to cover the full cost of acquisition and that consideration will need to be given by regional and central government to assist in the acquisition. He stated he would be reporting to Head Office and recommending that some Crown funding be made available.

On 10 August 1987, the Auckland Branch of the Geological Society of New Zealand wrote to both the Minister of Railways and the Member for Manurewa noting that the Cave had been 'granted interim protection by the Railways' and that 'all parties are at present, working towards a long term solution'.

On 21 September 1987, the Minister of Conservation (Hon Helen Clark), in response to the Auckland Branch of the Geological Society of New Zealand's letter of 8 July, indicated that she believed the survival of the Cave undamaged is 'reasonably well assured', citing the existence of interim protection afforded by the tender documents and the existence of a 'degree of protection' under the Manukau District Scheme and the Auckland Regional Scheme. She also wrote:

"In the light of the Railway Corporation's sympathetic attitude, preliminary discussions have been held on formalising interim protection for the duration of the current quarrying programme, which is expected to last three years. Such protection may be achieved through a management agreement between, for example, the Railways Corporation, Manukau City Council, New Zealand Geological Survey and the Department of Conservation, as provided for under s.29 of the Conservation Act or s.38 of the Reserves Act. The parties have agreed to further discussions on this".

and

"My department, in conjunction with other parties, is also assessing means of permanent protection for the Cave. Options include purchase for reserve, or contribution as a reserve at the time of subdivision under the Local Government Act, or protection by covenant under the Reserves Act, Conservation Act or Queen Elizabeth II National Trust Act".

On 30 March 1988, the Corporation, in the name of her Majesty, entered into two separate but interlocking agreements with Refac Holdings Ltd. Under an *Agreement for Sale and Purchase*, it was agreed that Refac was to seek a mining licence over the land and a period of up to 1 April 1998 was allowed for it to seek and obtain a licence, at which time the land would be transferred to Refac. Under a *Mining Easement Agreement*, Refac was permitted (in the meantime) to enter the said land and "extract and remove" the minerals, all such minerals becoming the property of Refac.

On 12 May 1988, the Crown Law Office provided the Ministry of Energy with an opinion as to the lawfulness of this Railcorp/Refac arrangement. The conclusion was that "although the position was not as clear as it might be" the writer considered the arrangements for Refac to mine without a licence would involve a contravention of the Mining Act 1971.

On 12 May 1988, the Minister of Conservation wrote to the Minister of Railways seeking clarification of Railway Corporation's intentions.

On 16 May 1988, Kensington Swan, Barristers and Solicitors, provided legal opinion to NZ Railways Corporation relating to the 12th May advice to the Ministry of Energy from the Crown Law Office. The opinion covered various provisions of the Mining Act 1971 and disputed that a Mining licence was needed by Refac, on several grounds. This opinion was later passed to the Crown Law Office by Kensington Swan with a covering letter, dated 21st June, stating that an agency agreement (see below) had been entered into to cover the immediate provision, between NZ Railways Corporation and Refac, but disputing the need for a mining licence in any case.

On 19 May 1988, the Corporation, in the name of Her Majesty, entered into an additional *Agency Agreement* with Refac Holdings Ltd whereby the Corporation appointed Refac to undertake on its behalf (but at the cost and expense of Refac) a mining operation on the land, subject to the Corporation agreeing to sell to the

Company, for a nominal sum, all the metal and gravel extracted and subject to the two other agreements, referred to above.

On 19 May 1988, Mrs Clapham, Chairman of ARA Regional Planning Committee wrote to the Minister of Railways noting the ARA's understanding that the caves were in the process of being sold and pointing out that the Proposed Regional Planning Scheme was now "nearly operative, having been approved by Cabinet" and that the Scheme identifies the cave as a nationally significant area, with policy no. 7.28 applying:

"Areas and features identified in this Scheme as being of international, national or regional environmental significance *shall* be managed to ensure the protection of the value intended".

Mrs Clapham then went on to note that in terms of this policy, the Crown has "an obligation to ensure the protection of the cave" and that ... "the Authority requests that the Crown upholds its obligations by ensuring that a covenant or caveat to protect the caves is entered into and placed on the title *before* the area changes ownership".

On 24 May 1988, the Auckland Branch of the Geological Society of New Zealand wrote to the Minister of Railways pointing out the provisions of the Auckland Regional Planning Scheme and drawing his attention to "the obligation of the Crown to preserve and protect this area of national significance".

On 24 May 1988, the Weymouth Residents and Ratepayers Association wrote to the Minister of Railways seeking an assurance that if Railways Corporation was to 'transfer' the land containing the Cave to a private Company, the Company would be made fully aware of his (the Minister's) responsibility to protect the feature. The Association copied the letter to, and sought the support of Roger McClay MP, Opposition spokesperson for Conservation, Hon Merv Wellington, Hon Helen Clark, Hon Roger Douglas, and Manukau City Council. Mr McClay referred this letter to the Parliamentary Commissioner for the Environment.

