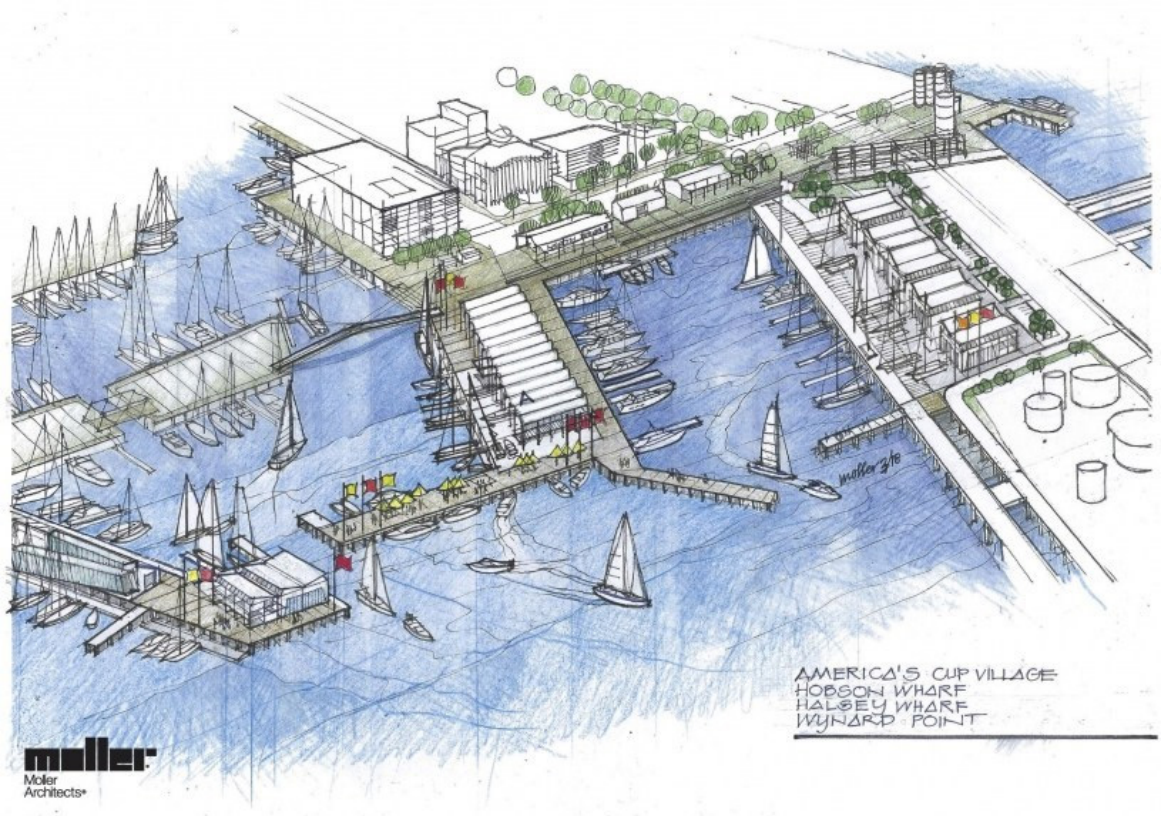
Environment Court of New Zealand
Te Kooti Taiao o Aotearoa

Annual Review

Calendar Year 2018

By Members of the Court



Contents

Calendar year 2018: an overview by Principal Environment Judge

- This is the fifth Annual Review of the Environment Court, prepared on behalf of its Judges and Commissioners, and covering the calendar year 2018. It is intended to complement the Annual Report to Parliament by the Registrar that covers each Government reporting year (most recently to 30 June 2019) and provides commentary beyond the statistical focus of that Report.

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

- The Review describes progress of the Court in 2018, drawing from the its database. The Court continued to achieve a high clearance rate for all types of cases. Factors driving these results include continued use of individualised case management, alternative dispute resolution, streamlined hearing techniques, and use of modern technology.

- A section of the Review describes the nature of the work of the Court in 2018 including alternative dispute resolution and varied case management techniques. It describes the Court's use of its three case management tracks, adjudication by hearing, cases directly referred without first being heard by councils, civil enforcement cases and criminal prosecution hearings (the latter by Environment Judges sitting in the District Court).

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

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

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

Profile of the Court

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

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

The Court's place in the New Zealand Court system

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

Progress of the Court in 2018

Reference may be made to the Report of the Registrar to 30 June 2019 for statistical detail, but it is appropriate to record in this Review that the clearance rate of all cases in the Court remained at a relatively good level during 2018. Case lodgments have been lifting quite strongly since 2017, possibly as a trend, and discussions are occurring with the Ministry of Justice and the Ministry for the Environment about gaining further resources at judicial officer and staff levels. In the 2018 calendar year 828 new cases were lodged, and 381 were resolved in ways which will be described in the next section of this review.

The two largest categories of cases were appeals against decisions of consent authorities and appeals on proposed policy statements or plans.

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

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

The apparent shortfall of numbers of cases resolved compared to cases lodged in the calendar year almost exactly equates to the arrival of the significant number of Queenstown District Plan appeals in May. With this taken into account, we are satisfied that the case resolution rate in the Court remains satisfactory, as has been the case now for a number of years. There will always be variations year on year in comparative rates of lodgements and disposals caused by factors beyond the control of the Court, such as the Auckland example last year. Close attention is however being paid to a possible trend to a steady increase on lodgments.

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

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

- Plan appeal numbers have risen in the last year, as contrary to experience in years up to 2017, there seems now to be a "second wave" of quite large plan reviews, in addition to the rolling plan reviews and plan changes which had been more common;

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

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

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

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

The nature of the Court's work in 2018

Types of case resolution as described in the Practice Note 2014

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

In 2018 work started, led by the Judges, on updating the Practice Note to take account of significant changes in process occurring in recent times, particularly technological.

Case management tracks

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

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

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

Adjudication by hearing

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

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

The Practice Note contains detailed provisions about preparation of statements of evidence, again stressing succinctness, focus, relevance and the avoidance of repetition. Sadly, members of the Court have noticed very little improvement in practice in these regards by counsel and expert witnesses, and work is under way to achieve this; including in the forthcoming revamped Practice Note.

It is the 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 –roughly in half.

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

and members of the Court benefit from such streamlining, there is commensurately more work undertaken in the registries to achieve this.

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

Environment Court Hearing Room in Christchurch

Direct referrals

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

Applicants commenced using this process from the beginning of 2010, and a relatively small but steady number of cases have been lodged in the Court since then. The cases tend to comprise proposals for larger commercial or infrastructural activities, and accordingly have

been treated by the Court as requiring a reasonably high degree of priority to process, hear and determine.

