

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2016-404-002261
[2017] NZHC 356**

IN THE MATTER of the Local Government (Auckland
Transitional Provisions) Act 2010 and the
Resource Management Act 1991

AND
IN THE MATTER of an appeal under section 158 of the
Local Government (Auckland
Transitional) Provisions Act

BETWEEN INDEPENDENT MĀORI STATUTORY
BOARD
Appellant

AND AUCKLAND COUNCIL
Respondent

AND AUCKLAND UTILITY OPERATORS
GROUP INCORPORATED

CONTD

Hearing: 20-21 February 2017

Appearances: T Hovell and N Buxeda for Appellant
J Caldwell and K Wilson for Respondent
M Doesburg for Auckland Utility Operators Group Inc
P McMillan for Democracy Action Inc
R Gardner for Federated Farmers of New Zealand Inc
C Kirman and A Devine for Housing New Zealand Corporation
No appearances for trustees of Self Family Trust
Dr K Palmer for himself

Judgment: 7 March 2017

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 7 March 2017 at 3.00pm
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:.....

Cont

DEMOCRACY ACTION
INCORPORATED
FEDERATED FARMERS OF NEW
ZEALAND INCORPORATED
HOUSING NEW ZEALAND
CORPORATION
TRUSTEES OF SELF FAMILY TRUST
KENNETH PALMER
S 301 parties

Solicitors/counsel:
K Anderson, Auckland Council/Buddle Findlay, Auckland
Russell McVeagh, Auckland
Franks Ogilvie, Wellington

Introduction

[1] The appellant, the Independent Māori Statutory Board (the “IMSB”), appeals aspects of a decision made by the respondent, Auckland Council (the “Council”), on the proposed Auckland Unitary Plan.¹ The Council decided to accept a number of recommendations made to it by the Auckland Unitary Plan Independent Hearings Panel (the “IHP”). Inter alia, it deleted from the proposed Unitary Plan as notified:

- (a) some of the provisions relating to sites of value for mana whenua (“SVMWs”) proposed to be incorporated in the regional policy statement section of the plan;
- (b) a SVMW overlay² proposed to be included in the district plan section;
- (c) an accompanying schedule of SVMWs;
- (d) associated rules and provisions proposed to be included in the district plan section; and
- (e) various provisions for cultural landscapes proposed to be included in the regional policy statement section.

The IMSB challenges these various deletions.

[2] The appeal by the IMSB is brought pursuant to s 158 of the Local Government (Auckland Transitional Provisions) Act 2010.

¹ A plan for Auckland that meets the requirements of a regional policy statement, a regional plan (including a regional coastal plan) and a district plan.

² It is recorded in the proposed Unitary Plan – A1.6.2 – that overlays manage the protection, maintenance or enhancement of particular values associated with an area or resource. They can, and do, apply across zones and precincts. Overlays can manage specific planning issues, e.g. addressing reverse-sensitivity effects between different land uses. They generally apply more restrictive rules than the Auckland-wide zone or precinct provisions that apply to a site, but in some cases they can be more enabling. Overlay rules apply to all activities on the part of the site to which the overlay applies, unless the overlay rules expressly state otherwise. There is a separate chapter in the plan – chapter D – dealing with overlay provisions. Overlays are identified on the relevant planning maps.

[3] Section 158(5) of the Act provides that, except as otherwise provided in the section, ss 299(2) and 300-307 of the Resource Management Act 1991 apply, with all necessary modifications, to appeals brought under s 158. Inter alia, s 301 of the Resource Management Act applies. It extends a right to appear and be heard on an appeal to any party to the proceedings, or to any person who appeared before the IHP when it heard submissions on the proposed Unitary Plan. Auckland Utility Operators Group Incorporated, Democracy Action Incorporated, Federated Farmers of New Zealand Incorporated, Housing New Zealand Corporation, the trustees of the Self Family Trust and Dr K Palmer all appeared before the IHP and all gave notice under s 301 that they wished to appear and be heard.

[4] When the appeal was called, there was no appearance for the trustees of the Self Family Trust.

[5] Mr Doesburg, for Auckland Utility Operators Group, sought leave to withdraw. His client was concerned with what are known as the cultural impact assessment provisions which were contained in the proposed Unitary Plan. Those provisions have been deleted but the IMSB does not challenge this. Mr Hovell, for the IMSB, expressly accepted that the cultural impact assessment provisions cannot be resurrected as part of this appeal. On this basis Mr Doesburg was content to abide the Court's decision. He did not expressly adopt the submissions of any other party; nor did he vacate his client's appearance. I granted him leave to withdraw.

[6] The IMSB and the Council filed a joint statement of facts in accordance with directions made by the Court. This statement of facts was accepted by Auckland Utility Operators Group and Federated Farmers. Other parties had not, prior to the hearing, confirmed their final position on the document, although Democracy Action had filed a statement in response to aspects of the joint statement. I asked all counsel and Dr Palmer whether they accepted the statement. All accepted the statement of facts, although Ms McMillan, appearing for Democracy Action, took issue with some of the inferences that can be drawn from the factual detail recorded in the statement.

Background

Independent Māori Statutory Board

[7] The IMSB is constituted pursuant to the provisions of the Local Government (Auckland Council) Act 2009.³ It is an independent board comprising nine members. There are seven mana whenua group representatives and two mataawaka representatives.⁴

[8] The IMSB has both general and specific functions. Inter alia, it is required to develop a schedule of issues of significance to mana whenua groups and mataawaka of Tāmaki Makaurau, to advise the Council on matters affecting mana whenua groups and mataawaka and to work with the Council on the design and execution of documents and processes to implement the Council’s statutory responsibilities towards mana whenua groups and mataawaka.⁵

The Council/Notification of the proposed Unitary Plan

[9] The Council was established as a territorial authority on 1 November 2010, following the reorganisation of local government in the Auckland region.⁶ One of the planning priorities for the Council was the development of an Auckland Unitary Plan incorporating a regional policy statement, a regional plan (including a regional coastal plan) and a district plan for the new “super city”.

[10] In preparing a draft plan, the Council consulted with mana whenua and the IMSB in accordance with its statutory obligations.

[11] In September 2012, a working draft of the proposed plan was released to iwi authorities. The working draft included regional provisions relating to mana whenua cultural heritage and in relation to unscheduled sites and places. It proposed the use of what was referred to as an “alert layer” to protect these sites and places. It also included provisions related to Māori cultural landscapes and information management protocols.

³ Local Government (Auckland Council) Act 2009, s 81.

⁴ Schedule 2, cl 1.

⁵ Section 84(1)(b), (d) and (e).

⁶ Section 6 and 2(1).

[12] The draft Unitary Plan was released to the public in March 2013. It proposed two layers of protection for sites and places of Māori cultural heritage, namely:

- (a) a sites and places of significance to mana whenua layer. It set out draft objectives, policies and rules for these sites and places. There was an accompanying schedule detailing 61 sites and places of significance; and
- (b) a Māori cultural heritage alert layer which would extend to approximately 9,000 sites. These sites had been taken from a database known as the Cultural Heritage Inventory maintained by the Council. This database in turn had been taken from a list of sites considered to be appropriate for further investigation by the New Zealand Archaeological Association.

[13] Both mana whenua groups and the public provided feedback on this draft version of the proposed Unitary Plan. Following the feedback, in September 2013, the Council's Auckland Plan Committee resolved to amend the draft mana whenua cultural heritage provisions to include an overlay and specific provisions for sites and places of Māori origin where the location of the sites/places had been confirmed.

[14] The Council's proposed Unitary Plan was notified on 30 September 2013. The regional policy statement section contained proposed policies intended to recognise, enhance and protect mana whenua values associated with mana whenua cultural landscapes. It dealt separately with other sites and places considered to be part of mana whenua's cultural heritage. It distinguished between sites and places of significance to mana whenua and SVMWs. It proposed:

- (a) objectives, policies and rules for sites and places of significance, and an accompanying schedule listing 61 sites of significance; and
- (b) objectives, policies and rules for SVMWs by way of an overlay showing the location of the sites of value to mana whenua, and with an accompanying schedule detailing some 3,600 such sites.

The overlay rules proposed that resource consent should be required, as a restricted discretionary activity, for earthworks on or within 50 metres of a scheduled site of value (with some exceptions). A cultural impact assessment would be required as part of any resource consent application. Planning maps formed part of the proposed Unitary Plan as notified. There was, however, an error in the planning maps. SVMWs were shown on the maps by purple circles. It was intended that each circle should have a radius of 50 metres. In fact, on the planning maps as notified, they had a radius of 100 metres.

[15] Submissions were able to be made on this notified version of the proposed Unitary Plan until 28 February 2014. The Council notified a summary of decisions requested on 11 June 2014. The period for making further submissions in response to primary submissions closed on 22 July 2014.

[16] The IMSB and various mana whenua groups lodged submissions generally supporting the SVMW overlay, the accompanying provisions and the cultural landscape provisions. Submissions were also lodged by various members of the public, by businesses and by other groups opposing the SVMW overlay, the related cultural impact assessment provisions, and the cultural landscape provisions. Each of the various s 301 parties lodged submissions and/or further submissions in relation to the SVMW provisions.

