IN THE DISTRICT COURT
AT GISBORNE

I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA

CRI-2018-016-002391
[2020] NZDC 2808

GISBORNE DISTRICT COUNCIL
Prosecutor

v

ARATU FORESTS LIMITED
Defendant

Hearing:	17 February 2020
Appearances:	A Hopkinson for the Prosecutor A Darroch for the Defendant
Judgment:	17 February 2020

NOTES OF JUDGE B P DWYER ON SENTENCING

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[1] Aratu Forests Limited (Aratu) appears for sentencing on two charges brought against it by Gisborne District Council (the Council) for breach of s 15(1)(b) of the Resource Management Act. The first charge relates to a forest known as Wakaroa Forest and is contained in charging document ending 1446. The second charge relates to a forest known as Te Marunga Forest and that is contained in charging document ending 1447. The charges are that:

- That, between 1 June 2017 and 3 July 2018, the defendant discharged a contaminant (namely slash, logging debris, waste logging material and/ or sediment) onto or into land in circumstances where it may enter water (charging document ending 1446, Wakaroa Forest)

- That, between 1 June 2017 and 23 June 2018, the defendant discharged a contaminant (namely slash, logging debris, waste logging material and /or sediment) onto or into land in circumstances where it may enter water (charging document ending 1447, Te Marunga forest).

[2] Aratu has pleaded guilty to both charges. No suggestion has been made that it should be discharged without conviction and it is hereby convicted of both accordingly. I am satisfied that the requirements of s 24A of the Sentencing Act relating to restorative justice processes have been met so as to enable me to proceed with this sentencing.

[3] I observe that there is no real dispute between counsel as to the underlying principles which I am to apply in carrying out this sentencing, although they are some distance apart in their views as to penalty outcome. I will deal with the determinative matters in that regard as part of my sentencing.

[4] The offences arise due to the discharge of logs, waste, slash, logging material and/or sediment (I am just going to call that generally forestry debris) from the two forests which were both affected by significant weather events in June 2018.

[5] The two forests are some distance apart physically and although the causes of the discharges were the June storm events in each case, they are completely separate forests, they are situated in different catchments, they were being harvested under different resource consents, they were primarily affected on different dates and the adverse environmental consequences of the offending were considerably greater in the Te Marunga Forest. For those reasons, rather than take a global approach to penalty for the two charges where I identify one overall penalty for both I am going to proceed by identifying appropriate penalty starting points for each offence separately, dealing with the Wakaroa Forest first. At the conclusion of that process I will consider the matter of appropriate overall penalty outcome and also as part of that process, at the end, I will consider matters relating to reparation to victims.

[6] Before doing so I make the observation that the summary of facts for both offences concentrated on issues arising out of acknowledged breaches of conditions

of resource consent applicable to the forests which were features of both sets of offending. The wider consequences and effects arising from harvesting steep, unstable slopes which are vulnerable to earth slips as a result of the harvesting process itself (which is the process that occurred in this instance) were not fully canvassed before me. Ultimately, I must sentence on the basis of the summary of facts which I have before me. However, I record that the vulnerability of the slopes in both forests to landslide when cleared is undoubtedly part of the context of this offending and is relevant to my considerations in that regard.

[7] Aratu is part of a conglomerate which has forest interests in various parts of New Zealand. Aratu itself owns 27,000 hectares of production forest in the Gisborne area including the 1300 hectare Wakaroa Forest situated about 38 kilometres north of Gisborne in the Waimata Valley. Approximately two thirds of the forest falls within areas identified in the Council's Regional Rules as land overlay 3 or 3a. Overlay 3 is land identified as the most susceptible to erosion, sediment generation and soil loss in the region and category 3a is a subset of that being the worst eroding land in the district or region.

[8] Six streams in the forest are classified as Protected Water Courses in schedule 7 of the Regional Water Plan. These streams flow into the Waimata River which flows into the sea near Gisborne. In addition to these streams the headwaters of the Mangaoae Stream are also located in the forest and this stream is identified in the Freshwater Plan as being a key habitat for long fin eels.

[9] Aratu holds three resource consents issued between 2008 and 2016 allowing it to carry out forest harvesting and related earthworks in the forest and has been carrying out harvesting operations pursuant to those consents: Paragraph 20 of the summary of facts identifies that:

> 20. Relevant conditions of the consents included:
>
> (a) Condition 9 provides that on slopes greater than 25 degrees fill used in construction of roads and landings shall be held in place by benching, compaction, armouring or a combination of these such that it does not directly or indicted [sic] enter the

watercourses shown on the attached consent map. That condition also included an advice note that it may be necessary to carry away excessive quantities of side cast material from road or landing construction end hauling to remote dump sites.

