

Determination 2022/026

Regarding a notice to fix in respect of a demolished retaining wall

11 Scotland Place, Hillcrest, Hamilton

Summary

This determination concerns the issue of a notice to fix in relation to a retaining wall that had been built by a neighbour over the property boundary and then subsequently demolished by the neighbour. The determination considers whether the owners of the property were a “specified person ... contravening or failing to comply with the Act or regulations” in terms of section 164 of the Building Act, such that a notice to fix could be issued to them.



Figure 1: Photograph of unretained cut¹

¹ Photograph from report dated 14 November 2019 prepared by structural engineers for the owners.

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (e.g., Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, Principal Advisor Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.²
- 1.2. The parties to the determination are:
 - 1.2.1. the owners of the property at the time the notice to fix was issued, L Cai and A Yang (“the owners”), who were the recipients of the notice to fix and applied for this determination³
 - 1.2.2. Hamilton City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. I have included Scotland Apartments Limited⁴ (“the builder”) as a person with an interest in this determination, as the owner and developer of the property adjacent to the owners (new units – see figure 2) at the relevant time and who carried out building work on the owners’ property.
- 1.4. This determination arises from the authority’s decision to issue a notice to fix to the owners on 6 November 2019, after demolition by the builder of the portion of a retaining wall that had been built over the boundary onto the owners’ property. The demolition of the retaining wall left an unretained slope that the authority considered was sitework in breach of the Building Code.
- 1.5. Under section 177(1)(b) and (3)(e) of the Act, the matter to be determined is the authority’s exercise of its power of decision in issuing notice to fix 2019/350 dated 6 November 2019 (the “third notice”).

² The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

³ The owners sold the property during the determination process, following the issue of a draft of the determination. The new owner is not considered to be a party to the determination under section 176 of the Act. However, a copy of the draft determination was provided to the new owner to make any comment if they wished (no comments were received).

⁴ At the time this determination application was made, Scotland Apartments Limited was a registered company. However, it was removed from the companies register on 15 March 2021.

Issues outside this determination

- 1.6. Earlier notices to fix issued by the authority, including notice to fix 2019/222 dated 19 July 2019 (the “first notice”) and notice to fix 2019/301 dated 24 September 2019 (the “second notice”), fall outside the scope of the matter to be determined. However, despite this, the first and second notices are discussed in this determination insofar as they are relevant to the background of the dispute. I have also included some comment and observations about the remedies in relation to the first notice.

2. The background and building work

- 2.1. In 2018 and 2019 the builder developed the property adjacent to the owners’ property (the “new units” shown in figure 2). In doing so, the builder excavated over the boundary with the owners’ property and then constructed a timber retaining wall which encroached onto the owners’ property. This portion of the retaining wall was in contravention of the building consent issued for the development.

The retaining wall

- 2.2. At the time the retaining wall was constructed, the exact location of the boundary between the owners’ and builder’s properties appears to have been unclear. The owners have advised that subsequently a “boundary marker identifier” was put in by the owners’ surveyor. The identifier showed that the retaining wall encroached onto the owners’ property by approximately 2.4m.
- 2.3. As shown in figure 2, the area where the retaining wall was constructed is in the northwest corner of the owners’ property. The area runs along the boundary line of the properties to the west of the owners’ property, and there is an existing concrete crib wall along part of the boundary retaining a slope of approximately 3.2m up to the properties to the west.
- 2.4. The owners have advised that to construct the retaining wall, the builder removed a fence between the properties, removed vegetation and soil from the owners’ property, and excavated the previously sloping ground.

