



The Malvern Hills Protection Society Inc
c/o Liz Weir
Lower High Street
R D Coalgate 7673

October 10th 2012

Environment Canterbury
PO Box 345
Christchurch 8140

Dear Margaret Bazley,

NGO Meetings with commissioners:

The Malvern Hills Protection Society has been attending meetings arranged between commissioners and NGOs. The Society has been considering the value of these meetings and has decided to withdraw from any further participation.

Our Society is a volunteer organisation that relies on the goodwill of its members. Given that the input of NGOs seems to be largely ignored, we feel that the volunteer hours could be better spent elsewhere.

The Society's concerns about clean drinking water and fresh water management are not being seriously addressed. We do not think that continuing the consultation with commissioners is useful and would result in any changes to the current direction of water management.

The Society will reconsider this decision once democracy has been fully restored to Cantabrians and there is fair representation of the wider community.

Yours sincerely,
Liz Weir
Secretary
The Malvern Hills Protection Society

1 May 2015

ECan Review
Ministry for the Environment
PO Box 10362
Wellington 6143

Environment Canterbury Review

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the proposals contained in *“Environment Canterbury Review: A discussion document, March 2015”* (discussion document).

Background

2. The discussion document has been released in the context of the impending expiry in 2016 of the governance arrangements provided for in the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.
3. The purpose of that Act was twofold:¹
 - (a) to replace democratically elected members of the Canterbury Regional Council with commissioners who would act as the Council’s governing body until new elected members came into office following the next election; and
 - (b) to provide the Council with powers that it did not otherwise have, to address certain issues regarding the efficient, effective and sustainable management of fresh water within the Canterbury region.
4. The intended temporary nature of the arrangements effected by the Act was apparent from both the Short Title, which included the phrase *“Temporary Commissioners”* and stated purpose in section 3(a) of the Act of the arrangements being *“until new elected members come into office following the next election ...”*.
5. The Act was the subject of some public concern regarding both the manner of its passage, being under urgency, and the nature of the substantive arrangements effected by it, being inconsistent with core democratic processes and values.

¹ Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, s2.

6. The importance of those democratic values has been recognised in numerous contexts, including many political arrangements since the signing of the Treaty of Waitangi, government and local body processes and the New Zealand Bill of Rights Act 1990. The commitment of New Zealanders to democratic values cannot be seriously challenged.
7. The Law Society's concerns about the 2010 Act were such that, by way of letter dated 28 September 2010, it wrote to the Attorney-General raising various concerns about the inconsistency of the Act and the manner of its passage. A copy of that letter is attached.
8. In 2012 the Environment Canterbury (Temporary Commissioners and Improved Water Management) Bill (Bill) was introduced. Its purpose was to extend the arrangements made in the 2010 Act.
9. The Law Society made written and oral submissions on that Bill to the select committee. A copy of those submissions is attached. The Law Society's concerns included:
 - 9.1 The inadequacy of any justification for the continuation of the term of non-elected commissioners, resulting in a total term of six and a half years.
 - 9.2 The unilateral decision-making process that led to that continuation. Advice to government recommending a mixed transitional body did not appear to have been given any significant weight.
 - 9.3 Substantial concern as to the proposed continuation expressed by or on behalf of the public at large, both within and outside of the Canterbury region.
10. The Bill was nevertheless passed. By the time of the expiry of the 2010 Act regional council democratic processes will have been suspended in Canterbury for six and a half years. That is hardly consistent with "temporary" arrangements.

The current proposal

11. The Law Society views positively the proposed re-introduction of a degree of democracy, by way of some elected members. However, this does not represent a return to full democracy.
12. The Law Society agrees with certain goals in the discussion document (high quality leadership, economic growth, strong environmental stewardship, strong accountability to local communities and value and efficiency for ratepayer money),² but considers that there is inadequate rationale advanced for why those goals cannot be achieved by elected members.

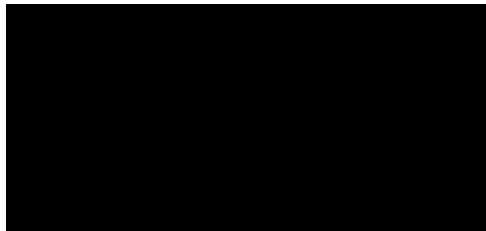
² Summarised on page 24 of the discussion document.

13. If, as is suggested by the discussion document, the goals set out on page 13 have now been achieved, then the justification for only partial democracy for a term of three years (2016 – 2019) is unclear. There is sufficient time between now and 2016 to enable transitional arrangements to be put in place and effected, with elected members governing from 2016, after the expiry of the arrangements made under the (extended) 2010 Act.
14. Even if there were any justification for the derogation from democracy in the 2010 Act, the time for a return to full democracy has passed. The Law Society's view is as set out in its letter of 28 September 2010 to the Attorney-General and submissions on the 2012 Bill, modified to take account of the proposed re-introduction of partial democracy.
15. The discussion document foreshadows that any changes will need to be implemented by legislation. The Law Society considers that any proposed changes should follow the usual legislative process, rather than use of urgency, and will wish to be heard on that Bill (if any).

Conclusion

If you wish to discuss these comments, please do not hesitate to contact the convenor of the Law Society's Rule of Law Committee, Austin Forbes QC, via the committee secretary Vicky Stanbridge (04 463 2912, vicky.stanbridge@lawsociety.org.nz).

Yours sincerely



Chris Moore
President

Attachments:

New Zealand Law Society letter dated 28 September 2010 to the Attorney-General
New Zealand Law Society submission dated 23 October 2012 on the Environment Canterbury (Temporary Commissioners and Improvement Water Management) Amendment Bill



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

ENVIRONMENT CANTERBURY (TEMPORARY COMMISSIONERS AND IMPROVED WATER MANAGEMENT) AMENDMENT BILL

23/10/2012

ENVIRONMENT CANTERBURY (TEMPORARY COMMISSIONERS AND IMPROVED WATER MANAGEMENT) AMENDMENT BILL

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Environment Canterbury (Temporary Commissioners and Improved Water Management) Amendment Bill (Amendment Bill).
2. The Amendment Bill proposes to extend the application of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 from 2013 to 2016.
3. The Explanatory Note to the Amendment Bill states that this "... will continue to empower Government-appointed commissioners to provide the governance and leadership necessary to continue to address long-standing, systemic, institutional, and governance issues with the Canterbury Regional Council (ECan)".
4. The effect is to extend for a further three years the loss of local government democracy in Canterbury – thus extending the term of the non-elected commissioners to six and a half years in total.

Background

5. The Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (ECan Act) was introduced and passed all stages under urgency on 30 March 2010. There was no public consultation.
6. The Law Society wrote to the Attorney-General on 28 September 2010, recording its view that the manner in which the Act was passed, and aspects of its substance, raised concerns fundamental to the rule of law. A copy of the letter is attached.