(b) Condition 11 provides that runoff onto landings shall be intercepted by cut-off drains and is to discharge clear of all fill.

(c) Condition 12 provides that watertable culverts shall be installed and shall not discharge directly onto fill or sidecast material.

(d) Condition 18 provides that cut-off drains are to be installed at a maximum spacing of one every 50 metres along arterial tracks to disperse water and prevent ponding and scouring following harvesting.

(e) Condition 22 provides that ephemeral channels draining runoff are to be kept open.

(f) Condition 27 provides that at the conclusion of logging at each landing, no unstable accumulations of slash, log ends, tree heads or waste logging material, including mixed in spoil are to be left on or beneath landing edges in situations where they may move downhill into the watercourses shown in the consent maps.

[10] I record that none of the consents authorises the discharge of forestry debris to land or water so that whatever the conditions of consent may be, whether they are complied with or not, Aratu is not entitled to discharge forestry debris and the like to land in circumstances where it might enter water or get in to water directly.

[11] In June 2018 there were two major storm events in the Gisborne area. The first was on 3 and 4 June and primarily resulted in flooding in catchments near Tolaga Bay. The second event was on 11 and 12 June. After the second event Uttings Bridge on Waimata Road in the Waimata Valley where Wakaroa Forest is situated became inundated with forestry debris leading to closure of the bridge. Council officers tracked the debris back to the Wakaroa Forest. Paragaph 34 of the summary of facts states that subsequent inspections of the forest by Council officers established that:

Council investigation

34. When Council officers inspected Wakaroa Forest on 3 July and 2 August 2018 they found that:

(a) Logging debris had been left perched on the edge of a number landings throughout the forest.

(b) There had been large slope failures from landings and roads that had been caused by water being directed onto vulnerable slopes which frequently contained side cast materials.

(c) Drainage controls at the forest were poorly constructed and/or poorly maintained.

(d) The collapse of debris and sediment at the forest had resulted in extensive scouring of the valley floors below and large amounts of sediment and logging debris entering watercourses at the forest. That debris had migrated downstream and was the primary source of the damage to Uttings Bridge on Waimata Road, approximately 3.5 kilometres from the forest.

(e) At least eight landings had collapsed into watercourses in this way during the June 2018 rain events.

[12] Photographs included in the summary of facts show massive collapses of forestry debris including large logs/earth et cetera. Paragraph 41 of the summary of facts records that the Council inspections identified the following contraventions of Aratu's resource consent LV-2016-107163-00:

Contraventions of consent conditions

41. During inspections of Wakaroa Forest on 3 July 2018 and 2 August 2018 Council officers identified the following contraventions of HFF's resource consent LV-2016-107163-00:

(a) There were a number of instances where there was little or no benching, compaction or armouring of fill on the roads and landings constructed on slopes greater than 25 degrees (breach of condition 9).

(b) Water on landings was being directed onto fill and logging debris including warratah waste mixed with soil on the edge of the landings (breach of condition 11).

(c) Runoff from roads was being directed through cut-offs and culverts (where culverts were found) onto fill and side-cast material (breach of condition 12).

(d) There was little sign of cut-offs or water control on the backline or tracks in the forest and scouring was noticeable at the discharge point of some cut-offs (breach of condition 18).

(e) Landings (where harvesting had finished) had unstable accumulations of logging debris, slash and/or waste logging material mixed with soil left on the edge of landings, with many landings having perched slash/slovens overhanging the landings and below the landings (breach of condition 27).

[13] In addition to the Council officer inspections the Council obtained expert advice from Dr R Visser and Mr N Ngapo. Their reports identified numerous instances of poor forestry management and failures to comply with the Forest Owners Association Environmental Code of Practice at Wakaroa. A point which Mr Ngapo stressed was the vulnerability of forests to erosion in large rain events up to nine years post initial harvest. The environmental effects of the discharges of forestry debris from the Wakaroa Forest are summarised in these terms in paragraph 58 of the summary of facts:

Environmental Effects

58. A Council ecologist carried out an assessment of streams in Wakaroa forest on 21 and 22 November 2018 to assess the environmental effects of the June storm events and to compare those streams with unaffected streams in the forest. The Council ecologist's report recorded the following adverse effects on streams in Wakaroa Forest that had been affected by the June rain events:

(a) The ephemeral and permanent streams in Wakaroa Forest have all been severely impacted by the migration of sediment and woody debris following the June 2018 storm events.

(b) The main issue was the deposition of sediment. Sediment levels in affected watercourses in the forest were at extreme intensities within the streams and on stream banks, covering benthic substrate and smothering invertebrate and fish habitat.

(c) Streams had been affected at the head waters and the degradation continues downstream.

(d) It is unknown if the streams will be able to recover following the large and potential continual influx of deposited and suspended sediment into the forest's watercourses.

