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 a recent Court of Appeal decision on the relevance of individuals' subjective views when making notification decisions under the RMA. We also review two recent High Court decisions; one in respect of development contributions policies and assessments undertaken under those policies, and another concerning a costs decision where costs were awarded in favour of a local authority. We also review a recent Environment Court decision on an appeal which raised significant questions of law concerning the jurisdiction of the Environment Court and how the Court can direct the recognition of native title in freshwater in a plan.

We provide an analysis of recent decisions concerning prosecutions for environmental offending which demonstrate the ongoing view of the District Court that environmental offending justifies significant financial penalties, the need for protection for diminishing and vulnerable environments such as wetlands, the importance of continual assessment of evidence as a case proceeds to a hearing, and guidance as to the appropriate phrasing of charging documents.

Over the past few months there has been development concerning issues with the Overseer farm nutrient modelling system for which we provide a brief update. In this edition, we briefly update on Fresh Water Reform and highlight the key areas to be considered in consultation on changes to the framework for managing wetlands. We will give an overview of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill which Government recently introduced to accelerate intensification under the NPS-UD. Finally, we will review the recommendations of the Environment Committee as outlined in their Report on the Inquiry into the Natural and Built Environments Bill, one of three pieces of legislation intended to replace the RMA.

NZ Southern Rivers Society Inc v Gore District Council [2021] NZCA 296, (2021) 22 ELRNZ 880

The Court of Appeal has recently considered the relevance of individuals' subjective views when making notification decisions under the Resource Management Act 1991 (**RMA**).

Background

This decision of the Court of Appeal dealt with an appeal against a judgment of the High Court declining the application for judicial review made by NZ Southern Rivers Society Inc (**Society**). The application for judicial review in the High Court was made in respect of a decision by Gore District Council (**GDC**) to grant resource consent to establish a river rafting tourism activity on the Mataura River on a non notified basis.

The applicant in the High Court and the appellant in the Court of Appeal was a Society comprising a group of anglers who fish on rivers located in Southland and Gore districts. The primary focus of the judicial review application and appeal was the extent to which the proposal would potentially affect existing river users, including adverse effects on the anglers.

In the High Court, the Society had alleged GDC made three errors of law, including treating the written approval from Southland Fish & Game Council (**Fish & Game**) as representative of the interests and views of the angling community when it was not. The Society also contended that GDC failed to take account of relevant considerations for the purposes of section 95A of the RMA These alleged errors were not accepted by the High Court, which dismissed the application for judicial review.

Issues in the Court of Appeal

The Society then appealed the High Court judgment to the Court of Appeal on three grounds. The key grounds related to whether GDC had adequate information for its decision not to notify the application and whether GDC had failed to consider all relevant potential adverse

effects of the proposal because it had not considered email correspondence sent to it by members of the angling community. The various emails were not referred to in the notification recommendation and were not provided to the Commissioner with delegated authority to determine the application.

The Society's legal submissions in the Court of Appeal focused particularly on the emails that were sent to GDC by the angling community. The Society submitted that the views of anglers as to why they appreciated the amenities of the Mataura River were relevant to the consideration of the application. As an assessment of an effect on amenity values was necessarily subjective, it was submitted by the Society that an assessment of an effect on amenity values had to commence with an understanding of the subjective appreciation of the relevant values, articulated by those who enjoy them.

The Society argued that, without having the views of anglers who fish on the Mataura River, GDC did not have adequate information to determine the adverse effects of the activity on the environment would be no more than minor. In this regard, it was suggested that information about the frequency and duration of the activity could not be properly assessed without reference to the subjective appreciation of the anglers.

Effects on amenity values

The Court of Appeal noted that GDC needed to assess, both at the notification stage and in relation to the grant of the consent, the potential adverse effects on the environment of the proposed activity. The definition of 'environment' in section 2(1) of the RMA includes amenity values.

The Court of Appeal therefore accepted that the amenity of anglers wishing to fish on the Mataura River was a relevant issue. It also accepted that the natural and physical qualities of the Mataura River and its surroundings contributed to appreciation by the anglers of the river's pleasantness and recreational attributes.