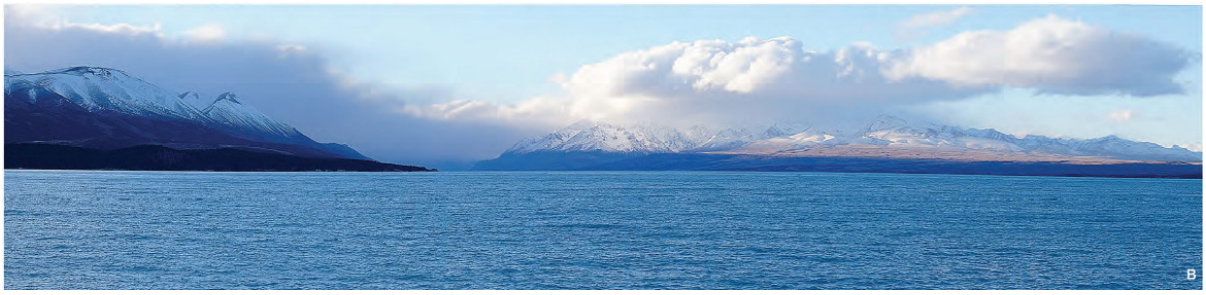
Consent authorities presently have discretion to refer a case directly to the Environment Court. In 2013 an amendment was made for the purpose of limiting councils' discretion to refer cases, but the provision was not to take effect until after Regulations had been promulgated. The Ministry for the Environment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

Five direct referral cases were lodged during 2018. Three in Christchurch and one in each of Wellington and Auckland:

Christchurch

Lindis Catchment Group Incorporated v Otago Regional Council

In June, Lindis Catchment Group Incorporated lodged with the Court an application for a suite of resource consents to replace water permits that are due to expire in 2021. A decision will be issued in 2019.



MACKENZIE DISTRICT PLAN CHANGE 13 APPEALS
Key Issues - 'tussock, lakes, snow & mountains': across Lake Pukaki towards Mt Cook / Aoraki

MACKENZIE DISTRICT PLAN CHANGE 13 APPEALS:
Key Issues - iconic views: from Tekapo down the length of Lake Tekapo

MACKENZIE DISTRICT PLAN CHANGE 13 APPEALS
Key Issues - structures in the landscape: a typical pivot irrigator on part of Godley Peaks Station west of Lake Tekapo

Skyline Enterprises Limited v Queenstown Lakes District Council

Skyline Enterprises Limited lodged an application for resource consent to construct a multi-level car park building, together with associated earthworks and landscaping at 53 Brecon Street, Queenstown. An interim decision was issued on 19 December 2018 with a final decision granting consent issued on 15 February 2019.

Blue Lake Investment (NZ) Limited v Mackenzie District Council

Blue Lake Investment (NZ) Limited lodged an application for resource consent to construct a private lodge within an area denoted as being a Lakeside Protection Area at Guide Hill Station, Braemar Road/Hayman Road, Lake Pukaki. This application was placed on hold in May 2018.

Wellington

Summerset Villages (Lower Hutt) Limited v Hutt City Council

Summerset Villages (Lower Hutt) Limited lodged an application for construction and operation of a retirement village at 32A Hathaway Avenue, Boulcott, Lower Hutt. (A hearing was held in June 2019 and the decision reserved).

Auckland

Panuku Development Auckland Limited

In May 2018 an application for a direct referral for resource consents for the necessary infrastructure and related activities associated with holding the 36th America's Cup in Auckland in 2021 was lodged with the Court. A decision was issued a month earlier than sought by the applicant, on 25 September 2018, and construction began not long after the release of the decision, no doubt easing pressures on the construction critical path.

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

Costs in direct referral cases

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

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

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

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

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

Cases involving significant Maori cultural issues and tikanga

In recent years there has been a trend to greater numbers of cases in which Maori cultural issues have been an important part. 2018 was no exception.

The Court has Maori Commissioners to assist in ADR and hearings with such flavour. It has also had available to it in recent years, 2 Maori Land Court Judges holding warrants as

Alternate Environment Judges. In 2018 that complement was increased to 4 to assist with this growing work.

Mediation

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

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

Other alternative dispute resolution processes

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

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

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

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

For instance, a presiding Judge will occasionally direct the giving of concurrent evidence by a group of expert witnesses for whom an issue is relevant (sometimes called "hot-tubbing").

This occurs during a hearing and can sometimes be used as an extension of expert conferencing. The focus is on gaining accurate and objective scientific answers.

Civil enforcement cases and criminal prosecutions

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

Enforcement orders operate like injunctions in the general civil courts.

On average, approximately 40 such cases are brought to the Court each year, but in 2018, only 11 were lodged.

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

Appeals against abatement notices issued by councils produced 11 appeals in the 2018 year, down from 36 the previous year. The difference is not considered indicative of any trend.

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

Because the work is carried out in the District Court, statistical analysis of the cases and outcomes is not the province of the Environment Court. Anecdotally, we understand that something over one half of charges concerned allegations of illegal discharges of contaminants to land, water and air (often dairy effluent waste).

Supporting the Court: The Registries

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

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

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

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

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

Some changes of significance were made to staffing the registries of the Environment Court by reason a major restructuring exercise undertaken by the Ministry of Justice in 2016. Following major changes to the senior management structure of the Ministry in 2015, restructuring of successive layers of senior and middle management occurred in 2016. A unit of management previously called the Environment Court Unit, within a Specialist Courts Group, disappeared. The restructuring has caused tensions which we discuss below, principally occasioned by a significant watering down of the national focus of the work of the court required by the RMA. The changes brought a regional approach and a considerable intermingling of management of support functions with other jurisdictions, particularly the District Court, without relevance or synergy for Environment Court work. The project purported to alter the statutorily-mandated nationally-orientated reporting line up through Deputy Registrars and the Registrar to the Principal Environment Judge.

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

The Court has a very capable Judicial Resources Manager (JRM) who is one of the Deputy Registrars and coordinates the Court's rostering and scheduling under direction by the Principal Environment Judge. The JRM role was omitted from the Phase 3 restructure, and has only just at the time of completing this Review, (mid-2019) been reinstated, along with national reporting lines below Registrar level.

Consequences of these adverse changes necessitated considerable discussion between the Principal Environment Judge and senior officials in the Ministry, and were a major diversion for the former in his role organising the efficient progress of the Court.

