Public Decision-Making Newsletter

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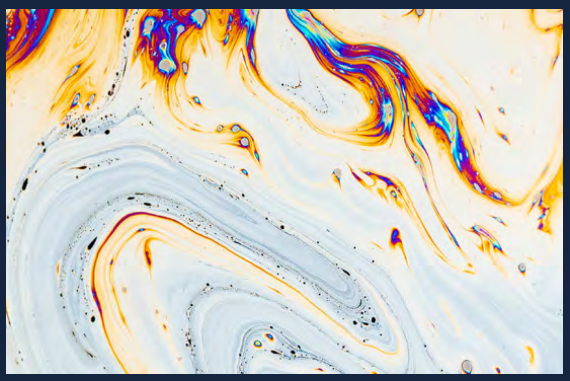
DLA PIPER

Summary

This newsletter summarises recent developments in the 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 which seeks to clarify the treatment of water under the RMA, the meaning of 'take' and 'use' under section 14 of the RMA and the importance of careful drafting in regional plans. A case which adds to the growing body of case law on water bottling in Aotearoa.

- Review recent noteworthy High Court decisions. The first relates to common law duties of local authorities regarding record keeping and providing resource consent information. The second is a High Court ruling on the meaning of 'freshwater planning instrument'. The third relates to an appeal of an Environment Court decision declining to make amendments to a freshwater plan to recognise Māori customary interests.

- Review recent noteworthy Environment Court decisions. The first relates to the consideration of whether the effects of climate change were within a scope of appeal. The second relates to a further decision of the Court concerning the rolling review of a district plan and its provisions relating to the preservation of kauri.

- Provide an analysis of recent decisions concerning enforcement for environmental offending. This includes a review of a recent decision awarding costs against a Council in relation to initiated proceedings which were found to be 'groundless at the most basic and fundamental level', and devoid of merit in the absence of supporting substantive evidence.

- Provide a brief legislative update. Firstly, on the Ministry for the Environment's updated guidance document on Medium Density Residential Standards. Secondly, on the Local Government Electoral Legislation Bill which intends to improve the process for electing councils.

Aotearoa Water Action Incorporated v *Canterbury Regional Council* [2022] NZCA 325

This Court of Appeal decision concerned three water bottling consents on the Canterbury plains. It is instructive in clarifying the treatment of water under the Resource Management Act 1991 (**RMA**), the meaning of 'take' and 'use' under section 14 of the RMA and underscoring the importance of careful drafting in regional plans.

Background

Section 14 (2) of the RMA prevents the 'taking, using, damming or diverting' of water unless permitted by subsection (3), which allows these activities, where permitted by a regional plan. Rapaki Natural Resources Ltd and Cloud Ocean Water Ltd came into possession of water consents for a freezing works and for a wool scour. In a non-notified process, the Canterbury Regional Council (**Council**) allowed the consents to be changed to permit the applicants to take and use water for water-bottling purposes. In the High Court, Justice Nation held that it was lawful to grant those consents on a non notified basis.

Aotearoa Water Action (**AWA**) appealed on two grounds:

a) Whether water bottling actually is a 'use' of water under section 14.

b) Whether an application to use water can be granted without an application to take water for the same purpose.

Is water bottling a use of water?

Water is defined in section 2 of the RMA as being 'water in all its physical forms whether flowing or not and whether over or under the ground [except] … in any form while in any pipe, tank or cistern.' AWA argued that water in pipes, then bottled, is not water in the terms of the RMA. Their reasoning was that bottles were 'within the concept of tank or cistern'. Therefore, the consent would have had to have been to 'taking of water for the purpose of water bottling' not to 'take and use' water.

The Court considered whether including water bottles within the definition would stretch the meanings of 'tank' and 'cistern' too far. The Court noted the broad

definition of water and the plain drafting, which both point to a natural definition of the terms used in the section.

If water bottling were not a use of water in the sense of section 14 of the RMA then it would not be possible to grant a consent for water bottling. The Court held that when water leaves a pipe, and enters a bottle, it is a 'use' as contemplated under section 14, and one that can be consented.

Can Council grant a 'use' consent separately to a 'take' consent?

In the High Court, Justice Nation found that 'section 14 permits a council to consider an application for a change of use from an already consented take without requiring it to be treated as an application for both a take and use consent'. AWA argued that the take was granted for a particular purpose, and the scheme of the RMA meant that the take could not be used for a wholly different purpose. A consent should have been sought for both the take and the use consent together.

