Environment Court of New Zealand
Te Kooti Taiao o Aotearoa

Annual Review

Calendar Year 2017

By Members of the Court

2017

Contents

Calendar year 2017: an overview by Principal Environment Judge

- This is the fourth Annual Review of the Environment Court, prepared on behalf of its Judges and Commissioners, and covering the calendar year 2017. It is intended to complement the Annual Report to Parliament by the Registrar that covers each Government reporting year (most recently to 30 June 2018) 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 2017, drawing from the its 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 2017 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.

- 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 2017

Reference may be made to the Report of the Registrar to 30 June 2017 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 2017. In the 2017 calendar year 390 new cases were lodged, and 238 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.

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 2017 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.

Auckland Museum, commemorative lightshow

The nature of the Court's work in 2017

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 a 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.

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.

Two direct referral cases were lodged during 2017, one at the start of the year and one at the end.

In January, an application by 3rd Fairway Development Limited for orders granting a resource consent application for a 31-lot residential subdivision at 84 Laurel Oak Drive, Albany, Auckland was lodged. In November an application by Pan Pac Forest Products Limited, in the Hawke's Bay Region for a coastal discharge permit and occupation of the Coastal Marine area (Pulp Mill at Whirinaki) was lodged.

The ability of the Court to maintain good momentum towards resolution of such cases is important. Such cases should not, in our view, be constrained by statutorily imposed time limits such as exist for applications for activities of national importance processed by the Environmental Protection Authority. Some cases take shape in unexpected ways, as was experienced in 2015-2016 with the Waiheke Marinas Limited direct referral application discussed in the 2015 Annual Review. Fairness to all parties can be hindered by focussing primarily on speed of case resolution, and quality of outcome could also be harmed.

Costs in direct referral cases

The Court may order a party in 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 five 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 mentioned above. 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 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 was 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, but remains on foot elsewhere to the best of our knowledge.

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 do 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 time inappropriately disadvantaging parties. An example again was the Waiheke Marina case, where the majority of 310 submitters were successfully 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

The Resource Legislation Amendment Act 2017 replaced the "voluntary" flavour of s 268 and s 268A now prescribes mandatory participation in alternative dispute resolution processes, except where a party gains leave from a Judge to be excused.

Prior to this amendment, the Court already strongly encouraged mediation. Litigation in the Environment Court is not just about resolving private disputes. Almost all cases raise significant public interest issues as well. This factor drives the Court to ensure early resolution of proceedings.

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 specialist advisors 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 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 so as to reach agreements and clarify 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 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 (sometimes called “hot-tubbing”). This occurs during 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 2017, 31 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.

Just over half the applications were allowed, many were withdrawn, and a small number declined.

Appeals against abatement notices issued by councils produced 36 appeals in the 2016 year, up from the 26 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 an understanding between the Heads of the District and Environment Courts that 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. Anecdotally, we understand that something over one half of charges concerned allegations of illegal discharges of contaminants to land, water and air (often dairy effluent waste).

Westland Coastline, South Island

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.

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. A unit 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 omitted from the Phase 3 restructure, and has not at the time of completing this Review, (mid-2018) been reinstated.

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-2018, have been resolved only to a limited 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 his duty to ensure the orderly and expeditious discharge of the business of the Environment Court.

The changes brought by the Phase 3 restructuring discussed above, have been more than unsettling for members of the court, they have been disruptive to the efficiency of the Court, and a significant distraction from judicial work for the Principal Environment Judge. He has been involved in many meetings with officials, and (only recently) reached a level of agreement with many of them, but, excepting some short-term palliative measures to relieve the pressure on the JRM from time to time, nothing concrete has yet happened.

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 and prepare 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 contemplate conducting 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.

Opito Bay, Coromandel Peninsula East Coast

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 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 largely concluded 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.

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.

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 before now, many practitioners were 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, it is now planned to run the seminars early in 2019.

Finally, on this topic, one possible factor underpinning the reducing 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.