(e) Invertebrate species observed in all streams indicated degraded water quality apart from one site.

(f) Woody debris has damaged stream banks as it has moved downstream and this has left areas exposed and eroding into the freshwater environment. Some of the woody debris had been removed from the streams in Wakaroa Forest, however there were still large amounts of debris present in November 2018.

(g) Based on unaffected watercourses in the area the state of the streams in the forest before June 2018 would have been very good, if not excellent.

(h) Logging debris and slash from landing WP49/35009 had entered a watercourse in the gully below.

(i) Logging debris and slash from landing WP50/35008 had entered two watercourses in the gullies below – one to the west and one to the east. The debris slide from the western side of the landing had entered a large stream and formed a debris dam which was still in the watercourse at the time of the inspection.

(j) Logging debris and slash from landing WP52/35006 had entered the watercourse in the gully below. Downstream in the same watercourse there was a logging debris dam from another collapsed landing.

(k) Two large debris dams were found in watercourses elsewhere in Wakaroa Forest. Both dams consisted primarily of logging debris such as slovens, shorts and waratah waste.

(l) Logging debris and sediment from collapsed landings could be seen in tributary streams that lead to the Mangahouku Stream. These streams had suffered extensive stream bank damage during the June 2018 events.

(m) There was still a lot of sediment present in the Mangahouku Stream where tributaries from Wakaroa Forest flowed into it.

[14] In fixing a starting point for penalty considerations on the Wakaroa offending I have had particular regard to the following factors:

- Maximum penalty;
- The vulnerability of the affected environment and the extent of damage to it;
- The breach of conditions of resource consent;
- The business activity aspect of the offending;
- The need for deterrence;
- Aratu's culpability for the offending;
- Aratu's remedial efforts and mitigating factors;
- Past good character;
- Comparable cases.

[15] The maximum fine for both of these offences is the sum of $600,000 in each case. That maximum is applicable to the worst cases. In this instance the Prosecutor has suggested a starting point for penalty considerations for Aratu of $150,000 for the Wakaroa offending. The Defendant's counsel has suggested a figure of $85,000 as part of a global starting point of $300,000 for both offences.

[16] A significant factor in my considerations is the known vulnerability of the forest environment. As I observed previously, two thirds of this forest is situated on land which is very highly susceptible to erosion, in some cases being the most vulnerable land to erosion in the district or region. Additionally, the rain events which brought about the discharges occurred at a time in the period shortly after harvest, before bedding down of root systems of replacement planting had matured sufficiently to provide adequate stabilisation to the hill slopes of the forest. It is not for this Court to question decisions made many years ago now to allow production forestry to be established in these circumstances nor more recent decisions to allow it to be harvested, but what is readily apparent from the information before the Court is that forest harvest operations on such land have to be undertaken with great care and in absolute compliance with codes of practice and conditions of resource consent, but a high degree of risk still remains.

[17] In this case the possibility that the area could be subject to extreme weather events should have been well known. A number of such events have occurred in the Gisborne area over recent years leading to the mobilisation of forestry debris in various forests. Even adopting best practice there is a real risk of incidents such as this happening on steep, highly erodible land which has been stripped of tree cover. The fact is that forest harvesting on these slopes is a high risk operation in terms of its affect on land stability. Significantly the Forest Owners Association Code of Practice directly identifies the significant environmental risks of harvesting steep erosion-prone terrain. Aratu has taken the risk in this instance and predictable consequences have resulted.

[18] It is apparent from the summary of facts that the discharge of forestry debris into the streams on the Wakaroa block had a range of identifiable adverse impacts on those water bodies. Sediment discharges smother stream beds, destroying invertebrate, fish and plant life. They cloud the water column making it difficult if not impossible for some fish species to see and breathe. They can settle and accumulate so that their effects are repeated and add to the effects of other sometimes naturally occurring sedimentation. Slash destroys stream edges and beds and blocks water bodies it enters, as happened in this case. The combination of slash and sediment interferes with the natural processes and flow of the water it enters.

[19] A further factor in my considerations is that the offending was contributed to by poor management involving breach of resource consent conditions. That breach of conditions is a factor which considerably elevates the seriousness of the offending in my view. Aratu had obtained a series of resource consents from the Council allowing it to undertake harvesting operations in the forest. In accordance with usual practice the consents were subject to a series of conditions imposed to ensure that harvesting was properly done and adverse effects on the environment avoided, remedied or mitigated. These sorts of conditions relating to management of landing/skid sites, excavations, roads, slash and the like are commonly volunteered by persons seeking consents and in reality represent common sense and good practice.