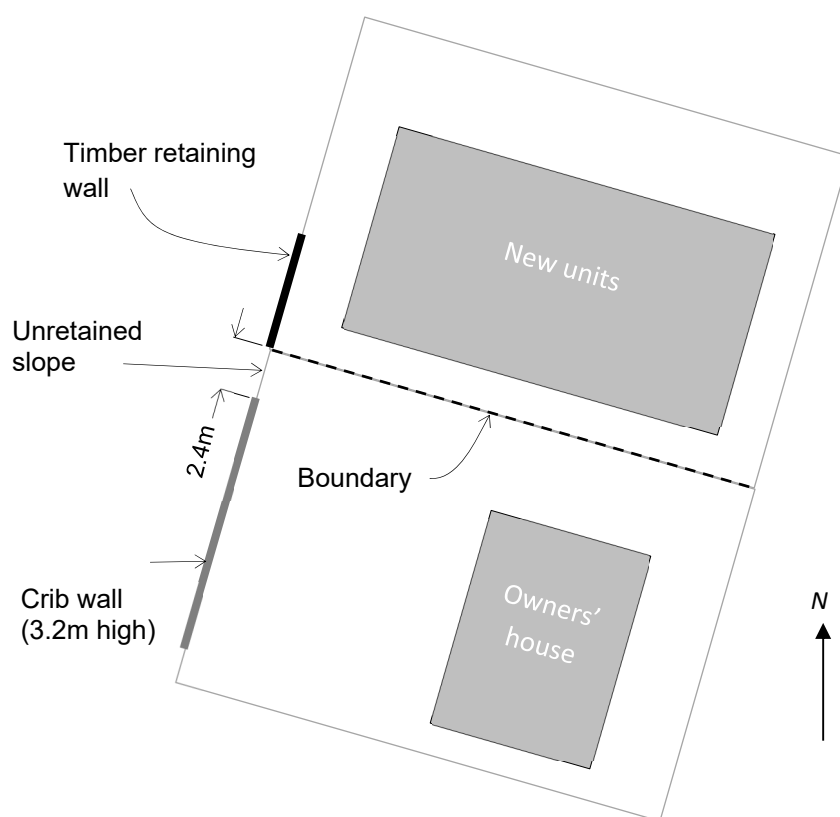


Figure 2: Site plan (approximate and not to scale)

The first and second notices to fix, and demolition of the retaining wall

- 2.5. Following the owners querying the location of the retaining wall with the authority, on 19 July 2019 the authority issued the builder and the owners with the first notice. The first notice stated the retaining wall had been constructed in contravention of the approved building consent and referred to section 40 (that a person must not carry out building work except in accordance with a building consent). The first notice specified the options to remedy the contravention were to apply for an amendment to the building consent, or to “[r]emove the retaining wall and construct in accordance with the approved Building Consent.”
- 2.6. In response to the first notice, the builder subsequently demolished the portion of the retaining wall that was on the owners’ property. The authority has advised that on 5 September 2019 the builder notified the authority the retaining wall had been removed.
- 2.7. No retaining structure was erected following the demolition of the portion of the retaining wall on the owners’ property. This left an open and near vertical cut of soil approximately 2.4m wide and 3.2m high (see figure 1).

- 2.8. On 24 September 2019, the authority issued the second notice to the owners. The second notice was in identical terms to the third notice which superseded it, except the date for compliance was 25 October 2019. The owners did not comply with the second notice.

The third notice to fix

- 2.9. On 6 November 2019, the authority issued the owners with the third notice. The operative sections of the third notice are set out in full below:

PARTICULARS OF CONTRAVENTION OR NON-COMPLIANCE

A Notice to Fix (2019/301) was issued to you on the 24th September 2019 for siteworks that have been undertaken on your property that have caused an un-retained slope to be exposed and this notice remains outstanding.

The Building Act 2004, Building Regulations 1992, Schedule 1, Clause B1.3.2 states

Buildings, building elements and sitework shall have a low probability of causing loss of amenity through undue deformation, vibratory response, degradation, or other physical characteristics throughout their lives, or during construction or alteration when the building is in use.

To remedy the contravention or non-compliance you must:

1. Apply for and uplift a Building Consent to provide support to neighbouring property as a consequence of siteworks

This notice must be complied with by: 6th December 2019

- 2.10. On 7 November 2019, the site was inspected by a structural engineer engaged by the owners. In a report dated 14 November 2019, the engineer stated:

The ground on both sides of the retaining wall has been examined during the site inspection. No visual crack on the ground has been observed. The existing timber fence is still upright. No sign of crack or tilting due to the ground instability has been observed.

Open cut area: ... this is near vertical cut and left unprotected. The width of this open cut is about 2.4m. It currently sustains a height of 3.2m. The soil is clay, has some cracks and scumbles on the surface.