On 26 May 1988, the Minister of Railways responded to Mrs Clapham, noting that "the Corporation has been assured by Department of Conservation that any interference with the caves would require the authority of the Manukau City Council and that that was made clear in the agreement signed by Railways and the purchaser of the quarrying rights" and that ... "it was understood that the need for such authority would rule out any danger to the caves as the local government authority was aware of the interest in the caves that was felt by its constituents and the wider public".

He also noted that more recently he had had representations from the Minister of Conservation and had asked the Railways Corporation to make a renewed effort to ensure that the integrity of the Wiri Cave is retained.

On 1 June 1988, the Minister of Railways, in response to the Minister of Conservation's letter of 12 May, stated that Refac Holdings was mining the land by agreement on behalf of the Railways Corporation and that "although the Corporation remains the owner of the land, it has entered into a legal and binding agreement with Refac

whereby, depending on certain legal rights being exercised by the Company, the land will be *transferred* to it prior to 1998 ... any attempt to cause the agreements to lapse would render the Corporation liable for substantial damages". He then set out the conditions in the agreement which related to the preservation of the Cave:

"The land is zoned as a quarry zone under the Manukau City Council Operative District Scheme and under that Scheme certain lava caves under the land are scheduled for protection as being of scientific interest.

The Company acknowledges the presence of certain lava caves as notified under the Manukau City Council Operative District Scheme as being scheduled for protection being of scientific interest and ... the Company warrants that at all times in the course of the mining operation it will exercise due care and so arrange its operation so as to avoid any damage to the caves and will comply with all lawful directions from the Manukau City Council and other persons having jurisdiction over the same".

The Minister went on to note that the intent of the provisions indicates that the Corporation had taken additional steps to ensure protection for the Cave. It has sought a much higher standard than mere compliance with the local ordinances ... obtaining a specific warranty from the Company regarding its operations.

On 7 June 1988, section one of the Auckland Regional Planning Scheme was approved by Government.

On 7 June 1988, the Huakina Development Trust wrote (identical) letters to the Ministers of Railways and Conservation expressing its concern for the protection of its taonga and requesting that ... "the Crown uphold its obligation under the Treaty of Waitangi and that in recognising our rangatiritanga, ensure that no destruction of the Wiri Caves shall occur".

On 29 June 1988, the Auckland Branch of the Geological Society of New Zealand wrote to Mr McClay MP, raising questions about the rightful ownership of the Wiri Mountain land, the land allocation process for Railcorp land and whether or not the Company mining the land needed a licence to do so. Mr McClay also referred this letter to the Parliamentary Commissioner for the Environment.

On 4 August 1988 there was a further letter to the Crown Law Office from Kensington Swan, noting that, as the Minister of Energy was still unhappy with the unlicensed Railways/Refac operation, there was a need to consider other options in the short term. The letter suggested either that an application for a licence could be made, without prejudice, prior to disagreements in legal interpretation being resolved, or, alternatively, that the Minister of Energy should exempt the land from the licensing requirement of the Mining Act, under the provisions of section 24. The letter noted that the opinion of a leading Queen's Counsel was being sought, which would particularly deal with the question of whether the Crown is bound by the provisions of the Mining Act 1971.

On 23 May 1989, the draft Report of the Parliamentary Commissioner for the Environment was sent to the Minister of Railways (Hon Stan Rodger), the Minister of Energy (Hon David Butcher), the Minister of Conservation (Hon Philip Woollaston), and the Mayor of Manukau City (Mr Barry Curtis). The covering letter requested comment on the content of the draft Report, and on steps which could be taken to secure a scientific reserve status for the Wiri Caves. The draft Report was critical of the actions of NZ Railways Corporation in apparently failing to safeguard the long-term future of the Cave, and raised a number of matters relating to the legality of the actions of Railcorp, based on Crown Counsel's advice.

On 31 May 1989, a response was received from the Minister of Conservation expressing continued concern over the lack of adequate protection, and indicating that "I believe the Minister of Railways should make the land concerned available, unencumbered by rights, for the creation of a scientific reserve under the Reserves Act or otherwise available for allocation by my Department... . I also support your view that a process should be put in place to screen the allocation of Railcorp land so that land with significant conservation values may be identified and retained by the Crown."

On 20 June 1989, a response on the draft Report was received from the Mayor of Manukau City confirming continued Council support for the protection of the Cave, and particular support for permanent legal protection as a scientific reserve under the Reserves Act 1977. The letter also indicated that, despite requests, the City had not received a quarry management plan for the area, which was a requirement of the District Scheme.

