BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 253

IN THE MATTER	of an application for declarations under Part 12 of the Resource Management Act 1991 (RMA)
BETWEEN	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED (EDS) (ENV-2016-CHC-000071) Applicant
AND	MACKENZIE DISTRICT COUNCIL Respondent

Court:	Principal Environment Judge LJ Newhook sitting alone under s279 of the Act
Hearing:	at Christchurch on 16 December 2016
Appearances:	R Enright and M Wright for Applicant D Caldwell and A Limmer for MDC L de Latour for Canterbury Regional Council S Gepp for Royal Forest and Bird Protection Society Inc R Gardner for Federated Farmers K Forward for The Wolds Station Limited and Mt Gerald Station K Reid for Mackenzie Irrigation Company, Simons Pass Station and Simons Hill Station
Date of Decision:	21 December 2016
Date of Issue:	21 December 2016

DECISION OF THE ENVIRONMENT COURT ON APPLICATION FOR DECLARATION OR ORDER REGARDING EARLY OPERATIVE EFFECT OF PROPOSED RULES

Introduction

[1] On 17 November 2016 EDS applied for declarations, initially to a different effect than ultimately argued.

[2] As first lodged, the Application sought interpretation of two rules in the

Mackenzie Operative District Plan controlling clearance of short tussock grasslands and indigenous cushion and mat vegetation and associated communities.

[3] Very broadly, the seven declarations then sought were designed to elicit rulings on the validity of an exemption found in each of the two rules alleged to provide a "grandfathering" exemption to property owners to allow vegetation clearance where a site had been oversown and topdressed at least three times in the previous ten years prior to new clearance such that the site was dominated by clovers and/or exotic grasses. The application also raised related concerns about whether the exemptions gave effect to certain objectives and policies in the Canterbury Regional Policy Statement; and duties alleged of the District Council under ss 6(b), (c), 17 and 31 RMA; amongst other things.

[4] Documentation filed in support of the application by way of affidavits and memoranda, pointed to significant clearance of protected indigenous vegetation in the Mackenzie Basin in recent years, allegedly unlawfully, given that the rules setting up the exemptions were expressed to be limited to three years of operative effect before revision by 2007, and had never been revised. Evidence was lodged that the Council has more recently been issuing certificates of compliance for pasture intensification, resulting in vegetation clearance causing significant harm to nationally and internationally significant ecosystems and biodiversity in the Mackenzie Basin, with consequential impacts on outstanding natural landscape values, said to be in breach of the sustainable management principles in the RMA.

[5] The Applicant sought an urgent fixture. On 24 November I convened a telephone conference, dealt with the issue of urgency, and directed a process for service of several groups of people and a timetable for preparation for an urgent hearing in mid-December. At that stage two of the seven declaration applications were put aside as potentially requiring considerable evidence, and another was modified to a similar end.

[6] I shall come back in some detail to the materials filed in support and opposition to the applications, but first must record an important change to what was to be argued in Court, announced by the Applicant and the Respondent three days before the hearing. The change resulted from EDS and the council reaching a significant agreement about how the rate of vegetation clearance or modification might be slowed, which informed the issues that came to be argued in place of the letter of the declarations themselves.

[7] The agreement was to the effect that the District Council would urgently promulgate a Plan Change (to be numbered PC17) before Christmas, putting a 12 month freeze on the purported "permitted activity" exemptions in the two rules under scrutiny.

[8] The Court would therefore be asked to issue one or both of the following:

(a) a Declaration that the intended Plan Change proposal would have immediate legal effect under s 86B (3) RMA upon notification; or

(b) an Order that the Plan Change is to have immediate legal effect upon notification under s 86D(2) RMA.

[9] I was advised by memorandum the day before the hearing that the wording of the intended addition to each rule would be:

> This exemption shall not apply to any vegetation clearance which is undertaken within the period 24 December 2016 (or notification date if not 24 December 2016) to 24 December 2017 (inclusive).

[10] On the day of the hearing I was advised by EDS and the council that they proposed to delete the words *"to any vegetation clearance which is undertaken"* from the proposed new words for each rule.

