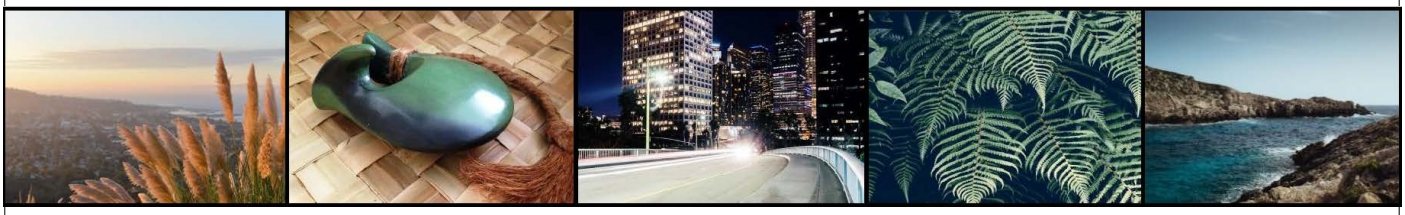


AHM News

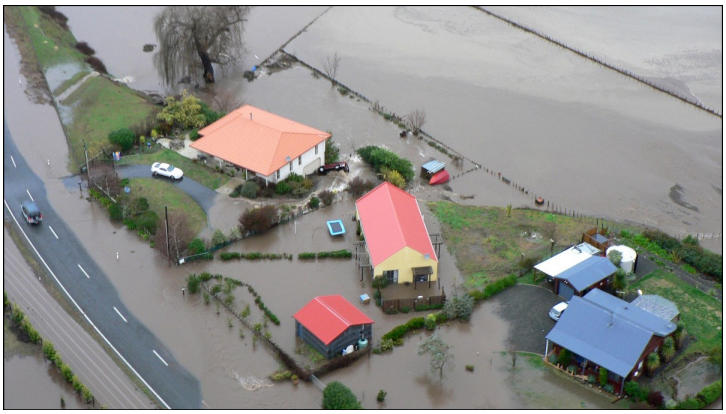
INTRODUCTION

It's been a busy start to the year, with weather events, legislative submissions, and changes of the political guard keeping everyone on their toes. This newsletter provides an update on the numerous law reform packages (and the potential changes which might arise from the new government leadership) and touches on the weather events which rocked the North Island. We then move on to an update on Crown Minerals legislation, before providing some case law updates on recent developments in the environmental and public law spaces.

LAW REFORM PACKAGES – SUBMISSIONS NOW CLOSED, AND CHANGES POSSIBLE

Last newsletter we provided an update on current legislative reforms. The Natural and Built Environments Bill and the Spatial Planning Bill were introduced in November 2022, beginning the Resource Management Reform process. In addition, Three Waters Reform continued with the introduction of the Water Services Legislation Bill and the Water Services Economic Efficiency and Consumer Protection Bill in December 2022.

These bills are now with select committees for further review, and we look forward to seeing the outcomes of the public consultation process – and whether recent political changes will further influence the direction of this reforms package. Readers will be aware that the change in Government leadership has led to the reconsideration of numerous policies, including the Three Waters Reforms. Cabinet is expected to consider all options on these reforms, with the new Local Government Minister (Hon. Kieran McAnulty) to report back.



EXTREME WEATHER EVENTS

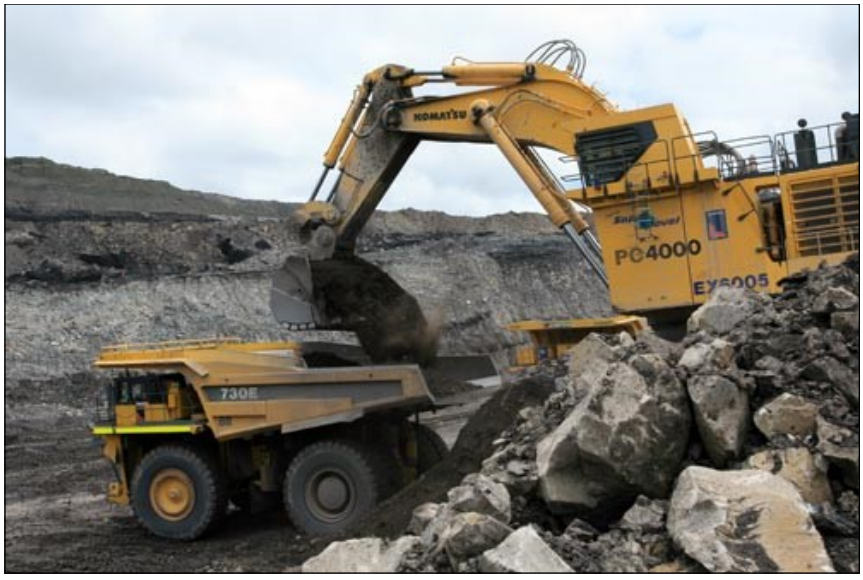
The opening months of 2023 brought extreme weather events which highlighted the need for improvement in water management, urgency in addressing climate change, and updates to emergency responses. Wet weather in the north led first to the Auckland Anniversary Floods over the period of 27 to 31 January, causing chaos, damage to infrastructure and housing, and the tragic loss of several lives. This deluge was swiftly followed by Cyclone Gabrielle, which affected the North Island, and parts of the top of the South Island, from 12 to 16 February. The storm system wrought havoc across the North Island, and led to further loss of life. Various industries and sectors in the Hawkes Bay and Gisborne regions have been severely impacted by Cyclone Gabrielle, with farmland, crops, and cattle sustaining extensive damage in the face of the intense weather system. Readers throughout the country will be feeling the flow-on effects of these events.