The IHP/the IHP hearings and further Council reports

[17] From the outset there was concern that the proposed Unitary Plan should be finalised in a timely fashion. Representations were made to the government to streamline the process. It was sympathetic and it introduced legislation to this end.⁷ Inter alia, the legislation provided for the appointment of a specialist panel (the IHP) by the Ministers for the Environment and of Conservation. It was to be given the powers of a commission of inquiry under the Commissions of Inquiry Act 1908 and it was required to conduct hearings into, and make recommendations to the Council

⁷ Local Government (Auckland Transitional Provisions) Amendment Act 2013, s 6.

on, the proposed Unitary Plan.⁸ The hearing and recommendations process was subject to a strict timetable, with limited provision for extension.

[18] The IHP was duly appointed and, in the exercise of its powers, it scheduled the required hearings by reference to topics based on the way the Council had grouped the submissions lodged. There were approximately 80 topics for hearing. The IMSB and the s 301 parties' submissions and further submissions were grouped either into Topic 09 – mana whenua – or Topic 037 – mana whenua sites.

[19] The hearing on Topic 09 was held between 19 and 21 November 2014.

[20] In December 2014, two processes were commenced in an endeavour to better assess which sites and places were of value to mana whenua. First, a desktop data audit was initiated by the Council to check the background information held by it in relation to each site. However, the individual sites were not visited. Secondly, a screening process was commenced by mana whenua representatives to determine what specific mana whenua values might be able to be attributed to each site. They sought to apply the various matters which were noted in the proposed regional policy statement.

[21] On 22 May 2015, the Council lodged its evidence with the IHP in advance of the hearing into Topic 37. The evidence advised that 2,213 SVMWs were considered to meet the following criteria:

- (a) the site was of Māori origin;
- (b) the site had mana whenua values ascribed to it in accordance with the matters noted in the proposed regional policy statement; and
- (c) the location of the site had been confirmed.

It was recommended that these sites should be retained in the schedule of SVMWs. The evidence also recommended that 1,373 sites should be removed from the

⁸ Local Government (Auckland Transitional Provisions) Act 2010, ss 123, 136 and 164.

schedule,⁹ either because relevant values had not been assigned to the sites by mana whenua, the sites were not associated with Māori, the sites were already scheduled, their location had not been confirmed or it was not known whether they were natural or archaeological sites.

[22] The hearing on Topic 037 was held between 2 and 9 June 2015.

[23] In its opening submissions to the IHP, Council representatives advised that the Council's intention was to initiate the withdrawal process for a number of the scheduled sites as a consequence of the data audit and the screening process.

[24] On 3 July 2015, the Council provided a post-hearing memorandum to the IHP. The report updated the IHP on the results of the data audit and the screening processes. Further, on 24 July 2015 the Council filed its closing legal submission on Topic 37 with the IHP. The Council confirmed that its staff had recommended that 1,387 sites should be deleted from the SVMW schedule and that it intended to initiate the withdrawal process for those sites.

[25] On 12 November 2015, the Auckland Development Committee of the Council met to consider whether to withdraw the 1,373 sites from the schedule of SVMWs contained in the proposed Unitary Plan. Following discussion, the Committee passed an amended resolution as follows:

... to remove Sites and Places of value overlay on private land until such a time that all Sites and Places have been accurately identified and mapped.

[the "withdrawal resolution"].

[26] Public notice was given on 16 March 2016 advising that the Council had withdrawn 593 sites from the SVMW overlay.

[27] As at 16 March 2016, 3,007 sites remained on the SVMW schedule. There were 2,213 sites which were considered to be of Māori origin, to have cultural values for mana whenua and the locations of which had been confirmed. Notwithstanding the withdrawal resolution, these sites were on both public and private land. There

⁹ Local Government (Auckland Transitional Provisions) Act 2010 s 124; Resource Management Act 1991, sch 1, cl 8D.

were additional sites where either the location of the site had not been confirmed, the site had not been screened for appropriate values by mana whenua, it was not known whether the site was a natural or an archaeological site, the site was non-Māori or the site duplicated another scheduled site.

The IHP's recommendations to the Council

Overview of Recommendations Report

[28] The IHP's Overview Report to the Council enjoined that the reasons for its recommendations and the proposed plan as recommended should be read as an integrated whole.¹⁰ Relevantly it adopted an "across the board" approach to the various schedules in the plan. It stated as follows:¹¹

The policies ... relating to schedules have generally been recast to require identification and evaluation in terms of specified factors before including items in schedules. Generalised provisions suggesting that unidentified items should be protected in the same way as identified items have been deleted as being uncertain and lacking in evidential foundation ...

[29] The IHP summarised its key recommendations. Item 24 read as follows:¹²

24. Delete the Schedule of Sites of Value to Mana Whenua until the evidential basis for it has been assembled.

...

It then set out a summary of the significant changes it was recommending. In relation to SVMWs, it stated as follows:¹³

vi. **The schedule of sites of value to Mana Whenua** is recommended to be deleted. On the evidence before the Panel, the restriction of activities based solely on the archaeological database used to create this schedule is inappropriate. The Panel notes that at the end of the hearing session, in response to submitters' complaints that the schedule was not properly based on Mana Whenua values, the Council withdrew the items in the schedule that were located on privately-owned land. The Panel does not consider that ownership is an appropriate basis on which to apply a control such as this and recommends the withdrawal of all the items listed in the schedule. Notwithstanding that, the Panel does consider that a two-tier approach to the

¹⁰ IHP's report to Auckland Council – Overview of Recommendations – Foreword – p 5, and para 2.1.2, p 18.

¹¹ Para 8.2.2 – Schedules - p 74.

¹² Headlines, p 8.

¹³ Executive Summary, p 13.

protection of sites that are special to Mana Whenua, similar to the two-tier approach to historic heritage places, is appropriate and therefore recommends that the policy framework at the regional policy statement level for the identification, evaluation and scheduling of sites of value to Mana Whenua should remain so that once the further investigation and assessment that is presently being undertaken is completed, a revised schedule can be proposed as a plan change.

...

[30] A little later in its report, the IHP discussed its recommendations in relation to the proposed regional policy statement. In relation to Topic 009 – mana whenua – it stated as follows:¹⁴

B6 Mana Whenua (Topic 009) – No significant changes are proposed to these policies. However, other recommendations affecting Unitary Plan provisions relating to Mana Whenua should be noted. The Panel recommends retaining text which refers to Mana Whenua rather than tangata whenua as this aligns with the approach in the Local Government (Auckland Council) Act 2009. The Panel recommends retention of express provisions addressing resource management issues relating to Māori and both their ancestral and their on-going relationships with natural and physical resources in accordance with sections 6(e), 7(a) and 8 (as well as other enabling provisions) of the Resource Management Act 1991. Some distinctions, such as provisions for cultural impact assessments and consideration of cultural landscapes, are deleted as being unnecessary given that the former is already part of the required content of assessments of environmental effects (see clause 7(1)(a) of Schedule 4 to the Resource Management Act 1991) and the latter simply reflects that landscape values (and choices about which of those are important) are all inherently cultural in origin. The Schedule of sites and places of value to Mana Whenua has been deleted: while the Panel supports a two-tier scheduling regime as for historic heritage sites, there was no sufficient basis for the items on this schedule which was simply a copy of the New Zealand Archaeological Association list of sites for further investigation.

...

[31] The IHP said the following about the SVMW overlay:¹⁵

The Sites and Places of Value to Mana Whenua Overlay (Topic 037) is linked to the Sites and Places of Significance to Mana Whenua Overlay, both based on policies set out in the regional policy statement. The approximately 3600 sites and places of value to Mana Whenua were identified using the New Zealand Archaeological Association database of archaeological sites, rather than by a comprehensive identification of Mana Whenua values or the degree of significance of those values.

¹⁴ Para 8.2.2 – Chapter B: Regional Policy Statement, p 73.

¹⁵ Para 8.3.6 – Sites of Value to Mana Whenua, p 79.

The Council's basis for this approach was stated to be 'precautionary'. There were a large number of submissions opposing this overlay on the basis that insufficient investigation had been undertaken. In evidence at the hearings the Council advised that a programme of work had been established to review the scheduled items and assess them in terms of their values to Mana Whenua.

The Panel supports the approach of having two distinct layers of protection for particular sites with which Mana Whenua have ancestral relationships. This is similar to other natural and physical resources for which the Unitary Plan provides two layers of protection.

However, the Panel does not consider there to be a sufficient evidential basis for the schedule at this stage and therefore recommends the deletion of this overlay. The re-application of the overlay can be considered once the values of Mana Whenua and the sites that are important to them in relation to these values have been identified following appropriate consultation and research. This may include a review of the New Zealand Archaeological Association database (and other identified sites).

The Panel notes that, in its reply on this topic, the Council withdrew many of the sites that had been scheduled as being of value to Mana Whenua where these were located on privately owned land. The Panel considered whether such a half-way position was an appropriate method, but concluded that the basis of the effects is the same whoever owns the land, so it would be more appropriate to ensure that all sites of value are properly identified, assessed and scheduled.

Recommendation Report on Topic 009 – Mana Whenua

[32] The IHP's Recommendation Report on Topic 009 provided an overview of cultural heritage matters as follows:¹⁶

The policy approach to Mana Whenua cultural heritage addresses the multiple levels of mana whenua cultural heritage. Sites and places where a value of significance has been identified are protected through the ... Sites and Places of Significance to Mana Whenua Overlay. Assessments of effects on the environment which pay particular attention to potential cultural effects based on history and tikanga are expected for areas subject to structure planning to identify additional sites that warrant protection. Similar assessments are required for resource consent applications where Mana Whenua values are affected.

