



Hup
2,3,4,

...keep it up

2,3,4

The reforms are
marching on



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For those of you who are old enough to remember the Jungle Book (or who have seen the recent re-release), you will be familiar with the elephant dawn parade led by the unflappable (but rather forgetful) Colonel Hathi. Hathi refuses to let the pace slip, with his rhythmic marching chant, 'Hup two, three, four, keep it up, two, three, four!'

The Government, a bit like Colonel Hathi, is also keeping up the pace in terms of local government and resource management reforms. But unlike Colonel Hathi, who seems to have forgotten the purpose of his march, the Government has some very clear goals it wishes to achieve. More flexible

and responsive local government structures, more affordable housing, and ensuring sufficient capacity for accommodating urban growth. While the goals themselves are hard to argue against, some of the mechanisms suggested to achieve the goals, and in particular the increasing central government intervention in local government matters along with the speed of the reforms, have raised concerns in some sectors.

Unlike Colonel Hathi's hapless crew, in the local government and resource management world, we like to know where we are heading and why, how we are going to get there and when. We also like to make sure we have buy-in along the way – rather different to the "military style" of the Colonel.

In this article we provide an overview of the recently released Local Government Amendment Bill which seeks to improve service delivery and infrastructure provision at the local government level. We then move on to discuss the proposed national policy statement on urban development and some of the key issues we see with the statement in its current form. We close this article with comments on a case that provides a timely reminder to all those purchasing (or acting for purchasers of) rural land with water permits – that permits do not automatically transfer with the land. We hope you enjoy the read.

LOCAL GOVERNMENT REFORM

In March this year Local Government Minister Hon Peseta Sam Lotu-liga announced further reforms to the local government sector to "enable councils to deliver better services for ratepayers".¹ This announcement was followed in mid June 2016 by the introduction of a new local government reform bill² (Bill) which sets out the content and detail of the proposed

1. <https://www.beehive.govt.nz/release/major-reforms-improve-services-ratepayers>.

2. *Local Government Act 2002 Amendment Bill (No 2) 144 -1*.

reforms. In essence the Bill seeks to do four things:

- To enable a broader range of functions to be transferred between local authorities, joint governance arrangements for areas of shared interest and greater use of joint council controlled organisations for providing services.
- To provide the Local Government Commission, subject to appropriate checks and balances, with discretionary powers to decide what investigations into reorganisation proposals it should undertake – either on its own volition or in response to requests from the Minister of Local Government, local authorities, or members of the public.
- To enable the Commission to facilitate the provision of more streamlined regional services and arrangements through providing for:
 - a local authority to act as a unitary authority in one district and a regional council only in another district; and to
 - allow a local authority to exercise specified functions, duties and powers in another district that has its own territorial authority.

The changes proposed clearly seek to streamline the efficiency of local government by providing a range of options for “reorganisation” as well as “amalgamation” of services. Providing the flexibility for local authorities to innovate and collaborate in solving the issues specific to their community, the Bill intends to enable the delivery of more tailored and efficient services. As the Department of Internal Affairs notes,³ the regions and territories of New Zealand face differing challenges in respect of demographic changes, economic shifts, environmental pressures, and technological innovations, and constituents expect councils to keep up with these changes responsively and quickly. While greater flexibility may enable innovation, there may also be complications arising from the changes.

One such complexity could be unforeseen consequences of a lack of uniformity in local government structures across the country, and potentially a lack of certainty if the structures continue to change.

Another is, given that the current local government system is structured around territorial boundaries, ventures which cross territorial boundaries, like joint council controlled organisations (CCOs), could cause challenges for the fulfilment of the separate obligations of local authorities. More so than singly-held CCOs, where a CCO is multiply-owned, Councils may find their obligations to their ratepayers in tension with their corporate obligations to the CCO. The Board of any joint CCO must be given the opportunity to comment on the long-term plans of any shareholding council (clause 25, new section 63E). The Bill also provides for accountability policies to address this tension and ensure that shareholding Councils’ objectives and priorities are met (clause 22, new section 56S).

The joint CCO capability appears to be largely aimed at essential services such as water and transport. Territorial boundaries become markedly irrelevant in respect of services relying on immovable physical resources, and so the practical benefit of enabling joint provision of such services is clear. Particularly in the case of water services in contexts like Auckland and Waikato, where municipal supply issues are closely intertwined, the ability to amalgamate water CCOs may be of great benefit.

There will also be costs associated with the Bill. The Local Government Commission receives a number of new functions and responsibilities under the Bill. The Commission may need additional resourcing to cope with the workload of assessing and approving/declining reorganisation proposals and joint-CCO proposals for local authorities, as well as reporting to the Minister. There will also be implementation costs as Councils review their

services in light of the new options. It will be interesting to see how such costs compare to any perceived long-term savings from adopting the new models.

The Bill has already been making waves, with the Hon Winston Peters leading the charge in opposing it. He described the Bill as needless “meddling” in the affairs of local government and an attempt to fix something which was not broken. In his view, “local government is not, repeat NOT, accountable to Central Government” and the Bill was a “new exercise in Nanny State micro-management”.⁴ It will be interesting to see what other reactions are forthcoming. The Bill is open for submissions until 28 July 2016 with the Local Government and Environment Committee’s report due by 28 October 2016.

PROPOSED NATIONAL POLICY STATEMENT – URBAN DEVELOPMENT CAPACITY

In early June 2016, the Government released the proposed national policy statement on urban development capacity (PNPS). Its purpose is to ensure regional and district plans provide adequately for business and housing growth.

The objectives in the PNPS apply to all local authorities whether or not they are experiencing growth. The policies apply in a stepped manner. All local authorities are required to comply with policies PA1 to PA3 which set out general responsibilities regarding providing for urban development. Policies PB1 through to PD4 inclusive, which require housing and business land assessments, monitoring, and potentially changes to plans and consenting process, apply to local authorities with areas experiencing medium or high growth. In addition, local authorities with high growth areas are required to comply with policies PD5 to PD9 which require: the setting of minimum targets for dwelling numbers and types; overestimating capacity by up to 20 percent to take account of the likelihood that not all capacity will be developed; and the development of a future land release and intensification strategy to demonstrate there is sufficient capacity and that targets will be met.

There are a number of issues with the PNPS in its current form. These range from big picture issues regarding whether the PNPS will achieve its goals, and how it fits with the other legislation, policies and plans, through to drafting issues regarding lack of clarity in terms used and lack of certainty in the extent of obligations. While there is not space to go through all of the issues in detail, we will briefly note three, which we consider to be of particular relevance to the water sector.

One particularly thorny issue arises in relation to the issue of infrastructure. In determining development capacity and making land available for urban uses, local authorities are required to consider the “provision of adequate infrastructure”⁵ and “actual and likely availability of infrastructure”.⁶ No definition or guidance is provided around what “adequate infrastructure” means. The potential for delays in the provision of infrastructure (and the flow-on effects this would have on development capacity) are not addressed and nor is the somewhat fraught issue of funding. In terms of the latter, the accompanying consultation document notes that infrastructure will be provided by a combination of development contributions and rates from the new ratepayer base resulting from the growth. Such an approach fails to recognise the existing shortcomings of infrastructure in some areas and the limitations on development contributions (requiring a causal nexus with a particular development).

Another difficult issue is how the PNPS fits with other national policy statements such as the NPS for freshwater management or the

3. [https://www.dia.govt.nz/diawebsite.nsf/Files/Better-Local-Services/\\$file/BLS-information-sheet-package-summary-20160317.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/Better-Local-Services/$file/BLS-information-sheet-package-summary-20160317.pdf)

4. <http://www.scoop.co.nz/stories/PA1606/S00295/local-government-nz-speech-by-rt-hon-winston-peters.htm>.

5. Refer definition of development capacity in section 3 interpretation.

6. Refer policy PB3.

New Zealand Coastal Policy Statement. No guidance is provided in the PNPS as to which national policy statement would prevail in the event of a conflict – such as for instance where urban development is proposed in coastal areas or in areas that may impact freshwater resources.

While the consultation document notes that non-statutory guidance on this (and other issues) will be provided once the PNPS is in place, as the guidance is not mandatory, decision makers can choose whether, and to what extent to apply it. Such an approach creates uncertainty for both local authorities and the public and is likely to lead to litigation. It would be far preferable for the issue to be dealt with in the PNPS itself. While that would not necessarily avoid litigation, it would at least provide local authorities and the courts with a clearer starting point.

The final issue we will mention here relates to consultation. While the PNPS provides for consultation with certain groups when the housing and business land assessments are being undertaken, a local authority is only required to take into account views of certain groups when it is developing its future land release and intensification strategy. As this strategy is likely to set a direction for areas to be opened up for urbanisation, it is considered that consultation with all potentially affected parties should be required.

Submissions on the proposed NPS close on 15 July 2016 and current expectations are that it would be introduced and take effect from October 2016.

RECENT CASE ON WATER CONSENTS TRANSFER

*Terracedale Developments Ltd v Cavell Leitch Pringle and Boyle*⁷ is a cautionary tale for those involved in buying and selling properties with water permits that water permits do not automatically transfer with the land.

Terracedale Developments Limited (“Terracedale”), a rural property development enterprise, purchased a block of rural farmland in Swannanoa, with the ultimate intention of subdividing it. The vendor of the land owned two water consents that authorised the taking of water from two irrigation wells on the property. The sale and purchase agreement, which was drawn up by Terracedale’s lawyer, did not provide for the transfer of the water consents and the consents were subsequently surrendered by the vendor. It was only after this occurred that Terracedale realised that the consents had not transferred as part of the sale and applied unsuccessfully to Environment Canterbury to have them reinstated.

Terracedale then sued its lawyer for breach of contract and negligence and sought to recover its loss. In particular, Terracedale claimed loss included the money it spent trying to reinstate the water rights, the income lost – prior to subdivision – in having to farm an unirrigated property and the loss caused by not having the water rights. The Court found that the lawyer had breached his duty to his clients “since access to water is an important component to the utility and value of the land, the matter should have at least been raised with the client.”⁸

The Court accepted that Terracedale had incurred losses on all three bases but decreased the costs awarded as it found Terracedale had contributed to its own loss by “failing to advise the lawyer of options for the property other than subdivision”.⁹

Total costs awarded were just over \$147,000 plus interest from the date of the judgment. It was a rather expensive reminder for all those involved that water consents do not automatically transfer upon the sale of land and that where a sale involves rural farmland, water availability and rights are key issues to consider. **WNZ**

7. *Terracedale Developments Limited v Cavell Leitch Pringle and Boyle* [2016] NZHC 605 (“Terracedale”).

8. *Terracedale*, paragraph [51].

9. *Terracedale*, paragraph [95].