

IN THE MATTER of an appeal under Clause section 19 of the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014

BETWEEN **ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**, an incorporated society having its registered office at Level 1, 90 Ghuznee Street, Wellington
Appellant

AND **CHRISTCHURCH CITY COUNCIL**, a territorial authority under section 2 of the Local Government Act 2002
Respondent

NOTICE OF APPEAL

25 November 2016

To: The Registrar of the High Court at Christchurch

And to: Christchurch City Council

TAKE NOTICE that the Royal Forest and Bird Protection Society of New Zealand Incorporated (the Appellant) will appeal to the High Court against the decisions of the Independent Hearings Panel on Chapter 9.1 of the Christchurch Replacement District Plan upon the grounds that the decisions are wrong in law.

DECISIONS OR PARTS OF DECISIONS APPEALED AGAINST

1. The Appellant appeals against decisions on the Christchurch Replacement District Plan (the plan) by the Independent Hearings Panel (the Panel) appointed pursuant to the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 (the Order in Council).
2. The specific parts of the decisions that are appealed are decisions on Chapter 9.1 Indigenous Biodiversity and Ecosystems.

ERRORS OF LAW

First alleged error of law – Clause 13(4)

3. The decision to approve Chapter 9.1 was ultra vires:
 - (a) The Panel's powers are as set out in the Order (Clause 10);
 - (b) The Panel may not include provisions that are materially different in scope from the provisions of Chapter 9.1 that were notified, except by directing the Council to prepare a new proposal (Clause 13(4));
 - (c) The decisions version is materially different in scope from the Notified Version including:
 - (i) Objective 9.1.2.1, in particular the absence of any reference to significant ecological sites within the potentially significant vegetation types in Appendix 9.1.6.6;

- (ii) Policy 9.1.2.4, in particular the provisions that provide that farm management practises are relevant to assessing significance;
- (iii) The Farm Biodiversity Plan provisions, including Policy 9.2.1.5, Policy 9.1.2.13, Rules RD4-5, Rule 9.1.5.3 and Appendix 9.1.6.7;
- (iv) The indigenous vegetation notice provisions, including Policy 9.1.2.6(a)(iii), Rule 9.1.4.0.1 and the words “and where a Council indigenous vegetation notice has been served” in Rules P1-4,C1, RD3-5, NC1;
- (v) Policy 9.1.2.8, in particular the absence of any reference to significant ecological sites within the potentially significant vegetation types in Appendix 9.1.6.6;

(d) The Panel did not direct Council to prepare a new proposal

Second alleged error of law – Natural justice regarding suggested rejection of Topic 9.1

4. The Panel did not meet the requirements of natural justice when it found that it could not reject Chapter 9.1 and have the Existing Plan remain in place until a plan change was notified in circumstances where the Panel had earlier:
 - (a) advised the parties that it was considering rejecting Chapter 9.1 with the consequence that the Existing Plan would remain in place until a plan change was implemented; and
 - (b) sought the parties views on whether it should reject Chapter 9.1 in those circumstances.

Third alleged error of law – Indigenous vegetation notice provisions void for uncertainty

5. In this notice of appeal the “indigenous vegetation notice provisions” are the provisions that provide that the Council must serve a Council indigenous vegetation notice before the rules regulating indigenous vegetation clearance in the potentially significant vegetation types in Appendix 9.1.6.6 come into force and include Policy 9.1.2.6(a)(iii), Rule 9.1.4.0.1 and the words “and where a Council indigenous vegetation notice has been served” in Rules P1-4,C1, RD3-5 and NC1.

6. The Panel erred in approving indigenous vegetation notice provisions, which trigger the indigenous vegetation rules in relation to potentially significant vegetation types in Appendix 9.1.6.6, only where a Council indigenous vegetation notice under Rule 9.1.4.0.1 is served on the owner or occupier of land. The Panel erred because the provisions are void for uncertainty, as there are circumstances where no person can reasonably ascertain whether the clearance of indigenous vegetation is permitted or not.