For reasons such as limited investment, cultural sensitivities and mismanagement of information in the past, the [IHP] acknowledges that very little Mana Whenua cultural heritage has been scheduled, despite the large number of Mana Whenua groups with strong associations to Auckland. The Council has a statutory responsibility to protect Mana Whenua cultural heritage from inappropriate subdivision, use and development. This will involve a collaborative approach with Mana Whenua, working in accordance with tikanga to identify, assess, protect and manage Mana Whenua cultural

¹⁶ IHP report to Auckland Council, Hearing Topic 009, Mana Whenua, July 2016, pp 6-7.

heritage, including in the context for individual sites and places which are the footprint/tapu wae of Mana Whenua.

The knowledge base of information about Mana Whenua cultural heritage is continually developing and tools that provide a form of protection and inform subdivision, use and development, while respecting Mana Whenua values, are increasingly valuable. An improved knowledge base helps reduce the risk of damage, enables development that properly reflects the values associated with the context of an area, informs landowners and applicants of the characteristics of their site, and helps to avoid major time and cost implications to applicants when development is halted by accidental discovery of protected items.

[33] Section 6 of the Recommendation Report on Topic 009 set out the key findings and reasoning for the IHP's recommendations on the regional policy statement objectives, policies and methods for SVMWs as follows:¹⁷

6.1 Statement of Issue

Whether the provisions relating to sites and places of value to Mana Whenua on public land should be retained or deleted. It is noted that the Council formally withdrew from the Plan those sites of value identified on privately-owned land.

6.2 Panel recommendations and reasons

The provisions relating to sites and places of value to Mana Whenua (and the related requirement to obtain a cultural impact assessment below) was probably the issue of most concern to many submitters. This was because a significant number of sites (in the order of 3600) were:

- i. not selected by Mana Whenua nor had they been evaluated against any criteria;
- ii. it had not determined or verified whether the sites of value actually existed and what values were sought to be protected, and that the majority of the sites had not had site visits undertaken;
- ...
- v. the sites of value had been notified incorrectly (covering a much larger area than was approved for notification).
- ...

[34] The IHP then summarised some of the evidence it had heard from a number of submitters and their witnesses. Regarding the Council's position, it noted as follows:¹⁸

¹⁷ IHP report to Auckland Council, Hearing Topic 009, Mana Whenua, above n 16, para 6 – Sites and Places of Value to Mana Whenua – p 12.

The Council in its closing statement (paragraph 11.1) clarified its current workstreams regarding cultural heritage and noted:

The Council is currently undertaking a desktop review of the 3,600 sites currently included in the Sites and Places of Value overlay, to determine whether there is enough information for these sites to remain in this overlay. We have been advised that this process is expected to be complete by early 2015; and

On 26 September 2014, the Council initiated a workstream which will implement B5.4, Policies 1-3 through a Māori Cultural Heritage project. The project will develop a methodology for identifying, assessing and mapping Māori cultural heritage with a view to, amongst other options, introducing Sites and Places of Value through a plan change.

The Council indicated that prior to the hearing for Mana Whenua sites (Topic 037) in June 2015 it intended to have refined the content of the sites and places of value overlay and to have re-mapped the overlay to improve clarity and accuracy, including the Maori cultural heritage overlays and the cultural impact assessment provisions.

Notwithstanding the above, the Auckland Development Committee, at its 12 November 2015 meeting passed Resolution number AUC/2015/205, which is:

That the Auckland Development Committee

- a) agree to remove Sites and Places of value overlay on private land until such a time that all Sites and Places have been accurately identified and mapped.

Accordingly these sites have been withdrawn from the notified Plan. The remaining sites are those on publicly-owned land.

The Panel has recommended the deletion of those sites of value identified on publicly-owned land. This means that all of those sites of value are to be removed from the Unitary Plan. The reasons for removing those sites of value identified on publicly-owned land are the same as those set out above. That is, those sites have not been appropriately identified and evaluated to determine if they are indeed a site of value.

The Panel's approach to protecting places and areas has been set out in the Panel's Report to Auckland Council – Overview of recommendations July 2016 and in the Report to Auckland Council – Hearing topic 010 Historic heritage July 2016. In that report it is stated:

In the Panel's view, the method of protecting historic heritage by scheduling those places identified as having considerable and outstanding historic heritage value is well established. The Panel supports this approach because it provides certainty to landowners and is likely to achieve the outcomes sought by the Plan. The Panel considers that significant historic heritage places should be identified, evaluated and included in the schedule following the process set out in the regional policy statement because this promotes effective protection.

For these reasons, the Panel does not support the inclusion of plan provisions relating to unscheduled historic heritage. If the Council wishes to protect historic heritage, it should follow the identification and scheduling process provided for in the regional policy statement, using the plan change procedure.

Overall, the Panel does not support the inclusion of objectives and policies addressing ‘unscheduled historic heritage’ in the regional policy statement (nor does it support the many references to ‘unscheduled significant historic heritage’ that occur throughout the Plan, and this is addressed in more detail in the Panel’s report on hearing topic 031 Historic heritage as referenced above). Accordingly, provisions relating to unidentified historic heritage places have been removed from the regional policy statement (pages 5-6).

The above paragraphs apply equally to the Sites and Places of Value to Mana Whenua Overlay. While those sites of value were identified in the notified Plan, no criteria had been applied to be able to evaluate them or verify that the sites actually existed and what their values were. If the Council wishes to pursue a schedule of sites of value with a supporting policy framework, this would need to [be] by a plan change using the Schedule 1 process under the Resource Management Act 1991, with the required section 32 analysis.

Overall, the Council’s section 32 evaluation for the Sites and Places of Value to Mana Whenua Overlay does not provide an adequate basis for the introduction of that overlay.

This matter is also addressed in the panel’s report on Topic 037 – Mana Whenua Sites as referenced above. However, given the deletion of [a] policy approach to the sites of value in the regional policy statement, the district plan provisions also need to be deleted. Accordingly there [are] no objectives, policies, rules or schedule for any of the sites of value.

[35] Section 8 of the IHP’s Recommendation Report on Topic 009 set out the key findings and reasoning for the IHP’s recommendations on the regional policy statement objectives, policies and methods for cultural landscapes as follows:¹⁹

8.1 Statement of issue

Whether specific reference should be retained for Cultural Landscapes as a method.

8.2. Panel recommendations and reasons

The notified regional policy statement contained policies relating to cultural landscapes. The Council proposed to amend some of these policies through the hearings process. No cultural landscapes were mapped in the notified Plan or proposed to be mapped by the Council during the hearing process.

The Panel questioned a number of submitters and their witnesses as to how Māori cultural landscapes might in future be recognised or protected in the

¹⁹ IHP report to Auckland Council, Hearing Topic 009, Mana Whenua, above n 16, para 8 – Cultural Landscapes – pp 16-17.

Plan rules. Some submitters are clearly concerned that a Māori cultural landscape may give rise to a further layer of physical protection over broad areas of the city, to be implemented by restrictive activity status and policy direction to 'avoid' certain effects.

The Council confirmed in its closing statement that the reference to Māori cultural landscapes was a deliberate decision. The Council considered use of the term 'Māori cultural landscapes' to be appropriate because this concept was gaining increasing recognition and use in New Zealand's planning documents. Mr Murdoch, Council's expert heritage consultant, discussed in evidence some specific examples, including the *Te Aranga Cultural Landscapes Strategy* which was developed by the Ministry for the Environment in conjunction with Te Puni Kokiri and which recognises the concept of a Māori cultural landscape. He also confirmed that through his involvement in the negotiation of Treaty settlement claims, he had seen increasing acknowledgement of Māori cultural landscapes by Government departments.

However, the Council at 5.2 and 5.3 of its closing statement stated:

At this stage, it is too early to speculate how such landscape protection might be implemented, which is why the Council has signalled the ongoing nature of this work in Chapter B5. In particular, B5.4, Policy 5 provides that Māori cultural landscapes will be recognised, enhanced and protected *by developing an agreed methodology to identify, record, assess and map the values associated with these landscapes, and determine the most appropriate mechanisms* to recognise the values associated with them (emphasis added). The methods in B5.4 also identify *"ongoing work to identify and map the Mana Whenua values associated with cultural landscapes"*.

Given the work to be done, it would be premature for the Council to signal how Māori cultural landscapes might be recognised or protected in the PAUP rules.

There are no cultural landscapes mapped nor is there a clear view of what they are, where they may apply and what type of management response would be appropriate or required if there were mapped cultural landscapes (i.e. objectives, policies and rules). The Panel agrees with the Council that it is premature to signal how Māori cultural landscapes might be recognised or protected in the Proposed Auckland Unitary Plan rules.

The regional policy statement sets out the issues of significance to Māori and to iwi authorities in the region, and this includes:

protecting Mana Whenua culture, landscapes and historic heritage.

Also the policies in B6.5 Protection of Mana Whenua cultural heritage, include that a Māori cultural assessment identify Mana Whenua values associated with the landscape in structure planning and plan change processes. Other than those provisions above, provisions relating to cultural landscapes have been deleted.

