Environment Court of New Zealand
Te Kooti Taiao o Aotearoa

Annual Review

Calendar Year 2016

By Members of the Court

2016

PUBLISHED AUGUST 2017 CONCERNING CALENDAR YEAR 2016

In this review

Calendar year 2016: an overview by Principal Environment Judge

- This is the third Annual Review of the Environment Court, prepared on behalf of its Judges and Commissioners, and covering the calendar year 2016. It is intended to complement the Annual Report to Parliament by the Registrar that covers each Government reporting year (most recently to 30 June 2017) and provides commentary beyond the statistical focus of that Report.

- An appendix to the Review describes the place of the Environment Court in the New Zealand Court system and its place in the resource management system. The appendix is carried over from previous annual reviews for simple ease of access. These pieces of information can be used as background and context for much of the material set out in the body of this document.

- The Review describes progress of the Court in 2016, drawing from the Court's database. The Court continued to achieve a high clearance rate for all types of cases. Factors driving these results include continued use of individualised case management, alternative dispute resolution, streamlined hearing techniques, and use of modern technology.

- A section of the Review describes the nature of the work of the Court in 2016 including alternative dispute resolution and varied case management techniques. It describes the Court's use of its three case management tracks, adjudication by hearing, cases directly referred without first being heard by councils, civil enforcement cases and criminal prosecution hearings (the latter by Environment Judges sitting in the District Court).

- There is a section describing the admirable work in support of the Court by the staff of its registries; also a project by the Ministry of Justice restructuring functions and reporting-lines amongst support staff of many courts including the Environment Court, and difficulties brought about.

- There is a section about some regular processes of assessment of progress of the Court and contact about same with persons regularly engaged in work before the Court.

- The Review discusses positive trends in appeals about policy statements, plan reviews and plan changes. It reports on progress towards conducting workshops with two professional societies about the quality of plan drafting.

- The section on initiatives and innovations describes a revamp and ongoing interactive use of the Court's website by parties; the appointment of the Environment Judges to chair Land Valuation Tribunals and the moving of its registry functions into our Court's registries; and significant community and international involvement on the part of many members of the Court.

Profile of the Court

The Court is constituted by s 247 of the Resource Management Act 1991 (RMA).

As a specialist Court of Record, it has a particular place in New Zealand's Court system, and in the resource management system.

The Court's place in the New Zealand Court system

Please refer to Appendix 1 to this Review for information about the place of the Environment Court in the New Zealand Court system, as background and context for many of the issues discussed in this document.

Progress of the Court in 2016

Reference may be made to the Report of the Registrar to 30 June 2016 for statistical detail, but it is appropriate to record in this Review that the clearance rate of all cases in the Court remained at a good level during 2016. In the 2016 calendar year 499 new cases were lodged, and 431 were resolved in ways which will be described in the next section of this review.

The two largest categories of cases were appeals against decisions of consent authorities and appeals on proposed policy statements or plans. In 2016 there were 109 of the first type lodged and 148 resolved. Of the second class 188 were lodged and 142 resolved.

Other classes of action included appeals against decisions of requiring authorities, applications for enforcement order, and notices of objection to intention to take land. In each case, a little over a dozen such cases were lodged in each class and similar numbers disposed of.

A feature in 2016 was a new class of cases being appeals concerning the Proposed Auckland Unitary Plan. Over 70 such cases were lodged towards the end of the calendar year, and a small number immediately resolved. (In the early months of 2017 a great many of them were resolved by alternative dispute resolution ("ADR") processes and some hearings).

The rate of resolution of these cases, as with all plan review and change appeals, has been rapid, mostly on account of prompt mediation being undertaken and robust case management.

The apparent shortfall of numbers of cases resolved compared to cases lodged in the calendar year almost exactly equates to the arrival of the moderately significant number of Auckland Unitary Plan appeals right at the end of the reporting period. With this taken into account, we are satisfied that the case resolution rate in the Court remains very satisfactory, as has been the case now for a number of years. There will always be variations year on year in comparative rates of lodgements and disposals caused by factors beyond the control of the Court, such as the Auckland example last year.

Robust case management, ADR activities, streamlined hearing techniques, together with increasing use of modern technology (all as described in detail elsewhere in this review), have all created significant positive impact.

As noted in previous reviews, societal factors impacting on both rates of lodgement and speed of resolution can include:

- Plan appeal numbers have fallen overall in recent years, particularly as there has been no large “second wave” of plan reviews, and rolling plan reviews and plan changes have become more common;

- The costs (legal and expert witness) of mounting a cogent case to the Court discourage many people from participating in Court processes;

- There has, since 2009, been a statutory regime of considerably more limited public notification of applications for consent and other legislative modifications to the extent of the Court’s jurisdiction in some areas;

- Resource consent activities in the overall resource management system are likely to have been impacted by times of some fiscal austerity (it having been calculated that appeal numbers generally equate to about 1% of the total applications processed by consent authorities);

- Introduction of a robust system of call-ins to ad hoc Boards of Inquiry of matters of national significance, albeit that Environment Judges and Commissioners are often seconded to the hearing panels for those cases.

Construction in Auckland's Wynyard Quarter Plan Change area

The nature of the Court's work in 2016

Types of case resolution as described in the Practice Note 2014

The latest revision of the Environment Court Practice Note was published during 2014 and came into effect on 1 December that year, replacing all earlier Practice Notes. Its introductory provisions record that it is not a set of inflexible rules. There was detailed discussion of it offered in the previous (2014) Annual Review, and the practice note itself can be found at www.justice.govt.nz/courts/environment-court/practice-note.

Case management tracks

As will be seen from the Practice Note, the Court operates three tracks for case management. In summary, the Standard Track is for relatively straightforward cases, the Priority Track is for more urgent cases such as enforcement proceedings and cases where the Court directs priority resolution; and there is a Parties' Hold Track. The latter is used when parties are not actively seeking a hearing, for example to allow an opportunity to negotiate or mediate, or when a fresh plan variation or change needs to be promoted by a local authority so as to meet an issue raised in an appeal. Such cases are regularly reviewed by a Judge to assess whether they need to move to another track and be actively progressed.

Progress through any of the Tracks is overseen by the use of proactive case management methodology. Each Judge on the Court is allocated a geographic area to oversee, and robust case management is at the heart of the work of the Court.

The Court has in recent years been successful in reducing the life of cases to the point where there is now no backlog of cases awaiting either mediation or, where necessary, hearing, or other court time. The Court continues to dispose of more cases than are being filed year on year. This is due in no small measure to a highly co-operative process between the judiciary on the one hand and the specialist registry staff on the other, driving efficiency and timeliness to earlier and less costly resolution of cases. Other factors at play are described elsewhere in this Review.

Waterfall on the Routeburn Track

Adjudication by hearing

In the relatively small number of cases that do not settle at mediation or get withdrawn (about 5%), considerable emphasis is placed on pre-hearing case management activity by Judges, and preparation for hearing by parties and members of the Court. A strong focus by the Court is brought on pre-hearing conferences, the setting of timetables, and monitoring of progress of the parties. The purpose of these conferences is to ensure proper preparation for the fair and efficient hearing of cases. Directions may be given about the resolution of preliminary questions, timetables for the exchange of evidence, and the date and duration of the hearing. Reliable estimates of hearing time are required from counsel and parties. All parties are to attend or be represented at the conferences by someone thoroughly familiar with their position and the submissions and evidence to be given. Many such conferences are conducted by telephone, but some occur in Court for logistical reasons such as sheer numbers of parties.

There is a particular focus in the Practice Note on cooperation in the preparation of evidence, to ensure that proceedings are dealt with in a focussed way. Parties are commonly required to supply statements of agreed issues of relevance and importance to the case and a statement of agreed facts. They are also required to provide an agreed dossier of copies of relevant provisions of planning documents and any other documents common to the parties' cases. The Court stresses succinctness and the avoidance of repetition, aided by efficient cross-referencing, tabulation, and indexing.

The Practice Note contains detailed provisions about preparation of statements of evidence, again stressing succinctness, focus, relevance and the avoidance of repetition.

It is the almost unvarying practice of the Court in recent times that the Judges and Commissioners rostered to hear a case will read all the evidence and other materials ahead of the commencement of the hearing. It is now most unusual for any evidence to be read out in court. The length (and therefore also cost) of hearings has been very substantially cut by the use of this approach – probably roughly in half.