Study of key performance measures

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

The Report is presently constructed with five sections:

1. Cases received:

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

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

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

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

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

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

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

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

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

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

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

The reporting of facts and data is currently inadequate to develop good performance measures from both the registry and judicial perspectives. The Court's database, CMS, is not a business tool. Business planning by the Ministry is considering:

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

- (in)efficiencies in back office processes;

- improving judicial access to information; and

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

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

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

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

The Principal Environment Judge and the Registrar are planning a survey of regular Court users to gain a better idea than is currently available, of attitudes to current Court practices including timeliness, and suggestions for improvement in processes. Meantime the Principal Environment Judge maintains regular formal and informal contact with relevant professional groups seeking ideas on practices that can enhance efficiency and access to justice. The support of senior practitioners of the many professions engaged in work before the Court is

much appreciated. We claim no monopoly on ideas about efficiency, fairness and access to justice.

Appeals about policy statements, plan reviews and plan changes

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

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

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

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

This successful pattern has continued since, although 2018 saw some major plan reviews undertaken that have produced considerable numbers of appeals. A feature of them has been a need to move directly to hearing some high-level issues before ADR and other hearings follow. This may impact a little on clearance times in these reviews in the next year or two.

There will always be instances where some cases involve difficult technical or legal issues, but the Environment Court's robust case management system now moves these along to prompt resolution by hearing, and sometimes settlement prior to a hearing being needed.

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

In its 2013 Final Report the Productivity Commission expressed a view that it might be desirable to consider the feasibility of making the Environment Court's mediation capability available earlier to support local authority plan making processes. This could indeed be desirable, and in fact was used to quite a significant extent throughout 2015/16 in the important

and urgent circumstances of the proposed Auckland Unitary Plan and the Christchurch Replacement District Plan. Commissioners are also seconded from time to time to mediate and facilitate in cases of national importance being heard by Boards of Inquiry.

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

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

The Court commenced an exercise with the Resource Management Law Association and the New Zealand Planning Institute of preparing a series of workshops to be held on the subject of plan drafting. (These workshops have since been held around the country in mid-2019). 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 further activity utilising experienced practitioners in these “arts” to lead workshops that can unlock clearer thinking and improvements in practice.

Finally, on this topic, one factor that could possibly reduce 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 recently.

Concerning plan appeals, we note that it has been suggested in some local government quarters that it is inappropriate for “unelected” people (being the members of the court) to “alter” local government policy. We reject that criticism. Any such resource management policy as first drafted by a council must be in accordance with the purpose and principles in Part 2 of the RMA, increasingly and more firmly guided by the National Policy Statements and Environmental Standards. The work of the Court on appeal is equally defined and constrained. In any event the independent hearing commissioners on Council hearing panels are as

"unelected" as members of the Environment Court and independent review is generally regarded as a beneficial component in policy development.

Minister for the Environment David Parker signalled in a major speech to the RMLA on 28 March 2018 that an overhaul of national planning standards is intended by Government. (At the time of writing this Review, the third quarter of 2019, the indication is being borne out).

Image from Otago RPS hearing

Initiatives and innovations

The Environment Court Website

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

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

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

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

Land Valuation Tribunal

Working with relevant Ministers, we identified synergies between the work of the Environment Court and the Land Valuation Tribunals. Consequently, on 15 December 2016 warrants were issued to Environment Judges as chairs and deputy chairs of the various Land Valuation Tribunals and the previous incumbents resigned from the Tribunals. In 2017, we brought management of the cases into the Environment Court registries and have applied robust judicial case management techniques and some ADR to eliminate a backlog of cases and move new work to resolution promptly.

These positive outcomes continued throughout 2018. From time to time, lost files were discovered in previous Registry locations, brought to the attention of our Judges as Chairs of the Tribunals, and placed on the same robust case management footing, and by years' end largely resolved.

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 active again in 2018, presenting to groups of law students, the New Zealand Planning Institute, the Resource Management Law Association, Law Society groups, and at the Thomson Reuters Environmental Law Conference in March 2018.

National and international involvement

Environment Judges and Commissioners Annual Conference – Napier

In November 2018, members of the Environment Court held their annual conference in Napier. Two guest speakers presented at the conference, local barrister Martin Williams and Mark Clews from Hastings District Council.

District Court Triennial Conference – Rotorua

The District Court held its triennial conference in Rotorua between 5 and 8 June 2018. The Environment Court and Māori Land Court held a separate session on 6 June with Simon Upton, Parliamentary Commissioner for the Environment, as the keynote speaker. Jamie Ferguson and Lara Burkhardt were guest speakers. Judges Newhook, Kirkpatrick and Coxhead also presented at the session.

ACPECT and QELA Conferences – Brisbane and the Gold Coast

A number of Environment Judges and Commissioners attended the annual ACPECT conference in Brisbane in May. Judge Smith presented a paper on truncated planning processes. Principal Environment Judge Newhook was invited to and attended the QELA conference immediately after ACPECT on the Gold Coast on 25 May.

Environment Institute of Australia and New Zealand Conference – Sydney

Principal Environment Judge Newhook was invited to address the EIANZ Annual Conference in Sydney on 1 November 2018 and presented a paper on the *Swings and Roundabouts in Access to Environmental Justice in New Zealand.*

3rd International Forum on Environmental Justice – Chile

Principal Environment Judge Newhook was also invited to address the 3rd International Forum on Environmental Justice in Santiago, Chile on November 29 and 30 2018. The International Forum on Environmental Justice is the largest event of its kind in Chile, and one of the most important in the Region. The Forum brought together people from the environmental justice field, including participants from countries such as Argentina, Australia, Bolivia, Brazil, Canada, Colombia, Costa Rica, Spain, the United States, France, New Zealand, Peru, and Chile.

His Honour sat on the Role Models of Environmental Justice panel and presented a paper on *Changes in Access to Environmental Justice in New Zealand: Some Negative, Some Positive*.

APPENDIX 1

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

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

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

The place of the Environment Court in the Resource Management system

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

The Environment Court also has enforcement powers.

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

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

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

Besides the Resource Management Act, the Environment Court has jurisdiction under some other Acts, for instance the Biosecurity Act 1993, the Crown Minerals Act 1991, the Electricity Act 1992, the Forests Act 1949, the Heritage New Zealand Pouhere Taonga Act 2014, the Local Government Act 1974, the Public Works Act 1981, the Government Roading Powers Act 1989, the Summit Road (Canterbury) Protection Act 2001, the Exclusive Economic Zone

and Continental Shelf (Environmental Effects) Act 2012, the Local Government (Auckland Transitional Provisions) Act 2010, the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004, the Affordable Housing: Enabling Territorial Authorities Act 2008, the Housing Accords and Special Housing Areas Act 2013, and the Land Transport Management Act 2003.

