A view into the kaleidoscope

Local Government and Resource Management

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There is an old adage that the only thing in life that is constant is change. Never has that seemed truer than in the field of local government and resource management at the moment where it feels a bit like a shifting kaleidoscope.

Just when you think you understand the way it all works, along comes a further proposal for change, which turns that understanding on its head. In this article, we provide an overview of the Water New Zealand submission on the Local Government Bill which notes issues of particular concern to the water sector, as well as some general reactions from other submitters.

We also outline the findings and recommendations of the Productivity Commission in its draft Report on Urban Planning[1] and express our view that the acceptance of those proposals would mean the end of the RMA as we know it. We then go on to note the proposal for an inquiry into the Havelock North water issues, an issue we will likely report on more fully in further issues.

Finally, we provide an overview of two recent cases of note: the final chapter in the case of the cousins at war over water consents; and an interesting case discussing defences to prosecutions for unauthorised works within a stream bed.

We hope you enjoy the read!

LOCAL GOVERNMENT AMENDMENT BILL

In our last article, we commented on the release of the Local Government Bill and some of the high-level issues we foresaw with the Bill in its present form. Submissions on the Bill closed on 28 July 2016 with a significant number of submitters taking issue with the changes proposed.

The key issues with the Bill for the Water sector were highlighted in the Water New Zealand submission on the Bill. These included:

- Lack of uniformity – the complexities that may arise with different degrees of horizontal and vertical integration between organisational structures that may apply in different areas;
- Cross boundary issues – the challenges that may arise for the fulfilment of separate local authority obligations where organisations span boundaries;
- Funding/resourcing – the lack of recognition of the funding/resourcing which will be required from local authorities and council-controlled organisations (CCOs) to implement new structures;
- CCO's – the need for the legislative regime to be fit for purpose and allow for transparency, accountability and effective public participation;
- Taxation – the lack of detailed consideration given to the tax implications of the proposals in the Bill and the need for further clarity around these matters;
- Ministerial powers –the extent of proposed Ministerial powers introduced and the need for some criteria/restrictions;
- Development contributions – whether enabling CCOs to collect these directly would be more efficient and/or confirming how the other development provisions in the Act apply to CCO's; and
- Procedural matters – the need for some criteria to guide the Commission when determining proposals, to provide a right of objection against the refusal of a bylaw proposal, to allow local authorities to act in the event of non-performance by a CCO (amongst others).

Water New Zealand spoke to these and a number of other wording-specific issues mentioned it its submission, when it presented to the Select Committee on 18 August 2016. A copy of the Water New Zealand submission is available on the organisation's website.[2]

A number of local government submitters and commentators have taken particular issue with the Bill, with some even calling it the "death of local democracy."[3]

Given how controversial some of the changes in the Bill have been, we expect the Select Committee to recommend significant changes to the Bill – if indeed it recommends that it be passed. The Select Committee report is due on 28 October 2016.