However, the Court of Appeal went on to note that what was to be assessed was the *'qualities and characteristics which contribute to the appreciation of the recreational attributes, not the appreciation itself.'* In other words, the Commissioner needed to be informed about the characteristics of the area, and the effects of the proposed activity on those characteristics, in order that the Commissioner could draw inferences and apply his or her understanding of them in making his decision.

In this case, there was information before the Commissioner in the application regarding the nature of the activity including its frequency and duration, and the existing users of the river (trout anglers, jet boaters and other occasional recreational users). It was also relevant that the Department of Conservation and Fish & Game had provided their written approval to the activity. The Court of Appeal found that all this information enabled the Commissioner to assess the likely interactions between anglers and the proposed activity and that it was open to the Commissioner to find that the type of interaction and potential effects on anglers would be infrequent, short-term and small in scale. The Court of Appeal considered that the subjective views of anglers would not have added anything of value to the Commissioner's consideration of the application.

Amenity values include many subjective aspects and consent authorities are often faced with the suggestion that information needs to be obtained directly from potentially affected persons, before a notification decision is made. This decision indicates that the key issue for the courts is whether there is adequate information on amenity values for a decision-maker to have a sufficiently and relevantly informed understanding of the nature of an activity, and its effects on such values.

AGPAC Ltd v Hamilton City Council [2021] NZHC 2222

Development contributions are an important, but reasonably complex, funding tool which are available to territorial authorities. At a high-level, they enable territorial authorities to charge those undertaking development for a portion of the capital expenditure cost necessary to service growth over the long term. Development contributions can only be required in accordance with a development contributions policy, which must be set and amended in accordance with the provisions of the Local Government Act 2002 (**LGA**).

The above decision of Gault J concerns an omnibus challenge by 19 commercial entities to various development contributions policies of the Hamilton City Council (**Council**) and decisions made under those policies relating to various recent developments. Seventeen pleaded claims were pursued by the commercial entities. Ultimately, the Council was successful in defending all of the claims.

Central to many of the claims was the proposition that a particular aspect of a development contribution policy, or a particular assessment under it, was contrary to:

- the section 199AA LGA purpose of development contributions 'to enable territorial authorities to recover from those persons undertaking development a fair, equitable, and proportionate portion of the total cost of capital expenditure necessary to service growth over the long term'; and/or
- the section 199AB LGA development contributions principles, particularly the principle in what is now section 197AB(1)(b) that 'development contributions should be determined in a manner that is generally consistent with the capacity life of the assets for which they are intended to be used and in a way that avoids over-recovery of costs allocated to development contribution funding'.

A recurring theme in the decision is that the s 197AA purpose of development contributions and the s 197AB principles must be taken into account when formulating a development contributions policy but, in that context, the concepts in these sections such as fairness, equity and proportionality require policy judgements to be exercised and do not dictate a particular outcome.

Specific issues considered by the Court in the context of the relevant development contributions policies, and actual assessments undertaken under those policies that may be of interest to territorial authorities, include:

- Development contributions remissions in the context of low demand developments, and whether a policy approach of a materiality threshold in remissions criteria was contrary to ss 197AA and 197AB.
- Whether a policy approach of providing for site credits, but not enabling refunds for these credits, was contrary to ss 197AA and 197AB.
- Whether a policy approach of a five household unit equivalent threshold for remissions was contrary to ss 197AA and 197AB.
- Whether a developer fully funding stormwater, wastewater, water supply and roading infrastructure nevertheless met the threshold requirement for a development contribution charge.
- Whether a policy approach of allocating catchment area costs across a catchment rather than only to those developers whose land intersects with the particular project giving rise to the cost was unlawful.
- Whether charges for projects not located within a particular catchment could nevertheless be levied for developments within the catchment.
- Whether a specific component of a development (a canopy), which is considered in calculating modelled demand, must itself generate demand for infrastructure.
- Whether expenditure on intangible assets (comprising programmes, plans and models) is capital expenditure on relevant infrastructure within the terms of the LGA, and therefore whether these assets can be included in a development contribution policy's schedule of assets.
- Whether using bedroom number in a residential development as a proxy for impermeable surface area and stormwater demand was contrary to ss 197AA and 197AB (or unreasonable).