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

Rare Whio ducks, Central North Island

APPENDIX 2

Decisions of Public Interest 2018

Panuku Development Auckland Ltd v Auckland Council [2018] NZEnvC 179

Judge Newhook, Judge Kirkpatrick, Commissioner Bartlett, Commissioner Bunting, Commissioner Leijnen, Commissioner Prime, Deputy Commissioner Paine

This was a direct referral application under s 87G RMA by Panuku Developments Ltd for resource consents for the necessary infrastructure and related activities associated with hosting the 36th America's Cup to be held in Auckland in 2020 and 2021.

Panuku Developments Auckland Ltd applied to the Auckland Council, under a direct referral to the Environment Court, for resource consents on both land and water, necessary for holding the next America's Cup (AC36), located in the Wynyard Precinct and the Viaduct Harbour Precinct near the Auckland CBD. The application was publicly notified, and processing was done under considerable urgency due to the timeframe for construction of infrastructure required for the event being extremely tight. The proposal included an extension to Hobson Wharf, construction of four breakwaters with wave attenuation panels, deck infills over water-space between Wynyard Wharf and Brigham Street, construction of syndicate team base buildings and associated infrastructure. Construction would be over a 19 - 21-month period, 24 hours a day, 6 to 7 days a week. The AC36 Event period would be for 6 months, including provision for pack-in and pack-out related infrastructure from December 2020 to May 2021. Consent was sought for a 10-year period to accommodate any future defence of the Cup but following this period syndicate Bases B to G would be removed and ETNZ Base A would revert to its original use as an event centre.

The Court noted that the decision was lengthy due to the nature of a direct referral being at "first instance" hearing rather than a consideration on appeal. As such the Court gave an initial overview of the proposal, summary of issues in contention, background and reasons for the consents being needed, before looking at the assessment of actual and potential effects on the environment. Effects were then discussed individually with topics including navigation, groundwater, land contamination, air contamination, coastal processes, ecology and water quality, landscape and visual effects, lighting and tree removal, servicing, hazardous substances risk, security, Mana Whenua issues, traffic and transport, natural hazards, and protection of legacy for future events. In summary, the Court held that the potential adverse effects on the environment in the round were to be overwhelmingly "no more than minor" in all relevant contexts, primarily on the conditions proposed which had been refined through much close attention by parties.

The Court found the application passed both the s 104D RMA thresholds and detailed assessment of matters for which the Court was required to have regard to under s 104 were met to its satisfaction. The Court then discussed consideration under Part 2. The Court noted that having regard to its findings in the decision assessing the proposal against all the relevant provisions of relevant instruments, an assessment against Part 2 would not add anything to the evaluative exercise and was not necessary. Drawing together all the relevant findings required by s 104, s 104D and s 108, and having found there was no need to bring the provisions of Part 2 RMA into consideration; and having considered and made findings on the very limited number of issues in consideration at the hearing; and having considered several iterations of draft conditions of consent in great detail and worked with the parties before, during and after the hearing to refine the conditions, the Court found that all matters would be appropriately managed under the proposed conditions of consent, especially through the detailed management plans

required under those conditions. Accordingly, it was the Court's decision that consent be granted subject to conditions that were attached to the decision as Appendix C.

Held: Consent granted, subject to conditions as now approved.

The Wellington Co. Ltd v Save Erskine College Trust [2018] NZEnvC 006

Judge Newhook, Commissioner Bunting, Commissioner Edmonds

Application under s 193 by The Wellington Company (TWC) for the demolition of an Erskine College building on a large site at Avon Street, Wellington in order that the chapel building on the same site could be restored and the remainder of the site redeveloped.

TWC owned a large site at 31-33 Avon Street located in the southern Wellington suburb of Island Bay. The property contained two scheduled heritage buildings (the main College building and Chapel) and TWC wished to demolish those buildings in order to redevelop the site, gaining consent from the Wellington City Council under the Housing Accords and Special Housing Area Act 2013 (HASHAA). However SECT appealed the consent and in decision [2017] NZEnvC 59 the Court held that there was no express provision in the HASHAA to the effect that a consent granted under its provisions overrode the need for approval under s 193 RMA, and as such once a consent had been granted under the HASHAA the holders were still required to obtain approval under s 193 (or s 176) RMA. SECT initially refused consent to demolish or remove the heritage items, but after mediation approved for TWC to develop the greater part of the property outside of a 'reserved area" containing the two principal heritage buildings. TWC subsequently sought under s 195 RMA a proposal to demolish the main building in order for it to be financially viable for TWC to retain, strengthen, restore and re-use the chapel.

The key issue for heritage came down to whether or not it was necessary and appropriate in s 6(f) RMA terms, to accept the sacrifice of one building in order to secure retention, strengthening, refurbishment, and re-use of the chapel; or whether in the absence of anyone evincing intention to save them, consent to demolition should be refused and the two buildings left to their fate in the hope that someone might rescue them in future.

The Court briefly analysed "how a place is found" as an appropriate assessment criterion, the ICOMOS NZ Charter 2010 and adaptive re-use before looking at alternatives considered for the main building and engineering issues. The Court noted that from a structural engineering perspective the buildings could be earthquake strengthened, the cost for which was relatively small, with the critical cost components and issues being the refurbishment and ability to re-use the buildings. From the engineering evidence the Court acknowledge that there was a significant public safety risk from building collapse in an earthquake if the buildings were to be left standing for any period without at least some reasonably significant temporary stabilisation.

The Court then moved on to examine whether TWC's contention that the demolition of the main building coupled with the intensity of the development of the site under the HASHAA consent was the only possible course in a business sense to provide enough financial input to allow the economic development of the site and the redevelopment of the chapel. The Court accepted the evidence that showed the feasibility gap remained in the millions of dollars for whichever option was under examination. It then went on to assess what this conclusion meant in terms of the considerations under s 195(3) RMA.

The Court first assessed subsection (3)(b) - incapable of reasonable use, and noted the fact that the Appellant had obtained a HASHAA consent did not mean that it was the only reasonable use of the site available to the Appellant and as such the Court considered the case under s 195(3)(b) was not made

out. In view of the concession made by the Appellant that serious hardship was unlikely to arise if the Court found that the refusal of consent would not render the land incapable of reasonable use, the Court held that the case under s 195(3)(a) was also not made out.

Lastly the Court considered subsection (3)(c) as being at the crux of the matter and noted that while feasibility did not necessarily equate with reasonable use, feasibility difficulties indirectly informed the Court's consideration of the partial nullification aspect of the heritage order. The Court also noted that should it refuse consent to demolish the main building it could not impose obligations on the land owner to take steps to strengthen the two buildings, let alone restore them. The opposition parties indicated a preference over demolition of the main buildings, that the two buildings be left to their fate. The Court rejected this, concluding that it would not be a responsible solution and would not serve the directive in s6(f) RMA. The Court held it would be a better outcome for heritage to agree to a partial nullification of the heritage order and allow demolition of the main building in order, upon appropriate conditions, to secure the long-term retention of the chapel. The Court was mindful that it was the chapel that the Appellant offered a condition of consent about immediate strengthening, followed by refurbishment and re-use, not the main building, and while both buildings were of high heritage value, the chapel was considered the finest example of gothic church interior in New Zealand.