(Minister for the Environment David Parker signalled in a major speech to the RMLA on 28 March 2018that an overhaul of national planning standards is intended by Government)

Amendments to Resource Management Act – Legislative Reduction in Access to the Environment Court

In April 2017, an extensive Amendment was made to the Resource Management Act after several years of slow progress and debate through legislative channels. It contained a number of very significant reductions in appeal rights to the Environment Court from decisions of Councils, not all of them signalled during the process. The Amendments passed into law in October.[1] At almost exactly the same time, there was a General Election and a change of Government. The new Administration has announced that it is working on early introduction of a Bill to reverse a number of the changes and make a small number of other amendments to the Act, including some requested by us to assist in the efficient administration of justice in our Court.

Opening of the Courthouse/Justice Precinct – Christchurch

In November 2017 Courts, Tribunals, and Ministry of Justice Registry Staff and other support, moved from the old Christchurch Courthouse, into the newly completed building styled by the Ministry of Justice as the Christchurch Justice Precinct. While the old Christchurch Courthouse had been one of the few buildings in the Christchurch CBD to survive the 2010/2011 earthquakes, and was reoccupied within a relatively short space of time, a Government decision was made to encourage reestablishment of the devastated CBD area, by creation of this major new building, adjoining another occupied by the Police and Christchurch Emergency Services.

The precinct is of impressive design, and is intended to robustly withstand the forces of nature in this part of the world. The photograph we insert on the next page will illustrate the point.[2]

Many aspects of the interior, reflect early constructive dialogue and collaboration between the Ministry of Justice and the Judiciary, and are proving to work very well in practice. Unfortunately, the collaboration did not continue throughout the project, and late in the project, decisions were made by the Executive, particularly concerning housing and workspaces for staff, that have produced difficulties for efficiency of workflow. Discussions are ongoing, and some remedial action has been taken. The major limitation seems to be lack of future-proofing for any increase in judicial and staff numbers; also, courtrooms. It remains to be seen how these matters will play out in coming months and years.

[1] Many commentators are highly critical of the significant loss of access to justice. A description of the changes, and concerns about them, can best be read in:
http://berrysimons.co.nz/media/blog/file/2016/09/26/RMJ_August_2016WEB_1_11_na6d6EN.pdf
http://berrysimons.co.nz/media/blog/file/2017/05/11/RMJ_April_2017.pdf
http://berrysimons.co.nz/media/blog/file/2017/09/25/RMJ_August_2017_Where_to_from_here.pdf

[2] The photograph on the front cover of this Review, is of this Court's new specialist courtroom in the complex.

Seismic Base Isolators near ground level, new Christchurch Courthouse

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. In 2017, 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.

These positive outcomes continued throughout 2017. From time to time, lost files were discovered in previous Registry locations, brought to the attention of our Judges as Chairs of the Tribunals, and placed on the same robust case management footing, and by years' end largely resolved.

Environment Judges and Commissioners Annual Conference – Nelson

From 22 – 24 November 2017, members of the Environment Court attended their annual conference in Nelson. Three guest speakers presented at the conference, Eric Verstappen from the Tasman District Council, Associate Professor Ceri Warnock of the University of Otago and Simon Berry of Berry Simons Lawyers.

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 2017, 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.

International Symposium on Environmental Adjudication in the 21st Century

The above symposium was held on 11 April 2017. 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.

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
- 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

A workshop which was held the day after the Symposium for the speakers, Environment Judges and various academics. The publishing house Edward Elgar was interested in publishing an edited book on 'Specialist Environmental Adjudication', with the intention that the focus and contents would be of particular interest to environmental adjudicators around the world (amongst other interested persons). The aim of the Workshop was to establish: a clear focus and structure for this book, chapter themes and working headings, contributors and a provisional timetable for publication. A special edition of the journal was published in October 2017.[3]

Workshop Participants, 12 April 2017

Chinese Delegation

On 17 November 2017, the Environment Court hosted a delegation from the Yunnan Provincial People's Procuratorate. Principal Environment Judge and Environment Judge Harland opened the day with an overview of the New Zealand legal system, Environment Court Processes and the Resource Management Act 1991. Prosecutors from Meredith

[3] Environmental Law & Management, '*Special Issue – Symposium on Environmental Adjudication in the 21st Century. Auckland, New Zealand, April 2017'*, Volume 29, Issues 2 – 3.

