AHM News

INTRODUCTION

This newsletter discusses the two major reforms underway in Aotearoa – Three Waters and Resource Management. In Three Waters news, there has been a lot to discuss, with the enactment of Bill 1, and the introduction of Bills 2 and 3 into Parliament. The overhaul of the Resource Management Act (**RMA**) has also finally begun in earnest, with the first two of the three replacement statutes released for public submissions. We have outlined the main highlights of the Three Waters bills, and RMA reform bills, but this is by no means a comprehensive review.

We also review the recent Ellis case and discuss the implications of the decision on tikanga and its place in Aotearoa's legal system.

THREE WATERS REFORM

Ongoing reform in the Three Waters space has certainly ramped up in the past month, with the Water Services Entities Bill (**Bill 1**) returning from Select Committee review in mid-November before being passed into law, and the introduction of both the Water Services Legislation Bill (**Bill 2**), and the Water Services Economic Efficiency and Consumer Protection Bill (**Bill 3**) in early-December.

Water Services Entities Act 2022

Following the report from the Finance and Expenditure Select Committee, which was returned in November, final tweaks were made to Bill 1 before it was enacted in mid-December. Consideration of public submissions led to numerous changes as recommended by the Select Committee. These included both minor technical amendments, as well as more fundamental changes such as to the purpose, objectives, operating principles and governance arrangements. Major recommendations from the Committee included an increase in representation within the new Regional Representative Groups, an improvement to transparency mechanisms, added obligations of auditing and reporting, and the inclusion of both coastal and geothermal water within Te Mana o Te Wai statements.

Of controversy was the inclusion of a new provision entrenching the obligation on Water Services Entities (**WSEs**) to maintain the water services and associated significant assets under public ownership and control. This late addition to Bill 1 resulted in pushback from opposition parties and legal scholars alike, due to potential constitutional ramifications, and the clause was ultimately removed before the final reading.

Bill 1 was enacted into legislation in mid-December as the Water Services Entities Act 2022, starting off the first major step in Three Waters reform. The new WSEs now begin their establishment period, which will run until July 2024, at which point they will become fully operational.

Water Services Legislation Bill

Bill 2 was introduced in early-December for its first reading and is now with the Select Committee. A so-called 'omnibus bill', Bill 2 will amend the Water Services Entities Act by creating a single statute. This combined piece of legislation will fully allow for the establishment of the WSEs by providing for their functions, powers, and duties.

Bill 2 has an operational focus, and details the tools required by the new WSEs to successfully operate as water services providers. Key points from Bill 2 include:

- a detailed breakdown of the functions and powers of the WSEs;
- the provision of statutory authority for WSEs to charge for their services;
- protections for vulnerable consumers;
- stakeholder rights, such as the obligation on WSEs to engage while exercising powers and functions;
- the introduction of a compliance and enforcement regime; and
- the update of certain provisions from the Water Services Entities Act 2022 in relation to allocation schedules.

Water Services Economic Efficiency and Consumer Protection Bill

Bill 3 was also introduced into Parliament in early-December. Bill 3 focuses on the price and quality of services to be provided by the new WSEs, as well as on consumer protection. Given that the new WSEs will deliver essential water services, and the large sizes of the WSEs will result in natural monopolies, economic regulation and consumer protection regimes will be particularly important.

Key points from Bill 3 include:

- the appointment of the New Zealand Commerce Commission as the economic regulator of water infrastructure services;
- the provision for a new Water Services Commissioner, to be appointed on the Commerce Commission's Board;
- functions designated to this Commissioner which will include monitoring of services and the assessment of market competition;
- regulation of price-quality, the disclosure of information, and the quality of services, which will be phased in over time; and
- the introduction of consumer protection provisions, which would include a complaints process and a dispute resolution scheme.

Three Waters Reform: Next Steps

Bills 2 and 3 are currently undergoing the Select Committee process, which provides an opportunity for public consultation and feedback. Submissions on these bills close on 12 February 2023.