On 30 June 1989, the Minister of Energy responded, questioning a conclusion of the draft Report relating to the need for a mining licence for Railway Corporation's agent, Refac Holdings Ltd.

On 31 July 1989, the Chief Executive of NZ Railways Corporation (Mr K Hyde) responded to the draft Report. The response challenged many of the findings of the draft Report and was accompanied by two major submissions - one from the Company Secretary and the second from legal advisers, Kensington Swan.

On 5 October 1989, the Parliamentary Commissioner met with officers of Manukau City Council and discussed further options for protection of the Cave. A meeting was also held with Mr Barry, Refac Holdings.

On 16 October 1989, the Parliamentary Commissioner met with a representative of NZ Railways Corporation to discuss options for protection.

On 14 November 1989, in a letter to the Parliamentary Commissioner, the Mayor of Manukau City indicated that the Council could perhaps consider accepting the Cave as a reserve contribution on subdivision of the site.

On 23 November 1989, a letter was received from NZ Railways Corporation indicating that on 15 October 1989 the agreements with Refac had been cancelled and that the Corporation had since entered into a joint venture agreement with Downers.

Under this new agreement the land title is retained by NZ Railways Corporation and Downers has the right to extract the minerals from specified areas (which clearly exclude the Cave area). Downers specifically warrant Railways Corporation that there will be no damage or disturbance to the lava Cave or the land. In addition, a quarry plan is to be produced by Downers and agreed, within one month of finalisation of the agreement, and prior to the commencement of quarrying operations.

The letter from Railways Corporation also states that it is the Corporation's intention to subdivide the land for industrial development after the quarrying operation is completed, with the Cave area comprising a separate title which could be vested with either the Manukau City Council or the ARA as a reserve contribution.

3.0 DISCUSSION OF ISSUES

The cancellation of the agreements with Refac and the preparation of a new agreement with Downers appears to have improved the chances of the Cave's long-term protection. The land is no longer to be transferred into private ownership, and will remain the property of Railways Corporation, at least until the area is subdivided. Although final agreements have not been reached, it appears that relevant parties are working with goodwill towards a satisfactory solution. The possibilities are outlined in Section 4 of this Report.

This investigation has, however, raised a number of related issues which have not been satisfactorily resolved. As legal opinions vary widely on current interpretations, these problems will remain until there is either definitive case law, or the law itself is clarified. I consider it appropriate to bring these matters to the attention of Parliament at this stage as they have a bearing on the protection of New Zealand's natural heritage.

3.1 Disposal of Railways Property

The New Zealand Railways Corporation was set up under its own Act in 1981. Under this Act, all real property or interests in land vested in or held or occupied by the Crown for railways purposes at the time, were effectively vested in the Corporation. The Act permits the disposal of property (other than public reserves within the meaning of the Reserves Act) with the written consent of the Minister who must have due regard to the future development of the railways (s.24).

The Act allows the Corporation to "establish, maintain, and operate or otherwise arrange for the operation of metal and gravel producing works" (s.23.)

The Act also provides for grants of easement for railway land, including the right to "take away earth, clay, rock, limestone, ballast, gravel, or sand" (s.35(2)).

In the Wiri case, Railways Corporation relied on these three sections of its Act to arrange the three interlocking agreement with Refac Holdings Ltd (an agreement for sale and purchase, a mining easement agreement, and an agency agreement to mine), which effectively disposed of this Crown land, and also apparently Crown-owned

minerals, to a private company. This included an area which was of known national scientific significance, and was despite the fact that representations had been made to the Minister of Railways (who gave written consent for the disposal of the property), by the Minister of Conservation, the Auckland Regional Authority, the Geological Society of NZ, the Weymouth Residents and Ratepayers Association, and members of the public. The power given to Railways Corporation, and the Minister, to dispose of Crown property belonging to the Corporation differs markedly to the processes and limitations for disposal of Crown property belonging to Government Departments and Ministries, which is covered by the provisions of the Public Works Act 1981.

The circumstances of asset transfer to Railways Corporation, were also quite different from those relating to most other State Owned Enterprises. While Railways Corporation assets were directly and unconditionally transferred by the NZ Railways Corporation Act 1981, most other State Owned Enterprises were provided for under the State Owned Enterprises Act 1986.

This Act was amended in 1987, to provide for the establishment of terms and conditions of transfer of properties and assets, and formal transfer procedures after agreement by appropriate Ministers. The legislative provisions were complemented by procedures instituted by Government through the Cabinet State Agencies Committee, to allocate Crown land as either Conservation Estate to Department of Conservation, or to the appropriate State Owned Enterprise.

