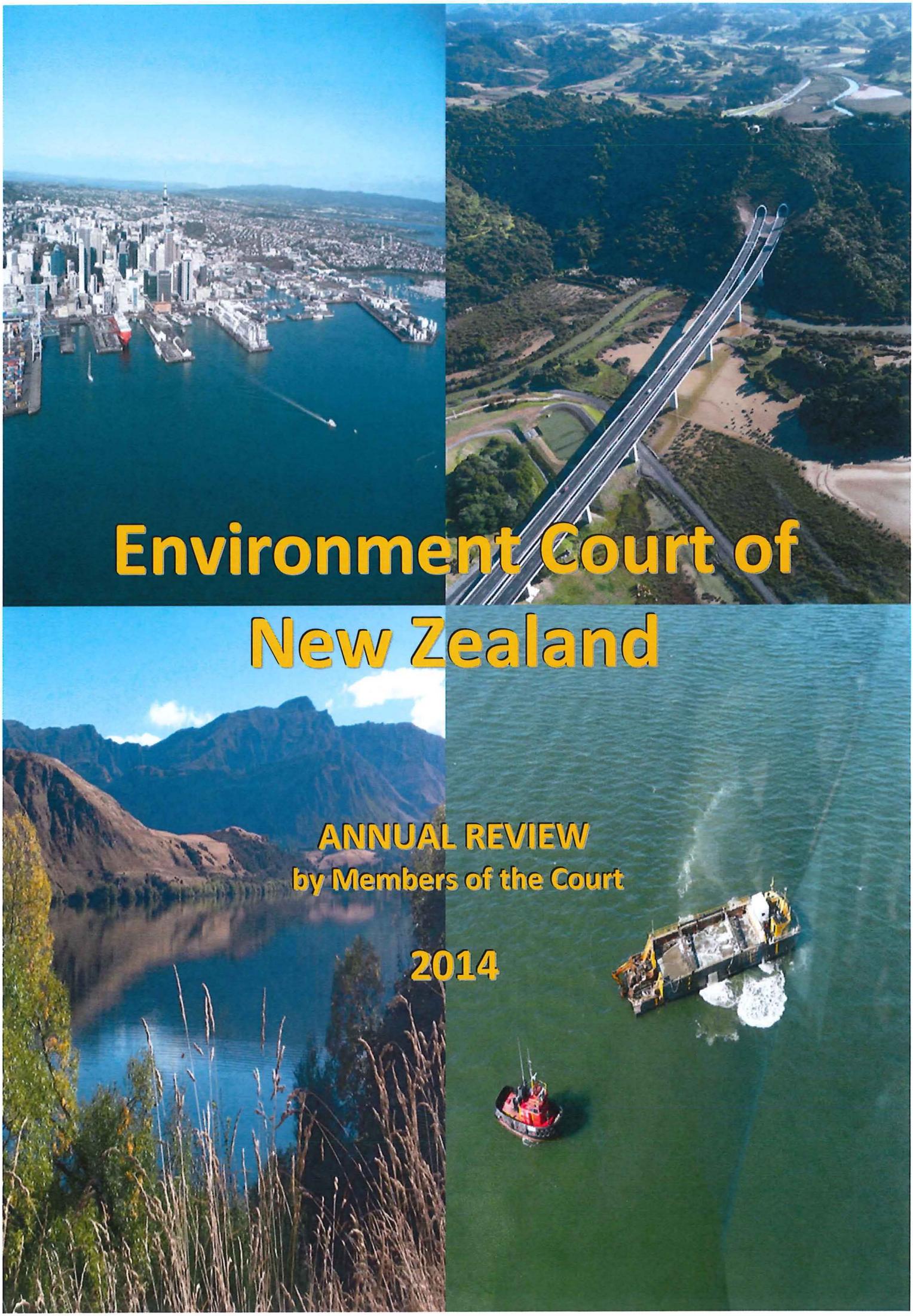

Environment Court of New Zealand

ANNUAL REVIEW
by Members of the Court

2014

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Calendar year 2014: an overview by Principal Environment Judge

- This is the first ever Annual Review of the Environment Court, prepared by its Judges and Commissioners. It covers the calendar year 2014 and is intended to complement the Annual Report to Parliament by the Registrar that covers each Government reporting year, most recently to 30 June 2014.

- 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. These pieces of information can be used as background and context for much of the material set out in the body of the document.

- An important section describes progress of the Court in 2014, drawing partly from statistical information in the Registrar's report to Parliament. The Court achieved a very high clearance rate for all types of cases, particularly for plan appeals. Factors likely to have been driving these results include increasing use of robust case management, alternative dispute resolution, streamlined hearing techniques, and use of modern technology. There may also be societal factors including reductions in numbers of plan appeals, a move to lower levels of public notification of applications by Councils, fiscal factors from the wider economy, and the introduction of some other hearing models such as boards of inquiry.

- A section of the review describes the nature of the work of the Court in 2014, not just in terms of conducting hearings, but also concerning alternative dispute resolution, varied case management techniques, and the advent of direct referral cases.

- The content of the considerably revamped Court Practice Note issued in 2014 is described, including the introduction of 3 new appendices concerning the lodgement and use of electronic documents, protocol for Court-assisted mediation, and protocol for expert witness conferences. There is a description of the slightly revamped range of case management tracks.

- Advantages and potential pitfalls of direct referrals are described, and a general description offered of the relatively conservative level of user-pays cost recovery administered by the Registrar. There is a description of the notable high-level of achievement of resolutions of direct referrals and other big cases through robust mediation. The work of the Commissioners in their task of independently

facilitating groups of expert witnesses to arrive at accurate and scientific agreements is offered.

- The Court acknowledges the strong and willing support of the Registrar, Deputy-Registrars, Judicial Resources Manager, and registry staff, many of whom are legally trained, and knowledgeable and passionate about their work. Surveys of parties and their representatives in 2014 indicated a very high level of satisfaction in this area.

- We offer a description of an ongoing study between the Principal Environment Judge and the Registrar into gaining better definition of key performance measures and avoiding the capture and dissemination of inaccurate or inappropriate data that could have unintended and potentially counter-productive results. An example is the need to gain a better understanding of the vexed issue of the needs of relatively complex cases, rather than lumping all cases (simple and complex) together and reporting a potentially meaningless statistical result. The PEJ and the Registrar contemplate designing a survey for regular court users to gain a better idea than is currently available, with attitudes to current court practices including timeliness, and suggestions for improvement in process. This is in addition to input that the PEJ regularly seeks from court users.

- There is a section expressing concerns about some public reporting about the performance of the Court, with examples given, seemingly directed on their face to offer criticism of the Court, but drawn from official studies and reports by the NZ Productivity Commission.

- We discuss the notable progress of the Court in the disposal of sets of appeals about policy statements, plan review and plan changes. As noted by the NZ Productivity Commission, practices have changed significantly in the last few years, (this has been particularly so in 2014, after the Commission issued its report); mediation is substantially resolving these sets of appeals in under a year, and the Court is moving robustly to resolve any residual harder issues through hearing and other means. A description of the skills of the mediators is offered, noting the time that it takes to acquire skills and experience, and noting that this is in strong contrast to less skilled people being labelled mediators and not being capable of producing the same results.

- Another benefit of application of the skills of members of the Court is described, the improvement in the quality of planning instruments, for instance a Waikato

Region plan change about the use of geothermal energy, the ultimate quality of which has subsequently enabled the processing of resource consent applications with relative ease, shorter timeframes, and reduced cost. This and other factors has led the Court to persuade a professional association to support it in conducting workshops on plan drafting best practice in coming months, to solve future occurrence of significant embedded problems in many existing instruments.

- The review describes the further advances with electronic developments during 2014, in the main Judge-led. Included are the use of iPads for hearing work, improvements in processes for uploading to and backing up iPads, installation of wi-fi in Court premises, and the interactive use of the Court's website for the exchange of evidence amongst large numbers of parties in big cases, and dissemination of materials to and amongst them. A description is offered of the ultimate goal of across-the-board electronic working methods.

- A description is offered of the considerable community involvement and education initiatives of the Judges and Commissioners during 2014, and commencements of preparation of subsequent ones. The work of the Court's education committee is described, as are processes in place by the PEJ for consultation with Court users.

- Formal events during 2014, including the swearing-in of the two new Environment Judges, and a ceremonial sitting to mark the conclusion of the professional career of the Court's most "senior silk". A description is offered of an initiative to enable greater consistency amongst presiding Judges in future.

- Acknowledgement is made of the hearing work of alternate Environment Judges, in particular the two who are judges of the Maori Land Court and who assist the Court with resolution of important Maori issues using their specialist knowledge and cultural awareness.

- Some significant decisions of the Court during 2014, are noted and summarised in an appendix.

Laurie Newhook, Principal Environment Judge.

Profile of the Court

The Court was established by s247 of the Resource Management Act 1991, as the successor to the former Planning Tribunal established under previous Acts.

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.

The Court's place in the Resource Management system

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

Progress of the Court in 2014

Reference may be made to the report of the Registrar to 30 June 2014 for detail, but it is appropriate to record in this Review that the clearance rate of cases in the Court reached a high level during 2014. In the Ministry's reporting year to 30 June 2014 there were 333 registrations of new cases, and the Court disposed of more than double that - 694. Tabular evidence is provided in the Registrar's Report.

The clearance rate was particularly high for plan appeals. At 30 June 2014 the number of plan appeals outstanding was 194. During that reporting year the number of plan appeals filed was 94, and the Court determined 362. This represents a clearance rate for plan and policy statement appeals of 385%.

As to resource consent appeals, at 30 June 2014 the Court had 127 cases outstanding. 112 appeals were filed, and the Court determined 176, representing a clearance rate of 157%.

In the year to 30 June 2014, 127 miscellaneous applications were filed (mostly declaratory and enforcement proceedings), and 156 matters were determined. This represents a clearance rate of 123%.

The Report of the Registrar noted the presence of a number of factors likely to be driving these results. These factors are regularly discussed between him and the Principal Environment Judge, and are the subject of a high level of agreement between them. They include societal factors in diminishing quantities of work flowing to the Court (some anticipated and some less expected), and the Court's approach to disposal of its work. These comments are however subject to what is said elsewhere about shortcomings with assessment of key performance measures in the Court's current systems.

Robust case management, alternative dispute resolution ("ADR") activities, and streamlined hearing techniques, together with increasing use of modern technology, (all as described in more detail elsewhere in this Review), have had a significant impact.

Societal factors are agreed to have included:

- Plan appeal numbers have fallen, particularly as there has been no "second wave" of plan reviews, and rolling plan reviews and plan changes have become more common;
- There has, since 2009, been a statutory regime of considerably more limited public notification of applications for consent;
- Resource consent activities in the overall resource management system are likely to have been impacted by the global financial crisis. (It has 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 of matters of national significance, albeit that Environment Judges and Commissioners are often seconded to form part of the hearing panels for those cases.

The nature of the Court's work in 2014

Types of case resolution

It is often perceived that the primary work of the Court is to adjudicate cases by way of hearing and determination. This belief is understandable, given that the Environment Court is a Court of Record, but in modern times is not strictly accurate.

The development of mediation and other forms of alternative dispute resolution have re-cast the nature of the work of the Court quite significantly. It is believed that these

processes now resolve approximately three-quarters of the cases brought to the Court. Statistical evidence for a high rate of resolution is to be found in the recent annual reports of the Registrar of the Environment Court to Parliament, in particular that for the twelve months to 30 June 2014. The statistical analysis has shortcomings however, because the Ministry of Justice's electronic database for all Courts, called CMS, is not a business management tool and, for instance, does not provide a clear record of resolution of proceedings other than immediately upon completion of mediation sessions. Often not captured are situations where resolution is achieved amongst parties within a few days or weeks of mediation being concluded, the settlement being significantly due to the quality of mediation provided by members of the Court.

In recent years the adjudication function of the Court has taken on a fairly different complexion from earlier times. While a relatively small percentage of cases before the Court now require resolution by hearing and determination, the nature of them has changed quite significantly. Increasingly the Court is confronted with large, multi-party, multi-issue causes, including on direct referral from Councils (a type of case discussed elsewhere in this Review) which can sometimes encompass hundreds of parties and many dozens of key issues. Hearing time before the Court is therefore increasingly devoted to these larger cases, many of the smaller ones having been resolved by alternative dispute resolution methods.

The Court's Practice Note sets out procedures for the various types of case resolution undertaken by the Court.

The Court and its predecessor Tribunals have for many years published and maintained a Practice Note after public promulgation of drafts and consideration of submissions by interested persons. It has regularly revised the Practice Note over the years.

New Practice Note in 2014

The latest revision was published during 2014 and came into effect on 1 December. It replaces all earlier Practice Notes. Its introductory provisions record that it is not a set of inflexible rules, but is a guide to the practice of the Court to be followed unless there is good reason to do otherwise.

Matters particularly updated or newly added to the Practice Note in 2014 are discussed elsewhere in this Review.

The topics addressed in the Practice Note are, broadly:

- Communication with the Court and amongst parties;
- Lodging appeals and applications;
- Direct referrals;
- Case management;
- Alternative dispute resolution;
- Procedure at hearings;
- Expert witnesses;
- Access to court records;
- Glossary of terms.

There are three appendices:

- Lodgement and use of electronic documents;
- Protocol for court-assisted mediation;
- Protocol for expert witness conferences.

A note at the commencement of the Practice Note reminds interested persons of the address of the Court's website at http://www.justice.govt.nz/courts/environment-court

The note advises that the website may prove to be a useful additional resource, particularly for those unfamiliar with the Court's staff, locations and procedures; that it offers contact names and addresses; and that it may be used for interactive purposes in particular cases. The latter aspect is discussed in more detail elsewhere in this Review.

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 robust and proactive case management methodology, the more so in recent years. 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.

As noted by the Registrar in his latest Annual Report to Parliament, 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. As he also points out, the Court continues to dispose of more cases than are being filed year on year. His report describes a highly cooperative 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

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 by 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. 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 number 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 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.

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.

The involvement of self-represented parties 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. The Court is required to adjudicate matters, not advise parties about them. 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 Resource Management Act introduced sections 87C to 87 I, making provision for an applicant for resource consent to request from a council a decision to refer the matter directly by the Environment Court, without first being decided by the council or commissioners appointed by it.

Applicants commenced using this process from the beginning of 2010, and a relatively small but steady number of cases has 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 some reasonably high degree of priority to process, hear and determine.

Consent authorities presently have discretion under s87E RMA, to refer a case directly to the Environment Court. In 2013 an amendment was made to the section for the purpose of limiting this discretion of consent authorities in certain ways, 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 Regulations have not yet been promulgated. Members of the Court consider that in its current situation the Court and parties would not be overwhelmed if the limitation involving a need for Regulations to be passed was removed in any new amending legislation.

In 2014, four Direct Referral applications were lodged, the first in March and the last in July. Two were the subject of decisions issued by the Court within six months, the third within eight months; the fourth was the subject of settlement with all parties bar one, and a hearing conducted within six months of lodgement. In all of these cases mediation and expert witness conferencing resolved all or most of the issues. Section 87G RMA appears to require a hearing of cases directly referred, but in cases where alternative dispute resolution has secured complete agreement amongst the parties, the hearing is necessarily something of a formality. The policy reason for this appears to be that the proceeding is one at first instance, but the true need is a little difficult to gauge.

In one of the cases, involving a proposal for a significant expansion of a commercial quarry strongly opposed by local residents, all issues were resolved by the Court's alternative dispute resolution processes. An online industry newsletter "*Inside Resources – Mining and Quarrying Intelligence*" reported the applicant as saying that the Court was very efficient in processing the application, and was very succinct and clear on a number of complex issues.

Lest a wrong impression be created, difficult issues can arise in direct referral cases as in any case, such that even if the Court commences a hearing at a reasonably early time, steps may become necessary that have the effect of prolonging the life of the case. A recent example is an application for consent to a marina on Waiheke Island near Auckland, lodged at the end of 2013, the hearing for which commenced in October 2014, and where the applicant applied to significantly alter the proposal at the end of the three-week hearing. (Mediation had been declined at all stages by all parties). Directions are now in place for determination of whether the proposed changes are, as a matter of law, within the scope of the proceedings. Due process must be followed, and the life of the proceedings has become extended accordingly.

It is a recognised feature of direct referral cases that the Court may order a party 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 parties from time to time, usually applicants. Bearing in mind that the discretion to award costs is ultimately that of the Court under s285(3) RMA, the pattern in the

direct referral cases concluded in the last four years has been that agreement has been reached between an applicant and the Registrar at a relatively conservative level.

The direct referral process can provide an avenue for speedy determination of complex cases, but it is considered that applicants need to have their cases extremely well prepared if they are to avoid "road blocks" 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."

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 is the Waiheke Marina case previously mentioned, 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 electronic developments 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 are laced with 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, somewhat in the direction of compulsion.

Other alternative dispute resolution

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 can get involved, 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 the 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 groups debate objectively and scientifically, differences amongst them, for the purpose of reaching agreements and/or clarifying 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 canvassed in expert evidence in cases, with resulting saving in hearing time, and of course 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 be seen as an extension of expert conferencing. The focus is on gaining accurate and objective scientific answers.

Another technique employed by the Judges from time to time is the judicial settlement conference, in circumstances where parties have got stuck on an issue in mediation. This can be particularly useful when other forms of ADR have produced the result that the unresolved issue is the last item standing in the way of final resolution of a case.

As with all aspects of Court work, preparation is important to success with all types of ADR. The need for good preparation extends not only to the parties, their witnesses and representatives, but to the members of the Court as well.

Supporting the Court: the Registries

The Ministry of Justice operates a unit called the Environment Court Unit, which falls within the Specialist Courts Group. The Unit is headed by a National Operations Manager, who is also the Registrar of the Court. The position is held by Harry Johnson, who has held the post of Registrar, and senior management roles in the Court, for a number of years.

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, pursuant to s260(2A) RMA.

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 managers and hearing 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.

The Court has a Judicial Resources Manager who coordinates the court's sitting programme under direction from the Principal Environment Judge exercising administrative functions under s251(2) RMA.

Surveys of parties and their representatives are regularly conducted by the Ministry concerning the quality of service offered by registry staff. The results in recent years, particularly 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.

Study of key performance measures

In 2014 the Principal Environment Judge and the Registrar commenced to discuss the basis upon which the Registrar's Annual Report to Parliament is compiled. While the statistics have the appearance of clarity on the surface, they do not tell the whole story about the work of the Court.

The reports are 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 – eg "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 as an overall indicator of Court performance (ie performance of Judges and Commissioners in undertaking their judicial roles), which is not seen as appropriate on the part of the Executive.

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. The Ministry is interested in addressing these issues through business plans it prepares concerning the Environment Court amongst other Specialist Courts.

Some issues of concern to both the Judiciary and the Ministry include:

- Some data is presented as targets, despite being beyond the control of the Judiciary and the Ministry (eg numbers of cases lodged).
- Activities of judicial officers and support staff not captured in connection with some kinds of activity, for instance membership and work to support of 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 points of view. 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 (the latter often multi-party and multi-issue and requiring not only special arrangements to programme 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 martial 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 before hearings.

The Principal Environment Judge and the Registrar are contemplating designing a survey for 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.

Concerns about some reporting of the Court's performance

In earlier sections of this Review attention was drawn to the limitations of the New Zealand Courts' electronic database in measuring and reporting the performance of the Environment Court. In summary, the database, CMS, is not a business management tool and is programmed to offer only limited statistical information about the progress of cases. Furthermore, it offers only quantitative, not qualitative, information. As a result, in managing the workload of the Court the Principal Environment Judge, Registrar, and Judicial Resources Manager need to bring to bear manual qualitative assessments of the work on hand.

Inadequacy of quality official information can give rise to an external problem when outsiders, usually possessed only of anecdotal information, (sometimes manipulated

for some particular purpose), make public claims about shortcomings in the timeliness of the work of the Court. Such claims are often also bound up with inaccurate statements about substantive outcomes in some cases, based on inaccurate or non-reading of decisions of the Court.

The Court is limited in any public comments it can make in these circumstances. This is because it is judicial convention that Courts generally speak through their decisions and case materials such as Minutes. This limitation comes as a surprise to many people. This Review will touch on some recent examples of inaccurate commentating in order to highlight the nature of the problem. The examples chosen ironically happen to point in the direction of some official publications that in the main offer a more accurate and objective analysis of the work of the Environment Court.

A statement appeared in the ***National Business Review*** on 5 December 2014 on the topic of consents for mining. The author chose to conflate difficulties applicants face with councils, with progress of appeals in the Environment Court, offering an ambiguous statement about "*lack of service culture*." Intriguingly, the ambiguities are not found in the full paper by the NZ Initiative from which the article appears to have been drawn, ***Poverty of Wealth – why minerals need to be part of the rural economy – 2014***. Chapter 4 of that document entitled "*Regulatory Roadblocks*" offers a detailed discussion about the operation of the purpose and principles of the RMA in its Part 2, and the promulgation and operation of national, regional and district planning instruments, and offers commentary about the significant complexity running through this matrix. <u>An acknowledgement is very properly offered that the Environment Court safeguards the quality of process and decisions</u>.

The ***Poverty of Wealth*** paper however then refers to five "unaddressed problems with the RMA" found in a 2013 discussion paper prepared for then Environment Minister Amy Adams entitled "***Improving our Resource Management System***." Included is reference to the considerable number of plans and policy statements in existence in New Zealand, and a statement that "first generation plans" had taken an average of eight years to be finalised and become operative. The latter criticism is, insofar as it concerns the Environment Court's place in the system, now completely outdated. The modern, efficient and timely processes of the Court in relation to appeals about plans and policy statements, is recorded elsewhere in this Review.

The same NZ Initiative paper refers to an official publication of the NZ Productivity Commission "***Towards Better Local Regulation***," first published as a draft report in December 2012, and issued as a final report in May 2013 after the commission considered public submissions. These reports contain up-to-date information,

including material sourced from the Principal Environment Judge, that accurately reflect recent past and current processing of appeals about these instruments. They reveal a situation very different from that described in the 2013 discussion paper for the Minister for the Environment referred to above. The reports of the NZ Productivity Commission are discussed in more detail in this Review in the subsequent section on appeals about plan reviews, plan changes and policy statements.

The NZ Initiative paper offers two case studies of some interest to public discussion of the work of the Environment Court. The first concerns planning provisions that were promulgated in the Thames-Coromandel District, classifying mining as prohibited throughout extensive areas. The author noted that the Environment Court found against the provisions and directed that underground mining be considered a discretionary activity in all zones. On appeal on points of law the High Court upheld the Environment Court, but the Court of Appeal introduced some qualifications. The resumed Environment Court proceeding was subsequently mediated to a fairly complex but reasoned and balanced conclusion.

The second case study involved the recent Bathurst proposal for mining on the Denniston Plateau (South Island West Coast), which was the subject of an extensive hearing before the Environment Court, and appeal processes in higher Courts. The author made a suggestion that there had been some delay in getting to a hearing in the Environment Court, but overlooked recording that all parties, by agreement, insisted on engaging first in an interlocutory process about jurisdiction to consider an aspect of climate change. All stages of the case were given high priority by the Environment Court. The ultimate outcome is not relevant to the current issue of timeliness, but all consents were finally confirmed, and a respectful process link was offered by the Court between its work and approvals required from the Ministry of Conservation, in the interests of consistency of consent terms and efficiency of process.

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 so as to import, when necessary, greater robustness of process. This is because, unlike private civil disputes, environmental disputes invariably have an element of public interest in them that calls for promptness of resolution. Members of the Court consider that the

concepts of access to justice and efficiency do not collide in this respect, in fact they coincide. ADR provides a far more cost-effective way of resolving many cases, and the reported results have been speaking for themselves in recent years.

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 under s274, and brought to a conclusion about 10 or 11 months after the cases have been filed, with a high degree of success. Some councils have been able to resolve to make large parts of the proposed instruments operative in short order, 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. Particular reference is made to a section in the 2013 report commencing at p 158 and concluding at the top of p 164. The Commission records that it accepted examples provided to it by the Principal Environment Judge during the submission process, for instance concerning resolution of district plan review appeals in the Western Bay of Plenty district in 2010 and 2011.

This pattern has continued through 2014, for example with a set of plan review appeals in the Ruapehu District. In February 2012, eighteen appeals were lodged, involving 32 topics. The vast majority of them were settled in mediation within about 10 months (before the end of 2012), with almost all of the rest being settled by mid-2013, about 15 months after initial lodgement. There was one outlier where the parties had difficulties that were ultimately resolved by mediation without the need for a hearing. All appeals in this set were then fully resolved. The proposed plan was capable of being made operative 15 months after the appeals were first lodged.

Similar processes commenced in 2014 and are currently being followed, with similar degrees of success, in Hamilton City, Waipa District, Otorohanga District, South Waikato District, and Northland Region. It is considered that this is now a strong pattern in the Court's work. There will always be the occasional exception where 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 occasional cases where delays are unavoidable, almost invariably requested by parties. Examples are given in another section of this Review that describes the use of the Hold Track.

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 to support local authority plan making processes earlier. This could indeed be desirable, and in fact is being undertaken to some degree in the important and urgent circumstances of the proposed Auckland Unitary Plan and the Christchurch Replacement District Plan.

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. They do this in the context of being fully in tune with the nature of the work of the Court in resolving appeals, and they approach the task in a principled and highly 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, then to extend mediations and expert facilitations across all council regulatory hearing processes would require effectively a 100% greater level of ADR activity than that presently undertaken in the Court.

It has been the experience of members of the Court that one cannot simply apply a label to a person and expect good outcomes. It has been observed that where such processes are conducted by persons without the necessary experience, the results do not flow. Cases are not settled in mediation, and groups of experts produce reports that do not contain scientific agreements, but rather serial and unhelpful reiterations of aspects of their statements of evidence prepared for the case.

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 quality of instruments brought about as a result of appeal processes (in mediation, expert facilitation and hearing). One example was a Waikato Region plan change concerning the use of geothermal energy in the Taupo

area. The document contained many 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 constantly experiences problems with poor drafting of planning instruments - not only during the processing of plan appeals, but also consent appeals. Speed of preparation and promulgation of instruments appears to be one factor, and the problems include prolixity, inconsistency, illegality, and objectives and policies lacking rules or other methods.

Late in 2014 the Court commenced an exercise with the Resource Management Law Association of preparing a series of workshops that will occur in the coming year, on the subject of plan drafting. While the Government may soon legislate to offer councils templates for such things as format and structure, 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 good practitioners in these "arts" to lead workshops that can unlock clear thinking and improvements in practice. This initiative is further discussed in the section of this Review concerning community involvement.

Finally on this topic, it is recorded that 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. It has been suggested in some local government quarters that it is inappropriate for "unelected" people, the members of the Court, to alter local government policy. We reject the criticism. The policy as first drafted by the council must be in accordance with the purpose and principles of the Act in Part 2, increasingly and more firmly guided by these National Policy Statements and Environmental Standards now being promulgated by 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. All must stick within the parameters set by the Act and higher order instruments.

Initiatives and innovations

Electronic developments

It is trite that we live in an electronic age. Also, that we find ourselves working with "the good, the bad, and the ugly". Unfortunately many platforms and systems assume vast proportions and come at great cost – and some work and some don't. Many again however are in the "cheap, cheerful and effective" category, and it seems fair to observe that there is an increasing trend worldwide, in tight fiscal times, to explore the latter.

The initiatives described below certainly come within the latter category, and have been in the main, Judge-led. We acknowledge the support received from the Special Jurisdictions arm of the Ministry, but otherwise have had our concerns that simple, cheap solutions that make our work more efficient and cost-effective, take much time and hard work to achieve.

iPads

Not long ago three divisions of the Environment Court trialled iPads in conducting hearings in large cases, namely ***Buller Coal*** (a proposal for a moderate sized mine for the extraction of coking coal on the West Coast of the South Island), ***Hurunui Windfarm*** (Canterbury) and ***Hagley Park Cricket Ground*** (Christchurch). Parties and counsel were given good advance notice, important given that hearings have a tendency to move at a fast pace when such equipment is employed. In consequence, not only were members of the Court equipped with iPads and an appropriate document management application, but so too were counsel and key witnesses.

Each of the three panel members on the Court, and their hearing manager, were equipped with iPads carrying the GoodReader App. All case materials were uploaded to the devices.

Surveys were subsequently conducted of members of the Court and the parties, the overall responses being that the trials had been a great success, such that all members of the Court and their Hearing Managers have now been similarly equipped and are regularly conducting hearings using the devices. In the surveys, approval was particularly offered about hearings having proceeded at a significantly faster pace, with all pre-lodged evidence and submissions uploaded to the iPads being pre-read by all participants. Counsel found themselves quite confidently

cross-examining witnesses from notes, references, and cross-references contained in the electronic materials. They advanced submissions to the Court wielding iPads instead of floundering through piles of paper contained in countless folders. New materials becoming available during the course of the trial included the transcript, which was steadily uploaded to the iPads and again could be easily referenced by members of the Court and parties.

Some difficulties have been experienced around the uploading of materials and backing up of the iPads. The Ministry of Justice has not been keen on File Transfer Protocol programmes and Cloud services often employed to achieve these things. Ultimately, the Court was introduced to a programme called "Box," which is understood to be encrypted and secure. The recommendation came from some senior commercial litigators who had represented parties in a High Court trial where the protection of commercially sensitive material had been particularly important to them and their clients. The need for a high level of confidentiality is much less significant in proceedings before the Environment Court, but is of course helpful on the rare occasions when confidentiality orders are made. By the end of 2014 the operations of uploading case materials to multiple devices, and backing them up, was working relatively seamlessly using Box.

Another advance has come courtesy of the Ministry of Justice National Transcription Service, which during 2014 significantly upgraded its services to Courts around transcription work. Enhancements offered have included capabilities of annotation, key word indexing, merge, and navigation functions, which are proving most useful for collaboration amongst panel members and drafting of decisions.

Through the Court's Judicial Resources Manager, the Court has commenced to offer some simple training in the use of iPads and GoodReader to outside participants. The equipment is found by all to be refreshingly intuitive.

There remains an issue around synchronisation and integration with Ministry of Justice systems, including files and folders maintained by judicial officers. We are hoping this can be worked on. It is thought that when the time comes for a second generation of tablets to be issued, a future iteration of the Microsoft Surface tablet might provide some answers.

Wi fi

The Court succeeded in 2014 in having wi fi services installed in all 3 registries and most judicial and commissioner chambers areas. This has proved most helpful in

the uploading of materials to the iPads and for backing them up, and generally for connectivity of mobile devices in our work.

Website

The Environment Court website has a somewhat old-fashioned look and feel, but has recently been adapted to allow the exchange of evidence amongst parties and to assist lodgement in Court, all to lessen the need to create and manage very large volumes of paper. This approach was initially taken in one large multi-party, multi-issue Auckland plan change case. The experiment was quite successful, particularly given that the issues for interested parties varied considerably amongst them, and not all parties required to receive all evidence.

The approach has more recently been extended to some of the large direct referral cases discussed elsewhere in this Review, including the Waiheke Marina case involving 310 parties. The use of the website has been expanded in this instance beyond the filing and service of materials, and is being used for many other types of communication as well. For instance, Minutes issued during the course of case management, and Memoranda received from parties, are routinely lodged and exchanged electronically.