[11] I was also informed by memorandum that the logic behind the 12 month period was that it would allow parallel processes to supersede operative plan provisions that contain the exemptions. It was submitted on behalf of the two parties that almost all the evidence that had been filed in support of the declaration applications would support the relief now sought; that the relief now sought was narrower than previously; that there should be no "surprises" to parties; and that for the time being there would be no maintenance of the challenge to the validity of certificates of compliance issued prior to the date of the proposed orders.[1]

Service of Other Parties and Subsequent Steps

[12] At the telephone conference previously referred to, after hearing from counsel for the initial parties, I directed that the Court would set up a webpage to assist with service of the application and subsequent documents. I also directed that the

[1] EDS reserved its position on the validity of those certificates of compliance, but such would not be an issue before the Court in the present hearing.

application and supporting documents were to be served on parties to the long extant proceedings before the Environment Court concerning the Mackenzie District Council's Proposed Plan Change 13 (PC13); also two other groups, all station holders in the Mackenzie Basin, and all persons who have received certificates of compliance from the Council for pasture intensification. To assist with identifying potential parties from those two groups, the Council was directed to provide the Court and the Applicant with the names of all such persons and entities and their addresses.

[13] I directed that a hearing occur on 14, 15 and 16 December 2016, while also indicating that three full days should not be needed. I directed that the hearing would address the declarations modified as described in paragraph [5] of this decision above.

[14] It was agreed that all evidence filed by any party would be succinct and contextual. This was agreed achievable in light of the modification to the declarations.

[15] EDS has since confirmed service in the manner directed, by affidavit filed at the hearing. The 21 existing parties to the PC13 proceedings were served, as were the 7 holders of certificates of compliance (in respect of 15 such certificates); and the 33 stations in the Mackenzie Basin.

[16] Canterbury Regional Council and six other parties joined the present proceedings under s 274 RMA. Those parties included three stations, also the Mackenzie Irrigation Company Limited, Federated Farmers of New Zealand, and Royal Forest and Bird Protection Society of New Zealand Incorporated.

The Relevant Statutory Provisions

[17] Section 86B(3) relevantly provides that:

> A rule in a proposed plan has immediate legal effect if the rule –
>
> ...
>
> (b) protects areas of significant indigenous vegetation; or
>
> (c) protects areas of significant habitats of indigenous fauna;
>
> ...

[18] Section 86D RMA relevantly provides as follows:

86D Environment Court may order rule to have legal effect from date other than standard date

(1) In this section, **rule** means a rule –

(a) in a proposed plan or change; and

(b) that is not a rule of a type described in section 86B(3)(a) to (e) or (6).

(2) A local authority may apply before or after the proposed plan is publicly notified under clause 5 of Schedule 1 to the Environment Court for a rule to have legal effect from a date other than the date on which the decision on submissions relating to the rule is made and publicly notified under clause 10(4) of Schedule 1.

(3) If the court grants the application, the order must specify the date from which the rule is to have legal effect, being a date no earlier than the later of –

(a) the date that the proposed plan is publicly notified; and

(b) the date of the court order.

[19] During the hearing I sought submissions about whether the two provisions were mutually exclusive having regard to the provisions of s 86D(1)(b). My reason for this was a tentative thought that the two provisions had been drafted by the law makers somehow assuming that ecological conditions would potentially follow precise cadastral demarcations; something rarely likely to be found in a real world situation. The evidence strongly suggested, and there seemed general agreement amongst the parties, that there was a mosaic of complex patterns of clearance in the Basin, other man-made effects, and residual areas of indigenous flora and fauna, that most certainly did not reflect cadastral boundaries. At my invitation, parties continued to lodge submissions on this issue after the hearing concluded.

[20] The District Council, through submissions of its counsel, expressed no preference as to whether one or other type of decision was made. The Council submitted that the entirety of PC17 could qualify under s 86B(3), whereas a declaration under s86D would not be limited to significant areas or habitats only. The Council nevertheless agreed with EDS that a situation in which the provisions of PC17 have legal effect only in so far as the vegetation or habitat affected is significant, would be undesirable. Such an approach would be unhelpful to plan users, and administratively burdensome.

[21] The Council accordingly made applications under both RMA provisions, while

warning of the apparent difficulty if there were to be a strict interpretation of s 86B(3).

Procedural Fairness

[22] The Environment Court considered procedural fairness in a decision *Re New Plymouth District Council*[2], where it put the following question:

> The obvious question to be asked in terms of process is whether or not there ought to be the opportunity for input into the application by persons other than the Council, and if not why not.