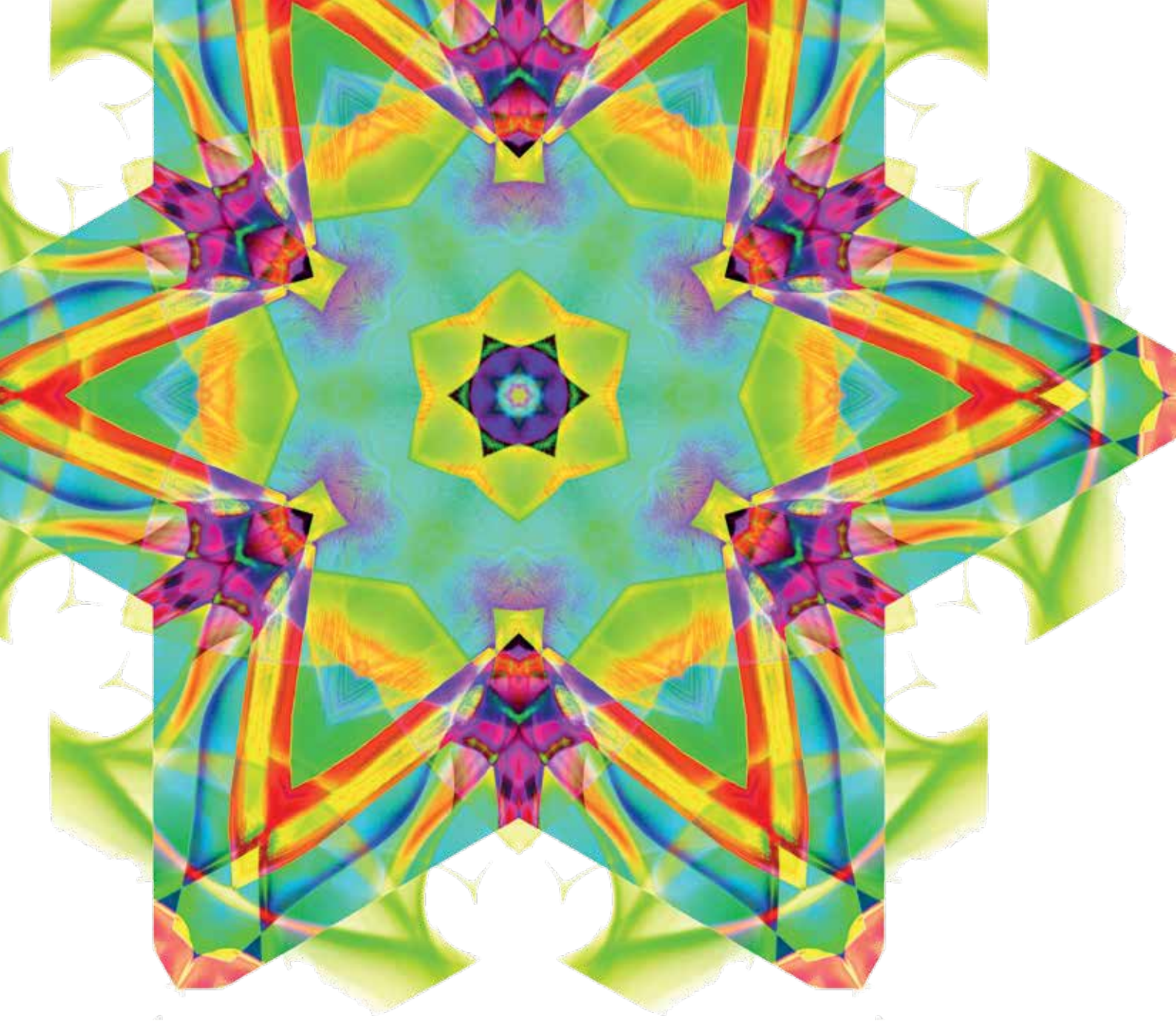
PRODUCTIVITY COMMISSION REPORT

The New Zealand Productivity Commission released its draft report on Better Urban Planning on 19 August 2016 (Report).[4] The purpose of the report is to "review New Zealand's urban planning system and to identify, from first principles, the most appropriate system for

[1] *New Zealand Productivity Commission. (2016). Better Urban Planning Draft Report. Available from www.productivity.govt.nz/inquiry-content/urban-planning.*

[2] *Refer: https://www.waternz.org.nz/Category?Action=View&Category_id=930.*

[3] *Comment made by Waimate Mayor Craig Rowley, as reported in an article in the Timaru Herald by Tess Brunton and Daisy Hudson, dated 15 July 2016; http://www.stuff.co.nz/timaru-herald/news/82141846/Local-Government-Amendment-Bill-could-be-the-death-of-local-democracy-Waimate-mayor-says.*



allocating land use through this system to support desirable social, economic, environmental and cultural outcomes."[5] And the aim of the Report is to "set out what a high–performing urban planning system would look like."[6]

In developing the proposals set out in the Report, the Commission considered and investigated matters such as: what makes a high-performing city; how planning can contribute to well-being; urban trends in New Zealand; and how well the current system is performing for urban issues. The Commission identified a number of priority areas for change. These are:[7]

- Clearer distinctions (and different regulatory approaches) between the natural and built environments;
- Greater clarity around priorities – especially at the national level and regarding land-use regulation and infrastructure provision;
- More responsive infrastructure provision including a clearer statutory framework for water services, better funding mechanisms and procurement practices and tools for councils to manage pressures on existing assets;
- A more restrained approach to land-use regulation – in other words, only imposing rules where there is a need for those rules, a clear link to externalities and alternative approaches are not feasible;
- Stronger capabilities (and a change of culture) within councils and central government to support the new planning regime – this would include both technical analytical skills as well as "soft" skills such as communication, mediation, facilitation skills and a greater understanding of Maori world views.

The Report then goes on to outline what the Commission considers a high-performing planning system would look like:[8]

- A presumption that favours development in urban areas, subject to clear (biophysical and other) limits;
- A clearer set and hierarchy of priorities for the natural environment;
- More and more robust environmental management tools;
- Infrastructure pricing and funding that more accurately reflects actual costs, use and impacts;
- Rezoning and regulatory change that adapts more rapidly to circumstances;

4 New Zealand Productivity Commission. (2016). Better Urban Planning Draft Report. Available from www.productivity.govt.nz/inquiry-content/urban-planning.

5 Terms of Reference for the Inquiry, reproduced at page iii of the Report.

6 Report, Overview, page 1.

7 Report, Overview, page 6.

8 Report, Overview, page 7.

- A focus on those directly affected by change – not third parties;
- A permanent independent hearings panel to scrutinise the proposed rules against the legislative purposes and consequently a different (and reduced) role for the Environment Court;
- More representative, less rigid consultation;
- Continued recognition and protection of Maori interests;
- Spatial planning as a core and fully integrated component;
- Central government as a more active partner in the planning process.

