

## APPENDIX TWELVE

### CASE LAW CONCERNING THE HOLISTIC APPROACH TO ASSESSMENT

#### Conservation Act 1987 and Resource Management Act 1991 purpose.

1. Westpower has on several occasions presented to the Department, the hearing panel and the decision-maker an overview of Westpower's response to the statutory issues relevant to the Waitaha concession application.<sup>1</sup>
2. The Conservation Act 1987 (**Act**), and the concession provisions in particular, are concerned with striking a balance between consideration of positive effects of a proposal and addressing adverse impacts. Importantly however, avoidance of adverse effects is not absolute<sup>2</sup>; as evidenced by the use of phrases "so far as is practicable" and "reasonably and practicably" that are used throughout the relevant provisions.
3. The key point is that the Act is not premised on absolute preservation/protection with no provision for use of conservation land or resources.
4. In accordance with section 5 of the Interpretation Act 1999, it is vital when interpreting provisions that they are considered in light of the purpose of the particular legislation.<sup>3</sup> Section 17W of the Act must therefore be interpreted and applied in light of the Act's key purpose, that is, that Part 3B concession regime can enable suitable developments despite high localised effects.
5. When section 17W of the Act is interpreted and applied in light of the Act's purpose, it is clear the assessment required for determining a proposal's consistency with the relevant conservation planning documents is a holistic one. In assessing a proposal's consistency with the conservation documents an overall balancing exercise must be undertaken to determine whether the Scheme, as a whole, is consistent with the CMS.
6. Similar to the Act, the Resource Management Act 1991 (**RMA**) envisages enabling development only where that development complies with the overarching sustainable management purpose of the RMA.
7. Given this similarity of purpose, Westpower submits there is no rationale for assessing an application under section 17W of the Act in a manner that is different from the assessment required under section 104D(1)(b) of the RMA.

#### Section 104D assessment

##### *Holistic approach*

8. The leading decision on section 104D(1)(b) of the RMA is the Court of Appeal decision in *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (**Dye**).
9. *Dye* provides that an application's consistency with objectives and policies should be assessed holistically. Tipping J in the Court of Appeal in *Dye* found that the application was consistent "... on a fair appraisal of the objectives and policies **read as a whole** ...".<sup>4</sup> (Our emphasis).

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<sup>1</sup> For example, "Initial response on the statutory framework presented to the hearing on 8 December 2016".

<sup>2</sup> A key element of the definition of "preservation" and "protection" is that the scheme of the legislation is not focussed on absolute protection or preservation.

<sup>3</sup> *Commerce Commission v Fonterra Cooperative Group Limited* [2007] NZSC 36 at [22] and [23].

<sup>4</sup> *Dye* at [25].

10. Further Court of Appeal decisions have followed the approach in *Dye*.<sup>5</sup>
11. Numerous Environment Court decisions have also adopted this approach,<sup>6</sup> for example:
  - (a) in *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 the Environment Court held section 104D(1)(b) of the RMA was complied with even though some individual policies were not met. Overall, it found the proposed scheme "to be not inconsistent".<sup>7</sup> ; and
  - (b) in *Clearwater Mussels Ltd v Marlborough District Council* [2016] NZEnvC 21 the Environment Court stated that a "**holistic view** of the objectives and policies of the relevant plan must be taken", when determining s 104D(1)(b).<sup>8</sup> (Our emphasis).

#### *Key objectives and policies*

12. While a holistic assessment under section 104D(1)(b) of the RMA has been accepted, when an application is contrary to key objectives or policies, it is open to the decision-maker to conclude that on balance the gateway test is not met.
13. In *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110 the Court adopted a holistic assessment but found that it would be possible for an application to fail the gateway test under section 104D(1)(b) on a single objective or policy if that objective or policy was of paramount importance.
14. Other cases have followed this approach.<sup>9</sup>
15. There is one High Court decision which has refuted the standard holistic approach discussed above, preferring instead a strict approach. This decision is however an outlier because it has not followed well established authority and has so far not been followed in other decisions.<sup>10</sup>

<sup>5</sup> In *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 the Court of Appeal noted that whether a proposal is "consistent with or contrary to the objectives and policies; in other words, whether it comes within the very limited circumstances contemplated as acceptable, is a matter of assessment on a case-by-case basis..." at [24].