Connell, Cooney Lees Morgan, Auckland Council and an Investigator from the Waikato Regional Council also presented on the day. Council investigative processes, the role of councils in prosecutions and enforcement in New Zealand, jury trial prosecutions and judge alone prosecutions were all topics of discussion. The Court received positive feedback from all of those who attended.

Principal Environment Judge Newhook, delegates and presenters.

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.

Richly ornamented wharenui, Rotorua

APPENDIX 2

Significant Decisions of 2017

Environment Court Decisions

Tram Lease Limited v New Zealand Transport Agency [2017] NZEnvC 0004

Judge Newhook

s 157 LGATPA PAUP designation appeals, service of documents

The Auckland Council applied, pursuant to s 281 RMA, for various waivers and directions in respect of the appeals under s 157 of the LGATPA against decisions of either requiring authorities or the Council in relation to designations or heritage orders included in the PAUP.

The Council sought three main waivers and directions; that any Notice of Appeal could be served electronically via e-mail, similarly s 274 notices could be served electronically and the serving of "all other parties" would be effected by the uploading of the notice on the Environment Court's website. Lastly the Council sought that all other documents filed in relation to the appeals could be filed and served electronically and uploaded onto the Court's website.

The Court's main issue was to determine whether any potential party would be prejudiced by the waivers and directions sought. The Court was satisfied that in the special circumstances of the PAUP the procedures established for filing and service of Notices of Appeal and other related documents on the PAUP sufficiently overcame any concerns about prejudice. The Court held the waivers and directions sought would simplify processes and enable parties to access Court documents in a timely and efficient manner.

The application was granted.

Envirofume v Bay of Plenty Regional Council [2017] NZEnvC 012

Judge Smith, Commissioners Prime and Leijnen

s 120 RMA application to discharge methyl bromide, log fumigation, Port of Tauranga

This is an appeal from the refusal of the Bay of Plenty Regional Council to grant consent for the discharge of methyl bromide from log fumigation of ships holds and under tarpaulin at the Port of Tauranga.

Methyl bromide has two major mechanisms for attack on the human body (and all other animals, birds and insects). Firstly, it is corrosive both to the nasal passages and to the lungs on inhalation. Secondly, it is a neuro-toxin and enters the body through the skin, into the blood stream and thence into the brain. It accordingly has both acute (fatal) effects from inhalation and also long-term neuro-toxicological effects, including cancers and other neurological issues. The gas also depletes the ozone layer.

In light of this chilling information, the Court pointed out that the use of methyl bromide is immediately questionable. It is, however, the most effective known fumigant for large scale cargoes and several countries, particularly China and India, still require all log imports to be fumigated with methyl bromide.

In 1987 NZ ratified the Montreal Protocol that required the use of methyl bromide to be phased out except for quarantine or pre-shipment uses by 2005. The Court found that it is clear that the objective obligation of New Zealand under the Protocol is to reduce emissions where they cannot be avoided.

Having considered the application, the Court concluded that the benefits of the proposal were at best speculative in terms of reducing emissions from the port or improving compliance with the health and safety standards already in existence.

Overall, the Court's view was that this matter requires an integrated approach from the Port of Tauranga, the marshalling/stevedoring companies, the forestry industry and the fumigators to adopt an approach for the safe application of methyl bromide and the recapture of all reasonable emissions. This would probably require a dedicated area for fumigation, and may involve a building or other system that seeks to encapsulate and recapture gas. The Court was not satisfied that granting this application and introducing another company into the Tauranga market would bring about those changes. In the Court's view, the advance towards reduction of emissions has seen little progress since the 1990s, and the Court stated its surprise to see that there is approximately ten times as much methyl bromide being applied in Tauranga as there was in the 1990s.

The appeal was declined.

Ngai Te Hapu Incorporated v Bay of Plenty Regional Council [2017] NZ EnvC 073

Judge Smith, Alternate Environment Judge Fox, Commissioners Prime and Leijnen

RMA – s120 – MV Rena

The Court considered an application to abandon the remains of the wreck of the MV Rena on Otaiti/Astrolabe Reef, and to permit the future discharges of identified contaminants subject to comprehensive conditions of consent.

