

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO
AT AUCKLAND**

ENV-2020-AKL-109

UNDER

the Resource Management Act 1991

IN THE MATTER

of an appeal under clause 14 of the First
Schedule to the Act in relation to Proposed
Plan Change 144 to the Operative
Whangārei District Plan

BETWEEN

NORTHPORT LIMITED

Appellant

AND

WHANGAREI DISTRICT COUNCIL

Respondent

**JOINT AFFIDAVIT OF ROBERT ADAM BURGOYNE AND MELISSA IVY MCGRATH IN SUPPORT OF
JOINT APPLICATION UNDER SECTION 293 OF THE ACT
SWORN/AFFIRMED 18th DECEMBER 2020**

INTRODUCTION

1. We, Melissa McGrath and Robert Burgoyne, planners of Whangarei, affirm/~~swear~~.

Qualifications & Experience – Melissa McGrath


2. My full name is Melissa Ivy McGrath. I am a qualified planner. I hold a Bachelor of Arts and a Master of Resource Management from Massey University New Zealand. I am a Full Member of the New Zealand Planning Institute (MNZPI).
3. I have worked within the District Plan Team at Whangarei District Council for the past 11 years, being the District Plan Manager for the past four years.
4. I have been employed in various resource management positions in local government and private companies since 2003. My predominant experience has been in statutory policy and resource consent planning in the Whangārei and Auckland regions. My experience includes processing and reporting on resource consent applications, district plan formulation and policy advice for the Far North District and Whangarei District Councils, preparation of Assessment of Environmental Effects, monitoring and compliance of consent conditions.
5. I am familiar with the area to which this appeal relates.

Code of Conduct – Melissa McGrath

6. I record that I have read and agree to abide by the Environment Court's Code of Conduct for Expert Witnesses as specified in the Environment Court's practice Note 2014. This affidavit evidence is within my area of expertise, except where I state that I rely upon the evidence of another expert witness as presented to this hearing. I have not omitted to consider any material facts known to me that might alter or detract from any opinions expressed.

Qualifications & Experience – Robert Burgoyne

7. My full name is Robert Adam Burgoyne. I am a qualified planner holding the qualification of Bachelor of Resource and Environmental Planning from Massey University in Palmerston North. I am a Full member of the New Zealand Planning Institute (MNZPI).
8. I have been employed in various resource management positions in local government and private companies since 2013. My predominant experience has been in statutory policy and resource consent planning in the Whangārei and Auckland regions. My experience includes processing and reporting on resource consent applications, district plan formulation and policy advice for the Whangarei District Council, internal and external consultation, and liaising with the public on resource management issues.
9. I am familiar with the area to which this appeal relates.


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Code of Conduct – Robert Burgoyne

10. I record that I have read and agree to abide by the Environment Court’s Code of Conduct for Expert Witnesses as specified in the Environment Court’s practice Note 2014. This affidavit evidence is within my area of expertise, except where I state that I rely upon the evidence of another expert witness as presented to this hearing. I have not omitted to consider any material facts known to me that might alter or detract from any opinions expressed.

OVERVIEW

11. This affidavit has been prepared in support of an application to the Court to request direction under section 293 (“s293”) of the Resource Management Act 1991 to notify an amended appeal by Northport Limited (“Northport”) to the decision (“the decision”) of the Whangārei District Council (“Council”) on Plan Change 144 (“PC144”) of the Urban and Services plan change package to the Operative Whangārei District Plan (“the Plan”).
12. We prepared s42A reports and attended plan change hearings on behalf of Council as part of the Urban and Services plan change package. We were not the s42A reporting planners for PC144 but have reviewed all relevant documentation pertaining to this appeal.
13. This affidavit concentrates on the schedule 1 process of PC144 and is set out as follows:
- (a) Nature of the Section 293 application
 - (b) Operative Plan Provisions
 - (c) Plan Changes Notification
 - (d) Submissions
 - (e) Section 42A Report
 - (f) Hearing
 - (g) Decision
 - (h) Appeal
 - (i) Amended Appeal
 - (j) Proposed Section 293 Process
 - (k) Alternatives
 - (l) Conclusion

NATURE OF THE S293 APPLICATION

14. The s293 application relates to the Whangārei Port (“the Port”) and areas of surrounding land at Marsden Point and across the Whangārei Harbour at Whangārei Heads / Reotahi as shown below.


