

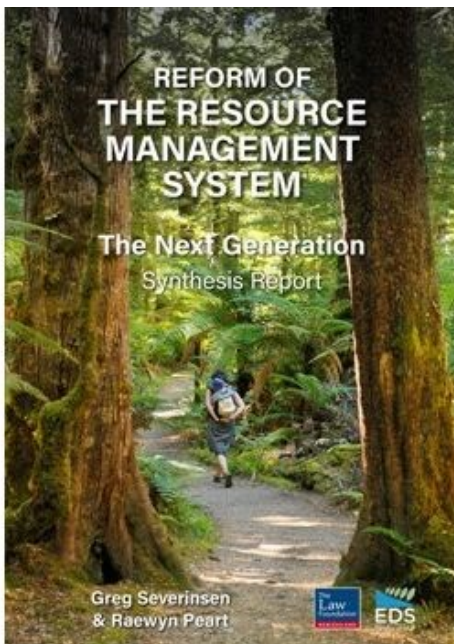


AHM News

INTRODUCTION

Welcome back to 2019, and what a year it promises to be! We know we say this every year, but we really do think that this year will be full of new and exciting projects, legislative changes, opportunities and outcomes.

The vexed question of how we should best manage our natural resources is a hot topic again this year and we provide a summary of a recent report which takes a first principles approach to the issue. If you have ever pondered what land is included in the “bed” of a river, the High Court recently had cause to consider this issue, and we provide an overview of the Court’s findings. We also summarise the current state of play of the proposed Water Conservation Order on the Ngaruroro River in the Hawke’s Bay, and include an update on what we have been up to at AHM.



RMA REFORM

The Environmental Defence Society has released a 340 page report, *[‘The Next Generation’](#)*, on phase one of its long-term [Resource Management Law Reform Project](#).

The report comes at the right time for a “rethink” according to Minister for the Environment David Parker. In a [speech at the launch of the report](#) the Minister said that “there is both a need and an opportunity to create a system that better enables economic growth within environmental limits and bottom lines, and which aligns the economy with the environment”.

The Project takes a first-principles look at resource management in New Zealand and what that system could look like in the future. The goal is to reform the entire system - not just the Resource Management Act (**RMA**) - to better manage natural and physical resources.

The report breaks the resource management system down into analytical units based on “themes” (e.g. principles, legislative design, public participation) rather than domains, sectors or spaces. These themes are further separated into areas for analysis, and three potential models for future reform are presented.

At this stage the report merely presents the building blocks of potential reform. A preferred model for reform has been intentionally excluded so that a discussion can be had on the best way forward with the available information. The Minister hopes that this structured approach will allow reform to



be more coherent and deliberate – rather than the hurried ad hoc approach that led to the current incoherent patchwork of legislation.

Only one of the three models put forward involves retaining the RMA (although with significant amendment). The Minister admits that the Government has recognised that the RMA is underperforming and that “plan making is too slow”. The Minister points out other areas his speech such as the inadequate “spatial planning around growing urban populations” and the poor

management of the “cumulative effect of intensification of land use on water”.

Phase two of the project, ‘*A Pathway to Reform*’, will select and develop a preferred model as well as a transition pathway to that model from the current system. Phase two will involve the publication of two working papers and a final report over the course of 2019, as well as extensive engagement.

Part of the Phase 2 pathway will involve a plan for parliamentarians on how to proceed and implement the model. EDS Senior Researcher Dr Greg Severinsen says that there is already “cross-party interest in change and a recognition that the present system is not delivering adequately for town or country”.

Whatever model is chosen, the report identifies seven core roles that a resource management system should perform: impose environmental bottom lines; manage trade-offs above bottom lines; fund and ensure the delivery of public goods (including infrastructure); pursue “good” outcomes (not just prevent or manage “bad” outcomes); protect and promote Māori interests; resolve disputes; and allocate rights to use non-private resources.

Because of the staged process of this reform, legislative changes to the existing RMA are planned for the interim. A Bill is expected to be introduced in the coming months to address issues with the current RMA that need fixing now. The Minister says this will largely “reverse changes made through the 2017 RMA amendments that were widely criticised by all sides”, with the Bill prioritising freshwater, climate change, and urban development and housing.

A RIVER BED BY ANY OTHER NAME WOULD BE AS WET...?

The High Court has recently had cause to consider the meaning of the term “bed” as applied to a river. Mr Dewhirst (as Director of Dewhirst Land Company Ltd) sought to develop part of his land along the Selwyn River. However, Council informed Mr Dewhirst that the area was within flood control vegetation lines contained in a local Bylaw making it part of the river “bed” and the proposed works could not occur. Dewhirst did not accept this and cleared vegetation up to the point he believed to be the edge of the riverbed and created a gravel bund along the line of the bank.

Dewhirst was subsequently prosecuted and pleaded guilty for works undertaken without proper consent. He did however dispute the area of the river bed which was relevant to the scope and scale of the offending.

The RMA defines “bed” in relation to any river as the space of land which the waters of the river cover **at its fullest flow without overtopping its banks**. The key issue for the High Court was the meaning of the words “fullest flow without overtopping its banks” within that definition.

The Council considered that this definition included the area that would be covered by a 1 in 50 year flood – a very wide interpretation, that was adopted by the District Court.