The Court granted the application having accepted that it would be difficult to remove the remaining parts of the wreckage without endangering human life and further damaging the reef. The only way in which removal of the parts of the vessel could be considered feasible or safe is if small parts were to break away during storm events making them recoverable.

The Court considered potential contaminants, including copper from one of the containers trapped under the wreckage, anti-foul paint chips and the potential for other flotsam and jetsam. The Court was satisfied that the effects from these would be minor and that conditions of consent could be put in place counteract these issues including a thorough and robust monitoring and reporting systems. The Court also considered Maori cultural issues and evidence and required that a technical Advisory Group consisting of local iwi and the Council be formed as well as the creation of the Kaitiaki Reference Group.

New Zealand Energy Limited v Manawatu-Wanganui Regional Council [2017] NZEnvC 141

Judge Dwyer, Commissioner Buchanan, Commissioner Howie

RMA-resource consent-case returned from HC

Appeal allowed

HC quashed interim decision on resource consents granted to NZEL for ongoing operation of the Raetihi Hydro-Electric Power Scheme. Court reconsidered all relevant water take scenarios, within the existing environment without the current takes in operation. The scenarios retaining the core hydroelectricity allocation all involve similar and significant modification of the streams. Abstraction of the core hydro-electricity allocation above the minimum residual flow would result in extended periods of stable flow compared to natural flow fluctuations. The experts disagreed about the extent of nuisance periphyton levels that would be created. Other scenarios provide mitigation of these adverse effects by using flow sharing that mirrors the natural fluctuations in stream flow. The experts agreed that the supplementary take would have less than minor additional effects beyond that already occurring under the core hydro-electricity allocation. Any increase in allocation of water above the core hydro-electricity allocation established by consents granted in 2003 will be consistent with Policy 5-17 one plan. Water take permits were granted subject to conditions that maintain the rates and take, maximum takes and combined cap on take provided in the 2003 consents. Minimum flows are to be as per Sch C One Plan. A supplementary allocation from one stream was to be granted. Consents confirmed, subject to revised conditions.

City Rail Link Limited v Auckland Council [2017] NZ EnvC 204

Judge Newhook, Commissioner Dunlop, Commissioner Bunting

Application by CRLL under s 189E RMA for alterations to the City Rail Link designation 1714 and Kiwirail Designation North Auckland Line 6300.

In May 2017 CRLL and Kiwirail Holdings Ltd applied to the Court under s 198E for alterations to the City Rail Link designation 1714 and Kiwirail Designation North Auckland Line 6300 which was a 3.4km long passenger railway line being constructed largely underground from Britomart Station, Central Auckland to the North Auckland Line ('NAL') where it cut through Mount Eden. Subsequent to confirmation of the designation further design work resulted in the requirement for changes in the general vicinity of the intersection of the CRL and NAL in Mount Eden. The prime focus of the parties was proposed changes which included the removal of the vehicular component of an over bridge above the tracks on the alignment of Porters Avenue and Wynyard Road, part of existing Designation 6. During the proceedings, the issues of the case narrowed such that if the Court found that mitigation for the loss of the vehicular connectivity at Porters Avenue was required a link-road suggestion by s 274 party Qambi would be required to be considered by the Court and if it was not within jurisdiction would result in the Court directing further processes as an alternative to refusing the requirements for designation.

The Court assessed the existing environment which was inclusive of the current designation for which the Porters Avenue overbridge would be closed for 2 to 3 years while the construction was taking place and the effects on the environment of the new alterations to permanently close the bridge would have to be assessed in that context. The Court noted that the alteration would facilitative grade separation of the CRL and NAL which would result in many operational and safety benefits. It also accepted CRL's submission that given the evidence about the shift within the Central Auckland environment towards public transport use, the upgraded station as a result of the alteration would be of significant benefit for the Mount Eden area. The Court held that the adverse traffic and connectivity effects from the deletion of the Porter's Avenue vehicular overbridge would be no more than minor. After consideration of the evidence the Court reached the conclusion that not only were there no significant adverse effects on the environment, but that adverse effects overall were no more than minor. The Court also found that there was more than adequate consideration given to alternatives by the requiring authorities.