Use of electronic media, both in preparation for hearings, and during hearings themselves, is described elsewhere in this Review. The use of the Court's website for interactive exchange of evidence, and the use of electronic tablets for accessing case materials before, during and after hearings, has further considerably streamlined the progress of cases and caused substantial reduction in volumes of paper materials.

A feature of the Court's work is the high degree of involvement of self-represented parties which can raise a tension between efficiency/speed of disposal of cases, and ensuring that such parties (and indeed all parties) are treated fairly. The Court finds it helpful to guide self-represented parties on matters of process to some degree in the interests of keeping cases moving, but fairness to other parties requires that the Court stop short of offering self-represented parties legal and other substantive advice. More information on how the Court endeavours to meet the needs of such parties will be found in the sections of this Review on direct referral cases and electronic initiatives.

Direct referrals

The 2009 Amendment to the RMA introduced provision for applicants for resource consent to request from councils a decision to refer the matter directly by the Environment Court without first being decided by the council.

Applicants commenced using this process from the beginning of 2010, and a relatively small but steady number of cases have been lodged in the Court since then. The cases tend to comprise proposals for larger commercial or infrastructural activities, and accordingly have been treated by the Court as requiring a reasonably high degree of priority to process, hear and determine.

Consent authorities presently have discretion to refer a case directly to the Environment Court. In 2013 an amendment was made for the purpose of limiting councils' discretion to refer cases, but the provision was not to take effect until after Regulations had been promulgated. The Ministry for the Environment has subsequently sought and received submissions on the topic, but the relevant provision (s87E RMA) is awkwardly constructed and Regulations have not yet been promulgated. Members of the Court consider that the Court and parties would not be overwhelmed if the need for Regulations were removed in any amending legislation.

Three direct referral cases were lodged during 2016, one mid-year and two towards the end of the year.

In June, an application by Horowhenua District Council for consents for discharge of waste water from the Foxton Wastewater Treatment Plant, was lodged. In October an application by Wellington International Airport Limited for extension of its runway and related matters was lodged. In December an application by Skyline Enterprises Limited for resource consents to undertake redevelopment of its gondola and associated facilities in Queenstown, was lodged.

Each of these direct referral cases, despite being assiduously managed by the Court, has been delayed for reasons beyond the control of the Court. By way of example, the Wellington Airport application needed to be adjourned to accommodate regulatory processes outside of resource management matters.

The ability of the Court to maintain good momentum towards resolution of such cases is important. Such cases should not be caught by statutorily imposed time limits such as exist for applications for activities of national importance processed by the Environmental Protection Authority. This is what had been experienced during the previous two years with the Waiheke Marinas Limited direct referral application discussed in the 2015 Annual Review.

The last named case was closed in February 2016, following a costs decision awarding notably large sums against the unsuccessful applicant.

Autumnal Tree in the Queenstown Area

Costs in direct referral cases

The Court may order a party to a direct referral case to pay to the Crown all or any of the Court's costs and expenses. For the guidance of parties, the Registrar maintains an informal scale of such costs that are discussed with applicants from time to time. Bearing in mind that the discretion to award costs is ultimately that of the Court, the pattern in the direct referral cases concluded in the last four years has been that agreement has generally been reached between an applicant and the Registrar at a relatively conservative level, and subsequently approved by a Judge.

A notable exception was the Waiheke Marina case just mentioned. Applications for costs were made by the large community group which was the principal party in opposition, Auckland Council, and the Registrar of the Court. Meantime the officers of the applicant company had placed it into liquidation. The liquidator expressly took no part in the costs debate. In the absence of effective opposition the Court was obliged to weigh the claims most carefully.

Higher than normal costs were awarded (50% of moneys expended) to the community group, largely because of the difficulties repeatedly created by the applicant in what the Court described in its decision as a "lengthy, tortuous and complex case". The Court held that the Council could be entitled to an award of 100% of its costs, and confirmed such award in its decision. The claim by the Crown was treated similarly. The total of all costs awarded was notably high: over $1 million. Recoverability is not within the jurisdiction of this Court.

The direct referral process can provide an avenue for speedy determination of complex cases, but applicants need to have their cases extremely well prepared if they are to avoid "road blocks" and high costs along the way because they will not have the usual benefit of a first instance hearing before a council or hearing commissioners as a "filter" of issues.

The Court has developed techniques for managing extremely large numbers of parties in these cases, particularly including the appointment by the Court of process advisors to submitters to enable the proceeding to move forward quickly without at the same time inappropriately disadvantaging parties. An example again was the Waiheke Marina case, where the great majority of 310 submitters were encouraged to coalesce their interests under the umbrella of a community organisation formed to oppose the application. The Court has also developed electronic processes to assist it and the parties to manage what could otherwise be tremendous quantities of paper materials. This is discussed in greater detail in the section on innovations in this Review.

Mediation

Section 268 RMA contains a broad power for the Environment Court to initiate, "*for the purpose of encouraging settlement*", mediation, conciliation, or other procedures designed to facilitate resolution before or at any time during the course of a hearing. The Court makes significant, and increasing, use of these powers.

The section has a "voluntary" flavour about it, recording that ADR may be carried out "*with the consent of the parties and of its own motion or upon request…*"

However, litigation in the Environment Court is not just about resolving private disputes. Almost all cases raise significant public interest issues as well. Not only does this factor drive the Court to ensure early resolution of proceedings, but it colours its approach along the "voluntary" to "compulsory" mediation spectrum, to offer very strong encouragement.

Other alternative dispute resolution processes

The Practice Note records that the Court actively encourages ADR, and in addition to mediation will offer conciliation, conferences of expert witnesses, expert determination, and judicial settlement conferences. While the ADR work of the Court is mainly conducted by its Commissioners who are specially trained in the process for resource management cases, Judges do run settlement conferences, and there is provision for outside specialists to be engaged as well.

The Practice Note advises that ADR techniques are often highly cost-effective compared to proceeding to a full hearing before the Court, and that outcomes may also be reached which would be beyond the jurisdiction of the Court in a hearing. These can be achieved by way of "side agreements" that will not become part of any order ultimately issued by the Court.

In recent years Commissioners have been trained and have developed experience in facilitating, on a fully independent basis, conferences of expert witnesses. The emphasis in such work is not to foster compromise, but to have experts in their appropriate peer groups debate their differences objectively and scientifically for the purpose of reaching agreements and clarifying the particular issues on which they do not agree. These conferences are conducted in the absence of influence by parties, although counsel are assigned particular obligations in readying the witnesses for the conference, explaining the procedures to them including their duties of independence and objectivity, and assisting their clients to understand the process. Increasingly, these conferences are successful in resolving significant numbers of issues that would otherwise have to be canvassed in expert evidence in cases, with resulting savings in hearing time, and therefore also the cost of litigation. Good preparation by those involved is crucial to good outcomes, and the Court stresses this in the course of case management.

The Judges have developed techniques to further assist cost-effective resolution of cases in some instances where mediation and/or expert conferencing has got stuck over particular issues.

For instance, a presiding Judge will occasionally direct the giving of concurrent evidence by a group of expert witnesses for whom an issue is relevant (in Australia called "hot-tubbing"). This occurs during the course of a hearing, and can sometimes be used as an extension of expert conferencing. The focus is on gaining accurate and objective scientific answers.

Civil enforcement cases and criminal prosecutions

The Environment Court undertakes civil enforcement cases under Part 12 of the RMA. Also undertaken under Part 12 are declaration proceedings and appeals against abatement notices issued by councils. These cases comprise a fairly significant part of the work of the Court.

Enforcement orders operate like injunctions in the general civil courts.

On average, approximately 40 such cases are brought to the Court each year, but in 2016, 25 were lodged. A similar number was resolved during the year.

As in previous years, approximately two thirds of enforcement cases were brought by councils and one third by individuals.

A little more than half the applications were allowed, many were withdrawn, and a small number declined.

Appeals against abatement notices issued by councils produced 26 appeals in the 2016 year, slightly fewer than the 35 in the previous year. The difference is not considered indicative of any trend.

Prosecutions are not heard in the Environment Court, but instead by Judges of the District Court who also hold Environment Court warrants. There currently exists a Protocol between the Heads of the District and Environment Courts whereby full warranted Environment Judges will hear all prosecutions save in cases of urgency when Alternate Environment Judges (full time District Court Judges holding an Alternate Environment warrant) may sit.

