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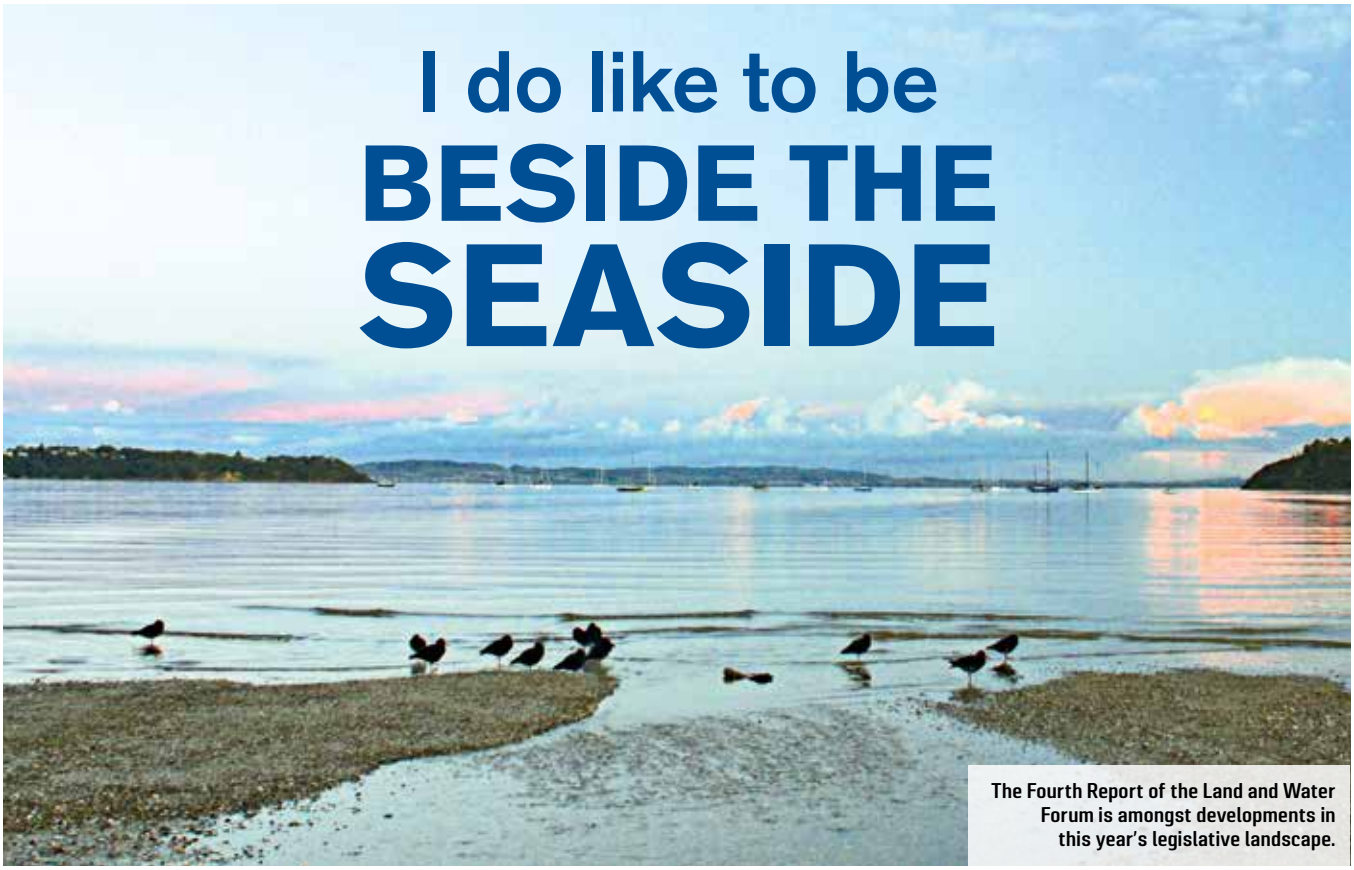

The Fourth Report of the Land and Water Forum is amongst developments in this year's legislative landscape.

By **Helen Atkins,** partner, **Vicki Morrison-Shaw,** senior associate; and **Phoebe Mason,** solicitor – Atkins Holm Majurey

We are writing this article at a time when most of New Zealand is traditionally at the beach and enjoying long hot summer days – interspersed by a few summer storms – this is New Zealand after all! By the time this article goes to print, those long summer days may feel like a distant memory as everyone is immersed in what is set to be a very busy year.

Legislative reform is back on the agenda with the Resource Legislation Amendment Bill having been introduced at the end of last year and changes for local government signalled. Further changes are also likely in these sectors once the Government has had the time to consider the recommendations in the Fourth Report of the Land and Water Forum which was issued in November 2015.

In this article, we provide a brief outline of these developments and summarise a couple of water cases from last year which considered water take activity status and water permitting issues.