Fourth alleged error of law – Natural justice regarding Indigenous vegetation notice provisions

7. The Panel breached natural justice by adding new provisions requiring that the Council serve a Council Indigenous Vegetation Notice under Rule 9.1.4.0.1 before Rules P1-4,C1, RD3-5 and NC1 come into force, without giving parties the opportunity to be heard the parties about those provisions.

Fourth alleged error of law – Indigenous vegetation notice provisions fail to give effect to NZCPS and CRPS

8. The Panel failed to give effect to the New Zealand Coastal Policy Statement, including Policy 11, and the Canterbury Regional Policy Statement, including Policy 9.3.1 by adding indigenous vegetation notice provisions requiring the Council serve a Council Indigenous Vegetation Notice before the rules providing for clearance of vegetation within the potentially significant vegetation types on Appendix 9.1.6.6 apply.

Sixth alleged error of law – Distinction between significant sites on Appendix 9.1.6.1 and significant sites in vegetation types on Appendix 9.1.6.6

9. The Panel failed to give effect to the Canterbury Regional Policy Statement, including Policy 9.3.1, when it distinguished between significant sites on the Schedule of Sites of Ecological Significance listed on Appendix 9.1.6.1 and significant ecological sites within the potentially significant vegetation types in Appendix 9.1.6.6, in particular by:

- (a) providing that the following provisions do not apply to significant ecological sites within the potentially significant vegetation types in Appendix 9.1.6.6:

- (i) Objective 9.1.2.1, which relates to the protection of significant sites; and
 - (ii) Policy 9.1.2.16, which relates to the offsetting significant sites.
- (b) not including a matter of discretion in Rule 9.1.5.2 relating to the protection of protect significant sites within the potentially significant vegetation types in Appendix 9.1.6.6; and
- (c) not requiring in Rule 9.1.5.3, that clearance in accordance with a Farm Biodiversity Management Plans protect significant sites within the potentially significant vegetation types in Appendix 9.1.6.6.

Seventh alleged error of law – Determination of boundaries of significant ecological sites

10. The Panel erred in law when it concluded that farm practices played a part in the determination of the boundary of significant ecological sites by:
- (a) failing to give effect to the Canterbury Regional Policy Statement, including Policy 9.3.1 and Appendix 3;
 - (b) failing to give effect to the NZCPS, including Policy 11; and
 - (c) misapplying section 6(c) of the Resource Management Act 1991.

QUESTIONS OF LAW

First alleged error of law – Clause 13(4)

11. Did the Panel include in Chapter 9.1 provisions that were materially different in scope from the provisions of Chapter 9.1 that were notified?
12. If so, should the Panel instead have directed the Council to prepare a new proposal?
13. If so, was the decision to approve Chapter 9.1 ultra vires?

Second alleged error of law – Natural justice regarding suggested rejection of Topic 9.1

14. Did the Panel breach the requirements of natural justice by finding it could not reject Chapter 9.1 and have the existing plan remain in place until a plan change was notified after the Panel had:

- (a) advised the parties that it was considering rejecting Chapter 9.1 with the consequence that the Existing Plan would remain in place until a plan change was implemented; and
- (b) sought the parties views on how whether or not it should reject Chapter 9.1?

Third alleged error of law – Indigenous vegetation notice provisions void for uncertainty

- 15. In considering the indigenous vegetation notice provisions, are there circumstances where no person can reasonably ascertain whether or not the indigenous vegetation notice provisions are satisfied and the clearance of indigenous vegetation is permitted?
- 16. If so, are the trigger provisions void for uncertainty?

Fourth alleged error of law – Natural justice regarding trigger provisions

- 17. Did natural justice require that the Panel seek the views of the parties on its proposed new provisions requiring that the Council serve a Council Indigenous Vegetation Notice under Rule 9.1.4.0.1 before rules protecting significant ecological sites located within the potentially significant vegetation types in Appendix 9.1.6.6 come into force?