For what is a complex, and sometimes contentious, regime there are relatively few High Court decisions providing guidance on the development contributions regime.

- Whether allocating costs for arterial roading projects partly to a citywide growth catchment and partly to the local growth area catchment based on the benefit in terms of trip generation was contrary to ss 197AA and 197AB.
- Whether particular aspects of modelling demand for the purposes of calculating development contributions were lawful.

For what is a complex, and sometimes contentious, regime there are relatively few High Court decisions providing guidance on the development contributions regime. Therefore, the decision's up to date overview of the regime is helpful, as well as its discussion of the 'leading decision' of Potter J in *Neil Construction Ltd v North Shore City Council* [2008] NZRMA 275. So too is Gault J's careful consideration of the various issues, which will likely assist territorial authorities in updating and amending their development contributions policies going forward.

Auckland Council v New Zealand Fairy Tern Charitable Trust [2021] NZHC 1671, (2021) 22 ELRNZ 895

This was an appeal by Auckland Council (**Council**) against the Environment Court's decision on costs. DLA Piper were involved as counsel for the Council.

Background

In 2019, the New Zealand Fairy Tern Charitable Trust (**the Trust**) sought orders against the Council for the removal of a weir within the bed of Te Arai Stream[2]. The weir was on land owned jointly by Land Information New Zealand and the Department of Conservation. The Environment Court found that the Council was not the proper party to have been named as a respondent in the proceedings[3]. The Court accepted that this had been raised repeatedly with the Trust.

The Trust proceeded to make an application for costs to the Environment Court in relation to the proceedings. The Council opposed the application and sought an order that the Trust paid some of the costs accrued by the Council. The Environment Court considered that the Trust's application for costs must fail as it considered there was no legal basis to make orders against the Council. As the enforcement action brought by the Trust had eventually led to the issue with the weir being resolved, the Environment Court also declined the Council's costs application, and ordered costs to lie where they fell as 'blame' for the situation could not be apportioned to either party.

High Court Decision

The Council appealed the decision to the High Court, submitting that the Environment Court, in dismissing its application for costs, failed to take into account relevant factors and took into account

[1]See *The New Zealand Fairy Tern Charitable Trust v Auckland Council* [2020] NZEnvC 188 for the Environment Courts decision on costs.
[2]*The New Zealand Fairy Tern Charitable Trust v Auckland Council* [2019] NZEnvC 172, at [1].
[3]At [32], [37], [38] and [40].

irrelevant factors. The Court concluded that this was an appropriate case to interfere in the exercise of the Environment Court's discretion not to award the Council costs in these proceedings. On a principled basis, it stated an award of costs against the Trust and in favour of the Council was inevitable, even if unpalatable (given the nature and role of the Trust). The Environment Court's decision to the contrary was, in the High Court's view, wrong.

This will be an important case going forward for local authorities regarding costs awards in their favour as it indicates that the Environment Court's exercise of its discretion not to award costs to local authorities should be carefully exercised on a principled basis.

In coming to its decision, the High Court observed that the Environment Court has an unfettered discretion in relation to costs of proceedings in that Court but stated that discretion must, however, be exercised on a principled basis. The High Court found that[4]:

- It was clear from both the Environment Court's substantive and costs judgments that it viewed the Trust's proceedings against the Council as fundamentally misconceived.
- As the Environment Court accepted, the Trust was on notice that the Council was the wrong respondent to the application from the outset of its proceedings, and regularly thereafter.
- The Trust's motivation in trying to have the weir removed was genuine and properly in the public interest. When (unsuccessful) litigation is reasonably pursued in pursuit of a genuine and proper public interest, it may nevertheless be appropriate for costs to be reduced or lie where they fall. But importantly for this case, there was no public interest in bringing and continuing legal proceedings which were fundamentally misconceived, particularly when the Trust was on notice from an early stage of the defects in its claim. The Environment Court erred by conflating the Trust's proper public interest in protecting the fairy tern population generally with a public interest in pursuing misconceived proceedings.