[23] In the present case the EDS application for declarations was served on three wide groups of people, and was also posted on the websites of the Environment Court and the Council.

[24] The Council submitted that the EDS proceedings directly challenge the extent of permission afforded by the exemption to rules 12.1.1.g and 12.1.1.h, which it submitted could, if granted, result in resource consent being required for indigenous vegetation clearance which would otherwise appear to have been permitted under the exemptions. The Council submitted that PC17 proposes substantially the same result.

[25] The Council consequently submitted that any person concerned with the extent of permission afforded by the exemptions:

(a) Could reasonably be expected to have joined the EDS proceedings; and

(b) Would have the opportunity to make submissions in court [assuming they had joined as parties under s 274 RMA].

[26] Importantly, the Council submitted that notice had effectively been given to any party who might be interested in whether PC17 has legal effect upon notification.

[27] It submitted however, that if the Court had residual concerns, these could be overcome by adopting the approach taken in the recent decision of the Environment Court *Re Dunedin City Council*[3], concerning the operation of s 86D(2). In that case, the Court reserved leave for any person affected to apply to set the orders aside, cautioning however that such a step would not be undertaken lightly.

[2] [2010] NZEnvC 280 at paragraph [11].
[3] [2015] NZEnvC 165 at paragraph [76].

[28] Counsel for EDS expanded on the submission concerning the *Dunedin City Council* decision, submitting as well that given that this was a statutory discretion, each case would likely turn on its own facts. I agree. A particular point was made that previous relevant decisions had involved urgent applications to the Court under s 86D, brought and resolved *ex parte*. EDS submitted that in the present case parties could not claim surprise because the declarations raised the same or similar issues to those addressed by the intended plan change, that is the activity status of vegetation clearance under the two rules, and the validity and operation of exemptions.

[29] EDS submitted further that the Council's intention to review the two rules had been a matter of public record since they became operative in 2004, and the short term (12 month) period and forward-looking nature of proposed orders would further alleviate any concern about prejudice.

[30] The Regional Council took a neutral stance in relation to the applications argued before me, and withdrew after the commencement of the hearing. Equally, counsel for the Mackenzie Irrigation Company and two of the stations, offered no argument and gained leave to withdraw.

[31] I heard submissions from Ms Forward for The Wolds Station Limited (but expressly not the other party she appeared for, Mt Gerald Station), and oral submissions from Mr Gardner for Federated Farmers.

[32] Ms Forward's submissions on behalf of the Wolds Station Limited were the only significant opposition to the making of a declaration under s 86B, or an order under s 86D[4]. Her submissions concerned principally the issue of procedural fairness, so I consider them at this point in my decision.

[33] She commenced by offering support for the concept of protection for significant flora and fauna (I here summarise relevant statutory wording) where significance was genuinely found.

[34] Ms Forward submitted that the Court should be satisfied that the relevant area must not be dominated by exotic species and must have been regularly over-sown and top-dressed within the last 10 years. She noted the findings about the need for a conservative approach, in the Environment Court decision in *New Plymouth District*

[4] Mr Gardner's oral submissions I considered regrettably did not focus well on the key issues before me.

Council[5], and submitted that the present application is an occasion in which the Court should exercise its discretion to give notice to the wider public. She perceived differences between the declarations sought by EDS and (admittedly) notified to a significant number of persons and entities, but considered that the matters being argued under s 86B and s 86D were sufficiently different that reliance should not be placed on those notifications earlier undertaken.

[35] I find that the practical effect of granting the present applications or either of them, would be virtually the same as would follow from granting the declarations originally sought by EDS. The question is not whether the declarations originally sought were capable of being granted (that topic was not argued), but whether the parameters of the effect of them if granted, would be less than the parameters of the relief now sought.

Factual background, and analysis of the relief now sought

[36] There was no expert debate about the importance of the flora and fauna under scrutiny; indeed there was but one tentative non-expert qualification (which I shall discuss) to the agreement otherwise reached that the area contained significant indigenous vegetation, and significant habitats of indigenous fauna.