Recommendation Report on Topics 036/037 – Māori Land and Treaty, and Mana Whenua Sites

[36] Section 5.2.2 of the IHP's Recommendation Report on Topics 036 and 037 set out the key findings and reasoning in relation to Sites and Places of Value to Mana Whenua as follows:²⁰

1.2. Summary of the Panel's recommended changes to the proposed Auckland Unitary Plan

...

ix. Confirming deletion of the Sites and Places of Value to Mana Whenua Overlay consequential to the recommendations in Topic 009 Regional Policy Statement – Mana Whenua.

...

5.2.2. Sites and places of value to Mana Whenua

The Panel heard wide-ranging evidence on this issue and concluded that the entire schedule should be deleted because it was not properly founded. The reasons for the Panel's recommendation to delete the entire schedule are set out in the Panel's Overview of recommendations (report as referenced above) and in the Panel's Report to Auckland Council – Hearing topic 009 Regional Policy Statement - Mana Whenua.

...

The IHP went on to repeat its observations contained in para 8.3.6²¹ of its Overview Report set out above at [31].

Summary

[37] In relation to the protection of sites and places of significance to mana whenua, and the SVMW overlay and schedule, the IHP's key findings were that:

- (a) The SVMW overlay was flawed when it was notified. It contained sites which had not been properly evaluated against appropriate criteria.

²⁰ IHP report to Auckland Council, Hearings topics 036 and 037, Maori Land and Treaty, and Mana Whenua sites, July 2016, para 1.2, p 4; para 5.2.2, p 13.

²¹ The report reads para 8.3.8. This is in error. The correct reference is to para 8.3.6 in the Overview Report.

- (b) The Council's s 32 evaluation did not provide an adequate basis for the SVMW overlay.
- (c) It favoured two tier protection for sites/places which are special to mana whenua – namely sites and places of significance to mana whenua and sites and places of value to mana whenua.
- (d) Sites and places of significance to mana whenua should be protected through an overlay and a schedule.
- (e) Appropriate policies for sites of value to mana whenua should be retained in the regional policy statement.
- (f) If the Council wishes to pursue an overlay/schedule of SVMW's, it can do so using the Schedule 1 plan change provisions contained in the Resource Management Act.

[38] It can be assumed that the IHP considered that the Council would be fulfilling its statutory obligations contained in Part 2 of the Resource Management Act, and in particular, s 6(e), if it accepted the recommended policy and rule framework, albeit that it did not include a secondary overlay for SVMW's. The IHP was required to ensure the Council would comply with its statutory obligations pursuant to s 145(1)(f) of the Local Government (Auckland Transitional Provisions) Act 2010.

[39] The IHP was aware, from the evidence which it had heard, that the Council, and mana whenua, had undertaken, and were continuing, work to try and identify and categorise sites and places which might be of value to mana whenua.

[40] In relation to cultural landscapes, the IHP considered that the proposed plan as recommended by it contained sufficient reference to the evaluation of landscapes for associated cultural values to ensure that their identification remains possible in the future, and that adverse effects on cultural values associated with landscapes can be assessed where relevant.

The Council's decision

[41] The IHP delivered its recommendations, including the changes it recommended to the proposed Unitary Plan as notified, to the Council on 22 July 2016.

[42] The Council publicly notified the recommended version of the proposed Unitary Plan on 27 July 2016.

[43] The Council had to decide whether to accept or reject each recommendation made to it by the IHP. If it rejected a recommendation, the Council had to decide an alternative solution.²² The Council also had a very strict timetable within which to complete its tasks – 20 working days – again, with limited provision for extension.

[44] The Council met in August 2016 to consider and make decisions on the IHP's recommendations. Council staff recommended that the IHP's recommendations in relation to SVMW's should not be accepted.

[45] Notwithstanding its staffs' recommendation, on 10 August 2016, the Governing Body of the Council resolved to:²³

Accept all the recommendations of the Independent Hearings Panel as contained in the Panel reports entitled 'Report to Auckland Council Hearing Topic 009 – Mana Whenua, July 2016' and 'Report to Auckland Council Hearing Topic 036/037 – Maori land and Treaty and Mana Whenua sites, July 2016' as they relate to the content of the Proposed Auckland Unitary Plan and also the associated recommendations as they appear in the plan and the maps.

(resolution number GB/2016/87)

[46] The Council released its decisions on the IHP's recommendations, and a decisions version of the proposed Unitary Plan, on 19 August 2015.

²² Local Government (Auckland Transitional Provisions) Act 2010, s 148.

²³ Open minutes of meeting of Governing Body of the Council, 10 August 2016, at para 6.2.1.

The appeal

The IMSB's position

[47] The questions of law raised by the IMSB have evolved since the notice of appeal was filed on 9 September 2016. That document detailed seven questions said to be questions of law. Following a direction given by the Court, a refined list of questions was filed on 26 January 2017. Nine alleged questions of law were raised in this document. A synopsis of submissions was then filed by the IMSB on 2 February 2017, which refined the questions of law further still and, at the hearing, oral submissions were made which changed the emphasis yet again. At least one of the questions of law previously raised – that there were no criteria for evaluation of SVMW's – was abandoned. At my request, counsel, during the course of the hearing, prepared a final summary of the alleged questions of law. It read as follows:

- (a) “Did the Council’s approach to the consideration of the SVMW overlay preclude it from meeting its statutory requirements, particularly Part 2 [of the Resource Management Act] and the NZCPS?
- (b) Did the Council apply an improper evidential threshold in considering the SVMW [overlay]?
- (c) Did the Council err in law in finding that the s 32 report did not provide an adequate basis for the introduction of that overlay?
- (d) Did the Council err in law [by] relying on a mistaken understanding of the withdrawal resolution?
- (e) [Was] the deletion of objectives and policies for the SVMW overlay and/or the deletion of the rules and schedule a mistake or a finding that could not reasonably have been made given the [IHP’s] findings and the evidence before it?

- (f) Did the Council apply the wrong legal test in finding that the provisions for Māori cultural landscapes were unnecessary?”

[48] Mr Hovell sought to summarise the IMSB’s case. He asserted that the SVMW overlay sought to proactively manage sites and places of cultural value to mana whenua by formally scheduling sites as part of the proposed Unitary Plan. He submitted that mana whenua had affirmed the cultural value of the SVMW sites, and that they were important to Māori in terms of s 6(e) and (f) of the Resource Management Act. He argued that, as a result of the screening process and the data audit, 2,213 sites had been confirmed against a range of appropriate criteria, and that as a consequence, the schedule of SVMWs met “probative evidential thresholds”. He submitted that retention of the schedule is necessary if the Council is to comply with the various statutory directives contained in the Resource Management Act, which requires it to actively protect and manage mana whenua taonga within the Auckland region. He put it to me that the proper legal test for considering mana whenua values is informed by the Resource Management Act’s framework, and that the provisions of Part 2 of the Act must be taken into account, along with the provisions of the New Zealand Coastal Policy statement and the regional policy statement.

[49] Mr Hovell also argued that the IHP, and the Council in adopting the IHP’s recommendations, misinterpreted the withdrawal resolution. He observed that the IHP interpreted the resolution as withdrawing from the SVMW schedule all sites which were on privately owned land, leaving for its consideration only sites on public land. He submitted that this was not the case, and argued that the IHP had proceeded on a mistake of fact, and reached a conclusion which had no evidential foundation.

[50] Further, Mr Hovell referred to s 32 of the Resource Management Act, and argued that the IHP, and the Council, erred in law when they concluded that the SVMW overlay had an insufficient evidential basis and that it should therefore be removed. He submitted that, on the evidence, it could not be concluded that the potential to adversely affect mana whenua values was so low that the duty to actively protect them could be disregarded in future planning for the Auckland region.

[51] In relation to Māori cultural landscapes, Mr Hovell argued that the Council was required to give effect to the New Zealand Coastal Policy statement, and that the IHP and the Council failed to do so, and did not consider whether or not the proposed Unitary Plan gives effect to relevant statutory provisions in relation to Māori cultural landscapes.

The position of the Council and the s 301 parties

[52] Ms Caldwell, for the Council, argued that the IHP's recommendations, and the Council's acceptance of those recommendations, have to be read and understood in the wider context of the IHP's approach to overlays and schedules generally. She submitted that there were no distinct criteria for identifying sites of value contained in the proposed regional policy statement, and no guidance as to the evaluation methodology to be applied. She argued that, as a consequence, there had been no substantive criterion based evaluation of the SVMW overlay, and no proper evaluation under s 32 of the Resource Management Act undertaken prior to notification of the proposed Unitary Plan. She noted that the IHP heard a wealth of evidence from various parties, both in support of and in opposition to the SVMW overlay, and that it was not persuaded that either the work undertaken by the Council and mana whenua during the period between the Topic 009 and Topic 037 hearings, or the evidence presented in support of the overlay, was sufficient to cure the defects apparent in the SVMW overlay as notified. She submitted that this finding was consistent with the IHP's approach to schedules generally.

[53] Ms Caldwell accepted that the panel misinterpreted the withdrawal resolution, and in particular that it erred when it observed that it was only sites on publicly owned land that remained in the overlay for consideration after 16 March 2016. However, she argued that this mistake was not material to the IHP's recommendations in view of its principle finding that there was insufficient evidence for the SVMW overlay.

[54] In relation to cultural landscapes, Ms Caldwell argued that the amended cultural heritage policy framework contained in the plan, as recommended by the IHP, allows for landscapes with identified cultural values to be identified and

assessed in the context of structure plan and resource consent processes, and that the IHP did not err in finding that express reference to cultural landscapes was unnecessary.