Fifth alleged error of law – Failure to give effect to NZCPS and CRPS

- 18. Does the requirement to serve a Council Indigenous Vegetation Notice fail to protect significant sites within the potentially significant vegetation types on Appendix 9.1.6.6 where a Council Indigenous Vegetation Notice is not served?
- 19. If so, did the Panel fail to give effect to the New Zealand Coastal Policy Statement (NZCPS), including Policy 11, and the Canterbury Regional Policy Statement, including Policy 9.3.1, by adding provisions requiring that the Council serve a Council Indigenous Vegetation Notice before rules protecting significant ecological sites located within the potentially significant vegetation types in Appendix 9.1.6.6 come into force?

Sixth alleged error of law – Distinction between significant sites on Appendix 9.1.6.1 and significant sites in vegetation types on Appendix 9.1.6.6

20. Did the Panel fail to give effect to the Canterbury Regional Policy Statement, including Policy 9.3.1, when it distinguished between significant sites on the Schedule of Sites of Ecological Significance listed on Appendix 9.1.6.1 and significant sites within the potentially significant vegetation types in Appendix 9.1.6.6, in particular by excluding reference to significant ecological sites within the potentially significant vegetation types in Appendix 9.1.6.6 from:

- (a) Objective 9.1.2.1, which relates to the protection of significant sites; and
- (b) Policy 9.1.2.16, which relates to the offsetting significant sites
- (c) Rule 9.1.5.2 relating to the protection of protect significant sites within the potentially significant vegetation types in Appendix 9.1.6.6; and
- (d) Rule 9.1.5.3, relating to clearance in accordance with a Farm Biodiversity Management Plans protect significant sites within the potentially significant vegetation types in Appendix 9.1.6.6.

Seventh alleged error of law – Determination of boundaries of significant ecological sites

21. Did the Panel err in law when it concluded that farm practices played a part in the determination of the boundary of significant ecological sites by:

- (a) failing to give effect to the Canterbury Regional Policy Statement, including Policy 9.3.1 and Appendix 3; and/or
- (b) failing to give effect to the NZCPS, including Policy 11; and/or
- (c) misapplying section 6(c) of the Resource Management Act 1991.

GROUNDS OF APPEAL

First alleged error of law – Failure to apply Clause 13(4) of Order in Council

22. The Panel was constituted by the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 to “hear submissions and make decisions on proposals”.²

23. The Panel’s decision making power is not limited to making changes within the scope of submissions.³ However, if the Panel considers that changes are needed to deal

² Clause 8

³ Clause 13(2)(b)

with matters that are, in a material way, outside the scope of the proposal as notified and to deal with submissions on it, the panel must direct the council to prepare and notify a new proposal.⁴

24. Chapter 9.1 of the plan relates to the protection of indigenous biodiversity. A number of parties, including Forest & Bird, lodged submissions on the Notified Version of Chapter 9.1. The Panel commenced hearing Chapter 9.1 on 18 January 2016. On 26 January 2016 the Panel issued a minute regarding Chapter 9.1 (the 26 January minute) where the Panel expressed a view, in strong terms, that Topic 9.1 was not appropriate.⁶
25. In order to address the Panel's concerns the parties attended two days of mediation. After mediation, the Council made a number of changes to the proposal, which were provided to the panel for consideration on 15 April 2016 (the Revised Version). This contained a number of changes from the Notified Version, including the addition of new provisions relating to farm management plans.
26. On 9 August 2016, the Panel issued a minute (the 9 August minute), which acknowledged that the Revised Version included "*significant revisions*".⁷ The minute goes on to say that the Panel considers that there are "*fundamental aspects of what it [the Revised Version] includes that the Panel considers need to be addressed in order for it to be an appropriate planning framework*".⁸
27. The minute then sets out the Panel views on some of the issues of concern. The minute concludes with directions. These directions provide:

[31] It is directed:

- (a) The Council must, and any party may, by 4 pm 10 August 2016, by memorandum or supplementary closing submissions, inform the Panel of its preference (and related reasons) between the alternative approaches of:*
 - (i) Rejection of all proposals for Issue 9.1, with the effect of leaving the Existing Plan regime in place pending a future plan change, or;*
 - (ii) A Panel direction to the Secretariat to prepare a modification of the Revised Version (as per the approach in this Minute) and to allow*

⁴ Clause 13(4)

⁶ Minute of 26 January 2016 at [12]

⁷ [1]

⁸ Minute of 9 August 2016 at [4]

for a further round of supplementary closing submissions on (in terms of which a further Minute setting a timetable for those submissions will be issued).

28. The Panel sought the parties' views on those two options. Forest & Bird submitted that Option (ii) appeared to be beyond the scope of the Order in Council¹⁰ and that Clause 13(4) provides a specific power and process to deal with situation the Panel faced.¹¹ As the use of that specific power and process was not one of the options the Panel had put forward, Forest & Bird submitted that it favoured Option (i).
29. In a minute dated 12 August 2016, the Panel confirmed Option (ii).
30. On 2 September 2016, the Panel circulated a revised set of provisions (the Panel Draft) to the parties, who were given the opportunity to lodge supplementary closing submissions. The Panel Draft contained a number of changes from the Revised Version including:
 - (a) Objective 9.1.2.1, which relates to the protection of sites of ecological significance would only apply to sites on the schedule of significant sites on Appendix 9.1.6.1 and would not apply to significant sites within potentially significant vegetation types in Appendix 9.1.6.6. Those sites fall within Objectives 9.1.2.2, which relates to the maintenance of biodiversity. This distinction was carried through into the matters for discretion in Rule 9.1.5.2 and 9.1.5.3.
 - (b) The requirement to offset adverse effects on significant sites is compulsory only in relation to sites on the schedule of significant sites in Appendix 9.1.6.1.
 - (c) The rules relating to protection of significant sites in the potentially significant vegetation types on Schedule 9.1.6.6:
 - (i) would only come into force after the owner or occupier received formal notification from the Council;
 - (ii) would expire after six years.

¹⁰ Paragraph 2

¹¹ 9. Clause 13 provides a specific power and process to deal with situation the Panel now faces. The option set out in [32](a)(ii) is not consistent with Clause 13. It would not be the proper use of a provision that allows for incidental powers, to adopt a process which effectively bypasses the express process in Clause 13 of the Order in Council which was intended to deal with this situation.

31. On 20 October 2016, the Panel issued its decision (the Decisions Version), which builds on amendments made through the Revised Version and involves further substantive changes to the Panel Draft, in particular, the inclusion of Rule 9.1.4.0.1, which provides for Council indigenous vegetation notices.
32. The Panel considered whether the Panel Draft was within scope. In doing so, it did not consider the detail of the changes that were made, but rather found:¹²
- (a) Nobody had raised any issues about scope in relation to the Revised Version;
 - (b) Forest & Bird:
 - (i) had concerns about scope, raised in the 11 August memoranda, but these were raised without the benefit of reading the Panel Draft; and
 - (ii) did not raise scope in its 9 September closing submissions; and
 - (c) The City and Regional Councils were substantially supportive of the Panel Draft.
33. Forest & Bird's closing submissions on 9 September 2016 indicated that it retained the concerns with the process it expressed in its 11 August memoranda.¹³ The concerns expressed in the 11 August memoranda included concerns about scope.
34. The Panel decided it had scope to consider the Panel Draft. The Panel did not consider whether the changes it made to the Panel Draft were within scope other than by considering whether parties had raised matters of scope or were supportive of the Panel Draft.
35. The Decisions Version is outside the scope of the Notified Version in a material way. The material changes include:
- (a) the references to farm biodiversity plans, which were absent from the Notified Version;

¹² [95] – [96]

¹³ 4. Forest & Bird also has concerns with the Panel drafting the provisions. Counsel referred to these in details in the memorandum dated 11 August 2016. Forest & Bird retains concerns about the process, particularly in light of Policies 9.1.2.6(iii), Policy 9.1.2.7 and the provisions that provide that the rules or parts of them cease to have effect from 2 November 2022 (for ease I will refer to these as the sunset provisions). The sunset provisions are entirely new.

