AHM News

INTRODUCTION

Welcome back into 2018 – a year which New Zealand has welcomed in with extreme weather events, allegations of sexual misconduct throughout various institutions and professions, and celebrations of Prime Minister Jacinda Ardern's pregnancy. And it's only April!

In this newsletter we address:

- Some recent news about our team and presentations they have given;
- The Parliamentary Commissioner for the Environment's Report "A Zero Carbon Act for New Zealand";
- Recent High Court authority regarding assessment of proposed plan provisions; and
- The peculiar case of *Auckland Council v Auckland Council.*

RECENT TEAM NEWS

Vicki Morrison-Shaw joins the partnership

Helen, Mike, Paul and Tama are delighted to welcome Vicki Morrison-Shaw to the partnership.

Vicki has been with the firm since it was established in 2009 and specialises in environmental law with a development focus. Vicki has been involved in major development projects throughout her career (including Long Bay, Te Arai, Te Rere Hau windfarm, Trans-Tasman Resources iron sand mining, and most recently Waiheke marina).

Vicki has co-authored reports for government departments, presented numerous seminars around the country, and has been a member of the New Zealand Law Society's Environmental Law Committee since September 2015.

Vicki's considerable experience will add real value to the capacity of the partnership.

Recent environmental law presentations

Vicki Morrison-Shaw and Rowan Ashton joined a panel of leading environmental lawyers on Wednesday 21 March 2018 to present at the Legalwise Seminar on Environmental and Planning Reforms and Updates. Vicki and Rowan's presentation addressed how Part 2 of the RMA is considered in the context of resource consents, and provided an overview of recent

cases dealing with notification, subdivision, landscape, freshwater and conservation. They will also cover a recent declaration regarding fisheries and the current status of GMOs in the High Court. This was an informative and interesting seminar, with experts in their fields sharing insights and lessons from their experiences in environmental practice.

Helen Atkins recently presented at the Environmental Law Conference on 20 March 2018 in Auckland. This Conference tracked rising issues in the profession, including commentary on the state of environmental law in New Zealand, recent changes in freshwater policy, and changes arising from the RMA amendments in 2017 - including the collaborative planning process and Mana Whakahono a Rohe.

Helen provided an environmental case law update alongside Stuart Ryan (Barrister), with insights on the requirements and obligations that case law imposes on practitioners and clients working in the environmental arena.

A ZERO CARBON ACT FOR NEW ZEALAND?

The report *A Zero Carbon Act for New Zealand*, is the first from the new Parliamentary Commissioner for the Environment Simon Upton. It builds on an earlier review by his predecessor and makes recommendations for both the content of the proposed Zero Carbon Act and the process for getting it enacted.

The purpose of the proposed Zero Carbon Act is to provide an over-arching framework within which policies to reduce emissions can be given a stable, long-term focus, mainly through an iterative process of analysis and response between a new Climate Commission and the Government.

The Zero Carbon Act could enact an over-arching target based on the Paris Agreement to reach net-zero emissions in the second half of the century, along with provisions to establish the new Climate Commission. The Act would require the Commission to advise, within a defined timeframe, on a specific target or targets consistent with the over-arching target, and require the Minister for Climate Change Issues to present that advice to the House of Representatives. Then the Minister could consider introducing amending legislation, which, with Parliament's endorsement, would bring the more specific targets into the Zero Carbon Act.

The iteration of advice and response between the Government and the Climate Committee is about institutionalising a requirement that public policy remains focused on the long-term and that the Government is required to be transparent about its policy intentions. It is intended to provide a mechanism for managing a risk that is unfolding over a timescale dislocated from any that our political systems have traditionally been designed to deal with.

Given this long-term focus, achieving cross party consensus on the Act will be critical. An understanding of the timeframes of Government policies is also important for the commercialisation of key emissions reduction technologies, the development of necessary infrastructure, changes in consumer behaviour, and the development of markets for new technologies.

The report also addresses the potential for the Act to address adaptation and requirements for new legislation to have a climate impact assessment.

Given the coalition governments intention to establish a Zero Carbon Act, this space is one to watch.