[55] In summary, Ms Caldwell argued that the Māori cultural heritage provisions in the decisions version of the proposed Unitary Plan form a coherent framework that is consistent with submissions made and evidence presented by a number of submitters on the notified provisions. She argued that the provisions represent an approach to the issue of protecting Māori cultural heritage that was open to the IHP on the evidence before it, and that they give effect to the Council's obligations in respect of Māori cultural heritage and values under the relevant statutory provisions, including in particular, Part 2 of the Resource Management Act.

[56] Ms McMillan, for Democracy Action, expressed the gravamen of her client's concern by noting that, as from the date of notification, some 18,000 property owners were suddenly obliged to pay up to 13 iwi for cultural impact assessments for what could be very minor works on their own properties. She argued that the IMSB's appeal is effectively seeking to review the merits of the IHP's recommendations and the Council's decision, and submitted that the high hurdle for establishing an error of law has not been reached by the IMSB. She argued that there was no mistake of fact, and that the IHP and the Council were correct when they concluded that there was no sufficient evidential basis for the SVMW overlay. She noted that the panel expressly recorded that the regional policy statement as recommended by it gave effect to Part 2 of the Resource Management Act, in the context of the proposed Unitary Plan as a whole, and not just the SVMW overlay. She put it to me that the precautionary approach advocated by Council staff before the IHP was not warranted, and suggested that the Council had failed to undertake a robust analysis in the first place. It was submitted that the sites were not scheduled because of any scientific uncertainty, but rather because there was simply no time for the Council to undertake anything other than a preliminary factual survey. She argued that the resulting provisions imposed a considerable burden on affected property owners.

[57] Mr Gardner, for Federated Farmers, adopted the Council's submissions. He emphasised that, from Federated Farmers' perspective, the Council's decision to adopt the IHP recommendations was open to it, on the evidential material which was available. He also submitted that any error, in the event that error is identified, is not material. He noted that the IHP, and subsequently the Council, made it clear that it may be appropriate to vary the plan to insert an appropriate schedule and overlay, once the values of mana whenua, and the sites that are important to them in relation to those values, have been identified following appropriate consultation and research. He argued that any deficiency is best addressed by way of the plan change process, rather than through the appeal process.

[58] Ms Kirman, on behalf of Housing New Zealand Corporation, also adopted the submissions of the Council. She noted that the Corporation is concerned about ensuring that the proposed Unitary Plan allows for consenting to be undertaken in an efficient and effective manner, and submitted that the proposed SVMW overlay would have resulted in considerable uncertainty regarding when and how mana whenua should be involved in the planning process. She argued that the IHP and the Council made no errors of law, and that the adoption of the precautionary approach, as recommended when the plan was notified, did not justify the inclusion of an overlay of the kind proposed. She referred me to a number of cases where a precautionary approach has been adopted, and submitted that there is no support in the case law for the application of the precautionary principle where there is no scientific uncertainty, but simply a failure by the parties supporting the overlay to undertake the factual research that should have been done prior to notifying the Unitary Plan, and which might have entitled the Council to then apply restrictive rules to sites with certain characteristics. She submitted that the burden of proof of establishing that there was a factual basis for the overlay rested with the Council, and that there was simply no factual basis for the Council to impose restrictions of the type proposed on the use of land.

[59] Dr Palmer argued that the SVMW was an inappropriate use by the Council of its powers under the Resource Management Act, and that the impugned provisions should not be included in the proposed Unitary Plan. He noted that the proposed plan includes what he called "the conventional list" of places of historic significance,

consistent with s 6 of the Resource Management Act and the definition given to historic heritage under s 2 of the Act. He did not object to these provisions, but argued that the Council's approach to the evaluation of SVMWs did not follow this conventional approach. Rather, it reflected a desire by the IMSB and others to expand the recognition of Māori cultural heritage into a second tier layer, initially of 9,000 sites, but then reduced to 3,600 sites. He argued that this went beyond reasonable regulation and that under the Resource Management Act, one level of recognition is all that is required – namely for sites and places of significance to mana whenua. He argued that the SVMW overlay was not reasonably justified under the Act's provisions, and that it added a layer of complexity and uncertainty to the plan, and placed an added burden on the owners of the affected private land.²⁴ In common with other parties, he argued that a precautionary approach was inappropriate, and that the Council's pre-notification s 32 analysis was manifestly inadequate.

Section 158 – Question of Law

[60] As I have already noted, the appeal is brought pursuant to s 158 of the Local Government (Auckland Transitional Provisions) Act 2010. Section 158(4) provides that the appeal may only be on a question of law.

[61] Appeals from the Environment Court to the High Court are also limited to questions of law.²⁵ In this context, the leading judgment is the decision of a full High Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council*.²⁶ The Court there recorded that it should allow appeals from decisions of the Environment Court only if it considers that that Court:

- (a) applied a wrong legal test; or
- (b) came to a conclusion without evidence or to a conclusion which, on the evidence, it could not reasonably have come; or

²⁴ I note that the IHP favoured a two tier approach – see above at [20], [30], [31] and [33]. Dr Palmer did not appeal those findings. Nor did he give notice under s 305 of the Resource Management Act 1991. This issue raised by Dr Palmer is not before the Court.

²⁵ Resource Management Act 1991, s 299.

²⁶ *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153-154.

- (c) took into account matters which it should not have taken into account;
or
- (d) failed to take into account matters which it should have taken into account.

[62] It accepted that the Environment Court should be given some latitude in reaching findings of fact within its areas of expertise. It also accepted that any error of law found must materially affect the result of the Environment Court's decision before the High Court should grant relief.

[63] This analysis has been applied by the courts, generally without comment, for many years. Recently it was adopted by Whata J in *Albany North Landowners v Auckland Council* in dealing with a number of appeals (and applications for review) arising out of the Council's decisions on the proposed Unitary Plan.²⁷ The IMSB, the Council and the s 301 parties before me did not seek to criticise or distinguish the *Countdown* decision. In my view it is a correct statement of the applicable law.

[64] It is also trite law that this Court must resist attempts by litigants to use an appeal limited to a question of law as an occasion for revisiting the factual merits of the case under the guise of a question of law.²⁸ Where it is alleged that the court or tribunal below came to a conclusion without evidence, or one to which, on the evidence it could not reasonably have come, the appellant faces a "very high hurdle". It does not matter that this Court would almost certainly not have reached the same conclusion as the court or tribunal below. What matters is whether the decision under appeal was a permissible option. The appellate court will almost always have to be able to identify a finding of fact which was unsupported by evidence or a clear misdirection in law by the inferior court or tribunal.²⁹

Analysis

[65] It is the Council's decision which is the subject of the appeal. It adopted the IHP's recommendations in relation to all matters at issue in this appeal. As the

²⁷ *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [90]-[91].

²⁸ *New Zealand Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419 at 426.

²⁹ *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25]-[28].

decision-maker, the Council was required to comply with s 148 of the Local Government (Auckland Transitional Provisions) Act. As I have already noted, that section required it to accept or reject each recommendation, and if it rejected a recommendation, to decide on an alternative solution. The only requirement to provide reasons placed on the Council by the section was that imposed by s 148(4)(a)(ii). If the Council rejected a recommendation of the IHP, then it had to give its reasons for doing so. Decisions to accept recommendations were not required to be accompanied by reasons.

[66] Ms Caldwell, for the Council, accepted that, by implication, where the Council accepted a recommendation made to it by the IHP, it could be taken as having accepted the IHP's reasoning.

[67] This concession by Ms Caldwell was, in my judgment, properly made. The Council was expressly precluded from considering any evidence or other submission that was not before the IHP.³⁰ Unless it accepted the IHP's findings and reasoning, the Council would have been acting in a vacuum.

[68] I now deal with each of the various errors alleged by the IMSB, by reference to the *Countdown Properties* classification of questions of law, although I note that it is a little difficult to slot some of the alleged errors into the appropriate *Countdown* classifications.

Did the approach taken by the Council/IHP to the SVMW overlay preclude the Council from complying with its statutory obligations?

[69] The first error of law alleged by Mr Hovell on behalf of the IMSB falls into the first category in *Countdown* – namely that the IHP/Council applied a wrong legal test.

[70] Mr Hovell asserted that the Council erred in law because its approach to the consideration of the SVMW overlay precluded it from meeting its statutory obligations.

³⁰ Local Government (Auckland Transitional Provisions) Act 2010, s 148(2)(b).

[71] The relevant Resource Management Act obligations relied on by Mr Hovell are found in Part 2 of the Resource Management Act. Section 6 sets out matters of national importance, and requires that all persons exercising functions and powers under the Act recognise and provide for them. Specifically, s 6(e) refers to the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga. Section 6(f) provides for the protection of historic heritage from inappropriate subdivision, use and development. Section 7 deals with other matters which persons exercising functions and powers under the Act are required to have particular regard to. Relevantly, s 7(a) refers to kaitiakitanga. Section 8 requires persons exercising functions and powers under the Act to take into account the principles of the Treaty of Waitangi.