The now-defunct Ministerial Committee on Land Allocation had agreed to pursue with Railways Corporation that such a process should be instituted for its land holdings.¹⁰ Despite this agreement, I have not been able to ascertain that any steps have been taken in this direction by the responsible Ministry, the Ministry for the Environment, or any agreements reached.

Wiri Lava Cave provides an example of land which clearly is of national significance, which should thus be protected as Conservation Estate, but which was close to being disposed of into private ownership in a way which did not adequately assure its long-term protection.

It is to NZ Railway Corporation's credit that it has now cancelled the agreements it had entered into, and has now made more satisfactory arrangements. However, I consider that it would be appropriate for the Ministry for the Environment to now pursue the matter of reallocation of land, and for the Minister of Railways (as property owner under the NZ Railways Corporation Act) to agree to undertake a formal evaluation and reallocation process similar to that undertaken for other State Owned Enterprises.

Because of the lack of clarity of the provisions in the NZ Railways Corporation Act relating to minerals, and the status of the Corporations as Crown agency, any allocation procedure would need to address the question of minerals ownership, as well as other land and estate. It is noted that s.7 of the State Owned Enterprise Amendment Act 1987 specifically provided that no transfer of land from the Crown to a State Owned Enterprise would derogate from the provisions of s.6 and s.7 of the Mining Act 1971.

It is these sections of the Mining Act that reserve minerals in favour of the Crown when any alienation of land from the Crown (including that to most State Owned Enterprises) takes place. As has been noted earlier in this report, it appears that, under the provisions of the NZ Railways Act, land and minerals could have transferred from the Crown to Refac Holdings without any similar restriction or limitation.

3.2 Mining rights and right to mine

The question of the need of NZ Railways Corporation (or its agent) to obtain a mining licence was raised by the NZ Geological Society at the time the Corporation was bound in contractual agreements with Refac. The question was particularly relevant at the time, in view of public concern about the lack of control over mining activities which could have been detrimental to the Cave. Under s.69(1A) of the Mining Act 1971, the Minister of Energy, in considering an application for a licence, must have regard to "any environmental and social factors involved in the development of that resource", and under s.69(1) may attach any conditions he sees fit in granting a licence. The licensing process includes opportunities for public comment. This is in contrast to the provisions of the NZ Railways Corporation Act, which appears to empower the Railways Corporation to operate unconditionally, and with no public right of comment, a metal and gravel producing works, and to grant licences and easements for the same purpose.

The situation has changed with the new agreement with Downers which specifically excludes the Cave area from mining operations, and guarantees that both Downers and its contractors will not damage the Cave area, but the question of the need for a licence to mine remains of general relevance in terms of regulation of mineral extraction.

There was considerable uncertainty surrounding the application of the Mining Act 1971 to the Wiri Cave area. The differences of legal opinion centred particularly on whether this Act binds the Crown. There is also the question of the extent to which the NZ Railways Corporation is limited in its activities by the general purposes of its own Act.

The question of whether the Crown is bound by the provisions of the Mining Act can not be resolved in this Report. The extent to which opinions vary became clear in the legal opinions referred to in section 2.5 of this Report. Differences of opinion were sufficient for the Minister of Energy to write to the Minister of Railways in a letter dated 20 June 1988 referring to licensing of the Wiri mining operation as follows:

"... I would be most unhappy to see the Railways Corporation and the Ministry of Energy embroiled in a public argument in a Court room ..."

Leaving aside this very significant question, NZ Railways Corporation was advised by its legal advisers that it could rely on the provisions of s.41 of the Mining Act, which provides penalties for mining without authority. This section has an exclusion from penalty where the owner of the land is also the owner of the mineral, and no other mining privilege has been granted for the land. The provision was interpreted to mean that the owner of both land and minerals may mine without a licence, provided no one else already has a licence relating to the same land.

As has been noted earlier, Railways Corporation is the owner of the (Crown) land concerned; it appears that the Corporation is also the owner of the minerals in question (although the NZ Railways Corporation Act does not clearly state this). It can thus mine without a licence. Despite the importance of Wiri Lava Cave, there has been no opportunity for public involvement at any stage in the mining operations and no opportunity for the Minister of Energy to attach protection conditions to the operation of the mine.

It is noted that the Resource Management Bill, currently before the House, incorporates substantial changes relating to consents for use of Crown-owned mineral resources.

The next unresolved question was the extent to which NZ Railways Corporation could mine, could dispose of the products, or could pass its operations over to an agent to mine on its behalf, without contravening the provisions of its own Act. The land concerned was originally acquired by the Crown and remains vested in the Crown for "railways purposes". Section 5 of the Railways Corporation Act provides that such land shall be "occupied and used by the Corporation for Railways purposes.". The functions of the Corporation, stated in s.12 of its own Act, all relate to providing transport and ancillary services, albeit in a profitable manner. Many of the powers and rights given to the Corporation by the Act are specifically limited in terms of the Corporation carrying out or achieving its functions. It would thus be necessary to justify any activity in terms of its contribution towards providing a viable transport system.

