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## ENVIRONMENT/ RESOURCE MANAGEMENT

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## HEATING UP THE ARGUMENT ON CLIMATE CHANGE

*A review of the Genesis decision*

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Bell Gully is pleased to announce the appointment of new solicitor Vivienne Holm.

Vivienne joins the Resource Management team in Auckland after working as a solicitor in other leading firms in New Zealand for the last 12 years.

At Bell Gully, Vivienne's key practice areas include resource management and planning, with particular expertise on local government matters.

Hot on the heels of announcements by Government around climate change, the Court of Appeal has reversed earlier case law on the approach consent authorities must take to resource consent applications involving the discharge of greenhouse gases (GHGs).

### Background

In *Genesis Power Limited v Greenpeace New Zealand Incorporated* (the Genesis case) the Court of Appeal overruled the position taken by Justice Williams in the High Court in *Greenpeace New Zealand v Northland Regional Council* (the Mighty River case) earlier in 2007. The Genesis case involved an application for resource consent for a gas-fired electricity generating plant at Rodney which would discharge GHGs to air (which is now on hold due to the Government's proposed 'ban' on fossil-fuelled generation). The key issue for the Court of Appeal was whether section 104E of the Resource Management Act 1991 (the RMA) required the consent authority to consider the scope of its powers and obligations to consider the effects of GHG emissions on climate change when reaching a decision on whether to grant a resource consent. Section 104E relevantly provides that when considering an application for a discharge permit relating to the discharge

into air of greenhouse gases, a consent authority must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of GHGs. In the Mighty River case the Environment Court reached the view that the purpose of s104E was to allow consideration of the effects of discharge on climate change only in the context of applications to use or develop renewable energy that would enable a lowering of GHGs.

### High Court decision

On appeal to the High Court this decision was overturned by Justice Williams, who considered that such effects are relevant in the context of any application relating to an activity which involves the discharge into air of GHGs (and not just those involving renewable energy). Justice Williams also suggested that the provision might require applicants to identify alternatives, stating:

"If the application for a discharge permit ...includes no proposal which...would enable a 'reduction into air of greenhouse gases' by the 'use and development of renewable energy' then that...is a factor the consent authority is entitled to take into account in deciding whether to exercise its discretion and grant the resource consent."

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Justice Williams further concluded that:

“...the section enables the consent authority to balance [the] proposed activity alongside any proposal by the applicant which would effect ‘reduction in the discharge into air of greenhouse gases’ by an activity which involves the ‘use and development of renewable energy...relative to the use and development of non-renewable energy’ and to that extent to have regard to climate change.”

#### Genesis case and what lies ahead

Subsequent to the High Court decision, Genesis sought declaratory relief challenging the result of the Mighty River case. Genesis was concerned by the possible impact of the High Court’s decision on its application for a proposed gas-fired electricity generating plant at Rodney.

In the Genesis case the Court of Appeal decided that the Environment Court’s approach was to be preferred for several reasons. First, the wording of s104E mirrors wording used in s70A of the RMA, which deals with the rule-making powers of regional councils. If Justice Williams’ interpretation was preferred the same expansive approach would need to be taken to the latter provision, meaning that regional councils would be empowered to make rules which imposed restrictions on the emission of GHGs. The Court of Appeal took the view that this could not have been intended in light of the Government’s broad shift of approach from regional to national regulation of emissions.

Secondly, the Court of Appeal said that Justice Williams’ approach would be unduly onerous in that it would permit, if not require, those involved in the consenting process to deal with both the possibility or practicality of developing an alternative proposal using alternative energy; and the significance of the proposed emission of

GHGs on climate change. The court also noted that it would be difficult to apply Justice Williams’ approach to applications not involving energy generation. Accordingly, the Court of Appeal found that the requirement to consider the effects of climate change under s104E only applies to applications which involve the use of renewable sources of energy production. For the sake of clarity, it confirmed that in cases involving non-renewable energy production a consent authority is not required to:

- “(a) Compare the proposal advanced by the applicant with a hypothetical proposal using renewable sources.
- (b) Treat the non-use of renewable sources of energy as a negative factor counting against the grant of consent.
- (c) Assess the extent to which GHG emissions associated with the proposal would have an effect on climate change.”

The Court of Appeal also declared that when considering the application by Genesis Power for a discharge permit associated with the proposed Rodney power station, the Auckland Regional Council must not have regard to the effects of that discharge on climate change.

This decision is by no means the end of the issue. It is unsurprising, given the precedent value of the decision and its significance for the assessment of climate change related aspects of resource consent applications under the RMA, that Greenpeace has filed an appeal to the Supreme Court. In light of the current rigorous debate on climate change and the move toward national regulation of emissions, it is unlikely that an approach that sought to divest such powers to regional governments would be upheld in the long term without specific provision in legislation.