However, the High Court disagreed and found that the words “usual or non-flood” were implied by the definition. This is a much narrower approach meaning the river’s *fullest usual flow* is that which occurs over a reasonable number of river activity cycles (years), but does not include flood waters. In essence, the High Court found that the river bed is the *bank-to-bank* area between the “reasonably observable banks” of a river during its usual and non-flood flow.

This [decision](#) has been appealed by the Council, with the appeal expected to be heard later this year. Council says the decision to appeal is to clarify the meaning of the term ‘riverbed’ for all landowners, communities and river users – particularly in areas where banks are not easily identified such as Canterbury’s braided rivers.

NGARURORO WATER CONSERVATION ORDER UPDATE

In our November 2017 we provided [an overview of the Ngaruroro River Water Conservation Order \(WCO\) Application](#). Here we note the developments since that time.

A hearing in relation to the upper reaches of the Ngaruroro River was held towards the end of 2017. In 2018 scientific evidence developed as part of the Hawke’s Bay Regional Council’s ‘TANK’ (see below) confirmed that wider hydraulic connections exist through the Ngaruroro and Clive Rivers catchment than was properly understood when the Application was first notified.



Accordingly, the Special Tribunal directed that further public notification was required. The hearing for the lower portion of the Ngaruroro and Clive Rivers will be held mid-2019.

At the same time as this hearing is progressing, a related process guided by Hawkes Bay Regional Council is also underway – [TANK](#) (an acronym of the names of the waterways this process looks to manage – Tutaekuri, Ahuriri, Ngaruroro and Karamu catchments). TANK was established as a stakeholder group to represent the wider community. Representatives include iwi, producers (Heinz-Watties), growing representatives (Federated Farmers, Dairy Sector, Irrigators, Forestry, Vegetable Growers, Pipfruit), local government, government agencies (Department of Conservation), waters users groups, viticulture (Gimblett Gravel Grape Growers’ Association, Hawke’s Bay Winegrowers), environmental interest groups (Fish and Game, Forest and Bird). The aim of TANK is to look at the best way to manage the waterways of the four catchments through assisting in the development of objectives, policies and rules for the Plan Change. Science indicates that the waterways and aquifer below the Heretaunga Plains are highly inter-connected, giving rise to a significant consideration for the TANK group. The TANK group produced a [TANK Draft Plan](#) which was presented to the Regional Planning Committee in August 2018. Not surprisingly there are a few matters the TANK group was unable to reach consensus on which were highlighted as requiring further review and consideration by the Regional Planning Committee. In December the Hawkes Bay Regional Council agreed to adopt the TANK Plan Change for targeted consultation in early 2019 with formal notification envisaged mid-2019.

From all accounts, water users and interest groups appear to agree that the TANK Plan Change has been appropriately formulated by an informed group of representatives, contains views which are inclusive of multiple regional interests and representative groupings, and has been properly and widely consulted on, with further consultation processes in the pipeline. There are views from participants that WCO process could compromise the TANK Plan Change process and conflict or run roughshod over the work that has already gone into the TANK Plan Change. Participants have also raised questions as to the desirability of a WCO instrument in this circumstance when so much work has gone into the TANK Plan Change to date, and whether the WCO is an irrelevant and unnecessary protection instrument for the Ngaruroro and Clive Rivers.

The Special Tribunal is hearing the arguments and evidence relating to the proposed WCO application on the Lower River in February / March 2019. Helen Atkins and Nicole Buxeda are involved in this Hearing.

AHM SEMINARS AND TEAM UPDATES

Thomson Reuters Environmental Law Conference 2019

Helen Atkins recently gave a presentation on Freshwater at the Thomson Reuters Environmental Law Conference. Following on from the Labour Party's promises of freshwater clean-up and legislation reform, Helen analysed where we have landed 18 months post the election, the latest developments in freshwater policy at the national and local levels, and where changes will be going into the future, including the Government review of the Three Waters (drinking, stormwater, wastewater) framework. Helen looked at the examples of the Ngaruroro WCO (above), the Waikato Plan Change 1 process, the Havelock North Inquiry, and a Cabinet Paper in 2018 which raised queries about the effectiveness of the Three Waters regulations. Helen noted that the next steps for Three Waters Review are regulatory arrangement proposals to be put to Cabinet in mid-2019, likely further investigation into service delivery and economic regulation at the end of 2019, and engagement with iwi and stakeholders in water to be undertaken.

AHM Team changes

In December we said farewell to one of our partners, Tama Hovell. Tama had been with the firm since mid-2009 and over that time had built a specialist practice focusing on Māori and resource management issues. We were sad to see Tama go but look forward to retaining and strengthening our connections with Tama as he takes the next steps in his career.

In February we farewelled one of our solicitors, Rowan Ashton, who had been with the firm these past two years. Rowan has headed off to obtain some big firm experience and we wish him all the best for the next part of his legal journey.

We are also pleased to welcome Thomas Gray, our new law clerk, to the AHM team. Tom has travelled and worked in hospitality management both before and during his period of legal studies at AUT, graduating at the end of 2018. Currently studying to be admitted to the Bar (albeit a different bar from his previous hospitality experience), Tom brings enthusiasm, dedication, commercial and managerial experience, incredible puns, and a keen legal eye to the AHM team. We look forward to working with Tom as he begins his legal career.

Questions, comments and further information

If you have any questions, comments or would like any further information on any of the matters in this newsletter, please contact the authors:

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