# Public Decision-Making Newsletter

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DLA PIPER

# Summary

This newsletter summarises recent developments in law relating to resource management and local government in New Zealand that may be of interest to local authorities and decision makers.

In this edition, we review recent decisions of the High Court in respect of a decision on applications under the Marine and Coastal Area (Takutai Moana) Act 2011, and a judicial review of a Board of Inquiry decision and the application of section 104D of the RMA. We provide an analysis of recent decisions concerning prosecutions for environmental offending, including a decision of the District Court which addresses the need to carry out a careful investigation prior to filing charges, and a decision which provides insight into the continued trend of high penalties for environmental offending. We also analyse the recent expert consenting panel decision approving the resource consents and notices of requirement for the Te Ara Tupua - Shared Pathway project under the Fast-track Consenting legislation.

Over the past few months there has been considerable development in legislation concerning the environment and decision-making by local authorities, including a review into the future of local government, a NPS on outdoor storage of tyres, and sustainable freedom camping. In this edition, we briefly update on RMA Reform and consider the Exposure Draft of the proposed Natural and Built Environments Bill. We provide a more detailed review of the Exposure Draft in the link provided.

# *Re Edwards (Te Whakatōhea No.2)* [2021] NZHC 1025

Customary marine title and protected customary rights have been awarded by the High Court in Eastern Bay of Plenty in only the second High Court decision on customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011 (**MACA**). This case made findings on a number of legal issues not determined in the previous case (*Re Tipene* [2016] NZHC 3199) and it will have significant implications for MACA claims (particularly overlapping claims) that have not yet been determined. The case is *Re Edwards (Te Whakatōhea (No. 2)*) and it was issued in May 2021.

The tests for customary marine title (**CMT**) are that the applicant group holds the specified area in accordance with tikanga and has, in relation to that area, exclusively used and occupied it from 1840 to the present day without substantial interruption. In terms of these 3 requirements, the Court found:

- In terms of determining whether the area is 'held in accordance with tikanga':
    - It is not appropriate to import concepts of proprietorial interests as recognised at common law or other statutes dealing with land into the CMT tests. There is no requirement that the applicant must show a proprietorial interest consistent with other interests in land.
- The purposes of MACA favour an interpretation which focusses on tikanga and the exercise of that tikanga, rather than reference back to common law or statutory property rights.
- Holding in accordance with tikanga is determined by focussing on the evidence of tikanga and the lived experience of the applicant group. Whether it is 'held' involves a factual assessment that will be heavily influenced by the views of those who are experts in tikanga.

- When considering the requirement for exclusive use and occupation, the Court found there was an available concept of 'shared exclusivity'. There can be jointly held CMT (not two overlapping CMT's for the same area held by different parties) where this is agreed by the holders of joint CMT. However, it is not a 'default' outcome where two competing applicant groups are each claiming they have exclusive rights.
- In terms of substantial interruption:
  - Raupatu (Crown confiscation of the land) was not substantial interruption.
  - An inference cannot be drawn that all activities carried out pursuant to a resource consent prior to MACA are automatically substantial interruption. It will be a fact specific exercise to determine in each case, as will whether a third party structure represents substantial interruption.
  - Reclamation will have an effect because the land in question is no longer in the takutai moana.
  - It is not consistent with the purposes of MACA to have substantial interruption arising from navigation, fishing and access to the area by third parties as those rights are preserved under MACA, even if CMT is granted.

The tests for protected customary rights (**PCR**) are that the right has been exercised since 1840, has continued to be exercised in a particular part of the common marine and coastal area in accordance with tikanga (whether in exactly the same way or in a way that has evolved over time) and is not extinguished as a matter of law. There are a number of specific exclusions under MACA (eg, an activity that is regulated under the Fisheries Act 1996) and there has been some doubt around the types of activities that can be recognised as a PCR.

This case has clarified the position in relation to a number of activities, including:

- tītī (muttonbird), tōroa (albatross) and marine mammals (including whales) cannot be included in a PCR and nor can exercising kaitiakitanga or maintaining rangatiratanga, without manifestation of any physical activity.
- non-commercial whitebait fishing can be recognised, as can karakia, use of certain stones, sand, mud and plants for cultural practices, collecting firewood and shells, launching and using waka for accessing fishing grounds, carrying out baptisms and planting and harvesting plant resources (such as for rongoā and kai) with the exception of seaweed.