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OPERATIVE PLAN PROVISIONS

15. Under the operative Plan provisions the Port is zoned as Marsden Point Port Environment (“MPPE”). The Plan contains rules relating to noise and vibration in the district wide Noise and Vibration Chapter (“NAV”). NAV.6.1 requires consent where noise emitted from any site within the MPPE exceeds the following levels when measured within the boundary of certain surrounding Environments¹:

Daytime 0700 to 2200 hours	Night-time 2200 to 0700 hours	
dB LAeq	dB LAeq	dB LAfmax
55	45	75

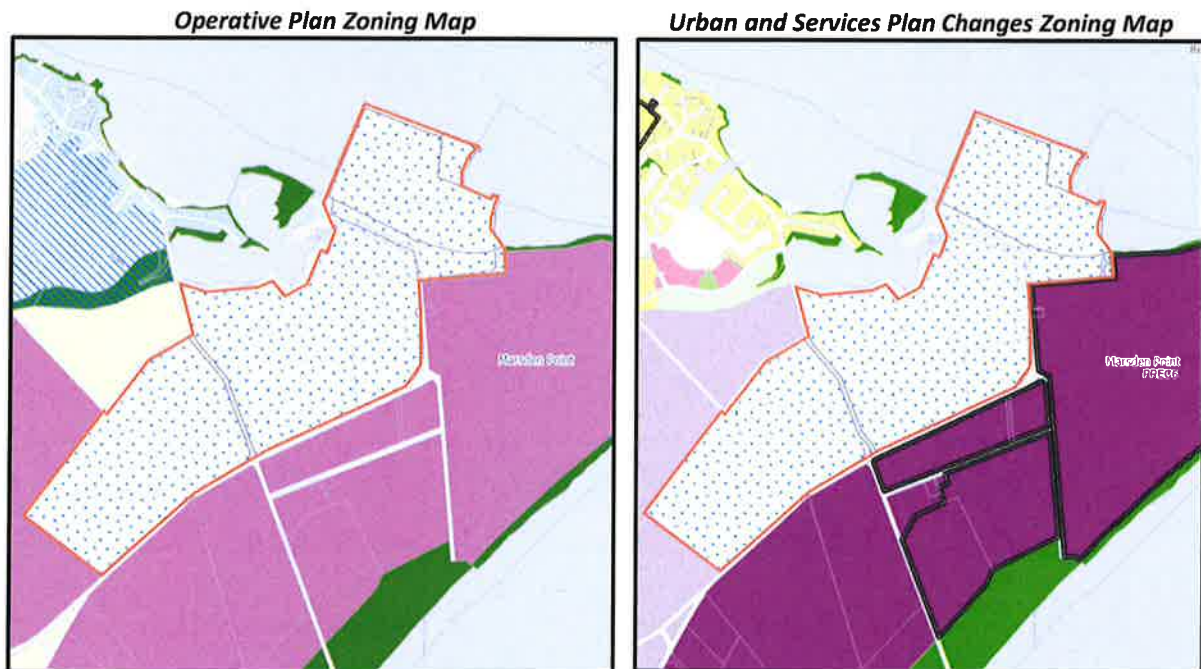
16. The Plan does not contain any provisions managing sensitive activities in proximity to the MPPE, nor does it require noise insulation for any activities in proximity to the MPPE.

¹ Living 1, Living 2, Living 3, Urban Transition, Rural Production, Rural Living, Rural Village Residential and Rural (Urban Expansion) Environments.

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PLAN CHANGES NOTIFICATION

17. On May 8th 2019 the Council notified PC144 together with a suite of other plans changes collectively known as the “Urban and Services Plan Changes”. PC144 introduces a new Port Zone (“PORTZ”) to replace the MPPE. The PORTZ applies to the same spatial extent as the operative MPPE as outlined in red in the plans below.



18. In general, the MPPE and the PORTZ aim to achieve similar outcomes of recognising the importance of the Port and enabling port related activities within the zone, while managing conflicts between this land use and nearby activities.
19. With regard to noise limits, PC144 proposed consequential amendments to the NAV Chapter to change references to MPPE to PORTZ but retained the status quo provisions.

