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Spatial planning for New Zealand's renewable energy future



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THE ASSOCIATION FOR RESOURCE MANAGEMENT PRACTITIONERS

Te Kahui Ture Taiao

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EDITORIAL

Bronwyn Carruthers, Barrister, Shortland Chambers

In this edition of the Journal we explore two of the issues likely to arise in the upcoming reform and analyse four recent decisions of the Courts and address two current challenges.

The reform issues are:

- Where to put the new wind, solar and/or hydro schemes that are expected to be needed in the coming decades? The NPS Renewable Energy requires each planning instrument to provide for the development, operation, maintenance and upgrading of new and existing renewable electricity generation activities but, as yet, there is no spatial plan or national direction as to where they should be located. The article by Emma McRae explains the approach taken in Wales and provides thoughts on how that experience can assist in our context.
- What is "quality"? The proposed Natural and Built Environments Act offers the opportunity for resource practitioners to promote environmental 'quality' but leaves the term undefined. The article by Dr Steve Ulrich illustrates the importance of clarity, consistent terminology and consistent definitions.

Thoughtful analysis is provided of these four recent decisions:

- Thomas Gibbons comments on the Supreme Court decision in *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157;
- Sarah Down and David V Williams comment on the Court of Appeal decision in *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 ;
- Ezekiel Hudspith and Liam Bullen address the High Court decision in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388; and
- Daniel Minhinnick and Ben Guernier summarise the Environment Court decision in *Bay of Islands Maritime Park Inc v Northland Regional Council* [2021] NZEnvC 6.

A key challenge for consent decision-makers is determining the adequacy of offsets and compensation for residual adverse effects on terrestrial biodiversity values (i.e. those adverse effects remaining after all appropriate

avoidance, minimisation and remediation measures have been sequentially applied). The article by M Baber, M Christensen, J Quinn, J Markham, G Kessels, G Ussher and R Signal Ross considers the merits of two different modelling approaches for providing guidance on the type and amount of habitat restoration and enhancement activities needed for a project.

A key challenge for farmers is understanding the impact of the new Resource Management (National Environmental Standards for Freshwater) Regulations 2020 and the Resource Management (Stock Exclusion) Regulations 2020. This is particularly so given the number of Regional Plans under review or promulgation across the country with the potential to overlap or contradict the regulations. Charlotte Muggeridge looks at one such example, comparing Proposed Waikato Regional Plan Change 1 (which is subject to appeal) with the newer regulations and in doing so identifies a number of potential issues.





Spatial planning for New Zealand's renewable energy future

The Climate Change Commission's draft plan, released in January this year, requires rapid expansion of wind and solar power generation in the coming decade to meet electricity demand as our energy needs increase and decarbonisation requires that electric vehicles become more widely adopted. To meet the draft plan projections, it is estimated that 13 additional large wind farms are needed by 2035. Solar energy is also expected to expand dramatically, with more commercial-scale solar expected to form part of the country's energy mix.

The National Policy Statement for Renewable Electricity Generation 2011 (NPS-REG) currently states (Policy E1) that regional policy statements, and regional and district plans must provide for the development, operation, maintenance and upgrading of new and existing renewable electricity generation activities. In line with this, regional and district plans must now contain objectives and policies which respond to this requirement.

The reform of the Resource Management Act is set to go further than this, with the 2020 report of the Resource Management Review Panel (the Randerson Report) identifying that suitable locations for renewable energy generation should form a national priority as part of spatial planning.

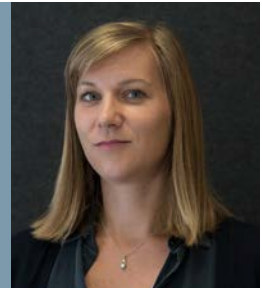
Spatial planning for renewable energy on a national scale has so far received limited attention in New Zealand. The following paper draws on the experience of Wales, a country with a similar sized population, to discuss how spatial planning might assist to plan for these additional large wind and solar farms.

THE WELSH APPROACH

Technical Advice Note 8: Planning for Renewable Energy (or TAN 8, as it is known) (<<https://gov.wales>>), published

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by the Welsh Assembly Government in 2005, set out to identify areas within Wales where large scale (over 25MW) wind developments could be accommodated.

TAN 8 identified seven Strategic Search Areas (SSAs) considered to be unconstrained areas capable of accommodating large-scale wind developments. TAN 8 did not specifically contain guidance in relation to solar development but outlined that proposals should be supported for appropriately designed schemes, with the exception where visual impact is critically damaging to a listed building, ancient monument or conservation area.

The SSAs were identified as areas capable of delivering the Welsh Assembly Government's renewable energy target of 4TWh by 2010. The fundamental objective in defining the SSAs was to ascertain the most appropriate areas of Wales in which to locate 800MW of onshore wind turbines minimising direct land take. The SSAs were identified as "relatively unconstrained" areas according to nominated criteria and excluded areas with nationally or internationally recognised designations.

Consultation on the draft of TAN 8 was critical of the treatment (or lack thereof) of landscape and visual issues, and cumulative impacts. However, a report commissioned following the release of the draft SSAs concluded that landscape, visual and cumulative issues could not be

addressed satisfactorily at an “all Wales” level, and these issues were best addressed at a local or regional level (Welsh Assembly Government *Facilitating Planning For Renewable Energy in Wales: Meeting the Target Review of Final Report* (June 2005) <<https://gov.wales>>).

The seven SSAs identified in TAN 8 were at a “broad brush” scale. Not all of the land contained within each area was technically, economically or environmentally suitable for wind farm development, and it was a matter for local authorities to assess the detailed locational requirements for the siting of onshore wind developments and refine SSAs where appropriate.

Local authorities had the authority to assess applications for wind projects of under 50MW; those over 50MW were considered Nationally Significant Infrastructure Projects (NSIPs) and referred to the Planning Inspectorate agency. In 2015, the Planning (Wales) Act introduced a new category of planning application: ‘Developments of National Significance’. This covered large-scale infrastructure projects of national importance and removed onshore wind projects from the NSIPs process and devolved energy consenting to Wales.

A 2018 review of TAN 8 found a shortfall in the capacity of operational wind farms within SSAs. TAN 8 capacity targets were based upon turbines generating 1.5 to 2 MW, however progress in turbine technology enabled turbines with much greater capacity; this meant that the capacity of turbine schemes, either consented or in planning, in 2018 far exceeded the 800MW target set out in 2005. However, many of the consented projects identified in the review did not actually progress to construction. Several schemes did not gain consent, despite being located within SSAs, with public opposition to turbines a contributing factor in the decisions. Grid capacity was also an issue where SSAs were located in remote areas.

A proposal for high voltage towers connecting proposed wind farms in Powys, mid-Wales, through several areas with sensitive landscape and historic values faced strong local opposition. In 2015, the Department of Energy and Climate Change refused planning consent for four proposed wind farms which would have used the connection, and work on the project was suspended. Nevertheless, the 2018 review identified that pre-TAN 8, there was 298MW of operational wind power, and post-TAN 8, this had risen to 701.8MW. Of this, 136MW lay outside the SSAs.

In February 2021, following release of a draft in March 2019, the Welsh Government published the new national

development framework ‘Future Wales – The National Plan 2040’ ((last updated February 2021) <<https://gov.wales>>), which is the first national spatial plan for Wales, and the 11th edition of Planning Policy Wales. This new planning policy document replaces TAN 8 and the SSAs. Eleven new ‘Pre-Assessed Areas for Wind Energy’ are identified, based on a methodology which included stakeholder workshops with representatives of local planning authorities, distribution network operators, transmission operators, National Parks and Natural Resources Wales. Constraints and opportunities relating to technical issues and other environmental issues, as well as cumulative impacts and wider benefits were considered and used to develop an analysis tool to define the areas using ESRI’s software ArcGIS Enterprise.

The Welsh Government’s background report (*Assessment of onshore wind and solar energy potential in Wales: Stage 1 – Development of Priority Areas for Wind and Solar Energy* (7 March 2019) <<https://gov.wales>>) which identified the initial boundaries of the 11 ‘Pre-Assessed Areas’ also originally identified priority areas for solar development, however these were not carried through to the spatial plan. The mapping of the Pre-Assessed wind areas is designed to be read at a national scale, with further assessment required to identify suitable sites. Within such areas, there is a presumption in favour of development of wind energy, subject to meeting policy requirements in relation to visual, ecological, heritage, amenity (in the Welsh context this refers to noise, shadow flicker etc), defence or transport interests. More supportive policy within the ‘Future Wales’ framework for renewables also gives reference to solar schemes but without identifying specific areas.

HOW CAN SPATIAL PLANNING ASSIST NEW ZEALAND’S FUTURE RENEWABLE ENERGY REQUIREMENTS?

The Welsh experience identifies that a methodology for identifying areas for future renewables development must be based on criteria that take into account renewable energy sites and their connection to the wider electricity network.

Landscape characterisation provided one of the elements used to define the 2019 background report’s ‘Pre-Assessed Areas’, but it was not used in the first stage of the assessment back in 2005 to define the SSAs, which only excluded areas with agreed national and international designations.

Landscape characterisation identifies and describes the combination of elements and features which give a landscape its distinct character. In Wales, this is provided by the Welsh LANDMAP system, which identifies areas relating to five attributes – Visual and Sensory, Landscape Habitats, Geological Landscape, Historic Landscape, and Cultural Landscape, each acting as an overlapping layer with values assigned for each aspect.

Landscape characterisation in New Zealand has been applied to varying degrees, more typically to inform evaluation of 'Outstanding Natural Landscapes' and 'Outstanding Natural Features' or as part of defining the natural character of the coastline. Work on establishing landscape characterisation similar to that applied in Wales would help identify and describe areas of higher and lower landscape value and increase capacity to accommodate change. This would also have repercussions for developments wider than just the energy sector. Unique to New Zealand will be the involvement of iwi to define how values and attributes are ascribed to the landscape.

Natural England's publication, *An Approach to Landscape Character Assessment*, outlines how mapping and describing landscape character types and areas can

be used as a tool to "inform judgments and decisions concerning the management of change".

The proposed Spatial Planning Act and Natural and Built Environments Act are poised to create change within our landscapes, but how this change is implemented and with what ease may depend upon the strength of the analysis and the evidence base which is established to justify it.

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Image 1: Waipipi Wind Farm (Waverley, Taranaki). Image credit: Boffa Miskell.



Image 2: West Wind (Makara, Wellington). Image credit: Boffa Miskell.



Image 3: White Hill Wind Farm (Mossburn, Southland). More information can be found online: <https://bit.ly/3tl3Czb>. Image credit: Boffa Miskell.



What is 'quality'? *Zen and the art of resource management reform*

In the 1974 best-seller *Zen and the Art of Motorcycle Maintenance*, the narrator tied himself up in philosophical and existential knots trying to define 'quality'.

The proposed Natural and Built Environments Act (NBA) offers the opportunity for resource practitioners to promote environmental 'quality', presumably with less angst and more clarity.

This is because the 2020 report of the Resource Management Review Panel (Review Panel) on new directions for resource management in New Zealand (the Randerson Report) advanced 'quality' in its draft purpose for the NBA (at 483):

- (1) *The purpose of this Act is to enhance the quality of the environment to support the wellbeing of present and future generations and to recognise the concept of Te Mana o te Taiao.*

However, the key word 'quality' was left undefined in the proposed NBA definitions of the Randerson Report (at 485–489). Given its central importance and need for clarity for practitioners, this void may only be welcomed by Zen philosophers.

Arguably, the Review Panel envisaged 'quality' to be associated with ensuring that "positive outcomes for the

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environment are identified and promoted" (proposed s 5(2)(a) of the NBA at 483). These outcomes are related to setting biophysical limits through national direction, despite the inadequacies of existing instruments to remedy the state of freshwater and coastal ecosystems, and the capacity of regional councils to implement them effectively.

In early 2021, Cabinet largely agreed with the suggested purpose, with the word 'promote' substituted with 'enhance' (Cabinet Business Committee "Reforming the resource management system" (CAB-20-MIN-0522, February 2021) at 32 (Cabinet Paper)). Essential terms remain undefined however, and the 'exposure draft' of the NBA in May this year will be eagerly awaited.

Similar issues will arise with the liberal use of the terms 'enhancement' and 'maintenance' in relation to biodiversity and the environment generally. For example, Cabinet retained the term 'enhancement' in relation to the national and regionally significant outcomes sought under the NBA (s 8), along with 'maintenance' of indigenous biodiversity. These were left undefined in the Randerson Report (at 485–489).

Presumably, the Review Panel and Cabinet saw the plain English definitions as sufficient. However, this approach has been shown to be inadequate when maintaining biodiversity and ecosystems, as these terms are poorly understood and misapplied in an ecological context (Steve Ulrich, Simon Thrush, Judi Hewitt and Eric Jorgensen "What it means to "maintain" biodiversity in our coastal marine environment" (April 2018) RMJ 25).

When I was the coastal scientist for Marlborough District Council between 2013 and 2018, I found it extraordinary that a policy planner believed 'maintain' to mean merely holding the ecosystem in its current degraded state. When I asked what would happen if one of the last remaining ecologically significant marine sites was to be destroyed, the response was that the new degraded state would then need to be maintained.

This erroneous thinking has likely contributed to the biodiversity crisis, as it is based on a fundamental misunderstanding of what 'maintain' means in an ecological sense. Moreover, as we showed in our 2018 RMJ article, there is actually a dictionary definition that requires repair (restoration) before an ecosystem can be maintained. This flips the notion that restoration comes **after** maintenance – it can actually come **before**.

The 2019 draft National Policy Statement for Indigenous Biodiversity (NPS-IB) recognised that taking action may be necessary for maintaining biodiversity, rather than passively accepting the status quo. The draft NPS-IB stated that: "The maintenance of indigenous biodiversity may also require the restoration or enhancement of ecosystems and habitats" (at [1.7 (3)]), and a number of criteria for biodiversity maintenance were set out.

In the 2018 RMJ article, we also expressed concerns about the lack of a specific ecological definition of 'enhance'. In the NPS-IB, examples of restoration and enhancement were given within an "Information Note", but these terms were run together and not specifically defined (at 27).

Table 1 below demonstrates the differences between dictionary and ecological definitions, illustrating the point that clarity is required in the NBA, as is a reconciliation between planners and ecologists of essential terminology.

This is essential to being able to measure and monitor the effectiveness of 'maintenance' and 'enhancement', as well as to determine how much, and what sort of, enhancement is appropriate and reasonable for an activity, a place or a region. Care will also need to be taken to not conflate enhancement with offsetting.

Without this clarity, it is likely it will fall to the courts to determine, given the subjectivity in applying those terms to plans and consent applications, and the competing values that underpin a myriad of interpretations.

That is an undesirable outcome when the legislative purpose should provide an anchor. The risk is that inconsistent interpretations will occur between regions, resulting in suboptimal environmental outcomes.

A parallel can be drawn with the 'overall broad judgment approach', rejected by the Supreme Court in 2014 in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, which had arguably contributed to the ongoing deterioration of land, freshwater and coastal marine environments administered under the Resource Management Act 1991 (RMA) since its enactment.

The Randerson Report also makes the inexplicable error of proposing to change the definition of biodiversity (biological diversity) away from that currently set out in the RMA, which is also the same as the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2021 (EEZ), the Environmental Reporting Act 2015 (ERA); the 1992 international Convention on Biological Diversity (CBD) ratified by New Zealand in 1993; the 2019 draft NPS-IB; and the 2020 Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy (ANZBS).

The new ANZBS also introduced the concept of Te Mana o te Taiao, which has been picked up by the Randerson Panel into the recommended purpose of the new NBA and subsequently adopted by Cabinet.

However, the Randerson Report's definition of biodiversity adopts the Fisheries Act 1996 (FA) definition. The FA definition omitted the crucial concept of ecological

complexes (Steve Ulrich, Simon Thrush, Judi Hewitt, Eric Jorgensen “The Earth Summit 25 years on: why is biodiversity continuing to decline” (April 2018) RMJ 19).

As we pointed out in both 2018 RMJ articles, this means that life-supporting ecological complexes such as biogenic habitats (formed by living and dead tissue of species), which provide multiple feeding niches for other species, store carbon, cycle nutrients and deliver ecosystem services, are essentially unprotected and vulnerable to damage or destruction from direct impacts and cumulative effects in different environments.

Given the global and national biodiversity crisis, it is difficult to see how the Randerson Panel’s watering-down of the biodiversity definition will enhance Te Mana o te Taiao. In fact, it will probably contribute to the ongoing degradation of the mauri of te Taiao, as evidenced in the ERA report “Environment Aotearoa 2019” (Ministry for the Environment and Stats New Zealand (ME 1416, April 2019)).

The perpetuation of inconsistent definitions between different statutes is also unhelpful, and leads to different mental models about the same thing (think Treaty of Waitangi vs Te Tiriti o Waitangi), which sends confusing signals to different management agencies about what is important to ‘maintain’, ‘enhance’ and ‘restore’, and how and what to prioritise to ‘protect’.

Take biogenic habitats in the territorial sea as an example. One agency may think that it will maintain biodiversity by protecting significant habitats for indigenous flora and fauna, and thereby enable ecosystem processes to recover through the maintenance of ecological complexes. Another agency may ignore these ecological complexes, as the statutory definition of biodiversity within its enabling legislation omits this.

This has recently been brought into sharp focus by the Prime Minister’s Chief Science Advisor, Juliet Gerrard, in her report “The Future of Commercial Fishing in Aotearoa New Zealand” (Office of the PMCSA, February 2021). The PMCSA stated (at 5):

The most striking example [of under-utilisation of existing statutory tools] is perhaps Section 9(c), which enables the protection of habitats of particular significance for fisheries management – but has never been used.

This is perhaps unsurprising, given the plethora of reasons discussed in the PMCSA’s report. For this article, two points need to be made in this vein: first, ‘habitats’ are not included in the definition of biological diversity in the FA by the omission of the analogous ‘ecological complexes’ (‘habitats’ is also not defined in the RMA nor within the proposed NBA); second, the FA does not direct decision-makers to give effect to the environmental principles in s 9(c) – they are just merely required to take them into account.

The NBA may perpetuate this, should the Randerson Panel’s recommended definition of biodiversity remain. When the breath-taking scale of seabed habitat damage and destruction in our marine waters is considered (Steve Ulrich “A national issue of international significance: seabed disturbance in our marine waters” (April 2017) RMJ 13), one wonders how the concept of Te Mana o te Taiao will actually be ‘recognised’ in practice.

This may be allayed somewhat by the setting of biophysical limits in coastal, rural and urban areas to protect and sustain the natural environment’s biophysical resources and ecosystem services (Cabinet Paper at [87]). This is dependent though on how well these limits are articulated and the underpinning ecological principles elucidated. For example, it is vital to minimise frequent and intense disturbances, foster habitat connectivity and provide indigenous species with space to shift their ranges under climate change.

Which brings us back to, what is meant by ‘quality’ in the purpose of the proposed NBA? To me, as an ecologist, ‘quality’ can be understood in two interrelated ways via the concepts of ‘Ecosystem Health’ and ‘Ecological Integrity’ (see Matt McGlone and others “Biodiversity monitoring, ecological integrity, and the design of the New Zealand Biodiversity Assessment Framework” (2020) 44 NZJ Ecology 1).

These authors define ‘Ecosystem Health’ as the (at 2):

... fundamental physical and biological state of an ecosystem in relation to its ability to support [ecosystem] services... in good health [it] is functionally appropriate for a given environment, generates biomass, exchanges gases, recycles nutrients, protects the land and water from erosion and pollutants ... it is resilient to external threats, supports adequate functional diversity and all expected trophic levels are present and well interconnected.

Their definition of 'Ecological Integrity' is drawn from s 2 of the ERA: "the full potential of indigenous biotic and abiotic features and natural processes, functioning in sustainable communities, habitats, and landscapes". McGlone and others suggest these definitions can be applied together in all environmental domains. For example, an urban area largely free of contaminants can have high ecological health but low ecological integrity. This approach may assist in defining biophysical limits within National Directions under the NBA.

However, as these authors point out, tangata whenua may have their own understanding of these concepts in relation to mauri. Will 'quality' then include an assessment of the mauri of natural and built environments to recognise the concept of Te Mana o te Taiao? And if so, should mauri be defined in the NBA or left to individual iwi and hapū to determine the biophysical and/or cultural limits at the scale of their interest?

The latter approach was suggested in 1993 by Professor Hirini Matunga of Lincoln University through the "Mauriora Systems Framework" (Figure 1 below, Helen Matunga, Hirini Matunga and Steve Ulrich "From exploitative to regenerative tourism: tino rangatiratanga and tourism in Aotearoa New Zealand" (2020) 9 MAI Journal 295). This will challenge some councils to act more bi-culturally, which is appropriate not only for Te Mana o te Taiao.

The Review Panel defined Te Mana o te Taiao as (at 489):

... refers to the importance of maintaining the health of air, water, soil and ecosystems and the essential relationship between the health of resources and their capacity to sustain all life.

Cabinet, in adopting this concept (Cabinet Paper at 32), determined that ministers will work with the Māori Collective "on how best to express Te Mana o te Taiao so that it is clear and workable" (at [58]).

The definition of 'health of resources' is therefore a core pillar of the NBA, as is the definition of 'maintain'. If 'maintain' is not about taking action, then it is likely that not only will the biodiversity crisis continue to deepen, but nature's ability to sequester and store carbon in terrestrial, coastal and marine ecosystems will also diminish.

Similarly, the definition of 'positive outcomes for the environment' will also need to be carefully thought through (proposed s 5(2)(b) of the NBA). Te Ātiawa Manawhenua

Ki Te Tau Ihu Trust suggests it is more appropriate to replace 'positive' with 'net enduring restorative outcomes' to actively, additively and incrementally improve the environment and collective wellbeing of people and place (Ian "Shappy" Shapcott, unpublished material).

Accordingly, the Cabinet Paper definition of the RMA should be amended to reflect that, with suggested changes emphasised, as follows:

Section 5 Purpose

- (1) *The purpose of this Act is to promote the **quality [ecological sustainability]** of the environment to support the wellbeing of present and future generations and to recognise **[give effect]** to the concept of Te Mana o te Taiao.*
- (2) *The purpose of this Act is to be achieved by ensuring that:*
 - (a) *the use, development and protection of natural and built environments is within environmental biophysical limits and is sustainable;*
 - (b) *positive **[net enduring restorative]** outcomes for the environment are identified and promoted; and*
 - (c) *subject to (a) and (b), the adverse effects of activities on the environment are avoided, remedied or mitigated.*

Promoting ecological sustainability and net enduring restorative outcomes is a much clearer purpose than the nebulous and ambiguous 'quality' and could well lead to a much more regenerative and resilient ecology, economy and society. That would be a more positive outcome with a much clearer contribution towards wellbeing, worthy of a new story to replace the one in "Environment Aotearoa 2019". Perhaps there could be a new chapter called "Zen and the art of resource management". Now, there's a thought.

Figure 1: The Mauriora Systems Framework (redrawn from Matunga, 1993) in H Matunga and others "From exploitative to regenerative tourism: Tino rangatiratanga and tourism in Aotearoa New Zealand" (2020) 9 MAI Journal 295.

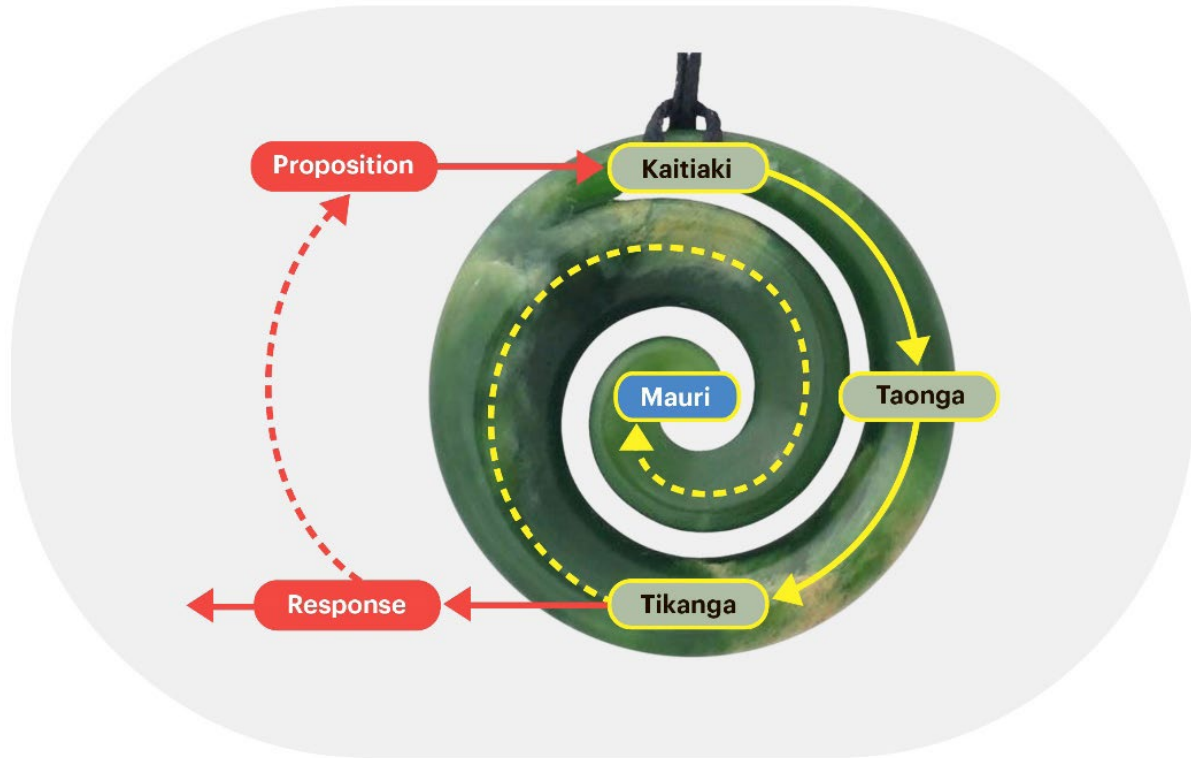


Table 1: Definitions of ‘maintain’, ‘enhance’ and ‘restore’ relevant to biodiversity from *The New Shorter Oxford Dictionary* (1993) and ecological definitions, along with applied examples (from Ulrich and others “What it means to “maintain” biodiversity in our coastal marine environment” (April 2018) RMJ 29).

Term	Dictionary Definition	Ecological Definition	Example one	Example two	Example three
Maintain	To preserve or retain, cause to continue in being (a state of affairs, a condition, an activity, etc); keep vigorous, effective, or unimpaired; to guard from loss or deterioration	Take action to preserve or retain natural species diversity (including foundational species) from loss and keep the functioning of ecological complexes effective and unimpaired from deterioration	Prevent habitat disturbance to intact mussel reefs at known specific sites	Prevent habitat disturbance to soft sediment habitats to enable ecological functioning to recover at an ecosystem scale	Implement more stringent rules on forest harvesting, earthworks, and replanting to reduce excess sedimentation into estuaries and enable ecological functioning to recover

Enhance	To raise in degree, heighten, intensify (a quality, attribute, etc)	Facilitate recruitment, co-existence and successional processes by stabilising ecological functioning through time	Infilling of existing reefs and expansion from edges after action to maintain	Expansion of biogenic species and succession to three-dimensional complex structures	Shellfish beds expand as storms flush out estuaries over time as sediment inputs reduce
Restore	Bring back or re-establish; return something to a former condition or place	Re-establish species or habitat by direct action	Place live mussels on the seabed to create new reefs	New habitats establish due to increased larval mass from intact and enhanced areas	Replant saltmarsh and seagrass to replace lost habitat



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Crying over spilt milk? The Synlait decision and land covenants

INTRODUCTION

Zoning changes, but covenants are forever.

That is a pithy summary of the intersection between the Resource Management Act 1991 (RMA) and property law (more specifically, private land covenants), but it is a summary with elements of both truth and untruth. The intersection between the RMA and property law is of course a subject of considerable interest, and indications from the courts are that more attention is needed to the degree of disparity and overlap between these fields. Covenants exist independently of zoning and do not always last forever, but they run with the land, bind successors in title and can last much longer than planning provisions.

Taking this further, resource management is sometimes considered a subset of public law; conversely, we often talk of private property, but even private property has important public law aspects. Land law in New Zealand – at least as it is taught in law schools – is often seen to rest on the Land Transfer Act 2017, which rests heavily on the role of the state in guaranteeing title. While other aspects of land law (such as the Property Law Act 2007 (PLA)), common law issues of contract and tort and the more opaque topic of equity may be seen to reflect a more private law orientation, there remains a considerable degree of public law in private land law issues. In the present context, the *Synlait* decision (*Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157) contains a useful analysis of how land covenants may be modified or extinguished because of RMA-based changes, including zoning.

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The relationship between the RMA and property law deserves more attention, and this article continues a theme I developed earlier (for example, “Private Land Use Arrangements in the Environment Court: Recent Decisions” (April 2019) RMJ at 15). While *Synlait* is nominally a decision on private land covenants, it also has broader resource management implications. For that reason, this article examines PLA issues with a particular focus on commentary on zoning within the decision.

PROCEDURAL MATTERS AND BACKGROUND

This decision reflected an unusual incident of timing, of ‘spilt milk’, as the parties had essentially already settled. However, the Supreme Court, ostensibly conscious of the varying approaches in the High Court and Court of Appeal, of the matters of general importance, and of its progress with the judgment (at [1], [4] and [9]), proceeded to issue its decision.

While historically well-known as an ice-cream stop on the way to Auckland, Pokeno has changed immensely in the last 20 years. It is now a relatively bustling and

well-established dormitory suburb, but while I was an undergraduate, it had something of a crisis of identity and temporarily rebranded itself to jenniferann.com. Around this time, in 1998 and 2000, virtually identical covenants were entered into in favour of a 140-ha block of land which contained a basalt resource suitable for a quarry. Over time, this 140-ha block was subdivided and came to have four different owners, including New Zealand Industrial Park Ltd (NZIPL). The burdened land was a parcel of 9.74 ha, now split across three titles. Part of the burdened land had been amalgamated with the benefited land and some with other titles. Covenants run with the land and do not disappear when land is subdivided: covenants are (not quite) forever.

The 2000 covenant was in the nature of a 'reverse sensitivity' or 'no complaints' covenant: a well-known example of private land law arrangements being used to achieve resource management outcomes (see for example, A Davidson "Reverse Sensitivity — Are No-Complaints Instruments a Solution?" (2003) 7 NZJEL 203). The covenant instrument provided that the owner of the benefited land intended to carry out quarrying activities, with various noise, vibration, dust and other quarrying impacts. To protect the interests of the owner of the benefited land in a quarry, the covenantor (as owner of the burdened land) agreed, among other things, to limit its activities to planting, forestry, grazing and lifestyle farming, as long as these activities did not interfere with the operation of a quarry.

The context of change in Pokeno warrants attention. The 2008 Pokeno Structure Plan proposed an increase from around 500 people to 5,000. Plan Change 24 in 2012 gave effect to this and rezoned land to industrial, which meant the uses in the 1998 and 2000 covenants were no longer consistent with the zoning. Both Plan Change 24, and the later Plan Change 21 in 2018, also provided for further residential zoning. Summarising the changes, the Supreme Court noted that there had been zoning changes: (1) a change from the burdened land being rural and the benefited land seen as suitable for a quarry, to the land in the vicinity of Pokeno becoming residential and industrial; and (2) ownership changes, with various subdivisions and amalgamations being implemented; things were not the same as they had been.

In this context, then-owner Stonehill sought modification of the covenants under s 317 of the PLA so that they no longer applied to the burdened land owned by Synlait – effectively,

a partial extinguishment of the covenants. The Supreme Court's assessment of the grounds of relief under s 317 are discussed below but in brief terms are: s 317 allows a court to modify or extinguish an easement or covenant on various grounds, including because of a change being made in the use of the land, a change in the neighbourhood or other circumstances (s 317(1)(a)); that the continuation would impede reasonable use (s 317(1)(b)) and that the modification or extinguishment will not substantially injure any party (s 317(1)(d)); alongside other grounds – such as the agreement of all parties and being contrary to public policy – that are less relevant here. The High Court found in favour of Stonehill. The Court of Appeal, on the other hand, held that none of the grounds in s 317(1) of the PLA were made out. The present proceedings dealt only with the Synlait-burdened land, not the other parcels that remained subject to the covenant. The Supreme Court also commented on an application by Synlait to adduce further planning evidence, including as to the potential for residential rezoning and written approvals under s 104(3)(a)(ii) of the RMA – again highlighting the intersection of planning law and covenants – and on changes in the ownership of the land with the benefit and burden of the covenants, and population and planning changes in Pokeno.

PROPERTY LAW ACT 2007

The Supreme Court then turned to ss 316–317 of the PLA, noting recent amendments in respect of covenants and determining that it had a two-step test: (1) to determine if one or more of the grounds in s 317(1) was made out, and (2) to determine if its discretion should be exercised. The Court of Appeal had outlined a conservative approach to the exercise of powers under s 317 of the PLA, noting there should be "strong reasons" to justify extinguishment or modification of covenants (at [69]). The Court began by tracing the origins of s 317 of the PLA by reference to ss 127 and 126G of the Property Law Act 1952. Reference was made to a "progressive broadening" of the scope of orders under these provisions (at [76], citing *Harnden v Collins* [2010] 2 NZLR 273 (HC)), and a key argument of the appellant was that the Court of Appeal had been unduly conservative in its approach (at [72] and [80]).

The Supreme Court observed that the statutory language of s 317 should not be overlaid (at [84]):

... with requirements that cases be exceptional, that sanctity of contract be protected, that property rights not be expropriated and the like. ... There is a circularity about saying that property rights must be protected from the exercise of the power conferred by s 317 when the fundamental premise of the section is that those property rights are liable to be modified or extinguished.

Therefore, the requirements of s 317 should not be overlaid with non-statutory criteria that would alter Parliamentary intention; rather, each case was to be considered on its own merits (at [85] and [88]).

The Court then proceeded to consider various factors under s 317(1) of the PLA.

Section 317(1)(d) – whether the modification or extinguishment would substantially injure any party

The High Court had found that the respondent would not suffer substantial injury if the covenants were extinguished, largely because NZIPL could seek a consent for quarrying with or without the covenants, and Synlait could oppose this application with or without the covenants as it owned land that was not burdened. The Court of Appeal had paid more attention to the restricted-discretionary activity status of aggregate extraction and held that NZIPL could suffer injury “of an intangible kind” (at [99]). The Supreme Court noted that the parties’ undertakings meant that the Synlait plant would still be allowed on the Synlait land but that an obligation to not complain about NZIPL’s quarrying would remain. It was noted that any injury under s 317(1)(d) had to be substantial, rather than insignificant, theoretical or fanciful, but could be economic, physical or intangible – including for example an intrusion upon privacy or loss of neighbourhood ambience (at [104]–[105]). The evidence for NZIPL was that development of a quarry was a possibility, supported by the zoning, and was plausible even if the land was developed for residential use. The Supreme Court then turned to “the planning implications” of removing the covenants, including the environment and the likelihood of resource consent for a quarry, with some criticism of the Court of Appeal’s interpretation of the evidence (at [120]–[121]). The Supreme Court’s conclusion was that the establishment of a quarry was possible, but there was real uncertainty as to it eventuating; that obtaining resource consent would be difficult; that if no resource consent application was made, there would be no substantial injury;

and that the presence of the Synlait plant on the Synlait-burdened land would make little difference to the chances of consent. Because a consent application was unlikely, difficult and the plant would have little impact, there was no substantial injury to NZIPL.

Section 317(1)(a) – The covenant should be modified or extinguished because of a change in circumstances since its creation

The High Court had found that there were a number of changes in the nature and extent of the use of the land under s 317(1)(a)(i), including the subdivision and sale of large parts of the benefited land; the Court of Appeal had disagreed, as notwithstanding these changes, quarrying remained a real possibility. The Supreme Court agreed with the Court of Appeal, particularly as the quarrying resource remained within NZIPL land.

With respect to s 317(1)(a)(ii), the High Court had held that there had been a change in the character of the neighbourhood, with the increase in Pokeno’s population, the establishment of new industry and residential development; the Court of Appeal did not agree, finding that the covenants were intended to last 200 years, and changes to zoning did not change the burden on the burdened land. However, the Supreme Court found that the fact that neighbouring areas were never subject to the covenant was irrelevant: the statutory question was whether changes in the neighbourhood justified modification of the covenant. That said (at [151]):

... a change in zoning is a factor that can be taken into account, not a decisive factor. ... [O]n its own, a zoning change is unlikely to amount to a change in the character of a neighbourhood. If that were not the case, there is a risk of undermining the purpose of covenants designed to resist zoning changes.

The implication here is clear and obvious but also worth reiterating: covenants exist independently of zoning. Covenants can override zoning; the reverse is not the case. It was noted that the zoning change was supported by the owner of the benefited land and predated Synlait’s ownership of the Synlait-burdened land. The population growth, new residential areas, industrial zoning and manufacturing operations reflected “significant changes to the neighbourhood” (at [152]) and justified modification of the covenant.

Other relevant changes were able to be considered under s 317(1)(a)(iii), which relates to any other circumstances the court considers relevant. The High Court and Court of Appeal had been at cross-purposes about the ongoing utility of the covenants, with the Supreme Court having little to add to the Court of Appeal's assessment.

Section 317(1)(b) – the continuation of the covenant would impede reasonable use

The High Court had held that the continuation of the covenants was an impediment to reasonable use of the burdened land, with the parties not foreseeing the industrial zoning that later arose. The Court of Appeal, on the other hand, felt that the impediment to reasonable use had not arisen since the covenants were entered into, as the covenants continued to "provide a higher level of protection to the benefited land than zoning alone" (discussed in SC judgment at [160]). The future restrictions on use were foreseeable and known. In the Supreme Court's view, reasonable use was not static, and a change in zoning could be relevant to the nature or extent of an impediment to reasonable use. The reasonable use of the burdened land had changed because of zoning and the neighbourhood: the covenants prevented the burdened land being used at all without a resource consent. Further, knowledge of the covenants was irrelevant, as any applicant under s 317 would have known about their title and the presence of the covenant. The changes that had taken place in Pokeno could not have been reasonably foreseen when the covenants were entered into, and the impediment on the use of the land was greater than it had been because of the changes in the neighbourhood and potential use of the land.

Exercise of Discretion

The Supreme Court was therefore satisfied that the grounds in s 317 were made out. It then turned to whether it should exercise its discretion, noting that there were apparently no cases where one or more of the grounds

in s 317 had been made out but discretion had been declined. The respondent argued that the covenants had a continuing purpose; a term of up to 200 years (of which only 20–22 had passed); that the burdened land had been acquired with knowledge of the covenants; and that they could not be replaced even if a future quarry went ahead. The Supreme Court, however, did not believe that the covenants had a sufficient continuing purpose, no matter how long they had to run; and that while they could not be replaced, the injury arising from their modification was not substantial. In addition, the Supreme Court declined to order compensation or even to refer that issue back to the High Court. In terms of costs, the Court also held that this action was not "enforcement" of the covenants in a way that allowed indemnity costs under the covenant terms.

As such, the appeal would have been allowed.

CONCLUSION

As noted above, the 'spilt milk' in this decision was the reality of the parties having settled. A cynic might say that the Supreme Court felt obliged to issue a judgment because of concerns that the Court of Appeal's decision might be followed in future, and the Supreme Court felt its junior court had so egregiously erred in law that this could not be allowed to happen. However, the Supreme Court's discussion of the differences in opinion between the High Court and Court of Appeal highlights that important legal issues were involved.

Property lawyers need a workable understanding of the RMA. RMA lawyers, particularly those involved in land development issues, also need a workable understanding of property law tools. Covenants can restrict land use in a way that overrides zoning provisions. Conversely, zoning changes can make covenants less purposeful and therefore less likely to be upheld. The *Synlait* decision shows both the constancy of change and the malleability of property law tools in achieving resource management outcomes.



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Tikanga Māori: an integral strand of the common law of New Zealand

INTRODUCTION

In April 2020, in *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 (*Trans-Tasman* (CA)), the Court of Appeal upheld the decision to reject the approval of an application to mine offshore for iron ore and remitted the application back for reconsideration by the Environmental Protection Agency (EPA). The *Trans-Tasman Resources* application was the first full hearing by the EPA under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act). However, the findings regarding Māori rights and interests have a number of important implications beyond the EEZ Act. In particular, the appellate Court's findings represent a significant step forward for our understanding of Treaty of Waitangi obligations, the Crown's obligations with respect to as yet unrecognised customary claims and tikanga as a source of common law. This has ramifications for other areas of law where questions of Māori rights are in debate, not least of all with respect to freshwater. This article explores the key findings relevant to Māori and the areas of contention that will need to be addressed on appeal, which at the time of writing is before the Supreme Court.

TREATY OF WAITANGI/TE TIRITI O WAITANGI

The EEZ Act includes a Treaty of Waitangi provision under s 12. However, unlike the Treaty provision under s 8 of the Resource Management Act 1991 (RMA), this is not set out in a general way for decision-makers and the courts to interpret. Instead, s 12 refers to a number of specific sections in the EEZ Act "to give effect to the principles of the Treaty of Waitangi". The Government has indicated its preference for this type of specific Treaty clause since 2000 (see for example, Environmental Protection Authority Act 2011, s 4 and Public Records Act 2005, s 7).

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An important question before the Court of Appeal (Kós P, Courtney and Goddard JJ) was whether s 12 of the EEZ Act was exhaustive or whether Treaty principles could be applied more broadly. In the High Court, Churchman J was emphatic that if Parliament had intended for there to be a general obligation to give effect to Treaty principles, the Bill would have been amended to make this explicit (*Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217 (*Trans-Tasman* (HC)) at [241]–[243]).

Goddard J for the Court of Appeal adopted a broad approach, finding that while s 12 appears to be non-exhaustive, as long as the Act's provisions were interpreted and applied in a manner giving effect to Treaty principles, the question was "more apparent than real, and need not be resolved" (at [162]).

One of the directions under s 12 is that decision-makers must take into account the effects of activities on existing interests. The meaning of existing interests refers to (inter alia) “any lawfully established existing activity, whether or not authorised by or under any Act or regulations, including rights of access, navigation, and fishing” (EEZ Act, s 4(a)). In interpreting this provision, the Court found that “rangatiratanga” and “full exclusive and undisturbed possession of lands, estates, forests, fisheries and ‘taonga katoa’” are a “lawfully established existing activity” (at [166]). This is a significant acknowledgement that the rights of Māori as defined by tikanga and guaranteed under the Treaty continue today and are legally cognisable.

Also of interest is the way Goddard J centred his reasoning on the text of Te Tiriti o Waitangi/the Treaty of Waitangi as well as on Treaty principles. Article 2 of the Treaty in both Te Reo and English were quoted in full and Goddard J focused on the “guarantees” of rangatiratanga and Māori rights to their lands, resources and taonga (at [165]–[166]). This emphasis on the text of the Treaty itself may reflect an important shift away from a sole focus on Treaty principles (see also, for example, Cabinet Office Circular “Te Tiriti o Waitangi/ Treaty of Waitangi Guidance” (22 October 2019) CO (19)5).

Additionally, Goddard J applied the seminal decision of *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) (at 210) which declared that “the Treaty is part of the fabric of New Zealand society” and provides relevant context for interpreting “legislation which impinges upon its principles”. Goddard J noted that “environmental regulation is a sphere in which the Crown’s obligations under the Treaty are of particular importance” (at [40]). *Huakina* has remained under-cited and under-applied in the context of environmental law, so this decision may open the door to its further use.

While it is arguable that specific Treaty provisions provide greater certainty than general Treaty provisions, there is concern that, in effect, they declare legislation “complies with Treaty obligations, rather than placing a positive, forward-looking obligation on decision makers in terms of the Treaty and Treaty principles.” (13 September 2011) 675 NZPD 21214 (Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill—First Reading, Rahui Katene). The Court of Appeal’s reluctance in (*Trans-Tasman* (HC)) to read down the Treaty obligations owed to Māori under such Treaty clauses is significant.

AS YET UNRECOGNISED CUSTOMARY CLAIMS

Another key question was whether applications under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA) for customary marine title and protected customary rights are an existing interest under the EEZ Act or alternatively could be considered as “any other matter”. The High Court found that the argument that lodged interests should be considered “would do violence to the words of that Act, which refers to protected customary right or customary marine title ‘recognised’” (at [233]).

Goddard J took a different position, noting that while claims not yet granted under MACA are not naturally seen as ‘existing interests’, this was beside the point. This was because “MACA does not bring the underlying customary interests into existence. Rather, it provides a mechanism for recognising them” (*Trans-Tasman* (CA)) at [168]). On this basis, Goddard J avoided the issue that the EEZ Act refers to the customary right or customary marine title “recognised” by referring to the definition of ‘existing interest’ under s 4(a). It was found that, “pending such recognition, tangata whenua with customary interests continue to have and enjoy those customary interests, and those customary interests qualify as existing interests ...” (at [168]). Consequently, there was an obligation to engage with the full range of customary rights, interests and activities identified by Māori as affected by the proposal and to consider the effect of the proposal on those existing interests (at [170]).

The finding that customary rights must be respected before they are legally proven has implications for other areas where Māori rights and interests are yet to be given legal form, particularly freshwater. It suggests that decision-makers need to be cognisant of customary claims and should consider what those claims are and how they may be impacted by proposed activities.

While the Court of Appeal’s findings were framed by the New Zealand context, the approach taken finds support in overseas jurisprudence. In Australia, groups who have made customary claims that have not yet been legally proven hold special rights of consultation and negotiation with respect to proposed activities affecting those claims (Native Title Act 1993 (Cth), ss 25–44). In Canada, in *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511, the Supreme Court found that when the Crown is aware of aboriginal claims, the Crown cannot run roughshod over these claimed rights (at [27]). The Crown’s honour required it

respect these potential, but yet unproven, interests, through a duty to “consult and accommodate”. The right is not one of veto for the concerned Indigenous groups, and the Crown must balance the potential impact of the decision on the asserted claim with other societal interests. Notwithstanding, cases such as *Clyde River (Hamlet) v Petroleum Geo-Services Inc* 2017 SCC 40, [2017] 1 SCR 1069 have established a high standard on the Crown’s duties.

Goddard J’s findings reflect this approach in that it was found that the protection to be given to these rights was not absolute but at the very least required that reasons be given to justify a decision to override existing interests, absent of the free and informed consent of affected iwi (at [171]). The adequacy of those reasons could then be assessed by reference to assurances given by the Crown to Māori under the Treaty and the express provision under the Act to give effect to the principles of the Treaty (at [171]). Given the Court’s emphasis on Treaty guarantees to Māori of their lands, resources and rangatiratanga, the bar for justification was arguably set high.

While the duty to consult in Canada is linked to the constitutional protection of aboriginal title, it also relates to more general legal principles affirmed in New Zealand, including that the honour of the Crown demands recognition and protection of the property rights of the original inhabitants of the land (*Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [152]–[153]). Furthermore, in *Trans-Tasman (CA)*, Goddard J stressed that the Treaty principles of partnership (including good faith) and active protection were “intrinsically relevant” matters to customary claims (at [171]).

TIKANGA AND CUSTOMARY RIGHTS

A further argument raised by iwi was that decision-makers were required to consider tikanga Māori as ‘any other applicable law’ and that ‘kaitiakitanga’ was an existing interest under the EEZ Act.

Drawing upon the Court of Appeal’s findings in *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), Goddard J stressed that Māori customary property rights and interests depend on the customs and usages (tikanga Māori) which gave rise to those rights and interests. At [177], he noted that:

The continued existence of those rights and interests necessarily implies the continued existence and operation of the tikanga Māori which defines their

nature and extent. As Tipping J said in Attorney-General v Ngati Apa, “Maori customary land is an ingredient of the common law of New Zealand”. The same can be said of the tikanga that defines the nature and extent of all customary rights and interests in taonga protected by the Treaty.

Thus “it is (or should be) axiomatic that the tikanga Māori that defines and governs the interests of tangata whenua in the taonga protected by the Treaty is an integral strand of the common law of New Zealand” (at [177]). On this basis, the relevant aspects of tikanga needed to be identified and taken into account in so far as relevant to the proposal (at [178]).

Drawing extensively on the extra-judicial writings of Williams J, the Court considered the relevant tikanga and in particular, recognised that kaitiakitanga and the interrelated concept of whanaungatanga are foundational to tikanga Māori and of key importance in this case (at [172]–[174]). Goddard J acknowledged that tikanga did not always align with English legal concepts but this did not mean they could be disregarded or shoe-horned into an English property law framework (at [169]).

The strong statements in *Trans-Tasman (CA)* are arguably the clearest recognition of tikanga as a source of common law to date. However, it builds on the momentum of previous case law from *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 to *Mason v R* [2013] NZCA 310, *Paki v Attorney-General (No 2)* [2012] NZSC 50, [2012] 3 NZLR 277 and *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116. Most recently, the scope of tikanga in New Zealand law arose in the appeal heard by the Supreme Court after the death of appellant Peter Ellis (*Ellis v R* [2020] NZSC 89). Arguably, under tikanga, mana and tapu remain important after a person’s death and a case should not be discontinued on a litigant’s death. Both the *Trans-Tasman* and *Ellis* appeals will require the Supreme Court to address the scope, nature and extent of tikanga in our national law.

CONCLUSION

In the Court of Appeal’s *Trans-Tasman* decision, we have the makings of a fundamentally different way of conceiving of the nature of Māori rights and the extent to which they can be recognised by the courts. How the Supreme Court deals with these arguments will have significant implications for law in 21st-century New Zealand.

Consequential effects and 'end use' under the RMA – Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council [2020] NZHC 3388

INTRODUCTION

In *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, the High Court upheld the decision of a majority of the Environment Court to dismiss appeals against the grant of consents authorising a large-scale water bottling plant at Otakiri, in the Bay of Plenty. (That Environment Court decision was summarised in the April 2020 issue of RMJ).

Te Rūnanga o Ngāti Awa (Te Rūnanga) and Sustainable Otakiri Incorporated (Sustainable Otakiri) had appealed decisions of the Bay of Plenty Regional Council and the Whakatāne District Council to grant a new water take permit and a variation to an existing land use consent (respectively) to Creswell NZ Limited (Creswell). These resource consents would enable the large-scale expansion of an existing water take and bottling operation.

One of the key legal issues for both Courts was the extent to which the decision maker was permitted or required to consider the environmental effects associated with exporting the water, and in plastic bottles, once it was taken. These aspects of the overall proposal did not themselves require resource consent but were seen as consequential or 'end use' effects of the applications being made.

ENVIRONMENT COURT'S APPROACH

The Environment Court majority had addressed this issue early in its decision, as part of what it called a "Jurisdictional



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Overview" (*Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196). Its reasoning included that:

- The consent authority *could* have regard to consequential effects of granting the consents sought but only "within the ambit of the RMA and subject to limits of nexus and remoteness" (where nexus refers to "the degree of connection between the activity and the effect" and "remoteness refers to the proximity of such connection" – both in the sense of the causal legal relationship rather than in physical terms) (at [59]–[61]);

- While the end use of the water take (i.e. in plastic bottles) was foreseeable and the effects were potentially adverse, “refusing consent to the taking of water in this case will have no effect on all other instances where plastic bottles are used in New Zealand or where water is exported” (at [64]);
- It was not open to the Court in relation to a proposed water take to “effectively prohibit either using plastic bottles or exporting bottled water”. Instead, “[s]uch controls would require direct legislative intervention at a national level” (at [65]).

Accordingly, the majority of the Environment Court concluded its “Jurisdictional Overview” by stating (at [66]):

... in this case, the end uses of putting the water in plastic bottles and exporting the bottled water are matters which go beyond the scope of consideration of an application for resource consent to take water from the aquifer under s 104(1)(a) RMA.

Despite this, after hearing competing evidence as to cultural effects, the majority later found that (at [156]):

... there is no loss of mauri from the water as the water remains within the broad global concept of the water cycle and is returned to Papatūānuku irrespective of where it is used.

HIGH COURT’S DECISION – RESULT

The High Court summarised the appeals as being about the relevance of ‘end use’ in the consideration of resource consent applications, and in particular, the relevance of (*Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388 at [1]):

- the export of bottled water in terms of negative effects on te mauri o te wai and the ability of mana whenua to be kaitiaki, and*
- the use of plastic bottles.*

Ultimately, the High Court dismissed the appeal on the basis that the Environment Court had not made any (material) errors of law in coming to its decision. However, the High Court’s reasoning was somewhat different to that of the Environment Court, which means that both categories of effect could be live issues in future cases. Its findings with respect to the two categories of effect are explored below.

HIGH COURT’S APPROACH – CULTURAL EFFECTS

The High Court considered the established legal principles and authorities as to ‘end use’ that were discussed by the Environment Court, and at that general level did not “discern any error” with the majority’s analysis. It summarised the legal position as follows (at [82]):

Limitations of nexus and remoteness must apply when assessing which effects on the environment of allowing the activity are relevant under s 104(1). It was common ground that the two concepts of nexus and remoteness are separate albeit there is some overlap. The complexity lies in the application of these concepts of nexus and remoteness in a case such as this ...

However, the High Court “[did] not favour a legal proposition of general application that the effects of exporting water are too remote or otherwise beyond the scope of consideration in any application for resource consent to take water”. Instead, remoteness was an issue of fact and degree that was not “capable of such a statement of law in the abstract” (at [142]).

The High Court also considered that there was “a nexus between the water take and the export of bottled water in this case” (at [140]). Thus, the Court did not accept that the effects of exporting bottled water were “too remote from, or insufficiently connected to, the activity of extracting it from the ground – at least when those effects are cultural effects occurring in New Zealand” (at [141]). As a result, the High Court found that the majority’s conclusion in its “Jurisdictional Overview” that exporting bottled water is (always) beyond the scope of consideration in an application for resource consent to take water “went too far” (at [142]).

Despite this, the High Court also found that any error on the part of the majority in this regard was not material (at [119] and [208]) because the majority had gone on to make factual findings that there was no loss of mauri, and that the project would not unreasonably prevent the ability of Ngāti Awa to be kaitiaki (at [142]). While the majority’s approach in reaching that finding was itself criticised by the parties on appeal, the High Court observed that as a

finding of fact, it was not susceptible to challenge under s 299 of the RMA (at [123] and [142]).

HIGH COURT'S APPROACH – USE AND DISPOSAL OF PLASTIC BOTTLES

The environmental impact of plastic bottles was not raised by either Te Rūnanga or Sustainable Otakiri in their arguments in the Environment Court, but instead was raised by Commissioner Kernohan when questioning witnesses (at [89]). However, because the Environment Court did address the impact of plastic bottles in its majority judgment, the High Court considered the appellants were able to pursue this issue in appearing before it (at [54] and [89]).

In terms of the effects associated with the use of plastic bottles (as opposed to the effects of exporting water in and of itself), the High Court found that:

- Insofar as the plastic bottles are exported, the effects of discarding them occur overseas. As such, the effects were too remote and outside the scope of the RMA, just as overseas discharges were considered too remote in *Royal Forest and Bird Protection Soc of NZ Inc v Buller Coal Ltd* [2012] NZHC 2156, (2012) 17 ELRNZ 220 (at [149]). As such, the remainder of the High Court's analysis was confined to local (New Zealand) effects.
- Insofar as the discarding of plastic bottles occurs in New Zealand, it was not inevitable that every plastic bottle would be improperly discarded, and disposal facilities require separate approval under the RMA (at [150]).
- While littering was itself unlawful, and thus could be said to be independent from the grant of water take consent, "the fact that something is unlawful and primarily the responsibility of another person does not necessarily preclude nexus – sometimes there can be more than one effective cause" (at [151]).
- In considering indirectness or independence of effects, it was also relevant to consider whether discarding plastic bottles was separately controlled under the RMA. The Court observed that the adverse effects of discarding bottles were not direct effects of allowing the water take activity for which consent was sought. Instead, they were "downstream effects, which normally would only be taken into account if the relevant activity – discarding plastic bottles – is not subject to regulation under the RMA" (at [153]).
- In relation to the use of plastic bottles (rather than cultural effects), the extent of the effect associated with this application relative to other instances raised a similar 'tangibility' issue to that in *Buller Coal*, involving "consideration of whether restricting the water take using plastic bottles would make any appreciable difference to the overall use of plastic bottles and have any perceptible adverse effect on the environment" (at [134]). However, there was limited evidence (i.e. as to the scale of other bottling operations) which "did not enable the effects to be ignored on (in)tangibility grounds" (at [134] and [155]).
- Importantly, with respect to the extent to which the disposal of bottles from the facility would lead to adverse effects, the High Court found that there was evidence of the scale of the bottling operation, but "no evidence as to the scale or adverse effects of plastic bottles from the operation being discarded in the (regional) environment" (at [156]).

In light of this assessment, the High Court concluded that (at [156]):

... as a matter of fact and degree, the adverse effects of consumers discarding plastic bottles were too indirect or remote to require further consideration in Creswell's application for resource consent to take water from the aquifer.

Accordingly, the High Court did not consider the Environment Court majority erred in law when it concluded in its "Jurisdictional Overview" that the effects on the environment of using plastic bottles were beyond the scope of consideration in relation to Creswell's application to take water (at [157]). However, the Court was quick to emphasise that it was "not saying that as a matter of law the effects of plastic bottle or other plastic disposal will always be too remote to warrant consideration (nor suggesting that councils cannot address such effects in their planning documents)" (at [157]).

COMMENT

This case raises a number of fascinating issues in relation to end use effects, particularly effects that are diffuse and somewhat intangible. With respect to future 'water bottling' cases, there are perhaps three direct implications of the High Court's approach:

- Environmental effects that might occur overseas associated with the use of plastic bottles are too remote to be considered as part of a water take application.
- However, cultural effects associated with the export of water will be relevant effects to consider, because they occur in New Zealand. The extent to which they are given weight will depend on the evidence before the decision-maker; and
- While it will be a matter of fact and degree in each case, effects within New Zealand associated with the use and disposal of plastic bottles are capable of being a relevant consideration under the RMA (with sufficient evidence as to 'nexus and remoteness', and perhaps also subject to hurdles as to 'tangibility' or materiality).

While the High Court considered its conclusion was consistent with that in the recent case of *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625, it would appear that the Court took slightly different approaches in the two cases, given in that case it was accepted that the "effects of plastic bottles are a consequential effect outside of what could be considered on a consent application" (*Aotearoa Water Action Inc* at [252]).

It seems clear that if submitters are to succeed with arguments about the effects of plastic bottles in the future they will need to provide clear evidence of the scale and adverse effects of bottles being discarded from the particular operation. In addition, the Court's discussion of the 'tangibility' issue suggests it may also be necessary to show that the proposed operation will materially add to

the quantity of plastic bottles that are already in circulation. It follows that applicants may be able to argue that any such effects can be ignored, because they will "make no appreciable difference to the overall use of plastic bottles and have no perceptible adverse effects on the environment" (see *Te Rūnanga* (HC) at [155]).

While this discussion could be read as an argument as to futility (i.e. that there is no point in declining an activity if its adverse effects will just occur elsewhere), it is perhaps better framed in terms of the evidential challenge in showing perceptible adverse effects. In most RMA cases the adverse effects are somewhat localised and emanate directly from the proposed activity, but for water bottling, any effects associated with plastic bottles are diffuse and arise (if at all) where bottles are sold. An apt comparison might be the difference between localised air pollution and activities that contribute to (global) climate change. Once the problem is no longer localised then the environmental effects of any individual contributor will almost always be *de minimis* and so effective regulation (if it is to occur under the RMA) will require clear policy guidance.

Finally, it is suggested that this case illustrates yet another instance of uncertainty as to the kinds of effects or activities that can properly be regulated under the RMA – the current reform process is an opportunity to secure greater certainty as to the scope of relevant adverse effects in the future.

We understand that an application for leave to appeal has been filed in the Court of Appeal.



Do the National Environmental Standards for Freshwater apply in the coastal marine area? Bay of Islands Maritime Park Inc v Northland Regional Council [2021] NZEnvC 6

BACKGROUND

This case looked at the issue of where the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F) apply and, in particular, whether they apply in the coastal marine area (CMA). The issue arose in the context of appeals on the Proposed Northland Regional Plan. Through the appeal process, Bay of Islands Maritime Park raised the issue of the potential for the NES-F to cover areas of the CMA. To resolve this uncertainty, the Environment Court was asked to make a declaration on whether the NES-F applies to wetlands in the CMA.

DEFINITIONS, DEFINITIONS, DEFINITIONS

The Court was required to consider a range of definitions in making its determination. The starting point was the use of “natural wetland” in the NES-F. The term has the same meaning as in the National Policy Statement for Freshwater Management 2020 (NPS-FM), which defines the term broadly as a wetland (as defined in the Resource Management Act 1991 (RMA)) that is not constructed by artificial means, a geothermal wetland or any area of improved pasture that is dominated by exotic pasture species and is subject to temporary rain-derived water pooling. The NPS-FM also includes a narrower definition for “natural inland wetland”, being a natural wetland that is not in the coastal marine area. The NPS-FM states that it applies to “all freshwater (including groundwater) and, to the extent they are affected by freshwater, to receiving environments (which may include



estuaries and the wider coastal marine area)”. Also of relevance is the definition in the NES-F of “river or connected area” as “a river; or any part of the coastal marine area that is upstream from the mouth of a river”.

Sitting alongside those definitions is the distinction between “freshwater” and “coastal water” in the RMA. “Freshwater” is defined in the RMA as “all water except coastal water and geothermal water”. “Coastal water” is defined in the RMA as water within a river that has saline content but which may or may not be within the CMA.

The CMA is in turn defined in the RMA as including not only the sea itself but also that part of a river either a distance five times the width of the mouth of the river or one kilometre upstream of the river mouth – whichever is the lesser.

DECISION

The Court concluded that the NES-F applies to the CMA, but only to that part of the CMA upstream of the "river mouth" as defined in the RMA. In particular, the NES-F does not apply to the general CMA, open oceans, estuaries, bay and other areas not falling within the definition of "river or connected area".

In coming to this conclusion, the Court undertook an analysis of the NES-F in the context of its promulgation alongside the NPS-FM, being the output of the Government's Essential Freshwater work programme. The Court found the intent of the NPS-FM, and of the RMA more broadly, was to provide an integrated approach to freshwater management. There was a clear connection between the NES-F and NPS-FM, as terms in the NES-F took their meaning from the NPS-FM.

Of importance in determining the intent of the NES-F was the regulation's definition of "river or connected area", which specifies the boundary is the mouth of the river. This boundary provided certainty as to the areas that would be affected by the regulations. The Court observed that the NES-F makes limited reference to the coastal environment and contains no specific provisions that refer to the characteristics of the CMA (such as tidal cycles). This showed that while the NES-F seeks to ensure that coastal waters are not affected in an integrated management sense, it does not intend to control all wetlands or activities within the CMA itself.

The Court also considered that if the NES-F applied to activities within the CMA, it would be mandatory and would have significant consequences on issues relating to marine areas and, potentially, under the Fisheries Act 1996. The NES-F would also not integrate directly with the area covered by regional plans, which would create issues with implementation into plans and enforcement. Given these implications, the Court found that the Government should have been clear if it wished to constrain activities within all coastal water areas as they relate to natural wetlands.

The image below outlines an indicative representation of how the various definitions interact.

COMMENT

Given the challenging set of definitions, this is a pragmatic decision by the Environment Court. As was highlighted in the decision, the interface between salt and fresh water is dynamic, with saline levels in rivers varying depending on things such as coastal processes and geographic features. A transitory boundary would create significant administration and enforcement challenges; using the mouth of the river as the boundary provides certainty. This decision is subject to appeal to the High Court. It will be interesting to see how the High Court grapples with the overlapping definitions on this issue.

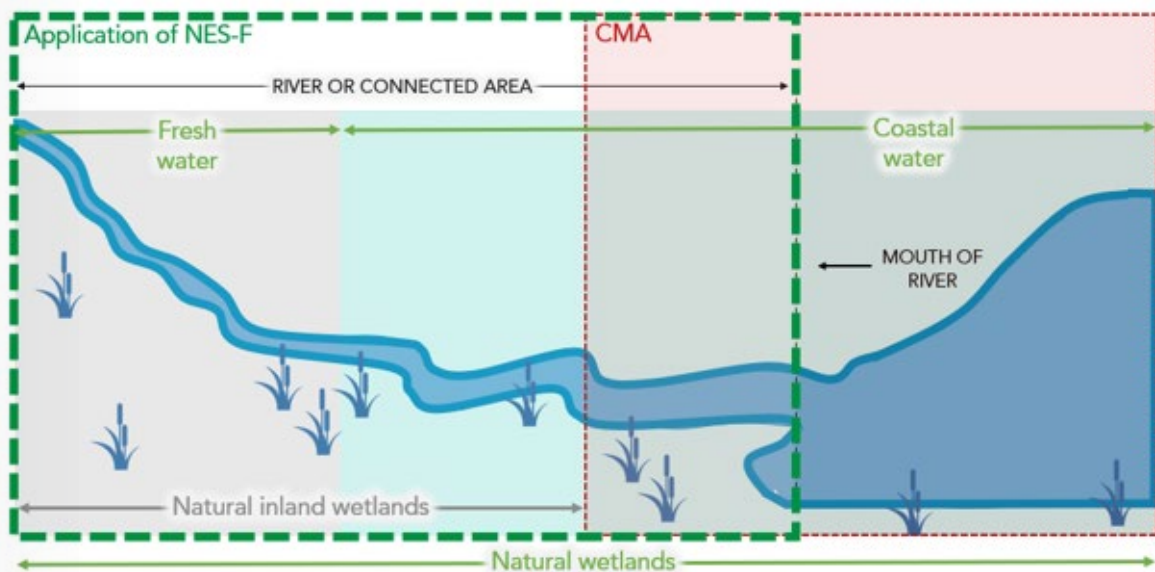



Figure 1: Interaction of relevant definitions in relation to wetlands (Russell McVeagh)



*The use of modelling for
terrestrial biodiversity offsets
and compensation: a suggested
way forward*

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INTRODUCTION

In recognition of New Zealand's indigenous biodiversity decline, offsetting and compensation principles are increasingly identified in statutory planning documents to address residual effects on terrestrial biodiversity. The proposed National Policy Statement for Indigenous Biodiversity (NPSIB), when finalised (likely April 2021), is expected to require the use of these measures more generally.

A key challenge for consent decision-makers is determining the adequacy of offsets and compensation for residual adverse effects on terrestrial biodiversity values (i.e. those adverse effects remaining after all appropriate avoidance, minimisation and remediation measures have been sequentially applied). To our understanding no operative or proposed policy documents mandate a specific method for the calculation or assessment of the adequacy of offsets and compensation, and there is currently no consistent approach used.

One of the key principles of an offset is achieving 'no net loss' (NNL) or preferably net gain (NG) of indigenous biodiversity. However, demonstrating that NNL/NG will occur at the consenting stage is difficult due to data deficiencies and uncertainty in the success of the measures proposed. Correspondingly, efforts to address residual effects often default to compensation, which in many instances is based solely on professional opinion and may include the use of compensation ratios or 'multipliers' (i.e., wetland enhancement at a ratio of 1:3 to address wetland loss). These approaches have been challenged due to a lack of transparency and rigour, and their often ad-hoc application.

This article considers the merits of two different modelling approaches for providing guidance on the type and amount of habitat restoration and enhancement activities needed for a project to achieve NNL or NG at the consenting stage: Biodiversity Offset Accounting Models (BOAMs) and Qualitative Biodiversity Models (QBM)s.

We conclude that QBM)s are useful as the primary modelling approach at the consenting stage because, unlike BOAMs, QBM)s can provide guidance on both offsetting and compensation requirements and can be readily applied across the full spectrum and scale of consent applications. That said, to provide greater assurance that NNL/NG outcomes are achieved if consent is granted, BOAM)s based on ongoing biodiversity monitoring should be used to verify NNL/NG outcomes are achieved and/or guide adaptive management needs as required.

BACKGROUND: OFFSETS AND COMPENSATION IN NEW ZEALAND

A biodiversity offset is a 'measurable conservation outcome' that meets certain principles and balances adverse residual effects that cannot reasonably be avoided, remedied or mitigated, to a NNL/ NG standard. While offsetting requires a measurable outcome that has been quantified through a robust and transparent process, biodiversity compensation does not necessarily need to be quantified and measurable.

While there is, at present, no general requirement under the Resource Management Act 1991 (or the Conservation Act 1987) for an applicant to provide offset or compensation to address the residual adverse ecological effects of a resource consent proposal, many councils include biodiversity offsetting and NNL/NG outcomes in their statutory planning documents.

Policy guidance on biodiversity offsets and environmental compensation was developed by the Business and Biodiversity Offsets Programme (BBOP) and in subsequent papers which apply the principles to the New Zealand context (for example, Maseyk and others, 2018).

BOAM)s have been developed to help determine the type and amount of biodiversity offset required to achieve NNL/NG outcomes (Maseyk and others, 2015; Maseyk and others, 2018). To demonstrate an offset, such models require explicit quantitative measures of loss of biodiversity values at impact sites versus gains in biodiversity values at offset sites. For example, at the impact and offset site(s), this may include the quantification of the relative abundance of tui using standard bird count methods or the quantification of a range of vegetation and habitat characteristics using standard vegetation plot methods. In summary, BOAM)s:

- account only for 'like for like' biodiversity trades aimed at demonstrating NNL;
- use Net Present Biodiversity Value (NPBV) to estimate whether NNL is achieved;
- incorporate the use of a discount rate to account for the time lag between impact associated with project activities and the gain at the proposed offset site(s); and
- adjust for the likelihood of success regarding the proposed offset actions and account for the risk of under-estimating losses at the impact site or over-estimating gains at enhancement sites.

PRACTICAL CHALLENGES OF BIODIVERSITY OFFSETS AT THE CONSENTING STAGE

Despite increased policy recognition of offsets, efforts to demonstrate that offsets have been achieved through the use of BOAM)s are still rare (see Christensen and Baker-Galloway, 2013 for a summary of offsets case law prior to 2013). Notable consenting examples since then include: the Oceana Gold Deepdell North Stage III Mine (decision of independent Hearing Commissioners, 23 September 2020), Matawii Water Storage Reservoir, September 2020 (decision of the Expert Consenting Panel under cl 37, sch 6

of the COVID-19 Recovery (Fast-track Consenting) Act 2020) and Te Ahu a Turanga: Manawatū Tararua Highway Project (decision of independent Environment Court Commissioners, 13 November 2020).

Moreover, where modelling has been used, decision-makers have at times expressed concern that the use of models may result in more confidence being placed in the model outcomes than is warranted or reasonable. See for example *West Coast Environmental Network Inc v West Coast Regional Council and Buller District Council* [2013] NZEnvC 47 at [218] and *Waka Kotahi NZ Transport Agency v Manawatu-Whanganui Regional Council* [2020] NZEnvC 44 at [175].

These issues primarily reflect challenges with demonstrably offsetting residual effects through the application of BOAMs at the consenting stage. Ultimately, this means that most if not all proposed measures to address residual effects default to compensation. These challenges include:

1) Offsetting cannot always be feasibly or demonstrably achieved.

Offsetting is generally limited to certain 'low-hanging' biodiversity values. Such values include young, regenerating native habitat types with low complexity and common forest birds for which existing monitoring techniques are reliable and sufficient information can be collected. Most other biodiversity values cannot be demonstrably offset. For example:

- Complex habitats such as old-growth forests that take a long time to replace may require monitoring over centuries to verify that an offset has been achieved.
- Rare or cryptic fauna (for example, lizards) are difficult to detect or monitor, are often at low abundances and their response to offset and compensation measures may be slow or uncertain.
- Highly mobile species such as long-tailed bats or Australasian bittern have extensive home ranges which obscure site-specific cause and effect.
- Ecosystem functions such as ecological connectivity, buffering potential or sediment control are inexplicit.
- Not all habitats can be recreated or replaced (for example, coastal marine inter-tidal habitat or many wetland habitats).

2) Verifying offsets with an acceptable degree of confidence.

Proposed habitat enhancement and restoration actions adhere to the principle of additionality and as such, at consent lodgement they are typically yet to be implemented. Projected biodiversity gains must therefore be based on assumptions, which makes it difficult to convincingly demonstrate an offset at the consenting stage with the necessary degree of confidence. For example, a BOAM for tui would require an expert ecologist to predict tui counts at an offset site at some point in the future, which depends on numerous site-specific factors and landscape dynamics. Correspondingly, despite quantitative data inputs giving the impression of increased precision, a BOAM can amount to little more than a best guess based on professional opinion.

3) Application to small projects.

Small- to medium-scale projects disproportionately contribute to net biodiversity loss through 'death by a thousand cuts'. However, the extent and cost of detailed field investigations required to inform the BOAMs can be prohibitive for all but the largest projects.

4) Bang for buck.

Beyond information requirements to inform an assessment of effects, the additional data needs for a BOAM can be costly, complicated and incompatible with project timelines. Moreover, this level of data can go far beyond what is commensurate with the 'scale and significance' of a project and does not necessarily provide further value to the effects assessment. Additionally, if consent is granted, this pre-consent information often becomes redundant because it is superseded, either:

- by more recent data gathered from impact and offset sites in the same time period and closer to the time of impact to allow more meaningful comparisons; and/or
- through changes to the biodiversity offset monitoring indicators or methods between consent application lodgement and certification of Ecological Management Plans.

These practical challenges in applying offsets are not restricted to New Zealand; see for example the International Union for Conservation of Nature (IUCN) Commission on Environmental Management's work on impact mitigation and ecological compensation (IUCN, n.d.).

QUALITATIVE BIODIVERSITY MODELS (QBMS)

More recently, and in response to the challenges set out above, QBMs have been used on projects at the consenting stage to provide guidance on the type and magnitude of offsetting and compensation requirements that are expected to generate NNL/NG outcomes. While not without their limitations (Tonkin & Taylor, in preparation), the key advantages of using QBMs at the consenting stage is that, compared to ad hoc approaches, they:

- offer a transparent, science based, systematic, scalable and practically feasible modelling approach to provide guidance on **all** residual effects associated with a project. Of key importance and unlike BOAMs, QBMs can be used to provide guidance on residual effects that cannot be measured or quantified with adequate precision, which is typically the case at the consenting stage; and
- can be converted to BOAMS if consent is granted, i.e. through the provision of real data at offset sites after the commencement of habitat restoration and enhancement activities.

QBMs are similar to BOAMs in that they are informed by field investigations at the impact site(s) and by expected gains at the proposed 'offset' site(s), and they account for uncertainty and the time lag between biodiversity losses and gains. However, unlike BOAMs, QBMs include the use of science-based qualitative data where quantifiable data is not available or lacks adequate precision.

For example, rather than the use of detailed quantitative measurements on a range of habitat and vegetation characteristics for a particular habitat type, a QBM would include a qualitative biodiversity value score. This biodiversity score would be based on field assessments and assigned to the affected habitat type before and after impacts (losses) and before and after implementation of restoration or enhancement measures (gains). For habitat-type QBMs, these biodiversity scores are based on the four sub-criteria, i.e., representativeness, rarity/distinctiveness, diversity and pattern, and ecological context, which are used to assess "Ecological Value" under the Ecological Impact Assessment Guidelines (Roper-Lindsay, 2018). For species or species assemblages, biodiversity values are based on a field assessment of the importance of habitats for a particular species or assemblage before and after impacts and before and after restoration or enhancement measures based on scientific literature and field investigations.

To date, QBMs (previously termed Qualitative Biodiversity Compensation Models or QBCMs) have been used in relation to the Peacocke Structure Plan Area (PSPA) and the proposed Amberfield subdivision for Hamilton City Council; the proposed Auckland Regional Landfill project for Waste Management New Zealand; and Te Ahu a Turanga: Manawatū Tararua Highway for Waka Kotahi NZ Transport Agency.

In respect of *Waka Kotahi NZ Transport Agency*, the type and quantum of proposed habitat restoration and enhancement measures was ultimately determined using QBMs, with the BOAM used to provide additional detail where warranted.

The overall approach was supported by ecology expert witnesses (Department of Conservation, Forest and Bird, Queen Elizabeth II National Trust and Horizons Regional Council) through joint witness statements in advance of the Environment Court proceedings. The Court also accepted at [169] that:

... these offsets and compensations are consistent with agreed biodiversity offsetting principles including No Net Loss and Net Gain outcomes, increased landscape ecological connectivity, additionality, permanent protection of restored areas, and ecological equivalence.

At [173], the Court also noted that "there is no compulsion to use any particular model or for the model to do more than assist the Court in making a decision as to whether reasonable mitigation (sic) is being applied".

Key lessons learned through these projects were that:

- Adherence to biodiversity offsetting principles was necessary to satisfy decision-makers that the level of residual adverse effects and the approach to residual effects management was likely to achieve NNL/NG outcomes.
- The QBMs were useful for guiding the type and magnitude of restoration and enhancement measures that are likely to generate NNL/NG outcomes for biodiversity. However, it is important to include a NG buffer in the QBM to reduce the risk of false positives.

A false positive indicates NNL/NG outcomes when the converse is true and may occur if 'Net Loss' outcomes transpire for biodiversity values that are not or cannot be factored into a model or if data inputs and assumptions underplay impacts or overstate benefits.

- Application of BOAMs at the consenting stage can also be useful but can be incredibly resource intensive and detailed and does not guarantee or necessarily provide additional confidence that an offset will be achieved.
- If BOAMs are used at the consenting stage, they should be used in a selective manner where conservation concern/risk is high, likelihood of NNL/NG outcomes less certain and predicted gains can be estimated with a reasonable degree of accuracy.
- Additional certainty of outcomes is best achieved at the decision-making stage through adherence to all offsetting principles; strong performance measures in conditions; and comprehensive, robust, quantitative-based offset monitoring and reporting requirements that include offset verification and contingency measures.

A SUGGESTED WAY FORWARD

In the absence of meaningful change in the way residual effects on indigenous biodiversity are managed, the ongoing decline in biodiversity will continue. In particular, and as highlighted above, there is a pressing need for a more scalable and pragmatic modelling approach to guide offset and compensation requirements at the consenting stage.

To this end, we consider the QBM approach to strike the best balance between offsetting theory and practice at the consent application stage, and it has the potential to generate significantly better ecological outcomes than the status quo. Of key importance, this approach is at the 'as close to offset as possible' end of the compensation continuum, which is termed "biodiversity compensation" in the proposed NPSIB. This was recognised in respect of *Waka Kotahi NZ Transport Agency* with the Environment Court acknowledging at [183] that:

[T]he Project's proposed compensation package follows the same hierarchy as provided for in the (Regional) Plan and requires that there be a demonstrated and verifiable outcome even if this is not quantifiable in the strict terms of an offset package.

In broad terms, the QBM approach involves two steps to provide greater certainty that the intended NNL/NG outcomes will be achieved for a given project.

Step 1: apply qualitative biodiversity models (QBMs)

QBMs are used as a decision support tool at the consent application stage to provide guidance on the type and amount of habitat restoration and enhancement that is **likely** required to achieve NNL/NG outcomes. These qualitative models are not used instead of the BOAMs but rather as a precursor to these more comprehensive tools as per step 2 below.

Step 2: implement a biodiversity offset monitoring programme

Assuming consent is granted and the project commences, QBMs should be converted to BOAMs based on quantitative data collected at both the impact and offset sites through a biodiversity monitoring programme implemented as a condition of consent (via a certified management plan). Data can be used to demonstrably verify that an offset or **likely** offset (compensation) has occurred or is on-track. Resource consent conditions can be used to ensure that the desired offset or likely offset outcomes are verified based on real data and that contingency measures are in place if required.

CLOSING

In our view, the approach suggested above can be implemented within the current regulatory framework. It is likely that the replacement of the RMA with new legislation as proposed by the Government will create an even greater need to implement measurable, transparent and consistent approaches to offsetting residual adverse effects on biodiversity. We consider it would be helpful if the proposed RMA reforms enable the application of biodiversity offsetting principles through modelling approaches such as we have outlined here. However, we consider some flexibility critical, particularly in respect of the effects management hierarchy, to avoid perverse ecological outcomes and/or incompatibility with other legislation, as has recently become evident in respect of natural freshwater wetland policy via the National Policy Statement For Freshwater Management (Minhinnick and Atkins, 2020).

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New stock exclusion regulations and Waikato Regional Council's Plan Change 1: comparisons and conundrums

INTRODUCTION

Proposed Waikato Regional Plan Change 1 (PC1) by Waikato Regional Council was adopted on 18 March 2020, with the decisions version notified on 22 April 2020. PC1 has had numerous appeals lodged against it. These are currently being addressed, and during this period of time, new freshwater policies and regulations were issued by central government.

This article provides an overview of PC1 and compares the 'Minimum Farming Standards' in PC1 to the Resource Management (Stock Exclusion) Regulations 2020 (SR). These regulations were released with the new freshwater policies, including the National Policy Statement for Freshwater Management 2020 (NPS-FM), and the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F).

PC1 OVERVIEW

History

The purpose of PC1 was to give effect to the National Policy Statement for Freshwater Management 2014 and Te Ture Whaimana o Te Awa o Waikato – the Vision and Strategy for the Waikato and Waipā rivers. The Vision and Strategy resulted from three pieces of iwi settlement legislation: the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010; Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010; and Ngā Wai o Maniapoto (Waipā River) Act 2012.

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In an effort to explore an alternative process to the usual plan-making, a Collaborative Stakeholder Group was established in 2014 to consider relevant environmental, social, cultural and economic issues, and the consequences for various groups if no initiatives were adopted to address the state of the region's significant rivers and their tributaries. PC1 is therefore intended to provide an outlook for an 80-year journey to improve water quality and ensure freshwater can be used for food gathering. It targets the management of nitrogen, phosphorus, sediment and bacteria through fencing and farming plans. Targeted contaminant management is not a first for New Zealand, but it reflects a significant change for farmers in the Waikato region, introducing a set of rules which in many cases requires resource consent where farming has traditionally operated as a permitted activity.

Rules under PC1

Different levels of farming intensity and stock type will determine how a farm will be categorised under the regional plan. As a starting point, any farm that now

requires resource consent under the new PC1 rules starts with an Interim Permitted Activity rule status (rule 3.11.4.2). This is a transitional provision, allowing the farm to operate as permitted for a specified period of time (depending on the location of the farm) before consent is required, provided that minimum farming standards in Schedule C are adhered to. If the minimum standards are not met at any point, resource consent will be required immediately.

Any rules in PC1 that are more stringent than the national policies, including the NPS-FM, take precedence. When looking to comply with the relevant policies and rules for farming, or any activities affecting water, the range of legislation and planning tools to be understood is vast and not often linear. As such, it can be difficult for farmers to understand which rules apply to them. Ideally, PC1 would operate as a 'one stop shop' for rules, but the overlay of national regulations arguably reduces clarity, rather than enhancing it.

PC1 will not become operative until all appeals are heard or disposed of, but there is guidance on the Waikato Regional Council website that states that fencing and stock exclusion from waterbodies is to be completed within two years of PC1 being operative (or one year after PC1 becomes operative if the farm is located in a sub-catchment that is *E. coli* sensitive).

SCHEDULES

There are six schedules in PC1, each covering an area of regulation. In outline, these schedules are:

- (1) Schedule A: Registration with Waikato Regional Council for each property greater than 4.1 ha (relates to every activity in the PC1).
- (2) Schedule B: Nitrogen Leaching Loss Rate for Freshwater Management Units (relates to some permitted activities and all other activity statuses). This schedule outlines data means and records to be contained.
- (3) Schedule C: Minimum Farming Standards. This article compares these stock exclusion standards to the national standards.
- (4) Schedule D1: Requirements for Farm Environment Plans for farming under a permitted activity.
- (5) Schedule D2: Requirements for Farm Environment Plans for farming that requires consent.
- (6) Schedule E: Certificate requests for sector schemes.

SCHEDULE C – MINIMUM FARMING STANDARDS

Schedule C is arguably the most controversial schedule within PC1, particularly because all farms are required to comply with it, including those that fall under permitted activity status. As above, rule 3.11.4.2 provides for farming to continue as an interim permitted activity rule before resource consent is required. However, any non-compliance with Schedule C results in resource consent being required immediately. Schedule C also means enforcement options are available under the RMA. This section of this article considers various aspects of Schedule C.

Definition of water bodies

It is useful to begin with water bodies, as these are closely linked to central government's freshwater policies, but also highlights differences between these central government policies and PC1. The drafting of the definitions has been outlined below to draw attention to the small but technical differences in wording.

Under PC1, a 'water body' is defined as (Schedule C at 31):

- (a) *The bed of a river (including any spring, stream and modified river or stream), or artificial watercourse that is permanently or intermittently flowing; and*
- (b) *The bed of any lake; and*
- (c) *Any wetland, including a constructed wetland, greater than 50m².*

An area of tension is the definition of 'intermittently flowing' (which is not defined in the RMA). Under PC1, 'intermittently flowing' needs to meet three of the following for a water body (Schedule C at 31):

- (a) *it has natural pools;*
- (b) *it has a well-defined channel, such that the bed and banks can be distinguished;*
- (c) *it contains surface water more than 48 hours after a rain event which results in stream flow;*
- (d) *rooted terrestrial vegetation is not established across the entire cross-sectional width of the channel;*

- (e) *organic debris resulting from flood can be seen on the floodplain; or*
- (f) *there is evidence of substrate sorting process, including scour and deposition.*

It also seems that an artificial watercourse could be a drain for the purposes of needing to be fenced. Under ch 3.11 of PC1, a drain means “an artificially created open channel designed to lower the water table and/or reduce surface flood risk but does not include any modified (e.g., straightened) natural watercourse”. As outlined at point 3 below, a drain does not need to be fenced under the SR but does under PC1.

Under the SR, a ‘water body’ is defined as:

- (1) any ‘lake’ (as defined in the RMA, s 2), meaning a body of freshwater which is entirely or nearly surrounded by land;
- (2) ‘natural wetland’ (as defined in the NPS-FM at [3.21]) means a ‘wetland’ (as defined in the RMA as including permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions) that is not:
 - (a) “a wetland constructed by artificial means (unless it was constructed to offset impacts on, or restore, an existing or former natural wetland); or
 - (b) “a geothermal wetland; or
 - (c) “any area of improved pasture that, at the commencement date, is dominated by (that is more than 50 [per cent] of) exotic pasture species and is subject to temporary rain derived water pooling.”
 - (d) The SR also states that the regulations do not apply to wetlands less than 500m² unless the wetland is identified in a regional plan as having threatened species or was listed in a regional plan, district plan or regional policy statement that is operative as at 3 September 2020.
- (3) Any ‘river’ (as defined in the RMA, s 2) that is wider than one metre anywhere in the land parcel (measured as the bed width bank-to-bank) and is a continually or intermittently flowing body of freshwater; and includes a stream and modified watercourse; but does not include any artificial watercourse (including an irrigation canal, water supply race, canal for the supply of water for electricity power generation, and farm drainage canal).

It is fair to say that the definition of a ‘wetland’ is vaguer in PC1 than in the NPS-FM, but the SR provides further guidance. Interestingly, PC1 and the SR provide for the same fencing setback from a wetland. A ‘river’ under PC1 includes an artificial watercourse, whereas the SR does not apply to artificial watercourses and do not include farm drainage canals or water areas under one metre wide; this makes PC1 more onerous in respect of artificial watercourses and drains.

STOCK EXCLUSION

Sloping land

Under PC1, all farmed cattle, horses, deer and pigs must be excluded from water bodies on land with a slope of up to 15 degrees, or where a paddock adjoins the water body with a slope of up to 15 degrees, and the number of stocking units exceeds 18 per grazed hectare (unless there is a natural barrier formed by topography or vegetation). Under the SR, stock are to be excluded from lakes and rivers wider than one metre on low sloping land. The SR provides maps to assist with identifying what land is low sloping. The maps show land with an average slope less than or equal to 10 degrees across the land parcel, compared with the 15-degree allowance under PC1. This highlights that the SR is more restrictive than PC1 in some respects.

Fencing distance

Under PC1, farmed cattle, horses, deer and pigs are to be three metres from the edge of any wetlands listed in the Waikato Regional Plan. The SR also has a three-metre setback for natural wetlands that are identified by a regional or district plan or regional policy statement (to be fenced by 1 July 2023). PC1 also provides for a three-metre setback for any other waterbodies, such as lakes and rivers.

In the SR, beef cattle and deer that are break feeding or grazing on annual forage crops or irrigated pasture must be excluded from lakes and rivers by 1 July 2023. Dairy cattle and pigs must be excluded by 1 July 2023. On low-slope land (as mapped), beef cattle and deer must be excluded by 1 July 2025. Dairy support cattle must be excluded by 1 July 2025.

PC1 and the SR also define drains differently. Under PC1, artificial watercourses are still considered watercourses and require a three-metre setback for fencing. Under the

SR, a river must be fenced if it is over one metre wide, but this requirement does not apply to artificial watercourses. As above, the more stringent rules in PC1 will take precedence, meaning that farmers in the Waikato region will likely be required to fence all drains, whether relating to natural or artificial watercourses.

Crossing a water body

Under PC1, stock may enter into or pass across the bed of a water body if using a livestock crossing structure or being supervised and actively driven across a water body at a location identified in a Farm Environment Plan. This crossing also must be completed in one continuous movement. Any resource consents required to build structures must also be applied for.

Under the SR, dairy stock must not cross lakes and rivers more than twice per month unless they cross by way of a dedicated culvert or bridge. If they are not crossing on a dedicated bridge or culvert, they must be driven across and supervised when crossing. Where the river has a highly mobile bed and the stock needs to cross the river more than twice per month, the stock does not have to cross with a dedicated bridge or culvert, but they still must be supervised and driven across.

While the national standards allow for movement across water bodies every two months, PC1 does not place a limit on the number of crossings but governs this in the Farm Environment Plan requirements. PC1 therefore allows for greater specificity for individual farms.

Under the SR, if there is an existing barrier that already excludes livestock, then this existing barrier does not have to be moved if it was in place before 3 September 2020.

CONCLUSION

Farmers in the Waikato region will need to be aware of both the national policies and PC1 in order to work out which standards are to be met and what compliance dates apply. This is not an easy task. Each farm will need a Farm Environment Plan, and as the Farm Environment Plans are to be certified, each certifier will need to have a high level of understanding of all policies involved and hold appropriate accreditation.

Arguably the most difficult task is understanding the differences in definitions between PC1 and the national policy documents. For example, the RMA does not define 'intermittently flowing' but PC1 has attempted to. Understanding the differences among these definitions is a cost borne by the farmer. Of course, it must be remembered that PC1 is not unique, and there are other regional councils that have implemented similar rules. Further, farms from around New Zealand and in the Waikato region have been using Farm Environment Plans for years: the difference now is that these will be reviewed and governed by Waikato Regional Council. Overall, while the national policies and PC1 provide rules and guidance on creating and sustaining healthy waterways, the areas of inconsistency also create uncertainty.

Call for Contributions

Resource Management Journal

The Resource Management Journal's mission is to facilitate communication between RMLA members on all matters relating to resource management. It provides members with a public forum for their views, as articles are largely written by Association members who are experts in their particular field.

Written contributions to the Resource Management Journal are welcome. If you would like to raise your profile and contribute to the Journal, a short synopsis should be forwarded by email to the Executive Officer (contact details below) who will pass that synopsis to the Editorial Committee for their review. Accordingly, synopsis and copy deadlines are as follows:

Publishing Date	Synopsis Deadline	Copy Deadline
August 2021	15 May 2021	1 July 2021
November 2021	15 August 2021	1 October 2021

The Resource Management Journal is published three times a year: April, August and November. Articles should generally be no more than 2,000 words (this is at the Editor's discretion) and written in accordance with the *New Zealand Law Style Guide* (3rd ed) by Alice Coppard, Geoff McLay, Christopher Murray and Jonathan Orpin-Dowell, the Law Foundation New Zealand. Note: All references are to be included in the body of the text and footnotes, endnotes and bibliographies are discouraged.

Acceptance of written work in the Resource Management Journal does not in any way indicate an adoption by RMLA of the opinions expressed by the authors. Authors remain responsible for their opinions, and any defamatory or litigious material and the Editor accepts no responsibility for such material.

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