Held: Preliminary indication of approval to demolish the "main building" on strict conditions of consent. A draft timetable for further steps and draft conditions of consent was to be lodged in 15 working days. Costs were reserved.

Self Family Trust v Auckland Council [2018] NZEnvC 49

Judge Jackson, Commissioner von Dadelszen, Commissioner Baines

District plan — New Zealand coastal policy statement — Regional policy statement — Landscape protection — Soils — Rural — Maori values

The Self Family Trust (“the Trust”) appealed, under s 156 of the Local Government (Auckland Transitional Provisions) Act 2010 (“the LGATPA”) to the Environment Court against the decision by Auckland Council (“the council”) not to accept the recommendation of the Independent Hearing Panel (“the IHP”) that two areas of land, namely Crater Hill (Nga Kapua Kohuora) (“the Hill”) and the Pukaki Peninsula (“the Peninsula”), east of Auckland International Airport, should be included on the urban side of the Rural Urban Boundary (“RUB”) in the Auckland Unitary Plan (“the AUP”). The council concluded that the two areas should be on the rural side of the RUB. The Trust owned most of the Hill and, if the appeal was allowed, sought that the land be rezoned to allow for 575 new dwellings. The Trust was joined in the proceeding by land owners on the Peninsula. Other parties under s 274 of the RMA included the Auckland Volcanic Cones Soc Inc (“the Society”), seeking to protect the values of the Hill, and Auckland International Airport Ltd (“the Airport”), which raised concerns about reverse noise sensitivity.

The Court considered the chapter in the AUP on the RUB, which identified land potentially suitable for urban development. Having concluded that it had jurisdiction to consider the RUB, the Court reviewed the environment and the landscape of the Hill, the Peninsula and surrounds, noting the presence of two low volcanic craters, the Pukaki-Waokauri Creek system (“the Creek”), horticulture and farmland, and the coastal environment. The Court considered the Maori cultural landscape and the strong connection of mana whenua, specifically Te Akitai Waiohua, to the landscape containing the sites, which were closely linked to the historic portage routes from the Tamaki River to the Manukau Harbour. The Court found that the volcanoes Crater Hill and Pukaki Crater, physically connected to Pukaki Marae, via the Peninsula, the Creek and other coastal margins, lay at the centre of a “cultural landscape” of significance to Te Akitai Waiohua. In the centre of this was a Maori Reservation under the Te Ture

Whenua Act 1993, reserved to the exclusive use of the Marae as a place of historic spiritual and cultural significance. Also relevant were the elite soils of the Peninsula, in continuous use for market gardening for decades.

The relevant statutory instruments considered included: the New Zealand Coastal Policy Statement ("the NZCPS"); the National Policy Statement on Urban Development Capacity ("NPSUDC"); the RPS in chapter 8 of the AUP; the proposed Regional Coastal Plan; the AUP, comprising the regional and district plans and the Auckland Plan. The Court referred to the Supreme Court decision in *King Salmon* and that of the Court of Appeal in *Man O'War Station v Auckland Council* [2017] NZCA 24; (2017) 19 ELRNZ 662, noting how the words "avoid" and "inappropriate" in planning documents were properly to be interpreted. The Court noted that the NPSUDC focused on planning decisions made regarding the development capacity and infrastructure provision to meet the demand for housing and business land. However, the Court agreed with submissions that these objectives were not to be read at the expense of other values to people and communities and it was required that regard be had to the benefits and costs of the efficient use of urban land. The Court noted that in the AUP, the Hill was identified as an outstanding natural feature ("ONF"), but was not scheduled as having historic heritage status or being a site of significance to Mana Whenua.

The Court then turned to consider the environment and context, and issues raised in an evaluation under s 32 of the RMA, relating to the Hill and the Peninsula. Regarding the Hill, the Court concluded that the status quo, leaving the council's RUB where it was, was more effective than the counter view of the appellants and that the net social benefit also favoured the status quo. While acknowledging that the Self family would lose the potential for profit from land sales, and the community would lose the opportunity for over 500 new houses, the Court also took into account the subjective elements on other "owners" if the RUB was moved as sought. The proposed development on the Hill would be the last of a line of disappointments for Te Akitai, going back to the Land Wars, including the taking of the land for the Airport and the urban development in the area. Furthermore, the RPS provisions of the AUP relating to the ONF and volcanic cones meant that these had to be protected from inappropriate subdivision, use and development and also that the visual and physical integrity of the volcanoes were to be protected. The Court concluded that the AUP's objectives would be better achieved if the RUB were not moved. The combined circumstances in the present case of a volcano, being an ONF and also in the coastal environment meant that the policy common theme was that the volcanoes should be protected from urban and other development. Regarding the Peninsula, the Court similarly concluded that the overall status quo better achieved the objectives of the RPS than the proposed alternative. The Peninsula was surrounded by tidal creeks lined with mangroves and was the last piece of continuous water/land interface within the rohe of Te Akitai. It was a matter of national importance that the council recogniseand provide for the relationship of Maori and their culture and traditions with their ancestral lands, under s 6(e) of the RMA. Further, Policy 13 of the NZCPS required that significant adverse effects on the coastal environment be "avoided". Taking the two sites together, the Court concluded that, notwithstanding that the appellants proposed to transfer 60 per cent of the Hill to Te Akitai, the further fragmentation of the two sites into more allotments and building of housing and light industrial structures would neither improve nor maintain the mauri of the Te Akitai's world view of the coastal environment.

Overall, the Court stated that after taking into account the various positive features of the appeal, it found that there was one characteristic of each site which outweighed the alternative. These were the ONF on the Hill and the elite soils on the Peninsula, when assessed under the RPS and the NZCPS. The Court stated that when the consideration of the coastal environment and the need to recognise Te Akitai's values were added, the case for the status quo clearly outweighed the counterfactual. The Court concluded that the council drew the RUB in the correct place and its decision was accordingly confirmed. Costs were reserved.

SKP Incorporated v Auckland Council [2018] NZEnvC 081

Judge Newhook, Commissioner Leijnen, Commissioner Buchanan

RMA – s120 – Appeal against the grant of consent for a 186-berth marina in Kennedy Point Bay on Waiheke Island.