<sup>6</sup> In *Guilty As Ltd v Queenstown Lakes District Council* [2010] NZEnvC 191 the Environment Court interpreted "contrary to the objectives and policies of the plan" in s 104D(1)(b) as "referring to those policies as a whole and imposing a strong test" and that "it will be unusual for a proposal to be regarded as contrary to the objectives and policies taken as a whole simply because it is inconsistent with some of those policies, although implementing and consistent with others". at [74] and [76].

In *Yaldhurst Rural Residents Assoc Inc v Christchurch City Council* [2012] NZEnvC 39 the Environment Court concluded that it did not consider the application to be "contrary to or inconsistent with the objectives and policies of the Plan taken as a whole, although it is inconsistent with a number of provisions". at [73].

In *Wakatu Inc v Tasman District Council* [2012] NZEnvC 75 the Environment Court held that "taking the thrust of the objectives and policies of the plan as a whole" it did not consider that the application was "inconsistent, must less contrary to" the objectives and policies. At At [112]. See also [114].

<sup>7</sup> *Director-General of Conservation (Nelson-Marlborough Conservancy)* at [738], [745].

<sup>8</sup> *Clearwater Mussels Ltd* at [242].

<sup>9</sup> In *Clearwater Mussels Ltd* the Environment Court stated that a "holistic view of the objectives and policies of the relevant plan must be taken", when determining s 104D(1)(b). However, the Court held that s 104D(1)(b) was not met as the proposal was "contrary to one or more key objectives and their supporting policies". at [242].

In *SKP Inc v Auckland Council* [2018] NZEnvC 81 the Environment Court stated that the "evaluation under subsection 1(b) is again, not an approach focused on each relevant provision, but rather something more of a holistic approach". However, the Court went on to say that "As has been observed in many other decisions, it is usually found that there are sets of objectives and policies running either way, and it is only if there is an important set to which the application is contrary, that the consent authority might conclude that this gateway is not passed". at [50].

<sup>10</sup> *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817

16. The Environment Court in *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81<sup>11</sup> and in *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243<sup>12</sup> chose to follow the standard holistic approach set out above rather than this strict approach.
17. Most recently, the approach was applied in *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, where in assessing whether or not the proposed project (EWL) would be contrary to the provisions of the relevant planning document (AUP) the High Court stated that:<sup>13</sup>

*"It follows that in order to reach a conclusion as to whether the proposed EWL is not contrary (in the sense of not being repugnant) to the objectives and policies of the AUP for the purposes of s 104D(1)(b) of the RMA, the relevant plan provisions must all be considered comprehensively and, where possible, appropriately reconciled."*

*Current approach to section 104D(1)(b) of the RMA and application to section 17W of the Act.*

18. Westpower considers it clear from the above RMA decisions that a holistic approach is to be adopted when assessing whether or not a resource consent application is contrary to the objectives and policies in a plan(s) in accordance with section 104D(1)(b) of the RMA.
19. Westpower's position is that this same approach should apply to section 17W of the Act in assessing whether or not a concession application is consistent with the policies in the conservation document, including the CMS.
20. As noted by the Environment Court in *Re P & I Pascoe Ltd* [2014] NZEnvC 255,<sup>14</sup>  
*"If the Legislature had meant to impose a test requiring that a proposal must not be contrary to even one single objective or policy, it could have, and would have, used a phrase in subsection (1)(b) such as ... will not be contrary to any objective or policy..."*
21. Westpower considers that if parliament had intended to impose a test under section 17W of the Act requiring that an application must be consistent with every single one of the conservation planning document policies, it could have, and would have, used similar a phrase in section 17W of the Act.

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<sup>11</sup> *RJ Davidson Family Trust* at [248]. Note that the Court of Appeal in *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [73] referred to Tipping J's "a fair appraisal of the objectives and policies read as a whole" test in *Dye v Auckland Regional Council* in relation to assessing a resource consent in accordance with s 104(1)(b). While this is not relevant to s 104D(1)(b) it is noted so you can see what the Court of Appeal in this case decided.

<sup>12</sup> *Saddle Views Estate Ltd* at [80] – [84].

<sup>13</sup> *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390 at [30]. This case is currently on appeal to the Supreme Court.

<sup>14</sup> *Re P & I Pascoe Ltd* at 123.