...

No immediate hazard to integrity of the neighbouring houses at the top of the cut/wall. Use [of] the backyard however is risky with a possibility of abrupt subsidence and fence failure.

- 2.11. The owners subsequently applied to the Ministry for a determination in relation to the third notice.⁵
- 2.12. During the determination process, the owners sold the property. Prior to selling the property, the owners fixed the unretained area which was of concern to the authority.

3. Submissions

Owners

- 3.1. The owners have provided various documents to the Ministry setting out the background and details of the dispute, including correspondence with the authority and the builder, the notices to fix, and photographs of the properties and building work. The owners also provided a surveyor's site plan dated September 2019 and a structural engineer's report dated 14 November 2019.
- 3.2. The owners make the following points that I consider are relevant to the matter (in summary):
 - 3.2.1. The builder has caused the situation on the owners' property by building the retaining wall and later removing it.
 - 3.2.2. The owners are of the view the first notice (issued to the builder) was "rather irresponsible" because it included removal of the retaining wall which then left the bank unsupported, and the damage caused by the removal of the wall was with the authority's knowledge.
 - 3.2.3. It is unfair the authority has issued the third notice to the owners when the only thing they have done is advise the authority that the builder's work encroached onto their property, and later that the retaining wall had been removed.
 - 3.2.4. The third notice should have been issued to the builder as the person who has caused the damage (the unretained bank) and who the authority is aware carried out the building work.

Authority

- 3.3. The authority provided the Ministry with a chronology of events that led to the notices to fix being issued to the owners, together with information relating to the notices.

⁵ Under section 183, the authority's decision or exercise of a power relating to the issue of the third notice is suspended until I make this determination.

3.4. The authority stated:

... we believe that [the owners are] the specified person in terms of Section 163 of the Building Act 2004. We form this view on the basis that the Notice to Fix was issued as a result of siteworks being undertaken on [the owners'] property, causing a loss of amenity to the neighbouring property and as the owner ... falls within the definition of a specified person for the purpose of Section 163.

Builder

- 3.5. The builder provided information to the Ministry, including a code compliance certificate for the development of the new units and various invoices relating to building work.

Draft determination and submissions in response

- 3.6. A draft of this determination was issued to the parties and the builder for comment on 10 August 2020. The draft concluded that the authority was incorrect to issue the third notice to the owners, on the basis that they were not a 'specified person' in terms of section 163, therefore the authority could not issue a notice under section 164.
- 3.7. The owners accepted the draft determination and reiterated their views as detailed at paragraph 3.2.
- 3.8. The authority advised it did not agree with the conclusions reached in the draft determination and submitted (in summary):
- 3.8.1. The issuing of a notice to fix is not contingent on the building in question remaining on the property at the time a notice to fix is issued. A notice to fix can be issued in respect of a building that has been removed from the property or for building work associated with the removal of a building if there has been non-compliance with the Act or Building Code.
- 3.8.2. Section 40 provides "buildings not to be ... removed without consent". Removal of a building is included in the definition of "building work" in section 7.
- 3.8.3. In Determination 2014/024⁶, a retaining wall was removed, and a new wall was not built to replace it. The determination considered the unsupported vertical excavation of land up to the boundary breached the Building Code and a notice to fix could be issued to the owner of the property who had undertaken the work.

⁶ Determination 2014/024 *Regarding the issue of a notice to fix for building work carried out to remove a retaining wall* (28 April 2014).

- 3.8.4. The removal of the retaining wall and failure to reinstall a complying wall in this case is a breach of Clause B1.3.6 of the Building Code, as the site works are likely to cause damage to other property.
- 3.8.5. The works to remove the retaining wall were undertaken while the applicants owned the property and with their knowledge and consent.⁷ Therefore, a notice to fix can be issued to them as a 'specified person' under section 163.
- 3.9. The builder advised there were no further comments to be made in response to the draft determination.

