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 Aotearoa New Zealand that may be of interest to local authorities and decision makers.

In this edition, we:

- Provide an overview of the implementation and timeframes to be aware of post-royal assent of the Natural and Built Environment Act 2023 and Spatial Planning Act 2023.
- Analyse the recent *Port Otago Limited* Supreme Court decision which provides new guidance on the interpretation of directive planning provisions.
- Review a decision about an application for leave to appeal to the Supreme Court in a land subdivision case, involving the issue of kaitiakitanga and rural amenity values.
- Discuss the new National Policy Statement for Indigenous Biodiversity 2023 and the National Policy Statement and National Environment Standards for Greenhouse Gas Emissions from Industrial Process Heat.
- Summarise a High Court decision about an appeal involving a resource consent application declined under the Covid-19 Recovery (Fast Track Consenting) Act 2020.
- Review a High Court judicial review decision which provides useful comment on councils' obligations to consult.
- Provide an analysis of recent decisions concerning prosecutions for environmental offending.
- Provide an update on recent legislation, including the Climate Change Response (Late Payment Penalties and Industrial Allocation) Amendment Act 2023 and changes to various water services legislation.

Implementation of the Natural and Built Environment Act 2023

The Natural and Built Environment Act 2023 (**NBEA**) received royal assent on 23 August 2023. The NBEA sets out a range of provisions which come into force the day after royal assent. However, there are significant transitional provisions set out in Schedule 1 of the NBEA, which limit the application for the NBEA at this stage. A critical date for the NBEA becoming relevant is "the region's NBEA date." The region's NBEA date means the date that the decisions version of the first plan for a region is treated as operative. It is also important to be aware that there are parts of the NBEA which will come into force based on a date appointed by the Governor General by an Order in Council. These dates can be different for different districts, regions or areas.

For development of NBEA plans , the first relevant date is the National Planning Framework (**NPF**). A targeted engagement draft of the NPF was released in October 2023. A Regional Planning Committee is to be established by a date to be set by an Order in Council. Regional Spatial Strategies (**RSS**) are required to be notified within seven years of the Spatial Planning Act 2023 coming into force, and adopted three years after the Regional Planning Committee is established. A region's NBEA Plan is required to be notified approximately two years after the RSS is adopted, and made operative two years after that.

For resource consents, on a region's NBEA date, the RMA ceases. However where an application for resource consent has been made but not determined, it is to continue to be processed and determined under the RMA. A similar approach applies for subdivision, with the subdivision sections of the NBEA not applying until the region's NBEA date, with some specific transitional provisions for subdivisions which have not been completed by the region's NBEA date. Existing resource consents are treated as consents under the NBEA.

For enforcement, breaches which occurred before commencement of the NBEA continue to be dealt with under the RMA. Following this, which legislation applies (and what enforcement mechanisms are available) depends on whether the offending took place within six months of the NBEA commencing, between six months and two years after commencement, or more than two years after commencement. For example, for offending two years after commencement, NBEA penalties such as a monetary benefit order and pecuniary penalties are available.

King Salmon survives the Supreme Court, though not without amendment

On 24 August 2023, the Supreme Court issued a decision in *Port Otago Limited v Environmental Defence Society Inc.* [2023] NZSC 112 which provides new discussion about the relative weighting of directive planning provisions. As discussed below, the approach the Supreme Court has taken clarifies the approach it previously outlined in ***King Salmon***[1].

By way of background, the matter relates to an appeal against the provisions of the proposed Otago Regional Policy Statement (**RPS**). In particular, the Supreme Court was required to assess how the RPS policy relating to ports should reflect the relationship between similar policies in the New Zealand Coastal Policy Statement 2010 (**NZCPS**). In this case, there was a potential conflict between the enabling of port operations and the directive avoidance requirements of the NZCPS.

In a unanimous decision, the Supreme Court held that the Court of Appeal erred in holding that the NZCPS ports policy, Policy 9, which uses the language "requires" was subordinate to the NZCPS avoidance policies, Policies 11, 13 and 15. Rather, the Supreme Court found that the avoidance policies and the ports policy are all directive. The ports in issue are part of an existing network operating in the coastal environment. The Supreme Court considered that reconciliation of any potential conflict between the NZCPS avoidance policies and the ports policy should be addressed at the regional policy statement and plan level as far as possible.

The Supreme Court set out various considerations and a framework for analysis on how a decision-maker should address any potential conflict between the ports policy and the avoidance policies. The Court found that where there is a potential conflict between the avoidance policies and the ports policy with regard to a particular project, the decision-maker would have to be satisfied that:

- The work is required (and not merely desirable) for the safe and efficient operation of the ports;
- If the work is required, all options for dealing with these safety or efficiency needs have been evaluated and, where possible, the option chosen should not breach the avoidance policies;
- Where a breach of the avoidance policies is unable to be averted, any breach is only to the extent required to provide for the safe and efficient operation of the ports.