The Court also clarified there can be multiple overlapping PCRs and the fact that another group holds CMT does not prevent a different group from obtaining a PCR in the same area.

Finally, the Court made a number of comments about the potential injustice brought about under MACA by the fact there is a dual pathway for applicants – through a High Court process or direct engagement with the Crown. In particular, where an application being advanced through litigation overlaps a different claim by another applicant group which is proceeding by way of direct engagement. If the High Court finds a group holds CMT in the overlapping area, this would effectively prevent the Crown from coming to an agreement with the other party who is not part of the litigation. This is going to potentially be a significant issue for applicants involved in Crown engagement, if they did not file a High Court application as well and the High Court application is heard before Crown engagement is concluded.

This case is now subject to appeal.

# *Royal Forest & Bird v NZTA* [2021] NZHC 390

Royal Forest and Bird Protection Soc Inc (and others) (**Forest & Bird**) appealed a Board of Inquiry decision to the High Court. The Board had approved resource consent applications and notices of requirement sought by New Zealand Transport Agency (**NZTA**). This allowed the East West Link project, for the construction, operation and maintenance of a new four-lane road in Auckland, to proceed.

The primary issue raised on the appeal was whether the Board erred in reaching its conclusion that the project was not contrary to the policies of the Auckland Unitary Plan (**AUP**) for the purposes of section 104D(1)(b) of the RMA. In its decision, the Board concluded that the Proposal was contrary to a small number of policies, had more than minor adverse effects, however, overall did not tilt the section 104D purposes as a whole. Forest & Bird argued that the Board had no jurisdiction to consider the merits of the proposal as the particular policies it could not comply with meant it was contrary to the objectives and policies of the AUP and therefore did not meet the threshold test in section 104D(1)(b) of the RMA.

Section 104D(1)(b) requires applications for an activity to not be contrary to the objectives and policies of the relevant plan, relevant proposed plan or both.

The Court found that within section 104D(1)(b), "contrary" meant it must be "...opposed in nature, different to or opposite... repugnant and antagonistic".

When a consent authority is required to assess the merits of an application with section 104D, they must conduct "a fair appraisal of the objectives and policies read as a whole." Furthermore, the assessment requires comparing the proposed infrastructure against relevant provisions in the relevant planning documents. The Court concluded, when considering whether a proposal is contrary to an objective or policy, it requires looking at the context of a whole plan. If one objective or policy is contrary, it cannot be looked at in isolation.

This case is now subject to appeal directly to the Supreme Court.

# *Bay of Islands Maritime Park v Northland Regional Council* [2021] NZEnvC 6

This case is an Environment Court decision relating to wetlands under the National Policy Statement for Freshwater Management 2020 (**NPS-FM**). The issue of the application of the National Environmental Standards for Freshwater (**NES-F**) arose in the context of the Northland Regional Plan review. The proposed Northland Regional Plan manages mangrove removal and pruning. Some of those provisions were appealed. The mangroves in the Hokianaga and Mangawhai Harbours were at issue and the question arose as to whether the NES-F applied to coastal marine areas (**CMA**).

The Court considered expert input on the meaning of wetland, together with the relevant definitions. In particular, the NPS-FM defines 'natural wetlands' and 'natural inland wetlands'. As the definition of natural wetlands could include those in the CMA, the Court was tasked with deciding whether the NES-F applied to wetlands in the CMA.

The Court also considered the boundaries between freshwater and coastal water. The Court stated that 'natural wetlands' include those both above the CMA and below it. In coming to its decision, the Court looked at the meaning and purpose of the NPS-FM. The Court stated its intent was to provide an integrated approach to freshwater management not to 'subsume the entire environment including the CMA'. The Court then turned to the NES-F specifically and noted that although there is no purpose section, its title alludes to 'freshwater' and that freshwater is distinguished from the CMA in the regulations. The Court observed that the restrictions in relation to wetlands and the coastal environment do not appear to cover the effects of activities within the CMA.

The Court concluded that whilst receiving environments included the coastal environment, this does not mean that the NES-F was intended to control activities in natural wetlands in the coastal environment. If it did, then it should have been explicit. If the NES-F had effect in the CMA, it would have consequences on issues relating to marine areas and under the Fisheries Act 1996.