Importance of democracy

7. The Law Society reiterates the points made in that letter, expressed with regard to the 2010 Act, and notes that the extension of the ECan commissioners' tenure until 2016 exacerbates the situation. The article appended to the Law Society's letter in 2010 noted that:

"Democratic decision-making in local government is ingrained in the national psyche and a legitimate expectation of the citizenry. Its suspension in Canterbury for a period in excess of

three and a half years is, itself, a rule of law issue. Representative democracy and independent courts are the twin pillars of the legal system. The abrogation or suspension of the former, even at local government level, has menacing implications. The suspension of regional body elections in Canterbury until (at the earliest) October 2013 is a period longer than the maximum term of Parliament fixed at three years (Constitution Act 1986, s 17(1)). In the past, the New Zealand public has unreservedly voted down referenda proposals to extend Parliament's life beyond three years, which compounds the gravity of the situation under the ECan Act."¹

The Amendment Bill

8. The Amendment Bill will now extend the term of the non-elected commissioners to six and a half years in total. The rejection of past proposals to extend the period between parliamentary elections exemplifies the objection to the Amendment Bill. There have been two referenda proposals, in 1967 and 1990, to extend Parliament's term from three to four years. The New Zealand public unreservedly rejected the deferral of national elections by even one year.
9. It is acknowledged that a genuine state of emergency, whether through natural disaster or national calamity, might arguably justify the temporary suspension of the democratic right to vote within a region. But the circumstances would need to be overwhelming. Such is the centrality of democracy and the value we attribute to it under our governance system.
10. The Government's justification for the further suspension of local democracy in Canterbury was outlined in the Minister's speech introducing the Amendment Bill in the House.² None is considered to be a sufficient justification. The Minister referred to:
 - the need for stable and effective governance arrangements;
 - the need to provide a platform for the region's economic growth;
 - the commissioners have unfinished work; and
 - the need for strong and effective leadership to assist with earthquake recovery.
11. The Minister said:

"[T]he job [of the commissioners] is not yet complete. Subsequent to the original legislation, the Canterbury region has been hit by four devastating earthquake events ... To give Cantabrians the best chance of a successful recovery the region needs strong and effective leadership ... This Bill is about providing the Canterbury region with the stable and effective

¹ P Joseph "Environment Canterbury legislation" [2010] New Zealand Law Journal 193 at 196.

² Hon David Carter, NZPD, Vol. 684 at 5301, 18 September 2012.

governance arrangements that are desperately needed to assist the earthquake recovery, and providing a platform for future economic growth.”

12. Again, that is not considered to be a sufficient justification. Parliament has enacted the Canterbury Earthquake Recovery Act 2011 (CER Act) to facilitate earthquake recovery work. The CER Act confers sweeping emergency powers, so it is difficult to comprehend the need to retain the ECan commissioners in order to assist with earthquake recovery. In the context of the Canterbury earthquakes, the Minister referred to the need for strong and effective leadership. However, the CER Act reposes the leadership role for overseeing earthquake recovery in the Minister for Canterbury Earthquake Recovery (Hon Gerry Brownlee) and the Chief Executive of the Canterbury Earthquake Recovery Authority (CERA).
13. Indeed, the Government’s own appointed commissioners are also reported to have warned against the Government using earthquake recovery as “an excuse” for unilateral action. *The Press*, 8 October 2012, reports: “Environment Canterbury (ECan) commissioners warned the Government that Christchurch’s earthquake recovery should not be used as an excuse to suspend democracy, documents reveal.”³
14. The Government’s decision to suspend elections until 2016 appears to be a unilateral one. The Chair of ECan, Dame Margaret Beasley, advised the Government in April 2012 that the commissioners recommended a return to democratic elections within the Canterbury region from 2013.⁴ They recommended a mixed-governance model of six to eight elected members and four to six appointed commissioners. It is difficult to accept the Minister’s stated reasons for further delaying elections for ECan when the Government’s appointed commissioners themselves have a contrary view.
15. Other advice to the Government likewise recommended a return to democracy in 2013. In July 2012, the Department of Internal Affairs’ and Ministry for the Environment’s Regulatory Impact Assessment of options for ECan’s future governance arrangements supported the recommendation of the ECan commissioners to establish a transitional body, comprising elected councillors and Government-appointed members, which would be subject to Ministerial review in 2017.⁵ The Canterbury Mayoral Forum held in February 2012 also recommended a return to democracy.⁶

³ *The Press*, 8 October 2012, per Rachel Young.

⁴ Note 3 above. See also *Regulatory Impact Statement: Environment Canterbury governance arrangements*, 31.7.12, [http://www.dia.govt.nz/Pubforms.nsf/URL/RIS-Environment-Canterbury-governance-arrangements.pdf/\\$file/RIS-Environment-Canterbury-governance-arrangements.pdf](http://www.dia.govt.nz/Pubforms.nsf/URL/RIS-Environment-Canterbury-governance-arrangements.pdf/$file/RIS-Environment-Canterbury-governance-arrangements.pdf), at [26] – [27].

⁵ Note 3 above.

⁶ Note 3 above.

16. In view of this advice, the Government bears a weighty onus to justify its decision. However, no persuasive justification has been advanced.
17. Nor, it seems, did the Government follow the departmental recommendation in the Regulatory Impact Statement that it should consult local stakeholders about ECan's future governance arrangements. The Regulatory Impact Statement noted that "... it would be appropriate for further specific consultation to be undertaken with ECan, Canterbury's territorial authorities, Local Government New Zealand and Ngai Tahu on aspects of proposed arrangements before any legislation is introduced to the House of Representatives." It appears from the first reading debates on the Amendment Bill that no such consultations occurred.
18. The Minister's stated reasons for the Amendment Bill seem to imply that local body democracy in Canterbury is inefficient, cannot provide for future economic growth, and must be replaced. However, economic expediency cannot justify the abandonment of the most vital plank of Western democracies, namely the citizens' right to vote. The article attached to the Law Society's response to the 2010 Act (quoted above) observed that the suspension of local government had "menacing implications". Those concerns are now exacerbated. The suspension of local body democracy for a proposed period of six and half years cannot be said to be "temporary". The reference in the Act's title to "Temporary Commissioners" is simply misleading.

Local body democracy

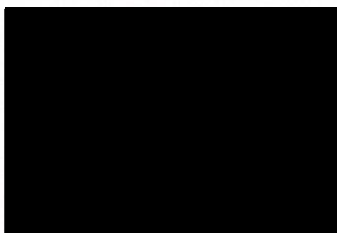
19. There has been considerable comment in the Christchurch media (in particular *The Press*), expressing serious concern about the Government breaking its commitment to hold elections for ECan in October 2013. Local body democracy is just as important in Canterbury as it is in any other part of New Zealand. Indeed, democratic decision-making is all the more important when there is in place an Act which gives sweeping emergency powers to the Minister for Canterbury Earthquake Recovery and CERA for the purpose of earthquake recovery.
20. *The Press* earlier referred to the 2010 Act as being the "most radical denial of voting rights that the nation has experienced in recent times". That disturbing observation was made when it was announced that the appointed commissioners would remain in office until 2013, when elections for ECan councillors would be reinstated. Now, the Government proposes to suspend local body elections in Canterbury for a further three and a half years. The Government says that the commissioners are doing a good job, particularly in regard to Canterbury's water resources. On that

basis, “doing a good job” could justify the commissioners’ appointment indefinitely. Commissioners appointed to other regional councils in New Zealand might likewise do a better job (at least in the Government’s view), but that would not justify the loss of the democratic right to elect councillors to do the task.