[37] The exemptions in the two relevant Chapter 12 rules apply to land within the Mackenzie Basin. The framework of the Operative District Plan as it relates to that area, is that all clearance is allowed subject to standards, affecting certain types of vegetation in riparian areas, sites of natural significance as mapped, tall tussock and canopy, wetlands, high altitude areas, shrub lands, short tussock grasslands, and indigenous cushion and mat vegetation and associated communities. The restrictions on clearance of shrub lands, short tussock grass lands and indigenous cushion and mat vegetation and associated communities were added following mediation of appeals on the proposed plan rules over a decade ago. It is the standards relating to clearance of short tussock grasslands and indigenous cushion and mat vegetation that are subject to the exemptions, and again is only those provisions that are subject to the note in each rule that [it was to be] "*an interim rule that will be revised three years after the plan becomes operative.*" The parties agreed that the note effectively meant that the exemptions were due for review in 2007.

[38] Rules 12.1.1.g and 12.1.1.h respectively provide as follows:

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[5] Ibid at paragraph [36].

12 VEGETATION CLEARANCE

12.1 Permitted Activities – Vegetation Clearance

12.1.1.g Short Tussock Grasslands

An interim Rule that will be reviewed three years after the Plan becomes operative.

On each of the individual farm properties existing in the Mackenzie Basin Map as at 1 January 2002 in any continuous period of five years there shall be no clearance including cultivation above the following thresholds of short tussock grasslands, consisting of silver or blue (*Poa* species), or *Elymus solandri*, or fescue tussock where tussock exceed 15% canopy cover:

(i) 40 hectares or less – Permitted Activity
(ii) Greater than 40 hectares – Discretionary Activity

Performance Standards for Permitted Activity:

- The landholder shall notify the Mackenzie District Council of the proposed clearance 4 months prior to the clearance being undertaken and shall supply a map of the proposed site.
- The clearance shall be more than 150m from the boundaries of any existing Sites of Natural Significance.

Exemptions

This rule shall not apply to:

- Any removal of declared weed pests; or
- Vegetation clearance for the purpose of track maintenance or fenceline maintenance within existing disturbed formations; or
- Any vegetation clearance including burning which has been granted resource consent for a discretionary or non-complying activity from the Canterbury Regional Council/Environment Canterbury under the Resource Management Act 1991; or
- Any short tussock grassland where the site has been oversown, and topdressed at least three times in the last 10 years prior to new clearance so that the inter-tussock vegetation is dominated by clovers and/or exotic grasses.

12.1.1.h Indigenous Cushion and Mat Vegetation and Associated Communities

An interim Rule that will be revised three years after the Plan becomes operative.

On each of the individual farm properties existing in the Mackenzie Basin as at 1 January 2002 in any continuous period of five years there shall be no clearance including cultivation above the following thresholds of indigenous

cushion, mat (*Raoulia* species) or herb and scabweed vegetation where at least 50% of the vegetation ground cover comprises vascular and non-vascular indigenous species, OR where the number of vascular indigenous species is greater than 20:

(i) 10 hectares or less – Permitted Activity
(ii) Greater than 10 hectares – Discretionary Activity

Performance Standards for Permitted Activity:

- The landholder shall notify the Mackenzie District Council of the proposed clearance 4 months prior to the clearance being undertaken and shall supply a map of the proposed site.
- The clearance shall be more than 150m from the boundaries of any existing Sites of Natural Significance.

Exemptions

This rule shall not apply to:

- Any removal of declared weed pests; or
- Vegetation clearance for the purpose of track maintenance or fencelined maintenance within existing disturbed formations; or
- Any vegetation clearance including burning which has been granted resource consent for a discretionary or non-complying activity from the Canterbury Regional Council/Environment Canterbury under the Resource Management Act 1991; or
- Any indigenous cushion or mat vegetation where the site has been oversown and topdressed at least three times in the last 10 years prior to new clearance so that the site is dominated by clovers and/or exotic grasses.

For the purposes of Rule 12.1.1(g) and 12.1.1(h):

- The intention of the landholder notifying the Mackenzie District Council of permitted clearance activities is to allow interested parties to assess their interest in the proposed area, to discuss the proposal with the landholder and to undertake an inspection where appropriate. All inspections will be the result of voluntary agreement between the parties.
- The Mackenzie District Council will maintain a publicly available register of permitted clearance activities as notified by landowners under these Rules.
- For Discretionary Activities, the Mackenzie District Council will require areas of short tussock and indigenous cushion and mat vegetation to be significant in terms of the primary and secondary criteria for significance in Rural Policy 1B (i.e. the criteria used to identify Sites of Natural

> Significance) if these areas are to be protected from clearance. When assessing 'significance', the Mackenzie District Council shall restrict its assessment solely to the criteria set out in Rural Policy 1B.