SUBMISSIONS

Northport submission

20. Northport made a submission² (“the submission”) to the Urban and Services Plan Changes seeking various amendments to the PORTZ (see Common Bundle Tab 1).
21. The submission deals with noise and vibration at paragraphs 13-27 (see Common Bundle CB.005 – CB.007).
22. With regard to noise, Northport requested that (as summarised by us):

² Original submission number 132.

(a) The Plan refer to the *New Zealand Standard 6809:1999 Acoustics – Port noise management and land use planning* (“Port Noise Standard”)³.

(b) NAV.6.1 be amended to apply the following standards to noise emitted from the Port⁴:

Location	Day-night ⁵ (Long term)	Night-time ⁶ (Short term)
At any point on land at, or beyond, the inner control boundary	65 dB Ldn (5 days)	60 dB LAeq (9 hrs)
	68 dB Ldn (1 day)	65 dB LAeq (15 min)
		85 dB LAFmax

(c) A new sound insulation requirement be added to NAV.6.5 applicable to a new Port Noise Management Area (“PNMA”)⁷.

23. The submission did not specify where the noise control boundaries or the PNMA would apply, but provided a plan showing the properties likely to be affected by the PNMA⁸ as shown below.



³ Common Bundle CB.005, paragraph 15 of the submission.

⁴ Common Bundle CB.006, paragraph 22 of the submission.

⁵ Northport defined day-time as “0700 – 2200 on any day”.

⁶ Northport defined night-time as “2200 – 0700 the following day”.

⁷ Common Bundle CB.006 – CB.007, paragraphs 24 – 26 of the submission.

⁸ Common Bundle CB.006 – CB.007, paragraph 24 of the submission.

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New Zealand Refining Company submission

24. New Zealand Refining Company's ("Refining NZ") original submission⁹ (see Common Bundle Tab 2) sought similar relief with respect to noise, seeking the introduction of a Marsden Point Industrial Noise Precinct overlay. This submission point and relief sought was rejected in the decision and was not pursued by Refining NZ on appeal.

New Zealand Refining Company further submission

25. Refining NZ¹⁰ lodged the only further submission (see Common Bundle Tab 3) on Northport's submission with respect to noise. Refining NZ supported Northport's request that sound insulation requirements be added to NAV.6.5 applicable to the PNMA. Refining NZ reserved its position pending confirmation of the extent and provisions of the PNMA.

SECTION 42A REPORT

26. The submission was addressed in Part 7 of the section 42A report ("s42A") (see Common Bundle Tab 4). The s42A reporting planner considered that *"Northport has provided insufficient technical information and evidence for both the Port Noise Management Area and sound insulation requirements¹¹."*
27. The Council's acoustic consultant Mr Jon Styles reviewed the submission providing technical comments as part of the s42A¹² (see Common Bundle Tab 5). Mr Styles stated:
- "We support the adoption of the principle of the PNMA (and the associated and appropriate provisions) However, Northport's proposed relief relies on the adoption of noise control boundaries, sound insulation provisions and associated land use controls, over an area of land which is currently undefined. Without this information we are unable to provide advice on the potential adverse noise effects, the appropriate policy and rule framework and the analysis required by Section 32 cannot be completed¹³."*
28. The s42A reporting planner recommended that the submission point relating to noise provisions and sound insulation be rejected¹⁴.

⁹ Common Bundle Tab 2, original submission number 260.

¹⁰ Common Bundle Tab 3, further submission number x352.

¹¹ Common Bundle CB.052, paragraph 153 of Part 7 of the s42A Hearing Report.

¹² Common Bundle Tab 5, attachment 6 of Part 1 of the s42A Report.

¹³ Common Bundle CB.064, section 2.2 of Attachment 6 of Part 1 of the s42A Report.

¹⁴ Common Bundle CB.053, paragraph 155 of Part 7 of the s42A Hearing Report.