21. Underlying the reasons and the Amendment Bill is a concerning idea: that effective leadership, at a regional level at least, is best achieved through a non-democratic and non-representative institution. This is misguided. The failure to involve citizens in regional decision-making that affects them so directly, and to draw directly on their knowledge and expertise, often has adverse and unexpected consequences. History has long shown the perils of non-democratic leadership, a matter that the New Zealand Government has railed against within the Pacific region.
22. The rights and freedoms affected may not fall within those affirmed by the New Zealand Bill of Rights Act 1990, but underlying those are core constitutional values, most importantly that of a “free and democratic society” (section 5). The proposed extension runs counter to those values.

Conclusion

23. It is clear that this issue is of real concern to the public at large, both in and beyond Canterbury. It is certainly not just of concern to lawyers. Only a demonstrable or overwhelming reason might justify the suspension of the democratic right to vote within a region for a period of six and half years. But none has been advanced.
24. The Law Society does not support the Bill and wishes to appear in support of this submission.



Jonathan Temm
President
 23 October 2012

Attachment:

New Zealand Law Society letter dated 28 September 2010 to the Attorney-General (Hon Christopher Finlayson)



28 September 2010

Hon Christopher Finlayson
Attorney-General
Parliament Buildings
Wellington

Dear Mr Finlayson

Environment Canterbury

The Society is writing to you as Attorney-General, and as the Senior Law officer in Government with particular responsibility for the rule of law in New Zealand. The Society and its members, as you know, also have a special responsibility for the rule of law (conferred by ss4(a) and s65(e) of the Lawyers and Conveyancers Act 2006).

The Society is concerned about the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 ('the Act'). This was passed under urgency in April. The Act dismissed the elected members of Environment Canterbury ('ECan'), replacing them with Commissioners. The Act deferred the 2010 elections for ECan. It made various provisions for dealing with legal proceedings about Water Conservation Orders and regional policy statements and plan changes. It applied retrospectively, to proceedings already in existence when the legislation came into force.

The Society considers that the manner in which the Act was passed, and aspects of its substance, raise concerns fundamental to the rule of law. This letter records those concerns.

Interference with court proceeding

The Act changed the process and appeal rights for extant legal proceedings concerning Water Conservation Orders in Canterbury (s46(2)). These are now to be decided by the ECan Commissioners rather than the special Tribunal as required in the Resource Management Act 1991. The right of appeal on the merits to the Environment Court, which formerly existed, is removed. There is now an appeal to the High Court from the Commissioners' decision, on a point of law only.

One particular proceeding in existence at the time of enactment – the Hurunui Water Conservation Order proceeding – is singled out. The Act provides that the new ECan Commissioners are to hear the Hurunui WCO application, even though that application was in fact substantially advanced at the time the Act was passed. It had already been heard by a special Tribunal in accordance with the RMA. Indeed, by the time the Act was passed, the Society understands that it was already under appeal to the Environment Court.

Further, Schedule 1 of the Act sets out a new Canterbury Water Management Strategy ('CWMS') against which the Hurunui and other applications are to be assessed. The substance of the relevant law has been altered with retrospective effect.

Under s69 ECan Commissioners can hear and determine matters raised in submissions on a proposed regional policy statement or plan even when any hearing has earlier been concluded. They may do so on the basis of the submissions and evidence in the earlier proceeding and without holding any further hearing. The new CWMS will apply (s63) to their decision. No opportunity is required to be given to submitters to make further submissions (s69(3)) in writing or in person.

The rule of law has a number of accepted principles. One is the citizens' right of access to the courts. When legislation is enacted that has an impact on extant legal proceedings – by changing the substance of legal tests and by altering procedure in an adverse way – it is open to criticism for not observing the standard required by the rule of law. The Society considers that, for the reasons summarised above, the ECan legislation is properly open to such criticism.

Henry VIII clause

Section 31 of the Act confers a power on the Governor-General to change the duration of the Commissioners' powers, and also to provide that any specified provisions of the Resource Management Act 1991 do (or do not) apply to the Commissioners. This is a Henry VIII clause. Such clauses may have their place in legislation involving transitional schemes, but in this case the combination of a power to extend the *duration* of the Commissioners' powers and to suspend provisions of the RMA make s31 problematic from a rule of law perspective.

It is a fundamental component of the rule of law that legislation should be enacted by Parliament. The use of legislative power to authorise regulations that effectively delegate a broad legislative power to the executive, for a significant period, is inconsistent with this principle of the rule of law.

Impact on regional plan process

Though the "purpose" clause of the Act refers to concerns about fresh water, the effect of the Act is to remove elected councillors and replace them with Commissioners who perform *all* the functions of the former elected councillors, many of which will not relate to water issues at all. This is a disproportionate response to the stated concerns in the region that prompted the legislation. It raises the concern that the people in Canterbury are, in matters of local government, not being treated equally with citizens in other regions. No reason is known to exist for this.

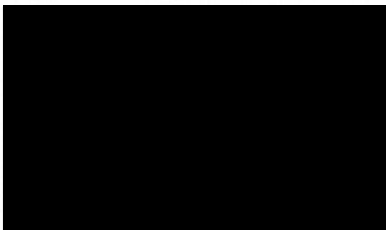
Conclusion

The Society recognises that there may be occasions when the public interest requires that legislation be enacted even though it has a bearing on extant court proceedings. But a case has to be made that this is so, and it is appropriate that the matter be debated in Parliament and the public consulted. The Society is concerned, therefore, that this legislation was enacted under urgency and without time for submissions and measured consideration. If

there had been the opportunity of even a brief time for submissions, the rule of law concerns could have been aired and a principled solution found. The impact of the Act on existing proceedings could have been more carefully assessed and dealt with, and a more proportionate response to perceived problems found.

The Society's Rule of Law Committee and the Convener of its Law Reform Committee (Professor Paul Rishworth) would be pleased to meet with you to discuss in more detail the problems with the Act, and ways in which they could have been avoided and might still be rectified. A member of the Rule of Law Committee, Professor Philip Joseph, has published an article about the ECan Act and a copy of that is attached for your reference.

Yours sincerely



Jonathan Temm
President

Environment Canterbury legislation

Philip Joseph, the University of Canterbury
finds the legislation a constitutional affront
in a paper written for the NZLS Rule of Law Committee

This article documents four rule of law issues raised by the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (ECan Act). These concern provisions of the Act which:

- are ad hominem;
- apply retrospectively to the detriment of affected individuals and organisations;
- deny individuals and organisations the right of access to the Environment Court for protection of their rights or interests; or
- authorise statutory regulations that suspend sections of the Resource Management Act 1991 (the RMA) that regulate activities of regional councils.

The article raises four additional concerns that also broach rule-of-law issues. These additional matters compound concerns over the ECan legislation.

RULE OF LAW STANDARDS

The concept of the rule of law prescribes the formal requirements of legal norms. The law should: be general and prospective in operation; be relatively stable, certain and accessible; and apply equally to all. These requirements are defining criteria of a just and efficacious legal system, “distinguish[ing] law as an autonomous body of rules that command the general obedience of the people”: Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed), Wellington, Thomson Brookers, 2007, at 147. Each of the above characteristics is a defining criterion of legal norms. However, the two re-eminent requisites are that law be general and prospective in operation.