Under the agreement with Refac Holdings Ltd, the connection was extremely tenuous - Refac was acting as agents, but mining and disposing of the scoria and basalt for purposes unrelated to Railways or other Crown purposes - for its own commercial benefit. The argument put forward by Railways Corporation, that its prime aim is to make a profit and therefore the agency agreement was in accord with "railways purposes"¹¹ did not, in my view, stand up to detailed scrutiny.

With the new agreement with Downers, the situation is a little different. The Corporation now appears to be relying on s.23 of its Act, which is unconstrained in terms of purposes, and which specifically allows the Corporation to "establish, maintain, and operate or otherwise arrange for the operation of metal and gravel producing works" and "enter into ... joint ventures for the supply or execution of works ... the marketing of materials, goods (etc) ... whether or not they are systems, products, by-products or manufactures of any branch of the Corporation."

The new agreement between Downers and Railways Corporation is based on a joint venture relationship; there is an agreement for profit sharing and the land will remain the property of Railways Corporation.

While the link to the "railways purposes", for which the Crown retains the land, is still tenuous, the new arrangement appears to be more in line with the specific provision of the Act than previous arrangements.

3.3 Responsibilities of State Owned Enterprises to protect Conservation Estate

The question of the responsibility of Railways Corporation, as a State Owned Enterprise, to protect Conservation Estate is one of the issues which has been present throughout the investigation.

The NZ Railways Corporation Act, s.12, sets out the functions and powers of the Corporation. As has been noted, these are expressed entirely in terms of establishing, maintaining and operating safe and efficient transport services, and other ancillary activities, while endeavouring to ensure that revenue exceeds costs, and to provide any return on capital specified by the Minister of Finance. Section 12(12) refers also to functions, powers, and duties conferred or imposed by other enactments.

As a State Owned Enterprise, NZ Railways Corporation is also bound by the provisions of the State Owned Enterprise Act 1986. Under s.4(1) of this Act, the primary objective of all State Enterprises is to operate a successful business. In achieving this, a State Enterprise is to be, amongst other things, "an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate these when able to do so".

As has been noted earlier, it is apparent that the Minister of Railways was aware of the interests of the national, regional and local community in the protection of the Cave at the time the agreement to dispose of the land and minerals to Refac was signed, and that the decision was not an easy one.

In a letter, dated 23 July 1987 to the Member for Manurewa, the Minister of Railways acknowledged that "Railcorp is faced with a classic conflict of interests in that it needs to exploit commercially the very valuable deposits in the quarry but at the same time the Corporation recognises the conservation aspects to protect the cave".

The Minister, following representations from the Minister of Conservation, asked Railways Corporation to make a 'renewed effort' to ensure that the integrity of the cave be maintained. In a letter to the Minister of Conservation on 1 June 1988, he cited clauses from the Railcorp/Refac agreement to indicate that Railcorp had obtained a 'specific warranty' from the Company with respect to its operations, aimed at avoiding any damage to the Cave.

Although the Minister sought some protection for the Cave during the mining operation, the fact remains that he sanctioned the sale of the land, thereby foregoing the opportunity to secure long term protection for the Cave, and possibly compromising public access to it.

An examination of the details of the agreements with Refac Holdings leaves me with considerable doubt that the transfer of the Cave land was a necessary part of the transaction for the commercial exploitation of the remainder of the quarry area. It is likely that the Minister could have achieved both his commercial objectives and his wider social and community responsibilities simultaneously, by a decision to exclude the Cave area from the agreements with Refac Holdings, and agreeing to the land being

retained as Conservation Estate. This would have been a more fitting demonstration of Railways Corporation's social responsibility than a minor and temporary protection clause in agreements to mine and transfer the land from the Crown into private ownership.

The cancellation of contracts with Refac Holdings has returned the status of the land to Crown land. The Minister of Railways has advised that "the Corporation is now addressing the protection of the Wiri Cave area by creating a separate title for the cave area and negotiating a sale to the Manukau City Council or the Department of Conservation"¹² although, later in the same letter, he refers to my investigations "to determine whether the Council would be prepared to assume ownership of the caves in return for granting a dispensation for any reserves levy which may be payable by the Corporation on the subdivision of the ... site following the cessation of quarrying." It is clear that the Minister still wishes to gain maximum commercial benefit from the Cave land, rather than simply allocating the (Crown) land to the public as Conservation Estate. However the situation is now one where both the commercial and community objectives can be achieved together - a considerable improvement on the situation six months ago.

