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Public Decision Makers Newsletter

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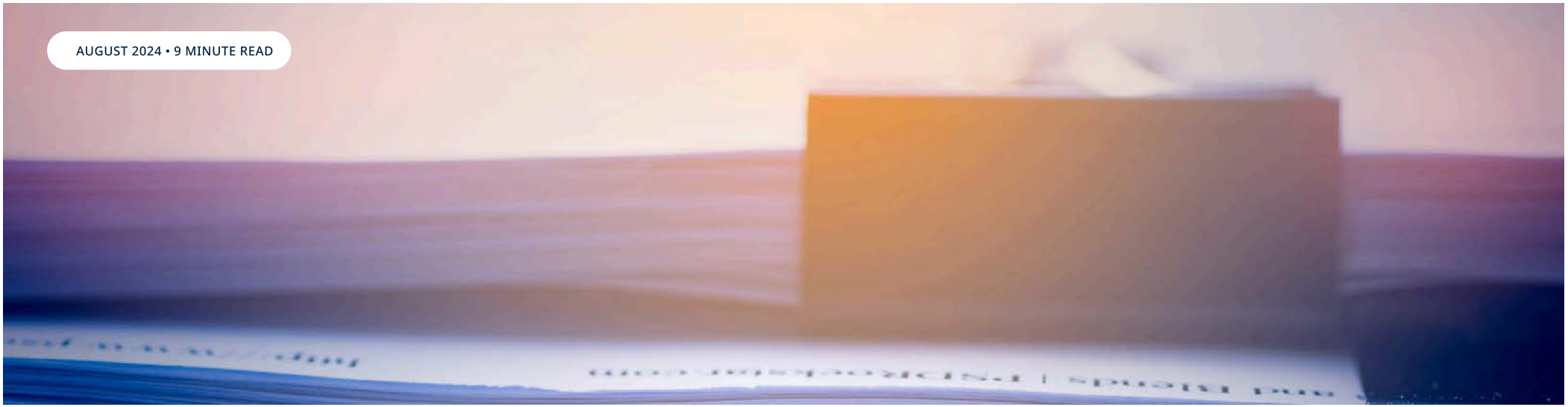

Legislative update: key changes in resource management

INTRODUCTION

The current Government is continuing to progress its proposed reforms of the resource management system, particularly in areas such as freshwater, significant natural areas, coastal permits for marine farms, and the fast-tracked approvals process. Additionally, there are changes on the horizon aimed at modernising the Public Works Act 1981 to make it easier to build infrastructure and enabling people to build granny flats as of right.

RESOURCE MANAGEMENT (FRESHWATER AND OTHER MATTERS) AMENDMENT BILL

The Resource Management (Freshwater and Other Matters) Amendment Bill (FW Bill) reflects part of the current Government's 'second stage of reform' of the resource management system and has the aim 'to slash the tangle of red and green tape throttling some of New Zealand's key sectors'.

The FW Bill proposes to amend the National Policy Statement for Freshwater Management 2020 (NPS-FM), the National Policy Statement for Indigenous Biodiversity 2023 (NPS-IB), the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F), Resource Management (Stock Exclusion) Regulations 2020 (Stock Exclusion Regulations) and, of course, the Resource Management Act 1991 (RMA) itself. The key changes to these documents are:

1. Excluding consideration of the Te Mana o te Wai hierarchy contained in the NPS-FM in decision making on resource consents by removing the ability of a consent authority to have regard to the hierarchy when considering the application and removing the need for an applicant to provide an assessment of the proposed activity against the hierarchy and the ability of the consenting authority to request information on this. Notably, the wording of the FW Bill means that Te Mana o te Wai as a concept still continues to apply, but clauses 1.3(5) and 2.1 of the NPS-FM are singled out as being excluded from resource consent decision making (leavings intact the concept and principles of Te Mana o Te Wai). Te Mana o te Wai and the hierarchy of obligations still needs to be given effect to in plans and policy statements.