ASSESSMENT OF PROPOSED PLAN PROVISIONS

Is it open to Regional Councils to depart from national and regional policy statements when drafting plans, and is the directive to 'avoid' adverse effects qualified by context? The High Court in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080 says no to both – the requirement to "give effect to" national and regional policy statements means 'implement" these statements; 'avoid' means 'avoid', it is not qualified by context.

This decision concerned an appeal from a decision of the Environment Court relating to natural heritage provisions in the Bay of Plenty Regional Council's proposed Regional Coastal Environment Plan (Coastal Plan).

At issue was whether, in determining the disputed policies and rule in the Coastal Plan, the Environment Court erred in its approach to the consideration of various provisions contained in higher order documents, including, the New Zealand Coastal Policy Statement (NZCPS), the National Policy Statement on Electrical Transmission, the National Policy Statement on Urban Growth, the Bay of Plenty Regional Policy Statement (RPS), and unchallenged objectives contained in the Coastal Plan. In reaching its conclusion, the Environment Court confined its consideration to the unchallenged objectives and policies of the Coastal Plan without reference to the higher order national and regional planning documents. The Environment Court reached what it termed a "proportionate response" and held that the directive to avoid adverse effects was qualified by context. Much of the parties' submissions focussed on the effect of the Supreme Court's decision in *King Salmon*.

Royal Forest and Bird argued that *King Salmon* represented a sea change in New Zealand resource management law. It submitted that the Supreme Court recognised that higher order planning documents can provide mandatory directions about how the development and protection of natural and physical resources is to be reconciled, and that where this has occurred, subordinate documents must give effect to the higher order documents. It suggested that it is no longer correct to take an overall broad judgment approach to the promulgation of plans, and that it is not open to Regional Councils proposing regional plans to depart from national instruments or from their own regional policy statements (where those statements recognise the directives contained in the national instruments), on the ground that regional or activity-specific context requires a departure.

Submissions for other parties, including the Regional Council, Transpower and landowners in the region sought to distinguish *King Salmon* and confine it to its factual context. The High Court did not consider *King Salmon* could be distinguished merely because *King Salmon* concerned only one national policy instrument, whereas the present case concerned multiple national policy instruments that pulled in different directions.

The High Court found that the Environment Court erred when it proceeded primarily by reference to the Coastal Plan's objectives, with only limited reference to the RPS and the

NZCPS. Its approach in effect ignored the statutory directive contained in section 67(3). That subsection is clear in its terms. It requires that decision-makers promulgating regional plans must "give effect to", inter alia, national policy statements and regional policy statements. The Environment Court failed to have regard to the majority of the Supreme Court's finding that the words "give effect to" mean to implement, and that this is a strong directive, creating a firm obligation on the part of those subject to it.

The Environment Court's "proportionate response", or "contextual" approach, was also held to be inconsistent with the approach taken by the Supreme Court in *King Salmon*. The High Court found that the Environment Court erred in its interpretation and implementation of the NZCPS and the RPS. The High Court found that the applicable parts of the relevant NZCPS policies are directive. They either use the word "avoid", or cross-refer to it. They do not say "avoid where practicable" or "avoid, remedy or mitigate".

The Court found that these were material errors and the matter was remitted to the Environment Court, to reconsider in light of the High Court judgment.

AUCKLAND COUNCIL SUES ITSELF

In *Auckland Council v Auckland Council* [2018] NZEnvC 022 the Council is in the unusual position of being both the appellant and respondent on an appeal against the refusal of a resource consent. The Council appealed against a decision of its delegated hearing commissioners refusing consent for works associated with protection of the esplanade reserve between Kohu Street and Marine View at Orewa Beach. The proposed works included constructing a walkway, sea wall and associated access structures.

The Court considers there is an important preliminary issue of law to be determined regarding whether it is possible for a Council to appeal its own decision notwithstanding section 120(1)(a) RMA or whether it should be struck out as an abuse of process under section 279(4). The matter is proceeding to a preliminary hearing on this issue. An amicus curiae (or "friend of the court") has been appointed to assist the Court in reaching its determination.

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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