Overall the Court found that the proposed alterations were reasonably necessary to achieve the objectives in the round, because;

(a) They would improve transport mode choice in Mount Eden by providing a safer, more resilient and efficient service to the CBD and other benefits for the Auckland train network including the CRL and NAL;
(b) Result in significant operational benefits with consequent minimising of negative environmental impacts;
(c) Result in significant capital and operational cost standings for the public purse;
(d) Improve the amenity of Mount Eden Station and potentially improve that of surrounding streets by way of urban renewal thus encouraged; Encourage opportunities for business and economic growth in the area. Court held that a pedestrian and cycle bridge as proposed by the requiring authorities with modifications by the Court as detailed, was appropriate and that the existing designation could be altered to delete the vehicular component.

Minister of Corrections v Otorohanga District Council [2017] NZEnvC 213

Judge Borthwick, Commissioner Leijnen, Commissioner Bartlett, Commissioner Paine

Application by the Minister of Corrections for alteration to an existing designation to enable the expansion of Waikeria Prison.

The Minister of Corrections, on direct referral to the Environment Court, applied for an alteration to an existing designation enabling the expansion of Waikeria Prison. The altered designation would house up to 3,000 male and female prisoners, which presently could accommodate around 650 prisoners. The confirmation of the designation was "a matter of urgency" due to the rapid growth of the prison population. The new facility was to be procured through a Public-Private Partnership, but as a result, the design of the facility was unknown and the effects on the environment were difficult to quantify. The Minister hoped to overcome this by proposing a set of design parameters, but the Court held theses were insufficient to address the scale and significance of actual and potential effects on the Environment as well

as being insensitive to the direction given in the relevant planning documents. As such the key issue was the response under the RMA where a notice of requirement was unsupported by a conceptual design or layout of the works that would be enabled.

The Court noted it was not in a position to confirm the designation subject to any modifications to conditions due to the Minister filing evidence after the hearing supporting conditions that would increase the assessed level of height of buildings across the majority of land identified as the "Building Zone". As such the Court gave its preliminary findings on ss 171(a)-(d) and directed the Minister address the scope for amendments to conditions proposed by the landscape expert. The Court also sort clarification of a number of other conditions. The merits of the relevant provision would follow once the legal position on scope was determined, then the NoR would be formally considered pursuant to Pt 2 RMA.

The Court accepted that the works or designation were reasonably necessary for achieving the objectives of the requiring authority for which the designation was sought. The Court discussed the effects of the works on the environment considered in the context of the proposed conditions. Topics included wetlands and streams, landscape and rural character, effects on housing and its affordability, earthworks, traffic, lighting, stormwater and wastewater management, noise and impervious surface area. The Planning Framework (s 171(1)(a)) was discussed, with the Court being concerned to understand how integrated management of natural and physical resources could be achieved within the Prison site and for the site within its rural setting. The Court was not satisfied that the few high-level parameters set out in the proposed conditions would constrain the environmental effects to the level predicted by various experts.

The NoR concluded by stating that the rural character of the area surrounding the Prison Site and amenity values derived from the same would be retained. The Court was surprised by that conclusion noting that the new prison facilities would expand to potentially 93 ha which would change the physical landscape, alter it characteristics and the mostly elevated views which were valued by people living and working in the area. The assessment of environmental effects found that after mitigation had established over 8-10 years, the adverse effects on visual amenity of some residents would remain. In addition, the Court reiterated that there would be adverse amenity effects including those arising from increased busyness and noise from traffic on the Waikeria Road. The Court noted that the enduring relationship on mana whenua with the Prison site would be provided for by ongoing exercise of mana whenua of kaitiakitanga which would be recorded in a formal agreement between parties.

Court not in a position to confirm the NoR as the Minister had yet to establish whether there was scope to introduce the reduced levels. Court held this was not an insignificant matter, given the intensifying effects on residential neighbours. Minister given till 26 January 2018 to file legal submissions.

Parties given till 31 January 2018 to counter and file agreed memorandum on the matters raised in the interim decision and file amended set of conditions and plans.