4. Discussion

The legislation

- 4.1. Section 164 provides an authority must issue a notice to fix where the authority considers, on reasonable grounds, that a "specified person is contravening or failing to comply with [the] Act or the regulations" (which include the Building Code). "Specified person" is defined in section 163 and includes a building owner and a person carrying out or supervising the building work.
- 4.2. A notice to fix is an enforcement notice which:
- 4.2.1. requires the specified person to remedy the contravention of, or to comply with the Act (section 164(2)(a))
 - 4.2.2. specifies a reasonable timeframe for compliance (section 165(1)(b))
 - 4.2.3. may be enforced by a prosecution for failing to comply with the notice (section 168).
- 4.3. For an authority to be able to issue a notice to fix, there must be a contravention (or breach) of, or a failure to comply with, the Act or the regulations. The contravention in this case is of section 17, which provides all building work must comply with the Building Code. The authority has cited the non-compliance as Clause B1.3.2:

Buildings, building elements and sitework^[8] shall have a low probability of causing loss of amenity through undue deformation, vibratory response, degradation, or other physical characteristics throughout their lives, or during construction or alteration when the building is in use.

⁷ The owners dispute the building work carried out on their property was done with their knowledge and consent.

⁸ "Sitework" means work on a building site, including earthworks, preparatory to, or associated with, the construction, alteration, demolition, or removal of a building (section 7 of the Act). In this case the sitework was earthwork carried out in preparatory to and associated with the construction and later demolition of the section of retaining wall that encroached on the owners' property

Application to this case

4.4. In deciding whether the authority was correct to issue the third notice to the owners, I must consider whether:

4.4.1 the owners are a 'specified person' in terms of section 163, and

4.4.2 the owners contravened or failed to comply with the Act or regulations, in terms of section 164.

Are the owners a 'specified person'?

4.5. Section 163 defines 'specified person' as follows:

specified person means—

(a) the owner of a building:

(b) if a notice to fix relates to building work being carried out,—

(i) the person carrying out the building work; or

(ii) if applicable, any other person supervising the building work:

(c) if a notice to fix relates to a residential pool, a person referred to in section 162C(4).

4.6. The authority has advised the third notice was issued to the owners on the basis they are the owners of a building. As the authority relies on paragraph (a) of the definition of 'specified person' I will not consider the other paragraphs; however, I note:

4.6.1. paragraph (b) does not apply because the owners did not carry out or supervise the building work

4.6.2. paragraph (c) cannot apply as the third notice does not relate to a residential pool.

4.7. There is no dispute the owners in this case are the owners of the property. 'Owner' is defined in section 7, in relation to land and any buildings on the land, to include the owner of the fee simple of the land.

4.8. The issue is whether the owners are the owners of a *building*. There is no question the owners are the owners of a building on the property, being the dwelling. There is also no question a retaining wall is a building, as it is "a temporary or permanent movable or immovable structure" in terms of section 8(1)(a) and is not excluded by section 9. I have not considered the question of whether the owners of the land owned the portion of the retaining wall that was constructed on their property. I consider that is a matter of property law and it is not relevant to my considering

the issue of the third notice. Once the retaining wall had been demolished and there was no part of it remaining on the owners' property, it is my view they were not the owners of a building for the purpose of section 163(a).

- 4.9. It is my view the "building" in the words "owner of a building" must relate to the notice to fix being issued, in that the building is the subject of, or provides the basis for, the notice to fix.
- 4.10. In case I am wrong in my interpretation and my conclusion that the owners are not a specified person under section 163(a), I have also considered the other requirements in section 164.

Are the owners contravening or not complying with the Act or regulations?

- 4.11. Putting aside for the moment whether there is a contravention of, or non-compliance with, the Act or regulations in this case (ie of section 17 or Clause B1.3.2), it is clear that section 164 requires the specified person be the person contravening or not complying with the Act or Code.
- 4.12. The contravention must be carried out by, or on behalf of or with the authority of the specified person. Therefore, there must be a link or connection between the specified person and the contravention or non-compliance, ie the contravention is done or caused by the specified person. I refer to this as a 'causal link' between the specified person and the contravention or non-compliance.
- 4.13. This interpretation of section 164 is supported by the case of *Waikato Regional Council v Poseidon Holdings Limited* [2021] NZDC 6951 ("*Poseidon*"). In that case the District Court considered a notice to fix issued to a subsequent owner of a property, where the previous owner had carried out non-complying building work. The Court made the following statements which are of direct relevance to this case:

[50] Where the definition refers to the "owner of a building", the ordinary meaning of that phrase must mean the current owner. However, that is not a complete answer as s **163 must be read in light of s164**. That means an NTF could only be served on PHL if they as a specified person were "contravening or failing to comply" with the Act or regulations.