Two issues are noted as not being resolved and on which specific feedback is sought to help the Commission finalise its recommendations. These relate to the legislative separation of planning and environmental protection and the centralisation of environmental enforcement or greater oversight of regional councils.

While there is not space to go into the full details and likely issues arising with each of the Commission's proposals (the entire report is almost 400 pages!), suffice to say that if the Commission's proposals were adopted, it would be the end of the RMA (at least as we know it). In particular, the proposals to limit public participation in urban planning processes (especially appeal processes), contrasts starkly with the RMA framework which has long been based on giving the public a voice in such decisions. We imagine that submitter interest in the Report will be high, and for anyone wishing to make a submission we note that it has a very helpful 12-page overview section, and a summary section (section 13) which sets out all the findings and recommendations made throughout the Report.

Submissions on the draft Report are due by 3 October 2016 and the Commission's final report is due to the Government by 30 November 2016.

HAVELOCK NORTH WATER INQUIRY

As most of you will be aware, the contamination of the Havelock North drinking water supplies, the significant number of people affected (over 4100) and the significant number of confirmed cases of campylobacter poisoning as a result (523)[9] made quite a splash in the news in mid-August.

On 22 August 2016, the Government announced it had decided to establish an Inquiry to investigate: what caused the contamination; how it was handled; the subsequent response; and any lessons and improvements that can be made in the management of the water supply network in Havelock North and across New Zealand.

It is understood that the Inquiry will be led by the Department of Internal Affairs using powers under the Inquiries Act 2013 and that the Department will report to the Attorney General. At this stage, no timeframes are known, however, as we suspect this inquiry will be of interest to most within the water sector, we will maintain a watching brief on this and report further in future articles.

RECENT CASES

Hampton v Canterbury Regional Council [2016] NZSC 50

You may well remember from previous articles the case of the warring cousins who were involved in a dispute regarding water-take consents.

The dispute has a complex history but, in essence, the case was about the legitimacy of the Council's decision to grant a resource consent to Robert to use water which was already allocated to Simon (Robert's cousin and neighbour), although Simon was not in a position to use the water at the time.

The dispute went to the High Court and Court of Appeal and after failing in the Court of Appeal, Simon recently sought leave to appeal to the Supreme Court. The grounds for seeking leave were that Simon's consent variation application should have been given priority over Robert's new consent application; that the Court of Appeal erred in finding that Robert's consent did not derogate from Simon's; and that granting Robert's consent breached Simon's legitimate expectations.

The Court did not consider that any of the grounds justified granting leave. In particular and in relation to the priority ground, the Court noted that:[10]

"On appeal, Simon would have to argue that his application should receive priority despite the fact that he lodged the application after Robert, had no ability to use the water allocation at the time the application was made and voluntarily placed the application on hold for several years…

…we do not see the facts of the present case as directly engaging the Fleetwing principle and for that reason we do not consider that granting leave for the purpose of allowing that issue to be argued would be in the interests of justice in this case."

The Court determined that it would not be in the interests of justice to grant leave in respect of any of the grounds. This means that Robert's consent remains valid and can be exercised according to its terms.

Phillips v Wellington Regional Council 2016 NZHC 1266

This case was an appeal against conviction on three charges under the Resource Management Act 1991. The charges related to work Mr Phillips performed depositing soil and rock into a stream and diverting the course of that stream without resource consent. Mr Phillips did not dispute that he undertook the works, but contended that he was able to as he considered there was a risk to life and/or property if the works were not undertaken. The Court considered whether there was a defence available under two separate heads:

- s 341(2)(a) – whether the works necessary to save life/health, prevent serious damage to property; or avoid adverse effect on the environment; and
- s 330(1)(a) – whether the works were a public work and immediate remedial action was required or there was a sudden event causing likely loss of life or serious damage to the property.

The Court found against Mr Phillips on both grounds. In relation to the first ground, the Court agreed with the District Court that the defence was not available as "the stream had been in the same or similar position for some time, and there is no coherent evidence at all that urgent and unconsented work was required to save life or serious damage". While Mr Phillips sought to introduce new evidence on appeal about the necessity for the works, the Court noted that the evidence did not state erosion was imminent or likely to occur in the near future. The Court therefore held that the evidence did not change the conclusion that the defence did not apply.

In relation to the second ground, the Court found that the defence did not apply as there was no public work involved. The work that was performed was a private work and therefore could not avail itself of the defence.

The appeal against conviction was therefore dismissed. **WNZ**

[9] *Refer: http://www.stuff.co.nz/national/health/83426335/government-announces-widereaching-inquiry-into-havelock-north-water.*

[10] *Refer paragraphs [8] and [9] of the Supreme Court decision.*