[72] Mr Hovell also referred to the New Zealand Coastal Policy Statement.³¹ He noted that it contains an objective – objective 3 – namely, to take into account the principles of the Treaty of Waitangi, to recognise the role of tangata whenua as kaitiakitanga and to provide for tangata whenua involvement in the management of the coastal environment by inter alia recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua. He went on to refer to the following policies:

- (a) Policy 2 which is concerned with the Treaty of Waitangi, tangata whenua and Māori heritage. It says that in taking into account the principles of the Treaty, iwi authorities or hapu, on behalf of tangata whenua, should be involved in the preparation of regional policy statements and plans, and that there should be effective consultation with them.
- (b) Policy 2(g)(i) which recognises that tangata whenua have the right to choose not to identify places or values of historic cultural or spiritual significance or special value, but which also provides for consultation and collaboration with tangata whenua and requires that the importance of Māori cultural and heritage values should be recognised

³¹ The IHP also referred to the National Policy Statement on Freshwater Management – Report to Auckland Council – Hearing Topic 009 – Mana Whenua, July 2016, para 1.3, p 5. Mr Hovell did not, however, suggest that the IHP/Council failed to give effect to this policy statement.

through methods such as historic, heritage, landscape and cultural impact assessments. The policy also provides for the identification, assessment, protection and management of areas or sites of significant or special value to Māori.

- (c) Policy 10 which deals with reclamation and de-reclamation. It records that where reclamation is considered to be a suitable use of the coastal marine area, when considering its form and design, particular regard should be had to whether the proposed activity will affect cultural landscapes and sites of significance to tangata whenua.
- (d) Policy 14 which seeks to promote the restoration of natural character, and specifically policy 14(c)(viii) which refers expressly to the restoration of cultural landscape features.
- (e) Policy 15 which deals with natural features and natural landscapes. It seeks that they should be identified and assessed, and that regional policy statements, plans and maps should identify where their protection requires objectives, policies and rules.
- (f) Policy 17 which deals with historic heritage, and seeks to protect it through identification, assessment and recording.

[73] It was common ground that the purpose of a regional policy statement is to achieve the purpose of the Resource Management Act by providing an overview of the resource management issues of the region, and the policies and methods to achieve integrated management of the natural and physical resources of the whole region.³² It must be prepared in accordance with Part 2 of the Resource Management Act.³³ Further, a regional policy statement “must give effect” to a national policy statement.³⁴ A regional plan “must give effect” to a national policy statement and a regional policy statement,³⁵ as must a district plan.³⁶

³² Resource Management Act 1991, s 59.

³³ Section 61(1)(b).

³⁴ Sections 62(3).

³⁵ Section 67(3).

[74] The Supreme Court has held in *Environment Defence Society Inc v New Zealand King Salmon Co Ltd*,³⁷ in the context of the New Zealand Coastal Policy Statement, that the words “give effect to” mean implement, and that this is a strong directive, creating a firm obligation on the part of planning authorities. There was, however, a caveat noted by the Court. The implementation of any directive is affected by what it relates to. A requirement to give effect to a policy which is framed in a specific and unqualified way may be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.³⁸

[75] In the *King Salmon* decision the Supreme Court also held that the New Zealand Coastal Policy Statement gives substance to the principles in Part 2 of the Resource Management Act in relation to New Zealand’s coastal environment, by translating those general principles into more specific or focussed objectives and policies, and that, in principle, when considering a plan change in relation to the coastal environment, a decision-maker will necessarily be acting in accordance with Part 2 by giving effect to the New Zealand Coastal Policy Statement.³⁹

[76] I note a submission made by Dr Palmer – namely that the New Zealand Coastal Policy Statement applies only to the coastal environment. While those words are not defined, as Dr Palmer pointed out, logically, large parts of Auckland do not fall within the coastal environment.

[77] It follows that for those parts of Auckland which fall within the coastal environment, the Council was required to give effect to the New Zealand Coastal Policy Statement. It did not need to separately consider Part 2 of the Resource Management Act. For those parts of Auckland which do not fall within the coastal environment, the Council was required to consider Part 2 of the Act. Given the Supreme Court’s observations in *King Salmon*, the end result should be the same.

³⁶ Section 75(3); And see *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281.

³⁷ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [77] and [91].

³⁸ At [80] and [128]-[130].

³⁹ See [85], [88] and [90]; And see *Man O’War Station Ltd v Auckland Council* [2017] NZCA 24.

[78] In my judgment, the objectives and policies in the New Zealand Coastal Policy Statement relied on by the IMSB are not particularly directive. Broadly, they relate to historic heritage, consultation, tangata whenua and mana whenua values, and the protection of both heritage and values through consultation and other non-statutory methods. The policies are framed at a high level of abstraction. They are not directed specifically to decision-makers; they do not require decision-makers to “avoid” certain matters. I do not consider that the policies are particularly directive. The requirements impugned by ss 6, 7 and 8 of the Resource Management Act are, however, more forcefully expressed – “shall recognise and provide for”, “should have particular regard to”, and “shall take into account”. These imperatives are directed to all persons exercising functions and powers under the Act.

[79] I agree with Ms Caldwell that, when considering whether or not the IHP and the Council erred as alleged, it is necessary to consider the overall policy framework and all of the various provisions seeking to protect Māori cultural heritage in the proposed Unitary Plan. In my judgment, it would be misleading to single out the SVMW overlay provisions and assert that because they have been deleted, the plan as a whole fails to comply with the various statutory directives I have noted.

[80] There are a very large number of provisions in the proposed Unitary Plan which refer to mana whenua values, and to cultural heritage:

- (a) In the proposed regional policy statement there are references to mana whenua values and to cultural heritage. By way of example, issue B1.4(5) identifies issues of significance to mana whenua as an issue of regional significance. There are references to mana whenua values and cultural heritage in the urban growth provisions (B2),⁴⁰ in the infrastructure, transport and energy section (B3),⁴¹ in the natural heritage section (B4),⁴² in the built, heritage and character section

⁴⁰ Issue, B2.1(8); Policy, B2.2.2(f),(g) and (h); Growth Policies, B2.4.2(4)(c) and (5)(a); B2.5.2(4)(g); B2.6.1(1)(a) and B2.6.2(2).

⁴¹ B3.2.2(3).

⁴² Issue B4.1; B4.2; Objective B4.2.1(2); Policy B4.2.2(1)(g); B4.2.2(4)k).

(B5),⁴³ in the mana whenua section (B6),⁴⁴ natural resources section (B7)⁴⁵ and in the coastal environment section (B8).⁴⁶

(b) In the regional plan and in the regional coastal plan there are further references to mana whenua values and to Māori cultural heritage. Such recognition occurs e.g. in the infrastructure section (E26),⁴⁷ in the outstanding natural features (D10) and outstanding natural landscapes overlays (D11 and D14),⁴⁸ in the historic heritage overlay (D17),⁴⁹ in the sites and places of significance to mana whenua overlay (D21), in the regional land disturbance provisions (E11)⁵⁰ and in the coastal – general coastal marine zone – (F2).⁵¹

(c) There is also extensive reference to mana whenua values and cultural heritage in the district plan section of the proposed Unitary Plan. In addition to the overlays, which I have already noted for historic heritage and sites of significance to mana whenua, there are references to mana whenua values in the land disturbance provisions (E12).⁵² There are similar references in the Waitakere Ranges heritage area overlay (D12). Sites of significance to mana whenua are covered in an overlay (D21)⁵³ and the sites are listed in schedule 12 in Chapter L of the proposed Unitary Plan. There are 75 such sites.⁵⁴ They are afforded a very high level of protection through a number of provisions contained in the proposed Unitary Plan.

⁴³ Objective B5.2.1(1); Policy B5.2.2(1)(c).

⁴⁴ Issues B6.1; B6.2, B6.3, B6.5; Objectives B6.5.1(1)-(5) and Policies B6.5.2(1)-(9); B6.6.

⁴⁵ Objective B7.4.1(6); Policy B7.4.2(3); B7.7.

⁴⁶ B8.2; Objective B8.2.1; Policy B8.2.2(5); B8.5.2(11) and (13); p 11 (cross references).

⁴⁷ E26.6.5.1 (accidental discovery rule).

⁴⁸ Objective D10.2(2); Policy D10.3(1); D11 and D14.

⁴⁹ D17.1; Objective D17.2(1)-(2); Policy D17.3(8)(d)-(f) and (12)-(15); Schedule 14.1.

⁵⁰ Objective E11.2(1); Policy E11.3(2)(c) and (d) and E.3(3); Rule E11.6.1 and E11.8.1(d).

⁵¹ Objective F2.2.2(3)(d); Objective F2.5.2(2); Policy F2.6.3(3)(j); F2.23.1(1)(f)(iv) and F2.23.2(1)(f)(i).

⁵² Policy E12.3(1), E12.3(2)(c) and E12.3(4); Rule E12.6.1 and E12.8.1(2)(a)(viii); E12.8.1(2)(c)(ii).

⁵³ Sites and places of significance to mana whenua overlay D21.

⁵⁴ The number of sites of significance was increased from 61 to 75 by the IHP/Council as a result of the hearings process.

[81] Some places/sites of importance to mana whenua, particularly archaeological and waahi tapu sites, are included in the proposed Unitary Plan's historic heritage list – schedule 14.

[82] Scheduled sites/places are not the only sites/places protected. Unscheduled mana whenua sites and places are protected in various ways, albeit not by a dedicated overlay, or by identification in a schedule.