The Court has been conscious that not all parties are likely to have access to computers, and/or be computer-literate. In the Waiheke Marina case, this disadvantage for a small number of parties was overcome by persuading the Auckland Council to install a computer terminal at its Waiheke Island service centre, and arrange for a member of its staff to assist with its use when called upon.

The Resource Management Act gives the Environment Judges considerable powers and discretions about process, for instance in relation to such things as waivers. The Waiheke case has accordingly been the subject of judicial directions for the use of the Court's website on an interactive basis amongst parties, using these discretions. With the numbers of people involved, the savings in generation of paper can immediately be seen. One need only imagine in contrast, a registry process of preparing, copying, stuffing envelopes and mailing, a five page Minute to 310 parties. Then extrapolate to the lodgement and service amongst 310 parties, of many lever arch folders-worth of evidence!

Another recent initiative has been to make greater use of the Court's website to disseminate decisions of the Court that are of greater than normal public interest. Steps in this direction will be increased in 2015.

Electronic filing pilot

In 2006 the Environment Court was selected by New Zealand Courts' Heads of Bench and the Ministry of Justice to run a pilot electronic filing system on behalf of all Civil Courts and Tribunals. Unfortunately, what was then commenced proved to be a cumbersome, process-laden and ultimately unaffordable project, and was cancelled (with justification) in the 2011 Government budget round. It appeared to be taking on the character of a large, expensive, home-grown project whose ultimate success could not be guaranteed.

The basis of selection of our Court for the project was in part its relatively small size, its agility, and ability to use statutory discretions to govern process. It was also thought helpful that the Court maintains a clear geographical "docket" system for case management.

The Court was selected again in 2013, this time to pilot a small electronic filing system on behalf of all Civil Courts and Tribunals. Our Court had at that stage been introduced to some "cheap and cheerful" examples of the art in Australia. In particular, in 2013, the Supreme Court of Victoria Australia was running an inexpensive pilot to manage cases bearing some similarity with those of the New Zealand Environment Court (in the Victorian Court's Technology, Engineering and Construction List). In 2014 that pilot, having been very successful, became business-as-usual, and was rolled out to a number of Lists (the ultimate intention being, to all of them). The system is now described on the website of that Court as its "electronic case management system for use in all new judge-managed proceedings that fall under the Commercial, TEC, IP, and Corporations Lists". It is stated to be hosted in a secure Cloud-based environment which allows parties to electronically file and manage documents related to their proceeding from any location with access to the internet, 365 days a year. Access to case files is securely limited to appropriate parties. Practitioners can electronically lodge, process and retrieve court documents relating to civil cases through the Court's electronic lodgement service, at a fee.

Unfortunately in our view, the apparent intention of the NZ Ministry of Justice as at early 2014, to have the Environment Court commence a similar pilot on behalf of Civil Courts and Tribunals, seems to have stalled.

The ultimate goal

Visitors to the Registries and Judges' chambers are invariably flabbergasted at the quantities of paper that confront them in our premises. There seems to be no disagreement that it is important to wage war on paper, and the visitors take no persuading that there are significant efficiencies to be gained from the use of electronic systems, for instance the saving of many days of hearing time, the ability to avoid lugging mountains of paper around the country, and all the copying and transmitting of those mountains of paper that has traditionally taken place.

The ultimate goal in the view of members of this Court is to get its various electronic systems (iPads, website, and e-filing) to "talk to each other" as an integrated system in the quest to become as paperless as possible. Security issues are steadily being overcome – for instance "Box" or other FTP (file transfer protocol) technology could be applied across all parts of such system, and/or other security measures taken.

Nevertheless, as at 2014/15, the Environment Court as a Court of Record must for the meantime maintain at least one paper trail. Under present legislation, a move to a paperless environment would require permission from the Chief Archivist under the Public Records Act 2005. Also as of late 2014, it is noted that there is a Judicature Modernisation Bill before Parliament. The Bill in its current form contains a number of provisions which could be helpful in bringing New Zealand Courts more easily into the electronic age.

New information on the Court's website

During 2014 increased use was made of the Environment Court's website to publish copies of speeches and papers presented by members of the Court, copies of Court decisions of particular public interest, pages relating to large direct referral cases (discussed previously in this Review), the Court's new Practice Note, and a formal agreement entered into between the Principal Environment Judge and the Chair of the Auckland Unitary Plan Independent Hearing Panel.

Community involvement and Education initiatives

Community 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 particularly active in 2014, presenting to groups of law students, architecture students, the NZ Planning Institute, the Resource Management Law Association annual conference and "road show" workshops and seminars, and other gatherings. Some Judges adjudicated at moots of student bodies. A small number of Judges and Commissioners attended the bi-annual conference of Australasian Environment Courts and Tribunals in early 2014, and presented papers and participated in discussions with colleagues from the Australian states.

A particular highlight of the year was the involvement of a number of the Judges and Commissioners in a "road show" series of seminars on conditions of consent. This occurred in 11 regional venues around New Zealand, and was chaired by the PEJ. This series was sponsored and supported by the Resource Management Law Association. The sessions attracted some of the biggest audiences the association has experienced for such events, and involved presentations not only by members of the Court, but from experienced legal and planning practitioners. Persons attracted included local government politicians, local government planners, consultant planners, law practitioners, enforcement officers, and some developers.

The exercise was undertaken because it has been the experience of members of the Court that conditions of consent considered in the course of mediating or hearing appeals have often been of a poor standard from many points of view. Detailed presentations included an academic assessment of the quality of conditions and the extent of enforcement of them throughout New Zealand; legality, clarity, and enforceability; management plan conditions; adaptive management consenting; guidance from the Courts; infrastructure and large development consenting; types of security and how and when to employ them; engagement of a "conditions expert"; strategic approaches to using conditions to make projects consentable; enforceability including the views of enforcement officers at the "coal face"; ensuring that conditions are time-bound; certification versus approval; clarity and recommended amounts of detail; performance standards; and much more.

The President of the Resource Management Law Association has reported that the event was one of the best attended it has organised, and expressed gratitude for the strong involvement by the Court.

A new workshop being planned

Towards the end of 2014 the Court suggested to the Resource Management Association that another vitally important aspect of environmental law work, and an area in which major problems are again experienced, is the preparation and drafting of plans and policy statements. It is the experience of members of the Court, and must also be apparent to other decision-makers and professionals, that serious problems are often found in such documents with illegality, lack of clarity, repetition, inconsistency, lack of relevance, and sheer want of simplicity and usability. It seems unarguable that the costs of these problems to the community, including "loss of opportunity" costs, must annually run to an enormous if incalculable sum. One has only to take into consideration, extended hearing times (before the Courts and councils), the needless extra cost of professional advice, extended interaction with council officers, delays in resolution of applications and other proceedings, and even abandonment of good projects in the face of these issues, to arrive at such a conclusion.

Led by the Court, work is under way to prepare "best practice" workshops, define topics (which include those mentioned above), and assemble a college of good presenters from the RM professional community and the Court. The emphasis will be to involve people with known good plan drafting skills, and people with relevant experiences of using plans and policy statements both good and bad. The Court hopes to partner not only with RMLA, but also the Ministry for the Environment and Law Societies.

Measured against what has been forecast by the Minister for the Environment about reforms involving possible templates for format and structure of plans and policy statements, we do not anticipate any inconsistency. We will aim to factor in such reforms as they emerge in coming months to the extent necessary.

Consultation with Court users

Members of the Court, particularly the Principal Environment Judge, meet and communicate regularly with professional bodies such as the Resource Management Law Association Inc, and the Environment Law committees of the NZ Law Society and the Auckland District Law Society Inc. The PEJ regularly conducts open discussions with members of the RMLA at the conclusion of regional seminars and roadshows, for the purpose of gaining input and ideas for improving the efficiency and timeliness of Environment Court processes. The PEJ also consults quite widely

and regularly with senior members of professions engaged before the Court, and retired members of the Court, about such matters.

As mentioned in the section of this Review about key performance measures, the PEJ and the Registrar are contemplating designing 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.