The Government introduced the Severe Weather Emergency Legislation Act to address recovery efforts. The Act was passed on 20 March 2023, and is intended to remove unnecessary red tape, allowing for a more streamlined recovery and rebuild, and draws on experience gained following the Christchurch Earthquakes.

REFORMS TO THE CROWN MINERALS ACT 1991

In 2013 the National Government reformed the Crown Minerals Act 1991 (Act), introducing the requirement that the mining industry and associated activities be actively promoted. Accordingly, the Purpose Section currently requires the prospecting, exploration, and mining of Crown owned minerals be promoted for the benefit of New Zealand.

Recently, the Government announced this purpose is out of touch with modern attitudes towards the mining industry and New Zealand's climate change commitments to phasing out polluting fossil fuels. In November 2022 the Government announced reforms to the Act intended to bring the purpose in line with present thinking through two methods. First, removing the focus on the promotion of prospecting and exploration. Secondly, shoring up provisions regarding the relationship between the mining industry, iwi, and hapū. Despite such changes, the Act will continue to fulfil its core role of setting out and determining how the Government allocates Crown owned minerals in New Zealand. Most functions under the Act will therefore remain unchanged.



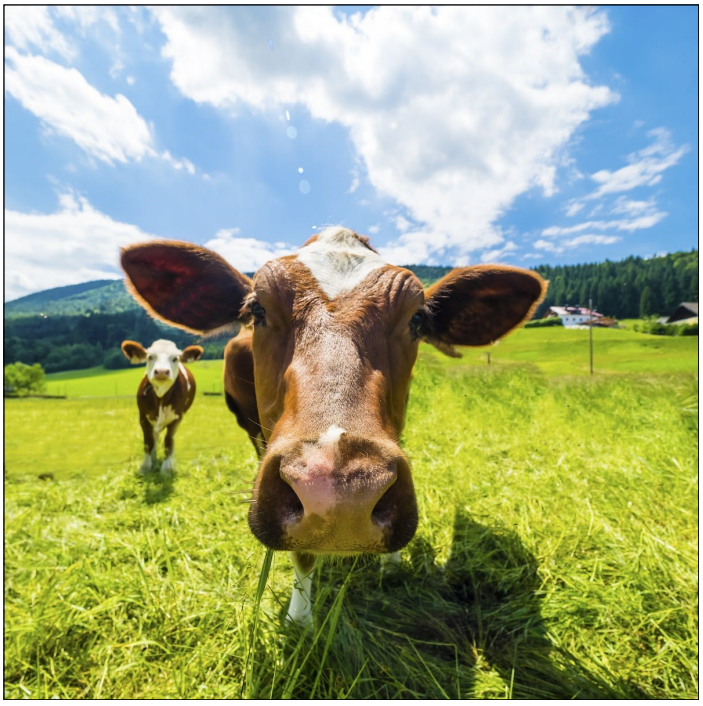
The amendments intend to bring the Act in line with the Government's long-term goal of phasing out fossil fuel usage while ensuring that access to energy remains secure, accessible, and consistent for New Zealanders. Additionally, the changes expressly allow iwi and hapū the ability to review and discuss annual "iwi engagement reports". Māori will be empowered by regulations to specify minimum content requirements for these reports, in the context of the Act, enabling a greater degree of control over how engagement occurs, and which issues are addressed.

