# Out with the old, in with the new.

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In this article we provide an overview of developments in relation to a number of legislative instruments, including: the Resource Legislation Amendment Bill, the National Policy Statement on Urban Development Capacity 2016, and the Fire and Emergency New Zealand Bill.

We also provide a brief overview of a couple of cases that have caught our eye over the past couple of months.

## Resource Legislation Amendment Bill

The proposals in this Bill have proved rather controversial with the Government finding it difficult to obtain enough support for the Bill to pass it in its present form. Indeed, the Government sought an extension for the Select Committee report back date for the Bill until November 7, 2016 last year but was unable to obtain support for the extension.

To overcome this issue, the Government had the Select Committee report the Bill back pro-forma (essentially as it was when it was first referred to the Select Committee) and then rather than allowing it to have its second reading, the Government put forward a notice of motion referring it back to the Select Committee with a new report back date of 10 May 2017. While a number of other political parties opposed the move, the approach was ultimately confirmed by the Speaker of the House as one which had been used on a number of occasions previously and was therefore open to the Government in this case.[1]

## National Policy Statement On Urban Development Capacity

Last year the Government consulted on a proposal to establish a National Policy Statement (NPS) for Urban Development Capacity. The proposed NPS was directed at ensuring there was sufficient development capacity to accommodate urban growth. Submitters (including Water New Zealand) identified a number of issues with the proposed NPS and sought a number of changes.

The National Policy Statement on Urban Development Capacity 2016 which came into effect on 1 December 2016 (NPS UDC) included a number of changes which were made in response to submissions but did not fully address all of the issues raised by submitters. In relation to the key issues raised by Water New Zealand, it is notable that:

- Contrary to the relief sought by Water New Zealand the NPS UDC does not:
  - provide guidance as to the form additional urban development capacity should take – intensification, expansion or both;
  - recognise nor address issues such as construction resourcing, attitudes to growth, and the fragmented consenting system which may impact both capacity and/or the subsequent take up of that capacity;
  - resolve or address the potential for conflict with other national policy statements and other legislative instruments.
- infrastructure has been split into two types:
  - "development infrastructure", which is defined as comprising the 3 waters and land transport infrastructure controlled by local authorities; and
  - "other infrastructure", which is defined as including open space, social and community infrastructure, telecommunications, energy, open space and land transport/ other infrastructure not controlled by local authorities.
- In terms of funding of infrastructure, the NPS UDC imposes a requirement on local authorities to ensure there is sufficient funding by including funding for such works in their long term plans.
- a new policy has been included to require decision makers to have regard to the efficient use of urban land – however there is no express requirement to consider the quality of the development outcomes on that land.
- while there is a policy encouraging collaboration and co-operation between local authorities who share jurisdiction over an urban area there is no requirement for a broader (eg, region-wide approach).
- the housing and land assessments remain with local authorities – (Water New Zealand had sought that these responsibilities be transferred to the Ministry for the Environment for smaller local authorities).
- the NPS UDC has been brought into effect ahead of the remainder of the proposed Resource Management Act reforms.

With the NPS UDC now being operative, the focus for central Government has now shifted to providing implementation and guidance to local authorities as to how to undertake their responsibilities under and best give effect to the NPS UDC. In this regard, the Ministry for the Environment and the Ministry of Business Innovation and Employment have been working together to develop an implementation programme. This programme comprises the following work streams:

- Monitoring market indicators;
- housing and business development capacity assessments;
- responsive planning;
- consenting processes;
- future development strategies;
- monitoring and evaluation (ie, monitoring the implementation of the NPS UDC and evaluation of the effectiveness of the NPS UDC); and
- communications and engagement.

Further information on the progress of the various work streams and make-up of the various advisory groups is expected to be available in the next month or two. It is understood that the Ministries are aiming to have guidance statements available for each of the different work streams between May and September this year.[2]

## Fire And Emergency New Zealand Bill

The Fire and Emergency New Zealand Bill was introduced last year to give effect to a single unified fire services organisation for New Zealand. Submissions closed in August

*1 New Zealand Parliament, Resource Legislation Amendment Bill – Recommittal, Hansard Debate 10 November 2016. Available here: https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL67856_1/tab/hansard.*

*2 For further information on the current state of play refer to the Ministry for the Environment's website: http://www.mfe.govt.nz/more/towns-and-cities/national-policy-statement-urban-development-capacity.*

and the Select Committee released its report on 22 December 2016 recommending that the Bill be passed but with some amendments.

Water New Zealand made a submission on the Bill which sought:

- more proactive consultation between Fire and Emergency New Zealand (FENZ) and local water organisations;
- better co-ordination between organisations operating in the emergency sphere;
- the appointment of a regional relationship manager; and
- changes to specific clauses including:
  - clause 20 – to require the appointment of representatives from the local council or local water organisation to the local committee;
  - clause 41 – to clarify the relationship between FENZ and local councils in terms of use of water and ability to change water pressure in emergency situations;
  - clause 45 – to require the consent of the local water authority to use water for emergency and training purposes;
  - clause 63 – to clarify that the code of practice would replace current codes, to ensure water organisations were in the list of consultees, and to require consideration of local water limitations; and
  - clause 64 – to require prior notification to local councils when FENZ is undertaking water supply checks and to give consideration to traffic issues while such checks are taking place.

Most of the changes made by the Select Committee were to provisions not directly relevant to the water sector or Water New Zealand's submission. One positive change is the recommendation to include a new clause (13A) which sets out the purpose and functions of local advisory committees. These functions include local engagement, advice and planning. In carrying out these functions FENZ is required to consider the interests of FENZ volunteers and industry brigades as well as relevant current operational service agreements and any memoranda of understanding.