...

[67] ... Put simply, **there would seem to be a strong policy argument against criminal sanctions being visited on the current owner of a building who had no knowledge of and was not responsible for the non-compliant work.**

...

[74] In my opinion the phrase "contravening or failing to comply" is meant to encompass the acts and omissions of a "specified person". The first part of the phrase "**contravening**", which is a verb, connotes a sense of action/s undertaken on the part of the "specified person". A relevant question to be asked is: "have they undertaken any action/s or are they currently undertaking any action/s, which violate, infringe, are contrary to, or in conflict with the Act and Building Code?"

[75] The second part of the phrase “or **failing to comply**” is to be read in **contradistinction to “contravening”**. **This part of the phrase captures the omissions of a “specified owner”**. A relevant question to ask is: “have they failed or omitted to undertake any steps to ensure they comply with the Act or regulations?”

[my emphasis]

4.14. In *Poseidon* the Court held that the subsequent owner:

... did not undertake any steps or actions which contravened the Building Code. To hold a subsequent owner responsible to fix the defective work of a previous owner in those circumstances would, in appears to me to strain the ordinary meaning of the words “contravening”.⁹

4.15. Similar to the subsequent owner in *Poseidon*, the owners in this case have not undertaken any action causing, and are otherwise not responsible for, the alleged breach of the Building Code. The building work leading to the alleged contravention was not carried out by them or under their authority.

Response to authority’s submission regarding the draft

4.16. The points made by the authority in relation to the draft determination are set out at paragraph 3.8; I have addressed these briefly below.

4.17. The authority contends that issuing a notice to fix is not contingent on the building in question remaining on the property at the time the notice to fix is issued. However, I do not hold the view that issuing a notice to fix is contingent on the building remaining on the property. With respect to the authority, it appears to have misunderstood my position. Rather, I consider a notice to fix may be able to be issued in respect of a building that has been removed, or for building work associated with the removal of a building, (if the other requirements of section 164 are met), *to the person who carried out or supervised the building work, or under whose authority it was carried out*. This person may or may not be the owner but is a ‘specified person’ in terms of subsection (b) of the definition of that term, rather than subsection (a).

4.18. The authority refers to sections and clauses of the Act and Building Code it says are relevant. However, for the following reasons I do not consider the authority’s submissions on these points are relevant considerations:

4.18.1. Regarding Clause B1.3.6, which provides that sitework shall be carried out to provide stability for construction on the site and to avoid the likelihood of damage to other property, the third notice did not allege a contravention of Clause B1.3.6, rather it alleged a contravention of Clause B1.3.2 “loss of amenity”.

⁹ *Poseidon*, at [77]. The case was an appeal of Determination 2020/019 *Regarding the authority’s decision to issue a notice to fix for an agricultural effluent storage pond* (10 August 2020).

- 4.18.2. Regarding section 40, subsection (1) provides “a person must not carry out any building work except in accordance with a building consent”, and I agree that the removal of the retaining wall is building work¹⁰. However, as with Clause B1.3.6, the third notice did not allege a contravention of section 40.
- 4.19. The authority refers to Determination 2014/024. That determination does not consider the “owner of a building” category of the definition of ‘specified person’. The recipient of the notice to fix in that case was the owner at the time *and also carried out the building work*. Therefore, the owner was a ‘specified person’ in terms of section 163(b)(i), being the person “carrying out the building work”. The authority in this case notes in Determination 2014/024 “the owner was also the person who had undertaken the works”. In my view, this is the key point that differentiates that determination from the present case.