[83] Protection is afforded to unscheduled sites in various overlays, for example, landscape overlays D10, D11, D12 and D14. There is also a very large number of objectives and policies that recognise mana whenua values, and which do not distinguish between scheduled and unscheduled sites. Specifically, policy B6.3 in the regional policy statement seeks to ensure that any assessment of environmental effects for an activity that may affect mana whenua values includes an appropriate assessment of adverse effects on those values. Policy B6.3.2(6) requires that resource consent decisions have particular regard to potential impacts on various matters, including the holistic nature of the mana whenua world view; the exercise of kaitiakitanga; mauri, particularly in relation to freshwater and coastal resources; customary activities; and sites and areas with significant spiritual or cultural heritage value to mana whenua. Policy 6.5.2 deals with the protection of mana whenua cultural and historic heritage. These policies focus on specified outcomes and set out processes for the protection of both scheduled sites and unscheduled sites. There are accidental discovery rules which apply when an item of significance to mana whenua is accidentally uncovered in the course of land disturbance. There are various discretionary assessment criteria in both the regional and district plan provisions, both generally and for specific activities, which refer to mana whenua values. The plan also refers to non-regulatory methods, for example, use of the Council's cultural heritage inventory, by resource consent planners, in the context of requirements for assessment of effects.

[84] As I have already noted, the IHP was required to ensure that, were the Council to accept its recommendations, relevant provisions in the Resource

Management Act would be complied with.⁵⁵ It considered that if the Council accepted the proposed Unitary Plan, with the changes recommended by it, it would comply with its obligations under the Resource Management Act.

[85] Having considered all relevant plan provisions, I do not consider that the deletion of the SVMW overlay, and associated provisions, either has compromised, or has the potential to compromise, the Council's compliance with the various statutory obligations imposed on it by the Resource Management Act. This ground of appeal does not succeed.

Did the IHP/Council apply an improper evidential threshold in considering the SVMW provisions?

[86] Mr Hovell argued that the IHP/Council applied what he referred to as an "improper evidential threshold". In terms of the *Countdown* decision, again, he was asserting that the IHP/Council applied a wrong legal test.

[87] Mr Hovell referred to a decision of this Court, *Ngati Maru Iwi Authority Inc v Auckland City Council*.⁵⁶ He referred not to the substantive decision, but rather to a decision given by Baragwanath J, when granting leave to appeal to the Court of Appeal. In the leave decision, Baragwanath J observed that, unless evidence as to *Ngati Maru's* claim to continuing participation in the planning processes, and of the *waahi tapu* attaching to the site there in question, could be dismissed as "insubstantial", it could reasonably be argued that the changes there in issue were not necessary and not appropriate in terms of s 32 of the Act as it then stood.⁵⁷

[88] I do not consider that the observations made by Baragwanath J assist. The Judge was considering whether or not to grant leave to appeal from a decision of another Judge who had retired. His comments were made in that context and were strictly *obiter*. He was not advancing a considered judgment as to the appropriate evidential threshold in cases before the Environment Court. While leave was granted, the appeal did not proceed. The issues between the parties were settled.

⁵⁵ Local Government (Auckland Transitional Provisions) Act 2010, s 145(1)(f)(i).

⁵⁶ *Ngati Maru Iwi Authority Inc v Auckland City Council* HC Auckland AP18-SW01, 24 October 2002.

⁵⁷ At [24].

[89] As I have noted, the IHP had the powers of a commission of inquiry. The hearings before it were inquisitorial and not adversarial. The Commissions of Inquiry Act 1908 applied. Relevantly, s 4B(1) of that Act provides as follows:

The Commission may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the inquiry, whether or not it would be admissible in a Court of law.

The position is similar to that which applies to the Environment Court, pursuant to s 276 of the Resource Management Act 1991.

[90] In Resource Management Act proceedings, the allocation of the evidential and persuasive burdens of proof can be problematic, and sometimes inapposite.⁵⁸ Ordinarily, where a party is seeking to persuade a decision-maker in the resource management context to make a decision in his or her favour, the onus is on that party to prove, on the balance of probabilities, the factual matters relied on support the position the party wishes to advance. The same standard does not apply when the decision-maker is asked not to ascertain what has already happened, but rather to prophesise what may happen at some stage in the future. An assessment of potential effects depends on an evaluation of all of the relevant evidence, but it does not depend on proof to a preordained standard that the potential effect is more likely to occur than not.⁵⁹

[91] The SVMW overlay was being advanced on a precautionary basis – essentially to protect sites it was thought might be of value to mana whenua from inappropriate development – until which time as it was finally determined whether or not each site does have ongoing value to mana whenua. The focus of the SVMW overlay was on potential adverse effects. Essentially, the IHP/Council had to balance the potential adverse effects against the restrictions which would be imposed on landowners if the overlay and its associated restrictions were approved. To this end, the IHP considered whether or not the overlay and the schedule of sites/places of value was robust, and it concluded that it was not. That conclusion was open to the IHP on the evidence.

⁵⁸ *Boulder Trust v New Zealand Transport Agency* [2015] NZEnvC 84 at [56]; *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZHC 2897, (2014) 18 ELRNZ 97 (HC) at [90].

⁵⁹ *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.

[92] Mr Hovell did not point to any specific finding to which the IHP/Council applied the alleged improper evidential threshold, and I cannot see that there was any error by the IHP or the Council in this regard. Insofar as I have been able to ascertain from considering the detail of the recommendations relevant to this appeal, the IHP proceeded in an orthodox fashion, consistent with accepted principle. This ground of appeal also fails.

Did the Council err in law in finding that the s 32 report prepared by the Council did not provide an adequate basis for the introduction of the SVMW overlay?

[93] This ground of appeal is presumably said to fit into the second category in *Countdown*, namely that the IHP/Council came to a conclusion to which they could not reasonably have come on the evidence before them. As I have noted, when this type of error is raised, there is a very high hurdle on an appellant.

[94] Both regional and territorial authorities, in preparing their regional policy statements, regional plans and district plans respectively, must do so in accordance with their obligation to prepare an evaluation report in accordance with s 32 of the Resource Management Act, and their obligation to have particular regard to the evaluation report prepared in accordance with that section.⁶⁰

[95] Here, the Council prepared a s 32 report in relation to the proposed Unitary Plan. It is dated 30 September 2013. It expressly recorded that it would be updated as the planned development process continued.⁶¹ Part 1 of the report set out in some detail the processes which the Council had undertaken, and intended to continue to undertake, relevantly to consult with tangata whenua and iwi authorities, with mana whenua, and with mataawaka representatives. Counsel did not refer me to anything in this part of the s 32 report relevant to SVMW's. Part 2 of the s 32 evaluation did however contain four sections relevant to mana whenua.⁶² For example, section 2.15 dealt with mana whenua cultural heritage. It noted the processes undertaken, and referred to the provisions contained in the proposed regional policy statement. It

⁶⁰ Resource Management Act, s 61(1)(c) and (d), s 66(1)(d) and (e) and s 74(1)(d) and (e).

⁶¹ Section 32 Evaluation, Part 1 for the proposed Auckland Unitary Plan, 30 September 2013, para 1.1.1.

⁶² Section 32 Evaluation, Part 2, para 2.15 – Mana Whenua Cultural Heritage; para 2.16 – Māori Development; para 2.17 – Māori Land, and para 2.18 – Māori and Natural Resources.

commented on the effectiveness and efficiency of these proposed provisions and, very generally, on their assumed costs and benefits.

[96] The s 32 evaluation was audited by Harrison Grierson NZIER.⁶³ Relevantly, the audit noted that:⁶⁴

The topic report does not identify the limitations of the data or place caveats on the information relied upon. In particular, the topic report could have acknowledged the lack of information available on the total number of sites likely to be affected by the proposed overlays as not all sites or places “of value” to mana whenua had been identified.

...

No justification has been provided for why the costs or benefits have not been assigned monetary value. Although it is apparent that a monetisation exercise would have been difficult given the subject matter involved in this topic, it would have been appropriate to include a section in the report justifying this approach.

...

None of the benefits and costs have been monetised.

...

A qualitative cost benefit analysis was undertaken using a framework that described both the costs and benefits of the four wellbeings (environmental, economic, social or cultural) and on whom the costs and benefits would fall on. However, no explicit weighting exercise was used to compare whether the relative costs outweigh the benefits.

The report comes to a strong conclusion that the preferred option results in cumulatively greater long-term benefits than costs, and that associated costs are mainly related to financial costs to Council. Without some indication of the scale and significance of the issue and the number of private landowners who may face constraints on use of their land as a result of the policies, it is difficult to assess the reliability of this conclusion.

Under the heading “Areas where further analysis or information could assist”, the audit noted as follows:⁶⁵

- the topic report needed to articulate the scale and significance of the issues in terms of geographical extent, and the potential reach of proposed policies in its effects on other landowners, their

⁶³ Section 32 RMA Report of the Auckland Unitary Plan – Audit – Harrison Grierson and NZIER report to the Ministry for the Environment November 2013.

⁶⁴ Table 12 – p 79.

⁶⁵ Section 32 RMA Report of the Auckland Unitary Plan – Audit – Harrison Grierson and NZIER report to the Ministry for the Environment, above n 66, at p 81.

development prospects, and implications for economic development and employment potential

...

- the topic report could have identified the limitations of the data or placed caveats on the information relied upon. For example, the topic report could have acknowledged the lack of information available on the total number of sites likely to be affected by the proposed overlays as not all sites or places of “value” to Mana Whenua have been identified
- a section justifying why a monetisation exercise had not been undertaken could have been included.