The Court of Appeal agreed with the lower Court that there was nothing in the Act which suggests that 'take' and 'use' must be read and dealt with together. However, the Council's Land and Water Regional Plan variously refers to 'taking and use' and 'taking or use'. Where 'taking and use' is referred to, an 'is' was used, implying that it is a single activity. The fact that there were other parts of the plan which used the disjunctive 'or' and plural 'are' led the Court to infer that a different meaning was intended in each instance. Concerning the taking and use of groundwater, it meant that taking and using should be considered together, not separately as the Council had done. Their plan had created a direct link between the two concepts. It was open to the Council to have drafted separate rules, and to interpret the plan otherwise would undermine the integrity of the Land and Water Regional Plan as drafted.

Ultimately the Court concluded that the Council could not grant take and use consents separately. The relevant initial consents were therefore invalid, but the amalgamation and reissue were 'legitimate administrative steps'. The initial flaw in the consents unfortunately meant that they were still invalid once amalgamated. It was not necessary to address concerns raised by the Rūnanga concerning the environmental effects surrounding the sale of bottled water or the cultural harms that may exist.

Takeaway points

When assessing consents, the Court will be mindful of the wording in any relevant council plan, as well as the RMA. Therefore, when granting consents for a given activity, equal attention must be given to the Council's own plan. Accordingly, how rules are drafted will be key. Particularly where different wording is used within the plan itself. Despite the decision adding to growing line of 'water bottling' case law, it is evident that the decision has implications well beyond water bottling.

Reminder of common law duties relating to record keeping and providing Resource Consent information

The High Court's decision in *Daisley v Whangarei District Council* [2022] NZHC 1372 was released on 10 June 2022. The decision provides an important reminder to local authorities in relation to their common law duties regarding record keeping and providing information about resource consents.

Daisley brought a claim for damages against the Whangarei District Council (**Council**) for breaching those duties, which Daisley argued caused him significant loss.

Background

Daisley bought a quarry in December 2004 on the understanding that the vendors had operated the quarry for several decades without challenge. The Whanganui Proposed District Plan (**PDP**) permitted the removal and disturbance of up to 500 cubic metres of brown rock or other materials in any 12-month period, without a resource consent. Daisley intended to extract metal in excess of that permitted.

Seven weeks after purchasing the quarry, Council issued a letter requiring Daisley to cease quarrying activity on the property until resource consent had been obtained. A few weeks later, Council issued its first abatement notice on the assertion that the removal of material from the site was neither expressly allowed by consent, nor existing use right. Over the next few years, Council continued to take enforcement action against Daisley. In 2006, Daisley applied for consent for the works, however it was declined on the grounds it would adversely affect amenity.

In 2009, Daisley's lawyer obtained archived files from Council that revealed a land use consent to extract materials had actually been granted in 1988 to the then lessees of the Quarry. The consent was not limited in time nor volume of materials and therefore it was agreed the consent ran with the land. Later that year, Daisley was forced to sell the quarry under financial pressure at 25 per cent below market value. Despite discovery of the consent, Council continued its final enforcement action against Daisley until 2011.

Daisley commenced the current proceedings against Council in 2014, claiming he had suffered losses of over $20 million as a result of its breach of statutory duty, common law negligence and misfeasance in public office.

Common law duties

Daisley's first cause of action was careless performance of a statutory duty. The Court found that this was misguided as on its own it is not an independent tort. Alternatively, the Court found that the Council owed common law duties in regard to information about resource consents. The Court considered the nature of the council's statutory duty in section 35 of the RMA to gather information and keep records of resource consents, and its statutory duty in section 322 of the RMA to have reasonable grounds for believing that circumstance exist justifying the service of an abatement notice. The Court concluded that these duties provided a basis for the Council to hold common law duties to the public to:

(a) exercise reasonable care and skill both in keeping the record of resource consents reasonably available for inspection and in the provision of information about such matters; and

(b) to conduct reasonably diligent inquiries into the existence of a resource consent whenever that was in issue.

Breach of common law duties

The Court considered whether these common law duties were breached by the Council. In doing so, the Court found two faults with Council's actions relating to the 1988 consent. Firstly, the Court found that given the consent ran with the land, it was negligent for the council to archive the hard copy file without ensuring that some copy or record of it was available in the current records. Secondly, the Court found that the council breached its common law duties when it failed to keep the 1988 consent in its register of current files so as to keep it 'reasonably available at its principal office' as required by section 35 of the RMA, and further, when it failed to conduct diligent searches at specific points in time when taking enforcement action against Daisley or when reviewing and declining his resource consent application.

The Council raised a defence under section 4 of the Limitation Act 1950, alleging that the proceeding was time-barred. The Court found that Daisley was not time barred as Council were in continuous breach of their duties between 2004 and 2009, and a concealment of the consent. Daisley then also suffered continuing damage from 2006 until 2011 when enforcement proceedings were withdrawn.