The submission made on behalf of the Trust that the proceedings against the Council were "necessary" to achieve the outcome of having the weir removed, and that ultimately the question for the High Court was whether the means (proceedings) necessitated the ends (the removal of the weir), should be rejected. It was not persuaded that the Council's engagement with the Trust, or suggested lack thereof, justified the proceedings against it and the decision not to make a costs award in its favour. Of relevance to that, the Council was not a party with any direct control in relation to the weir.

The Council's appeal was granted and the Environment Court's decision on costs was quashed. The High Court noted the parties had agreed the quantum of costs to be paid by the Trust to the Council[5]. This will be an important case going forward for local authorities regarding costs awards in their favour as it indicates that the Environment Court's exercise of its discretion not to award costs to local authorities should be carefully exercised on a principled basis.

[4]Auckland Council v New Zealand Fairy Tern Charitable Trust [2021] NZHC 1671, (2021) 22 ELRNZ 895at [41]-[47].
[5]Ibid, at [5] and [49].

Te Whānau a Kai Trust v Gisborne District Council [2021] NZEnvC 115, (2021) 22 ELRNZ 920

This case is an Environment Court decision on Te Whānau a Kai Trust's (**TWK**) appeal against Gisborne District Council's (**Council**) decision in respect of submissions on the proposed Gisborne Regional Freshwater Plan (**Freshwater Plan**). TWK sought amendments to the Freshwater Plan to recognise its customary (including proprietary) interests in freshwater within its rohe, and by doing so, that its interests in those waters be taken into account in all decision making.

This appeal raised significant questions of law concerning the jurisdiction of the Environment Court to recognise and determine the TWK's claim of proprietary interests in freshwater and to direct how the Freshwater Plan should recognise that interest. The Court recognised that secondary to this jurisdictional issue is the matter of relief sought by way of specific amendments to the Freshwater Plan. The Court addressed four key issues and its findings are summarised as follows:

a) Could the Court direct the inclusion of provisions in the Freshwater Plan which recognised and provided for the exercise of proprietary interests in freshwater?

- The Court observed that the statutory framework under the Resource Management Act 1991 (**RMA**) does not enable the Environment Court, or the Council, to recognise and provide for a propriety right in freshwater of the kind claimed by TWK. The Court accepted in principle that a Māori claim to customary proprietary rights or aboriginal title in a freshwater body could be recognised under the New Zealand common law. However, the Court expressed the view that the Environment Court's jurisdiction is statutory and circumscribed when it came to recognition of propriety interests in freshwater; therefore, it is not the appropriate Court to decide this issue and lacks the inherent jurisdiction of the High Court to determine unresolved questions relating to the application of native title to freshwater.

b) Did TWK have an unextinguished native title (and proprietary interest) in the freshwater bodies in its rohe?

- The expert evidence produced on behalf of TWK was directed towards establishing that TWK held an unextinguished customary title to freshwater. The Court noted that site-specific evidence of continuity of connection and use under tikanga would still be required to support a proprietary title over such an extensive area including the character and extent of the amendments to the Freshwater Plan proposed by TWK. The Court concluded that even if it did have the appropriate jurisdiction, there was insufficient evidence to support a finding that TWK held an unextinguished customary or native title to freshwater in its rohe.

