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High Court leaves the door ajar for RMA controls on fishing

In our February Resource Management Update, we discussed the Environment Court decision of *Motiti Rohe Moana Trust v Bay of Plenty Regional Council,* where the Trust sought a declaration that it is lawful for the Council to include objectives, policies and rules in its proposed Regional Coastal Environment Plan to control fishing activities within its boundaries (on the grounds of maintaining indigenous biodiversity and recognising and providing for mana whenua interests). The High Court has now issued its decision on appeal from the Environment Court's decision.
The key issue before the Environment Court was the interface between the RMA and the Fisheries Act 1996, and particularly the application of s 30(2) of the RMA (which prevents regional councils from controlling the taking, allocation or enhancement of fisheries resources). The Environment Court held that the Council could include controls in the Plan to restrict the taking of fish and fishing methods for purposes other than managing fishing or fishing resources, including on those grounds mentioned earlier.

The Attorney-General, on behalf of the Ministry for Primary Industries, appealed to the High Court, where Whata J considered the tension between s 30(2) of the RMA and a regional council's indigenous biodiversity function pursuant to s 30(1)(ga). The High Court found that a regional council may exercise its functions to manage the effects of fishing that are not directly related to the biological sustainability of the aquatic environment as a resource for fishing needs (which is otherwise addressed via the Quota Management System under the Fisheries Act), and that, notwithstanding s 30(2), a regional council may perform its function under s 30(1)(ga) to maintain indigenous biodiversity within the coastal marine area, but only to the extent strictly necessary to perform that function.

While the High Court's reasoning largely accorded with that of the Environment Court, Whata J did not consider that the declaration correctly captured the correct scope of s 30(2). The Court held that the declaration made did not place clear limits on the extent to which a regional council could control fishing in pursuance of its functions, which could lead to unqualified incursion into the sustainable utilisation of fisheries resources under the Fisheries Act. For that reason, Whata J allowed the Attorney-General's appeal in part, with the declaration set aside and leave reserved to the parties to make submissions on the form of a declaration. In his final decision, Whata J declined to make a formal declaration, as any final declaration on the broad, essentially hypothetical questions posed by the Attorney-General ran the risk of overreach or oversimplification. Instead, Whata J identified that the legality of control in disputed areas will need to be worked out "at the finer grain" through the plan-making process, using his earlier analysis as a reference guide.

In February, we suggested that under the Environment Court's approach, regional councils would have greater scope to protect marine life through regional coastal plans, which could generate gains for biodiversity and help to address environmental effects of fishing practices in the coastal marine area, but could also increase regulatory costs for the fisheries industry and create significant uncertainty regarding what management system will apply. In the High Court, however, Whata J commented that the ability of regional councils to provide for

matters not controlled under the Fisheries Act "does not open the door to carte blanche regional council regulation of the adverse effects of fishing on the aquatic environment", and that primacy must be given to management of the effects of fishing under the Fisheries Act. Any controls in this area are likely to be highly contentious and subject to further challenge through the plan-making process.

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