Kennedy Port Boatharbour Ltd (KPB) was granted consent to construct, operate and maintain a 186 (maximum) berth marina and associated facilities in Kennedy Point Bay on the south-west coast of Waiheke Island. SKP and Mr Walden appealed the Council decision and sought the application be refused. The bulk of the marina was to be located in the Coastal Mooring Zone, adjacent to the existing car vehicle and freight ferry terminal facilities, and the overall activity status was agreed to be non-complying. The issues of contention related to s 104D "gateway" tests, effects on the environment (positive and negative), matters arising under Part 2 and s 290A RMA and whether a consent was appropriate, proposed and other possible conditions of consent and mitigation. The Court gave a caution in regard to the huge volumes of evidence and support materials for the case noting not all the material was relevant or would be referred to in the decision.

The Court went on to discuss in detail the location and zoning, existing and future environments, the relevant statutory and planning framework before assessing the effects on the environment both positive and negative. Adverse effects focused around acoustic effects and effects on ecology, in particular the Little Blue Penguin, effects on the benthic community, potential effects on archaeological sites, cultural effects, effects on navigation and existing moorings and lighting and on effects on natural character, landscape and visual amenity values. The Court also looked at the effects on the future ferry terminal expansion.

The Court found that the marina would offer a variety of positive effects for people and communities, in particular providing new access to the coastal marine area for recreational purposes, and also on the physical environment. The proposal was found to adequately serve the higher order and regional policy frameworks and specific regional plan objectives and policies. Therefore, the proposal passed through both gateways in s 104D. With conditions imposed as finally submitted by KPB the Court found that the proposal was suitable for approval through s 194(1) appraisal.

Held: Consent was granted subject to conditions that were attached to the decision as Annexure B. Costs were reserved.

Okura Holdings Limited v Auckland Council [2018] NZEnvC 087

Judge Dwyer, Commissioner Bartlett, Commissioner Bunting, Commissioner Dunlop

Appeals against the location of the Rural Urban Boundary near the Okura Estuary, 20 km north of the Auckland CBD and zoning of land owned by the Appellants.

The Appellants appealed decisions of the Auckland Council on the proposed Auckland Unitary Plan (AUP), specifically on the position of the Rural Urban Boundary (RUB) near the Okura Estuary where the Appellants own property, and also the zoning of their respective properties. At Okura, the RUB was situated on a ridgeline which divided two catchments, the southern side was included within the RUB and consisted of land which was already undergoing intensive residential development. The northern side, where the Appellant's land was situated, was excluded from the RUB and as such was not considered suitable for urban development. However, the IHP recommended that at Okura the RUB should be extended northwards to the Estuary's southern shore to include the Appellants' land.

The Appellants sought that the RUB be extended to incorporate its land of 130 hectares and be zoned predominately Residential-Mixed Housing Suburban with a lesser area of Residential-Large Lot zoning, and the balance as open space. The Appellant wished to develop the land with between 750 - 1000 dwellings proposed. The site was well positioned and north facing and was well served in terms of roading and infrastructure and recreational open space. The coastal edge had a history of Māori occupation and as such was considered of archaeological importance, which the Appellants proposed to protect with a coastal margin reserve. The Long Bay - Okura Marine Reserve, considered an ONL, surrounded the headland and included the Okura River. The site was also in close proximity to two significant areas of reserve land which were designated areas of high natural character

The Court was required to determine firstly whether the RUB should be extended to incorporate the Appellants land, and secondly if extended, what relevant zoning provisions should apply. On analysing the evidence, the Court identified a series of issues which related to the effects of earthworks and sediment discharges, stream modification, coastal sediment dispersion modelling, metal contaminant discharges and coastal dispersion, marine benthic ecology, avifauna, freshwater and terrestrial ecology, water supply and wastewater disposal, traffic and transportation, economics and lastly the effects on natural character, landscape and open space. The Court discussed each issue and its effect, before giving its findings.

The Court found that provided strengthened provisions were in place the land could be developed in the form proposed from an earthworks prospective and once the earthworks were completed there would be little sediment discharge into the Estuary. However, the Court was not satisfied with the adequacy of the provisions to protect and enhance the habitat of freshwater species. The Court had concerns in relation to the ongoing maintenance of the realigned stream system, but found metal contaminants entering the estuary would not exceed guidelines. The Court found there was less certainty with regards to cumulative heavy metal effects within the Estuary sediment and as such a precautionary approach was required in the assessment of the effects. The Court identified that the Estuary was an important habitat of avifauna and increased human activity arising from urbanisation would have significant adverse effects on the Estuary's bird life. The Court was also not confident that the proposal would protect marine ecology from adverse effects.

The proposal was found to be satisfactorily serviced with water and wastewater, but there were uncertainties relating to servicing by road infrastructure. The Court accepted that the proposal was a more efficient use of the land at Okura that under the Council's zoning in purely monetised economic terms but the land development was not necessary to meet future urban growth requirements.

The Court identified that the proposal would have significant adverse effects on natural character and landscape values of the site and the surrounding environment. The development was found to be "inappropriate" in having regard to a number of criteria, objectives and policies identified. Concern was also expressed in relation to the adequacy of the management process for the open spaces.

Overall the Court found that the proposal was directly contrary to a number of objectives in the Unitary Plan and the Council Countryside Living Zone proposal was the most appropriate way to achieve the relevant objective of the Plan. The appeals were declined.

Clearwater Mussels Ltd v Marlborough District Council [2018] NZEnvC 88

Judge Hassan, Commissioner Edmonds, Commissioner Hodges

Resource consent — Marine farming — Zoning — Coastal marine area — Visual impact — Landscape protection

Clearwater Mussels Ltd ("CML") appealed against the decision by Marlborough District Council ("the council") to decline new consents, for a further 20 years, to operate CML's two marine farms at Pig Bay, in the outer Marlborough Sounds. CML had been operating the farms for many years, and currently operated under expired consents. There were several s 274 parties, individuals and incorporated societies, opposing the proposal. The applications were for discretionary activities under the RMA as specified by r 35.4 of the operative Marlborough Sounds Resource Management Plan ("the OP").

The Court considered the proposal under s 104(1) and (2A) of the RMA. The Court noted that the council had declined the proposal on the grounds of undue adverse effects on visual amenity values, natural character of the coastal environment and landscape values. Further, the council had found that the consents were incompatible with relevant provisions of the New Zealand Coastal Policy Statement 2010 ("the NZCPS"). The Court considered the weight to be given to the relevant statutory plans, concluding that considerable weight should be given to the NZCPS, and the OP. The OP had no relevant incompatibilities with the NZCPS and set out rules for three mapped coastal marine zones. Within CM1, where CML's farms were located, new marine farms were prohibited. For existing farms within CM1, the OP had spot zoning, whereby discretionary activity status was conferred to CML's sites.