Other events

Formal sittings of the Court occurred during 2014 for the swearing in of the two new Environment Judges, and to mark the conclusion of the professional career of Paul Cavanagh QC, the most senior silk regularly engaged before the Court. Mr Cavanagh had been practicing law for 50 years, and was a Queens Counsel for 23.

Planning commenced for an initiative to be led by Retired Judge Gordon Whiting, to enable some consistency in courtroom hearing work by the Judges and Commissioners. It has been recognised that while Commissioners move amongst Divisions and have the benefit of experiencing the manner of conducting hearings by all judicial officers, it is rare for the Judges to work together in that environment, so they tend to work in some isolation. Judge Whiting will observe proceedings around the country from time to time in coming months, and will provide the benefit of his observations and his own considerable experience, to all members of the Court.

Education

The Court has established an Education Committee comprising Judges, Commissioners, and the National Manager. Its purpose is to oversee the education needs of all members of the Court and provide a prime point of contact with the Ministry for the gaining of resources for the purpose.

In 2014 the committee undertook a number of activities, including commencing a review of library services, and coordinating seminars on topics of particular relevance to the work of the Court. It has been working with the Principal Environment Judge on electronic initiatives to assist education, including making available to a greater extent on the Court's website, decisions of the Court of public interest.

Members of the Court

TITLE	NAME	APPOINTED	DOMICILE
Environment Judge Acting Principal Environment Judge Principal Environment Judge	L J Newhook	August 2001 August 2011 February 2014	Auckland
Environment Judges:	JR Jackson	September 1996	Christchurch
	JA Smith	May 2000	Auckland
	CJ Thompson	August 2003	Wellington
	BP Dwyer	September 2006	Wellington
	JE Borthwick	November 2008	Christchurch
	M Harland	September 2009	Auckland
	JJM Hassan	January 2014	Christchurch
	DA Kirkpatrick	February 2014	Auckland
Alternate Environment Judges:	C J Doherty	August 2008	Christchurch
	C L Fox	July 2009	Gisborne
	S R Clark	July 2009	Hamilton
	J M Kelly	July 2009	Wellington
	P R Keller	July 2009	Dunedin
	R P Wolff	February 2011	Hamilton
	G A Rea	February 2011	Napier
	G Davis	April 2011	Whangarei

Environment Commissioners	APPOINTED	RE-APPOINTED	DOMICILE
Mr JR Mills	July 1999	September 2009	Wellington
Mr WR Howie	June 2001	June 2013	Wellington
Mr RM Dunlop	March 2003	June 2013	Auckland
Mr K Prime	March 2003	June 2013	Bay of Islands
Ms MP Oliver	April 2004	March 2009	Auckland
Ms KA Edmonds	January 2005	January 2010	Wellington
Dr AJ Sutherland	January 2005	January 2010	Christchurch
Mr D Bunting	August 2007	August 2012	Wellington
Ms A Leijnen	January 2011		Auckland
Mr IM Buchanan	January 2013		Wellington
Ms E von Dadelszen	January 2013		Napier
Mr J Hodges	June 2013		Auckland
Deputy Environment Commissioners:			
Mr OA Borlase	March 2003	August 2011	Dunedin
Mr D Kernohan	August 2007	August 2012	Wellington
Ms C Blom	November 2010		Auckland
Mr J Illingsworth	June 2013		Cambridge
Dr B Maunder	May 2013		Auckland

Appointments and retirements

Environment Judge Laurie Newhook was appointed Principal Environment Judge in February 2014. He had held appointment as Acting Principal Environment Judge since August 2011.

In January 2014 Environment Judge JJM Hassan was sworn in, in Wellington, appointed to Christchurch. In October 2014 Judge Hassan was seconded to be

Deputy Chair of the new Christchurch Replacement District Plan Independent Hearings Panel for a term approaching two years.

In February 2014 Environment Judge DA Kirkpatrick was sworn in, appointed to Auckland. From mid-2014 Judge Kirkpatrick was seconded to chair the Auckland Unitary Plan Independent Hearings Panel, leading a process likely to take something approaching three years.

Four commissioners came to the end of their five-year appointment terms during the year. Each of them continues in office under section 254(4) RMA pending either re-appointment, or appointment of a successor pursuant to processes under subsections (1) and (2) of section 254.

Two of the Alternate Environment Judges are Judges of the Maori Land Court – Deputy Chief Judge C L Fox who is based in Wellington and Gisborne, and Judge S R Clark who is based in Hamilton. They were appointed under sections 249 and 250 RMA in mid 2009, and sit as members of our Court to provide their specialist knowledge and cultural awareness in cases which have a high focus on matters of particular concern to Maori. Notably, Principles found in Part 2 of the Act include a requirement that decision-makers (including the Court) take into account the principles of the Treaty of Waitangi, and to recognise and provide for, as a matter of national importance...*the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga;* also to have particular regard to...Kaitiakitanga. The contribution of both Alternate Judges in our hearing work is much appreciated and valued.

Six of the eight Alternate Environment Judges are fulltime District Court judges who at varying times received the Alternate Environment Judge Warrants in order to assist with resource management prosecution work in the District Court. Upon the appointment in early 2014 of the new Environment Judges, the Principal Environment Judge and the Chief District Court Judge signed a Memorandum of Understanding that Environment Judges would, as a matter of priority, hear and determine the prosecution and sentencing matters under the RMA in the District Court, and that the Alternate Environment Judges would be called upon only in cases of urgent need.

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 (eg 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.

APPENDIX 2

Significant Decisions of 2014

Environment Court Decisions

Re Canterbury Cricket Association Inc (No 3) [2013] NZEnvC 281

Judge Borthwick, Commissioners Bunting and Leijnen

This was the last in a series of substantive decisions regarding a Direct Referral application by Canterbury Cricket Association Inc to establish Christchurch's Hagley Oval as an international cricket venue. The nature of the proposal meant that the proceedings covered a vast range of topics including traffic, noise, lighting overspill and landscape protection. Overall the proposal was non-complying and some of its adverse effects were found to be more than minor. Its overall positive effects were weighed against these, and mitigation options explored. The proceedings were conducted under considerable urgency because of the looming date for commitment to offer the facility for the 2015 Cricket World Cup.

In an earlier interim decision ([2013] NZEnvC 184) the Court had granted the application, subject to the finalisation of certain conditions changing the number of game days in a season from those sought in the application, and setting noise, lighting, traffic and parking restrictions. Following the lodgement by parties of further draft conditions, the Court issued a 2nd interim decision which finalised those other than relating to the Access Management Strategy (AMS). The AMS subsequently produced was not adequate, and when an amended version was produced the hearing reconvened and a firm decision issued. That included provision to monitor effects of the World Cup tournament. The s274 parties sought full monitoring of the event where the applicant argued that this was too onerous.

Final decisions were made regarding temporary events traffic management, interface with school cricket use of the grounds, World Cup event monitoring and other major events monitoring. The final conditions set out that all World Cup and other major events are to be monitored and their effects on surrounding infrastructure (including the hospital) be recorded. Changes were made according to the earlier decision and final versions of Resource Consent and AMS were confirmed by the Court.

Carter Holt Harvey Ltd & Ors v Bay of Plenty Regional Council [2014] NZEnvC 14
Judge Smith, Commissioner Leijnen

This was the final in a series of decisions relating to several resource consent application for the taking of geothermal fluid from the Kawerau geothermal field. Some applications were for the renewal of existing consents and others were for the establishment of new consents. The Bay of Plenty Regional Council was moving towards a common approach to the management of all takes from this field, as set out in higher level planning documents, which were relevant to the context in which these consents would operate. The two issues remaining at the time of hearing were the formation and role of an industrial liaison group and the assessment of potential subsistence damage.

While some parties argued that reference to the liaison group in the conditions of consent was unnecessary, the Court found otherwise, while acknowledging that confidentiality was an important issue due to the sensitive commercial nature of some information. That being said, effective information sharing is vital to the management of finite resources. Common wording across consents (current and future) was encouraged. The decision of the Environment Court here acknowledged the potential for further consents to be granted and put in place wording allowing for this. It also acknowledged that parties have entered into private agreements regarding the industry liaison group.

