



AHM News

INTRODUCTION

After a record-breaking drought in Auckland this year, unprecedented legislative change is now in full flow.

There have been a slew of proposed legislation pushed through Parliament with some still out for consultation. In this newsletter we provide an overview of where these legislative processes are at before moving on to



summarise a Court of Appeal decision which clarifies the meaning of the bed of a river. We end the newsletter with some news about our team. We hope you enjoy the read!

LEGISLATION DEVELOPMENT

The entire Resource Management system is currently under review and water appears to be a significant focus of the reform.

The Resource Management Reform: Issues and Options paper was released for public consultation, as was the Urban Development Bill, Infrastructure Funding and Financing Bill, and Taumata Arowai Water Services Regulator Bill.

RMA: Issues and Options paper

As noted in our December newsletter, the Resource Management Review Panel released its Issues and Options Paper in November of last year. The Paper was released as a starting point for conversation about issues to be considered and addressed by a review of the resource management system. The Paper also offered some initial thoughts on possible options for reform.

The Panel is currently processing all of the feedback received on the Paper before a final report is delivered to the Minister for the Environment on 31 May 2020. From here, the



Government will conduct its own engagement with iwi and stakeholders before considering next steps. Any changes to the system will require comprehensive legislative change which will be open to full public scrutiny.

Urban Development Bill

This Bill follows on from the Kāinga Ora–Homes and Communities Bill (now an Act), which disestablished Housing New Zealand and set up a Kāinga Ora as a Crown entity.

The Urban Development Bill is intended to enable Kāinga Ora to facilitate specified development projects (SDPs) to improve urban development outcomes through a mix of housing types, transport connections, employment and business opportunities, infrastructure, community facilities, and green spaces. To achieve these outcomes the Bill provides Kāinga Ora with a range of powers - some of which are far-reaching – including a veto right in relation to all resource consents affecting an SDP area and the ability to stop proposed plan provisions from applying within that area.

The Bill attracted a large number of submissions with a number expressing concern at the extent of the powers. Public submissions closed on 14 February 2020 and the Bill is currently with the Select Committee for review.

Infrastructure Funding and Financing Bill

This Bill provides a funding and financing model which is intended to support the provision of infrastructure for housing and urban development to reduce the impact of local authority financing and funding constraints.

The Bill enables Special Purpose Vehicles (SPVs) to be responsible for financing and constructing infrastructure assets and servicing the finance raised to cover the assets via a multi-year levy.

The levy would be applied to a specific geographic area of land, (identified within the relevant levy order), and would be payable by land owner or person responsible for the payment of rates.

Public submissions on this Bill closed on 5 March 2020.

Taumata Arowai Water Services Regulator Bill

This Bill establishes a new regulatory body (Taumata Arowai) to oversee, administer, and enforce a re-booted and enhanced drinking water regulatory system - following the deadly Havelock North campylobacter outbreak and subsequent enquiry in 2016.



Engagement with local government, the specialist water sector and Iwi was undertaken in the development of the Bill and it comes as part of a reform aiming to take full effect in 2021.

The Bill establishes Taumata Arowai as a new standalone Crown entity with its own objectives, functions, operating principles, and governance arrangements. These arrangements include the establishment of a board and Māori Advisory Group to provide guidance to the board and the Chief Executive on tikanga, mātauranga, and Te Mana o Te Wai.

At its inception Taumata Arowai will be focused solely on drinking water quality – but it is expected that additional functions in relation to waste and storm water will follow).

Bill Bayfield has been appointed as the interim Chief Executive of Taumata Arowai. Mr Bayfield, is the current Chief Executive of Environment Canterbury, (a role he has held for many years), with a background in both central and local government. Mr Bayfield will report to the Taumata Arowai Establishment Board, which is anticipated to be in place by mid-2020. Taumata Arowai will step fully into its regulator role as from 2021 and an announcement of the permanent Chief Executive will follow in due course.

A separate Bill, the Water Services Bill, will be introduced later this year. The Water Services Bill is intended to complement the regulator legislation and will set out Taumata Arowai's detailed functions and powers. The Water Services Bill will give effect to decisions to implement the system-wide reforms to the regulation of drinking water and source water, and targeted reforms to improve regulation and performance of wastewater and stormwater networks.



CASE LAW UPDATE: CANTERBURY REGIONAL COUNCIL v DEWHIRST LAND COMPANY

The Court of Appeal in *Canterbury Regional Council v Dewhirst Land Company* [2019] NZCA 486 has confirmed the meaning of river "bed" under the RMA.

Dewhirst Land Company (Dewhirst) owned farming land

adjacent to the bank of the braided Selwyn River and undertook works to develop the land - some of which the Council considered to be within the "bed" of the river. Prosecution proceedings ensued. Dewhirst did not deny undertaking the works but argued that the works were undertaken outside the "bed" of the river, given the river was a braided river and had no discernible bank and adjoining flood plains. The District Court found that the works were undertaken within the "bed" of the river, by applying a meaning to the term "bed" which encompassed flood flows. This decision, and the interpretation given to the term "bed" was then appealed to the High Court. The High Court disagreed with the interpretation applied by the District Court and found that the definition of "bed" should be read as if fullest flows referred to "fullest usual or non-flood" flows. It also found that relying on 50 and 20 year flood return data to determine those flows was flawed. The High Court decision was then appealed to the Court of Appeal.

The starting point for the Court of Appeal was the definition of "bed" in s.2 of the RMA which referred to "the space of land which the waters of the river cover at its fullest flow without overtopping its banks".

The Court agreed that Parliament never intended that floodwaters or flows following only from major storms fell within the RMA definition of "river" when assessing a riverbed. The Court found that the determination of a river "bed" would depend not only on the position of the

banks of the river, but also on the water coverage measure as determined by the river's fullest flow occurring within those banks.

That qualifying term served to exclude flows higher than normal arising from major storms where the water extended temporarily beyond the banks. As such, the Court of Appeal upheld the definition of "bed" from Glendall J in the High Court.

On the second question of law the Court found that there was no need to imply the words "usual or non-flood" into the definition of river "bed". Rather, the application of the definition would involve an assessment of what was the usual or non-flood level. The Court also noted that the words "fullest flow" were qualified by the phrase "without overtopping its banks", which could only be reference to flood conditions when the water breached the banks. The Court therefore considered that the High Court did err in adding the phrase "usual or non-flood" into the definition of "bed".

Lastly the Court upheld the judgement of Glendall J in the High Court that any reliance on the methodology using data from 50 and 20 year flood returns was flawed. Therefore, the Court of Appeal upheld the decision of the High Court to disregard such data as irrelevant in applying the definition of river "bed". The appeal was dismissed.



SOME TEAM NEWS

Paul Majurey has been included in the Doyles Guide for New Zealand lawyers as a preeminent Māori law, Māori land, and Treaty of Waitangi lawyer. This Guide recognises lawyers who have been identified by clients and peers for their expertise and abilities in the area. Paul's mahi has no doubt been a driving factor of Atkins Holm Majurey's recognition as a top tier firm in the same areas.

Congratulations to Vicki Morrison-Shaw and Tom Gray for completing the Huntly Expressway half marathon. This one-off event involved a 21km run along the new stretch of SH1, bypassing Huntly and streamlining the journey between Auckland and Hamilton.

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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