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HEARING

29. Northport provided tabled evidence, including technical evidence from Marshall Day, at the Hearing with specific track changes to the NAV Chapter and maps identifying the proposed noise control boundaries¹⁵ (see Common Bundle Tab 7). The specific amendments sought include:
- (a) Mapped inner and outer noise control boundaries.
 - (b) Day and night-time noise rules applicable to the inner and outer noise control boundaries.
 - (c) A requirement for noise protection for new buildings containing noise sensitive activities between the inner and outer control boundaries.
 - (d) A requirement for a Port Noise Management Plan.
 - (e) A requirement for Northport to offer noise mitigation for existing dwellings between the inner and outer control boundaries where monitored noise levels exceed 55 dB L_{dn} (5-day).¹⁶
30. Council responded to Northport's evidence in Part 7 of the Right of Reply ("ROR") Report (see Common Bundle Tab 9). The reporting planner stated that:
- "Mr Styles remains of the view that the information provided is still insufficient for the purpose of assessing the effects of the requested changes and the implementation of the [PNMA] and noise control boundaries¹⁷..."*
31. The reporting planner recommended that the Hearing Commissioners ("Commissioners") reject Northport's submission points regarding noise¹⁸.

DECISION

32. The Commissioners addressed the submission in Topic 5 of Report 8 of the Report and Recommendations of Independent Commissioners (see Common Bundle Tab 10). The Commissioners agreed with the s42A and ROR reporting planner and Mr Styles that Northport's submission point relating to noise should be rejected due to "insufficient

¹⁵ Summary of evidence of Brett Lewis Hood on behalf of Northport Ltd 6 December 2019.

¹⁶ Common Bundle CB.115, paragraph 13 of the Summary of evidence of Brett Lewis Hood on behalf of Northport Ltd 6 December 2019.

¹⁷ Common Bundle CB.169 – CB.170, paragraph 28 of Part 7 of the ROR.

¹⁸ Common Bundle CB.170, paragraph 31 of Part 7 of the ROR.


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information for the purpose of assessing the effects of the requested changes and the implementation of the [PNMA] and noise control boundaries¹⁹.”

33. With respect to legal submissions from the Council and from Northport with respect to scope of the submission, the Commissioners also expressed concerns *“that people (particularly in the One Tree Point and Reotahi areas) that could possibly be adversely affected by the controls are not aware of the inner and outer control boundaries proposed in evidence and have had no input into this process²⁰.”*
34. The Decision Version of the Whangārei District Plan (“Decision Version”) retained the NAV provisions that were notified in PC144 and that are consistent with the Operative Plan provisions discussed in paragraphs 15 and 16 above.

APPEAL

35. Northport lodged an appeal²¹ (see Common Bundle Tab 11) on the Decision Version seeking the following relief:
- (a) Apply the Port Noise Standard to activities in the PORTZ and make consequential amendments to the NAV chapter.
 - (b) Require new dwellings and noise sensitive activities in the PNMA to be sound insulated.
 - (c) Any additional changes which are required to the text and the maps of the Proposed Plan to give effect to the relief sought in this appeal.
 - (d) Such other or further relief to address the reasoning above.²²
36. Kāinga Ora – Homes and Communities (“Kāinga Ora”) joined the appeal under section 274.

AMENDED APPEAL

37. Northport filed an amended Notice of Appeal on 15 December 2020 (see Common Bundle Tab 12).

PROPOSED SECTION 293 PROCESS

38. If the Court were to direct the Council to notify Northport’s amended appeal and a map of the proposed Inner and Outer Control Boundaries, we consider that the Council could issue

¹⁹ Common Bundle CB.175, paragraph 85 of Topic S of Report 8 of the Report and Recommendations of Independent Commissioners.

²⁰ Common Bundle CB.175, paragraph 87 of Topic S of Report 8 of the Report and Recommendations of Independent Commissioners.

²¹ ENV-2020-AKL-000109.

²² Common Bundle CB.180, paragraph 17 of Northport Appeal.


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- a public notice (see Common Bundle Tab 14) and notify the information package within 2 weeks following the direction being received from the Court.
39. As part of the notification process we propose that letters would be sent to all land owners (see Common Bundle Tab 15) that fall within the proposed Inner and Outer Control Boundaries as well as a buffer area beyond the Outer Control Boundary (we are currently of the view that at least 100 metres beyond the Outer Control Boundary would be appropriate).
40. Council and Northport have agreed in principle a joint communication plan for notification whereby Council would respond to queries on procedural matters and Northport would respond to queries on technical and operational matters.
41. If the Court's direction was made by 19 February 2021, with a 20-working day period for filing of any submissions or s274 notices, we consider that the matter would be ready for direct discussions or formal mediation by 6 April 2021.