(b) the indigenous vegetation notice provisions, which were also absent from the Notified Version;

(c) the removal of reference to significant sites within the potentially significant vegetation types in Appendix 9.1.6.6 from Objectives 9.1.2.1 Policy 9.1.2.8,16, Rule 9.1.5.2-3..

36. In these circumstances, the Panel was required to direct the Council to prepare a new proposal under Clause 13(4).

37. Because it did not follow that process, the decision to include those provisions was ultra vires.

Second alleged error of law – Natural justice regarding suggested rejection of Topic 9.1

38. In the 9 August minute the Panel advised it working through its deliberations. The Panel indicated that there was a prospect that it “*would still determine that the most appropriate outcome is that the proposal for Topic 9.1 be rejected.*”¹⁴ The Panel indicated it was considering Options (i) and (ii).¹⁵ The Panel advised that rejection of the proposal for Topic 9.1 would mean that the Existing Plan regime stayed in place.¹⁶ This advice was confirmed in [31](a)(i).

39. Forest & Bird relied on the 9 August minute¹⁷ and the 12 August minute¹⁸ that it was an available option for the Panel to reject Topic 9.1, in which case the Existing Plan regime would remain in place. In particular, Forest & Bird sought Option (i) in its memorandum of 11 August and in its supplementary closing submissions.

40. In its decision, the Panel found that the option of having the Existing Regime remain in place (Option (i)) was not legally possible.¹⁹ Despite the 9 August minute, the Panel found:

¹⁴ [3]

¹⁵ See paragraph 27 above

¹⁶ [5] *The Panel’s view is that, following careful consideration of the evidence, the Higher Order Documents (particularly the CRPS and NZCPS), and related legal submissions, is that the likely most appropriate choice would be either:*

(a) *Continuation of the Existing Plan regime pending a full future plan change, i.e. rejection of the Notified and Revised Versions; or*

(b) *A modification of the Revised Version such that it better reflects the essence of a collaborative approach to be applied for the inclusion of future SES in the CDRP (with a sensible backdrop to ensure the Council can, nevertheless, institute protection where collaboration has been unsuccessful)*

¹⁷ [5] and [31](a)(i)

¹⁸ [2]

¹⁹ [122] – [127]

We do not, however, have jurisdiction to direct that any parts of the Existing Plan continue in force in tandem with the CRDP.²⁰

We find that there is no legal ability to achieve an outcome under the OIC or RMA that would see this aspect of the Existing Plan remaining in force in tandem with the CDRP. It is not an available option under section 32 and we reject it.²¹

41. In doing so the Panel breached natural justice. It is a breach of natural justice for the Panel to:

- (a) represent to the parties that a certain course of action was one of two available and appropriate alternative approaches for proceeding;
- (b) identify certain outcomes associated with those options;
- (c) allow the parties proceed on that basis, including by lodging memoranda and submissions supporting one option; and
- (d) then find that the option supported by the party was never available in the first place.

42. The question of whether the Panel complied with the rules of natural justice is essentially a question of fairness.²²

43. The panel misrepresented the alternative approaches available to it. The option set out in paragraph [31](a)(i) was not an available option. The approach of the Panel was unfair and a breach of natural justice. Forest & Bird was prejudiced by this breach in that it had, as a result of the Panel's misrepresentations, sought an outcome that could never have been achieved. If it had known that Option (i) was unachievable, it would have focussed its efforts on outcomes that were achievable.