Even where the option chosen encroaches on the avoidance policies only to the extent necessary for the safe and efficient operation of the ports, the Supreme Court found that this does not mean that resource consent would necessarily be granted. In deciding whether to grant resource consent all relevant factors would have to be considered in a structured analysis, designed to decide which of the directive policies should prevail, or the extent to which a policy should prevail, in the particular case.

The Supreme Court suggested revised wording and directed Otago Regional Council to consult with the parties, noting that it must otherwise give appropriate effect to the policies of the NZCPS and their interrelationships. While the Supreme Court was careful to note that the applications are 'fact-specific', the Supreme Court has clarified the approach in ***King Salmon*** as we know it. The decision arguably benefits infrastructure providers to some extent, however there can be no presumption that one directive policy will always prevail over another.

[1] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

Canyon Vineyard Ltd v Central Otago District Council [2023] NZSC 108

The Canyon Vineyard's application for leave to appeal directly from the High Court to the Supreme Court has been declined.

Background

Bendigo Station Ltd (**Bendigo**) owned a large farming property in Central Otago and was granted resource consent by the Central Otago District Council (**Council**) to subdivide its land into 12 lots. The Canyon Vineyards Ltd (**Canyon**) owned land to the west of Bendigo's land where it operated, among other things, a vineyard, restaurant and function centre. Canyon opposed Bendigo's application for the subdivision consent and appealed to the Environment Court on the basis that the subdivision would negatively affect the 'rural amenities'. The Environment Court upheld the Council's decision, albeit for a slightly amended proposal.

Canyon's appeal to the High Court against the Environment Court's decision was dismissed. Canyon then applied for leave to appeal directly to the Court of Appeal, but that too was declined. Despite these rejections, Canyon sought leave to appeal directly to the Supreme Court.

Canyon's grounds of appeal alleged two errors of law (which were broadly similar to those raised in the Courts below):

1. The alleged failure by the Environment Court to consider evidence on kaitiakitanga presented by Mr Johnston, the sole director and shareholder of Canyon; and
2. An alleged error by the Environment Court and the High Court in their assessment of effects in light of the Central Otago District Council Plan's (**the Plan**) objective to "maintain and where practical enhance rural amenity values".

Jurisdiction

The Council submitted that the Supreme Court had no jurisdiction to entertain the application for leave to appeal because appeals of High Court decisions under section 299 of the Resource Management Act 1991 (**RMA**) to the Court of Appeal are governed by the Criminal Procedure Act 2011 (**CPA**), with necessary modifications. Under the CPA, a party to a High Court decision under s 299 of the RMA can instigate a second appeal in either the Court of Appeal or the Supreme Court. In this case, the Council submitted that Canyon chose to appeal to the Court of Appeal and therefore had no right of appeal to the Supreme Court.

Even if there was jurisdiction, the Council submitted that there must, under section 75 of the Senior Courts Act, be exceptional circumstances that justify taking a proposed appeal directly from the High Court to the Supreme Court. Bendigo pointed out that this was a very difficult barrier to overcome where the Court of Appeal had already declined leave in a fully reasoned judgment.

Kaitiakitanga and rural amenity values grounds of appeal

Following its discussion of the parties' submissions about jurisdiction, the Supreme Court discussed key aspects of the Court of Appeal's decision declining Canyon's application for leave to appeal in relation to the kaitiakitanga and rural amenity values being alleged errors of law. The Court of Appeal referred to the approach of the Environment Court and High Court in respect of those matters in its decision.

With respect to the kaitiakitanga ground of appeal, the Supreme Court noted that the Court of Appeal held that the evidence had been considered and rejected in the courts below for reasons that were explained those did not give rise to an error of law.

In relation to the rural amenity values ground of appeal, the Supreme Court referred to the Court of Appeal's findings that it was not arguable that the incorrect test was applied by the courts below and Canyon's view that the rural amenity values were negatively impacted by any visible building on the site reflected a misunderstanding of the Plan.

The Supreme Court's assessment

In the assessment section of its decision, the Supreme Court held that it did not need to deal with the RMA jurisdiction point (the argument that as Canyon chose to appeal to the Court of Appeal it therefore had no right of appeal to the Supreme Court), as it was of the view that Canyon clearly failed the tests in section 75 of the Senior Courts Act. In this regard the Supreme Court stated that there were no exceptional circumstances justifying the application for leave to appeal to it, particularly in light of a full and detailed leave judgement from the Court of Appeal.