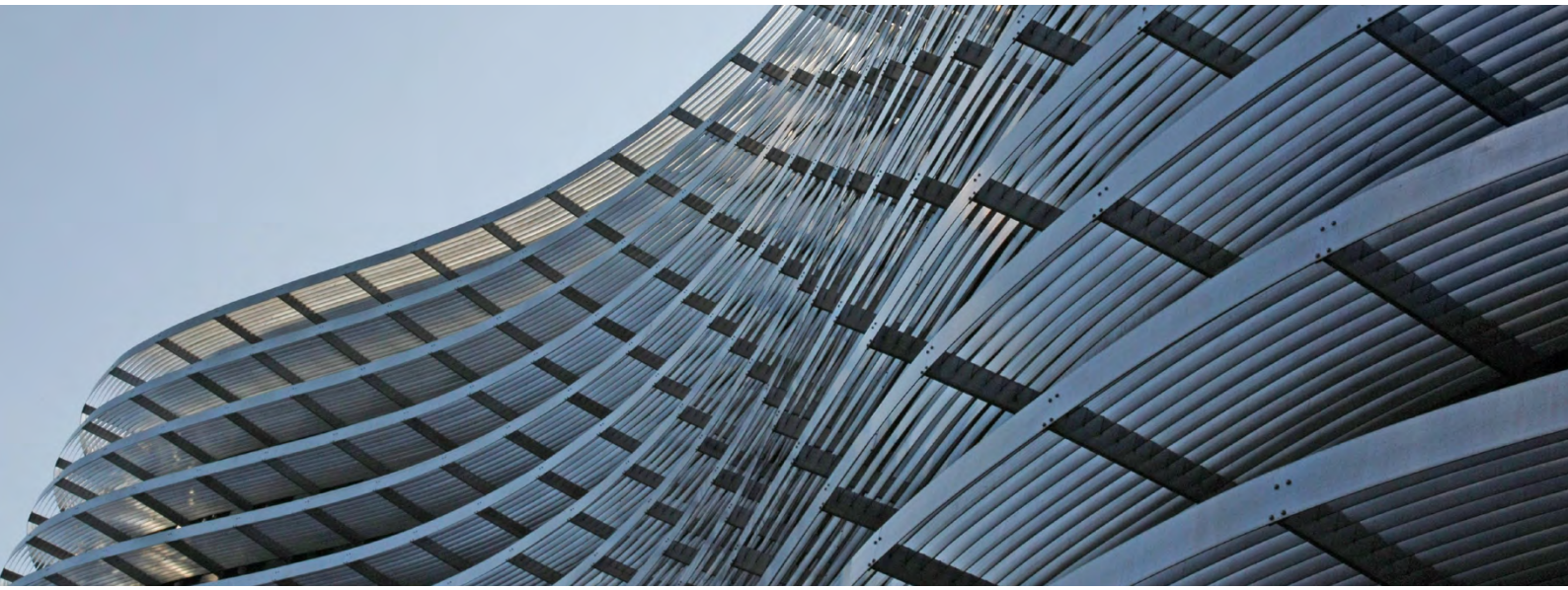
c) Could the Court direct the inclusion of provisions in the plan that required the Council to provide technical and financial assistance and resourcing to TWK?

- The Court considered that it was not for the Environment Court to direct a local authority, through the addition of new objectives to its plan, as to how it should allocate, or to whom, it should direct resources. The Court noted that although the RMA contains provisions and obligations about how consultation shall occur, or how various functions or powers can be exercised in relation to iwi authorities or hapū, there is no legislative authority to direct the Council to provide resourcing. Therefore, the Court found that it was not appropriate to enshrine in plan provisions an obligation to resource TWK with technical and financial assistance.

d) Were the other plan amendments sought by TWK appropriate?

- Despite the Court not having jurisdiction to determine proprietary interests and having declined much of the relief sought by TWK in terms of its proposed changes to the Freshwater Plan, the Court found that the examination of other relief sought by TWK led to some changes being made to the Freshwater Plan. These approved changes included new definitions as well as amendments to the objectives, policies, methods and rules, and were regarded as having potential to foster a stronger Māori voice in future collaboration with the Council and give explicit recognition to the kaitiaki role of iwi and hapū.

Prosecution Update



Recent decisions dealing with environmental prosecutions demonstrate the ongoing view of the District Court that environmental offending justifies significant financial penalties, the need for protection of diminishing and vulnerable environments such as wetlands, and the importance of continual assessment of evidence as a case proceeds to a hearing. The decisions (discussed below) also provide some guidance as to the appropriate phrasing of charging documents.

Canterbury Regional Council v Harrison Spray Services Limited[6], is a sentencing decision which demonstrates the potentially high penalties that can occur from environmental offending. Harrison is a chemical spraying contractor. On 5 March 2020, it was carrying out agrichemical spraying. During filling, due to human error, water contaminated with Pyrinex (a highly toxic chemical) spilled onto the ground and entered a water race. In the short term, the impacts of the spill on aquatic life in the race extended for 6 kilometres, and some 600-1000 fish were killed. Recovery was expected to take years. The water race is of significance to Ngāi Tahu, particularly for its mahinga kai.