[39] It appeared not to be in dispute that station holders are increasingly seeking to carry out pastoral intensification.[6] It was also agreed that if the exemptions are [validly] utilised, they will serve to permit vegetation clearance (subject to interpretation of the criteria about exotic dominance) without any assessment of the significance of the vegetation of habitat affected or how any loss in biodiversity might be offset.

[40] Plan Change 13 previously referred to, involves consideration of a proposed regime to significantly limit the ability of the farmers to operate in this way. Unfortunately proceedings in the Courts concerning PC13 have been slowed by difficulties surrounding a possible s293 package, and resolution may at best be some months away.

[41] At the same time, the District Council is reviewing rules on the subject as part of its wider District Plan Review process. However notification of any new plan is equally some months away.

[42] The District Council and EDS approached the Court in the present proceedings on the basis that action is urgently needed, and that the pending new controls (PC13 and the district plan review) might encourage a "gold rush" of applications for certificates of compliance, and a continuing major rate of clearance of significant indigenous vegetation and fauna in coming months.

[43] The thrust of evidence about the importance of these significant items, came in an affidavit made on behalf of EDS by Dr S Walker, an ecologist specialising in the conservation management of modified indigenous ecosystems of the dry eastern rain shadow zone of the South Island, and Mr N J Head, an ecologist employed by the Department of Conservation, called by the Royal Forest and Bird Protection Society of New Zealand Incorporated.

[44] Dr Walker considered that criteria for determining whether sites support significant indigenous vegetation and / or significant habitats of indigenous fauna, are met in the Basin, and those that have not yet been cultivated or irrigated are likely to meet the criteria in Appendix 3 of the Canterbury Regional Policy Statement 2013; and that even severely ecologically degraded sites usually meet the criteria because they

[6] Indeed the Council received another application for a certificate of compliance only last week.

provide some habitat for threatened plant and animal species. She considered that most of the indigenous vegetation that has been cleared since mid 2014 would have met the significance criteria in both that policy statement and the Mackenzie District Plan Rural Policy 1B, prior to clearance.[7]

[45] Mr Head[8] advised that despite modification of the native plant communities present in the Basin, most ecosystems that have not been intensively developed typically retain significant ecological values when assessed in accordance with the standard ecological significance criteria such as those in the regional policy statement; and that significant areas had been lost.

[46] Evidence from Mr N H Hole, the Planning and Regulations Manager for the District Council, expressed some minor uncertainty about the extent of significant areas alleged to have been cleared prior to now, but very properly conceded that he was not qualified [as an ecologist] to be able to offer a clear opinion about significant vegetation.

[47] Of quite some importance to the present proceedings, Mr Hole had sworn an affidavit on 30 April 2015 in proceedings in the Court of Appeal opposing leave sought by Federated Farmers to appeal against the decision of the High Court concerning PC13. The Court of Appeal affidavit was exhibited to his evidence in the present proceedings, and essentially confirmed his view on the following matters:

(a) The exemptions in the two rules are a "loophole"; and the operative planning framework controlling vegetation clearance and pastoral intensification is outdated and incomplete.[9]

(b) The Council should have reviewed the exemptions in 2007 which it failed to do due to changes in key staff, and subsequently a decision made to await the outcome of PC13.[10]

(c) Reliance by owners on the exemptions has resulted in adverse effects to indigenous vegetation and outstanding landscape values.[11]

(d) Previous Environment Court decisions have identified that regulatory change is required to control these impacts to landscape values, and

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[7] Affidavit of Dr S Walker, paragraphs 9-11.
[8] In his paragraphs 10.1 and 11.2.
[9] Paragraphs 12, 16, 22 and 29 of the Court of Appeal Affidavit.
[10] Paragraphs 18 and 19 of the Court of Appeal Affidavit.
[11] Paragraphs 17, 22, 27 and 28 of the Court of Appeal Affidavit.