Milford Centre Ltd v Auckland Council [2014] NZEnvC 23
Judge Smith, Commissioners Sutherland and Illingsworth

This was an interim decision relating to Milford Centre Ltd's application for Private Plan Change 34 to allow increased building heights with 9 building envelopes across the mixed commercial / residential Milford Centre. Auckland Council with the support of a residents' group, proposed an alternative plan change which would decrease height of the three highest proposed envelopes. The case was essentially about character and so had a high level of community involvement. Extensive expert conferencing was conducted and the issues before the Court at hearing were narrowed to whether the PC 34 was site appropriate, given growth strategies and effects of intensification, whether it provided adequate resource consent guidance, and whether it satisfied the RMA.

The Court found in the affirmative on all questions. Current and draft planning documents, including the Proposed Unitary Plan, all flagged Milford as a growth

area. The Court further found that, while amenity should be considered at the design stage, it was appropriate that it be addressed in a broader sense in higher level documents. In reaching its conclusion the Court considered the character of Milford, namely its coastal proximity, marina, estuary, and the mix and age of buildings and residents as well as the proximity of residences to the shopping areas. The Court did not see this character changing simply by intensification of residential activity. Rather an increase in town centre residential activity was seen as a way of anchoring Milford, emphasising its role as a focal point in the community, and increasing its vitality. The envelope heights in the Environment Court decision represented an increase from those set out in the Proposed Unitary Plan, but were less than that sought in PC 34. Parties were given 20 working days to respond with further wording and a final decision, granting a modified PC 34 was issued in May 2014 ([2014] NZEnvC 103).

Colonial Vineyard Ltd v Marlborough District Council [2014] NZ EnvC 55
Judge Jackson, Commissioners Sutherland and Mills

Colonial Vineyards Ltd applied for Private Plan Change 59 to have its vineyard near Blenheim rezoned for residential use. Marlborough District Council declined the application in its entirety, finding it did not achieve the goals of the Wairau Awatere Resource Management Plan. The council considered that the subject site would be better suited to "employment land" (business, retail and industrial uses) to be considered as part of a forthcoming plan review. Others considered residential use of the land would be incompatible with the nearby Omaka airfield. The council's decision was appealed to the Environment Court.

The Court found that the growth strategy regarding "employment land" could be met without rezoning the subject site for that purpose and the residential zoning sought would meet the immediate housing need. In terms of potential conflict between a residential zoning and future use of the airfield, the Court considered several mitigation options, but due to considerable uncertainty surrounding the air field's future use, considered that no-complaints covenants would be most effective. The Court considered that PC59 met more policies in the Marlborough Regional Policy Statement than it didn't, and so represented effective integrated management. The heritage value of the airfield was a matter of national importance, but there was nothing to suggest that PC59 would impact negatively on that in the near future. The appeal was therefore allowed and the council's decision cancelled.

[The High Court dismissed an appeal of this decision: *New Zealand Aviation Trust and Marlborough Aero Club Inc. v Marlborough District Council* [2014] NZHC 3350].

Grace v Minister for Land Information [2014] NZEnvC 82
Judge Thompson, Commissioners Prime and Kernohan

The Minister of Land Information issued Ms Grace with a Notice of Intention to Take Land, advising that the land at 204 Te Moana Rd, Waikanae was required for the Northern Corridor Expressway. Ms Grace filed an objection with the Environment Court under the Public Works Act.

The subject site was Maori freehold and Ms Grace had recently been successful in proceedings in the Maori Land Court to have it recognised as a Maori Reservation. While all the steps required to create a Maori Reservation had not yet been completed, the Environment Court recognised that such a Reservation was inalienable for the purpose of a Notice of Intention to Take. Furthermore, with the purpose of the Public Works Act in mind, the Court did not consider that the taking was fair, sound and reasonably necessary under s 24(7)(d) of the Public Works Act, given that alternative routes that did not require taking were available, and reported to the Minister accordingly.

Marlborough District Council v Awarua Farm (Marlborough) Ltd [2014] NZEnvC 89
Judge Smith, Commissioner Howie, Deputy Commissioner Blom

This is one of a series of decisions made in relation to Awarua Farms (Marlborough) Ltd and its director Mr Woolley, who own and operate several dairy farms with ongoing compliance issues, but where the Marlborough District Council has not made any application to cancel resource consents.

Considering the ongoing issues with the effluent storage and irrigation system, the Court was not satisfied that compliance with the conditions of the resource consent was a possibility. The Court set out the upgrades the system required and made permanent orders that the farm was not to be restocked until those changes were made. The decision made it clear that if the condition of the order were not complied with, resource consents might be cancelled and the farm destocked.

Whangaroa Maritime Recreational Park Steering Group v Northland Regional Council [2014] NZEnvC 92
Judge Newhook, Commissioners Buchanan and Sutherland

Whangaroa Maritime Recreational Park Steering Group appealed a decision of the Northland Regional Council to grant Westpac Mussels Distributors Ltd four resource consents required to establish and operate a marine farm. These matters were

somewhat related to Plan Change 4 which had not yet been the subject of a final decision in proceedings before the Court. The marine farm would be operated as a joint venture with Ririwha Ahu Trust, who administer nearby Stephenson Island on behalf of 500 beneficial owners.

Under the operative planning regime several of the activities were discretionary, but in terms of an interim decision about PC4 they stood to become prohibited. Section 87B(I)(c) s87B(1) both apply, and the activities were therefore to be assessed as discretionary. The nature of proposal meant ss 104, 105 and 107 were also relevant.

The Court examined competing economic, ecological, cultural, landscape and other evidence and found that the proposal had many benefits, with its adverse effects being localised and purely visual in nature. Much of the appellants' evidence was simply assertive, and was also quite inaccurate. The joint venture nature of the proposal would increase the kaitiakitanga of local iwi and have positive flow on visual effects in terms of ecological restoration projects on Stephenson Island that would otherwise not occur. The appeal was dismissed.

KPF Investments Limited & Ors v Marlborough District Council [2014] NZEnvC 152
Judge Jackson, Commissioners Prime and Buchanan

Two appeals were lodged against the decision of Marlborough District Council granting consent to KPF Investments Ltd to convert an existing mussel farm at Danger Point in outer Pelorous Sound to a salmon farm, by adding King Salmon to the list of species covered by existing consents. One appeal was lodged by KPS relating to the limits on feed quantities in the conditions of consent. The other was lodged by Pelorus Wildlife Sanctuaries Ltd and others and related to the granting of the consent. The case was closely related to the New Zealand King Salmon litigation.

This matter was considered under ss 104, 105 and 107 of the RMA as well as other relevant policy documents including the New Zealand Coastal Policy Statement. While benefits including increased employment were acknowledged, as well as limited ecological effects, the Court agreed with the Board of Inquiry in ***King Salmon*** that the visual impact of salmon farms does represent serious incursion into the natural seascape. This was in contrast to a mussel farm, the visual impacts of which were relatively benign. Adverse effects on Tangata Whenua were held to weigh

heavily against the proposal. There are already 4 king salmon farms approved in the area and cumulative effects from this proposal would be serious for Ngati Koata.

The approach that the Court took concerning the "overall judgement approach" differed from the Supreme Court in King Salmon because this application was subject to s 104 and therefore Part 2 was directly relevant. In undertaking assessment under Part 2, the Court found that s 6(b) and (e) were not satisfied by the proposal, nor policy 15 of the New Zealand Coastal Policy Statement which requires that effects on outstanding landscapes be avoided. The cumulative effects on Tangata Whenua were also not recognised in the Council decision. Balancing these effects against the positive effects, overall the Court found that the purpose of the RMA, and the instruments made under it, would be better achieved if consent was refused.

H.I.L Limited v Queenstown Lakes District Council [2014] NZEnvC 177
Judge Dwyer, Commissioners Edmonds and Mills

This was the final decision concerning a proposed 5 lot subdivision by the Shotover River in Queenstown. This matter was the subject of an earlier procedural decision that found a modification made to the proposal was within the scope of the proposal as notified ([2014] NZEnvC 45).