However, the Court also concluded that there must have been an intention to include some areas of the CMA, due to the definition of 'river or connected area' being defined as 'a river; or any part of the coastal marine area that is upstream from the mouth of a river'. It stated that this is the appropriate boundary for the application of the NES-F, noting that the NES-F only has regulatory effect upstream of the river mouth, even if it includes the CMA. Below the river mouth, the wetland is not within scope of the NES-F and is controlled by the regional coastal plan and NZCPS.

In terms of the application of the NES-F to activities, it is important to be aware that the restrictions on activities in wetlands will not apply if that wetland is outside the scope of the NES-F, ie on the coastal side of a river mouth. However, when applying for a resource consent, the NES-F may be relevant as a matter to have regard to. The Court noted that NES-F will still be relevant when considering drafting provisions of a regional plan or regional coastal plan due to the interconnectedness of these areas.

This case is now subject to appeal.

# Pito-One to Ngā-Ūranga on the Fast Track

On 5 February 2021 the expert consenting panel (**Panel**) released its decision approving the resource consents and notices of requirement for the Te Ara Tupua - Shared Pathway project. This part of Te Ara Tupua runs along the seaward edge of the Wellington-Hutt Valley Railway line after it crosses from the landward side of that railway line at Nga-Uranga and back to the landward side again at Pito-One.

The project was a fast-track project. It was listed in Schedule 2 of the Covid-19 Recovery (Fast Track Consenting) Act 2019 (**FTCA**). As this was a project considered under the FTCA, a framework different to the standard RMA process applied. This was one of the earliest, but not the first, decision under this process.

One of the issues the Panel had to consider was whether the application should be declined on the basis it is inconsistent with the New Zealand Coastal Policy Statement (**NZCPS**). The applicant, Waka Kotahi, had acknowledged that the 'most serious effects relate to the permanent occupation and habitat loss in the CMA… This effect will be permanent and is unavoidable'.

Clause 34(1)(a) of Schedule 6 of the FTCA sets out that a listed project can be declined only on the grounds specified in that clause. Those grounds are that the grant would be inconsistent with any national policy statement, including the NZCPS or the grant would be inconsistent with section 6 of the FTCA. If neither ground exists, the project must be approved.

In considering the issue, the Panel considered that 'inconsistent with' means 'not in keeping, discordant; or incompatible'.[1] The Panel also considered that a project could be inconsistent with the NZCPS if it was inconsistent with only one or two NZCPS policies, provided they are directive policies.[2] Overall, the Panel found that the project, with relevant conditions, was not inconsistent with the NZCPS and therefore that ground for decline was not made out.

The case was notable in its approach to analysing effects of reclamation and on indigenous biodiversity under Policies 10 and 11 of the NZCPS. While focused on the FTCA and its statutory tests, the decision is useful in a broader RMA context due to the commentary on 'inconsistent' and how this may extend to consideration of whether a non-complying activity is 'contrary to' the NZCPS.

[1]At [178].
[2]At [180].

# Witness Summonses in the Environment Court

A recent Environment Court decision provides some guidance on the Court's approach to witness summonses.[3]

The decision arose in the context of an appellant in a private plan change appeal requesting the issue of witness summonses to six experts; some who had produced evidence at the council-level hearing on the proposed plan change, and the others who had produced evidence at a later council-level hearing for a resource consent proposal relating to the same site as the plan change.

Summonses for the first group of experts were not opposed by the parties, however summonses for the second group were. This was on the basis that the resource consent application was not before the Court; the experts had no prior involvement in the plan change; and the relevant statutory tests for a plan change being different to those for a resource consent.

The Court recognised that it had the inherent power to determine whether or not to issue a witness summons notwithstanding the drafting of r 9.43 of the District Court Rules 2014.[4] Next the Court emphasised s 25(1) of the Evidence Act 2006 and that expert opinion 'is admissible if the fact-finder is likely to obtain substantial help from the opinion', and clarified that the calling of expert evidence 'is not a numbers game'.[5]

In light of that legal context, the Court declined to issue summonses to the experts involved in the council-level hearing for a resource consent proposal. Central to the Court's reasoning was that there were sufficient numbers of experts on relevant topics, and the experts had no prior involvement in the plan change - rendering their evidence unlikely to meet the s 25(1) Evidence Act standard.

The Court also clarified the appropriate scope of a summons: to require a witness to attend the hearing and produce documents,[6] rather than to compel a witness to be involved in the preparation of a case for one party. Summonsed witnesses cannot be compelled to 'get up to speed' with a party's case.

Overall, the decision is a useful reminder of the Court's overall approach to witness summonses, the ability of parties to successfully oppose them, and the limited scope on which they can be issued.