In any event, the Supreme Court stated that it did not consider the application for leave to appeal would meet the test in section 74 of the Senior Courts Act. While the Supreme Court considered that the issue of the approach to kaitiakitanga and the interpretation of plans could be matters of general or public importance, it was of the view that the case before it rested purely on the circumstances of the case. Further, the Supreme Court stated that that nothing raised by Canyon suggested a risk of a miscarriage of justice.

In addition, the Supreme Court noted that Canyon's application for leave to appeal was out of time and an extension of time for filing would be required. The Supreme Court stated that it assumed that Canyon, by filing the application, was also applying for an extension of time. Ultimately as the Court was of the view that leave would not be granted, it dismissed Canyon's application for an extension of time to apply for leave to appeal.

The case highlights the high hurdles that must be overcome to obtain leave to appeal to the Supreme Court where a resource consent applicant has already appealed a decision of the Environment Court in the High Court and the matter is not of general or public importance. The case also reinforces the importance of applying for leave to appeal within the timeframes prescribed by relevant legislation.

New National Policy Statements

National Policy Statement for Indigenous Biodiversity

On 7 July 2023, the Ministry for the Environment (**Ministry**) released the National Policy Statement for Indigenous Biodiversity 2023 (**NPS-IB**) in response to the biodiversity decline occurring in Aotearoa, New Zealand. The aim of the NPS-IB is to protect and maintain the unique biodiversity in Aotearoa by providing guidance to provide consistency for local government across the country. It intends to do so by prioritising the intrinsic value and mauri (life force) of indigenous biodiversity and recognise its connections and relationships with tangata whenua.

It directs councils to establish consistent approaches in their policies, plans and strategies to maintain indigenous biodiversity. It therefore provides for councils to implement RMA requirements through their plans, policy statements and decision-making. It applies to all land types, and it sets out consistent ecological criteria to be used by councils to identify where significant natural areas (**SNAs**) are located. Its aim is to better protect our native plants and animals and provide certainty to people who want to develop or change the way they use their land.

The NPS-IB requires territorial authorities to identify and protect SNAs through plans. The NPS-IB directs that adverse effects on SNAs (such as loss of extent, fragmentation, disruption to ecosystem function) must be "avoided" in RMA decision making unless one of the few exceptions applies. This is a different approach from the voluntary identification in the past and pairing it with an onerous avoid policy could result in more resource consent applications for activities such as development, subdivision or uses that are in, or affect, an SNA needing to be declined unless one of the exceptions applies. Outside of SNAs, the NPS-IB also addresses the Treaty of Waitangi principles by providing more flexible and locally developed approaches for Māori land, and provides more certainty for landowners to continue existing activities as long as there is no change that causes any loss or degradation of SNAs.

Implementation

The NPS-IB took effect on 4 August 2023. Councils will need to implement parts of the NPS-IB straight away. This means new activities or developments that may have adverse effects on indigenous biodiversity and need resource consent will need to meet NPS-IB requirements. The following implementation dates will be relevant to councils going forward:

- Late-2023 – MFE will release a separate iwi/Māori implementation plan outlining specific implementation support to assist iwi/Māori to engage with NPS-IB processes.

- Mid-2026 - Regional councils without regional biodiversity strategies must have initiated the preparation of a strategy within three years of NPS-IB commencement.
- Mid-2027 – Councils that have already identified SNAs must demonstrate how this has fulfilled the requirements of the NPS-IB.
- Mid-2028 – Territorial authorities have identified, mapped and notified all SNAs and given effect to Subpart 2 of Part 3. Councils must also have notified a plan or policy statement change that gives effect to Subpart 2 of Part 3, which includes the identification of SNAs and rules around their management.
- Mid-2031 – As soon as reasonably practicable or by the end of 2031, councils must have notified any changes to their policy statements and plans to give effect to the NPS-IB.
- Mid-2033 – Regional councils without regional biodiversity strategies to have completed them, and those with pre-existing regional biodiversity strategies to have updated them.

Biodiversity credit system

Finally, released on the same day, the Government is proposing a new 'biodiversity credits' system, which could complement the NPS-IB 'by recognising landholders who protect and restore nature'. The proposed credit system would allow landowners to earn credits for protecting, restoring and enhancing native ecosystems. Private companies could then buy those credits to be able to claim a positive impact. The proposals are outlined in this Discussion Document.