AD HOMINEM LEGISLATION

The Act fails the first requirement that law be general in operation. Part 2 of Sch 2 to the Act is ad hominem, not general. Part 2 is titled, “Hurunui WCO application”. Clauses 6-15 under Part 2 are specifically directed at the application for a water conservation order (WCO) over the Hurunui River. Clause 6 defines “Hurunui WCO application” as meaning “the WCO application in respect of the Hurunui River made under section 201 of the RMA on 30 August 2007 jointly by the New Zealand Fish and Game Council, and the New Zealand Recreational Canoeing Association”. Furthermore, it defines “Hurunui report” as meaning “the report on the Hurunui WCO application by a special tribunal under section 208 of the RMA dated 14 August 2009”.

Clause 7 of Part 2 compounds the rule-of-law objection. Clause 7 is retrospective in effect and denies access to the Environment court for the resolution of environmental protection matters. It reads:

“7 Jurisdiction of Environment Court removed in relation to Hurunui WCO application

Despite anything in the RMA or any other enactment, on and from the commencement date, the Environment Court does not have jurisdiction to conduct, or to continue to conduct, an inquiry in respect of the Hurunui report.”

The RMA prescribes quite elaborate procedures for processing applications for WCOs (ss 201-217). Any person may apply to the Minister for the Environment to initiate the process for making a WCO. The Minister, after making such inquiries as may be necessary, must appoint a special tribunal to hear and report on the application. Public notification must be given and submissions called for. The tribunal must conduct a public hearing at which the applicant (or applicants) and submitters may be heard and present evidence. The tribunal must take into account certain matters and, as soon as reasonably practicable, prepare and notify a report recommending that the application be granted or declined. A recommendation to grant the application must include a draft WCO. The applicant(s), the submitters, the Minister, the relevant regional or territorial authority, and any other person granted leave, has then the right to make a submission to the Environment Court on the tribunal’s report (RMA, s 209). The Court must conduct a public inquiry into the report and the submissions on it, and report to the Minister recommending that the tribunal’s report be accepted (with or without modifications), or rejected. A WCO is made as a statutory regulation on the recommendation of the Minister.

The Hurunui WCO application is singled out for special treatment. Clause 7 and the associated provisions of Part 2 oust the above procedures for the Hurunui application, notwithstanding that much of the statutory process for making a WCO had been completed. The combined functions of the special tribunal and the Environment Court are now placed in the hands of the appointed ECan commissioners, who replaced the elected councillors. They — not the tribunal and the Court — must conduct the hearing into the Hurunui WCO application (or revised application). The applicants and persons who made submissions to the special tribunal (but no other person or body) are granted a right of hearing. The commissioners must then report on the application, either granting or declining it. A report granting the application must include a draft WCO. Under this arrangement, the Environment Court is relieved of any independent review function.

Governments resort to ad hominem legislation when expedience speaks loudest ... Such legislation may be vigorously defended politically but it does nothing to promote respect

for the law" (Joseph, at 213). Part 2 of Sch 2 of the Act overrides the due process of law by prescribing special procedures for a named WCO application. It withholds rights to be heard by a special tribunal and the Environment Court, and is avowedly *ad hominem*. Such legislation denies the equal protection of the law, and is constitutionally repugnant.

The applicants (the New Zealand Fish and Game Council, the North Canterbury Fish and Game Council, and the New Zealand Recreational Canoeing Association) might rightly feel aggrieved, that they have been deprived of their legal rights and protections. So, too, might the parties who made submissions to and appeared before the special tribunal and have since been preparing for appearance before the Environment Court. They might be forgiven for believing that the legislation had callous intent. These persons and organisations committed considerable resources to preparing and presenting their cases to the tribunal, all for naught.

Part 2 of Sch 2 is either gratuitous or disingenuous. Why was it considered necessary? The Hurunui WCO application (or any other WCO application) is unrelated to the statutory purpose. The Act was passed under urgency to rectify systemic governance issues affecting water allocation in the Canterbury region (s 3(b)). Regional councils, however, have no role in deciding WCOs. The decision-making process reserves to them, at most, a minor, residual role. They may exercise a right to be heard and make submissions in any Environment Court hearing on a WCO application, which, if granted, would affect their region (RMA, s 211).

RETROSPECTIVE LEGISLATION

The ECan Act fails the first and also the second requirement of the rule of law; that law be prospective in operation. The pith of the Act is to make the substituted procedures for ECan decision-making retrospective. This is so for decision-making on the Hurunui WCO application, and generally for decision-making on Ecan's regional policy statement and regional plans.

Ad hominem legislation is usually reactive and almost always retrospective. Part 2 of Sch 2 dealing with the Hurunui application is wholly retrospective in overriding the statutory procedures for WCOs. The applicants lodged their WCO application in August 2007. The application was supplemented by further information provided to the minister in March 2008. In August 2008, the minister appointed a special tribunal to hear and report on the application. In November 2008, the tribunal publicly notified the application and called for submissions. The submission period closed in February 2009. Directions concerning the pre-circulation of expert evidence were served on the applicants and the hearing commenced in March 2009. The applicants and submitters presented their evidence and submissions, and the tribunal completed and forwarded its report to the minister, the applicants and submitters in August 2009. From then until the passage of the ECan Act on 12 April 2010 (the assent date), the parties had been preparing for the Environment Court hearing.

The retrospective and *ad hominem* *modus operandi* extends beyond the Hurunui WCO application to embrace the entire policy functions and decision-making of the regional council. Schedule 1 to the RMA prescribes detailed procedures for the preparation and making and/or amendment of a regional policy statement and plans. These procedures address: public notification of proposals, rights of consultation, the making of submissions, the requirements

of a hearing, the making and notification of a decision, appeals to the Environment Court, and public notification of an approved policy statement or plan. These procedures promote public participation in local government in accordance with the democratic mandate of elected

regional councils. They apply throughout all the regions of New Zealand, except Canterbury, where they are now ousted.

Sections 64–69 of the Act confer new decision-making functions and powers on the ECan commissioners. The exercise of these functions and powers excludes all recourse to the Environment Court. Decisions on Canterbury's Regional Policy Statement (RPS) and regional plans lie with the commissioners, who exercise all the powers of regional government. The RPS provides an "overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region" (RMA, s 59), while regional plans "assist a regional council to carry out its functions to achieve the purpose of [the RMA]" (RMA, s 63(1)). Where hearings have been concluded on proposed changes to Canterbury's RPS or regional plans, the commissioners can make decisions without calling for further submissions or granting a further hearing.

The introduction of a new legal test compounds the absence of a right of rehearing before the Environment Court. In matters of regional government, the commissioners must have regard to the "vision and principles of the CWMS" (ECan Act, s 63). The "CWMS" means the non-statutory Canterbury Water Management Strategy developed by the Canterbury Mayoral Forum as a framework for water management in the region. Now, submitters have only an attenuated right of appeal to the High Court on questions of law (ECan Act, s 66). Formerly, the right of appeal to the Environment Court was on the merits, with the proceeding constituting a rehearing on the evidence *de novo*.

Retrospective, *ad hominem* legislation can be justified in certain limited situations (see Burrows and Carter, *Statute Law in New Zealand* (4th ed), Wellington: LexisNexis, 2009, at 586–590). This is not one of them. The ECan Act offends against the rule of law and basic principles of good administration. For Friedrich Hayek, *The Road to Serfdom*, London: Routledge, 1944, p 72, the rule of law meant that:

[G]overnment in all its actions [must be] bound by rules, fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.