While these changes are not sweeping at first glance, there are broader implications of the changes to the purpose, including effects to the factors considered by the Minister in assessing applications. In effect, this widens the discretion of the responsible minister when considering the purpose of the Act.

Industry backlash against the reforms includes concern that the amendments may dissuade investors from the New Zealand market and are therefore doing more harm than good. Other opponents note that we should, temporarily at least, be relying on the mining industry to provide energy security and offset other impacts of New Zealand's shift toward sustainable energy and resources.

CASE LAW UPDATES

Alongside changes to the law by way of legislation, recent case law has illustrated the ever-evolving approaches to freshwater management, public law and local democracy.



Page v Greater Wellington Regional Council [2023] NZCA 20

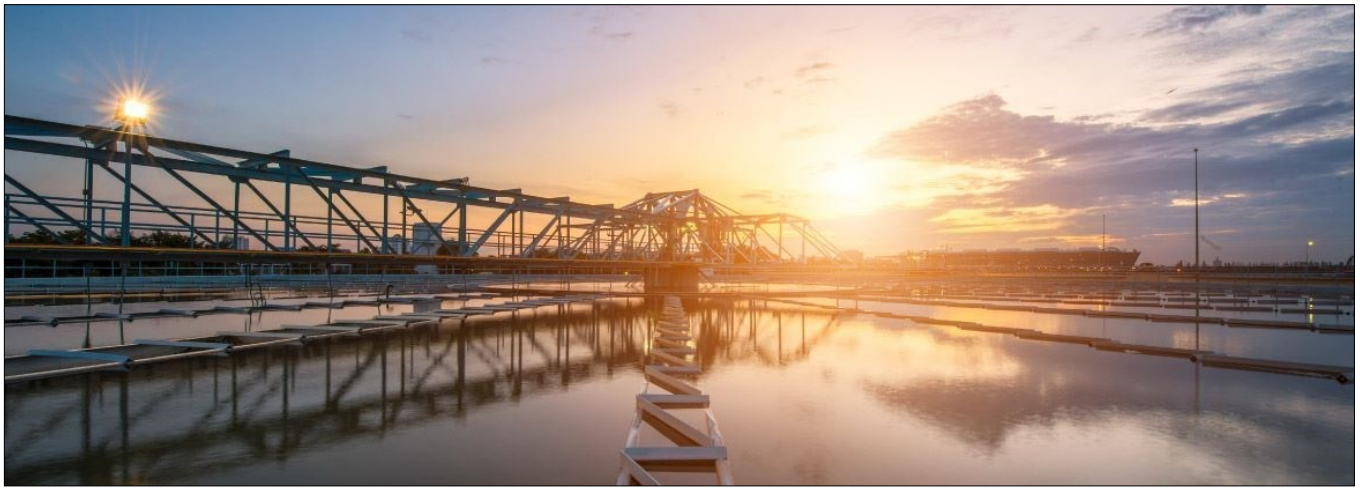
This case sought leave to bring a second appeal against a District Court decision. The Applicants, Mr Page and Ms Crosbie, were convicted of 35 offences under the Resource Management Act (RMA) for allowing cattle access to wetlands, disturbing wetlands, undertaking earthworks in waterbodies, depositing soil on a riverbed, taking water, and depositing substances into water or where they could enter water. Numerous abatement notices and enforcement order charges were also brought against the Applicants. At trial, the applicants were self-represented, and did not call upon expert evidence. Following conviction, Mr Page was sentenced to 3 months imprisonment and Ms Crosbie was fined a total of $118,782.

The appeal sought leave to bring fresh evidence from two experts on the grounds that to disallow this evidence would be a miscarriage of justice. The Applicants noted that the judge in the District Court had accepted the Greater Wellington Regional Council's (GWRC) evidence established the existence of natural wetlands on the Applicants property beyond reasonable doubt. The Applicants argued that their experts could prove there was insufficient evidence to establish that wetlands were present on the site, and this evidence should be explored.

The appellate judge ultimately found in favor of the Applicants. The Court held that the absence of any expert challenge to the Respondent's experts had a significant impact on the outcome if the trial, and that this ultimately amounted to a miscarriage of justice. Hence, leave to appeal was granted, despite the evidence not qualifying as 'fresh' evidence.

This case is notable on two counts. First, and of broad interest, the initial penalty of imprisonment for breaches of the RMA related to protected wetlands demonstrates just how seriously such breaches can be treated. Wetlands are recognized as a key component of a healthy national ecosystem, and a willingness towards strict sentencing shows landowners that their obligations under new policy frameworks will be rigorously upheld.