Damages

The Court were satisfied that had the 1988 consent been disclosed earlier, events would have unfolded differently. In relying on the Council granting the subsequent owner (who Daisley sold the property to) a variation of the 1988 consent, the Court found if the consent was disclosed earlier and Daisley had applied for a variation, the Council would have permitted the commercial quarrying Daisley envisaged. The Court also rejected the Council's claim of contributory negligence, confirming that the real cause of Daisley's inability to carry out his quarrying operations was the Council's negligence.

Daisley had also claimed for exemplary damages. The Court was unwilling to find that any council officer knew the consent existed and deliberately withheld knowledge, or that there was a level of deemed 'corporate' knowledge deserving of an award of exemplary damages. The Court did however find that the council's officers acted recklessly in assuming there was no mining consent in relation to the property, despite evidence to the contrary. The Court also deemed the Council's response once the 1988 consent was discovered as 'stubbornly obstructive and not contrite of compromising, which was 'inexcusable' given how Council embraced the subsequent owner's application for variation. The Courts view was that if the Council was as helpful to Daisley when the consent was discovered initially, Daisley might have been able to hold off the sale of the property. The Court concluded that the conduct of Council amounted to 'misfeasance in public office that required additional censure'.

Accordingly, the Court awarded damages to Daisley of $4,089,622 for loss of profits (plus interest of five per cent per annum); damages of $90,000 for loss of the value of the property (plus interest); damages of $50,000 for the recovery of direct costs (plus interest); and exemplary damages of $50,000.

Takeaway points

The High Court in *Daisley* is a firm reminder of the common law duties local government has in relation to record keeping and providing information about resource consents. It reinforces the importance of checking historical documents, particularly paper files. The Council has since appealed the decision to the Court of Appeal, so watch this space!

High Court rules on the meaning of 'Freshwater Planning Instrument'

The High Court's decision in Otago Regional Council v Royal Forest & Bird Protection Society of NZ Inc [2022] NZHC 1777 was released on 22 July 2022. It relates to the Otago Regional Council's (**ORC**) decision that the whole of its proposed regional policy statement (**RPS**) was a freshwater planning instrument and therefore, could use the freshwater planning process (**FPP**).[1]

The Council sought declarations from the High Court on how section 80A of the Resource Management Act 1991 (**RMA**), which sets out what is a freshwater planning instrument, is to be interpreted and applied.

The Court held that ORC's decision the RPS as a whole was a freshwater planning instrument was in error. The Court held in summary that (at [236]):

> In this judgement I have held it is only those parts of the proposed regional policy statement that **relate directly** to the **maintenance or enhancement of freshwater quality** or quantity that can be treated as parts of a freshwater planning instrument.

The Court's findings colour the wording in section 80A(2)(b) of the RMA which does not use the words 'directly' or refer to the 'maintenance or enhancement of freshwater quality or quantity', but says 'relates to freshwater'. The Court's finding on the meaning of that test is significant, as it places a new lens on which parts of an RPS or regional plan will proceed through the FPP.

In reaching its conclusion, the Court noted that it was not the intention of section 80A that the whole of an RPS be a freshwater planning instrument, even bearing in mind an integrated approach to the management of resources adopted by the RMA. The fundamental concepts of Te Mana o te Wai and te uta ki tai do not require, or allow, a regional council to treat the whole of its RPS as a freshwater planning instrument.[2] Further, the Court determined that the words 'relates to freshwater' must be interpreted having regard to the purpose for which section 80A was enacted – to address the decline in freshwater quality in New Zealand[3].

While not entirely clear in the decision, in addition to the 'relates to freshwater' issue in section 80A(2)(b) of the RMA, a RPS or regional plan can also be a freshwater planning instrument where it gives effect to the National Policy Statement for Freshwater Management 2020 (section 80A(2)(a)) where, the Court decided, that means the provision needs to relates directly to the maintenance or enhancement of the quality or quantity of freshwater[4].

The Court offered some *obiter dicta* guidance on how to split up an RPS to identify the provisions that are part of a freshwater planning instrument (at [204]):

> the ORC could not decide that, because there is a provision that relates to freshwater within a specific chapter, the whole of that chapter should be treated as relating to freshwater. Conversely, there may be a chapter which, to a significant extent, relates to freshwater. That is likely to be true as to the chapter on land and water. Nevertheless, there may be policies, objectives or rules in a land and water chapter that do not relate to freshwater. Such parts of that chapter, in terms of s 80A, could not be treated as part of a freshwater planning instrument.

The Court determined that it was for the ORC to decide which parts of the RPS related to freshwater and thus use the FPP. Accordingly, it now falls to ORC (and each regional council) to apply the test in section 80A(2) of the RMA in the terms set by the High Court to determine which parts of an RPS or regional plan are a freshwater planning instrument.

[1] Part 4, Schedule 1 and section 80A of the RMA.
[2] [158], [170] and [206].
[3] [191].
[4] [199]-[200].

Te Whānau a Kai Trust v Gisborne District Council [2022] NZHC 1462

In 2021, the Environment Court dismissed 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 had sought amendments to the Freshwater Plan to recognise its customary (including proprietary) interests in freshwater within its rohe, and by doing so, the right that its interests in those waters be considered in all decision making under the RMA.

Appeal

On Appeal, TWK continued to seek recognition in the Freshwater Plan of customary rights and interests in relation to freshwater within the relevant rohe. The questions before the High Court were:

(a) whether the Environment Court had jurisdiction under the RMA to recognise and provide for tikanga-based proprietary rights or interests in freshwater;

(b) whether the evidence before the Environment Court supported a finding that the appellant retained unextinguished tikanga rights within its rohe;

(c) whether there is power under the RMA to require the Council, through a provision in its Freshwater Plan, to provide resourcing to support the exercise of tikanga rights that are recognised in the Plan; and

(d) whether the Environment Court erred in rejecting a number of the appellant's proposed amendments to the Freshwater Plan.

Jurisdiction

In considering whether the Environment Court had the jurisdiction to recognise and provide for tikanga based proprietary rights or interests in freshwater, the Court acknowledged that 'it was the task of the Council (and the Environment Court) to identify, involve or provide for iwi and their mana whenua in accordance with mātauranga Māori and tikanga Māori.'

However, the Court reiterated that the RMA is not designed to 'recognise ownership nor native title rights

per se,' and that 'wording specifically used in the RMA, such as 'consideration of' and 'have regard to,' does not lend itself to declaratory judgements on the existence of a right.' However, although the Court found that jurisdiction is not expressly given to the Environment Court by the RMA in this case, it does leave this question open by suggesting a test case may be overdue.

Evidence

The Court found that the evidence provided by TWK fell short of proving the establishment of tikanga-based customary rights and interests across the region. The Court suggested that the correct evidential threshold for proving such a right would be 'continued exclusive use and occupation since 1840,' and noted the evidence needed before a court to do so would be to 'establish customary rights over all the various bodies of water,' whilst also considering the overlapping claims of other iwi and hapū. It was held there was little evidence on this point before the court.

Provision of resourcing to support tikanga-based rights

The Court held that sections 62 and 67 of the RMA (which relate to optional and required contents required to be covered in an RPS) did not provide or enable Council or the Environment Court to direct funds and resources to parties such as iwi, and that any such provisions of resources would have to be managed through the framework of the Local Government Act 2002 (section 101 in particular).

Wording of Plan amendments

The Environment Court had rejected some amendments proposed by TWK. On appeal, TWK proposed different wording than that put before the Environment Court. While the High Court acknowledged that 'a party cannot ordinarily raise a new argument on an appeal that was not pursued in the court below,' it reviewed the new proposed wording regardless, and still found that the Environment Court had made no error in its amendments and had adopted wording reflective of the approach in Ngāti Maru.

Ultimately, the High Court dismissed the appeal as it did not find any errors of law made by the Environment Court, resulting in none of TWK's grounds being made out – affirming the fact that the RMA does not directly provide for the recognition of Māori proprietary interests in freshwater.

A quote was referred to in the decision which quite accurately summarises the approach taken in the High Court, being that 'proprietary rights are not addressed under the RMA but that instead the RMA 'floats, rather like oil on water, across the top of ownership rights without affecting the substance."

Climate Justice Taranaki Limited v Taranaki Regional Council [2022] NZENVC 127

In these proceedings the Environment Court sought to answer a preliminary jurisdictional question relating to an appeal of the proposed coastal plan for Taranaki. Specifically, the Court considered whether the effects of climate change were within the scope of the appeal bought by Climate Justice Taranaki Inc (**CJT**).

The appeal by CJT to which the question of scope relates, is an appeal of Rules 26 and 30 of the proposed plan which would regulate the effects of oil drilling activities in the foreshore and seabed.

Taranaki Regional Council claimed that the evidence CJT wished to present was out of scope in reliance on section 70A of the Resource Management Act 1991 (**RMA**), which expressly states that when making a rule to control the discharge into air of greenhouse gases, a regional council generally must not have regard to the effects of such a discharge on climate change. The evidence related to ocean acidification and national and international instruments addressing the effects of climate change. While this provision is set to be repealed under the Resource Management Amendment Act 2020 on 30 November 2022, it was in agreement that the provision was to be treated as not repealed in this case. The Court confirmed, in reliance on Supreme Court authorities, that the literal interpretation of section 70A relates only to those activities directly resulting in the discharge of greenhouse gases and therefore prevented consideration of the effects discharges into air of greenhouse gases on climate change, as well as the effects of incidental activities on climate change.

Seemingly accepting those findings, CJT submitted that their arguments were not being advanced in relation to effects of climate change but rather in regard to the duty on Council to plan for the 'anticipated effects of climate change' and prepare a resilient plan for the region. CJT advanced that the plan as proposed would result in the region being 'shackled' to investments and costs of an industry with increasing liabilities, such as regulatory and economic. CJT further advanced that the second limb, in relation to ocean acidification, is not excluded by section 70A.

The Council maintained that the effects of oil drilling activities regulated by Rules 26 to 30 are not effects of climate change, rather, the rules expressly seek to regulate the effects of drilling and placement of structures. The Court agreed with the Council that even if the future economic and regulatory outcomes advanced by CJT could be considered effects of climate change, they were not effects of the drilling activities. Specifically stating that 'at most, they are outcomes that may result from Government decisions as to what oil exploration and drilling activities may establish or continue'. The Court concluded that the effects raised by CJT were within the activities that may be considered 'incidental' to those in Rules 26 to 30 of the proposed plan, and the restriction in section 70A would apply.

CJT advanced that the plan as proposed would result in the region being 'shackled' to investments and costs of an industry with increasing liabilities, such as regulatory and economic.

In relation to ocean acidification, the Court would not reach a finding on whether ocean acidification fell within the definition of 'climate change', however stated that because it was at least 'intertwined' with climate change, it was not helpful to rely on it as a means of addressing effects of the activities. This was in light of Parliaments clear intent regarding responsibility for climate policy.

Ultimately, the Court made a preliminary finding that the economic and regulatory effects raised by CJT were precluded from consideration, a conclusion which may differ once section 70A of the RMA is repealed in November.

Director-General of Conservation v Whangārei District Council [2022] NZENVC 103

This was a further decision of the Environment Court concerning the rolling review of the operative Whangarei District Plan (**the plan**) and in particular, provisions relating to preservation of kauri.

The Director-General of Conservation (**DOC**) wanted to ensure that there were effective measures for limiting the spread of kauri dieback disease. DOC sought to include in the plan constraints over gardening and cultivation that would prevent propagation of kauri dieback.

In *Director-General of Conservation v Whangarei District Council* [2022] NZEnvC 33, the Court made specific findings as to the most appropriate options and concluded that there should be a rules package similar to the findings it had tabled in its interim decision. A further issue that needed to be considered was whether infrastructure providers, such as electricity providers (Northpower Limited (**Northpower**)), who needed to access the 'Kauri Hygiene Areas' (**KHAs**) should be subject to controls to prevent propagation of the disease. Accordingly, the Court directed the parties to make submissions on the final wording.

In these proceedings, the parties had reached agreement on some matters, but several matters remained unresolved. The Court approved of the measures that had been agreed by the parties. In particular, the Court approved a new requirement in a permitted activity clause that all tools, equipment, clothing, and footwear be cleaned of soil and organic material prior to entry into and exit from a KHA. Although this rule would not be strictly enforceable in most scenarios, the Court agreed it was an appropriate 'indication of intent' to include.

The Court then addressed areas of disagreement which related to:

a) whether there should be tailored requirements for the section of the Management Plan dealing with emergency works and unplanned network outages (permitted); and

b) whether both the sites specific consents and district wide consents should state that procedures are 'commensurate to the risk' identified, or neither provision.

Emergency works and unplanned network outages

DOC and other parties disagreed about the exact detail for management plans that were required to be prepared as part of consents for carrying out these works in KHAs. The Court agreed with the Whangarei District Council (**Council**) and Northpower that it was more efficient and effective to address specific information requirements now than to leave these matters to the consent stage to be worked through on a case-by-case basis, as the DOC had proposed. The Court agreed with the Council that its role should be to 'certify' rather than 'approve' management plans.

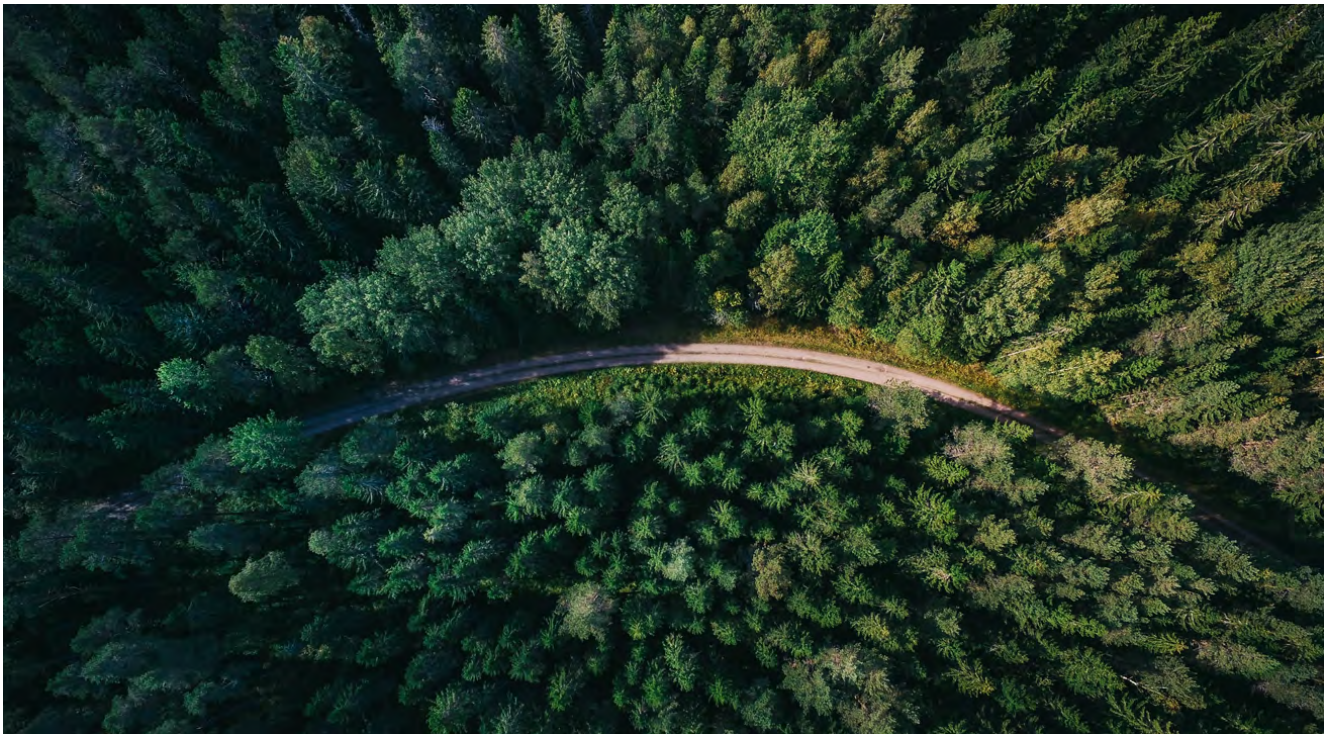
Commensurate to the risk

The Court also addressed a drafting consistency issue to ensure various information requirements appropriately addressed the level of risk. In light of DOC's concerns that cleaning was fundamental to avoiding propagation, the Court determined that management plans should detail the cleaning procedures which are to be followed, such as that of clothing and vehicles, to ensure cleaning was undertaken 'to the greatest extent reasonably practicable' prior to entry into and exit from a KHA, rather than cleaning being 'commensurate to the risk', which the Court saw as potentially introducing an unnecessary and complicating factor to the effective implementation of the rule.

Outcome and directions

The Court ordered that the agreed provisions were to be incorporated and the disputed provisions were to be resolved and incorporated as determined by the Court. Costs applications were not encouraged but the Court invited submissions if such an application was to be filed.

Prosecution Caselaw Update



Gisborne District Council v Lane

Gisborne District Council v Lane[5] relates to unconsented earthworks at a 990 hectare farm on Glenroy Road at Whangara. The works consisted of the construction of a 2.7 kilometre long forestry track to provide access to a 393 hectare forestry block which was being developed on the farm. There was also a breach of an abatement notice.

The Court adopted a global starting point for the earthworks and discharge of sediment offences. It then identified a global starting point for penalty on the two abatement notice charges which it considered to be significant offences in their own right, rather than just an aggravating factor in assessing penalty on the discharge offending.

The Court identified the further distinguishing aggravating feature of the offending, its deliberate nature. Council officers advised the defendant as to the need for resource consents for access track works on a number of occasions, both verbally and in writing. There was no dispute on the part of the defendant that a resource consent was required but he continued with the earthworks, nevertheless. The defendant (and his father) told the officer that it was more cost effective to deal with the Council about the unconsented earthworks than to stop the planting operation.

The Court stated that it had to regrettably categorise what happened as an act of deliberate defiance of recognised legal requirements. That puts culpability for the offending at the very highest level and would (combined with the particular site) justify an uplift point in the range of 30 to 50 per cent. The Court went on to consider mitigating factors (including the collapse of an access agreement, the health of the defendant's father, and his desire to leave a legacy, and a difficult financial situation) and imposed a final fine of $112,000.

Waikato Regional Council v Taylor

Waikato Regional Council v Taylor[6] deals with the unlawful discharge of farm animal effluent onto land on a dairy farm. The Court set a global starting point of $90,000. However, in consideration of financial capacity, the Court recognised that payment of a fine in the order of the starting point adopted would create significant hardship. However, the Court also considered that the offence was serious and some sentence beyond conviction and discharge needs to be imposed. The Court found that an adequate way of tailoring the sentence to the defendant's financial position and

[5] [2022] NZDC 10666
[6] [2022] NZDC 978

circumstances was to impose a minimal fine of $5,000 and 170 hours of community work. The fine could be paid in instalments over time.

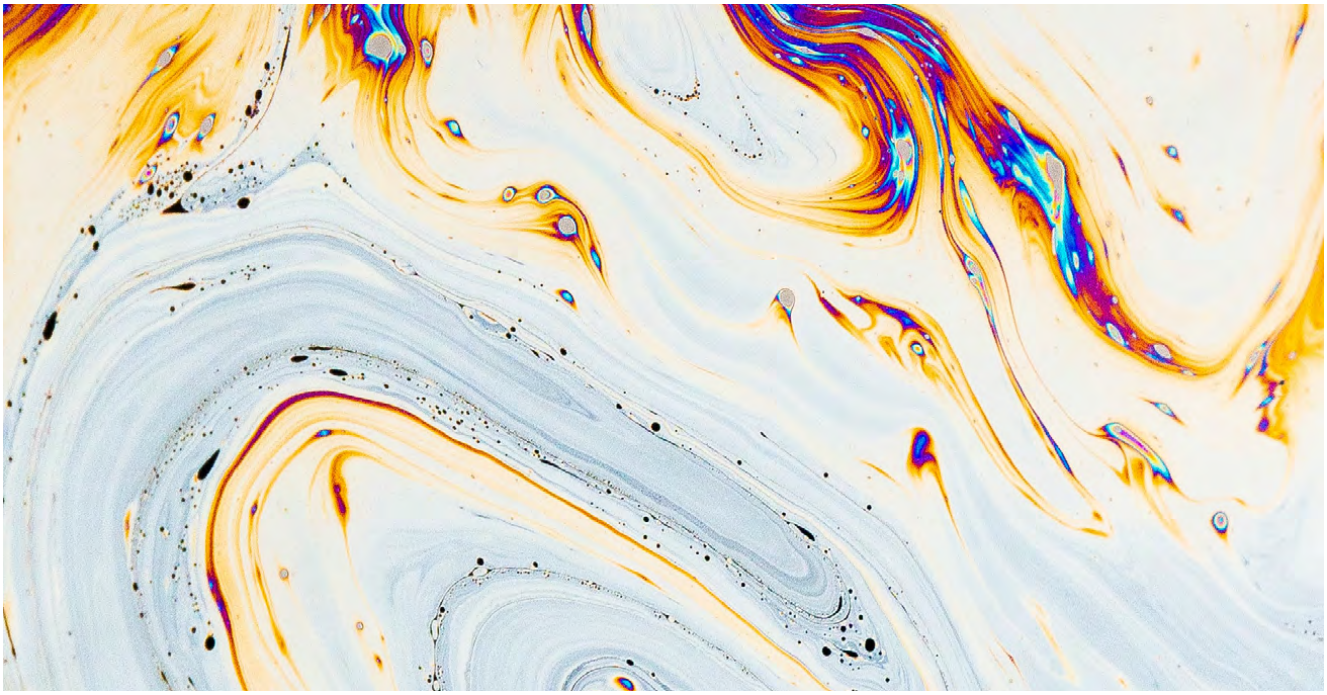
Bay of Plenty Regional Council v Maitai

Bay of Plenty Regional Council v Maitai[7] dealt with the discharge of septic tank waste, onto land in circumstances which may have resulted in that contaminant entering water, namely the Orini Canal. The defendant was employed by a septic tank waste removal business known as Brownfreight. On 17 May 2021 Mr Maitai had collected the contents of two septic tanks in Ruatoki at around 8:30 am. Each septic tank had a capacity of approximately 2,000 litres of wastewater, resulting in at least 4,000 litres of septage being in the tank of the truck. It was raining heavily that day. Mr Maitai was soaked and sent a text message to his manager saying that he was going home to change his clothes. The decision records that he was then observed discharging this wastewater directly to the Orini Canal.

The prosecutor sought that the defendant be sentenced to a period of imprisonment. The Court stated that while a sentence of imprisonment would respond to certain policies and principles of the Sentencing Act, including denunciation and deterrence, it would not provide for the education or rehabilitation of Mr Maitai or maintain or enhance the quality of the environment. A prison term of two months would likely result in one month of incarceration without any constructive element for the benefit of the community. The defendant would likely lose his present job, find it difficult to obtain a new job and have limited contact with his whānau. Instead, the Court imposed a fine of $5,850, and community work of 200 hours.

Greater Wellington Regional Council v Adams

Greater Wellington Regional Council v Adams,[8] deals with a costs decision against a Council. The Court considered the issue of an award of Crown costs against the Council, as it had found that the proceedings initiated by the Council were 'groundless at the most basic and fundamental level, and devoid of merit in the absence of supporting substantive evidence'. The Council noted that it had filed the enforcement proceedings in good faith and in pursuit of its statutory duty to protect natural wetlands (a matter of national importance), but to bring finality to the litigation, the Council agreed to pay the Crown costs award of $100,000. The Court accepted that the Council acted in good faith and in the honest belief that it was protecting natural wetlands.



[7] [2022] NZDC 9929
[8] [2022] NZEnvC 107

Legislation Update

MFE Guidance on immediate legal effect of the Medium Density Residential Standards

In July, MFE released the updated Medium Density Residential Standards: A guide for territorial authorities (**Guidance**). The Guidance was released just prior to the notification of the Intensification Planning Instruments (**IPI**) of the metropolitan territorial authorities[9] in mid-August.

The Guidance provides an overview of the Medium Density Residential Standards (MDRS) and addresses section 86BA of the RMA, which sets out which permitted activity rules of the IPI will have immediate legal effect from notification, and which operative district plan rules are no longer to be treated as operative. A flowchart concerning the immediate legal effect of the IPI rules is an Appendix to the Guidance and may be of assistance to territorial authorities navigating the potentially complex application of permitted activity MDRS rules in the notified IPI.

The Guidance can be accessed on the Ministry's website.

Local Government Electoral Legislation Bill

On 26 July 2022, the Government introduced the Local Government Electoral Legislation Bill. Primarily, this Bill is intended to improve the processes for electing councils at the next local government elections in 2025, including Māori wards. The Bill also covers decisions about the number of councillors at Auckland Council, clarity around rules for a tied election result, and the electronic filing of nominations. As the Local Government Minister Nanaia Mahuta said, the objective of the Bill is to improve the processes for individuals and communities to participate and be represented in local elections.

Turning to the detail, the most significant aspect of the Bill is the completion of the Māori wards reforms, commenced in February 2021. The Bill will remove all mechanisms for holding binding polls on Māori wards and simplifies the Representation Review process councils must follow every six years, so that Māori wards and general wards become part of one process. The proposed new process will include an initial step of a decision about whether to establish Māori wards or constituencies. The current process does not oblige councils to consider Māori wards.

The Bill also makes a number of changes to the local election process, including:

- The removal of the cap of 20 elected representatives at Auckland Council, which in turn allows for a growing population, consistency with other councils, and the inclusion of Māori wards.
- A simplified process for unitary authorities (including Auckland Council) to change local board boundaries without having to go through a full reorganisation process.
- Clarifying the process of judicial recounts following three disputed results at the 2019 elections.
- Modernises processes around nominations, allowing electoral officers to specify forms for submitting nominations (including electronic).

The Bill was widely consulted on between July and August 2021. It has passed first reading and is now at Select Committee process. Submissions may be made through this link, and are open until 14 September 2022. Our team is happy to provide further assistance or discuss the impact of the proposed changes further.

The Bill, and explanatory note, can be accessed on the legislation website.

[9] Tier 1 and specified Tier 2 authorities in Auckland, Hamilton, Tauranga, Wellington, Christchurch and Rotorua.

Key Contacts

Kerry Anderson
Partner
T: +64 4 474 3255
kerry.anderson@dlapiper.com

Diana Hartley
Partner
T: +64 9 300 3826
diana.hartley@dlapiper.com

Stephen Quinn
Partner
T: +64 27 434 9668
stephen.quinn@dlapiper.com

Emma Moran
Partner
T: +64 21 330 040
emma.moran@dlapiper.com

Anne Buchanan
Special Counsel
T: +64 9 300 3807
anne.buchanan@dlapiper.com

Emma Manohar
Special Counsel
T: +64 4 918 3016
emma.manohar@dlapiper.com

Waldo Randal
Senior Associate
T: +64 9 916 3751
waldo.randal@dlapiper.com

Kate Rogers
Senior Associate
T: +64 4 918 3050
kate.rogers@dlapiper.com

Kierra Parker
Senior Associate
T: +64 9 300 3885
kierra.parker@dlapiper.com

Suzanne Trounson
Associate
T: +64 4 474 3242
suzanne.trounson@dlapiper.com

Matthew Dicken
Solicitor
T: +64 4 474 3224
matthew.dicken@dlapiper.com

Frida Cho
Solicitor
T: +64 9 300 3843
frida.cho@dlapiper.com