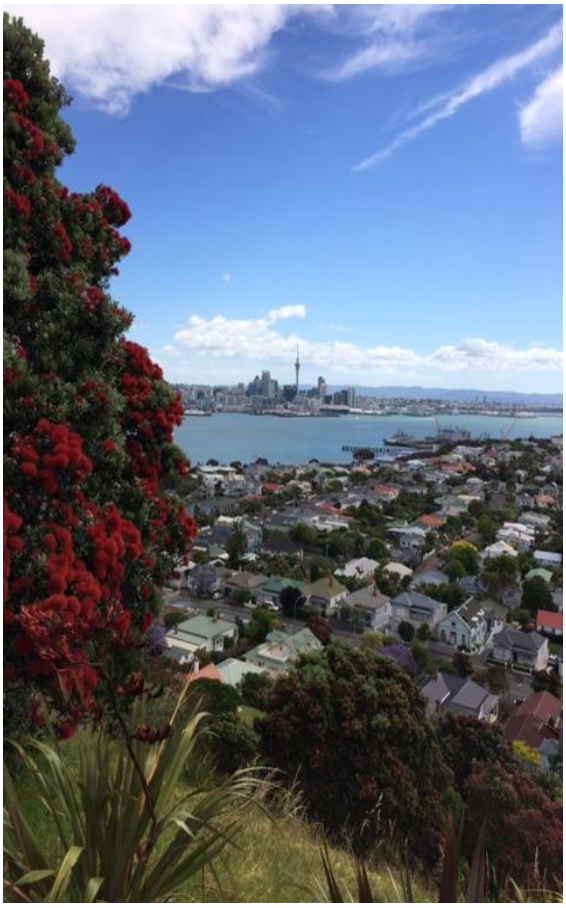
Because the work is carried out in the District Court, statistical analysis of the cases and outcomes is not the province of the Environment Court. Working however from information provided from the District Court's database, 413 charges were brought under the RMA in 2016. The largest group, over half, concerned allegations of illegal discharges of contaminants to land, water and air (often dairy effluent waste).

Supporting the Court: the Registries

The Court maintains registries in Auckland, Wellington and Christchurch. Each registry is led by a Regional Manager, each of whom are designated as Deputy Registrars, and who hold the powers, functions and duties of the Registrar under delegation.

The Registrar and Deputy Registrars exercise quasi-judicial powers such as the consideration of certain waiver applications; and when directed to do so by an Environment Judge, perform functions preliminary or incidental to matters before the Court.

Each registry provides services to parties, and administrative support to the Judges and Commissioners. These functions are largely carried out by Case, Hearing and Mediation Managers together with legal and research support through in-house counsel. Many of the case and hearing managers are legally qualified graduates with particular skills and interest in environmental law.



Auckland City, as viewed from Mt Victoria, Devonport

Surveys of parties and their representatives are conducted from time to time by the Ministry concerning the quality of service offered by registry staff. The results in recent years, the last of which was in 2014, have indicated a very high level of satisfaction. This is much appreciated by the Judges and Commissioners, who find they can place great reliance on the registry staff offering a reliable and user-friendly service to parties and their representatives, particularly during periods of case management of court business. They also offer proactive and intelligent support to the judges and commissioners in their work.

Some changes of significance were made to staffing the registries of the Environment Court by reason a major restructuring exercise undertaken by the Ministry of Justice in 2016. Following major changes to the senior management structure of the Ministry in 2015, restructuring of successive layers of senior and middle management occurred in 2016. Units of management previously called the Environment Court Unit, within a Specialist Courts Group, disappeared. The restructuring has caused tensions which we discuss below,

principally occasioned by a significant watering down of the national focus of the work of the court required by the RMA. The changes brought a regional approach and a considerable intermingling of management of support functions with other jurisdictions, particularly the District Court, without relevance or synergy for Environment Court work. The project purported to alter the statutorily-mandated nationally-orientated reporting line up through Deputy Registrars and the Registrar to the Principal Environment Judge.

The Registrar of the Environment Court had previously also held the title National Operations Manager. Phase 3 of the restructuring exercise proposed to disestablish that post, which we submitted was contrary to the requirements of the RMA. After consideration of our submissions, the position of Registrar was restored but a significant regional reporting emphasis continued to be required for the Registrar and our three Deputy Registrars. Each is now required by the Ministry to report to Regional Managers outside of the Environment Court. Even the Registrar (the holder of a national post) is required to report to a regional manager.

The Court has a very capable Judicial Resources Manager (JRM) who is one of the Deputy Registrars and coordinates the Court's rostering and scheduling under direction by the Principal Environment Judge. The JRM role was initially omitted from the Phase 3 restructure, but has been reinstated after discussions.

Consequences of these changes have been under considerable discussion between the Principal Environment Judge and senior officials in the Ministry, and at the time of release of this Annual Review in mid-2017, have been resolved only to a partial extent.

The members of the Court felt that in promoting such changes the Ministry had not paid sufficient heed to the obligations at law of the Principal Environment Judge under s 251(2) RMA, including the duty to ensure the orderly and expeditious discharge of the business of the Environment Court.

It will be appropriate to report in the Court's Annual Review of 2017 concerning the debates between the judicial and executive arms of Government, hopefully inclusive of satisfactory resolution.

Study of key performance measures

The Registrar's Annual Report to Parliament is compiled after discussion with the Principal Environment Judge. While the statistics included in the Report have the appearance of clarity on the surface, they do not tell the whole story about the work of the Court.

The Report is presently constructed with five sections:

1. Cases received:
    - Total cases received;

- Percentage of pending plan and policy statement appeals under 12 months old;
- Resource consent appeals and other matters under 6 months old;
- Cases on hand;
- Median age of active cases.

2. Cases disposed of:
    - Total cases disposed of;
    - Cases determined (clearance rate) – plan and policy statement appeals;
    - Cases determined (clearance rate) – resource consent appeals;
    - Cases determined (clearance rate) – other matters;
    - Median age of cases cleared.
3. Number of Environment Court sitting days supported.
4. Case clearance rate.
5. Judicial satisfaction (as to Registry case management and file preparation and presentation; and courtroom hearing and mediation support).

The approach taken is broadly similar to that taken by the Ministry in other jurisdictions, with of course differences in description of case types – e.g. “resource consent appeals”, etc.

The issues under discussion between the Judiciary and the Registrar derive from the separate roles played in the Court system by the Judicial and the Executive arms of Government. In the present instance, there is pressure on Registry staff to improve performance in areas over which they have no control; and the reported information may be used by the Ministry as an overall indicator of Court performance (i.e. performance of Judges and Commissioners in undertaking their judicial roles), which is not seen as appropriate for the Executive to do.

Some “measures” are simply facts or data with no particularly clear purpose; and the system is not designed to capture some aspects that are important to the planning of resource needs. There is a risk that the information may be used and interpreted in ways that are unintended and potentially counter-productive. Some issues of concern to both the Judiciary and the Ministry include:

- Some data are presented as targets, despite being beyond the control of the Judiciary and the Ministry (e.g. numbers of cases lodged);

- Activities of judicial officers and support staff not captured in connection with some kinds of activity, for instance membership of and work to support Boards of Inquiry and prosecutions;

- Lack of differentiation between first generation plans and subsequent plan appeal work;

- Lack of adequate reporting on cases directly referred by councils;

- Treatment of median age of cases inappropriately includes cases expressly placed on hold awaiting actions by third parties and the like;

- Judicial satisfaction may not be measured so as to capture all matters of importance to Judges and Commissioners.

The reporting of facts and data is currently inadequate to develop good performance measures from both the registry and judicial perspectives. Business planning by the Ministry is contemplating:

- reporting on activities with other agencies to identify workload requirements and drivers;

- (in)efficiencies in back office processes;

- improving judicial access to information; and

- improvements in dissemination of information, particularly electronic (for instance through use of websites).

Ideally, reporting would also tackle the vexed question of the relative complexity of cases rather than lumping together all cases, simple and complex. Complex cases are often multi-party and multi-issue and require not only special arrangements to timetable them for hearing, but also strong case management to identify true issues, identify parties interested in the various issues, conference the experts in relation to each of those, and marshal the parties to address each issue in an efficient manner.

Better reporting of data to take account of cases suspended for good reason in the “parties on hold track”, would also be desirable.

Reporting of sitting time would ideally be revamped to include the important modern activities of preparation by Commissioners for mediation and pre-reading of cases by members of the Court before hearings.