Third alleged error of law – Indigenous vegetation notice provisions void for uncertainty

44. The indigenous vegetation notice provisions contain a number of uncertainties. This includes situations where:

- (a) The Council indigenous vegetation notice does not include all the things that are required by Rule 9.1.4.0.1, for example a notice which indicates

²⁰ [124]

²¹ [126]

²² *Hawkes Bay and Eastern Fish and Game Councils v Hawkes Bay Regional Council* [2014] NZHC 3191 at [118]

a potentially significant ecological site but does not identify a vegetation type or location.

(b) The Council indigenous vegetation notice is correct with respect to the type and location of vegetation on the land but fails to refer to other potentially significant vegetation on the land. It is uncertain if the other potentially significant vegetation is covered by the indigenous vegetation rules.

(c) The Council indigenous vegetation notice contains an error and does not refer to correct vegetation type or location. It is uncertain if the notice is void and of no effect or whether the owner or occupier still bound by the rules where there is an error.

(d) The land to which the Council indigenous vegetation notice relates is sold or has a new occupier. It is not clear whether a Council indigenous vegetation notice binds on the owner, occupier, or the land. This uncertainty could arise in a number of situations:

(i) Where the owner is served with a notice but fails to provide this to an occupier (there is uncertainty as to whether the rules apply to the occupier).

(ii) Where an occupier is served with a notice but fails to provide this to an owner (there is uncertainty about whether the rules apply to the owner).

(iii) Where land is sold and the new owner is not provided with a copy of the notice (there is uncertainty as to whether or not the rules apply to the new owner).

45. A rule is void for uncertainty if it is couched in terms so nebulous that the reader is unable to determine whether or not a use may be carried on.²³

46. There are numerous situations which could arise where it is not possible to determine with any certainty whether or not the trigger provisions are triggered and whether indigenous vegetation clearance is permitted or requires resource consent. The rule is therefore void for uncertainty.

²³ *New Plymouth District Council v Baker* W91/04

Fourth alleged error of law – Natural justice regarding Indigenous vegetation notice provisions

47. The indigenous vegetation notice provisions were not in the Notified Version of the Chapter 9.1. The Panel draft included provisions that provided that the rules relating to clearance within the potentially significant vegetation types listed in Appendix 9.1.6.6 would only take effect “*where the Council has provided formal notification to the land owner*”.²⁴
48. These provisions were opposed by Forest & Bird, the Crown and the City Council. The City Council submitted that it would take 3-4 months before the mapping necessary for the formal notification could be completed.
49. The Panel rejected these submissions but amended the indigenous vegetation notice provisions. The Decisions Version includes Rule 9.1.4.0.1 which provides for:
- (a) Council Indigenous Vegetation Notice, with specific requirements as to contents; and
 - (b) a requirement that such a notice be served on the landowner or occupier in accordance with section 352 of the RMA.
50. No party was given the opportunity to comment on these changes. These changes are so significant that, as a matter of fairness, the Panel needed to hear from the parties. If they had done so the issues relating to uncertainty could have been raised.

Fifth alleged error of law – Failure to give effect to NZCPS and CRPS

51. The indigenous vegetation notice provisions mean that there will be a delay, probably 3-4 months, where there will be no protection for significant sites within the potentially significant vegetation types on Appendix 9.1.6.6 where a Council Indigenous Vegetation Notice has not been served.
52. The Plan is required to give effect to the NZCPS and the Canterbury Regional Policy Statement. The absence of protection does not give effect to the:
- (a) NZCPS, including Policy 11, which requires the avoidance of certain effects on indigenous biodiversity in the coastal environment; or

²⁴ See for example, Rule P1-4,C1, RD3-5, NC1

(b) Canterbury Regional Policy Statement, including Policy 9.3.1, by adding provisions requiring that the Council serve a Council Indigenous Vegetation Notice before the rules protecting significant sites within the potentially significant vegetation types in Appendix 9.1.6.6 come into force.

53. The indigenous vegetation notice provisions do not give effect to these provisions as many significant sites, including in the coastal environment, are given no protection until such time as a Council indigenous vegetation notice is served on an owner or occupier of land. There are no transitional provisions to protect the vegetation in significant sites in the intervening period.