[3] *Eden Epsom Residential Protection Society Inc v Auckland Council* [2021] NZEnvC 068 (**Decision**).
[4] Decision at [16].
[5] Decision at [18].
[6] Decision at [20].

# Prosecution caselaw update

Two recent prosecution cases provide insight into the need to carry out a careful investigation prior to filing charges, and the continued trend of high penalties for environmental offending.

***Canterbury Regional Council v Rooney Earthmoving Limited*** relates to a prosecution initiated for the straightening of a section of a creek near a farm.[7] The decision deals with an application for dismissal of the charges, together with a costs application.

The Court found that the process of identifying individuals who committed the offences was deficient. The initial interviews with Mr Phillips (the farm manager) was limited, and no photographs, maps or diagrams were taken or created during the early part of the investigation and put to Mr Phillips so he could show, graphically, who did what on the land. Charges were filed after the first interview. In a second interview, Mr Phillips confirmed that he had been doing works in the diversion area. The prosecutor then sought leave to withdraw the charges. However, the defendants sought a dismissal of the charges, and costs.

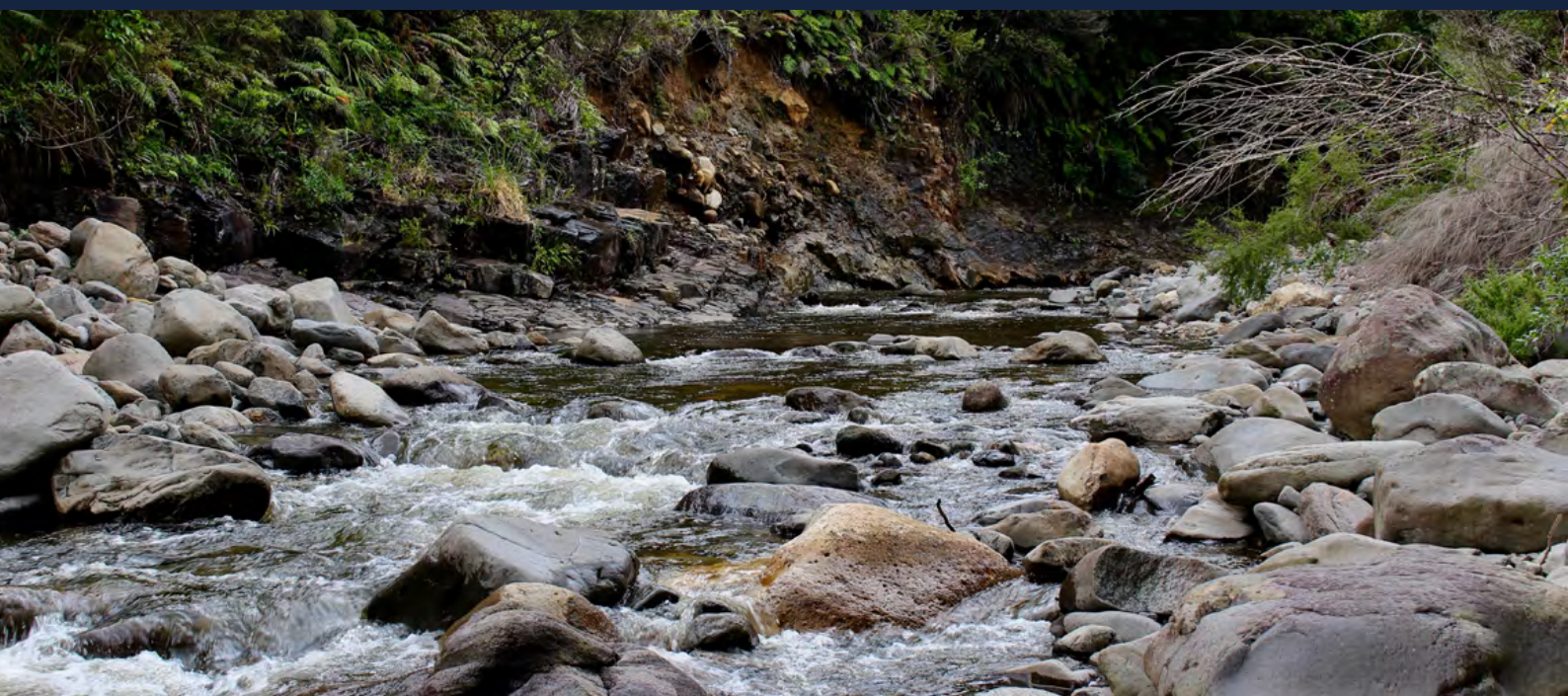
The Court found that this approach to the initial interview was an omission in the investigation which amounted to a significant error. It observed that had more detailed enquiries been made at the outset, the extent of Mr Phillips' role would have been identified and that it would be then difficult to avoid the conclusion that the prosecutor would have made the decision to not proceed against these defendants.