To stop a statutory process after it has been commenced breaches Hayek's imperative that the law must be "fixed and announced beforehand". Section 18(1) of the Interpretation 1999 codifies the usual expectation where a statutory process is put in train:

The repeal of an enactment does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity, or duty.

Section 18(2) makes explicit what is implicit in subs (1):

A repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the matter or thing or bringing or completing the proceedings that relate to the existing right, interest, title, immunity, or duty.

The rule-of-law imperative that statutes should be given prospective effect is rooted in the common law presumption that, in the absence of clear statutory language to the contrary, Parliament does not intend its legislation to apply retrospectively. This rule of statutory interpretation "rests on a presumption of commonsense in a well-ordered and civilised society" (*Barber v Pidgeon* [1937] 1 KB 664 at 678 per Scott LJ). That observation throws into sharp relief the retrospective orientation of the ECan legislation.

HENRY VIII CLAUSE

Section 31 of the Act is a form of Henry VIII clause for according primacy to subordinate (delegated) legislation over primary legislation. Under these clauses, Parliament may turn on its own supremacy and abdicate to the political executive. With apologies for quoting my own words (Joseph, at 503):

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Disproportionate response

The legislative response to Environment Canterbury's governance issues seems disproportionate and excessive. Here are three illustrations: first, decision-making over WCOs in Canterbury is now vested in the ECan commissioners. But regional councils have no function in WCO decision-making. They have only a right of appearance before the Environment Court to make submissions. Secondly, the Act denies citizens access to the Environment Court over changes to Canterbury's RPS and regional plans. Only rights of access to the High Court on questions of law remain. Thirdly, all regional governance and decision-making is now vested in the commissioners. This legislative response far exceeds the concerns that prompted the government intervention.

The impetus for government intervention concerned water issues and a lack of a water-management strategy in the region. These concerns could have been addressed in a measured and proportionate way. The Act specifically identifies the legislative purpose: "to address issues relevant to the efficient, effective, and sustainable management of fresh water in the Canterbury region" (s 3(b)). Consequently, each of the legislative responses outlined in para 35 would resoundingly fail the proportionality test that is used under the New Zealand Bill of Rights Act 1990 to justify reasonable limits on the rights affirmed. For a legislative response to be reasonable and proportionate, it must impact on rights or interests no more than is reasonably necessary to achieve the desired social objective. A proportionate response to concerns about Environment Canterbury would have been to remove water issues from its brief, establish a separate authority to develop a Water Management Strategy, and leave the elected councillors to attend to their other regional-council tasks.

Subterfuge

There are elements of subterfuge in the drafting of the Act. Its title contains reference to "Temporary Commissioners", suggesting that the current arrangement is transitional and temporary. But it is not. The arrangement will remain in force for longer than the life of any one Parliament. Furthermore, s 31 of the Act is titled, "Transitional regulations", but there is nothing overtly transitional about them. Section 31 authorises regulations "for a specified period of time or in specified circumstances". These regulations may suspend sections of the RMA applying to regional councils for the duration of the current arrangement ("in specified circumstances").

CONCLUSION

What should be done about the legislation? Repeal it and start again. Reinstate the elected councillors and, if needs must, establish a separate authority to oversee water allocation within the region. Reinstate the right of appeal to the Environment Court for regional decision-making and return to the status quo for WCOs. These would be the preferable outcomes but they are not going to happen. The political decision has been made and will not be revisited. The die is cast. But we should not be blinded to the cost of the government intervention. The two lasting implications will be the negative impact on local government democracy and the rule of law. □



28 September 2010

Hon Christopher Finlayson
Attorney-General
Parliament Buildings
Wellington

Dear Mr Finlayson

Environment Canterbury

The Society is writing to you as Attorney-General, and as the Senior Law officer in Government with particular responsibility for the rule of law in New Zealand. The Society and its members, as you know, also have a special responsibility for the rule of law (conferred by ss4(a) and s65(e) of the Lawyers and Conveyancers Act 2006).

The Society is concerned about the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 ('the Act'). This was passed under urgency in April. The Act dismissed the elected members of Environment Canterbury ('ECan'), replacing them with Commissioners. The Act deferred the 2010 elections for ECan. It made various provisions for dealing with legal proceedings about Water Conservation Orders and regional policy statements and plan changes. It applied retrospectively, to proceedings already in existence when the legislation came into force.

The Society considers that the manner in which the Act was passed, and aspects of its substance, raise concerns fundamental to the rule of law. This letter records those concerns.

Interference with court proceeding

The Act changed the process and appeal rights for extant legal proceedings concerning Water Conservation Orders in Canterbury (s46(2)). These are now to be decided by the ECan Commissioners rather than the special Tribunal as required in the Resource Management Act 1991. The right of appeal on the merits to the Environment Court, which formerly existed, is removed. There is now an appeal to the High Court from the Commissioners' decision, on a point of law only.

One particular proceeding in existence at the time of enactment – the Hurunui Water Conservation Order proceeding – is singled out. The Act provides that the new ECan Commissioners are to hear the Hurunui WCO application, even though that application was in fact substantially advanced at the time the Act was passed. It had already been heard by a special Tribunal in accordance with the RMA. Indeed, by the time the Act was passed, the Society understands that it was already under appeal to the Environment Court.

Further, Schedule 1 of the Act sets out a new Canterbury Water Management Strategy ('CWMS') against which the Hurunui and other applications are to be assessed. The substance of the relevant law has been altered with retrospective effect.

Under s69 ECan Commissioners can hear and determine matters raised in submissions on a proposed regional policy statement or plan even when any hearing has earlier been concluded. They may do so on the basis of the submissions and evidence in the earlier proceeding and without holding any further hearing. The new CWMS will apply (s63) to their decision. No opportunity is required to be given to submitters to make further submissions (s69(3)) in writing or in person.

The rule of law has a number of accepted principles. One is the citizens' right of access to the courts. When legislation is enacted that has an impact on extant legal proceedings – by changing the substance of legal tests and by altering procedure in an adverse way – it is open to criticism for not observing the standard required by the rule of law. The Society considers that, for the reasons summarised above, the ECan legislation is properly open to such criticism.

Henry VIII clause

Section 31 of the Act confers a power on the Governor-General to change the duration of the Commissioners' powers, and also to provide that any specified provisions of the Resource Management Act 1991 do (or do not) apply to the Commissioners. This is a Henry VIII clause. Such clauses may have their place in legislation involving transitional schemes, but in this case the combination of a power to extend the *duration* of the Commissioners' powers and to suspend provisions of the RMA make s31 problematic from a rule of law perspective.

It is a fundamental component of the rule of law that legislation should be enacted by Parliament. The use of legislative power to authorise regulations that effectively delegate a broad legislative power to the executive, for a significant period, is inconsistent with this principle of the rule of law.

Impact on regional plan process

Though the "purpose" clause of the Act refers to concerns about fresh water, the effect of the Act is to remove elected councillors and replace them with Commissioners who perform *all* the functions of the former elected councillors, many of which will not relate to water issues at all. This is a disproportionate response to the stated concerns in the region that prompted the legislation. It raises the concern that the people in Canterbury are, in matters of local government, not being treated equally with citizens in other regions. No reason is known to exist for this.