[20] I have previously noted six breaches of consent conditions identified by Council officers when they inspected the forest. If Aratu had advised the Council when making its applications that it would not abide by these conditions it would not have been granted consents to undertake its harvesting. Having taken the benefit of consents Aratu undertook the obligation to comply with the conditions imposed. Failure to do so undermines the very basis on which the consents were granted and challenges the integrity of the resource consent system itself. Even if it was argued that breaches of consent conditions were not the only or not the primary source of the discharges that occurred, in this case they are symptomatic of poor management practices particularly when they are considered in conjunction with failures to meet the Forest Owners Code of Practice which were also identified at Wakaroa Forest.

[21] I have previously noted that Aratu is a very substantial forester in the Gisborne area. It owns thousands of hectares of forest in the district and is part of a group with forestry interests in other parts of New Zealand as well. Such businesses can rightly be expected to know the rules under which they must operate and to comply with them. Fines for breaching their obligations in that regard should be set at such levels that they are not merely a cost of doing business but have real bite.

[22] Related to that is the matter of deterrence. This offending and that at Te Marunga Forest involved poor practice and breach of consent conditions on the part of a forester with extensive areas yet to harvest. In my view that calls for a sentence which deters a repetition of this situation.

[23] Further to that as I noted in the recent *Juken* case there is a need to deter the wider industry from similar failures.[1] That is particularly so in the Gisborne district where forestry is often undertaken on difficult country vulnerable to weather events and where there has been a history of slash and sediment discharges. Penalties should accordingly be set at a level which deters a repetition of this and previous forestry debris discharge incidents.

[24] Counsel for the Council describes Aratu's culpability in these terms:

> 22: In light of the foregoing factors it is submitted that the defendant's culpability for the offending was at the high end of the scale. The offending was not deliberate. However given the defendant was aware of the risks of forestry debris and sediment collapsing from skid sites and roads into watercourses in its forest it is submitted that the defendant's failure to properly manage those risks at Te Marunga Forest and Wakaroa Forest could be categorised as reckless. The standard of environmental risk management at the forests was extremely poor - particularly given that the defendant is a large scale commercial forestry company and should be aware of its responsibilities and the minimum standards it is required to meet.

I concur with that assessment.

[25] Dealing with remedial works undertaken by Aratu following these incidents, the Council issued abatement notices requiring Aratu to undertake remedial work at both forests. Insofar as Wakaroa Forest is concerned I understand that the remedial work required by the abatement notice or notices has now been completed. I am conscious of the provisions of s 10(1)(d)(iii) Sentencing Act which requires me to take into account any measures taken by Aratu to make good the harm that occurred in this instance and s 10(1)(e) which requires me to take into account any remedial action as part of the sentencing process. I do not understand these provisions to require any automatic credit for such measures or actions but rather that I turn my mind to whether some credit should be given for them in the sentencing process and if so how much. I note the approach adopted by the High Court in the *Thurston* case where no credit was given to a defendant for installing a waste pipeline at a cost in excess of $1 million where the Court considered that should have been in place from the start.[2]

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[1] *Gisborne City Council v Juken New Zealand Ltd* [2019] NZDC 24075.

[2] *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North CRI-2009-454-24, 27 August 2010.

[26] In this case work undertaken by Aratu at Wakaroa was done to comply with abatement notices issued by the Council. Aratu did not appeal the abatement notices and so was obliged to comply with them. It would have been an offence not to do so. I think that I am correct in saying that as a general principle the Court does not give a sentencing credit when sentencing for Resource Management Act offending for undertaking remedial work which should have been done in the first place or which a defendant is required to do by abatement notice or enforcement order. A recognised exception to that is where work or remedial measures undertaken go beyond merely remedying a breach and give rise to betterment, environmental improvement or some other beneficial outcome over and above what a defendant could have been legally required to do.

[27] I am told by counsel that Aratu undertook improvement or remedial work on skid sites and birds nest areas at Wakaroa which were not subject to the Council abatement notices but it seems to me that this was almost certainly work which should have been undertaken in any event, in accordance with best practice on vulnerable slopes or to remedy the effects of its failures in that regard. Nothing in the information before the Court establishes that work undertaken by Aratu at Wakaroa Forest falls into the "over and above" category. Rather the work was required to remedy the effects of harvesting on high risk country or breaches of conditions of its resource consent and I do not propose to make any reduction from starting point on account of that work.

[28] Nor do I give any credit to Aratu for past good character. It is apparent from the summary of facts that there have been previous compliance issues with its management at Wakaroa. I do not put these into the aggravating category which would elevate penalty but nor will I give any credit for past good character.