Sixth alleged error of law – Distinction between significant sites on Appendix 9.1.6.1 and significant sites in vegetation types on Appendix 9.1.6.6

54. Objective 9.1.2.1 relates to the protection of significant sites on the Schedule of Sites of Ecological Significance listed in Appendix 9.1.6.1. There are a large number of significant sites that do not fall within the scope of Objective 9.1.2.1. These are the significant sites within the potentially significant vegetation types in Appendix 9.1.6.6, which are covered by Objective 9.1.2.2 which provides for the maintenance of indigenous biodiversity.

55. Policy 9.1.2.16, relates to offsetting significant sites.

56. Policy 9.3.1 of the Canterbury Regional Policy Statement provides for the protection of significant sites that meet the criteria for significance in Appendix 3. Policy 9.3.1(3) provides:

Areas identified as significant will be protected to ensure no net loss of indigenous biodiversity or indigenous biodiversity values as a result of land use activities.

57. Objective 9.1.2.1 and Policy 9.1.2.16 do not give effect to the Canterbury RPS in that:

(a) Objective 9.1.2.1 does not provide for the protection of significant ecological sites within the potentially significant vegetation types in Appendix 9.1.6.6; and

- (b) Policy 9.1.2.16 does not require that offsetting occur within significant ecological sites within the potentially significant vegetation types in Appendix 9.1.6.6 such that there is no net loss of biodiversity as a result of land use activities.

Seventh alleged error of law – Determination of boundaries of significant ecological sites

58. The Panel concluded that farming practises were relevant in the determination of the boundaries of a site of ecological significance. The Panel’s approach fails to give effect to Policy 9.3.1 of the Regional Policy Statement and misinterprets section 6(c) of the Act.
59. The Panel concluded that because Appendix 3 of the Regional Policy Statement contained several words of evaluative judgment, including “relatively large” and “important”, the functionary²⁵ may take a different view from the ecologist advising the functionary as to where the boundary of a site of ecological significance should be drawn. This different view could be reached based on practical farming matters.²⁶
60. The Plan must give effect to the Regional Policy Statement, which requires that sites that meet the criteria for significance are protected to ensure no net loss. Appendix 3 of the Regional Policy Statement is the criteria for assessing significance in the region.
61. The criteria in Appendix 3 of the CRPS are ecological in nature. The reference to “relatively large” is in Criteria 2 of Appendix 3, which relates to ecological representativeness, and provides:

Indigenous vegetation or habitat of indigenous fauna that is a relatively large example of its type within the relevant ecological district

62. There is no scope for consideration of farming practises in the application of this criterion (or any other criterion in Appendix 3). Farming practices are not relevant to determining whether a site is a relatively large example of its type within the relevant ecological district.

²⁵ The functionary in this instance is the Council who is making the determination of the boundary of a site of ecological significance.

²⁶ [69]

63. Policy 11 of the NZCPS provides for the avoidance of certain effects on biodiversity in the coastal environment. There is no scope for consideration of farming practises when assessing whether a site contains values that need to be avoided.
64. Section 6(c) of the Resource Management Act 1991 requires that all persons exercising functions and powers under the Act recognise and provide for the protection of significant indigenous vegetation and significant habitat of indigenous fauna. Farming practices are not relevant to whether a site is significant in s 6(c) terms.

RELIEF SOUGHT

65. The Appellant seeks the following relief:
- (a) A declaration that the Panel erred in relation to the questions of law set out in this notice of appeal;
 - (b) That the Panel's decisions that are affected by the errors of law are quashed;
 - (c) That the Council be directed to prepare a new proposal with respect to Topic 9.1;
 - (d) If the Court declines the relief at (c), that the Panel is directed to reconsider its affected decisions in light of the High Court's findings on the matters set out above.
 - (e) The costs of this appeal.

Dated 25 November 2016



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