Conclusion

The Society recognises that there may be occasions when the public interest requires that legislation be enacted even though it has a bearing on extant court proceedings. But a case has to be made that this is so, and it is appropriate that the matter be debated in Parliament and the public consulted. The Society is concerned, therefore, that this legislation was enacted under urgency and without time for submissions and measured consideration. If

there had been the opportunity of even a brief time for submissions, the rule of law concerns could have been aired and a principled solution found. The impact of the Act on existing proceedings could have been more carefully assessed and dealt with, and a more proportionate response to perceived problems found.

The Society's Rule of Law Committee and the Convener of its Law Reform Committee (Professor Paul Rishworth) would be pleased to meet with you to discuss in more detail the problems with the Act, and ways in which they could have been avoided and might still be rectified. A member of the Rule of Law Committee, Professor Philip Joseph, has published an article about the ECan Act and a copy of that is attached for your reference.



Environment Canterbury legislation

Philip Joseph, the University of Canterbury
finds the legislation a constitutional affront
in a paper written for the NZLS Rule of Law Committee

This article documents four rule of law issues raised by the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (ECan Act). These concern provisions of the Act which:

- are ad hominem;
- apply retrospectively to the detriment of affected individuals and organisations;
- deny individuals and organisations the right of access to the Environment Court for protection of their rights or interests; or
- authorise statutory regulations that suspend sections of the Resource Management Act 1991 (the RMA) that regulate activities of regional councils.

The article raises four additional concerns that also breach rule-of-law issues. These additional matters compound concerns over the ECan legislation.

RULE OF LAW STANDARDS

The concept of the rule of law prescribes the formal requirements of legal norms. The law should: be general and prospective in operation; be relatively stable, certain and accessible; and apply equally to all. These requirements are defining criteria of a just and efficacious legal system, “distinguish[ing] law as an autonomous body of rules that command the general obedience of the people”: Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed), Wellington, Thomson Brookers, 2007, at 147. Each of the above characteristics is a defining criterion of legal norms. However, the two re-eminent requisites are that law be general and prospective in operation.

AD HOMINEM LEGISLATION

The Act fails the first requirement that law be general in operation. Part 2 of Sch 2 to the Act is ad hominem, not general. Part 2 is titled, “Hurunui WCO application”. Clauses 6-15 under Part 2 are specifically directed at the application for a water conservation order (WCO) over the Hurunui River. Clause 6 defines “Hurunui WCO application” as meaning “the WCO application in respect of the Hurunui River made under section 201 of the RMA on 30 August 2007 jointly by the New Zealand Fish and Game Council, and the New Zealand Recreational Canoeing Association”. Furthermore, it defines “Hurunui report” as meaning “the report on the Hurunui WCO application by a special tribunal under section 208 of the RMA dated 14 August 2009”.

Clause 7 of Part 2 compounds the rule-of-law objection. Clause 7 is retrospective in effect and denies access to the Environment court for the resolution of environmental protection matters. It reads:

“7 Jurisdiction of Environment Court removed in relation to Hurunui WCO application

Despite anything in the RMA or any other enactment, on and from the commencement date, the Environment Court does not have jurisdiction to conduct, or to continue to conduct, an inquiry in respect of the Hurunui report.”

The RMA prescribes quite elaborate procedures for processing applications for WCOs (ss 201-217). Any person may apply to the Minister for the Environment to initiate the process for making a WCO. The Minister, after making such inquiries as may be necessary, must appoint a special tribunal to hear and report on the application. Public notification must be given and submissions called for. The tribunal must conduct a public hearing at which the applicant (or applicants) and submitters may be heard and present evidence. The tribunal must take into account certain matters and, as soon as reasonably practicable, prepare and notify a report recommending that the application be granted or declined. A recommendation to grant the application must include a draft WCO. The applicant(s), the submitters, the Minister, the relevant regional or territorial authority, and any other person granted leave, has then the right to make a submission to the Environment Court on the tribunal's report (RMA, s 209). The Court must conduct a public inquiry into the report and the submissions on it, and report to the Minister recommending that the tribunal's report be accepted (with or without modifications), or rejected. A WCO is made as a statutory regulation on the recommendation of the Minister.

The Hurunui WCO application is singled out for special treatment. Clause 7 and the associated provisions of Part 2 oust the above procedures for the Hurunui application, notwithstanding that much of the statutory process for making a WCO had been completed. The combined functions of the special tribunal and the Environment Court are now placed in the hands of the appointed ECan commissioners, who replaced the elected councillors. They — not the tribunal and the Court — must conduct the hearing into the Hurunui WCO application (or revised application). The applicants and persons who made submissions to the special tribunal (but no other person or body) are granted a right of hearing. The commissioners must then report on the application, either granting or declining it. A report granting the application must include a draft WCO. Under this arrangement, the Environment Court is relieved of any independent review function.

Governments resort to ad hominem legislation when expedience speaks loudest ... Such legislation may be vigorously defended politically but it does nothing to promote respect

for the law" (Joseph, at 213). Part 2 of Sch 2 of the Act overrides the due process of law by prescribing special procedures for a named WCO application. It withholds rights to be heard by a special tribunal and the Environment Court, and is avowedly *ad hominem*. Such legislation denies the equal protection of the law, and is constitutionally repugnant.

The applicants (the New Zealand Fish and Game Council, the North Canterbury Fish and Game Council, and the New Zealand Recreational Canoeing Association) might rightly feel aggrieved, that they have been deprived of their legal rights and protections. So, too, might the parties who made submissions to and appeared before the special tribunal and have since been preparing for appearance before the Environment Court. They might be forgiven for believing that the legislation had callous intent. These persons and organisations committed considerable resources to preparing and presenting their cases to the tribunal, all for naught.

Part 2 of Sch 2 is either gratuitous or disingenuous. Why was it considered necessary? The Hurunui WCO application (or any other WCO application) is unrelated to the statutory purpose. The Act was passed under urgency to rectify systemic governance issues affecting water allocation in the Canterbury region (s 3(b)). Regional councils, however, have no role in deciding WCOs. The decision-making process reserves to them, at most, a minor, residual role. They may exercise a right to be heard and make submissions in any Environment Court hearing on a WCO application, which, if granted, would affect their region (RMA, s 211).

RETROSPECTIVE LEGISLATION

The ECan Act fails the first and also the second requirement of the rule of law; that law be prospective in operation. The pith of the Act is to make the substituted procedures for ECan decision-making retrospective. This is so for decision-making on the Hurunui WCO application, and generally for decision-making on Ecan's regional policy statement and regional plans.

Ad hominem legislation is usually reactive and almost always retrospective. Part 2 of Sch 2 dealing with the Hurunui application is wholly retrospective in overriding the statutory procedures for WCOs. The applicants lodged their WCO application in August 2007. The application was supplemented by further information provided to the minister in March 2008. In August 2008, the minister appointed a special tribunal to hear and report on the application. In November 2008, the tribunal publicly notified the application and called for submissions. The submission period closed in February 2009. Directions concerning the pre-circulation of expert evidence were served on the applicants and the hearing commenced in March 2009. The applicants and submitters presented their evidence and submissions, and the tribunal completed and forwarded its report to the minister, the applicants and submitters in August 2009. From then until the passage of the ECan Act on 12 April 2010 (the assent date), the parties had been preparing for the Environment Court hearing.