The Court found that the offending caused relatively serious harm both to a valued environmental resource and to sections of the community. The Court found that the defendant was reckless and found that his deliberate attempts to hide what he did fall well short of what a responsible operator in his position would have done. The Court found that an appropriate starting point for a fine was in the range of $160,000. A discount of 25% was given for the early guilty plea. Given Mr Harrison's repeated attempts to cover his tracks, the Court declined to give a further 5% discount for character.

Protection of wetlands in New Zealand has been a central government focus over the last few years, including in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 and National Policy Statement for Freshwater Management 2020. *Gisborne District Council v Tairawhiti Pharmaceuticals Ltd* demonstrates that concern about the protection of wetlands is becoming increasingly relevant in the enforcement space[7]. The decision deals with earthworks completed in a regionally significant wetland, to establish a manuka plantation. The Court noted the importance of wetlands in the decision, and that these are a diminishing and vulnerable resource. The Court fixed a global starting point for penalty considerations of $40,000, with a 30% reduction for past good character and early guilty plea. *Yealands* v R is a costs decision[8], where the defendant sought costs against the Crown. This followed a successful application by the defendant to have charges dismissed, on the basis that there was not sufficient evidence to establish that the defendant (a director of the company) was aware of the activities which resulted in charges being filed.

[6][2021] NZDC 7528
[7][2021] NZDC 15199
[8][2021] NZDC 15892

The Court did not find any bad faith on the part of either the Marlborough District Council or subsequently the Crown in the conduct of the prosecution or any other reason to require the defendant's actual expenditure to be met on an indemnity basis. However, the Court did find that greater costs than scale (which would have been approximately $4,000) was appropriate. The Court applied the approach to costs in civil proceedings in terms of the District Court Rules to provide a basis for an award that is reasonable, which it found was $14,000, plus the disbursements of $1,411.

The Court commented that a decision to file charges under the RMA is against the context of a limitation period, and that while that restriction does not justify a 'charge first – ask questions later' approach, it does provide some context for the practical reality that a local authority which is concerned to ensure that contraventions of the RMA are properly prosecuted may need to lay charges before all of its investigations have been completed. However, the Court commented it is important that prosecutors review the evidence that they gather after charges have been laid to check whether that evidence confirms or displaces the initial basis on which such charges were laid. The Court considered that in a case where further investigations establish that not all of the requisite elements of an offence can be proved beyond reasonable doubt, then a timely decision should be made by the prosecutor either to seek leave to withdraw a charge or to indicate that it will offer no evidence and allow the charge to be dismissed.

*Otago Regional Council v City Care Limited (**CCL**)*,[9] deals with an application by CCL to dismiss charges relating to discharges from wastewater treatments plants (**WWTP**). The WWTP were operated by CCL, under contract to the Clutha District Council. The application was not successful on any of the grounds.

The applications to dismiss the charges revolved around the structure of the charges and the charging documents themselves. The charges were framed that the defendant 'discharged or permitted the discharge'. This was challenged on the basis that this contains two charges, rather than the required one. The Court found that the wording of the charge was acceptable, as the offending was the discharge, and whether the defendant actually discharged the contaminant or, on the other hand, merely permitted the discharge are two separate routes to the same offending outcome, namely the discharge.

The charges were challenged on the basis that they did not contain sufficient particulars. The defendant argued that the charging documents did not specify how CCL was alleged to be a party to the offending. The Court said that it did not consider the consideration of the sufficiency of particulars to take place in a vacuum and that the Court is surely entitled to have regard to the fact that CCL must be aware that it was allegedly responsible for continuously operating, maintaining and approving the WWTP under the contract on the dates in question. The Court observed that CCL was not a passer-by unknowingly caught up in some way in the discharge. Notwithstanding this, the Court amended the charging documents to specifically record the contract whether CCL and the Council. Generally, the Court noted that a prosecutor is not required to prove its case in its charging document. What is required is that the charging document has sufficient particulars to fully and fairly inform a defendant of the nub and pith of the charge against it.