ALTERNATIVES

Variation

42. A Variation to PC144 could be notified to include noise boundaries and noise attenuation for Northport. A Variation would require Council approval prior to notification., In our opinion, allowing for preparation time following receipt of a decision on the s293 application, the agenda item containing the proposed Variation could not be taken to Council until at least late March 2021. If approved by Council, we consider that the following are reasonable timeframes for the statutory processes:
- (a) A Variation would require notification, 20-working days for submissions.
 - (b) Summarising of submissions and notification of the summary of submissions.
 - (c) A 10-working day further submission period. If there were any submissions received.
 - (d) The submission would need to be responded to in a s42A Report and heard (if the submitters wished to be heard).
 - (e) Council would then need to make a decision on the Variation, followed by the appeal period and 274 period.
43. Taking all of this into account, we consider that the earliest that a Variation would be ready for direct discussions or formal mediation would be by November 2021.

Resource Consent

44. A resource consent could address the noise levels generated by the Port, but could not impose restrictions on future sensitive activities within the noise control boundaries. That can only be achieved by amendments to the Plan.

CONCLUSION

45. We support the s293 application because in our opinion:
- (a) While the issue of scope is not agreed between Northport and the Council, notification of the amended Notice of Appeal together with a map of the proposed Inner and Outer Control Boundaries will address any procedural unfairness.
 - (b) Notifying Northport's preferred relief will allow potentially affected parties to better understand the full extent of the possible outcomes.
 - (c) A s293 direction to notify will be more efficient than a Variation and will better enable Northport's appeal to 'catch-up' with the other appeals on the Urban and Services plan change package, and will be more effective than a resource consent.

Sworn/Affirmed at Whangarei by

Robert Adam Burgoyne



this 18th day of

December 2020

before me:



C Browne
Deputy Registrar
Whangarei District/High Court

A Deputy Registrar/Solicitor of the High Court of New Zealand

Sworn/Affirmed at Whangarei by

Melissa Ivy McGrath



this 18th day of

December 2020

before me:



C Browne
Deputy Registrar
Whangarei District/High Court

A Deputy Registrar/Solicitor of the High Court of New Zealand

**BEFORE THE ENVIRONMENT COURT
I MUA I Te KOOTI TAIAO
AT AUCKLAND**

ENV-2020-AKL-109

IN THE MATTER of the Resource Management Act 1991
("the Act")

AND

IN THE MATTER of an appeal under Clause 14 of Schedule
1 of the Act against the decision of
Whangarei District Council on Plan
Changes 88 and 144 to the Whangarei
District Plan.

BETWEEN

NORTHPORT LIMITED

Appellant

AND

WHANGAREI DISTRICT COUNCIL

Respondent

**AFFIDAVIT OF BRETT LEWIS HOOD IN SUPPORT OF JOINT APPLICATION UNDER
SECTION 293 OF THE ACT
SWORN/AFFIRMED 18th DECEMBER 2020**

I, **BRETT LEWIS HOOD**, resource management planner of Whangarei, affirm:

1. My full name is Brett Lewis Hood. I am a resource management planner. I hold a Bachelor of Social Science (Geography) from the University of Waikato and a Master of Resources and Environmental Planning from Massey University. I am a full member of the New Zealand Planning Institute (MNZPI).
2. I have 21 years of experience as a planning consultant in the Northland and Auckland regions. My role has typically been to lead project teams through various resource consent, notice of requirement, and plan change processes, and to provide environmental and strategic planning advice for these projects.
3. I am familiar with the area to which this appeal relates. I have visited the site and surrounds on many occasions.
4. I record that I have read and agree to abide by the Environment Court's Code of Conduct for Expert Witnesses as specified in the Environment Court's practice Note 2014. This evidence is within my area of expertise, except where I state that I rely upon the evidence of other expert witness as presented to this hearing. I have not omitted to consider any material facts known to me that might alter or detract from the opinions expressed.
5. In May 2019 the Respondent publicly notified a suite of plan changes to the Whangarei Operative District Plan ("District Plan"). These plan changes were numbered 82A and B, 88, 88A – J, 109, 115, 136, 143-145, 147 and 148 and were collectively referred to as the "Urban and Services Plan Changes". The plan changes include a suite of consequential amendments to other operative chapters of the District Plan, including the Noise and Vibration ("NAV") chapter.
6. Northport Ltd ("NPL") lodged a submission to the Urban and Services Plan Changes (see common bundle **Tab 1**). I was responsible for the preparation and filing of the submission. The submission, inter alia, requested changes to the NAV chapter to incorporate New Zealand Standard 6809:1999 Acoustics – Port noise management and land use planning (or the 'Port Noise Standard' as it is commonly known). The submission included a map showing the area surrounding Northport that would be affected by the Port Noise Standard. It also stated proposed noise limits to be applied within the identified area, and sound insulation requirements that would apply to new sensitive activities locating within these areas.