The Principal Environment Judge and the Registrar are intending to conduct a survey of regular Court users to gain a better idea than is currently available, of attitudes to current Court practices including timeliness, and suggestions for improvement in processes. Meantime the Principal Environment Judge maintains regular formal and informal contact

with relevant professional groups seeking ideas on practices that can enhance efficiency and access to justice. The support of senior practitioners of the many professions engaged in work before the Court is much appreciated. We claim no monopoly on ideas about efficiency, fairness and access to justice.

Appeals about policy statements, plan reviews and plan changes

It is notable that alternative dispute resolution in the Environment Court has, with the full support of the judges, been lifted to another level in recent years so as to ensure greater efficiency of process and speed of resolution of cases. This is in part because, unlike private civil disputes, environmental disputes invariably have an element of public interest in them that requires promptness of resolution. In respect of cases about infrastructure and development, the old adage "time is money" is apt. Members of the Court consider that the concepts of access to justice and efficiency do not collide in this respect: in fact they coincide remarkably well. ADR provides a far more cost-effective way of resolving many cases for parties, and the reported results in recent years speak for themselves.

This has been particularly evident concerning the resolution of appeals about plans and policy statements. Gone are the days when a council would be granted a year or two by the Court to endeavour to negotiate solutions, often with no outcome to show for it, and only then to find that much mediation and/or hearing work remained necessary to resolve cases.

In recent sets of such appeals, mediation has been undertaken commencing as soon as all parties have been identified, and brought to a conclusion about 10 or 11 months after the cases have been filed, with a high degree of success. Councils have been enabled to make large parts of the proposed instruments operative in short order if they wish, leaving the Court to move quickly to resolve remaining issues through hearings, facilitated conferences of experts, and pre-hearing and settlement conferences.

This was a feature of the work of the Environment Court commented upon by the NZ Productivity Commission in its 2012/2013 reports. The Commission recorded that it accepted examples provided to it by the Principal Environment Judge at that time.

This successful pattern has continued since.

Recent examples include the reviews of the Whakatāne District Plan and the Bay of Plenty Regional Coastal Plan. It is considered that these successes are now a feature of the Court's work. There will always be instances where some cases involve difficult technical or legal issues, but the Environment Court's robust case management system now moves these along to prompt resolution by hearing, and sometimes settlement prior to a hearing being needed.

It should be recorded that there are occasionally cases where delays are requested by parties for good cause. Cases are moved to the Hold Track when this occurs. Examples are given in the earlier section of this Review that describes the case management tracks.

In its 2013 Final Report the Productivity Commission expressed a view that it might be desirable to consider the feasibility of making the Environment Court's mediation capability available earlier to support local authority plan making processes. This could indeed be desirable, and in fact was used to quite a significant extent throughout 2015/16 in the important and urgent circumstances of the proposed Auckland Unitary Plan and the Christchurch Replacement District Plan. Commissioners are also seconded from time to time to mediate and facilitate in cases of national importance being heard by Boards of Inquiry.

While obviously desirable, there is an issue of resource. The Environment Court Commissioners constitute a small group of extremely experienced mediators and facilitators of expert witness conferencing in resource management cases. They do this in the context of being highly familiar with the process of resolving appeals, and they approach the task in a principled and skilled fashion, bringing appropriate robustness in order to quickly resolve matters of public interest. There is considerable time required for Commissioners to be trained in this work and gain experience. Hence they presently comprise a rather small pool of practitioners who can produce the good outcomes. Remembering that only about 1% of council decisions are appealed to the Environment Court, to extend mediations and expert facilitations across all council regulatory hearing processes would require a massive increase in ADR activity beyond that presently undertaken in the Court.

It is considered by members of the Court that there is another benefit to be obtained from the skill brought by its members to these tasks. There have been some notable improvements in the quality of instruments brought about as a result of appeal processes (through mediation, expert facilitation and hearing). One example was a Waikato Region plan change concerning the use of geothermal energy in the Taupo area some years ago. The document contained numerous drafting difficulties and was considered by many parties to be incapable of efficient application for future consenting purposes. A series of improvements made to the instrument during court processes resulted ultimately in an operative document of sufficient quality that, subsequently, numbers of applications have been processed with relative ease, short timeframes, and reduced cost.

Marae and Geothermal Activity, Rotorua

The Court has commenced an exercise with the Resource Management Law Association and the New Zealand Planning Institute of preparing a series of workshops to be held on the subject of plan drafting. There are, in the view of members of the Court, many aspects of plan and policy statement writing that could be significantly improved by study and implementation of best practice, just some of which include succinctness, clarity, legality, logical structure, consistency, and approachability. The Court is intent on assisting experienced practitioners in these "arts" to lead workshops that can unlock clearer thinking and improvements in practice. While it had been hoped to conduct the workshops in 2016, many practitioners have been somewhat overwhelmed by the Auckland and Christchurch plan hearing processes referred to above. In fairness to those practitioners, and in order to gain the benefit of their experiences, we deferred the exercise until late 2017 or early 2018 with the work of the Auckland and Christchurch hearing panels concluded.

Finally on this topic, one possible factor in the lessening of numbers of plan appeals coming to the Court might be the greater extent to which National Policy Statements and National Environment Standards have been promulgated by central government in recent years. On this point we note that it has been suggested in some local government quarters that it is inappropriate for "unelected" people (being the members of the Court) to "alter" local government policy. We reject that criticism. Any such resource management policy as first drafted by a council must be in accordance with the purpose and principles in Part 2 of the RMA, increasingly and more firmly guided by the National Policy Statements and Environmental Standards now being promulgated by central government. The work of the

Court on appeal is equally defined and constrained. In any event the independent hearing commissioners on Council hearing panels are as "unelected" as members of the Environment Court and independent review is generally regarded as a beneficial component in policy development.

Initiatives and innovations

The Environment Court Website

The look and feel of the Environment Court website and much of its content was upgraded in July 2016. The website continues to be a place for parties to exchange evidence and to assist lodgement in Court, all to lessen the need to create and manage very large volumes of paper.

The Court has also continued to make use of the website to disseminate decisions of the Court that are of greater than normal public interest.

Members of the Court are routinely using iPads and other tablets for hearings and other work. Given that the work of the Court involves a great deal of travel (the RMA requires the Court to conduct any conference or hearing at a place as near to the locality of subject-matter as is considered convenient unless the parties otherwise agree), this technology is proving valuable.

The origins of these electronic initiatives are described in earlier Annual Reviews.

Land Valuation Tribunal

Working with relevant Ministers, we identified synergies between the work of the Environment Court and the Land Valuation Tribunals. Consequently, on 15 December 2016 warrants were issued to Environment Judges as chairs and deputy chairs of the various Land Valuation Tribunals and the previous incumbents resigned from the Tribunals. We brought management of the cases into the Environment Court registries and have applied robust judicial case management techniques and some ADR to eliminate a backlog of cases and move new work to resolution promptly.

Community and international involvement

The Judges and Commissioners are regularly active in presenting seminars, conference papers and the like to professional and community groups throughout the country. They were active again in 2016, presenting to groups of law students, the New Zealand Planning Institute, the New Zealand Institute of Landscape Architects, the Resource Management Law Association, Law Society groups, and other gatherings.

Queensland Environmental Law Association

In April 2016 the Principal Environment Judge attended the Queensland Environmental Law Association's annual conference and delivered a presentation on the jurisdiction and work of the New Zealand Environment Court.

14th Annual Colloquium of the International Union for Conservation of Nature (IUCN) Academy of Environmental Law – Oslo, Norway

In June 2016 the Principal Environment Judge attended this colloquium in Oslo. A separate Judges' Forum was organised by him and Associate Professor Ceri Warnock of the University of Otago which laid the foundations for their 2017 International Symposium on Environmental Adjudication in Auckland, New Zealand, discussed below.

Second International Forum of Environmental Justice, Santiago Chile

In November 2016 the Principal Environment Judge travelled to Chile to address the International Environmental Justice Forum organised by the President of the Tribunal Ambiente de Santiago.

International Symposium on Environmental Adjudication in the 21st Century

Organisation of the International Symposium on Environmental Adjudication in the 21st Century began in mid-2016.[1] The organisers (University of Otago and the Principal Environment Judge) gained generous support from the Royal Society of New Zealand. The purpose of the symposium was to bring together Judges, practitioners and academics with the aim of discussing and debating challenges for environmental adjudication in the coming decades. It was planned for April 2017 (and was held then).

Invitations were sent to many in the environmental law field, and 200 attended from New Zealand and around the world. The speakers invited were:

- The Honourable Justice Stephen Kós, President of the New Zealand Court of Appeal
- The Right Honourable Lord Robert Carnwath, UK Supreme Court (invited to deliver the key-note speech)
- The Honourable Justice Brian Preston SC, New South Wales Land and Environment Court
- The Honourable Justice Samson Okong'o, Environment Court of Kenya

[1] A full review of the Symposium will be included in the 2017 Calendar Year Review.

- His Honour Judge Michael E Rackemann, Planning and Environment Court, Queensland
- The Honorable Justice Michael D Wilson, Supreme Court of Hawai'i
- Chief Justice Rafael Asenjo Zegers, Tribunal Ambiente de Santiago, Chile
- Professor Denise Antolini, University of Hawai'i
- Professor Tracy Hester, University of Houston
- Dr Gitanjali Nain Gill, University of Northumbria
- Professor Ben Boer, Distinguished Professor at the Research Institute of Environmental Law, University of Wuhan and Emeritus Professor at University of Sydney Law School
- Principal Environment Judge Laurie Newhook and Environment Judges David Kirkpatrick and John Hassan, New Zealand Environment Court

Plans were also made for a workshop (which was also held, immediately after the Symposium) and for publication of the Symposium papers in the UK-based Journal of Environmental Law and Management[2].

[2] Anticipated to be a special issue of the Journal to be released in September 2017.

APPENDIX 1

The place of the Environment Court in the New Zealand Court system

The Court is a standalone specialist Court which has all the powers inherent in a Court of Record. The Court is not a division of the District Court, but the Environment Judges are required also to hold warrants as District Court Judges. They exercise the latter warrant when sitting, as provided by the Act, in the District Court, to hear prosecutions under the RMA.

Environment Court decisions are subject to appeal in the High Court on points of law only; that is, there is no right of appeal on findings or assessments of factual issues and findings on matters of expert (e.g. scientific) opinion. There are provisions in the Act for appeals above the High Court, to the Court of Appeal and ultimately the Supreme Court, all subject to leave being granted. All of this comprises a significant number of layers of appeal, albeit limited in substance and subject to leave above the High Court.

The place of the Environment Court in the Resource Management system

Most cases filed in the Environment Court are **appeals** against decisions of councils. In limited numbers of cases there are requests for interpretation of the RMA or national, regional or local plans. The Court has wide powers in all these respects.

The Environment Court also has enforcement powers.

The Court's jurisdiction can be broadly divided into the following categories:

- Appeals from the decisions of councils in respect of resource consents and designations;
- Appeals concerning the content of regional and district planning instruments, including Regional Policy Statements;
- Appeals against the issue by councils of Abatement Notices;
- Applications for Enforcement Orders;
- Applications for Declarations about the application and interpretation of resource management law, the functions, powers, rights, and duties of parties, and the legality of acts or omissions.

In exercising most of its functions, the Court is a judicial body exercising appellate jurisdiction over decisions of regional and district councils. It is not a planning authority.

Besides the Resource Management Act, the Environment Court has jurisdiction under some other Acts, for instance the Biosecurity Act 1993, the Crown Minerals Act 1991, the

Electricity Act 1992, the Forests Act 1949, the Heritage New Zealand Pouhere Taonga Act 2014, the Local Government Act 1974, the Public Works Act 1981, the Government Roading Powers Act 1989, the Summit Road (Canterbury) Protection Act 2001, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, the Local Government (Auckland Transitional Provisions) Act 2010, the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004, the Affordable Housing: Enabling Territorial Authorities Act 2008, the Housing Accords and Special Housing Areas Act 2013, and the Land Transport Management Act 2003.

These pieces of legislation stand separate from the RMA, but proceedings under them will sometimes overlap with resource management appeals. One example is the Heritage New Zealand Pouhere Taonga Act 2014.

Heritage Crane, Wellington

APPENDIX 2

Significant Decisions of 2016

Environment Court Decisions

Craddock Farms Limited v Auckland Council [2016] NZEnvC 51

Judge Thompson, Commissioner Edmonds, Deputy Commissioner Kernohan

RMA – resource consents – chicken layer farm

Appeal declined

Craddock Farms Limited (CFL) applied for land use consents, air discharge consents, earthworks consent, discharge consents for establishment and operation of a large chicken layer farm. CFL proposed to construct and operate ten laying sheds. Council declined the application. The main issue of concern was the effect of odour produced by wastes and manure from the sheds, and the impact on those who live or work nearby. Court considered odour dispersion modelling results presented by the witnesses. While modelling makes a useful contribution to informing consideration of relative odour effects, the modelling results are not absolute. There was significant uncertainty over the appropriate odour generation rates and therefore the concentrations predicted to be received. The Court accepted that the garden or curtilage of the house is effectively part of the house in terms of people's use of the property, whether that house is in a rural area or not. The Court concluded that the proposal could involve unacceptable levels of objectionable odour for appellants' properties. The proposal was for a very large activity on a narrow site, resulting in very short distances between the source of odour emission and the adjacent boundaries and sensitive receivers. CFL relies heavily on the dispersion modelling which is uncertain. In any event, the modelling showed there is potential for odour levels to exceed what CFL proposes is the appropriate guideline level for this environment. The odour effects would not be internalised and there are very limited options available to remedy odour effects should they occur. The Court rejected the suggestion of a staged approach to the proposal and the appeal was declined.

R J Davidson Family Trust v Marlborough District Council [2016] NZEnvC 81

Judge Jackson, Commissioner Mills, Commissioner Buchanan

Farming marine — Coastal marine area — Coastal — Effect adverse — Coastal policy statement — Natural character — Wildlife values — Visual impact

(a) Consideration of the application of the Supreme Court's *EDS v NZ King Salmon Co* approach to application of Part 2 RMA, in the context of a resource consent application

(b) Assessment of risk to threatened species

(c) Upheld in the High Court, leave granted to appeal to the Court of Appeal

This was a decision on an application for consent by the RJ Davidson Family Trust to establish and operate an 8.98 ha marine farm in Beatrix Bay, Central Pelorus Sounds to enable cultivation of green shell mussels and other crops. The application also sought to disturb the seabed with anchoring devices, to take and discharge coastal seawater, to harvest the produce from the marine farm and to discharge biodegradable and organic waste during harvest. An independent commissioner appointed by Marlborough District Council ("the council") heard the application and declined it. The Trust appealed and put forward to the Court an amended proposal to reduce impacts on the environment.

The Environment Court, by majority (Judge Jackson and Commissioner Mills) confirmed the decision of the council and declined consent. The Court stated that the ultimate issue for the Court was whether the proposal achieved the objectives and policies of the Marlborough Sounds Resource Management Plan ("the Sounds Plan") and the New Zealand Coastal Policy Statement ("NZCPS"). The Court noted the application was for a non-complying marine farm under the Sounds Plan. As the Court found that some of the adverse effects of the proposal were likely to be more than minor it found the first gateway test was not passed. However, it found the second gateway test was met as the application could not be said to be contrary to the objectives and policies of the plan as a whole, although this was a "close-run" judgment.

The Court considered the application under s 104 of the RMA. The Court had regard to the potential effects of the farm which included: likely net social benefits; a likely significant adverse effect on the natural feature which was a promontory; likely significant cumulative adverse effects on the natural character of the margins of the Bay; likely adverse cumulative effects on the amenity of users of the Bay; a very likely major adverse effect on the New Zealand King Shag ("Shag") habitat by covering the muddy seafloor with shell and organic sediment, which could not be avoided; very likely a reduction in feeding habitat of the Shag; very likely more than minor accumulated and accumulative reduction in the Shag's habitat within the Bay and an unknown accumulative effect on the habitat of the Duffer's Reef colony generally; and likely as not, no change in the Shag population, but with a small probability of extinction.

Regarding the Sounds Plan the Court stated that if it were to decide on the Sounds Plan itself and without considering the NZCPS it would on balance refuse consent on the basis that the proposal inappropriately reduced the Shag's habitat. Regarding the NZCPS the Court stated that the precautionary approach suggested it should exercise its discretion under s 104(1)(c) to take accumulative effects into account, and to the extent that the Court had inadequate information about those effects, to consider declining the application under

s104(6). Weighing the effects under the Sounds Plan and the NZCPS the Court concluded that the benefits of the proposal were outweighed by the costs it imposed on the environment.