RESOURCE MANAGEMENT REFORM

The long-awaited reforms to the resource management system have finally kicked into gear with the bills set to replace the Resource Management Act being released for public consultation. Both the Natural and Built Environments Bill (**NBEB**) and the Spatial Planning Bill (**SPB**) opened for submissions on 23 November 2022. Submissions will close on 5 February 2023, with the ability to apply for an extension available on a discretionary basis. This is the first concrete look at the new suite of legislation which heralds the end of the era of the RMA. The Climate Change Adaptation Bill has yet to be released.

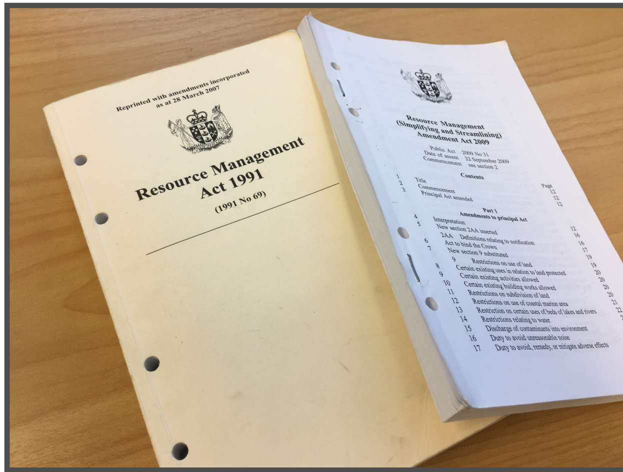
Natural and Built Environments Bill

The NBEB is the primary replacement for the RMA. It is an integrated statute that covers land use and environmental protection. The NBEB maintains a similar approach to resource management to that contained in the RMA with a hierarchy of planning documents, starting at the national level, and working its way to Natural Built Environment Plans and Regional Spatial Strategies (provided for in the SPB) at a more localised level.

One of the most significant changes is to Part 2 of the RMA, which in the NBEB has undergone a significant overhaul. The focus of the NBEB has switched from a "sustainable management" approach to focusing on the use, development, and protection of the environment in a way that supports the wellbeing of current and future generations. The new bill centres on protection and, where necessary, restoration of the natural environment. To support these principles, the NBEB also has made much stronger enforcement measures available to regulators.

Te Tiriti o Waitangi is also given greater recognition in the NBEB. Instead of taking te Tiriti principles "into account", decision makers are required to "give effect" to the principles of te Tiriti. This is much stronger wording than in the RMA and should ensure that te Tiriti has greater recognition under the new scheme. Central to the new scheme is te Oranga o te Taiao, a te ao Māori concept which deals with the health of the natural environment, and in particular the relationship of different elements of the natural environment with capacity for sustaining life.

The NBEB provides for a new National Planning Framework (**NPF**), which will provide guidance on the integrated management of the environment on matters of national significance or matters that require a nationally homogeneous approach. The principles and approaches contained in the NPF will then, in theory, trickle down into the new Natural and Built Environment Plans (**NBEP**). NBEPs are comprehensive plans that include all the content that would formerly have been contained in regional and district plans.



There have also been some changes to the considerations allowed during the development of a NBEP. Additional considerations include the need for a Regional Planning Committee (**RPC**) to take statements from the community and regional environmental outcomes into account.

In addition, RPCs can no longer give consideration to effects on amenity and scenic views from private properties or land transport assets. Furthermore, an RPC cannot take into account adverse effects on an activity arising from the use of land by people with low incomes, special housing needs or those with disabilities. While this change aligns with the Government's recent approach to intensification and urban development, this is at the expense of amenity and its consequential impact on people's wellbeing, which perhaps goes a step too far.

Spatial Planning Bill

The SPB works together with the NBEB to round out New Zealand's planning framework. The SPB provides for the creation of Regional Spatial Strategies (**RSS**) and RPCs, which will determine the approach to environmental planning at the regional level. The SPB sets out how RPCs are formed. RPCs must be made up of at least 6 members, with no upper limit on membership. At least one member must be appointed by the local authority of the region and at least two must be appointed by the Māori Appointing Body of the region. The responsible Minister also has the option of appointing one additional member.

RSS are intended to be long term instruments for the implementation of nationwide strategic spatial planning. RSS will identify issues and challenges facing a specific region and implement plans to respond to these issues. They are subordinate to the NPF and must give effect to the NPF to an extent specified by the NPF.