The retrospective and *ad hominem* *modus operandi* extends beyond the Hurunui WCO application to embrace the entire policy functions and decision-making of the regional council. Schedule 1 to the RMA prescribes detailed procedures for the preparation and making and/or amendment of a regional policy statement and plans. These procedures address: public notification of proposals, rights of consultation, the making of submissions, the requirements of a hearing, the making and notification of a decision, appeals to the Environment Court, and public notification of an approved policy statement or plan. These procedures promote public participation in local government in accordance with the democratic mandate of elected

regional councils. They apply throughout all the regions of New Zealand, except Canterbury, where they are now ousted.

Sections 64–69 of the Act confer new decision-making functions and powers on the ECan commissioners. The exercise of these functions and powers excludes all recourse to the Environment Court. Decisions on Canterbury's Regional Policy Statement (RPS) and regional plans lie with the commissioners, who exercise all the powers of regional government. The RPS provides an "overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region" (RMA, s 59), while regional plans "assist a regional council to carry out its functions to achieve the purpose of [the RMA]" (RMA, s 63(1)). Where hearings have been concluded on proposed changes to Canterbury's RPS or regional plans, the commissioners can make decisions without calling for further submissions or granting a further hearing.

The introduction of a new legal test compounds the absence of a right of rehearing before the Environment Court. In matters of regional government, the commissioners must have regard to the "vision and principles of the CWMS" (ECan Act, s 63). The "CWMS" means the non-statutory Canterbury Water Management Strategy developed by the Canterbury Mayoral Forum as a framework for water management in the region. Now, submitters have only an attenuated right of appeal to the High Court on questions of law (ECan Act, s 66). Formerly, the right of appeal to the Environment Court was on the merits, with the proceeding constituting a rehearing on the evidence *de novo*.

Retrospective, *ad hominem* legislation can be justified in certain limited situations (see Burrows and Carter, *Statute Law in New Zealand* (4th ed), Wellington: LexisNexis, 2009, at 586–590). This is not one of them. The ECan Act offends against the rule of law and basic principles of good administration. For Friedrich Hayek, *The Road to Serfdom*, London: Routledge, 1944, p 72, the rule of law meant that:

[G]overnment in all its actions [must be] bound by rules, fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.

To stop a statutory process after it has been commenced breaches Hayek's imperative that the law must be "fixed and announced beforehand". Section 18(1) of the Interpretation 1999 codifies the usual expectation where a statutory process is put in train:

The repeal of an enactment does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity, or duty.

Section 18(2) makes explicit what is implicit in subs (1):

A repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the matter or thing or bringing or completing the proceedings that relate to the existing right, interest, title, immunity, or duty.

The rule-of-law imperative that statutes should be given prospective effect is rooted in the common law presumption that, in the absence of clear statutory language to the contrary, Parliament does not intend its legislation to apply retrospectively. This rule of statutory interpretation "rests on a presumption of commonsense in a well-ordered and civilised society" (*Barber v Pidgen* [1937] 1 KB 664 at 678 per Scott LJ). That observation throws into sharp relief the retrospective orientation of the ECan legislation.

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Disproportionate response

The legislative response to Environment Canterbury's governance issues seems disproportionate and excessive. Here are three illustrations: first, decision-making over WCOs in Canterbury is now vested in the ECan commissioners. But regional councils have no function in WCO decision-making. They have only a right of appearance before the Environment Court to make submissions. Secondly, the Act denies citizens access to the Environment Court over changes to Canterbury's RPS and regional plans. Only rights of access to the High Court on questions of law remain. Thirdly, all regional governance and decision-making is now vested in the commissioners. This legislative response far exceeds the concerns that prompted the government intervention.

The impetus for government intervention concerned water issues and a lack of a water-management strategy in the region. These concerns could have been addressed in a measured and proportionate way. The Act specifically identifies the legislative purpose: "to address issues relevant to the efficient, effective, and sustainable management of fresh water in the Canterbury region" (s 3(b)). Consequently, each of the legislative responses outlined in para 35 would resoundingly fail the proportionality test that is used under the New Zealand Bill of Rights Act 1990 to justify reasonable limits on the rights affirmed. For a legislative response to be reasonable and proportionate, it must impact on rights or interests no more than is reasonably necessary to achieve the desired social objective. A proportionate response to concerns about Environment Canterbury would have been to remove water issues from its brief, establish a separate authority to develop a Water Management Strategy, and leave the elected councillors to attend to their other regional-council tasks.

Subterfuge

There are elements of subterfuge in the drafting of the Act. Its title contains reference to "Temporary Commissioners", suggesting that the current arrangement is transitional and temporary. But it is not. The arrangement will remain in force for longer than the life of any one Parliament. Furthermore, s 31 of the Act is titled, "Transitional regulations", but there is nothing overtly transitional about them. Section 31 authorises regulations "for a specified period of time or in specified circumstances". These regulations may suspend sections of the RMA applying to regional councils for the duration of the current arrangement ("in specified circumstances").

CONCLUSION

What should be done about the legislation? Repeal it and start again. Reinstate the elected councillors and, if needs must, establish a separate authority to oversee water allocation within the region. Reinstate the right of appeal to the Environment Court for regional decision-making and return to the status quo for WCOs. These would be the preferable outcomes but they are not going to happen. The political decision has been made and will not be revisited. The die is cast. But we should not be blinded to the cost of the government intervention. The two lasting implications will be the negative impact on local government democracy and the rule of law. □

1 May 2015

Ministry for the Environment

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Wellington 6143

BY EMAIL: ecanreview@mfe.govt.nz

Submitter:

North Canterbury Fish and Game Council
PO Box 50
Woodend 7641
03 314 5939, 027 5252 650

Environment Canterbury Review

1. The North Canterbury Fish & Game Council (**Fish and Game**) is one of 12 Regional Fish and Game Councils established under Section 26(P) of the Conservation Act for the purpose of the "...management, maintenance and enhancement of sports fish and game"... for each region defined by the Minister of Conservation, and are obliged to discharge their functions "...in the recreational interests of anglers and hunters".
2. The particular functions of these councils are set out in Section 26(Q) of the Conservation Act, and include "to represent the interests and aspirations of anglers and hunters in the statutory planning process" and "to advocate the interests of the Council, including its interests in habitats"
3. The North Canterbury Fish & Game Council manages the fish and game resources and its associated recreational use in the area between the Rakaia and Waiau catchments, and the Southern Alps.
4. This submission has been prepared by Fish and Game regarding the Environment Canterbury Review discussion document.

Submission

5. Fish and Game does not support the shared governance model after the 2016 Canterbury Regional Council elections, nor do we support continuation of the status quo. We instead wish to see a return to fully elected Commissioners.
6. Fish and Game would not take issue with elected ECan Commissioners appointing skill-based experts who could advise in a non-voting capacity, thereby providing a more transparent process for our license holders and members of the public.

Justification for Fish and Game's Position

7. Fish and Game's own elected Councillors in North Canterbury consider the removal of elected ECan Commissioners was done in haste and without adequate justification. The decision, combined with implementation of the ECAN ACT 2010, has severely limited Fish and Game's ability to meet its statutory obligations with respect to sports fish and game birds.
8. We do not agree that the CWMS and the Zone Committee process is being implemented in a truly collaborative way, due to the appointment of Zone Committee representatives by unelected Commissioners and the inability for organisations like Fish and Game to have a seat at the table. This situation has led to rurally dominated Zone Committees, with a disproportionate lack of environmental and recreational representatives.
9. The water management issues facing Canterbury are not unique. The 'shared vision' referred to in the paper is questionable, especially when most present and proposed RMA interventions appear to favour commercial and economic objectives. Present ECan management of water resources is underpinned by a relatively closed and controlled collaborative process; that differs from the Scandinavian approach that inspired more collaborative decision making.
10. The challenges in Canterbury and the risks of returning to an elected Council, do not in our opinion outweigh the importance of delivering regional governance for Canterbury's natural resources in a way that is consistent with other regions in New Zealand, and in a way that does not alienate the views of urban populations and the majority of our Canterbury license holders.