The Court considered whether the difficulties could be met by adaptive management. The Court found that the adaptive management threshold test in *Sustain Our Sounds Inc v Marlborough District Council* [2014] NZSC 40, [2014] 1 NZLR 673 was not met and it would be inappropriate to rely on adaptive management of adverse effects in relation to the applications. The Court concluded that after considering all matters raised by the parties and weighing all relevant factors it judged that the objectives and policies of the Sounds Plan, reinforced by the more directive polices of the NZCPS, required that it should refuse the consents sought.

The minority (Commissioner Buchanan) would have granted the application. The minority disagreed with the weight given to the effects on the Shag habitat and the evaluation of adverse visual effects of the proposed marine farm in an environment already containing 37 similar marine farms. The minority stated that the majority decision was a disproportionate response to "extremely unlikely" risk that an additional marine farm in the Bay might contribute to a decline in the Shag population in the Marlborough Sounds.

Ngāti Pikiao Ki Maketū v Bay of Plenty Regional Council [2016] NZEnvC 97

Judge Smith, Commissioners Dunlop and Buchanan

Resource consent — Maori culture — Water divert — River — Conditions

The Court confirmed the conditions applying to consents granted to Bay of Plenty Regional Council ("the council") relating to the Kaituna River Re-diversion and the Ongatoro/Maketu Estuary Enhancement Project.

The Court considered the conditions as agreed, and the matters still in contention which related mainly to a Tangata Whenua Collaboration Plan and Mauri Monitoring Plan. The Court stated that the mediation process had been a constructive one and made decisions regarding the provisions of specified conditions. The Court stated that it now considered that the consent conditions, attached as "A" to the decision, appropriately recognised and addressed the relationship of Maori with Ongatoro. The anticipated effects of the proposal were overwhelmingly positive and the intention was to enable the community to better provide for their social, economic and cultural wellbeing. Accordingly the conditions were confirmed, and to that extent the appeals were allowed. Otherwise, the appeals were dismissed.

Well Smart Investment Holding (NZQN) Ltd v Queenstown Lakes District Council [2016] NZEnvC 99

Judge Jackson, Commissioner Mills, Commissioner Howie

Final decision on the layout and development of the extended Queenstown CBD

District plan change — Rule — Zoning — Boundary adjustment

This decision concerned extensions proposed to the Queenstown Town Centre Zone by Plan Change 50 ("PC50") to the operative district plan. Prior to and during the hearing, the parties presented the Court with tentative agreements setting out agreed amendments to PC50. The Court suggested further changes to the text.

The Court recorded its understanding of PC50; set out the most relevant objectives and policies in the plan and how PC50 fitted into these; recorded the agreements concerning each appeal and certain procedural matters; and recorded evidence on which the Court relied in coming to its decision. The Court confirmed, under s 290(2) of the RMA, the decision of the council's hearing commissioners, subject to the changes both agreed and confirmed.

South Epsom Planning Group Inc & Three Kings United Group Inc v Auckland Council [2016] NZEnvC 140

Judge Smith and Judge Dwyer, Commissioners Leijnen and Howie

RMA – Interim decision on Private Plan Change

Plan Change 372 was a Private Plan Change that sought to rezone 21.6 hectares of land situated in the Three Kings area of Auckland to enable the redevelopment of a spent quarry owned by Fletchers, for residential and open space purposes.

The Court found that the objectives of PC 372 were the most appropriate way to achieve the purpose of the RMA in so far as development of the site for residential purposes is concerned. However, the Court identified various issues that the needed to be addressed including land contouring (depth of re-filling), protection of volcanic features, building form issues, minimum dwelling sizes and pedestrian access (connectivity and integration).

The Court requested the parties to consider its findings and address the issues identified. [The case was subsequently settled by agreement amongst the parties].

Koha Trust Holdings Limited v Constellation Brands New Zealand Limited [2016] NZEnvC 152

Judge Newhook, Commissioners Howie and Buchanan

Declaration sought by Koha Trust Holdings Limited in relation to whether a consent to take ground water from the Wairau Aquifer, Marlborough, held by Mr Woolley, had lapsed.

In January 2016 Koha Trust Holdings Ltd sought a declaration alleging the lapse of a resource consent held by neighbouring landowner Mr Woolley for the taking of water from the Wairau Aquifer in the Marlborough District. Koha alleged the consent was not given effect to within the meaning of s 125(1A)(a) RMA prior to its final lapse date of 1 February 2012, and therefore had lapsed. Koha had at the same time lodged an application with the Council to take the water previously allocated to Mr Woolley, on the basis that the consent had lapsed. In December 2013 Mr Woolley had agreed to lease a significant part of his land to Constellation Brands for the planting of extensive vineyards, and the Council authorised the transfer of consent for part of the water subsequent to both the leasing and the lapse date. Mr Woolley and Constellation Brands advanced the proposition that the carrying out of the activity in part might be sufficient to prevent lapse.

The Court discussed s 125 RMA noting that the focus of the case was on whether or not the consent had been given effect to under ss (1A)(a). A key area was whether compliance with two conditions was crucial to giving effect to the consent, as water was being drawn from the relevant wells during the two year lapse period. There was discussion about the meaning of "given effect to" and the distinction between conditions being those concerned with the establishment of an activity and those to be performed on a continuing basis after establishment. The Court concluded that continuing conditions would generally be more amenable to enforcement than to operation of the lapse provisions in s 125. Conditions identified as implementation or establishment, particularly where they involved a prohibition against operation of the consent until the required steps were completed were likely, if those steps weren't carried out before the end of the lapse period, be amenable to testing against the standard in s 125(1A)(a) "the consent was given effect to".

The Court found there was a sufficient basis for saying that the implementation or establishment element of the conditions had not been triggered, however the Court felt to go further and make a declaration could resemble a punitive result. The Court held it would be wrong to exercise its discretion to make a declaration that could affect the rights of a third party, Constellation, which had legitimately organised its affairs and made considerable investments in establishing an irrigated vineyard.

Held**:** Declarations refused in exercise of the Court's discretion.

Auckland Council [2016] NZEnvC 153

Judge Newhook and Judge Harland

RMA – notice of motion for waivers and directions

Decision on a notice of motion by the Auckland Council relating to waivers and directions on potential appeals against decisions of the Auckland Council on recommendations of the Auckland Unitary Plan Independent Hearings Panel on PAUP.

On 9 August the Court invited members of the legal and planning professions to an informal conference for preliminary discussions on preparation for the efficient management of such appeals as might be lodged in the Environment Court concerning Auckland Council's decisions on the independent Hearing Panel's recommendations on the Proposed Auckland Unitary Plan (PAUP). The following issues were discussed:

(a) the possibility of service waiver(s) involving electronic or other possible alternatives;

(b) preliminary consideration of procedures for identification and categorisation of topics;

(c) preliminary consideration of procedures for identification of priorities (including as between matters in the High Court and the Environment Court); and

(d) preliminary issues affecting deployment of Environment Court resources for Alternative Dispute Resolution and hearing activities.

Subsequently, and based in large measure on the discussions, the Court received a notice of motion from the Auckland Council seeking various waivers and directions under s 281 RMA in relation to potential appeals under ss 156(1) and (3) of the LGATPA against decisions of the Auckland Council on recommendations of the Auckland Unitary Plan Independent Hearings Panel on PAUP. The waivers and directions sought related to the service of any Notices of Appeal, the operation of s 274 of the RMA and the filling and service of any further Court documents relating to any appeal. The Council supported the Court's suggestion to make use of electronic methods of filing and service for all appeals filed under s 156 LGATPA in view of the substantial number of submitters.

The Court was minded that commensurate with good access to justice the process of filing appeals and other documents in relation to the PAUP should be as efficient and streamlined as possible. The Court held in the special circumstances of the case it was satisfied that the procedures established for filing and service of Appeals and other related documents on the PAUP sufficiently overcame any concerns about potential prejudice to other parties. The Court held the waivers and directions sought would simplify the processes and enable parties to access Court documents in a timely and efficient manner.