Mr Hole expressed himself as feeling compromised by issuing certificates of compliance that go against such findings.[12]

(e) The exemptions enable pasture intensification without assessment of the effects of clearance on indigenous vegetation and the Mackenzie Basin landscape.[13]

(f) Delay in resolution of PC13 renders the outstanding natural landscape vulnerable due to the exemption loopholes in the District Plan.[14]

[48] The affidavits in the present proceedings of Dr Walker, and of Mr G V Taylor, the Chief Executive of EDS, were complimentary and variously informed the Court that since 2009 the pace of change of land use in the Mackenzie Basin had significantly increased, facilitated by vegetation clearance and pastoral intensification enabled by the "loopholes"; that these activities had resulted in widespread degradation or loss of endangered, vulnerable and rare indigenous ecosystems and outstanding landscape values; that a high proportion of areas not identified as sites of natural significance in the District Plan, and that have not yet been cultivated or irrigated, are likely to qualify as significant under the regional policy statement; that most of the indigenous vegetation cleared since June 2014 would have met the RPS significance threshold; and that in the opinion of Mr Taylor, the pace of change had reached a "tipping point", and "extraordinary intervention is necessary" to prevent permanent loss rendering future, more protective provisions redundant.[15]

[49] The statements of expert opinion by Dr Walker and Mr Head, and the expressions of concern by the several witnesses described, was not seriously contradicted in any other evidence, with the minor exception of the careful statement by Mr Hole referred to, in which he was understandably reluctant to say that there had been *ex post facto* irregularity.

Matters for consideration, and the exercise of discretion

[50] I reiterate my findings concerning the factual background which was essentially not disputed.

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[12] Paragraphs 23, 29 and 41 of the Court of Appeal Affidavit.
[13] Paragraphs 25 and 34 of the Court of Appeal Affidavit.
[14] Paragraphs 11 and 37 of the Court of Appeal Affidavit.
[15] Affirmation of G V Taylor at paragraph 12.

[51] I am mindful as well of the provisions of the Canterbury Regional Policy Statement that were conveyed via the affidavit of Dr Walker, setting criteria for, and requiring protection of sites supporting significant indigenous vegetation and significant habitats of indigenous fauna.[16]

[52] EDS supported the making of an order under s 86D, while the Council favoured the making of a declaration under s 86B.

[53] Section 86D(2) enables a local authority to make application on an anticipatory basis for a rule to have legal effect from date of notification or the date of the Court order, whichever is the later.

[54] Section 86B(3) effectively enables the Court to declare a rule as having immediate operative effect in certain circumstances.

[55] Decisions of the Court concerning the provisions in recent years have steadily identified principles for the exercise of the discretion, given that the section itself offers no guide.[17]

[56] Relevant principles were considered in the decision of the Environment Court *Dunedin City Council*[18] where there was an application *ex parte* for restrictive vegetation clearance rules to have immediate effect. It was held that each case would turn on its own facts, but a number of themes could be seen running through the decisions including the nature and effect of the proposed changes by reference to the status quo; the basis upon which it can be said that immediate legal effect is necessary to achieve the sustainable management purpose of the Act; the spatial extent of the areas which are to become subject of the proposed changes and/or the approximate number of properties affected; consultation (if any) that has been undertaken in relation to the proposed changes; whether the application should be limited or publicly notified, including consideration of potential prejudice.

[57] Other principles may in my view include such matters as scarcity of the resources at issue, the largely irreversible effect clearance could have on s6(c)RMA values, together to be considered as being relevant aspects of vulnerability[19].

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[16] For instance in Appendix 3 to the Canterbury Regional Policy Statement 2013 (CRPS).
[17] See for instance *Re Auckland Council* [2011] NZEnvC 388 at paragraph [19].
[18] [2015] NZEnvC 165.
[19] See for instance *Re New Plymouth District Council* [2010] NZEnvC 280 {4} AND [5].

[58] I find that all of those matters are relevant to one degree or another in the present case, and that the questions posed or issues raised are answered strongly in the affirmative in the present case. As to matters of process, the consultation and notification issues have been dealt with in great detail in evidence about the progress of PC13 over time, and the extent of notification carried out pursuant to my direction in the telephone conference on 24 November 2016. I acknowledge that consultation on Proposed PC 17 itself has been limited to only a matter of days, but this must be placed into the context of the other consultations and promulgations over some period of time I have mentioned[20].

[59] I place some importance on the fact that the newly proposed restriction is temporary, limited to a 12 month period; that it creates regulatory certainty for all parties during that period, while PC13 proceedings are hopefully concluded and the District Plan Review promulgated; that the proposed PC17 would give effect to the operative plan intent that rules 12.1.1(g) and (h) were interim and were to have been reviewed many years ago; and that landowners would not be left without any remedy, because they can still apply for consent for vegetation clearance, that is the activity is not prohibited, indeed not even expressed to be non-complying, but instead discretionary.