This decision set out the steps required for assessing consent applications in the subject rural zone. The decision maker must assess the site, determine which category of landscape it falls into, and apply the relevant assessment criteria accordingly. In this case there was a dispute as to whether the subject site was within an Outstanding Natural Landscape, a Visual Amenity Landscape, or both. While the upper slopes' ONL status was uncontested, there was dispute as to where the border between ONL and VAL sat. The Court determined that it ran through the site and so both VAL and ONL criteria had to be applied. It was considered that the effects would be significantly adverse (in both categories) and that the existing and permitted buildings on the site represented saturation for that landscape.

For the purposes of the 104D gateway, the overall effects were more than minor and the proposal was found to be contrary to the plan. Its negative effects outweighed its positive effects and it was therefore considered inappropriate subdivision, use and development under s 6(b).

Lambton Quay Properties Nominee Limited v Wellington City Council [2014] NZEnvC 229

Judge Smith , Commissioners Leijnen, Howie and Illingsworth

This was an unsuccessful application by Lambton Quay Properties Nominee Limited for consent to demolish the "Harcourts Building". The case had been remitted back from the High Court for rehearing ([2014] NZHC 878), and was reheard on this occasion by a different division of the Environment Court. The building is a Category 1 historic building and is listed on the Register of Historic Buildings under the Wellington City District Plan. The building was also subject of an Earthquake Prone Building Notice under the Building Act 2004. The notice required that, by July 2027, the building be either strengthened to a sufficient degree, or be demolished in whole or in part so that any remainder is not earthquake prone.

This decision considered the relationship of the building with the neighbouring HSBC building (also owned by the appellant), which was not considered in previous decision. Together these created a public safety issue. If the buildings were left derelict the Court found that RMA and Building Act could work together to require steps to be taken to address this risk. To consent to demolition where there was a fair, appropriate, balanced and reasonable alternative would not be proper exercise of Court's discretion.

Court found that the appellant's economic evidence, which saw the cost of the repair outstrip the value of the repaired building, was based on invalid gross market rent values. Consent was refused.

Eldamos Investments Ltd (Direct Referral) [2014] NZEnvC 241
Judge Thompson, Commissioner Dunlop

This was a direct referral for consent to construct a Warehouse store and related retail facility in Mount Wellington, Auckland. All parties agreed application should succeed, and some conditions upon which the various consent could be granted. However, as the matter was a direct referral the Court held it was required to consider the matter and to reach its own view as to whether or not it is appropriate.

The site is Business 4 under current Auckland City District Plan, and Light Industry under 2013 Proposed Unitary Plan. There is already "big box retail" surrounding the site and it is the only undeveloped site in the zone. The proposal was amended both

before and after mediation to address issues raised by s 274 parties. The bundling of the various applications made proposal non-complying overall.

Issues of importance included traffic and visual amenity effects. There were no matters of national importance at stake and the amended proposal addressed the traffic and visual effects, as well as the relevant s 7 factors.

The applicant sought an 8 year lapse period (as opposed to standard 5) due to the presence of an encumbrance prohibiting a department store or supermarket on the site until 2021. All parties had agreed to this extension and the court found no reason to refuse it. Application granted accordingly.

Gallagher v Tasman District Council [2014] NZEnvC 245
Judge Dwyer, Commissioners Bunting and Mills

This was an appeal against the decision of Tasman District Council regarding Plan Change 22 to allow for future expansion of Mapua township/ Ruby Bay away from the inundation and erosion prone coastline and onto more elevated land. The Gallaghers (the appellants) sought a 'spot zone' to allow subdivision on their land, which is located on the lower land of the coastal plain.

Stormwater experts agreed that, while flow velocities through the appellants' property were predicted to be low, flood depths could be significant depending on the coastal overtopping rate adopted. There was significant disagreement among the experts regarding overtopping of the seawall.

The Court found that the predicted extent and depth of flooding, the rapid rate at which it could develop, the extended periods over which the water could remain on the site and difficulties with egress from the site, all combined to create a high level of hazard. The Court accepted that as at present day, the extent of flooding on the appellants' property probably fell into the inconvenient rather than hazardous category. However, it would still have effects on access, planting, curtilages and amenity. Development would increase the risk of social, environmental and economic harm from coastal hazards, and Policy 25 NZCPS signals that is to be avoided. The relief sought was inappropriate having regard to NZCPS. Appeal dismissed.

District Court Decisions (RMA prosecutions and sentencing)

Dunedin City Council v Grant's Motel Ltd CRI-2013-012-001679
Judge Dwyer

A sentencing decision. Grant's Motel Ltd, the defendant, had illegally planted approximately 280,000 Douglas firs on its property, part of which was a visually prominent Landscape Conservation Area. This offending had significant effects on natural landform and natural plant species and created a high risk of wilding pine spread. The offending was highly deliberate. Starting point $100,000 set.

Remedial actions were undertaken but were not done to an appropriate standard. Given this, the Court did not make any reduction for cost of remedial work already undertaken.

The defendant agreed to the making of an enforcement order directing the removal of the Douglas Fir at an estimated cost of $135,000, with additional remediation cost, which were recognised as representing remorse and cooperation. A deduction of 20% therefore allowed. Prompt guilty plea allowed a further reduction. Fine set at $60,000.

West Coast Regional Council v Rookies Mining Ltd CRI-2014-086-000009
Judge Dwyer

A sentencing decision. Rookies Mining Ltd, the defendant, allowed acid mine drainage and waste rock seepage containing AMD to be discharged to Rudolph Creek, which went from being a healthy stream, to very degraded stream with negligible macro-invertebrate life. The discharge had serious ongoing effects, being the result of the mine overburden left uncovered or inadequately covered. The defendant was conducting a commercial mining operation and the need for adequate covering of overburden was well known to it. It acknowledged leaving the area uncovered/ inadequately covered, notwithstanding proposals to cover featuring in its own management plan.

The defendant displayed carelessness in its failure to identify readily apparent visual presence of AMD and to accurately identify an appropriate monitoring point to take

pH readings in the creek. Belated remediation and cooperation along with an early guilty plea saw a starting point of $80,000 reduced to a fine of $57,600.

Manawatu-Wanganui Regional Council v Ruapehu Alpine Lifts Ltd CRI-2014-067-000070
Judge Dwyer

Sentencing. Ruapehu Alpine Lifts Ltd operated a diesel storage and reticulation system. A hose became detached, spilling approximately 19,000 litres of diesel into the environment.

RMA sentencing approach set out: assess starting points for each charge, apply mitigating and aggravating to each and then calculate the end penalty, having regard to totality principle. The Judge noted that there were critical deficiencies in the system, namely the absence of pressure relief valves and use of non-industry approved hose clamps. Environment affected was Tongariro National Park which is a cultural and natural world heritage site, and of immense significance to Maori and to New Zealanders generally.

The damage to that environment's water system was significant, diesel entered the water supply for Raetihi and the water was cut off for 11 days, with drinking water being unavailable for 20 days. The spill went unreported for 5 days; people drank the contaminated water and it was complaints about this that led to investigation by council. Accommodation and food providers had to close and turn away bookings, community organisations carried costs of setup of community facilities.

The response to the original spill was totally inadequate. Mitigating factors included assistance with clean up efforts, co-operation and an early guilty plea. Starting points for RMA offending was $375,000, with a final fine set of $240,000. Charges were also laid and convictions entered under other legislation including Work Safe.

Northland Regional Council v Bird CRI-2012-029-459
Judge Thompson

Bird and Beckham, along with their companies were charged with excavation, vegetation clearance and soil disturbance, contrary to regional plan. The offending was characterised as both long term and deliberate. The poor financial positions of companies were considered when setting a starting point and considering sentencing options. Fines of $3215 imposed on each charge ($50,000 global per company). Bird and Beckham both sentenced to community detention for three

months, curfew from 8pm to 6am Monday to Sunday inclusive and to 200 hours community work each.

This matter was also the subject of a sentencing indication, which was followed by guilty pleas from both parties.