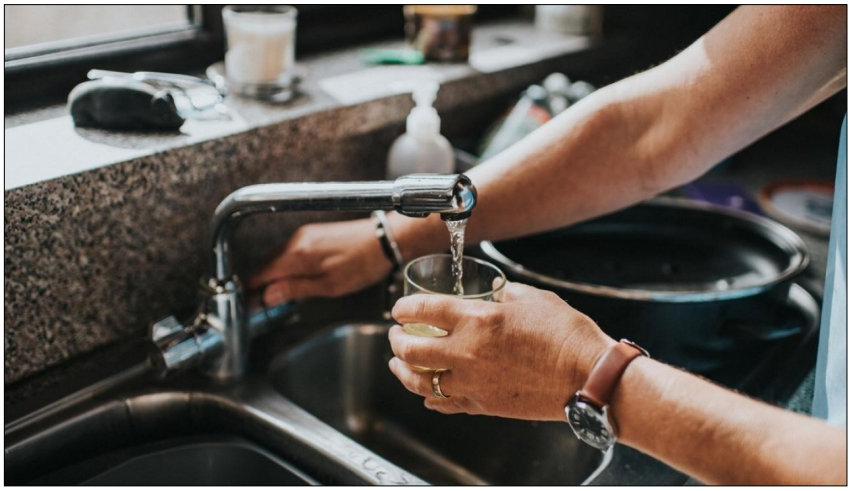
Secondly, and of interest more specifically to the freshwater management sphere, the decision shows how much weight courts are willing to place on expert evidence and its quality. The Court noted that the GWRC's evidence on hydrology was accepted by the trial judge by virtue of there being no evidence to the contrary presented by the Applicants. Judges rely on expert evidence to guide their understanding of material facts. Hence, the ability for parties to present their own expert evidence is vital in ensuring a fair and just trial, and a well-informed decision.



Timaru District Council v Minister for Local Government [2023] NZHC 244

In amongst the responses to the Three Waters Reforms, three local government entities sought a declaratory judgment from the High Court regarding the status quo of ownership of council assets. As currently proposed, the Three Waters Reform proposes to shift the responsibility to manage three waters assets, and deliver water services into four new entities, which straddle broad geographic zones. Water services infrastructure will be held by each new Water Services Entity on behalf of the communities it represents. The Government describes this new ownership system as a continuation of publicly held assets, while opponents of the reform consider that this change in structure amounts to unlawful confiscation away from councils.

The Timaru, Whangārei, and Waimakariri District Councils (together the Councils) took their opposition to the High Court, seeking a declaratory judgment as to the status of infrastructure ownership, and the democratic function of local government. Courts in Aotearoa New Zealand can make declaratory judgments on points of law, where the parties are not seeking a specific resolution to a dispute, but instead wish to clarify a current legal position. Parties supply declarations to the Court for their consideration, which if accepted are folded into case law on the topic. If the Councils' declarations were accepted, the proposed reforms may then be in breach of the law.



The Councils sought three broad declarations (termed declarations A, B, and C), each with several sub-paragraphs which expanded on the main principle. Broadly, the declarations covered the principle that local government is a core component of democracy (declaration A), that there are several principles and features of local government (declaration B), and that Councils have certain rights of ownership in relation to infrastructure assets (declaration C). The Crown opposed the declarations sought by the Councils, arguing that the declarations were too broad, that their purpose was to influence ongoing legislative processes, and that, because the declarations sought to clarify points of law which are already well-understood by Parliament, they lacked overall utility.

After establishing that it held jurisdiction to consider the case, the Court turned to the declaratory relief sought by each of the statements from the Councils, and whether this should be granted through discretion. The Court accepted that democratic governance is a core principle of our legal system, but agreed with the Crown that declarations A and B did not accurately reflect the principle in action. Most powers of local government stem from legislation, hence they are subject to amendments by further legislative action. The Court also held that the declarations as drafted were "too general, and therefore inaccurate to reflect the full framework of local government ownership rights in respect of infrastructure assets".

Regarding declaration C, the Court affirmed that Parliament may abrogate property rights, provided there is clear intention to do so, alongside acceptance of potential political fallout from such action. The Court held such intention had been demonstrated.

Additionally, the Court considered the declarations infringed upon the principle of legislative non-interference, and were not informative in any event. The Court concluded that the declarative relief sought by the Councils should not be granted.

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 :

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