Man O'War Farm Limited v Auckland Council [2016] NZEnvC 219

Judge Newhook

S 156(3) LGATPA 2010 and s281 RMA

This decision concerned an application to file an appeal out of time on certain provisions of the proposed Auckland Unitary Plan. The appellant had also filed an appeal with the High Court regarding the subject matter of the late appeal lodged with this court. The appellant filed its appeal with this Court out of caution and had taken this step to avoid having to seek

a waiver for a much greater period after conclusion of the High Court proceedings, should that prove necessary.

The waiver application was granted, and the appeal placed on hold pending the outcome of the related proceedings in the High Court.

Southland Fish & Game New Zealand v Southland Regional Council [2016] NZEnvC 220

Judge Borthwick, Commissioner Dunlop, Commissioner Bunting

Resource consent — Fishing — River — Access — Amenity — Landscape protection — District plan — Regional policy statement — Sustainable management

Southland Fish & Game New Zealand appealed against the grant of consent by the Southland Regional and District Councils, to Southland District Council as applicant ("SDC") for a proposal for a 22.5 km cycle trail along the upper Oreti Valley. The proposal would complete the Around the Mountain Cycle Trail which opened in 2014. The upper Oreti Valley was one of two alternative routes for this section. The other was the Mararoa Valley, which was preferred by Fish and Game, supported by six other parties, because of concerns about adverse effects on the brown trout fishery in the upper Oreti Valley which was recognised as an outstanding angling amenity under a Water Conservation Order. Overall, the status of the proposal was considered as a discretionary activity and considered under ss 104 and 104B of the RMA.

The Court held that SDC's failure to consult with Fish and Game prior to lodging the consent application meant that the opportunity was lost to focus on the central issue which was whether the use of the cycle trail would undermine the area's outstanding angling amenity. The Court then considered the evidence relating to the topics of recreational amenity, landscape and features, public access, economic benefits, construction and operation and terrestrial ecology. Regarding amenity values, the Court found that, subject to the proposed mitigation strategies, the nationally outstanding angling amenity values of the fishery would be adversely affected by increases in the incidence of disturbance to the fish habitat. The adverse effects of the proposal on amenity would likely displace specialised anglers. The proposed recreational management plan sought to avoid adverse effects resulting from interaction between users of the trail and the angling community, but the Court considered that this would be less than effective and the cycle trail would result in passive forms of recreation directly in the river. Considering such effects in the context of plan policy, the Court concluded that overall the effect on landscape and on the fishery would not achieve the objective in the proposed district plan ("PDP") that rural area amenity values were to be maintained. Further, the Court gave considerable weight to the river's nationally recognised outstanding angling amenity and also found that the proposal failed to achieve objectives in the operative district plan ("ODP") to maintain such values and to separate incompatible effects.

Regarding landscape and features, the Court found that the expert analysis fell short of what the Court would expect to enable it to form an opinion whether the landscape values constituted an outstanding natural landscape ("ONL"). Further, the Court found that the district council had yet to comply with its duties under s 6 of the RMA and had delayed identification of ONLs and outstanding natural features ("ONFs") and in the meantime provided little guidance and no certainty as to the circumstances in which such assessments were required by the PDP policies, despite strongly worded policies in the regional policy statement ("RPS") that such landscapes and features were to be identified and protected in district plans. The Court noted that since the Supreme Court decision in *King Salmon*, it was clear what was to be achieved in terms of protecting ONLs from inappropriate development. The Court concluded that the ODP had no ONF or ONL provisions capable of implementation and, although the experts were unanimous that large areas in the present proposal were potentially outstanding, the Court found the evidence insufficient to make any finding on this. Nevertheless, the Court found that there were moderate to significant adverse effects on the landscape and a reduction of amenity and perception of the area's natural character, and that the proposal was in tension with specified provisions of the Regional Water Plan. The Court was not satisfied that the proposal would be undertaken in a manner that maintained the area's amenity values.

The Court stated that it was not a purpose of the cycle trail to "facilitate" public access to and along the river and, while conditions of consent might discourage such access, they could not prevent it. RPS provisions stated that access to water bodies should be encouraged, but the Court stated that this was not without constraint: restrictions were necessary to protect important amenity and ecological values and avoid adverse effects. SDC failed to give adequate regard to such policies, and to amenity values which needed to be protected.

Evidence and projections as to the economic benefits of the proposal, and of the alternative Mararoa Valley route, were considered at length, along with estimates as to the economic benefits now provided by the angling activities. The Court stated that the key to realising financial benefits of the proposal was that two to four star accommodation, costing up to $5 million, would have to be provided and, without this, market demand for the trail as proposed would struggle to be viable. The Court noted that the RMA was not engaged in regulation of market access to a resource, but instead was concerned with the use and development and protection of resources, within the purpose of the Act, as articulated by policies in the planning documents. There was no direct support under such documents in the present case for the economic benefit derived from the use of the resource. In fact the policy direction told against the proposal as the benefits of land use in providing for growth and development were not to be recognised at any cost to the environment. Under s 290A of the RMA, the Court gave its reasons for differing from the conclusions in the Commissioner's decision.

The Court stated that weight had been given to the PDP provisions regarding infrastructure which provided that infrastructure should meet the needs of the district while ensuring that adverse environmental effects were avoided, remedied or mitigated. Measured against the purpose of the RMA, the Court found that this did not give an unfettered discretion. The proposal had the potential to give effect to relevant provisions for maintaining terrestrial ecology, water quality, protection of streams and soil resources. Existing recreational

opportunities were to be maintained and separated from other incompatible activities. At certain points on the proposed trail it was likely that the public would access the river waters and that this was incommensurate with maintaining the area's outstanding angling amenity and would undermine the characteristics sought to be protected under the Water Conservation Order. It was clear that under the PDP policies if such effects could not be remedied then they were to be avoided. The Court recognised SDC's desire to optimise socio-economic benefits from the route along the upper Oreti Valley; however, these were contingent on an accommodation lodge being built. As the proposal did not give effect to the plan's policies for public access and amenity, the Court decided to allow the appeal and refuse the consent.

Pickering v Christchurch City Council [2016] NZEnvC 237

Judge Borthwick, Commissioner Bunting, Commissioner Wilkinson

Resource consent — Conditions — Electricity — Noise — Adverse effects — Landscape protection — Amenity

L Pickering ("P") and other residents of McQueen's Valley ("the Valley"), appealed against the decision of Christchurch City Council to re-consent the existing wind turbine of Windflow Technology Ltd ("Windflow"), operational since 2003, at Gebbies Pass, Banks Peninsula ("the site"). Issues arising included whether the proposal had adverse effects on: noise in the receiving environment of the Valley; and landscape and rural character.

The Court noted that the application activity was non-complying and so considered the proposal under ss 104D and 104. Regarding noise effects, the Court referred to NZS6808:2010 – Wind Farm Noise and stated that limits in such standard or in the district plan did not give absolute protection against noise. Rather, the limits were designed to protect the sleep, health and safety of the majority of the population. Evidence from Valley residents, including P, as to the effects of the turbine noise on their enjoyment of their property, and of three acoustic experts, was considered by the Court. Windflow's proposed conditions required that the turbine sound levels, when measured and assessed according to standard NZS6808, were not to exceed the limits specified. The Court stated that the question to be decided was whether the character of the receiving environment was sufficiently out of the ordinary, and the character of the wind turbine noise was sufficiently annoying, that the noise limits in NZS6808 did not, by themselves, maintain the amenity of the residents of the Valley. After considering the expert evidence, the Court found that the turbine could operate within the noise limits in NZS6808 at the notional boundaries of the residences in the Valley and that penalties for special audible characteristics would not apply. The uncontroverted evidence from the residents was that the noise had the most deleterious effect during the evening. The Court noted that Windflow had offered modified conditions of consent by which the turbine would be shut down between the hours of 7 pm to 10 pm each day.

The Court addressed the effect on views and the visual amenity of the landscape and stated that a wind turbine was an industrial activity and incongruous in appearance within a rural landscape. However, the Court was satisfied that the single turbine would maintain the function, character and amenity of the rural environment and the distinctive character and amenity of Banks Peninsula. Further, the Valley's landscape had been modified by extensive farming, forestry plantations and a 200 m radio mast on the ridgeline. Against this, the turbine and associated structures did not constitute visually prominent development.