Despite the prospects for a satisfactory outcome, I consider the situation to be an unsatisfactory precedent for the future handling of all Railways land with conservation values. As outlined in section 3.1 of this Report, an allocation process, which re-examines all Railway Corporation's land assets, to ensure that those with significant conservation values are not lost to the Crown, is regarded as more appropriate and satisfactory, and more in keeping with the spirit of the State Owned Enterprises Act, and the process for other State Owned Enterprises.

4.0 CURRENT AND FUTURE PROTECTION OF THE WIRI LAVA CAVE

4.1 Current Situation

Protection Status

The Auckland Regional Planning Scheme, which became operative after approval by Government in July 1988, identifies the Cave as a geological feature of national significance based on criteria of "representativeness or rareness of a particular landform or feature demonstrating the dynamics of natural processes or the record of past processes, and their scientific importance." Areas of national significance are seen as also having regional and local significance, and the Scheme states that "responsibility for the protection of these areas rests with all levels of government and should be exercised as a shared duty. Local authorities and the Crown should ensure that the values identified for areas of regional or higher significance are to be preserved - i.e. change in the values is to be left to natural forces and managed only to the extent of preventing unnatural interference with the values or the natural processes affecting them".

The provisions of approved regional schemes are binding on the Crown and local authorities.

Since 1970, Wiri Lava Cave has been scheduled for protection as an object of "scientific interest" in the City of Manukau District Scheme. Items of scientific interest are identified for their "scarcity, uniqueness or educational value". The lava cave is a "Group 1" item, and is thus "considered to be of greatest value to the community and worthy of maximum protection". The Scheme statement indicates that "every effort will be made to retain these items and where there is a conflict between the aims of the owners and the community, then the question of public acquisition or partial financial compensation may arise. These questions will be resolved at the time and on the merits of the case". Ordinances prohibit works in the vicinity of a scheduled item which "endanger or are likely to endanger, damage or destroy that item" without Council consent. The ordinances provide a procedure and criteria for consideration of any application to alter a scheduled item, or delete it from the Schedule.

The 1989 proposed Second review of the Scheme confirmed the scheduled status of the Cave, and included, for the first time, a plan of the precise area requiring protection. As there were no objections to the provisions in the proposed Review, this is now the basis for protection.

The provision for protection in the Manukau City District Scheme is the most satisfactory that can be conferred by a public authority over public or private land. However the effect of the provision is limited in practice by the maximum penalty for non-compliance with the provisions of a District Scheme provided in the Town and Country Planning Act of \$10,000 plus \$1000 per day for a continuing offence. Sited in the midst of an active quarrying area, and made of material of high commercial value once extracted, accidental or deliberate destruction of the Cave area was seen by many as a possibility for which the maximum penalty would be an inadequate deterrent. The chance of damage to the Cave was perceived by most parties as likely to increase once the Cave area passed into private ownership.

Land Use Zoning

The zoning of the land which includes the Cave area is all "Quarry Zone". The Manukau City District Scheme includes objectives, policies, and ordinances for quarrying operations, and further provisions for areas identified as Quarry Zones. In the Manukau Central Quarry Zone, all uses require Council consent, and must comply with an approved quarry management plan for the area. A quarry management plan must specify the area to be quarried, existing and proposed finished contours, staging, drainage, means of compliance with environmental and other ordinances, and methods and phasing of restoration of the ground surface. The Council can attach conditions to any consent, and can require performance bonds.

Normally a quarry management plan would be approved prior to the operation commencing. Wiri is a long-established quarry which predated any planning scheme. It has thus operated under existing use rights. However, the Town and Country Planning Act provides that any change or intensification of use must comply with the

new ordinances. An intensification of use took place under the Refac-Railways Corporation agreement, to such an extent that a quarry management plan was required by the Council. The Railcorp-Refac agreements required Refac to meet all statutory requirements. It is understood that Manukau City had several times requested submission of a quarry management plan from Refac¹³, and that Refac had undertaken some preliminary data collection to this purpose, but no plan had been forthcoming. Refac was thus technically in breach of the Manukau City District Scheme. Before Manukau City took any action, the agreement was cancelled.

The quarry management plan procedure contained in the Manukau City District Scheme provides a further opportunity for protection of the Cave through identification of the area which could be quarried, and means of quarrying.

The District Scheme also provides, once the Quarry is worked out, for the land to be rezoned "for industrial use". A statutory process of rezoning, including opportunities for public comment, will be undertaken, prior to subdivision, and this could include designation as reserve, or an open space zoning for the Cave land.