[60] I find that there is a need to meet the purpose of the Act, and that this is best served by putting the temporary regulatory regime in place urgently, with consent authority oversight by way of a resource consent process. This will afford protection of significant indigenous vegetation and significant habitats of indigenous fauna, as well indirectly as outstanding natural landscape values in the Mackenzie Basin that are contributed to by indigenous flora and fauna values.

[61] I have previously mentioned that it was submitted by the Council and EDS that if the Court was concerned about any aspect of procedural unfairness in the urgent bringing of this application, promulgation of PC17 and processing of the applications, leave could be reserved to third parties, at least in the s 86D situation, to apply to set aside the interim effect of the orders.

[62] Since the hearing, and with leave I reserved, the parties have considered whether the same leave could be granted in respect of the declaration application under s 86B. There is little authority, but they have submitted, with reasons, that it could.

[20] Refer *Re Thames Coromandel District Council [2013] NZEnvC at paragraph [9] for mention of consultation as a relevant factor.*

[63] I have considered the issue with some care. I start by noting that the *Dunedin City Council* case involved an *ex parte* application for orders under s 86D. I find that the situation in the present case is significantly different, given the signals that have been sent by the Council (and substantially confirmed by the Courts in a general sense) for a long time about the need to serve the purpose of the Act, for the council to carry out its duty directed by the CRPS, and to regulate the situation through PC13 and a District Plan review; the fact that the controls are geographically limited to the Mackenzie Basin; the fact that all parties to PC13 have been served with the declaration application as have all landowners in the Basin and all those who have obtained certificates of compliance for vegetation clearance. I also take note of the fact that some parties so served have joined the present proceedings, some in support and some in opposition. I consider that reasonable opportunity has been afforded to the parties in the circumstances, and that there is no need for leave to be granted similar to that offered in the *Dunedin City Council* decision, whether in relation to s 86D or s 86B.

[64] As already noted, the Council favoured the making of a declaration under s 86B. My previous findings lead to the conclusion that avenues under either section are equally open in the present proceedings.

[65] I agree with the submissions for the Council that the Court has a wide discretion which must be exercised on a principled basis and having regard to the purpose of the Act. Further, I agree that it is almost trite that the pending finalisation of PC13 and promulgation of the District Plan Review could lead beforehand to a gold rush that would undermine what might otherwise be achieved through those instruments if confirmed. Indeed the evidence is clear that there is already a gold rush in progress.

[66] Finally, I turn to a concern touched on earlier in this decision, that s 86D(1)(b) directs that an order shall not be made under the section if the proposed rule is of a type described in s 86B(3)(a)-(e). The rule in fact comes within the terms of subs (3)(b) and (c). I have also made a finding about the complexity of the mosaic pattern of vegetation in the Basin, such that it would not be practical to follow cadastral boundaries and make a declaration in relation to some places, and an order in relation to others.

[67] I asked the parties to turn their minds to this issue, and they proposed that the Court should make :

(a) A declaration that the rules in PC17 to the Mackenzie District Plan

have immediate legal effect upon notification pursuant to s86B(3) RMA, applying to the extent that rule 12.1.1.g and rule 12.1.1.h protect areas of significant vegetation or protect areas of significant habitats of indigenous fauna; and

(b) An order that the rules in PC17 have immediate legal effect upon notification under s 86D(2) RMA , applying to the extent that rule 12.1.1.g and rule 12.1.1.h control vegetation clearance of areas of indigenous vegetation or habitats of indigenous fauna that are not significant under s 6(c) RMA.

[68] I consider that the proposal is a practical and workable solution to the awkward limitation found in s 86D(1)(b). It will overcome the need for argument as to whether any particular piece of land as if one type or another. It should also be remembered that the two rules are expressly confined in their terms to land mapped in the Operative District Plan as being in the Mackenzie Basin as at 1 January 2002, thereby strictly confining the geographical extent of the new temporary restriction.

[69] I exercise the discretion of the Court and make the declaration and the order in the carefully refined form set out in paragraph [67] above.

[70] Costs are reserved.

DATED at AUCKLAND this 21st day of December 2016

LJ Newhook
Principal Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND