



AHM News

INTRODUCTION

Welcome back to work for 2022! What a year it was last year, we hope you had a relaxing break and are back refreshed for whatever 2022 will throw at us. In this newsletter we provide an update on the progress of a number of legislative reforms and amendments within the environmental protections and resource management sphere, and we provide a case note of the recent Port Otago Court of Appeal decision.



We also say farewell to Vicki Morrison-Shaw who has headed out on her own as a Barrister.

THREE WATER REFORM UPDATE

In October 2021 the government announced that it will create four publicly owned water entities to ensure every New Zealander has access to affordable, long-lasting drinking, waste and stormwater infrastructure through the three waters reform package. This announcement followed months of consultation with local authorities in which the overwhelming view was that local authorities did not want the four publicly owned water entities. Working groups were then established to help local government, iwi and water industry experts to work through elements of the entity design, governance and accountability arrangements for the entities, as well as an opportunity for public participation and consultation.

The Working Group on Representation, Governance and Accountability of New Water Services Entities is made up of 20 members, including an independent chairperson, nine elected members of local authorities, nine iwi/Māori representatives, and the chair of the joint Central-Local Government Three Waters Steering Committee.

The Working Group will report back to the Minister for Local Government on how the representation, governance and accountability arrangements can be strengthened by 28 February 2022, which will enable Ministers to consider recommendations arising from the Working Group process before the Water Services Entities Bill is introduced to Parliament this year. An [exposure draft of the Bill](#) has been provided to the Working Group for their consideration.



NATURAL AND BUILT ENVIRONMENTS BILL

The Environment Committee released its [report](#) on the inquiry on the Natural and Built Environments Bill on 1 November 2021. The Committee recommended that the government proceed with the development of the Bill with proposed redrafting of certain provisions.

The Committee makes a number of recommendations regarding the content and form of the Bill and comments on the drafting of the exposure draft of the Bill. The Committee supported the inclusion of the concept of Te Oranga o te Taiao but recommended the concept be included in the purpose section of the Bill and that work be carried out with national iwi and Māori groups to further develop the concept. The Committee recommended that the purpose section should also be amended to better reflect the priority of environmental limits, the dual goals of the Bill and the intention that protection and restoration of the natural environment be achieved overall through the National Planning Framework and Natural Built Environment Plans.

The Committee made a number of recommendations regarding the environmental limits and outcomes clauses of the Bill, the National Planning Framework and work to be undertaken in regards to the proposed Natural and Built Environment Plans.

The full Bill is intended to be introduced alongside the Strategic Planning Act bill in 2022. There will be a second opportunity for public feedback on the Bill at this stage.



RESOURCE MANAGEMENT (ENABLING HOUSING SUPPLY AND OTHER MATTERS) BILL

The Resource Management (Enabling Housing Supply and Other Matters) Amendment Act (**Amendment Act**) was passed quickly through Parliament, having been introduced on 19 October 2021 as a largely bipartisan effort to

address New Zealand's housing supply. The Act received Royal Assent on 20 December 2021.

The Amendment Act intends to enable greater intensification in residential areas in tier 1 urban environments and in some tier 2 urban environments (if the Minister deems there to be an acute housing need). Medium density residential standards would be introduced which would enable medium density housing to be built as of right (at least 3 dwellings up to 3 stories per site). A new intensification streamlined planning process would be introduced which would accelerate implementation of the National Policy Statement on Urban Development 2020. Tier 1 territorial authorities would be required to notify an intensification planning instrument by 20 August 2022.

The Government has said that the matters addressed in the Amendment Act will complement other initiatives it has underway to address the housing crisis.

REVIEW OF NEW ZEALAND'S ENVIRONMENTAL PROTECTIONS

In August 2021 the Environmental Defense Society (EDS) published *Conserving Nature*, a paper about the need for reform of New Zealand's conservation system. The paper built on the Department of Conservations 2019 paper *Te Koiora o Te Koiora: A discussion document on proposals for a biodiversity strategy for Aotearoa New Zealand*, and goes further to say that "the dated nature of the statutory framework [for conservation], together with some 40 years of ad hoc amendments, has created an



unintegrated and highly complex regulatory environment.” The criticism is that conservation legislation is outdated and fails to account for the growth in international tourism, climate change and Treaty settlements.

The Minister of Conservation, the Hon Kiri Allan, has now announced work to address long standing problems in conservation law, starting with a review of the Wildlife Act 1953, and introducing a [roadmap for reform](#) of the conservation legislation in New Zealand.