The charges were framed to include all 14 identified breaches of the consent conditions. This was challenged as being unfair and onerous. The Court commented that a breach of only one condition of any given resource consent need be established, and that there was difficulty in having to deal with all of the contended breaches of conditions at trial, making the proceeding onerous for all parties including the Court, not just the Defendant. However, the Court found that it was appropriate, and necessary for the Prosecutor to identify all of the contended breaches of conditions when considering the question as to whether or not an activity is being undertaken was expressly allowed. The Court found that had the Prosecutor not identified all contended breaches of conditions it could well have been subject to criticism and disadvantage had non-identified breaches emerged during the course of the trial. The Court commented that it would wrong to dismiss the charges due to the large number of contended contraventions, as that would be rewarding the defendant for its non-compliance.

Alternative charges were filed, one set alleging that 'CCL together with Clutha District Council' discharged or permitted the discharge of contaminants, and the alternative named CCL alone. The Court found no impediment to CCL being separately and specifically charged as an individual in the non-party charges and as a party due to its contract with Clutha in the party charges and concluded that this approach was consistent with the Criminal Procedure Act.

[9] [2021] NZDC 14790

Legislation Update

Overseeing Overseer

For some time, issues with the Overseer farm nutrient modelling system have been known. It provides a way to estimate how nutrients are cycled within a farm system. A significant joint workstream between the Ministry for Primary Industries and the Ministry for the Environment is underway to improve nutrient management knowledge and assessment tools. On 11 August 2021, the Government announced the findings of an expert Scientific Advisory Panel and the Government's response to the models utility. The review found short-comings with the Overseer model that questioned its usefulness in the RMA regulatory context. While the Government has committed to developing a new risk index tool in the next 12 months that is capable of performing the role Overseer currently does, for now, regulatory approaches reliant on Overseer should be treated with caution. In addition to the new risk index tool, the Government is also considering whether Overseer can be redeveloped to address the identified concerns. However, if this occurs, and when, remains to be seen. In summary, while the Government's response considers that Overseer can continue to be used where it is already an established part of existing plans and consents, where possible, its modelling should be verified with other evidence. New reliance on Overseer is not supported. This is a significant issue for rural industries and regulation of the same, especially with the increasing regulation in the freshwater space.

The relevant documentation can be accessed here. We are happy to discuss the implications of this with you.

Freshwater reform – changes are coming

The Ministry for the Environment is undertaking consultation on a range of proposed amendments in the freshwater space. Consultation on proposed changes to the regulatory framework for intensive winter grazing, the stock exclusion low slope map and the freshwater farm plan system closed on 7 October 2021. Consultation on changes to the framework for managing wetlands closed on 27 October 2021.

In respect of the management of wetlands, the consultation related to four key areas. First, whether amendments to the definition of 'natural wetland' are required. The breadth and appropriateness of this definition has been an area of significant concern and debate since the introduction of the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 in 2020 (**NES-FW**). There are also proposals to change the provisions in respect of maintenance and restoration activities in and around wetlands and to introduce provisions in respect of biosecurity activities. Given the significant limitations placed on activities in and around natural wetlands by the NES-FW, the current consultation process includes a proposal to provide consenting pathways for quarrying, landfills, cleanfills, managed fills, mineral

mining and urban development. Without changes, those activities are likely to be unable to occur in and around natural wetlands. A key issue is whether the proposed amendments will weaken the very strong regulatory direction of the NES-FW to a point where its purpose is undermined, or whether the amendments are required to ensure the framework is workable while maintaining sufficient protection of a finite resource.

The relevant documentation can be accessed here.

Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill

On 19 October 2021, the Government introduced the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill (**the Bill**). The Bill proposes amendments to the RMA to bring forward and strengthen the National Policy Statement on Urban Development 2020 (**NPS-UD**). The aim of the Bill is to 'rapidly accelerate the supply of housing where the demand for housing is high' and proposes to address some of the issues with housing choice and affordability that New Zealand currently faces in its largest cities.

This Bill requires territorial authorities in New Zealand's major cities to set more permissive land use regulations that will enable greater intensification in urban areas by bringing forward and strengthening the NPS-UD.

The NPS-UD introduced a tiered classification of urban environments, with New Zealand's largest cities classified as Tier 1 urban environments. The NPS-UD requires Tier 1 territorial authorities to amend their RMA plans to enable intensification in urban areas. It could potentially take three years for territorial authorities to implement this under current plan making processes. The Bill proposes an intensification streamlined planning process as an alternative to existing Schedule 1 RMA processes in order to speed up the implementation of intensification provisions in the NPS-UD.