As the proposal met one of the gateway tests in s 104D of the RMA, the Court considered the application on its merits under s (104). There were benefits to people and communities from the production of renewable energy, although there was no direct support under the operative Banks Peninsula District Plan for locating the turbine within the Rural Amenity Landscape. However, Court was satisfied that the proposal was not contrary to, but gave effect to, provisions of the proposed Christchurch Replacement District Plan. The Court confirmed the grant of consent but issued the decision as an interim one, due to concerns about the enforceability of certain conditions, set out in Attachment A to the decision.

Northcote Point Heritage Preservation Society Incorporated v Auckland Council [2016] NZEnvC 248

Judge Newhook, Commissioners Howie and Buchanan

s120 RMA consent granted, conditions finalised

The Applicant, Woodward Infrastructure Limited, applied to Auckland Council for numerous consents required to establish and operate a walking and cycling path to be attached to the Auckland Harbour Bridge with landings near Westhaven at the Southern end, and Northcote Point at the northern end.

Three appeals were lodged seeking refusal of consent; two were withdrawn before the hearing; the appeal by Northcote Point Heritage Preservation Society Incorporated (NPHPSI) remained and was determined by this decision.

The Court ultimately concluded that the raft of proposed conditions, read and interpreted collectively, and inclusive of the new review condition in addition to monitoring and mechanisms for adjustments, will regulate and minimise effects on the environment entirely adequately.

Consent was granted.

P & E Ltd v Canterbury Regional Council [2016] NZEnvC 252

Judge Jackson, Commissioner Howie, Commissioner Buchanan

Discussion of methods of assessing instream habitat of, and the risks to, species of fauna in New Zealand's rivers.

Water take and use — Water divert — River — Effect adverse — Earthworks

This was an appeal about an application to take water from the Waimakariri catchment by obtaining a new permit to take water from the Cass River ("the river") (a tributary in the upper catchment) which the applicant P and E Ltd ("PE") proposed to substitute for existing permits in the lower catchment. PE had sought resource consent to take the water for irrigation purposes and to undertake works in the river to divert water for the taking. A commissioner appointed by the Canterbury Regional Council ("the council") declined the application. The council and s 274 parties including the University of Canterbury ("the university"), the Royal Forest and Bird Protection Society of NZ Inc, and North Canterbury Fish and Game Council opposed the appeal.

The proposed diverting and taking of water was a non-complying activity under the Waimakariri River Regional Plan ("the plan"); the proposed land use to carry out works in the bed of a river was a discretionary activity under the plan; overall the status of the activity was non-complying. The Court stated that it was contemplated that taking water from the upper catchment was only allowed if the council was satisfied that there were unusual or other justifying circumstances.

The Court considered the river and its environment. The Court noted the river habitat had been described as a "relatively pristine Canterbury foothills river". Two fish species found in the river, Canterbury galaxias and Longfin eels were described as "at risk" in a Department of Conservation report.

The Court considered the relevant statutory instruments including the Canterbury Natural Resources Regional Plan, the plan, the Canterbury Regional Policy Statement; the National Policy Statement for Freshwater Management and the decisions version of the proposed Canterbury Land and Water Regional Plan. Considering predicted effects the Court noted that it was not only the duration of low flow events that might be important but the duration of events approaching low flows. The Court concluded that it predicted, principally on the evidence of the university that the proposed abstraction was likely to cause adverse effects on the aquatic ecosystem of the river. The proposal would likely not safeguard but reduce the life-supporting capacity of the ecosystem especially for Canterbury galaxids. The Court found there would be low level adverse effects on the university's research and teaching conditions on the river. The effects of climate change were a likely additional stressor on fish inhabiting the river. The Court preferred evidence that a stockwater take of up to 144 L/s was likely to have adverse effects, and the proposed irrigation take of 200 L/s (including stockwater take) was very likely to have adverse effects on the environment. The Court accepted the proposal would have positive effects for PE due to improved pasture production.

Under s 104D the Court considered the adverse effects of the proposed take were more than minor. As to whether the plan's objectives were achieved, the Court concluded that the

adverse effects of the proposed abstraction of 200 L/s were likely to be sufficiently adverse that the bottom lines in Objective 5.1(1)(b) and Policy 5.1 of the plan would not be achieved. The Court found the proposal did not achieve the objectives and policies of the higher order planning documents.

The Court found that the application to take water as sought from the river should be refused. The proposal was likely to have more than minor, potentially serious, adverse effects on species of native fish which were significant fauna living in a significant habitat under the plan. The PE proposal did not safeguard the life-supporting capacity of the river nor its significant habitats of indigenous fauna. This was a bottom line that outweighed the positive or neutral aspects of the proposal.

However the Court offered a "way forward", as at times there was plenty of water in the river and water could be taken without causing adverse ecological effects caused during low flows. The Court stated that takes should cease at flows of 800 L/s at the Grasmere intake. If intakes ceased at 800L/s the adverse effects on the native fish and their habitat were likely to be minor. The second threshold test of s 104D would be passed more comfortably. The Court judged on the merits that consent might be granted subject to finalisation of amended conditions. As to the consent for works on the river, the Court stated that a design and management plan would ensure any adverse effects would be mitigated. The appeal was granted in part.

Save Erskine College Trust v Erskine Development Limited [2016] NZEnvC 255

Judge Newhook

Enforcement order interim — Heritage value — Heritage order — Building historic

This decision sought cancellation of an earlier granted interim enforcement order ex parte on the papers, where a Judge had been persuaded that the respondents might imminently receive a resource consent from Wellington City Council and undertake demolition of a heritage listed property. The applicant was the duly appointed Heritage Protection Authority for Erskine College in Island Bay, Wellington. Erskine College was a heritage site registered as a Category 1 Historic Place with Heritage New Zealand Pouhere Taonga.

In August 2016 one of the respondents, The Wellington Co Ltd ("WCL"), had applied to the council for resource consent under the Housing Accords and Special Housing Areas Act 2013 ("HASHA") to develop the site. The application provided for major subdivision and development with complete removal of the main block and permanent removal of some allegedly key heritage landscapes. WCL had not applied to the Trust for written consent to undertake any use of land that might have the effect of wholly or partly nullifying the effect of the heritage order. The core dispute was whether the HASHA impliedly repealed the jurisdiction of heritage authorities under s 193 of the RMA.

The Court considered argument from the parties as to the relationship between the HASHA and the RMA. The Court found the arguments of the applicant to be essentially correct. These were that: there was no express provision in the HASHA to the effect that a consent granted under its provisions overrode the need for approval under s 193 of the RMA (or under s 176 RMA); once a HASHA consent had been granted, it had the identical effect of any other resource consent, and holders were still required to obtain approval under s 193 (or s 176) of the RMA; s 22 of the HASHA and its reference to "an application, request, decision, or any other matter"' did not (even in relation to the wide class of "any other matter") extend to exclude ss 176 or 193 of the RMA, and in any event, s 49 of the HASHA expressly addressed the status of a HASHA consent once granted; there was therefore no ambiguity that required recourse to the purpose of HASHA or any other material; the two pieces of legislation were not inconsistent with each other let alone repugnant to each other; they were perfectly capable of standing together and accordingly there was no need to determine which must prevail. The Court stated that the two pieces of legislation were not inconsistent to the point that the Court would find them incapable of standing together. The HASHA provisions regarding swift resource consents and plan changes did not encompass matters embraced by ss 176 and 193 of the RMA and so were not a "one stop shop".

The Court then considered whether the interim enforcement order should remain in place or could instead be replaced by undertakings, at least pending the resolution of the s 193 application the respondents were now making. The Court considered the undertakings offered appropriate. The ex parte interim enforcement order was rescinded. Costs were reserved.

Re Waiheke Marinas Ltd [2016] NZEnvC 18

Judge Newhook

RMA – Direct Referral s87G – Costs Award s285

The Court had earlier refused to grant consents to establish a boat marina at Matiatia Bay, Waiheke Island. Applications for costs were brought by the Auckland Council, the Crown and s274 parties that included Direction Matiatia Inc (an entity that represented 310 of the s274 parties) and K Lewis & T Greve. The applicant, Waiheke Marinas Limited had suddenly gone into liquidation. The Liquidator did not make any representation to the Court about the applications for costs.

The Court agreed with the applicants for costs that Waiheke Marinas Limited had failed to meet the standard of an applicant on direct referral and that the case had been found to be lengthy, tortuous and complex. Substantial costs awards were made against Waiheke Marinas Limited as follows:

- Direction Matiatia $198, 848.00
- Lewis & Greve $10,914.20

- Auckland Council $530,423.96
- The Crown $427,404.33