RESOURCE LEGISLATION AMENDMENT BILL

On 26 November 2015, the Minister for the Environment Nick Smith announced the introduction of the Resource Legislation Amendment Bill 2015 (the Bill). The purpose of the Bill is to create a resource management system that achieves the sustainable management of natural and physical resources in an efficient and equitable way.

To this end, the Bill makes amendments to the Resource Management Act 1991 (RMA) as well as five other Acts, namely the:

- Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act);
- Environmental Protection Authority Act 2011;
- Conservation Act 1987;
- Reserves Act 1977; and
- Public Works Act 1981 (PWA).

What the Bill proposes

The Bill makes changes in eight key areas:

- national direction;
- plan-making;
- consenting;
- courts and appeals;
- process alignment;
- process improvement;
- the EEZ Act; and
- the PWA.

The changes, while not insubstantial, are not the wide-reaching overhaul of the RMA previously proposed by the Government. The changes will however have tangible effects on planning, consenting and land development processes and should assist in increasing Māori participation in these processes.

While we do not have the space in this article to detail all of the changes, it is worth providing a brief overview of some of the more significant changes in the areas of national direction, plan-making and consenting.

National direction

The Bill seeks to provide stronger national direction in the RMA in a number of ways.

- The processes for developing National Policy Statements and National Environmental Standards are sharpened to address current limitations on the (joint) development of these tools and to broaden what they can provide for.
- A new regulation-making power is introduced, effectively to avoid unnecessary and unreasonable restrictions on land. This power includes the ability to permit specified land uses, and to prohibit and remove plan provisions that duplicate or are contrary to other legislation.
- A new matter of national importance, "the management of significant risks from natural hazards", is proposed to ensure that such risks are considered in planning and consenting processes.

Plan-making

There are two main categories of changes to plan-making – those relating to planning templates and those relating to planning processes.

In terms of planning templates, national planning templates are proposed. The templates aim to improve consistency between plans and policies, make them easier to use, and reduce their complexity and ambiguity. The structure and format of plans will be the same across the country.

In terms of planning processes, the Government has recognised that one process does not fit all and has introduced two new "planning tracks" for Councils – the streamlined planning process and the collaborative planning process.

The streamlined process provides more flexibility in terms of both the process and timeframes and effectively allows a bespoke approach to address specific local issues and conditions. The collaborative planning process aims to encourage greater front-end public engagement to produce plans that better reflect community values and reduce the risk of subsequent litigation. Different interests are encouraged to work together on finding resource planning solutions and, as a consequence, participants have more input and buy-in to the plan.

Other proposed changes to planning processes include:

- limiting notification to only those people who are directly affected (when it is easy to identify who will be affected);
- requiring Councils to seek Ministerial approval for any extension of the two-year time limit for plans; and
- a new requirement to invite iwi to form an iwi participation arrangement that will establish the engagement expectations when consulting during the early stages of the Schedule 1 plan making processes.

Consenting

The Bill narrows the parties that must be consulted on a resource consent application to those directly affected. It gives Councils discretion to not require resource consent for minor issues. For simple resource consent applications, a 10-day fast-track application is proposed. Clarification is provided around the scope of conditions that can be imposed, and a new regulation-making power is introduced which will require Councils to have fixed fees for standard consents. This is in order to give certainty around costs to those seeking such consents.

Next steps

The Bill has been referred to the Local Government and Environment Select Committee for consideration. Public submissions close on 14 March 2016, and the Select Committee Report is due by 3 June 2016. Expectations at this stage are that the Bill will pass into law by the end of 2016.

PROPOSED LOCAL GOVERNMENT CHANGES

On 3 November 2015, Local Government Minister Paula Bennett announced that the Government intended to introduce legislation in early 2016 to allow councils to transfer functions and responsibilities between Regional Councils and Territorial Authorities in order to improve the way that Councils provide their services and manage infrastructure.

While at the time of writing the Bill has not yet been introduced, the 27 October 2015 Cabinet paper (Paper) provides further details of the reasons for the changes and what the Government hopes to achieve.[1] The Paper notes that super-city reorganisation proposals have failed to deliver change (or indeed even get off the ground) outside of Auckland and that change is necessary to lift local government performance and ensure local government structures are fit for the future.

The Paper proposes three steps to effect this change:[2]

- policy options and legislative amendments to provide a broader range of structures and more incentives for change;
- encouraging Councils to critically review their structures; and
- supporting the Local Government Commission to become a proactive broker for change.

Key areas of focus will be moving towards more effective delivery structures for Council services and infrastructure – particularly water and transport.

A report back to Cabinet is due in February 2016 and a Bill is expected to be introduced in April 2016.

FOURTH REPORT OF THE LAND AND WATER FORUM

On 27 November 2015, the Land and Water Forum released its Fourth Report. The report addresses:[3]

- how to maximise the economic benefits of freshwater, while managing water within the quality and quantity limits set out in the National Policy Statement for Freshwater Management (NPS-FM);
- the transition from the current water management regime to a new one;
- tools and approaches to assist the Crown to explore iwi rights and interests in the freshwater sphere; and
- regulatory requirements for stock exclusion from streams.