5. Conclusion

- 5.1. I do not consider the owners are a ‘specified person’ within the definition in section 163. This is because they are not the owners of a building insofar as the building relates to the third notice (in terms of paragraph (a) of the definition). Nor are they a ‘specified person’ in terms of paragraph (b), because they did not carry out or supervise the building work.
- 5.2. Nor do I consider the owners are a “specified person [who] is contravening or failing to comply with the Act or the regulations” in terms of section 164. The owners did not undertake or authorise the action resulting in the unretained slope on their property.
- 5.3. As the requirements of sections 163 and 164 are not satisfied, the authority could not issue the owners with a notice to fix. Consequently, I conclude the authority was incorrect to issue the third notice to the owners.

Additional comments in relation to the first notice

- 5.4. The matter to be determined is the authority’s decision to issue the third notice; I was not asked to consider the first and second notices. However, I have commented on the first notice below, because the action taken to satisfy the first notice caused the owners to be left with an unretained slope on their property. In my view, this was an unfortunate outcome that was a result of the remedies specified in the first notice.
- 5.5. When the authority issued the first notice, the remedies required the owners or builder to either:

¹⁰ ‘Building work’ is defined in section 7 as “... for, or in connection with, the construction, alteration, demolition, or removal of a building ...”

- 5.5.1. “[a]pply for an amendment to the building consent for the retaining wall”,
or
- 5.5.2. “[r]emove the retaining wall and construct in accordance with the approved Building Consent”.
- 5.6. The first notice, by including the option to remove the portion of the retaining wall constructed over the boundary but not requiring anything else to be erected to support/retain the land in its place, created a situation worse than before the building work to construct the retaining wall was carried out.
- 5.7. Section 165(1) sets out the requirements for the form and content of a notice to fix. Relevantly, section 165(1)(c) provides “if [a notice to fix] relates to building work that ... has been carried out without a building consent, it may require the making of an application for a certificate of acceptance for the work”. Section 165(1)(d) provides “if [a notice to fix] requires building work to be carried out, it may require the making of an application for a building consent, or for an amendment to an existing building consent, for the work”.
- 5.8. When the authority issued the first notice, remedies in accordance with sections 165(1)(c) or (d) could have included (but are not limited to):
- 5.8.1. an application for a certificate of acceptance to regularise the portion of the retaining wall constructed on the owners’ property, if the owners were to agree to it remaining in place; or
- 5.8.2. an application for building consent to remove the portion of the retaining wall constructed on the owners’ property, if the owners were to agree and subject to the land behind it being suitably retained.¹¹
- 5.9. It is not appropriate to include a remedy in a notice to fix that is beyond the control of the specified person to effect (ie requiring work to be done on another person’s property). In this regard, I am of the view the remedies in the first notice needed to acknowledge the role of the owners in approving any work to be carried out on their property; this is because without the owners’ agreement to works being carried out, the builder could not comply with the notice to fix.
- 5.10. As the District Court noted in *Marlborough District Council v Bilsborough* [2020] NZDC 9962, failure to comply with a notice to fix can result in the imposition of a significant financial penalty.¹² For this reason, it is my view that authorities have a

¹¹ To grant such a building consent, the authority must be satisfied that the proposed building work would comply with the Building Code.

¹² At [106]. Section 168(2) provides that a person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding \$200,000. Under section 168(1) a person commits an offence if they fail to comply with a notice to fix (other than a notice to fix in respect of the means of restricting access to a residential pool, which is covered by section 168(1AA) and (1AB)).

duty to exercise their important enforcement powers (such as the issue of notices to fix) in accordance with the law, fairly and reasonably, and not arbitrarily.

- 5.11. In my view, because the retaining wall was unlawfully constructed on the owners' property the authority needed to give careful consideration to issuing a notice to fix, the remedies provided for in any notice issued and involvement of the owners in any solution.
- 5.12. I have not received any information about what, if any, defects existed with the retaining wall (other than it being built without a building consent and without the owners' authority). I note it is likely the construction of any replacement wall would be substantially similar, in terms of function and performance, to the wall the authority required to be removed. However, the decision on how the cut face of the slope was to be retained was for the owners to make.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I hereby determine the authority was incorrect to issue the third notice to the owners. I therefore reverse Notice to Fix 2019/350 dated 6 November 2019.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 30 November 2022.

Peta Hird
Principal Advisor, Determinations