2. Aligning the consenting pathways for coal mining with other mineral extraction activities across the NPS-FM, NPS-IB and NES-F. The NPS-FM requires regional plans to include a policy concerning the avoidance of loss of extent of natural inland wetlands, which contains an exception for the extraction of minerals 'other than coal'. The FW Bill removes the coal exception. Similarly, the NES-F does not provide the ability to apply for resource consent for certain activities in the vicinity of natural inland wetlands for the purpose of extracting coal. This limitation is to be removed, applying the same rules for the extraction of minerals to coal. The NPS-IB is also amended so that the effects of coal mining are managed in the same way as other mineral extraction.
3. Suspending the requirement in the NPS-IB to identify significant natural areas in district plans for 3 years. The stated reason for suspending this requirement is to 'allow for a review of the operation of SNAs more broadly', perhaps signalling there are further SNA changes to come.
4. Changes to the NES-F and Stock Exclusion Regulations in respect of intensive winter grazing and low slope requirements For farming, the FW Bill removes the requirement to exclude non-intensively grazed beef cattle and deer from water bodies from the Stock Exclusion Regulations. Instead, it is envisaged that exclusion from water bodies in these circumstances will be managed through freshwater farm plans and regional rules. Additionally, the FW Bill removes the regulations regarding intensive winter grazing from the NES-F, albeit the standards relating to pugging and ground cover are to remain. From a consenting perspective, it is unclear what the activity status of intensive winter grazing becomes if these standards are breached.
5. Streamlining the national direction process. Under the current RMA, there are two process where the government can create national direction: a board of inquiry process or establishing the government's own process that contains minimum requirements. The FW Bill removes the board of inquiry process. Additionally, the FW Bill expands the definition of 'national direction' to include the New Zealand coastal policy statement and national planning standards, and allows the Minister for the Environment to amend national directions without following the required process in certain circumstances (e.g. to make changes that are no more than minor in effect).

The FW Bill is currently before the Primary Production Select Committee and their report is due 30 September 2024.

RESOURCE MANAGEMENT (EXTENDED DURATION OF COASTAL PERMITS FOR MARINE FARMS) AMENDMENT BILL

The Resource Management (Extended Duration of Coastal Permits for Marine Farms) Amendment Bill (Coastal Bill) proposes amendments to the RMA to automatically extend all coastal permits for aquaculture for 20 years, but not beyond 2050.

The Coastal Bill creates the opportunity for a one-off review by a consent authority of the conditions of a coastal permit that has been extended, within 2 years of the extension. However, the review is optional, and can only be instigated by the consent authority with the 'concurrence' of the Direction-General of MPI, so there is no certainty of a review.

Further, the consent authorities will bear the cost of a review. The review cannot be directed at amending the duration, species or area covered by the consent, which curtails the ability to review a coastal permit for the purpose of making changes necessary to promote sustainable management. No hearing can be held as part of a review and the direction of the inquiry is aimed at promoting the resources directly related to the marine farm, not the environment as a whole. A consent authority's decision on a review is limited to appeals to the High Court on questions of law.

On 18 July 2024 the Primary Production Select Committee reported back to the House on the Coastal Bill and it will now progress to its second reading.

FAST-TRACK APPROVALS BILL

The Fast-track Approvals Bill (Fast-track Bill) was introduced to the House on 7 March 2024 and proposes to give ministers broad powers to approve certain proposals.

The Fast-track Bill has attracted a wide range of criticism from all parts of the political spectrum. Some of that criticism includes that the powers to ministers are too broad and that decision-making has been highly condensed to ministerial power. The Fast-track Bill would introduce a two stepped process whereby Ministers refer a project to an expert panel and then make a substantive decision on the application, regardless of a panel's recommendation.

Additionally, the Fast-track Bill does not currently include a requirement for decision-makers to consider or give effect to Te Tiriti and its principles. Instead, the Bill has a more limited set of requirements, which at best require those exercising functions under the Bill to act in a manner consistent with existing Treaty settlements, customary rights recognised under the MACA and other similar legislation or agreements.

The Bill is currently before the Environment select committee. Submissions closed on 19 April 2024 and the committee is due to report back to Parliament on 18 October 2024.

COASTAL HAZARDS AND CLIMATE CHANGE GUIDANCE

The Ministry for the Environment has recently refreshed its guidance relating to coastal hazards and climate change (Guidance). The purpose of the Guidance is assist local government to adapt to coastal hazards and the risks presented by climate change, particularly sea level rise.

The previous iteration of the Guidance was released in 2017. The key changes from the latest update reflect:

- advances in sea level rise science and global predictions from the Intergovernmental Panel on Climate Change's Sixth Assessment Report;
- advances in knowledge relating to the types of coastal hazards and how they cascade and compound the effects on the coast;
- improved guidance on vulnerability and risk assessment methodology and monitoring adaptive pathways for adaptation plans; and
- the national adaptation plan directions on which climate scenarios to use for hazard and risk assessment within the resource management system.

The updated Guidance can be found here.

OTHER AMENDMENTS ON THE HORIZON

Amendments to the Public Works Act 1981

The Government has announced it will set up an independent panel to undertake review of the Public Works Act 1981, with a view to 'modernising [it] to make it easier to build infrastructure'. The independent panel will 'advise on common sense changes to enable large scale public works to be built faster and cheaper'.

On 4 July 2024 the Government announced it has appointed the expert panel to review the Public Works Act. The Government's intention is to introduce legislation to give effect to the proposed changes by mid-2025.

A new national environmental standard for 'granny flats'

The Government is proposing changes to the Building Act 2004 and the resource management system to make it easier to build 'granny flats' to 'make it more affordable for families to live the way that suits them best'. The proposal includes the addition of a new schedule is added to the Building Act 2004 to provide for simple standalone houses up to 60m2 in size and a new national environmental standard under the RMA to make 'minor residential units' a permitted activity.

The Ministry of Business, Innovation and Employment have published a discussion document that sets out the options for enabling the construction of granny flats' and is currently seeking feedback on the proposal. Submissions close 12 August 2024.

Changes to allow for housing growth

On 4 July 2024 the Honourable Chris Bishop announced changes the current Government is intending to make to 'fix our housing crisis'. Cabinet has agreed to:

1. The establishment of Housing Growth Targets for Tier 1 and 2 councils
2. New rules the make it easier for cities to expand outwards at the urban fringe
3. A strengthening of the intensification provisions in the National Policy Statement for Urban Development 2020
4. New rules requiring councils to enable mixed-use development in New Zealand's cities
5. The abolition of minimum floor areas and balcony requirements
6. New provisions making the Medium Density Residential Standards optional for councils

You can find further detail on these announcements here.

Supreme court overturns East-West Link approval

Royal Forest and Bird Protection Society v New Zealand Transport Agency (aka 'East-West Link')

The previous National government proposed a four-lane arterial road in Auckland connecting State Highway 1 at Penrose to State Highway 20 at Onehunga. The proposal was dubbed the 'East-West Link'. It involved a bi-directional four lane highway along the northern shores of the Mangere Inlet and required 24 resource consents and two notices of requirement. The proposal required reclamation of parts of the coastal marine area and would result in permanent loss to Significant Ecological Areas identified in the Auckland Unitary Plan (AUP).

In 2017 a Board of Inquiry was convened to decide the resource consents and notices of requirement for the East-West Link. The resource consents were assessed as a non-complying activity. NZTA was unable to demonstrate that the effects of the proposal were minor, therefore they had to rely on the proposal not being contrary to the relevant objectives and policies under section 104D of the RMA. When undertaking that assessment, the Board concluded that an overall assessment of the relevant AUP objectives and policies, such that a measure of inconsistency did not necessarily mean that the proposal was contrary to them

The Board's decision was appealed to the High Court on a question of whether the East-West Link proposal was contrary to the relevant objectives and policies. Additionally, a question was raised as to whether the Board had failed to have regard to the New Zealand Coastal Policy Statement (NZCPS). The High Court held that the Board had not erred in this regard and confirmed the Board's decision.

The High Court's decision was appealed directly to the Supreme Court on the basis of three broad issues, but ultimately the key focus for the Supreme Court was the interpretation, application and interaction of the relevant provisions in the NZCPS and AUP. The Supreme Court returned a majority decision (3-2) of over 160 pages that overturned the Board's decision on the East-West Link project.

When deciding a resource consent or making a recommendation for a notice of requirement, the decision maker has to have 'regard to' or 'particular regard to' (respectively) the relevant provisions of statutory planning documents. In addition, when deciding a resource consent for a non-complying activity, a consenting authority must only grant consent if the activity is not contrary to the objectives and policies of the relevant plan/proposed plan. In this context, the majority of the Court held that 'isolating and de-contextualising individual provisions in a manner that does not fairly reflect the broad intent of the drafters must be avoided'. However, they went on to say:

That does not mean all objectives and policies can simply be put in a blender with the possible effect that stronger policies are weakened and weaker policies strengthened. Rather, attention must be paid to relevant objectives and policies both on their own terms and as they relate to one another in the overall policy statement or plan. As the Environment Court noted in Akaroa Civic Trust v Christchurch City Council, the interpretive exercise must acknowledge that some policies will, in context, be more important than others. The way in which inevitable tensions between policies are identified and worked through in the documents must be grappled with. As King Salmon held, the mere presence of tension does not open up an unfettered discretion to choose between unequal policies. On the other hand, the presence of tension between stronger and weaker policies will not always be resolved in favour of the stronger. Ecosystems are complex and dynamic, as is the impact of human communities located within them. Fact and context will be important in determining how tensions between policies will be resolved.

The majority then went on to undertake a 'fair appraisal' (per the Court of Appeal in Dye v Auckland Regional Council [2002] 1 NZLR 337 (CA)) of the relevant AUP and NZCPS objectives and policies. They concluded:

…for present purposes at least, that large scale infrastructure located in the CMA is not, by definition and without regard to circumstance, prohibited by the objectives and policies of the AUP or the NZCPS. Such infrastructure is therefore not inevitably contrary to the objectives and policies of the AUP(plans) for the purposes of the s 104D(1)(b) gateway, nor is it necessarily inconsistent with the NZCPS- or AUP-related requirements of ss 104 and 171.

However, the majority still did not agree with the approach of the Board, holding that:

…the Board misinterpreted the "have regard to" standard in ss 104 and 171, misused the s 171 options selection process to serve the stricter requirements of the AUP policies, and decoupled the consideration of adverse effects from the assessment of practicable alternatives. These missteps left the door open for the Board to regress to an overall judgment approach by which it could undervalue the avoid policies and overvalue the pro-infrastructure policies. Consequently, the Board started from a more neutral starting point than that required by the AUP. In the result, the Board failed to engage properly with the central premise of the AUP, which is that the EWL is presumptively inconsistent with and contrary to relevant objectives and policies and should not be approved except in narrowly defined exceptional circumstances.

In respect of the 'have regard to' (or 'particular regard to') threshold in sections 104 and 171 of the RMA, the Court built on the Court of Appeal's decision in RJ Davidson Family Trust v Marlborough District Council:

…there is a corollary to Cooper J's rejection of the proposition that "have regard to" and Part 2 could authorise consent authorities to subvert relevant policies in their decision-making. The corollary is that a genuine, on-the-merits exception, by its nature, will not subvert a general policy, even a directive one. On the contrary, true exceptions can protect the integrity of the subject policy from the corrosive effect of anomalous or unintended outcomes. There is a fundamental difference between allowing consent authorities to routinely undermine important policy choices in the NZCPS (as rejected in RJ Davidson), and permitting true exceptions that will not subvert them. Of course, the more precise and sharp-edged the policy, the less room there will be for outcomes that can fairly be considered so anomalous or unintended that an exception is justified.

Justices Glazebrook and William Young dissented, although Glazebrook J still allowed the appeal. Justice Glazebrook considered the NZCPS and AUP provisions did not allow for the exception provided by the majority. Justice William Young provided for an even wider exception than the majority and would have dismissed the appeal. Ultimately, the appeal was allowed and remitted back to Board to remake its decision (albeit Glazebrook J observed that if her views had prevailed 'there would likely have been little point remitting to the Board').

The Supreme Court's decision reinforces previous decisions (including King Salmon) that emphasise the need to carefully interpret and apply objectives and policies in planning documents. While there is helpful dicta by the majority that is potentially of general application, the specific 'true exception' identified by the majority may not necessarily be applicable in other planning contexts. Further, not all directive objectives and policies will necessarily be subject to such exceptions. It will all depend on context.

Sentencing decision: *Waikato Regional Council v Peter Sole Transport Ltd*

This is a sentencing decision following Peter Sole Transport Limited (PST) pleading guilty to two charges under sections 9(2) and 338(1)(c) of the RMA. These charges were for conducting earthworks without a resource consent and breaching an abatement notice dated 22 December 2005. The offences occurred on 9 and 10 December 2021, and involved the deposition of cleanfill, specifically rock boulders, for the construction of a seawall on Mōkau Beach.

The Mōkau beach has had significant shoreline changes and ongoing dune erosion since the 1950s, and since 1995, there has been a long history of unconsented erosion protection structures being erected by property owners. The Mōkau iwi regard the entire sandspit where the works took place as an historic urupā (burial ground) and wahi tapu (sacred place).

On the morning of 9 December 2021, at the request of property owners on the Mōkau Beach, including himself, Mr. Sole delivered a truck and trailer load (approximately 22 tonnes) of large boulders to Point Road, Mōkau, using a truck owned by his company. He deposited one load at the base of the dunes below 8 Point Road and another below 16 Point Road, intending to reinforce the rock seawall structures. He then used PST's excavator to reconstruct the rock seawall by restacking dislodged boulders and adding new ones he had delivered. On 10 December 2021, Mr. Sole again used the excavator to place and stack the new boulders and restack existing ones, including those buried under the sand. He worked along the foreshore, restacking boulders and digging down to retrieve buried rocks to reform the seawall structure.

The Court found that PST's actions were undertaken without prior consultation with the local iwi, resulting in significant cultural offense. The iwi expressed disgust, anger, and shock, viewing the works as another instance of desecration and disrespect towards their burial grounds and their role as kaitiaki (guardians). The adverse cultural effects on the iwi were found to be moderately severe.

The Court also emphasised that PST deliberately and knowingly conducted unlawful works, focusing on protecting private property while disregarding statutory restrictions and the need for consent. Despite understanding the unlawfulness and having received many warnings from WRC, PST chose to proceed without consultation or consent. The Court found PST highly culpable, with a history of unconsented works contributing to the severity of the offence. Specific deterrence was deemed necessary to prevent similar future actions.

The Court imposed a total fine of NZD80,500 on PST, with NZD59,500 for the unlawful works charge and NZD21,000 for breaching the abatement notice. A 25% discount was applied for the early guilty plea, but no discount was given for previous good character, due to PST's history of formal warnings.

Misfeasance and limitation: *Whangarei District Council v Daisley*

The role of Council officers in maintaining and considering Council resource consent records when making enforcement decisions was the subject of an appeal before the Court of Appeal. This article briefly addresses the key findings in that decision.

In May this year, the Court of Appeal released its decision in *Whangarei District Council v Daisley*.[1] The Court allowed the appeal in part, setting aside the High Court's finding that the Council was liable for the misfeasance of its officers and an award of exemplary damages. The High Court's findings as to negligence and a duty of care owed in respect of the holding and provision of information as to resource consents remain unaffected. As does the related damages awarded against the Council for that negligence.

In a previous update, we addressed the High Court's earlier decision. In summary, the case concerns an ongoing dispute between Mr Daisley and the Whangarei District Council as to the use of Mr Daisley's property for quarrying activities. In the High Court, Toogood J found that the Council owed Mr Daisley a duty to exercise reasonable care and skill in keeping records of resource consents available for inspection, in the provision of information about them, and in making reasonably diligent inquiries into their existence whenever that was in issue. That finding was not challenged on appeal. The matters before the Court of Appeal relate to whether the alleged breach of that duty was a continuing breach, along with a challenge to the High Court's finding of liability for misfeasance of public office.

The Court of Appeal considered that the High Court erred in its application of the doctrine of continuing breach, although ultimately it did not impact on the finding of quantum.[2] The Court outlined that a continuing cause of action is one which arises from repetition of acts or omissions of the same kind. If the wrong is continuing on a daily or other regular basis, the cause of action accrues afresh on a continuing basis. The cause of action does not continue merely because loss from the original wrong continues to accrue within the limitation period. This decision accordingly provides a useful summary of this limitation issue.

In respect of the successful part of the Council's appeal, the Court set out that misfeasance of public office is an intentional tort which has at its base conscious disregard for the interests of those affected by official decisions.[3] The Court of Appeal considered this standard was not met and therefore the Council was successful in having the finding as to misfeasance of public office and the exemplary damages award attached to that finding, set aside.

1 [2024] NZCA 161
2 Ibid at [82] – [88]
3 Ibid at [181]

Environment Court guidance: *Second Star Ltd v Queenstown Lakes District Council*

The Environment Court decision in S*econd Star Ltd v Queenstown Lakes District Council*[1] was an appeal against the Queenstown Lakes District Council (the Council) decision to decline resource consent applications for a luxury visitor accommodation lodge at Damper Bay between Wānaka Township and Glendhu Bay. Ultimately, the appeal was dismissed. However, the Court provided some helpful guidance for Councils appearing before the Court on appeals against their decisions.

Typically, when a Council delegates decision-making on a resource consent application to Commissioners, the Commissioners' decision becomes the Council's decision. If appealed, the Council, as respondent, is expected to defend this decision. The Council's role in an appeal is not comparable to that of a private litigant due to its regulatory and quasi-judicial functions under the RMA, and its statutory responsibility includes enforcing its district plan.

However, the Court commented that when the Council cannot support its decision with initial evidence, it is expected to do some or all of the following:

- Maintain a neutral stance, while providing assistance to the Court with information on the decision under appeal and the relevant planning framework.
- Avoid calling expert evidence in support of its decision.
- Make the initial expert authors available to other appeal parties upon request.

If intending to call evidence in support of an opposite position, as the Court found that the Council did in this occasion, the Council's duty is to act with fairness and full transparency to all participants in the process as to the justification for its changed position, including parties joining under section 274.

The Court was particularly critical that the Council in this case had not taken a neutral role and had instead actively supported the applicant by presenting planning and landscape evidence in their favour. The Court also noted that the Council engaged in discussions with the appellant's representatives without involving or informing the section 274 parties, commenting that:[2]

By agreeing to attend meetings with representatives of the appellant, without extending an invitation, or insisting that an invitation be extended to s274 parties, the Council was in breach of a duty to be fair and fully transparent to all parties to the proceeding.

The Court also did not accept the suggestion of the Council that the Court should focus on unresolved issues from the original hearing, without being burdened by evidence that was already presented at the first instance hearing. The Court was not prepared to proceed on that basis and decided to base its judgment on all evidence presented, not just in relation to unresolved issues, adhering to its *de novo* jurisdiction.

This case clearly demonstrates the Court's expectations of Councils as consent authorities, when their resource consent decisions are appealed.

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1 [2024] NZEnvC 129.

2 At [70].

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