Remarkables Residences Ltd v Queenstown Lakes District [2017] NZEnvC 13

Judge Jackson

Commencement of consent

The Remarkables Residences Ltd ("the applicant") applied for early commencement of the resource consent granted to it by Queenstown Lakes District Council ("the council"), pending the resolution of the applicant's appeal. The consent was for the construction of 225 dwellings at Frankton flats. The appeal concerned only one condition of the consent, which related to the formation standard of a road. The council did not oppose the application.

The Court considered the provisions of s 116 of the RMA and noted that there were two tests under the section: whether early commencement pending and appeal would serve the purpose of the RMA; and whether there would be any prejudice caused. In the present case, the applicant's appeal was confined to a condition. The applicant submitted it would be prejudiced if the development could not commence forthwith. Further, there was no apparent prejudice to other parties. Accordingly, the Court determined that the resource consent was to commence on the date of the present decision. Costs were reserved.

Infinity Investment Group Limited v Canterbury Regional Council [2017] NZEnvC 36

Judge Jackson, Commissioner Mills, Commissioner Bunting

RMA-s120-water take-Decision

This was the substantive decision of the Court regarding the appeal by Infinity Investment Group Holdings Ltd ("Infinity") against the decision by Canterbury Regional Council ("the council") to decline Infinity's application for a water permit under the Waitaki Catchment Water Allocation Regional Plan ("the Allocation Plan") to take 68 litres per second from the Hakataramea River. In a previous procedural decision, the Court held that the proposed water permit was a discretionary activity under the Allocation Plan.

The Court considered the application under s 104 of the RMA and the provisions of the relevant statutory instruments, being: the Canterbury Regional Policy Statement ("CRPS"); the National Policy Statement for Freshwater Management 2014 ("NPSFM"); the Canterbury Land and Water Regional Plan ("CLWRP"); and the Allocation Plan. The Court addressed evidence as to the Hakataramea River environment, its ecological values and water flows. Ten existing consents had previously been granted to take water from the stem of the river, and 13 from its tributaries. Evidence was considered as to water quality and the deterioration in the lower reaches of the river.

The Court considered the weight to be given to the provisions of the statutory instruments and stated that the Allocation Plan was concerned with allocation of quantities of water rather than with issues of water quality. The CRPS, the NPSFM and the CLWRP post-dated the Allocation Plan. The Court stated that considerable weight should be given to the relevant policies of the NPSFM.

The Court then turned to consider what were the potential effects of the Infinity take, including accumulative adverse effects on reliability of supply for existing users, in addition to effects on water quality and on ecosystems, including salmon spawning. The Court stated that policy 5 of the NPSFM required that environmental outcomes, as set by regional plans, should not be exceeded. However, the Court observed that the water quality outcomes in the CLWRP were already exceeded and so the present application would cause further degradation.

Seven key findings:

i. the application to take water from the Hakataramea would, if granted, have considerable potential benefits for the applicant;

ii. the application is within the EFR and annual volume limits of the Allocation Plan;

iii. Infinity's proposed take of 68L/s is not only a discretionary activity, but also within the A-Band allocation from the main stem of the river as contemplated by rule 2 and Table 3Bxix, and therefore, at first sight, implements the policies and achieves the objectives of the Allocation Plan except for Policies 1A and 1B;

iv. the water quality and the state of the aquatic ecosystem are continuing to deteriorate (without any effects from the Infinity proposal);

v. however, the Hakataramea River is already qualitatively over-allocated as evidenced by the current adverse effects on water quality and aquatic ecology;

vi. the proposal, if granted would in a small way add to this deterioration with the result being that important policies in the NPS-FM 2014, the CRPS and CLWRP would not be achieved. In particular, we have found that it is neither feasible nor dependable that adverse effects would be avoided. In fact on the evidence they are likely to occur;

vii. there is inadequate justification for decreasing reliability of supply for existing farmers any further, particularly in drier years, and the proposal would result in external costs being imposed on these farmers.

Weighing all the relevant considerations, the Court concluded that it was more appropriate to decline consent under the Allocation Plan. It was important not to further allocate water from a river that was already over-allocated as to quality. Costs were reserved.