RSS must be publicly notified on or before the 7th anniversary of the SPB gaining Royal assent. It is therefore going to be a long time before we see any RSS in effect. In addition, given the level of control each RPC has over the formation of the RSS of its specific region, the provisions in each RSS are likely to vary from region to region. RPCs hold final decision-making power in making NBEPs and RSS. Once the RPC has created an initial draft of the plan, a hearing on the plan will be held by an Independent Hearings Panel which will make recommendations back to the RPC, who will make a final decision.

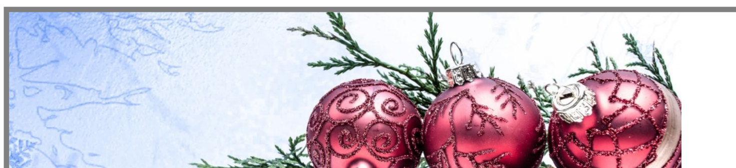
PETER HUGH MCGREGOR ELLIS v R [2022] NZSC 114: THE PLACE OF TIKANGA MĀORI IN OUR LEGAL SYSTEM

Peter Ellis was convicted of 16 counts of sexual offending in 1993. He unsuccessfully appealed this decision to the Court of Appeal in 1994, and again in 1999. In July 2019, the Supreme Court granted leave for Mr Ellis to appeal the Court of Appeal decisions. However, Mr Ellis passed away in November of that year, prior to either of the two hearings scheduled to take place. The Supreme Court then considered whether Mr Ellis' appeal should still be heard despite his death. While this case ultimately concerned alleged criminal conduct, its findings on Tikanga Māori and its place in Aotearoa's legal system have wide reaching implications for all areas of law, including the resource management sector.

Tikanga can be understood as including values, principles, standards, or norms within the Māori community, which help to determine appropriate conduct. The Court did not attempt to give a comprehensive answer on exactly how, or in what circumstances, tikanga will be applicable to an issue. This is due to the intricate, interconnected nature of tikanga principles, and the complex intersections between tikanga and the common law, or western legal system. Ultimately, the Court found that the applicability of tikanga will be case dependant.

The Court found that Mr Ellis' appeal should be allowed to continue, partially on the basis that the mana of those involved would continue to be in a state of imbalance due to either the alleged offending, or the potential miscarriage of justice in Mr Ellis's conviction. The majority reasoning affirmed that tikanga was the first law of Aotearoa and had not been extinguished by the advent of colonisation. Furthermore, the Court discussed how tikanga is becoming increasingly integrated into the legislation, case law, and everyday lives of New Zealanders.

The Court did provide guidance on the weight tikanga will be given when it is relevant. For example, where a piece of legislation, such as the RMA, specifically references tikanga as a consideration, it may become a determinative factor in the resolution of an issue. Principles of tikanga are already present in the environmental legislation and case law, through the application of the principles of te Tiriti. Given the focus on te ao Māori in the recently unveiled reforms to the RMA, the impact of this decision could be even more relevant under the new resource management regime.



MERI KIRIHIMETE

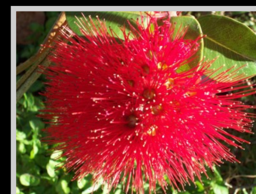
AHM wishes you all the best for a happy holiday season. We will be closing for the break on Friday 23 December and returning to the office on Monday 9 January. Merry Christmas, Meri Kirihimete, Happy Holidays, and we hope you all enjoy a well-deserved break!

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 :

Louise Ford	PH 09 304 0429	Email louise.ford@ahmlaw.nz
Amelia Scharting	PH 09 304 0422	Email amelia.scharting@ahmlaw.nz
Tait Hoby	PH 09 304 0425	Email tait. hoby@ahmlaw.nz

We welcome your feedback!



If you know someone who might be interested in reading this newsletter, please feel free to pass it along.

Atkins Holm Majurey produces a regular newsletter with updates on matters of legal interest. If you are not currently subscribed and wish to receive future newsletters straight delivered straight to your inbox, please click this link or email reception@ahmlaw.nz. You can choose to unsubscribe at any time.