The report contains some 60 recommendations regarding actions that the Government or councils should take. These include:

- that the Government should complete the implementation of the recommendations from the Forum's three previous reports (Recommendation 1);

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1. Local Government Cabinet Paper, 27 October 2015. A copy of the Paper is available from: www.dia.govt.nz/diawebsite.NSF/wpg_URL/Resource-material-Our-Policy-Advice-Areas-Local-Government-Policy?OpenDocument#future

2. Local Government Cabinet Paper, 27 October 2015, at paragraph [2].

3. Land and Water Forum, 2015, The Fourth Report of the Land and Water Forum, November 2015, Foreword. A copy of the Report is available from: www.landandwater.org.nz/

- that Councils be required to produce a two-yearly report card to iwi and their communities on progress (Recommendation 10);
- a national stock exclusion regulation for cattle (dairy/beef), deer and pigs from waterways (Recommendation 29);
- 10-year lapse periods for long-term water infrastructure projects (Recommendation 48); and
- that the Government provide additional funding and improve the science and information base needed to manage within limits (Recommendation 60).

Next steps

The Forum's next task is to review the implementation of the NPS-FM and further populate the National Objectives Framework to strengthen the limit setting framework. A report on these matters is expected by September 2016.

The Forum's final task (at least at this stage) is to review the overall changes to water policy and its implementation, to comment on the lessons learned and any further work required to improve water management. A report on these aspects is due by December 2017.

RECENT CASES

Rangitata Diversion Race Management Limited v Canterbury Regional Council [2015] NZHC 2174

This case was interesting as it considered (amongst other matters) whether there was any legal bar to using controlled activity status for the taking and use of water for hydro-electricity generation and for regionally significant infrastructure. Determining this issue involved the Court considering the interplay between sections 77A and 123 of the RMA. The High Court found that there was no such legal bar essentially because:

- there were no express restrictions on the use of controlled activity status for such purposes and if Parliament had intended such a broad qualification it could be expected to be explicit, and not by way of implication;
- it would be illogical for there to be an impediment on controlled activity status but not on permitted activity status;
- activity status categorisations would be reviewed as part of the 10-year plan reviews; and
- such a bar was not supported by the express words of the RMA, the internal context of the RMA, by external materials or by a cross check with the RMA's purpose.

The appeals were allowed and the matter was referred back to the Council for reconsideration in accordance with some procedural directions made by the Court.

Hampton v Canterbury Regional Council [2015] NZCA 509

This case is of interest as it considers a number of tricky issues including: the transfer of water permits; the nature of water permits and whether they constitute a property right; as well as the principle of non-derogation of grant as it applies to water consents.

The appellant, Simon Hampton, held a water permit which allowed him to take water to irrigate Robert Hampton's land. However, because Simon and Robert were unable to agree on the terms of such irrigation, Robert applied to the Council for his own water permit. The Council determined an additional water take could not be granted as water in the catchment was already over-allocated but that a secondary water right could be.

The Council therefore granted Robert a permit to take water to the extent that Simon's right to take water to irrigate Robert's land was not being used. Simon brought an appeal challenging the validity of such a grant and argued (amongst other matters) that Robert's permit interfered with his property rights (specifically his right to sell his own water permit), and amounted to a derogation of the rights associated with his water permit.

Both the High Court and the Court of Appeal dismissed the appeal. In coming to its decision the Court of Appeal noted that:[4]

- the conditions of Simon's consent required that the water taken be used only for the irrigation of Robert's land;
- Simon had agreed to that limitation (in order to cement an earlier arrangement he had to transfer part of his allocation to another party);
- Simon had no "right" to transfer the permit and a consent to do so would be required under both s 136(2)(b) and 127(1) of the Act;
- it is unrealistic to suggest that Simon had a legitimate expectation that he would be able to transfer the permit as such an expectation was contrary to the condition of consent he sought and procured when his consent was granted;
- a water permit does not create a right to property – the right is simply the right to carry out the activity under the RMA (here a water take);
- section 122(1) of the RMA confirms that a resource consent is neither real nor personal property and while the RMA does confer certain property-like rights (limited right to charge and transfer in certain circumstances), these are limited in scope and extent as set out in the RMA;
- the market value of a water permit must reflect the constraints the Act imposes – particularly in relation to alienation; and
- where a resource is fully allocated obtaining a consent is likely to be difficult and the limited (ie, secondary) basis on which Robert's consent was granted reflected that.

The Court ultimately found that:

> "[110] …we can see no basis to hold that the grant of [Robert's consent] affected Simon, still less defeated any right he had legitimately arising under the Act. His inability to charge Robert for water taken under [Robert's consent] and used to irrigate Robert's land is not an issue of resource management significance or concern." **WNZ**

4. Refer paragraphs [79], [80], [87], [99], [106], [107], and [109] .