National Policy Statement and National Environment Standards for greenhouse gas emissions from industrial process heat

On 11 July 2023, the Ministry for the Environment released the National Policy Statement 2023 (**NPS-IPH**) and the Resource Management (National Environmental Standards for Greenhouse Gas Emissions from Industrial Process Heat) Regulations 2023 known as the National Environmental Standards for greenhouse gas emissions from industrial process heat (NES-IPH). The new framework for industrial process heat is a product of the November 2022 amendments to the RMA which allowed for local authorities to consider the effects of greenhouse gas emissions on climate change. The aim of the NPS-IH and NES-IH is to support the decision making of local authorities when considering the discharge to air of greenhouse gas emissions from industrial sectors using process heat in particular, and states consideration must be given to cumulative effects.

Process heat makes up 33 per cent of our overall energy use and contributes to approximately eight per cent of gross emissions. More than half of process heat is supplied using fossil fuels, mainly gas and coal. Together the NPS-IH and NES-IH aim to accelerate New Zealand's transition to a low emission, thriving, and sustainable economy.

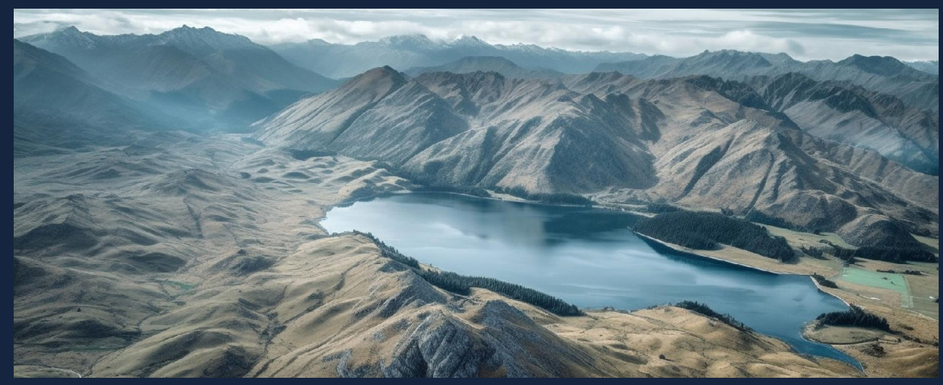
The NPS-IPH and NES-IPH provide nationally consistent policies and requirements for reducing greenhouse gas emissions from industries using process heat by:

- prohibiting discharges of greenhouse gases from new low to medium temperature coal boilers immediately and from existing coal boilers after 2037 (after this date no further consents can be issued),
- requiring resource consent to be held for new and existing fossil fuel boilers that emit 500 tonnes and above of CO2-e per year, per site, and
- requiring resource consent applicants to prepare and implement greenhouse gas emission plans and set out actions to reduce emissions.

The implementation of the NPS-IPH objectives and policies is facilitated by Part 3, which sets out what regional councils must do, in addition to meeting the requirements of the NES-IH. The requirements state that councils must include a 'cumulative effects' policy, an 'emissions plan' policy, and a requirement to provide a report to the Minister upon request which relates to the number of consents, extent to which emissions reduced, extent to which emissions plans have been implemented, and compliance with other conditions of consents for discharges of GHG to air.

The NES-IH, in particular, sets out activity status' for discharging GHG from heat devices, the requirements for granting resource consents for each activity status and setting resource consent conditions. They also describe specific requirements for the purpose, content and review of an 'emissions plan'.

Not on the fast-track – *Glenpanel Development Limited v The Expert Consenting Panel* [2023] NZHC 2069



A decision from early August is only the second High Court decision on an appeal on an application 'fast-tracked' under the Covid-19 Recovery (Fast Track Consenting) Act 2020 (**Fast Track Act**). The appeal and judicial review related to the Expert Consenting Panel's decision to decline consent for a housing development in Queenstown. The application was accepted as a referred project, but consent was declined by the Panel. The High Court upheld the Panel's decision with the appeal and judicial review being dismissed on all grounds.

The High Court confirmed that for a referred project, with a non-complying activity status, that the section 104D gateway test contained in the Resource Management Act 1991 (**RMA**) applied. The High Court confirmed, in respect of the objectives and policies gateway in section 104D(1)(b) of the RMA, that the position in *Akaroa Civic Trust v Christchurch City Council* remains the correct one[2]. That is:

> .....we consider that if a proposal is to be stopped at the second gateway it must be contrary to the relevant objectives and policies as a whole. We accept immediately that this is not a numbers game: at the extremes it is conceivable that a proposal may achieve only one policy in the district plan and be contrary to many others.

In respect of this part of the decision, the High Court was critical of additional evidence being adduced as to plan interpretation on a point of law appeal. It considered that the question is ultimately one of reading the decision and considering whether what has been undertaken is a fair appraisal, which is ultimately a judicial exercise.

The High Court also considered the effects gateway in section 104D(1)(a), the application of the existing environment principle from ***Hawthorn*** when assessing the future environment, assessing objectives, policies and other planning provisions and the relevance of Part 2 of the RMA to decision making under section 104 of the RMA. It also addresses allegations of procedural unfairness by the applicant and the issue of conflict of interest and predetermination where a legal practitioner is appointed to an Expert Consenting Panel. In respect of the final point, the High Court stated:[3]

> ...The very fact that the FTC Act permits lawyers to be appointed to panels, including to act as Panel Chair, implicitly acknowledges that there is no conflict of interest arising simply from the lawyer's role as an advocate for clients and their role on the Panel. Furthermore, it is to be expected that lawyers with expertise in appearing before, advising on, or sitting on expert panels under the FTC Act enhances their suitability for appointment, rather than detracting from it.

This is a useful decision in respect of the application of the section 104 statutory criteria to fast-track consenting and decision making for non-complying activities more generally.

[2]Decision at [82], citing *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110 at [74].
[3]Decision at [158].

CTS Investments LLC v Palmerston North City Council [2023] NZHC 1742

Background

This application for judicial review involved claims by the applicant CTS Investments LLC and others that Palmerston North City Council had inadequately consulted on a proposed plan change that would affect their land development proposal.

In August 2022, the Council notified Plan Change G to the Palmerston North District Plan. Plan Change G was designed to provide additional housing supply. The Council then applied for and obtained orders from the Environment Court that provisions of the plan change would have immediate effect under section 86D of the Resource Management Act 1991 (**RMA**).

One of the applicants for judicial review had applied for resource consents for a retirement village on land to which Plan Change G related. The Plan Change G provisions were more onerous than the operative plan provisions that applied to the land in question. The judicial review applicants submitted in opposition to Plan Change G. They did not challenge the Environment Court's decision under section 86D of the RMA but in the judicial review application sought orders setting aside the Environment Court's decision and effectively setting aside the Council's decision to notify Plan Change G on the basis of a number of allegations. These included that the Council, in preparing Plan Change G, failed to consult with people who represented adequately the interests of the applicants and to the extent that the Council did consult with people who represented the interests of the applicants, it did not provide sufficient information to enable them to assess the impacts of Plan Change G and provide meaningful submissions.

Key issues that arose in the application for judicial review were:

- the nature and extent of the Council's obligation to consult during the preparation of a proposed plan; and
- did the Council consult during the preparation of Plan Change G with people who sufficiently represented the interests of the applicants.

What is the nature and extent of the Council's obligation to consult during the preparation of a proposed plan?

The High Court began by setting out the legal principles relating to consultation in Schedule 1 of the RMA and section 82 of the Local Government Act 2002 (**LGA**). The Court noted that clause 3(2) of Schedule 1 of the RMA adds to the mandatory consultation requirements in subclause 3(1) a residual discretion in that a local authority "may consult anyone else during the preparation of a proposed policy or policy statement or plan". Clause 3(4) includes a requirement in "consulting persons" for the purposes of clause 3(2) that a local authority undertake the consultation in accordance with section 82 of the LGA.

The High Court observed that while section 82 of the LGA will provide clear guidance to local authorities on the principles of consultation, it is no more than an expression of the common law consultation requirements. The High Court considered that those common law requirements will apply alongside section 82 and must equally inform the decision on part of a local authority on whether to consult, and, if so, how it will consult under clause 3(2).

Having regard to those principles, the High Court found that consultation under clause 3(2) of Schedule 1 may be limited to those who are likely to be most affected by the changes being considered and otherwise to representatives of people or groups who may be more broadly affected.

In this regard it was relevant that section 82(1)(a) and (b) of the LGA require a Council to consider who the persons are who will or may be affected by a decision. The High Court considered that this meant clause 3(2) and section 82 of the LGA work together.

The Court found that it was clear that under clause 3(2) of Schedule 1, the Council needed to consult with the applicants on Plan Change G. The High Court observed that for one of the applicants, 32% of its land was within the area being rezoned. For another applicant the figure was 76%. The High Court took into account evidence from the judicial review applicants that the business zone overlay which formed a part of Plan Change G would see the potential loss of between 16 and 27 lots (depending on the final layout) with an average expected gross return of approximately $350,000 to $400,000 per lot. In addition, evidence on behalf of the judicial review applicants indicated that the applicants had spent more than $100,000 in preparing and advancing a resource consent application relating to a proposed retirement village.

The High Court accepted that with that context and framework in mind, major landowners whose land fell within the area covered by Plan Change G needed to be consulted and it went on to address the individuals who needed to be involved in the consultation and the material with which they should have been provided to comment on as a separate issue.

Did the Council consult with people who represented sufficiently the interests of the applicants?

After considering the consultation process undertaken by the Council at a broad level and with the applicants, the High Court found the Council had consulted with people who sufficiently represented the interests of the applicants.

While the applicants had argued that consultation was inadequate and needed to be undertaken with other applicants separately, this was not accepted by the High Court. The High Court noted that consultation is a two way street and the Council had engaged with a representative on the basis that he was the right person to consult with. If that representative wished to include others within the discussions he should have done so, as occurred later in the process when planners, architects and urban designers were included in discussions.

The Court also rejected the applicants' claim that they had been provided with insufficient information by the Council. While they had received different iterations of the structure plan as it was being prepared by the Council, the underlying master plan and other supporting information, the Court noted that the applicants were not provided with the actual Plan Change G provisions during the consultation process because they had not at that point in time been prepared. However, the High Court considered that the information provided did amount to provision of sufficient information to enable the applicants to understand the matters that the Council was considering during the preparation of the proposed plan change and to enable the applicants to make relevant and intelligent responses.

Finally, the High Court found there was no error by the Council in not giving notice to the applicants regarding the section 86D application. The Court noted that such applications for early commencement, by their nature, must usually proceed on an *ex parte* basis. Further, even if there had been a flaw in the council's consultation, the Court could not grant the relief requested of quashing the Environment Court's decision on the section 86 application. The Court could only do so if the Environment Court's decision itself was in issue and if a flaw was found in the Environment Court's process. Overall, the application for judicial review was declined.

Discussion

The significance of this case comes largely from the High Courts findings regarding councils' obligations to consult. The decision provides clarification for councils regarding consultation through the Schedule 1 process in that clause 3(2) of Schedule 1 works together with section 82 of the LGA. Accordingly, councils can use this framework to assess those parties and individuals who ought to be involved in a consultation.

Enforcement Update

In this section we summarise below two recent enforcement decisions before the District Court in relation to an unconsented septic tank, and a crematorium discharging smoke in breach of consent conditions.

Hawkes Bay Regional Council v Brown [2023] NZDC 14468

Mr Brown, the defendant in *Hawkes Bay Regional Council v Brown* was the owner of a property in rural Hastings, located over the Heretaunga Plains unconfined aquifer. The two dwellings on the property were served by individual septic tank sewage treatment systems which discharged septage to the land. These required consent as a discretionary activity under the relevant regional plan.

When the property was purchased valid resource consents were in place, but a notice of transfer of consent was not filed. When the previous owners surrendered the discharge consent, it subsequently expired, and the use of the septic tanks were no longer permitted by any consent.

At the hearing before Judge Dickey, the defence did not call any evidence, and many of the key elements were not disputed (including the applicable planning framework, lack of consent and use of the property as residential). The main issue for the purposes of proving the charges before the Court was whether the septic tank system was discharging septage to the land, or whether discharge was being prevented.

Mr Brown asserted that the system was not in use, despite the house being lived in, and that the chambers of the tank system were being used as "holding tanks" with any waste being sucked from them.

Despite no Council Officers observing any septage in the disposal field around the septic tank, the Court found that the Council's evidence established the charge beyond reasonable doubt. This was namely because of the evidence that the house was occupied, and facilities were clearly being used, and the septic tank chamber was full at the time of an inspection.

This case provides some insight into the level of evidence needed in a Council investigation where the offending itself may not be inherently visible or easily measurable – particularly in the context of discharge offences.

Bay of Plenty Regional Council v Legacy Funeral Homes Ltd [2023] NZDC 15466

This sentencing decision against Legacy Funeral Homes (**Legacy**), heard by Judge Kirkpatrick, was in relation to charges for discharging a contaminant in breach of section 15(1)(c) of the RMA, and abatement notices requiring the cessation of that same discharge. Legacy entered early guilty pleas for both charges, and at the time of the sentencing decisions, had ceased the discharge to comply with the abatement notice.

Legacy owned a funeral home on Pyes Pa Road in Tauranga, approximately 13km south of the central business area in Tauranga, and close by the residential area known as the Lakes. A few rural residential properties sit close by to the funeral home.

The funeral home expanded operations to establish a crematorium and mortuary about a decade ago. The appropriate consents were applied for at the district and regional level (noting submissions were received by the District Council in opposition and an appeal made to the Environment Court which was settled by consent order).

A plan change to the relevant Regional Air Plan in 2020 meant that discharges of contaminants to air from existing crematoria established prior to February 2018 became a controlled activity. Subsequently, Legacy applied for an air discharge permit. This was granted with the following conditions:

> condition 4.1 — no discharges from any activity on site shall give rise to air emissions (particulates, metals, gas (es) and/or odour), to an extent which, in the opinion of an enforcement officer, is noxious, dangerous, offensive or objectionable beyond the site boundary;
>
> condition 4.6 — the opacity meter shall assess the percentage of light attenuated by emissions from the stack. Opacity is to be measured at all times the cremator is operated;
>
> condition 4.7(a) — in the event that the opacity alarm is triggered, and intervention is required, the consent-holder shall keep a record of the date and time of this occurring. Within one month of the exceedance occurring the consent holder shall investigate the reasons for the exceedance and keep a written record of the opacity reading, and remedial actions taken to avoid further exceedances."

Between December 2021 and April 2022, there were several complaints made to Council about the discharge of thick, odourous smoke from the crematorium. Video recordings, witness statements and a recording device installed by the Council recorded the intensity of the smoke, including the location of it wafting into neighbours' properties and homes. Many of the neighbours provided statements which detailed the significant impact this had on them physically (headaches, nausea,) and mentally (disgust, distress). The neighbours spoke of the impact this had on their lives, including the inability to invite friends and family to their homes.

Legacy stated that there had been technical faults with the machinery at the crematorium which had been difficult to resolve due to the pandemic.

The Court identified three key effects on the environment: effects on human health; effects on amenity values; and cultural impacts. Judge Kirkpatrick stressed that the cultural concerns related to Te Ao Māori, and the principles of tikanga requiring appropriate care and respect to be afforded to the deceased, but also expanded this notion by stating that "cultural concerns are not only held by Māori but are also shared by people throughout the world. Respect for the dead and for human remains are deep concerns."

These cultural impacts, alongside the health and amenity concerns of the neighbours, became an important point for the Court when evaluating the appropriate starting point for sentencing.

Judge Kirkpatrick stated that Legacy's response was not as 'immediate or as empathetic as it should have been given the nature of the discharge' and considering it knew the activity was of cultural concern to its neighbours. The Court considered this should have required immediate attention and an effective alternative where technical issues were identified.

The Court ultimately came to an overall starting point of $100,000 for both charges, reflecting the high culpability of the offending – or as the Court put it, because 'Legacy let its neighbours down.' After accounting for the early guilty plea discount of 25% and a 5% discount for a first-time offender, the sentence came to a fine of $70,000, as well as $5,000 to each neighbour who provided a victim impact statement to the Court (a total of $15,000).

Judge Kirkpatrick also made note of the importance of planning for appropriate placement of activities involving combustion processes in proximity to residential properties, and urged such activities to be treated with care at the planning stage and any consenting stage.

Overall this case is one of the first of its kind in crematorium discharge prosecutions and sets a high precedent for the seriousness of this kind of offending.

Legislative Update

Climate Change Response (Late Payment Penalties and Industrial Allocation) Amendment Act 2023

At the end of August, the Government passed legislation to amend the Climate Change Response Act 2002 to introduce a revised late payment penalty for small forestry participants and enable changes to the way the Government allocates units to firms in emissions-intensive and trade-exposed industries.

The Climate Change Response Act 2002 (the **Act**) establishes the Emissions Trading Scheme (**ETS**), which is one of the Government's tools to reduce greenhouse gas emissions. The ETS sets a price for greenhouse gas emissions and encourages removing emissions from the atmosphere through forestry. The mechanism for this is the trading of "emissions units" (**Units**), which equate to one tonne of carbon emissions.

The ETS has a penalty and compliance regime, which imposes a penalty on participants who fail to pay Units on time to cover emissions associated with their activity. The previous penalty was a discretionary "excess emissions" penalty of $30 per unpaid Unit. The Government determined that this was not rigorous enough to deter non-compliance and had a high administrative burden, alongside other technical issues.

The Climate Change Response (Late Payment Penalties and Industrial Allocation) Amendment Act 2023 (the **Amendment Act**) establishes a revised penalty for small forestry participants to apply from 1 January 2025. "Small forestry participants" are those that carry forestry liabilities of less than 25,000 Units on average per year (or deforesting approximately 36 ha of mature pine forest). The revised penalty rate is half the carbon per unpaid Unit for post-1989 forest and a quarter for pre-1990 forest.

This is distinct from the "three to one" penalty introduced from 1 January 2021 for all other participants in the ETS. The "three to one" penalty never applied to small forestry participants as there was concern it could cause serious financial hardship.

The ETS also allows the Government to allocate Units to firms carrying out emissions-intensive and trade-exposed industrial activities where the ETS could affect the competitiveness of a firm compared to their overseas counterparts (called an "industrial allocation").

There are 26 activities which are eligible for an industrial allocation, with iron and steel manufacturing and methanol production receiving the highest allocation.

The allocation a firm can receive is based on a formula that uses "allocative baselines", which is a rate based on emissions per tonne of product. Those allocative baselines had not been updated for some time and meant that some firms were receiving more units than they needed (and in some cases receiving 100% of their emissions costs).

The Amendment Act addresses this issue by updating the allocative baselines and revising the eligibility for an industrial allocation. The baselines have been revised using the period 2016-2021, whereas the old baselines used the period 2006-2009. The Amendment Act also:

- allows the Minister of Climate Change to update allocative baselines, and retest and update the eligibility test, with new data; and
- revises the criteria that must be considered to determine whether an activity is eligible to receive an industrial allocation.

Changes to the Water Services Legislation

The end of August saw a flurry of activity regarding "three waters" legislation, with three bills being passed into law. These changes mark the finishing touches of legislation designed to improve the safety and quality of New Zealand's drinking water.

At the end of August, Parliament passed the Water Services Entities Amendment Act 2023 (the **WS Amendment Act**), Water Services Legislation Act 2023 (the **WSLA**) and the Water Services Economic Efficiency and Consumer Protection Act 2023 (the **WSEECPA**). This legislation forms part of the Government's "three waters" reform, that has the stated purpose of "significantly improving the safety, quality, resilience, accessibility, and performance of the water services, in a manner that is efficient and affordable for New Zealanders".

Water Services Entities Amendment Act 2023

The WS Amendment Act amends the Water Services Entities Act 2022 and local government legislation to give effect to Government announcements in April and May 2023 to refocus water services reform.

A key aspect of the WS Amendment Act is the replacement of the four water services entities under the 2022 Act with 10 new entities based on existing regional boundaries. The creation of these entities will be staggered between 1 July 2024 and 1 July 2026, with the first "cab off the rank" being the Northland and Auckland Water Services Entity.

The WS Amendment Act also:

- Amends regional representative group membership to require every territorial authority to be represented and removes the minimum and maximum number of members;
- Enables the creation of shared services arrangements between water entities to provide a means to achieve scale and efficiency gains;
- Enables the establishment of a Water Services Entities Funding Agency which will operate as a backstop central financing facility where smaller entities have limited borrowing capacity;
- Establishes a new mechanism called "community priority statements" which will provide an avenue for those with an interest in a body of water to communicate their objectives and priorities about how an entity's services and activities impact on it;
- Provides a merger process if two or more existing entities wish to form a single entity;
- Provides transitional provisions to reflect that, due to these amendments, most territorial authorities will continue to be responsible for water services beyond 1 July 2024 (i.e. until the establishment of the relevant entity).

The Water Services Legislation Act 2023

The WSLA is a highly technical Act that establishes the functions, power and duties of the entities established under the Water Services Entities Act 2022 (as amended by the Amendment Act). In summary the WSLA provides for:

- Additional, detailed implementation arrangements for the entities, including provisions relating to the transfer of assets, liabilities, and other matters from local authorities to new water services entities.
- Service delivery functions and powers, which are modernised arrangements based on existing local government and utilities legislation, to enable water services entities to deliver water services in place of local authorities.
- Regulatory functions and powers to enable water services entities to make rules, plans, and other instruments relating to water services, and engage in compliance and enforcement activities.
- Charging arrangements for water services, to enable entities to charge for services in place of existing rating arrangements.
- Engagement and publication requirements that water services entities must follow in developing specified instruments.
- Detailed changes to local government legislation, the Resource Management Act 1991, the Water Services Act 2021, and other legislation relating to regulation and service delivery of water services.

The Water Services Economic Efficiency and Consumer Protection Act 2023

The purpose of the WSEECPA is to set up a new economic regulation and consumer protection regulator to ensure that water entities are responsive to consumer expectations and have robust asset management practices. This new regulatory function is designed to complement Taumata Arowai's focus on ensuring drinking water standards are met and help ensure good consumer outcomes are achieved in relation to wastewater and stormwater networks.

In essence, the WSEECPA responds to concerns that the establishment of the new water services entities will create a natural monopoly on the provision of three waters. It will require the entities to disclose particular information to increase transparency and scrutiny of performance, provide regulatory tools to cap the maximum allowable revenue (subject to minimum quality standards) and apply minimum quality standards (e.g. leakages, disruptions) independent of costing.

To oversee this is a new Water Services Commission within the Commerce Commission that will be charged with regulating the water services entities.

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