[29] Finally, I have had regard to previous relevant decisions for considerations of consistency having regard to s 8(e) of the Sentencing Act. There are three cases which I consider have some degrees of comparability. The first is *Olsen* where on appeal to the High Court a starting point of $80,000 was identified for a breach of s 15(1)(b)

involving collapse of five slash piles as opposed to eight at Wakaroa.[3] The offending predated the increase of penalties in the 2009 amendment to the Resource Management Act where penalties for corporate bodies went from $200,000 to $600,000. The breach of conditions of consent which I have regarded as a significant aggravating factor in this case was not taken into account for the s 15(1)(b) charge in *Olsen* but was rather subject to a separate charge for which a $50,000 starting point was adopted. I accept there are some parallels between this case and *Olsen.*

[30] Secondly, I have looked at *Laurie Forestry* where a $100,000 starting point was adopted in a case which involved failure of one skid site and breach of consent conditions.[4] Adverse effects were significant but do not begin to approach the extent of effects in this case. I consider this offending to be vastly more serious than the *Laurie* case.

[31] Thirdly there is the *Juken* case which was sentenced in this Court in November 2019 and relates to another incident resulting from the storms which give rise to this offending. That offending also involved breaches of conditions of resource consent, there were 11 slips and similar damage to water bodies as we have in this case. I adopted a starting point of $200,000 in the *Juken* case.

[32] I have had regard to all of those matters in determining the appropriate starting point for penalty for the Wakaroa offending. I consider that the combination of:

- Vulnerable environment;
- Significant and widespread adverse effects;
- The recognised high risk of logging these slopes;
- High culpability;
- Poor practice and breach of conditions -

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[3] *PF Olsen Ltd v Bay of Plenty Regional Council* [2012] NZHC 2392.
[4] *Marlborough District Council v Laurie Forestry Services Ltd* [2019] NZDC 2602.

means that a penalty starting point of $200,000 is appropriate. That is one third of maximum penalty and consistent with the starting point adopted in *Juken.* I would not make any reduction from starting point for past good character or remediation or demonstrated remorse.

[33] That brings me to the charge relating to Te Marunga Forest. The factors which I have previously mentioned for Wakaroa are largely in play in Te Marunga as well so I will revisit them only to the extent necessary.

[34] Te Marunga is a 5000 hectare plantation forest located approximately 12 kilometres west of Tolaga Bay. The summary of facts states that the terrain in the forest is mountainous, steep and prone to severe erosion. Approximately 75 percent of the forest area comprises land identified as land overlay category 3 or 3a.

[35] There were at least 23 streams within the forest classified as Protected Water Courses in the Freshwater Plan. A number of these flow into the Mangatokerau River which flows into the Uawa River which in turn flows into the sea at Tolaga Bay.

[36] Aratu holds a number of resource consents granted between 2011 and 2016 which allow harvesting of the forest and associated earthworks. Paragraph 21 of the summary of facts provides as follows:

> 21. Relevant conditions of the consents included:
>
> (a) On slopes greater than 25 degrees fill used in construction of roads and landings shall be held in place by benching, compaction, armouring or a combination of these such that it does not directly or indirectly enter the watercourses shown in blue on the attached consent map. (Condition 6)
>
> (b) Runoff onto landings shall be intercepted by cut-off drains and is to discharge clear of all fill. (Condition 8)
>
> (c) Watertable culverts shall be installed and shall not discharge directly onto fill or sidecast material. (Condition 9)

(d) Cut-offs are to be installed at a maximum spacing of one every 50 metres along arterial tracks to disperse water and prevent ponding and scouring following harvesting. (Condition 13)

(e) At the conclusion of logging at each landing, no unstable accumulations of slash, log ends, tree heads or waste logging material, including mixed in spoil are to be left on or beneath landing edges in situations where they may move downhill into the watercourses shown in the consent maps. (Condition 20)

[37] Again I make the point that none of the consents allows discharges of forestry debris to water or to land in circumstances where it might enter water, so that even if the conditions were being complied with Aratu was not entitled to discharge forestry debris into the streams.

[38] As with Wakaroa, Te Marunga was subjected to the storm events of June 2018. In Te Marunga's case the greatest impact was the 3 and 4 June event. The summary of facts gives a general description of what happened in these terms:

> [31] The primary damage was caused by the 3 and 4 June rain event which caused an estimated 47,000 m^3 of forestry debris to be deposited on the beach at Tolaga Bay and at least 400,000 m^3 of forestry debris to be deposited throughout the Uawa catchment. The flow of debris damaged farms and houses and blocked bridges and roads in the Tolaga Bay area. One family had to be rescued by helicopter from the roof of their house due to the wall of forestry debris surrounding their house. The forestry debris had washed down the Mangatokerau River on the night of 3 and 4 June 2018.

[39] I note that Te Marunga was not the only contributor to these outcomes. I am advised that debris from other forests was the primary contributor at Tolaga Bay, however there is no dispute that it was a contributor to the situation and was responsible for the blockages in the Mangatokerau. Council officers inspected the Te Marunga Forest in June, July and August 2018. Paragaph 34 of the summary of facts records that their inspections revealed the following:

Council investigation

34. During these inspections the officers observed that:

(a) Large amounts of forestry waste material and sediment had been either left on the edge of steep hill faces or on landings at the edge of steep hill faces. Those piles of precariously perched forestry material and sediment had collapsed during the June 2018 rain events, fallen in debris slides down the hill faces and entered watercourses in the valleys below.

(b) At least 83 landings had collapsed into watercourses in this way during the June 2018 rain events.

(c) A number of forestry roads had collapsed.

(d) Stormwater run-off was not sufficiently controlled on landings resulting in stormwater discharging into fill or logging debris.

(e) The earthworks on roads and landings within the forests on slopes greater than 25 degrees lacked benching, compaction and armouring of fill.

(f) Water controls at the forests were poor meaning stormwater run-off during the June 2018 rain events caused or exacerbated large-scale erosion of forestry roads, tracks and landings.

[40] The Council inspections also identified various breaches of the terms of Aratu's resource consent and they are set out in paragraphs 39a to 39e of the summary of facts:

Contraventions of consent conditions

39. During the Council inspections of Te Marunga Forest in June 2018, Council officers identified the following contraventions of HFF's resource consents LV-2014-106420-00, LU-2013-105780-00, LV-2015-106784-00, LV-2013-106087-00 and LV-2014-106278-00:

(a) There were a number of instances where there was little or no benching, compaction or armouring of fill on the roads and landings constructed on slopes greater than 25 degrees (breach of condition 6).

(b) Water on landings was being directed onto fill and logging debris including warratah waste mixed with soil on the edge of the landings (breach of condition 8).

(c) Runoff from roads was being directed through cut-offs and culverts (where culverts were found) onto fill and side-cast material (breach of condition 9).

(d) There was little sign of cut-offs or water control on the backline or tracks in the forest and scouring was noticeable at the discharge point of some cut-offs (breach of condition 13).

(e) Landings (where harvesting had finished) had unstable accumulations of logging debris, slash and/or waste logging material mixed with soil left on the edge of landings, with many landings having perched slash/slovens overhanging the landings and below the landings (breach of condition 27).

[41] As with Wakaroa, the reports of Dr Visser and Mr Ngapo identified numerous problems with forest management, the fact that the majority of forestry debris arose from erosion of recently harvested areas rather than compliance issues, failure to follow the Forest Owners Code of Practice and generally what I would describe as overall failure to properly manage harvesting operations and earthworks on this undoubtedly vulnerable area.

[42] The environmental effects of this offending were described in these terms in the summary of facts:

Environmental Effects

56. A Council ecologist carried out a preliminary assessment of streams immediately downstream of Te Marunga Forest on 4 to 7 July 2018 to assess the effects of the two June storm events. The Council

ecologist's report recorded the following adverse effects on streams downstream of Te Marunga Forest that had been affected by the June rain events:

(a) There was severe erosion on stream banks (with riparian vegetation having been ripped out or covered in sediment from flood waters);

(b) Woody debris and slash was located on the stream banks and flood plain areas surrounding the streams; and

(c) High levels of deposited sediment were visible on the stream beds.

57. On 21 November 2018 a Council ecologist carried out a further assessment of streams within Te Marunga Forest and found that:

(a) Habitats in all 11 freshwater streams surveyed on 21 November had been adversely affected by sediment from the June 2018 events.

(b) Sediment levels were at extreme levels in the streams, covering benthic substrate and smothering invertebrate and fish habitat.

(c) Streams had been affected at the head waters within the forest and the degradation continued downstream.

(d) Invertebrate species observed in all streams indicated degraded water quality apart from one site.

(e) In all of the 11 streams the sediment cover was higher than 50% and in some places up to a foot of sediment had been deposited on top of stream substrate.

(f) Increased sediment levels can have dramatic effects on stream ecosystems and this was observed within Te Marunga Forest.

(g) The Mangaonui Stream, Mangatokerau River, Te Kokokakahi Stream, Tohitu Stream and Takamapohia Stream all had deposited sediment levels that were smothering in-stream habitat. The larger rivers may be able to flush some of the deposited sediment

through the system however the smaller streams may not have the capacity to flush the sediment out.

(h) The majority of the woody debris that collapsed into the streams in the forest had migrated downstream to watercourses outside of the forest during the June rain events. Woody debris has damaged stream banks as it has moved downstream, and this has left areas exposed and eroding into the freshwater environment.

(i) Much of the remaining woody debris had been removed from the streams, however the damaged stream banks were still exposed.

(j) Riparian margins need to be re-established to ensure that future erosion and sedimentation effects are decreased.

I record that the Prosecutor's contended starting point for penalty considerations for Te Marunga of $350,000 is based on these effects.

[43] In fixing a starting at Te Marunga I have had regard to the same issues as I had for Wakaroa. No further comment is required on the issues of maximum penalty, the vulnerability of the environment, the business activity nature of the offending, the need for deterrence or comparable cases. However, a matter to which I have given particular attention is the relationship between landsliding, slash deposition and breach of consent conditions which occurred at Te Marunga. I have considered findings on these matters contained in a report from Marden Environmental Consultancy commissioned by Aratu.

[44] The report covered about 10 percent of the forest. I understood that the findings cannot necessarily be extrapolated across the whole forest. The study looked at 494 landslides within the study area and concluded that 76 percent were the result of failures on natural slopes, 18 percent were associated with the road network and six percent were triggered by landing failure. As well as sediment the landslides conveyed remnant slash from earlier harvesting and large logs into the stream system. Additionally, collapsed landings contributed significant volumes of slash from current logging operations to the landslides and debris which made their way into the streams. In other words, there was a combination of effects between the landslides and the

failures to adequately protect landing areas, skid sites and the like. The study seems entirely consistent with the observations of Dr Visser and Mr Ngapo as to the poor management practices in the forest. It is clear from the information before the Court that landsliding in the study area primarily took place on slopes harvested in the preceding two years. The report observed that:

> With the clear felling of these slopes shortly before the June 2018 storms and in the absence of a protective vegetative cover these previously intact cover beds were primed to fail.

[45] In his submissions for Aratu, Mr Darroch contends that the poor logging practices and breach of conditions contributed primarily to the road network and landing failures which make up only about a quarter of the land-slides in the study area. He submits that a significant degree of damage would have occurred in any event. That does not reduce or mitigate Aratu's culpability in any way. What is clear from the Marden report is that by harvesting these steep unstable slopes, weakening the root systems of the harvested trees and removing their vegetative cover, Aratu primed the slopes for failure. Again, this situation demanded that if forest harvesting was to be carried out at all on this land it would be done in accordance with the conditions of Aratu's resource consents and best practice.

[46] The combination of poor forestry management practice generally, breach of resource consent conditions and Aratu's actions in priming the slopes for failure lead me to the view that Aratu's culpability for this offending is at the very high end of the scale.

[47] Council inspections of June, July and August 2018 identified 83 landing failures across the forest. There was extensive damage to streams as described in the summary of facts. Worst of all, the deposition of large quantities of forestry debris in the creek and river system interfered with river processes and flows generally and ultimately blocked the Mangatokerau River, flooding properties and houses in life threatening situations. Houses, buildings and livestock were destroyed. Neighbours suffered through terrifying and life threatening situations with one family having to be rescued from the roof of their house by helicopter after a night exposed to the weather.

[48] It is the common position of the Council and Aratu that in fixing penalty for this offending I ought give credit to Aratu for remorse and remedial work over and above what it would otherwise be obliged to do. It has undertaken remedial work in accordance with an abatement notice but I give no credit for that. However, I acknowledge the remorse shown by Aratu by way of visits to victims and formal apologies by its local manager and a then director from Malaysia. It has made koha payments to two victims. I will regard those payments as assistance to enable victims to get back on their feet and meet immediate financial needs following the devastating circumstances with which they were faced after the flooding and deposition of forestry debris on their properties. Aratu has done tidy up work on some of the victims' properties but much remains to be done and precisely when and how that can be done is a matter of debate. It met half of the costs of a log clean-up at Tolaga Bay. I am advised by the Council that Aratu was not the primary contributor to logs which ended up at Tolaga Bay so clearly that goes above and beyond what its obligations were. It deserves appropriate credit for all of these matters and I will reduce starting point by 15 percent to recognise these matters in respect of the Te Marunga offending.

[49] In reaching a starting point I have had regard to all of the above matters. The combination of factors I previously identified at Wakaroa together with:

- The widespread nature of compliance failures;
- The associated numbers of skid site and road failures;
- The life threatening nature of the incidents caused by the offending in this case; and
- The overall adverse effects arising from this combination -

lead me to the view that the appropriate starting point for penalty considerations for the Te Marunga offending is $360,000 which I note is 60 percent of maximum penalty. Reducing that amount by 15 percent gives a figure of $306,000.

[50] The Defendant is entitled to a further reduction from reduced starting point on both the Wakaroa and Te Marunga cases of 25 percent on account of its prompt guilty pleas. This gives an end penalty in Wakaroa of $150,000 and Te Marunga $229,500 an all up end penalty for both offences of $379,500.

[51] I ask the question whether that is an appropriate penalty looked at in the round for these two offences. In my view it is. It denounces offending involving egregious breaches of resource consent conditions which had widespread effects giving rise to environmental damage in a vulnerable environment and which (in one instance) put people's lives at risk.

[52] Aratu is fined those amounts accordingly, that is $150,000 on charging document ending 1446 and $229,500 on charging document ending 1447. Pursuant to s342 RMA, the fines less 10 percent Crown deduction are to be paid to Gisborne District Council. Additionally, it will pay solicitor costs as per the Costs in Criminal Cases Regulations (to be fixed by the Registrar if need be) and Court costs of $130.

[53] That brings me to the matter of reparation payments pursuant to s 32 of the Sentencing Act which provides as follows:

> (1) A Court may impose a sentence of reparation if an offender has, through or by means of an offence of which the offender is convicted, caused a person to suffer:
>
> (a) Loss of or damage to property; or
>
> (b) Emotional harm; or
>
> (c) Loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.

I had previously indicated to the parties that I would consider a sentence of reparation for emotional harm in this case.

[54] In order to impose such a sentence I have to be satisfied that the person who suffered emotional harm is a person who can be described as a victim in s 4 of the Sentencing Act. There is no question that the persons who appeared before the Court today and gave victim impact statements are victims of these offences as defined. I

understand Aratu to accept that. I record that they are Mr Paul Te Kira, Ms Nina Maraki and Ms Amber Grace. I will append to these sentencing notes copies of their victim impact statements subject to deletion of certain personal information which is contained in one copy of the victim impact statement. I will also append a copy of the victim impact report which has been prepared. Those documents give clear indications of the nature of the emotional harm to the victims of this offending.[5]

[55] The Sentencing Act does not define what constitutes emotional harm nor what I am supposed to take into account when considering reparation sentences. However, it will be apparent to any person reading the attached documents that the victims have been subject to emotional experiences ranging from what I can only describe as sheer terror as a result of real potential of being killed (along with a grandchild) to a sense of desolate loss from no longer being able to live in a much-loved home. This situation and these emotions were brought about as a direct result of Aratu's failures to safely carry out its forest harvest operations in accordance with recommended practice and the terms of its resource consent.

[56] It is of course impossible to put a figure on these things. How do you assess how much a night of terror is worth? It cannot be done. I also note that the purposes of penalising, denouncing and deterring the Defendant have been dealt with through the sentencing process. I do not understand it to be the purpose of an emotional harm reparation payment, to punish it again. I consider that the purpose of emotional reparation is for the Court to formally acknowledge in a financial way the emotional harm suffered by the victims, to tangibly mark it and to say this payment is to recognise that. I do not think it is to recompense the victims because you cannot.

[57] I have considered all of these things. I consider that the emotional harm suffered in this case was real and of such intensity, particularly in the case of Mr Te Kira and Ms Maraki, as to warrant a payment of some significance. In determining the appropriate amount I have had regard to the fact that Aratu is part of a wealthy international conglomerate which can afford to make payment of some

[5] Since giving that indication in Court I have considered the provisions of ss 23 and 24 Victims Rights Act 2002. Inclusion of the victims' statements and the victim impact report appears contrary to these provisions so I will not in fact append them to these sentencing notes.

substance on the basis of the information before me. I am aware that the amount of payment should not be based on a whim on my part. As I say it is not a payment to further punish and none of the cases to which I was referred give me any real guidance or involve comparable circumstances to this. I have had to take what I consider to be an appropriate amount for emotional harm based on all of those considerations. I have determined, having done so, that the appropriate amount is the sum of $50,000 each to Mr Te Kira and Ms Maraki who went through a terrifying, life threatening experience and $25,000 to Ms Grace. I note that these payments are separate to the fines I have imposed.

[58] In reaching that figure I have had regard to the koha payment made by Aratu to Mr Te Kira. I have previously recognised that in a reduction from starting point on the Te Marunga offending and I have regarded it as a payment giving assistance to overcome the immediate practical and physical effects of the damage to his property rather than a payment for emotional harm.[6]

[59] Finally I record that the Council has determined not to pursue the issues of financial reparation or enforcement orders. I have accepted after long consideration that the amounts which are claimed by the victims, particularly with regard to loss or damage to property, can only effectively be determined through some form of civil action. The courses available to this Court to determine the appropriate amounts are limited. All that the Court could do is have a disputed-facts hearing as part of the sentencing process and the victims have no right under the legislation to be parties to that. They cannot come along, produce their own witnesses, cross-examine or the like.

[60] Having regard to all of those matters I have determined that I am not going to order a sentence of reparation under s 32(1)(a) of the Sentencing Act. I note that the Council (which would have to enforce it) does not seek an enforcement order so I am not going to make one.

B P Dwyer
Environment/District Court Judge

[6] Section 32(6) Sentencing Act 2002.