The Court reviewed the expert evidence as to the effect of the proposal on the King Shag, a threatened species. Pig Bay was part of the Sounds Important Bird Area ("IBA"). Significant numbers of King Shags fed within the Sounds; however, this endangered bird's marine habitat was largely unprotected. The Court found that the IBA had significant weight, as an area of importance for survival for the King Shag, when considering protection priorities in s 6 of the RMA, and under the NZCPS and OP provisions. On the basis of the evidence, the Court found that King Shag foraging occurred in the water depths typically occupied by the marine farms; the benthos of soft silt was conducive to the presence of flatfish, a prey of the birds; but it was not possible to make any conclusions as to the benthic feeding habits of the birds. However, it was possible to conclude that the continuation of marine farming at the sites would pose a degree of disturbance to King Shag. The Court then addressed CML's proposed predator and pest programme, offered by way of mitigation in the conditions. The Court, concluded that this was a well-intentioned initiative but that it would not provide any of the benefits contended by CML in relation to the proposal. Overall, concerning the statutory provisions, the ecological effects of the proposal and the effects on King Shag, the Court found: the NZCPS and OP policies counted against the proposal to some extent; in net terms, the proposal would have a potential adverse effect on King Shag, and on ecological and biodiversity values; the proposal could not be relied on to deliver any offsetting or other ecological benefits; the proposal would increase the risk of adverse effects on King Shag as a threatened species; to grant consent would not be supported by specified OP provisions; to decline consent would likely provide a net positive potential ecological effect; and to grant the coastal permits sought would not recognise and provide for the matters in s 6(c) of the RMA.

The Court then addressed effects of the proposal on natural character and landscape values, concluding from the extensive expert evidence that: the evaluation of existing natural character in the OP and the proposed plan for Pig Bay, and for Port Gore as a whole, was higher natural character. The Court's findings as to the effects of the proposal on existing natural character included that: the proposal would not keep intact the relevant natural character areas under the OP and, further, the mitigation offered by CML would not effectively avoid significant degradation of natural character. In a direct sense, human activity associated with marine farming posed a degree of risk to King Shag roosting and foraging. In addition, the Court found that there would be a localised degradation to natural character arising from how people would perceive the marine farms' uniform grid of lines and buoys, which would disrupt the relationship between landform and seascape at Pig Bay. The Court concluded that the proposal would offend the natural character objectives and policies of the OP and the NZCPS; fail to recognise and provide for matters in s 6(c) of the RMA; and have a significant adverse effect on the natural character of Pig Bay and Port Gore. Regarding landscape, the Court accepted that Pig Bay was part of the Outer Sounds outstanding natural character and that policy 15 of the NZCPS applied. The

proposal would degrade several key values of the outstanding national landscape/ outstanding national features at Pig Bay and fail to avoid the adverse effects on the Outer Sounds ONL. Turning to amenity values and issues of public access, the Court found that the proposal would not maintain amenity values protected in the relevant planning provisions but would degrade them and that to decline the appeals would maintain and enhance such values.

The Court was, however mindful of the economic impact of declining the proposal on CML and so stated that it was important to provide for reasonable decommissioning arrangements. For this reason, the decision was an interim one, so that such arrangements could be made. The appeal was declined. Directions were given as to consultation regarding the decommissioning. Orders were made under ss 277 and 42 of the RMA to protect commercially sensitive information. Costs were reserved.

The Friends of Sherwood Trust v Auckland Council [2018] NZEnvC 178

Judge Harland, Commissioner Paine, Commissioner Bartlett

RMA-enforcement orders-1080 poison drop in Hunua Ranges

AC and DoC planned pest control operation dropping 1080 poison in Hunua ranges. Applicants sought interim and final orders preventing AC depositing bait, or authorising DoC to deposit bait, in on or under bed of river, or in the water catchment that supplies drinking water to Auckland. Focus is effect of discharges of 1080 to water. Court considered background information about the regulation, planning, delivery and monitoring of the 2018 1080 programme. It showed that the discharge of the 1080 pellets is necessary, will not be indiscriminate, and has been carefully planned. It will be governed by conditions applied to the permission by the Public Health Service. There are risks to the use of 1080, but the methods proposed to manage those risks are appropriate and adopt the necessary precautions.

Considering the evidence about consultation with mana whenua, the Court concluded that it is apparent that mana whenua in the operational area have been and continue to be engaged about the operation by AC and DoC. Consultation has been adequate.

The Resource Management (Exemptions) Regulations 2017 overrule the effect of any s 15 RMA matters in relation to 1080, providing certain conditions are met. The case for AC and DoC is that entry of 1080 into waterways is not an activity captured by s 13 RMA, as it will not be deposited in or on or under the bed of a river and 1080 is not a substance under s13 RMA (having regard to caselaw). Court considered the Brook Valley decision (HC), which, although it dealt with a different poison, dealt with the same issue – interrelationship of s 13 and s 15 and whether authorisations were required under both sections when there was a risk that the toxin might enter water. The HC found that ‘substance’ excludes contaminants. The HC also found that the wording of s 13 was not intended by Parliament to be a secondary hurdle to resolve resource consents granted under s 15, duplicating the process for a single activity. Although the decision has been appealed to the CA, the CA has not yet issued its decision and the HC decision is binding on the EC.

The applicants also argued that the 1080 drop was noxious, dangerous, offensive or objectionable to an extent that it has or is likely to have an adverse effect on the environment. The Court asked how could something that is permitted to occur under the Exemption Regulations nevertheless be so noxious etc that an order should be made, when there are conditions in place and the Council says that it will meet them? That would create a secondary hurdle. Section 319(2) does not refer to regulations, but the Exemption Regulations would militate against the making of the order as sought. This order was not sufficiently arguable to underpin the need for an interim order at this time.

There was some urgency attached to the need to get on with the operation to maximise the benefits and costs. There is no evidence of a risk of irreparable or serious damage to the applicants or others

if the orders are not made, as the permission granted includes conditions to protect the health of the public.

Neither undertaking as to damages was considered appropriate. The Court was not persuaded there would likely be serious harm to the environment if the 1080 operation proceeds and the applications were declined.

Port Otago Ltd v Otago Regional Council [2018] NZEnvC 183

Judge Jackson, Commissioner Dunlop, Commissioner Bunting

Port — Regional policy statement — New Zealand coastal policy statement

In this decision the Court considered how to provide for ports under the Proposed Otago Regional Policy Statement ("the PORPS") in a manner which gave effect to the New Zealand Coastal Policy Statement ("the NZCPS"). Port Otago Ltd ("POL") appealed against the decisions versions of the PORPS issued by Otago Regional Council ("the council"). At issue was the appropriate wording for a policy managing activities at Port Chalmers and Port Dunedin. POL's appeal was joined by the Environmental Defence Soc Inc and the Royal Forest and Bird Protection Soc of New Zealand Inc ("together 'the Societies'").