Whilst the Court observed that the judiciary generally do not judge a public prosecutor's discretion in the exercise of their power to prosecute in the absence of an abuse of that power or other exceptional circumstances, it did find that the charges needed to be dismissed and that the significant omission in the prosecutor's investigation justified the consideration of an award of costs.

The Court did not find any bad faith or any other reason to require it to meet the defendants' actual expenditure on an indemnity basis. It turned to the calculations based on daily recovery rates for civil proceedings in the District Court, as it considered the scale provides a realistic measure of litigation cost. It awarded costs of $46,500 plus disbursements of approximately $16,000 to one defendant and to the other two defendants, costs of $43,000 with disbursements in the order of $7,000.

The Court also noted that they saw nothing in the material to indicate whether any consideration was given to proceeding by way of an abatement notice or application for enforcement order, which may have achieved appropriate environmental outcomes, and only needs to be proved on the balance of probabilities.

[7] *Canterbury Regional Council v Rooney* [2021] NZDC 4035



***Taranaki Regional Council v Silverfern Farms Ltd*** deals with the sentencing of Silverfern Farms for discharging ammonia to air, and to land in circumstances where it might enter water.[8] The discharge came from Silverfern's beef processing plant. Some 400 kilos of ammonia were discharged into the air. As part of the process of containing the discharge, water was applied to the ammonia cloud, which dissolved the ammonia into water, which then fell onto the ground around the plant, where it was captured and directed to the plant's subsurface stormwater system, from which it then discharged into the Tawhiti Stream.

The adverse effects included lethal effects on fish, the stream and river systems. It appeared that the entire fish community in the Tawhiti Stream was killed. The estimate was that thousands and possibly tens of thousands of the fish would have died, as well as any larvae or eggs in the water. This was described as 'a devastating kill.' There was also the matter of cultural effects on Māori, including the particular significance of the Tawhiti Stream to the Ngāti Ruana iwi. There was also potential for harm to be suffered by a person, including damage to eyes, skin irritation, difficulty in breathing and in cases of severe exposure, death. One person was subject to an ammonia burn.

Silverfern pleaded guilty to both charges and was convicted. In terms of penalty, the starting point determined by the Court was a global sum of $450,000. The Court found that culpability was at the highest level. It observed that this starting point leaves headroom for cases of even more seriousness which might warrant higher or maximum penalties. The Court gave no credit for the installation of a new stormwater system which would prevent future discharges. The Court found that these upgrades fall in the category of putting things into the order that they should have been in the first place.

[8] *Taranaki Regional Council v Silverfern Farms Ltd* [2021] NZDC 3430

# Legislation update

## Update on RMA Reform

On 29 June 2021, the Minister for the Environment released the 'Exposure Draft' of the Natural and Built Environments Bill (**NBA**) for consultation. This important legislative change has been anticipated for some time. The NBA is one of three acts proposed to replace the RMA. The Exposure Draft is very limited in scope as it does not cover the NBA Bill in its entirety, rather provides an early look into proposed aspects of the legislation including:

- the purpose of the NBA (including Te Tiriti o Waitangi clause) and related provisions
- the National Planning Framework
- the Natural and Built Environments plans.

The Exposure Draft provides a limited number of sections, with the majority yet to be drafted or released. The accompanying explanatory material provides a description of intent and what is yet to be drafted, but none of the detail. However, there is enough in what has been released in order to understand some of the key proposed changes.

One of the more significant changes is that the new dual purpose of the NBA is specified as enabling:

- Te Oranga o te Taiao to be upheld, including by protecting and enhancing the natural environment; and
- People and communities to use the environment in a way that supports the well-being of present generations without compromising the well-being of future generations.

Te Oranga o te Taiao is a new purpose that the NBA states incorporates the health of the natural environment, the intrinsic relationship between iwi and hapū and te taiao, the interconnectedness of all parts of the natural environment and the essential relationship between the health of the natural environment and its capacity to sustain all life.