Subdivision Controls

Manukau City District Scheme includes a subdivision policy which states: "Land will be subdivided and developed in a manner that ensures the conservation of natural and historic features." Under Part XX of the Local Government Act, a local authority has considerable discretionary power with regard to the design and layout of new subdivisions.

Interagency Activities to Date

Concerns were raised early in the investigation that damage could be done to the Cave not only by blasting in the vicinity, but also by traversing of the Cave by heavy vehicles, storage of material and operation of a crusher nearby.

In the latter half of 1988 steps were taken towards some "on the ground" protection. Manukau City Council, in consultation with the NZ Geological Survey of the DSIR, prepared a plan of the area necessary to ensure protection. The Department of Conservation agreed to meet the cost of fencing and Manukau City the cost of erecting the fence. There was some delay, but part of the fence was erected in mid 1989, with the remainder being completed in December 1989. Fencing is an important step in the long-term protection of the Cave.

NZ Railway Corporation/Downers' Agreement

Following the cancellation of the agreement with Refac, NZ Railways Corporation entered into a completely new agreement with Downers. The agreement "allows for the sale and purchase of aggregates throughout the North Island.". Schedule 2 to that agreement comprises terms and conditions under which Downers Mining Limited are able to continue the quarry operation at Wiri Mountain on behalf of Railways Corporation¹⁴

Two clauses of the agreement provide for protection of the Cave. These state:

"Downers acknowledge that under the Manukau City District Scheme lava caves are scheduled for protection as being of scientific interest and warrant to Railways not to cause whether itself or through its agents, contractors, workmen and invitees any damage or disturbance to such lava caves on the land.

Downers must comply with all statutes and bylaws applying to quarrying, the removal or moving of quarried material and as are relevant by reason of Downers' activities on the land, and Railways must comply with all statutes and by-laws relevant to their ownership of the land."¹⁵

In addition, Downers and Railways Corporation are in the process of finalising a quarry plan. It is intended that the quarry operations take a period of six years. Indications are that for the first two years there will be no further quarrying operations in the vicinity of the Cave.

4.2 Future Protection

Agency Attitudes and Actions

It is clear that both the Auckland Regional Authority and the Manukau City Council have used the provisions of the Town and Country Planning Act to their fullest extent to protect the Caves.

The Department of Conservation and Manukau City have also demonstrated their commitment in a practical sense, through the provision of fencing.

Railways Corporation and Downers have provided for protection in their recent agreement. A letter from Manukau City to me¹⁶ recognises the practical cooperation by Downers Mining Ltd, with regard to reorganisation of the site and the completion of fencing.

The Minister of Railways has indicated the Corporation's preferred future option of setting aside the land as reserve contribution on subdivision.¹⁷

A letter to me from Railways Corporation queried whether the Council would be prepared to assume ownership of the Caves in return for granting a dispensation for any reserves levy which may be payable by the Corporation¹⁸. This is an option which Railways Corporation obviously wishes to pursue, although it has not yet made a formal approach to the City.

The Mayor of Manukau City has commented that:

"Certainly I believe a recommendation could be put to the new Council that, in principle, the cave could be accepted as a reserve contribution on subdivision of the site.

Obviously such a recommendation would be subject to receipt and consideration of the terms of the covenant or caveat against the title, and of the valuers' report which Council has undertaken to obtain."¹⁹

The City undertook to value the Cave area as a starting point for negotiations, but by mid-December had not completed its valuation because it was awaiting information from NZ Railways Corporation. Consequently the matter has not yet been put to the Council.

It is clear that all parties are now of like mind, and are working towards long-term protection of the Cave and its retention in public ownership.

Legislative Provisions for permanent protection

The Cave could be given permanent protection as a scientific reserve under section 21 of the Reserves Act 1977. This was the option favoured by local, regional and central government representatives at the interagency meeting of 13 July 1987 and the District Commissioner of Works subsequently indicated that he would recommend a central government contribution to purchase of the land.²⁰ The irony of that situation is that it appears that at that time the Crown was the owner of the land and all that was required to achieve reservation and/or Department of Conservation administration of the land was agreement between the Minister of Conservation and the Minister of Railways.

This option was lost for the period of the agreement between Refac and NZ Railways Corporation, but is now a possibility again. In this case the land could be directly transferred to Department of Conservation as a reserve of national significance and be administered and maintained by that body.

The second option, and that being presently pursued by Manukau City and the Corporation, relies on the subdivision provisions of Part XX of the Local Government Act. Section 286 provides that, where land is to be subdivided for commercial and industrial purposes, the Council can require that either a sum of up to 10 percent of the value of the commercial or industrial allotments be paid to the Council as reserve contribution, or an area of land within the subdivision of equal value to that sum should be set aside as public reserves under the Reserves Act, or a combination of both. Section 272 applies these requirements to Crown subdivisions.