7. Along with Mr Craig Fitzgerald of Marshall Day Acoustics Ltd, I appeared before the Whangarei District Council hearings committee to give evidence on behalf of NPL on the plan changes. Included in the evidence of Mr Fitzgerald was a plan showing the proposed inner and outer noise control boundaries to which it was intended that the Port Noise Standard would apply. Both these boundaries were within the area identified on the plan included with the original NPL submission. A copy of my evidence and that of Mr Fitzgerald, is included in the common bundle under **Tabs 6 and 8** respectively).
8. The Council and its noise consultant (Mr Jon Styles) did not oppose the introduction of provisions under the Port Noise Standard. However, Council's legal adviser raised an issue of fairness at the Council hearing that insufficient technical information and evidence had been provided with the NPL submission to enable potential submitters properly to understand the implications for them of the Port Noise Standard. The hearing Commissioners accepted the position of the Council and rejected the submission based on there being insufficient information for the purpose of assessing effects. This centered on the inner and outer control boundaries being introduced in evidence at the hearing and not in the original submission. The relevant excerpts from the decision are included in the common bundle under **Tab 10**.
9. I maintain that sufficient information was provided in the original submission, such that potentially affected persons were able to determine the extent of impact on them. It was clear in the NPL submission that any property located within the area identified on the plan included with the submission would be subject to new specified noise limits and sound insulation requirements for new builds. Despite that, no further submissions were received.
10. However, rather than argue the fairness issue and whether or not the relief sought by NPL at the hearing (by its evidence) is within the scope of its submission as lodged, NPL has resolved to work with the Council to ensure that persons potentially affected by application of the Port Noise Standard to Northport have a fully informed opportunity to have a say on the provisions. The process considered most effective to achieve that outcome is an application under section 293 of the Act. This application (if approved) would result in all landowners located within the inner and outer noise control boundaries being individually notified of the proposed changes to the District Plan and enabled to become involved.



11. Over the past months since the lodging of NPL's appeal, NPL has worked with Marshall Day and the Council and its acoustic consultants to better refine the relief package considered appropriate to incorporate the requirements of the Port Noise Standard into the District Plan. This revised suite of provisions is included in the common bundle under **Tab 12**. A larger version of the proposed Inner and Outer Noise Control Boundaries plan is provided under **Tab 16**.
12. The key features of the refined provisions to apply at Northport are:
 - (a) Mapped noise control boundaries derived from modelled noise contours for predicted peak operations over the lifetime of the District Plan;
 - (b) Specified limits for port noise applicable inside the Outer Noise Control Boundary.
 - (c) A requirement for new or replacement noise sensitive activities located inside the Outer Noise Control Boundary to achieve a specified indoor noise level.
 - (d) A requirement for the port to offer noise mitigation to existing noise sensitive activities located within the Outer Noise Control Boundary where monitored or predicted noise reaches a specified level.
 - (e) The introduction of a Port Noise Management Plan designed to minimise noise from port activities.
13. On 15 December 2020 NPL formally amended its notice of appeal to specify these revised provisions as its relief in the proceedings.

AFFIRMED at Whangarei by

BRETT LEWIS HOOD

this 18th day of
December 2020

before me:

C Browne
Deputy Registrar
Whangarei District/High Court

A Deputy Registrar/Solicitor of the High Court of New Zealand