Part 2 of the NBA also specifies a large number of 'environmental outcomes' to be addressed, including issues such as water quality, housing supply and natural hazards. The yet to be drafted national planning framework is required to include provisions to help resolve conflicts, including between the environmental outcomes.

The NBA provides that environmental limits will be set for the purpose of the ecological integrity of the natural environment and human health. The NBA does not set those limits, but specifies that the limits will be prescribed through the new national planning framework or in the natural and built environment plans as prescribed by that framework. The national planning framework must also address housing supply and infrastructure services.  This is work to be undertaken

by the Ministry for the Environment in a yet to be determined process.

Another of the key changes is a transition from the current regional policy statements, regional plan and district plans into one natural and built environments plan for each region. The intention is to transition from over 100 existing plans into 14 plans. Regional planning committees will be established to determine these plans.

The Exposure Draft has been referred to a select committee inquiry process. This process requested that submissions on the exposure draft are due on 4 August 2021. A second opportunity will be available for public feedback once the full NBA bill is introduced to Parliament, along with the Strategic Planning Act bill. This is proposed to be in early 2022.

We are happy to discuss the implications of the above, the balance of the proposed drafting and the accompanying explanatory material as to the likely balance of the NBA in detail with you. Please click on the following link for a more detailed review on the Exposure Draft.

## Local Government Reform

On 23 April 2021 the Minister of Local Government (**the Minister**) established a Review into the Future for Local Government (**the Review**). The Review is to consider, report and make recommendations on this matter to the Minister.

In recognition of the changing roles and functions of local government, the purpose of the Review is to 'identify how our system of local democracy and governance needs to evolve over the next 30 years, to improve the wellbeing of New Zealand communities and the environment, and actively embody the Treaty partnership'. The scope of the Review will comprise of what local government does, how it does it, and how it pays for it.

The current proposed timelines suggests:

- On 30 September 2021: An interim report be presented to the Minister signalling the probable direction of the review and key next steps;
- On 30 September 2022: Draft report and recommendations to be issued for public consultation; and
- On 30 April 2023: Review presents final report to the Minister and Local Government New Zealand.

## National Environmental Standard for the Outdoor Storage of Tyres

The Resource Management (National Environmental Standards for Storing Tyres Outdoors) Regulations 2021 (**NES**) comes into force on 20 August 2021. It prescribes national environmental standards for storing tyres outdoors.

The outdoor storage of tyres which pose risks to the environment, human health, and local communities. Rules for storing tyres are determined by regional and district councils under the framework of the RMA and the Local Government Act 2002. The NES will provide consistent rules across the country around the environmental risks of outdoor tyre storage,

and that regional councils will be responsible for its implementation.

Regulated closely are the effects of storing tyres outdoors that fall within the functions of regional councils under section 30 of the RMA. This is particularly related to water quality, control of discharges of contaminants into land, air or water, and the mitigation of natural hazards. The following activity statuses apply:

- less than 20 cubic metres is a permitted activity,
- more than 20 cubic metres but less than 100 cubic metres is a permitted activity subject to compliance with general conditions, and
- 100 cubic metres and more is a restricted discretionary activity.

The standards also apply to other uses of used tyres outdoors besides storage such as for engineering, landscaping or recreational uses. The standards also make an exception for tyres used in structures lawfully established before the standards come into force in August.

## Sustainable Freedom Camping in New Zealand

On 9 April 2021, the Ministry for Business, Innovation and Employment (**MBIE**) published a discussion document for the public consultation on proposals for changes to support effective management of freedom camping in New Zealand. The document outlines the current issues with freedom camping in New Zealand and why Government sees a need for change. The document also outlines four proposed changes which aim to make freedom camping in New Zealand more sustainable. The four proposals were:

- Make it mandatory for freedom camping in a vehicle to be done in a certified self-contained vehicle, or
- Make it mandatory for freedom campers to stay in vehicle that is certified self-contained unless they are stating at a site with toilets; and
- Improve regulatory tools for government and land manager such as though regulatory systems for self-contained vehicles and stronger infringement offences; and
- Strengthen the requirements for self-contained vehicles such as by determining what types of vehicles and toilets are suitable.

The consultation period closed on 16 May 2021. Since submissions have closed, MBIE has indicated they will review and publish a summary of the submissions made on their website, and report back to the Minister of Tourism with recommendations for consideration.

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