The parties now differed as to whether Policy 4.3.7 of the PORPS ("the policy") gave effect to the NZCPS. The Societies maintained that paras (d) and (e) of the policy, which provided an option to avoid, remedy or mitigate adverse effects "as necessary" to protect the outstanding or significant natures of the area, did not give effect to the avoidance provisions of the NZCPS. The Court considered the environment of the Otago Harbour and POL's operations, together with the scheme of the PORPS and the relevant provisions of the NZCPS, in particular Objectives 1, 2 and 6 and Policies 6, 7, 9, 11 and 16. The Court addressed relevant case authorities on the application of the NZCPS provisions, including the decision of the Supreme Court in *King Salmon* . The Court then considered the options for the Policy and the reasonably practicable options for port infrastructure, taking into account efficiency considerations and comparing the effectiveness of the options. The Court concluded that a policy in a subordinate instrument might give some effect to Policy 9 of the NZCPS supported by Policy 8 without giving full effect to one or more of the avoidance policies in the NZCPS. The Court then considered whether the proposed policy should provide an exception to the avoidance policies in the NZCPS. The Court's view was that to improve the coherence of the PORPS, it should be made clear that the proposed policy was related to the bottom lines in the policies implementing specified objectives of the PORPS and was a back up to the policy which exempted some infrastructure from having to comply.

After considering all the matters identified, the Court concluded that there should be an extension to the PORPS policy to give effect to Policy 9 of the NZCPS to make the policy easier to understand in the scheme of the PORPS and to distinguish between management of the effects of ensuring safety and the effects of ensuring transport efficiency. The Court also considered it would be useful if the policy gave some guidelines as to the different standards expected of port activities in relation to different resources. The Court had regard to the potential for adverse effects on surf breaks, effects on natural character and landscapes and to effects on biodiversity. The Court gave a possible suggested wording for the policy and, under s 293 of the RMA, directed the council to redraft the proposed policy of the PORPS. In addition, the Court confirmed that by consent the definition of "port activity" in the PORPS was to be as specified. Costs were reserved.

Taranaki Energy Watch Inc v South Taranaki District Council [2018] NZEnvC 227

Judge Borthwick, Commissioner Hodges, Commissioner Baines

District plan proposed — Hazardous substances — Reverse sensitivity — Contaminant — Health effects — Avoid, remedy, mitigate — Safety

This interim decision set out the Environment Court's key findings of fact and opinion regarding risks arising from the operation of petroleum exploration and production activities. The matter concerned the appeal by Taranaki Energy Watch Inc ("TEW") against decisions made by South Taranaki District Council ("the council") on submissions to the proposed district plan ("the PDP").

The Court considered the grounds of appeal grouped into four topics: risks of human fatality relating to fire or explosion occurring at a petroleum exploration and production facility; risks of injury to human health from, and reverse sensitivity to, contaminants emitted by a facility; risks of injury to human health and harm to the environment from, and reverse sensitivity towards, seismic testing activities; and risks of injury to human health from, and reverse sensitivity to, contaminants emitted by petroleum landfarming activities. The Court stated that the third and fourth topics had been resolved by the parties and the consequential amendments to certain rules and methods were set out in the Joint Memorandum of counsel of 28 September 2018. The Court stated that where there was a risk of individual fatality from fire or explosion at a facility, it was appropriate for such risk to be avoided; it was not appropriate for the PDP to address the risk in terms of it being mitigated. Prior to addressing the first and second topics, the Court considered effects of hazardous substances, which included petroleum products, and noted that under the PDP petroleum activities were defined as significant hazardous facilities ("SHFs"). Further, the Court reviewed the concept of reverse sensitivity, and relevant case authority, and activities with incompatible effects in the context of considering whether and to what extent planning instruments required internalization of adverse effects.

Considering the first topic, risks of human fatality upon a fire or explosion, the Court considered evidence relating to the separation distances that would be appropriate for rural landowners and businesses located near SHFs. In particular, the Court considered whether: risk extended beyond the boundary of the SHFs; who was exposed to risk; the likelihood of an event that could result in human fatality; the consequences if such an event occurred; and whether the level of risk was acceptable. The Court reached preliminary findings on these matters. Turning to the second topic, relating to air contaminants emitted by a facility, the Court noted that these included exposure to benzene, continuous, low-level, low volume leaks, uncontrolled loss of gas due to equipment failure, uncontrolled large, high velocity leaks, emissions from well-sites and emissions from a flare stack. The Court set out two propositions: that the location of sensitive activities was incompatible with petroleum activities if the sensitive activity was exposed to levels of contaminants which could cause chronic health effects; and the location of sensitive activities might be incompatible with petroleum activities if the sensitive activity was exposed to levels of contaminants with potential to cause acute health effects. The Court noted that within Rural zone in the PDP a number of sensitive activities, including residential activities, were permitted. The appellant TEW sought rules which required sensitive activities to obtain resource consent where it was proposed to locate them within the emissions radius of petroleum activities. The Court made findings that it was not an appropriate response to permit sensitive activities to locate within the effects radius of an activity that emitted levels of contaminants which might cause chronic health effects. After considering evidence and submissions, the Court made preliminary findings in relation to the effects of contaminants emitted from petroleum. These included that the control of discharges to air from existing and new petroleum activities was the responsibility of the Taranaki Regional Council and should not be duplicated in the PDP and that land use controls were the responsibility of territorial authorities. For well sites, the Court found that effects of emissions were likely to be below the level for chronic health effects on occupants of a dwelling house greater than 300 metres from the point of

discharge; however, the position regarding acute health effects was unknown. The Court stated that the regional council was not a party to the present proceeding and so evidence of its air quality experts had not been received. The Court encouraged the council to approach the regional council requesting a brief of evidence from a suitably qualified expert. The Court set out questions which it would like the regional council to address in this regard. The Court made directions accordingly.

Skyline Enterprises Ltd v Queenstown Lakes District Council [2018] NZEnvC 242

Judge Hassan, Commissioner Howie, Commissioner Wilkinson

As noted above, this was a direct referral application under s 87G RMA by Skyline Enterprises Ltd for resource consent to construct a multi-level car park building, together with associated earthworks and landscaping at 53 Brecon Street, Queenstown.

This was an interim decision which was a follow-up on an Interim Decision the court made in 2017 on the Skyline gondola's upgrade proposal where traffic issues were identified and the need for further car parking was recognised.

A final decision was issued in February 2019.