The Bill also introduces medium density residential standards (**MDRS**) in all tier 1 urban environments. The relevant provisions of the Bill are intended to enable medium density housing to be built as of right (at least 3 residential units of 3 storeys per site) across more of New Zealand's urban environments. The requirement will apply to residential zones (except for Large Lot Residential zones as described in the National Planning Standards). This means territorial authorities must amend their plans to make such developments a permitted activity, thus no longer requiring resource consent.

This Bill directs tier 1 territorial authorities to notify intensification planning instruments that implement the intensification policies and incorporate the MDRS by **20 August 2022**. The Bill proposes that rules in intensification planning instruments incorporating the MDRS into a district plan will have immediate legal effect on notification and must be treated as operative beginning at the time the rules have immediate legal effect. More information can be found on the Ministry of Housing and Development website or by reading the Bill's explanatory note. The Chairperson of the Environment Committee received submissions on the Bill on 16 November 2021.

Inquiry by the Environment Committee on the Natural and Built Environments Bill: Parliamentary paper

On 1 November 2021, the Environment Committee released its report regarding its inquiry into the parliamentary paper on the Natural and Built Environments Bill 2021 (**the Bill**). The Committee recommended that the Government proceed with the development of the Bill and proposed 37 recommendations which included the redrafting of certain provisions. The key recommendations of the Environment Committee are:

Te Oranga o te Taiao - supports the inclusion of the concept in the Bill's purpose, though recommends further work be carried out with national iwi and Māori groups to further develop it.

Purpose - recommends amendments to the purpose to minimise uncertainty and better reflect that environmental limits have priority in the new system, to give more prominence to the built environment, and require the NPF to provide high level direction on the effects management hierarchy.

Interpretation - recommends that, where appropriate, the Bill carry over relevant definitions already defined under the RMA, to ensure existing case law is retained in the new system. It further recommends that, where appropriate and possible, consistent verbs are used to achieve clear drafting.

Te Tiriti o Waitangi - recommends the inclusion of further direction in the NBA on how the principles of Te Tiriti are to be given effect to, including local

government's role in the partnership. The Committee suggests that consideration be given to the role of the NPF in giving additional expression to the principles of Te Tiriti.

Environmental limits - recommends amendments to clarify that limits could only be set for the purposes of protecting the ecological integrity of the natural environment, and/or human health. The Committee also recommends amendments to require the Minister to set environmental limits in the NPF for the six mandatory matters in the NBA (air, biodiversity, coastal waters, estuaries, fresh water, and soil), and establish clear principles and criteria that the Minister or decision-maker must have regard to when setting environmental limits. Lastly, the Committee recommends the use of transitional limits and environmental targets to provide an incentive to improve environmental health or quality.

Outcomes - recommends amendments to consolidate the outcomes and remove the differing qualifying or directive terms used in the exposure draft to refer to outcomes. It recommends specifying that there is no hierarchy among the outcomes and clarification that that the NPF and NBE plans are not limited to addressing the identified outcomes. Further direction is required on how conflicts between outcomes are resolved.

The National Policy Framework - recommends amendments to expand the purpose of the NPF, require public consultation and board of inquiry processes when establishing an NPF, have mandatory content on all outcomes listed in the NBA, strengthening the conflict resolution provisions in the NPF, and require more policy work to establish what regulations should be contained in the NPF.

Natural and Built Environment plans - supports having one plan per region but acknowledges the significant undertaking. The Committee understands that NBE plans provide ways for decision-makers to resolve conflicts though recommends the inclusion of a specific requirement for NBE plans to help resolve conflicts between competing outcomes. The Committee finally recommends clearly setting out the substantive role for local authorities in place-based planning.

The Environment Committee's report outlined that there are components of the Bill that are not included in the exposure draft. These are currently being considered by the Ministerial Oversight Group before inclusion in the full Bill. Meanwhile, it is anticipated that complete Bills for the NBA and SPA will be introduced to Parliament in 2022 with a second opportunity for public feedback before the Bills are enacted. Follow this link to read the Report.

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