The Local Government Act refers only to the value of the land, and only to the value of the lots to be used for industrial or commercial purposes. Thus the residual value of the mineral in the lot surrounding the Cave is of no consequence.

Although valuations have not been carried out, it would appear that the approximately 1.3 ha required to protect the Cave area would be somewhat less than the 10 percent value of the surrounding industrial lots which would normally be required in a reserve contribution.

Section 287 of the Local Government Act allows land set aside or given as "reserves for public purposes" in the same locality on any earlier subdivision, can be taken into account in calculating the reserve contribution for later subdivisions. In other words, if Railcorp were to subdivide the Wiri Cave site and transfer it directly to DOC or give it to Manukau City immediately, this could result in a reduction in Reserve contribution at a later date. It is this option that is currently under investigation by Manukau City and is the option favoured by Railways Corporation, assuming that sufficient guarantees are given by the City that the reserves contribution would later be correspondingly reduced.

Manukau City Council's policy is normally to take Reserve contributions in money rather than land in industrial areas, so that the proposal to give land would be a departure from normal practice. However the practice of retaining small open spaces in industrial areas for the benefit of workers and for "green relief" in the industrial landscape is not unusual in other parts of the country and a Cave area reserve could be expected to considerably enhance the amenity of the industrial area around it.

Equity and Responsibility Issues

The main outstanding question to be resolved is one of equity. It is debatable whether the local community (Manukau City residents) should have to forgo the cash reserves contribution they would normally obtain from such a subdivision, and also carry the development and on-going maintenance cost for an area which is recognised as being of regional and national, as well as local significance. The reserve could perhaps be acquired by the Council as subdivision reserve contribution, but vested in the Department of Conservation, and developed and maintained by the Department, as a more equitable means of cost-sharing, although that option overlooks the regional interest.

In the absence of a national allocation procedure for Railways land, long-term public ownership and long-term protection of the Cave rests with Manukau City through the Local Government Act provisions. Questions of equity and cost- and benefit-sharing do arise and can only be resolved by negotiation between the Department of Conservation the Auckland Regional Council and Manukau City. There are any number of possible solutions which can best be worked out by the parties themselves.

In general, this investigation has revealed a number of functional and legislative problems. Although the likely outcome appears to be more positive than it was some months ago, I am most concerned that it has apparently fallen to local government to use its powers and its resources to protect an area of national, and possibly international significance. This is especially the case given that the land was initially in Crown ownership but was almost transferred into private hands, and that the Department of Conservation had been established, with its stated mission being to ensure the protection of the nation's conservation estate.

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.

REFERENCES

- 1 Kermode, L O 1987: Wiri Lava Cave, Auckland: A Geological Site of National Importance. Geological Society of New Zealand Newsletter 78, pp.30-39.
- 2 New Zealand Gazette 1915, p.5; CT 517/253 Auckland Registry.
- 3 New Zealand Gazette 3 June 1982, No. 58, p.1756.
- 4 Kermode, L O, 1987 as 1 above, p.30.
- 5 In letter from Geological Society of New Zealand to Director General of Conservation, 15 June 1987.
- 6 In letter from Dr I Speden, Director of New Zealand Geological Survey (DSIR) to Parliamentary Commissioner for the Environment, 3 August 1988.
- 7 Letter from Huakina Development Trust to Minister of Railways, 7 June 1988.
- 8 In letter from Minister of Conservation to Auckland Branch of Geological Society, 21 September 1987.
- 9 Advice to Parliamentary Commissioner for the Environment from Department of Conservation, letter dated 9 September 1988.
- 10 Minute of Cabinet State Agencies Committee, 14 December 1988.
- 11 Memorandum, R J Glackin, Secretary, NZ Railways Corporation, to K Hyde, Chief Executive NZ Railways Corporation 25 July 1989.
- 12 Letter from Minister of Railways to Minister of Conservation, 12 December 1989.
- 13 Meeting with Officers, Manukau City Council, 10 October 1989.
- 14 Letter from Acting General Manager, NZ Railways Corporation to the Parliamentary Commissioner for the Environment dated 22 November 1989.
- 15 *Ibid* Attachment.
- 16 Letter from Manukau City Council Planning Department to the Parliamentary Commissioner for the Environment, dated 8 December 1989.
- 17 Letter from the Minister of Railways to Parliamentary Commissioner for the Environment, dated 12 December 1989.
- 18 See Ref. 14.
- 19 Letter from Barry Curtis, Mayor of Manukau City, dated 14 November 1989.
- 20 Memo from District Commissioner of Works (Auckland) to the Regional Planning Committee, Auckland Regional Authority, 29 July 1987.