There is no specific requirement for consultation or greater coordination and no requirement for prior consent of the councils. This appears to be on the basis that the Committee considers that FENZ will consult and notify as a matter of course:

> "We queried the powers provided to FENZ in clause 41(a) of the Bill, to cause water to be shut off from, or turned into, any pipe to obtain greater pressure, and enable firefighters to access water mains. Our primary concern about these powers was the negative consequences that may arise from altering or shutting off water supply, for example, the impact this may have on a dialysis patient. We were informed that fire personnel would contact the relevant water organisation to take appropriate action when necessary. Firefighters do not access water mains or pipes themselves. Water organisations can identify if there are any vulnerable customers in the area. Additionally, we were assured that dialysis patients are trained in what to do if their water supply is suddenly shut off during an emergency. We are confident that the appropriate steps would be taken when exercising these powers."[3]

A full copy of the Committee's report on the Bill is available on the Parliament website.[4] The next step is for the Bill to be read a second time.

## Case Law Update

There have not been that many cases since our last case law round-up late last year. We have therefore gone back a little earlier to provide an overview of a couple of cases that came out in the last half of last year. The first of these places another obstacle in the path for the establishment of the Ruataniwha water storage scheme proposal; and the second is a case regarding the appropriateness (or otherwise) of proposed restoration activities at Lake Horowhenua.

Royal Forest and Bird Protection Society of New Zealand Incorporated v Minister of Conservation [2016] NZCA 411.

One of the key issues that the Hawkes Bay Regional Council's water storage proposal faced was that part of the land to be flooded was part of a conservation park, which is subject to a statutory prohibition against disposal or exchange. To overcome this issue, a proposal was made to exchange certain land for that area and to revoke the conservation park purpose of the area. The Director General agreed and revoked the conservation park purpose and replaced it with a stewardship designation. It was the revocation decision which was subject to challenge by Royal Forest and Bird. There were also cross appeals regarding the marginal strip.

The appeal was dismissed in the High Court as the Court held that the Director General had acted lawfully by satisfying himself that the decision was properly based on conservation purposes interpreted broadly.

However, the Court of Appeal disagreed with the High Court. After setting out its views on the Conservation Act 1987 provisions, the Court of Appeal found that the process that the Director General followed led to an unlawful decision:[5]

> "The Director-General did not inquire into whether the 22 hectares should be preserved because of its intrinsic values or protected in its current state to safeguard the option of future generations where the scientific evidence established its ecological significance. Nor did he inquire whether preservation or protection of the area in its current state was not practicable. Nor did he inquire why the 22 hectares should lose conservation park status when its inherent characteristics remained unchanged and otherwise deserving of protection and preservation. This factor assumes particular relevance where destruction of the 22 hectares – land previously deserving of special protection – was the inevitable consequence of his decision. The decision would free much of the land to be submerged and cease to be land; there could not be a more fundamental corruption of its intrinsic value.

The Court considered that the revocation decision had been made for the sole purpose of expediting the proposed exchange, and had the effect of "circumventing a statutory prohibition that had been the subject of careful legislative consideration

*3 Fire and Emergency New Zealand Bill, As reported from the Government Administration Committee, Commentary at page 14.*

*4 https://www.parliament.nz/en/pb/sc/reports/document/51DBSCH_SCR72243_1/fire-and-emergency-new-zealand-bill-148-2*

*5 At paragraph [75].*

before its enactment".[6] Accordingly, the Court ultimately found that the revocation decision was unlawful and should be set aside and that the Director General should reconsider the application in accordance with the terms of the judgment.

Hokio Trusts v Manawatu-Wanganui Regional Council [2016] NZEnvC 185

This was an unusual case in that all parties were in agreement that restoration activities should be undertaken – the issues arose from the proposed restoration methods selected and the perceived effects of those methods on ecological matters and tangata whenua values.

Weed harvesting and the reduction of sediment by the installation of a sediment trap were the two short-term restoration methods proposed. In terms of ecological matters the Court found that:

- the most likely outcome of weed harvesting was a significant reduction or elimination of the toxic blooms and a significant reduction in the release of unionised ammonia which was toxic to the fish;
- any adverse effects of weed harvesting were no more than minor and could be appropriately managed via conditions;
- the Council had proposed a cautious adaptive management approach which adequately addressed the tests set out in the decision of the Supreme Court in Sustain our Sounds;[7]
- the sediment trap would have no discernible adverse environmental effects and would make a significant contribution to the short-term management of sediment and nutrient in-flow to Lake Horowhenua.

In terms of effects on local Maori, the Court accepted that Lake Horowhenua had historically been the 'food basket' of Muapoko and that the degraded state of the Lake diminished the strong cultural values associated with it.

The Court also accepted that there were a number of groups within Muapoko that had cultural ties to the lake and that there were differing views between these groups on how restoration should be achieved.

While some groups supported the proposals – others (including the Hokio Trust) opposed. In the end the Court found that the Hokio Trust had failed to establish that the restoration activities would have adverse effects on tangata whenua values. The Court considered that the restoration measures would also assist in restoring the mauri of the Lake and that the ongoing involvement of the Lake Trust (which was comprised of iwi members) would foster the relationship of iwi with the Lake. The appeal was dismissed and the consent was granted with a few amendments to the conditions. **WNZ**

*6 At paragraph [74].*

*7 Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd [2014] NZSC 40, [2014] 1 NZLR 673.*