[97] Mr Hovell submitted that the IHP/Council erred by requiring that there had to be a s 32 report, providing a sufficient evidential basis for the SVMW’s, prior to notification of the proposed Unitary Plan.

[98] I do not consider that the IHP/Council erred in this regard. The Council was required to prepare an evaluation report in accordance with s 32 of the Resource Management Act before the proposed Unitary Plan was notified. That is what the Resource Management Act required.⁶⁶ The IHP was aware of this.⁶⁷ The s 32 evaluation report was required to examine whether the proposed objectives were the most appropriate way to achieve the purpose of the Act, and whether the policies, rules and other methods proposed were the most appropriate way to achieve those objectives. The report was required to identify and assess the benefits and costs of the proposals made.

[99] The IHP had the report and the Harrison Grierson NZIER audit before it. It heard extensive evidence from a number of submitters and witnesses. It noted in its recommendations that some submitters considered that the proposed provisions contained in the plan as notified were unreasonable, and not supported by any appropriate s 32 justification.⁶⁸ The IHP had before it the Council’s evidence and submissions, and the evidence and submissions of other parties, both for and against the SVMW provisions. Having regard to the evidence before it, along with the inferences that it was entitled to draw from its own perusal of the relevant

⁶⁶ Report to Auckland Council, Overview of recommendations on the Proposed Auckland Unitary Plan, 22 July 2016, para 2.2.

⁶⁷ Resource Management Act 1991, s 32(5).

⁶⁸ Report to Auckland Council, Hearing Topic 009 - Mana Whenua, July 2016, para 1.3.

documents, the IHP did not err in law by concluding that the Council's s 32 evaluation prepared prior to notification did not provide an adequate basis for the introduction of the SVMW overlay. That conclusion was open to it.

[100] I note that in any event, any error in this regard would be immaterial. The IHP's recommendations constituted a further evaluation of the proposed plan provisions, in accordance with s 32AA of the Resource Management Act. This evaluation related to the changes that the IHP recommended be made, and it was undertaken at a level of detail that corresponded to the scale and significance of the changes. The IHP's further evaluation was contained in the body of its recommendation report for each topic.⁶⁹ This further evaluation, in effect, rendered the initial s 32 report moot.

[101] Again, this error of law has not been made out. The IMSB has failed to get over the very high hurdle necessary to establish this error.

Did the Council err in law by relying on a mistaken understanding of the withdrawal resolution?

[102] As I have noted above – paras [29], [31], [33] and [34] – the IHP referred in a number of contexts to the withdrawal resolution. The resolution is set out above at para [25]. It was "... to remove Sites and Places of value overlay on private land until such time that all Sites and Places had been accurately identified and mapped".

[103] Mr Hovell pointed out that not all SVMW's on private land were withdrawn, and that the IHP made a mistake in its interpretation of the resolution. Ms Caldwell, for the Council, was prepared to agree that the IHP made a mistake.

[104] I am not persuaded that the IHP did misunderstand the resolution. The relevant papers from the meeting of the Auckland Development Committee, which passed the resolution on 12 November 2015, were included in the bundle of documents. The resolution recorded that the Development Committee agreed to remove sites and places of value overlay on private land. This resolution on its face

⁶⁹ Report to Auckland Council – Overview of recommendations on the proposed Auckland Unitary Plan, above n 64, at, para 2.2.

was broad enough to permit an interpretation requiring that all SVMW's on private land be removed.

[105] However, the withdrawal resolution did not explicitly refer to "all" SVMW's on private land and it was not interpreted by council officers to mean that all 3,600 sites within the notified overlay on private land should be withdrawn. Ms Caldwell advised that, instead, council officers interpreted the resolution to require the removal of any site within the recommended group of 1,387, the location of which could not be confirmed, and where any part of the 200 metre diameter buffer circle (as notified) affected privately owned land. This resulted in 593 sites (of the recommended 1,387) being withdrawn from the SVMW overlay.

[106] I was advised from the bar that the 593 sites which were withdrawn were all located on privately owned land, but that they represented only a subset of the sites which were on privately owned land. Assuming that this is correct, it follows that the IHP's conclusion that only publicly owned sites remained in the overlay was incorrect.

[107] While I am not persuaded that the IHP misinterpreted the resolution, as it was perhaps capable of more than one interpretation, I am persuaded that it was wrong when it concluded that only SVMW's on public land remained in the SVMW overlay. However, I do not consider this error to be material. First, the IHP's misunderstanding about the effect of the withdrawal resolution was pointed out to the Council by Council officers in a report they made for the Unitary Plan decision-making meetings held in August 2016.⁷⁰ The Council nevertheless accepted the IHP's recommendations. Secondly, the key issue for determination by the IHP was whether or not to retain the SVMW overlay. Its reasoning and its conclusions focus on deficiencies in the identification and evaluation of the sites when they were included in the proposed Unitary Plan, and the inadequacy of later attempts to clarify which sites/places were in fact of value to mana whenua. It considered that, as at the time of notification, there had been no verification to ensure that the sites actually existed, or what their values were, and that no appropriate criteria subsequently had

⁷⁰ Auckland Development Committee agenda and addendum for a meeting dated 10 August 2016, item 11, para 6.2.A(ii).

been applied by which the sites could be properly evaluated. I do not consider that these key findings are undermined by the error the IHP made in its understanding of the effect of the withdrawal resolution.

[108] Accordingly, this ground of appeal must fail as well.

Was the deletion of the objectives and policies for the SVMW overlay and/or the deletion to rules and schedule a mistake, or a finding that could not reasonably have been made given the IHP's findings and the evidence before it?

[109] Again, this question of law is founded in the second classification contained in the *Countdown* decision – namely that the IHP came to a conclusion without evidence, or to a conclusion which, on the evidence, it could not reasonably have come. Again, the IMSB faces a very high hurdle if it is to make out this ground.

[110] In its recommendation paper on Topic 009 – mana whenua – the IHP summarised the evidence it heard. It listed a number of submitters who gave evidence addressing the issues which were before it, and noted that the Council, as well as the IMSB and some iwi groups, had expressed concern about the robustness of, and justification for, including all of the SVMW's scheduled in the plan as notified. The IHP summarised the evidence of key witnesses in this regard. It referred to the evidence of a Dr Mitchell, and a Mr Blair, to the effect that it was better to retain on the schedule only those sites which were clearly of value, and to include others only once they were assessed via a plan change. I was told from the bar that, at best, only some 140 of the 2,213 sites proposed were the subject of specific submissions and evidence from mana whenua, and that only 16 were supported by detailed evidence at the hearing.

[111] In my judgment, the IHP was entitled to reach the conclusions and make the recommendations it did. It heard evidence from a large number of parties, both for and against retaining (and/or expanding) the overlay. It was for the panel as a specialist independent body to exercise its judgment in evaluating the evidence put before it at the hearings. It was open to the IHP to recommend deletion of the SVMW overlay on the basis that, without evidence of mana whenua values that

provided support for all of the sites in the schedule and in the overlay, the provisions as a whole lacked a sufficient evidential basis.

[112] Again, this ground of appeal must fail. The IMSB has not surmounted the very high hurdle required to make out this error of law.

Did the IHP/Council apply the wrong legal test in finding that the provisions for Māori cultural landscapes were unnecessary?

[113] The alleged error of law falls into the first category discussed in *Countdown*.

[114] Mr Hovell referred to Part 2 of the Resource Management Act, and in particular to s 6(e) and (f), 7(a) and 8. He also referred to the New Zealand Coastal Policy Statement. He referred to the IHP/Council's decision, namely that consideration of cultural landscapes could be deleted as being unnecessary, and argued that the test of necessity was not the proper statutory test for determining the outcome of provisions which seek to give effect to the New Zealand Coastal Policy Statement and to provide for ss 6, 7 and 8 matters.

[115] As I have set out in some detail above – [80] to [83] – the policy and rule framework does recognise and provide for the relationship mana whenua have with landscapes, and for the identification of landscapes, based on cultural values. Further, the drafting retained by the IHP and the Council echoes the wording of the provisions in the New Zealand Coastal Policy Statement, and addresses the issue of cultural landscapes.

[116] Overall, I am satisfied that the proposed Unitary Plan framework implements the relevant statutory directives. While the decision version of the proposed Unitary Plan deletes specific reference to cultural landscapes, it retains sufficient reference to the evaluation of landscapes for associated cultural values to ensure that the identification of appropriate landscapes remains possible in the future, and that adverse effects on cultural values associated with landscapes can be assessed where relevant.

[117] I agree with Ms Caldwell that the rules and the policy framework recommended by the IHP, and accepted by the Council, complies with the relevant statutory requirements, and that there was no error law in the IHP/Council's approach.

Result

[118] For the reasons I have set out, the appeal is dismissed.

Costs

[119] The Council and the s 301 parties (with the exception of Dr Palmer who represented himself), are entitled to their costs and reasonable disbursements.

[120] I direct as follows:

- (a) Counsel for any party seeking costs, is to file a memorandum in this regard, within 10 working days of the date of this decision.
- (b) The IMSB is to file a memorandum in reply, within a further 10 working days.
- (c) Costs memoranda are not to exceed five pages.

I will then deal with the issue of costs on the papers, unless I require the assistance of counsel.

Wylie J