Two key issues the review of the Wildlife Act hopes to address include the fact that many threatened animal species are currently omitted from its protection, and the protection the Act provides is not consistent or proportionate to the Threat. Section 53 of the Act also does not allow interactions between wildlife and people to be managed in a way that protects wildlife.

PROPOSED NATIONAL PEST MANAGEMENT PLAN FOR PHYTOPHTHORA AGATHIDICIDA

A National Pest Management Plan for phytophthora agathidicida (**Pa NPMP**) to mitigate kauri dieback was [proposed](#) to Cabinet in December 2021 for approval. It is expected to enter into force in the second quarter of 2022. Following widespread consultation in in 2017-2019 and targeted consultation in 2021, the Pa NPMP was issued in December last year with a cabinet paper under a proactive release. The purpose of the Pa NPMP is to manage the spread and effect of phytophthora agathidicida.

The Cabinet Paper seeks confirmation to draft the Order in Council and Pa NPMP. The approval of the Draft Order in Council by Cabinet to implement the proposed Pa NPMP is the final step in the process for a NPMP under the Biosecurity Act.

PORT OTAGO LIMITED v ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED [2021] NZCA 638

This case was an appeal by Port Otago Limited (**POL**) on the proposed Otago Regional Policy Statement 2016 (**pORPS**) which did not fully provide for port activities at Port Chalmers or Port Dunedin. The Environment Court recommended different wording to that proposed by POL in its appeal, but still provided for port activities. The Environmental Defence Society (**EDS**) appealed the Environment Court decision to the High Court. The High Court consequently held that the Environment Court erred in recommending wording that did not give effect to the prescriptive avoidance policies of the New Zealand Coastal Policy Statement (**NZCPS**).



This appeal answers the question of whether a proposed regional policy statement gives effect to the avoid requirements in the NZCPS by providing that adverse effects in areas of outstanding natural character be “avoided, remedied or mitigated”?. The Court of Appeal decision sets out a detailed analysis of the framework and policies provided in the NZCPS and the *King Salmon decision*, and then discussed both the Environment Court and High Court decisions for this matter.

The Court of Appeal agreed with the High Court that the Environment Court’s recommended wording for the policy failed to give effect to the environmental bottom lines set by the NZCPS, as required by the decision in *King Salmon*. The Court further said that there is a “regulatory mismatch” with how the

NZCPS applies in a post-*King Salmon* world and held that “a bottom line requiring adverse effects to be avoided cannot be substituted with a ‘avoid, remedy or mitigate’” policy.

The Court then made four further points:

- It did not accept the argument that policy 9 of the NZCPS (relating to ports) is sufficiently different to policy 8 (aquaculture) so as to enable a different outcome to King Salmon, and enable the proposed policy in the pORPS.
- The Court did not consider that policies 7 and 9 were in conflict with the avoidance policies. The decision noted that the NZCPS contains its own directive hierarchy. The avoidance policies “contain relatively clear environmental bottom lines; policies 7 and 9 contain lower level degrees of direction as to development and other activities in the coastal environment.”
- The Court did not accept that dilution of avoidance policies is required to reconcile them with the other policies in the NZCPS – “the ports policy is applicable, but within bounds set by the more directive avoidance policies”. The Court of Appeal considered that “if in the wake of King Salmon the NZCPS now poses unworkable standards for essential infrastructure, the answer lies elsewhere.”
- Finally, the Court noted that provided plans give effect to the avoidance policies, prohibited activity status is not inevitable and the matter should not be prejudged at the higher level when regional and district plans have not been formulated. The Court clarified that avoidance policies do not require activities to be avoided (or prohibited). Rather, the avoidance policies require adverse effects to be avoided in or on specific areas or values.

The Court of Appeal noted the environment in which commercial port activities had been taking place for the last 150 years had been shaped by the effects of those activities. The Court noted that “Port activities are not presumptively inappropriate in that environment and may not in fact, correctly analysed at the resource consent stage, adversely affect natural character in the environment at all. Proposed activity effects in context may be minor or transitory, or otherwise capable of being avoided.” Essentially, while the pORPS did not properly give effect to the avoid policy contained in the NZCPS, it does not preclude port activities from being undertaken, when assessed properly through the resource consent process.

AHM TEAM NEWS

In September 2021 Vicki Morrison-Shaw left her role in the directorship Atkins Holm Majurey and set out to establish herself as a Barrister sole. We wish Vicki all the best in her future endeavors and look forward to continuing to work with her in the future.

Questions, comments and further information

If you have any questions, comments or would like any further information on any of the matters in this newsletter, please contact the authors:

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