Scott Pearson
Environmental Advisor
North Canterbury Fish and Game

Environment Canterbury Review - Discussion Document

To: Ministry for the Environment
From: Property Council New Zealand (Property Council)

About Property Council

Property Council is a member-led, not-for-profit organisation offering a collective voice for the commercial property industry. Our members include the owners, investors, managers and developers of office, retail, industrial and residential property; as well as planners, policy makers, engineers, lawyers, architects and other property professionals.

Our broad membership requires us to consider all aspects of the built environment, and we promote sound policies and requirements which benefit New Zealand as a whole. We advocate for quality urban growth that supports strong national and local economies.

We strive to serve our members through research, policy development, advocacy, education and networking event programmes nationally and regionally, raising the industry profile as we go.

Issues

The Government has set out its proposals for a mixed-model governance structure for Environment Canterbury to be in place after the local government elections in October 2016. The proposed structure will include community-elected councillors, and Government-appointed members.

Property Council supports the Ministry's stated goals for Environment Canterbury's governance to include: high quality leadership, economic growth, strong environmental stewardship, strong accountability to local communities and value and efficiency for ratepayer money. The goals encompass the different issues Environment Canterbury must address, and we agree there must be an appropriate mix of expertise and experience, within the organisation, in order to progress them.

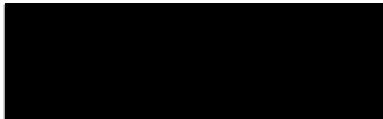
Property Council has a particular interest in Environment Canterbury's role in encouraging economic growth, and the Christchurch rebuild is a key matter that it must help facilitate in this respect. We note that, historically, many regional authorities have tended to focus on their environmental objectives to the detriment of economic growth. As such, whatever structure is eventually determined, we would encourage the organisation to have economic and development experts on its team.

Our view is that it is important for these people to be around the table, with the environmental and other experts, in order to ensure all relevant factors and evidence are considered - and the appropriate trade-offs are made when taking decisions and implementing policies. This will help

ensure environmental and urban interests are balanced in an evidence-based fashion; which protects things of value and creates a quality, fit for purpose built environment.

Conclusion

Property Council appreciates the opportunity to comment on this issue.



Jo McDonald
President, South Island Branch
Property Council New Zealand

DATED this 1st day of May 2015

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1 May 2015

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Environment Canterbury Review

1. Forest & Bird is New Zealand's largest non-governmental conservation organisation with 70,000 members and supporters. Our kaupapa is to "Give Nature a Voice" Forest and Bird carries out this important work through advocacy and education as well as many hundreds of our members being involved in restoration projects including pest and predator eradication around Canterbury's wetlands, lakes and rivers by volunteers belonging to our three Canterbury Branches.
2. Protection of our freshwater and the indigenous species that rely on them is a priority for our organisation.
3. The following is a submission by Forest and Bird regarding the Environment Canterbury Review discussion document.

Summary

4. The discussion document 'the Paper' recommends a shared governance model, after the 2016 Canterbury Regional Council elections. The recommended structure will provide for a mix of community-elected but rurally dominated councillors and Government appointed members of ECan's governing body.
5. The Paper is predicated on an assertion that the elected Council was performing poorly and a number of unprecedented requests for urgent action caused the Government to abolish the elected Councillors and replace them with Commissioners with special powers beyond any powers provided to councils in other regions in New Zealand.
6. The Paper also asserts that the Government-appointed Commissioners have since addressed 'serious performance problems' and have restored community confidence particularly in relation to water.
7. Forest and Bird rejects both of these assertions. The Paper is a selective account of what led up to the removal of the elected Councillors and what has been achieved by ECan subsequently as a result of the ECan Act and the installing of Commissioners.

8. It is evident from responses to a number of Forest & Bird Official Information Act requests that the reason the Government sacked the elected Councillors and installed Commissioners was to 'facilitate irrigation development' within the Canterbury region.¹ It is evident that this is to take precedence over environmental and recreation concerns.
9. The Paper is vague in relation to a number of key issues. The portion of elected councillors will not be installed until the end of 2016, despite the elections being held in October of that year. This is of course different to every other part of the country where elected councillors are installed as soon as the election results are confirmed. Linked to this there is an extremely vague suggestion that by then there will be amendments to the RMA that will have a provision similar to the 'special powers' enjoyed by the ECan Commissioners and therefore the Paper considers it inefficient to provide for the partially elected councillors to take office before then.
10. The proposed amendments to the RMA are controversial and the nature of them and the likelihood they will be passed is uncertain. It is unacceptable to delay the outcome of an election on the basis that the Crown is hopeful that it might make changes to the RMA despite those changes being highly controversial and not being available to comment on nor been through any proper legislative process.
11. The idea that the installation of the elected Canterbury councillors would have to wait for the passage of RMA amendments also suggests that the proposed amendments are specific to just Canterbury and will not apply to the rest of New Zealand. If this was not the case then the government would surely be proposing to delay the installation of all regional councillors. We struggle to imagine what sort of Canterbury-specific amendments to the RMA could possibly justify such a delay.

2.3 History to Government action

12. In the interests of a balanced and robust discussion with Canterbury people about what should occur post the 2016 election the situation the previous elected Council was facing in 2010, and what had been achieved by them before the Government intervention, should be set out fairly.
13. The Paper does not discuss the considerable investment the elected Council made in increasing capacity to allow for greater compliance with statutory timeframes for consent applications. This investment is clear from the Council's Annual Reports.
14. For instance it is claimed that the elected Council had a 'reputation for failing to meet statutory timeframes for processing resource consent applications'. The Paper cites the 2007/2008 Ministry for the Environment RMA survey which showed during that period ECan was the poorest performer in relation to other councils with only 71% compliance of statutory timeframes. It was at a time when ECan were dealing with an unprecedented volume of consents and in fact were considering more consent applications for water in a single year than all other regional councils combined.
15. Consistent with the selective telling of the history of ECan prior to Government intervention the paper fails to note that ECan during 2009/10 were 80% compliant with statutory timeframes for processing resource consents, this is a period when the Commissioners were only two months into their term.

¹ Response to Forest and Bird OIAs from Ministry for the Environment 5 May 2010

16. Contrary to what the Paper claims the Council did have a water plan and in fact the Commissioners adopted the Natural Resources Regional Plan (NRRP) that was in the final stages of the hearing process. The CWMS was developed under the term of the elected Councillors prior to their sacking.
17. It also fails to note that there was no National Policy Statement on Freshwater under the RMA to guide decision making.

2.5 ECan achievements

18. If the Paper was an honest attempt to set out the issues rather than self-serving story telling, **Table 1** would not make the claims it has seen discussion in above section above regarding statutory timeframes for resource consents and the planning work that was in place prior to the installation of the Commissioners. The Table fails to properly record the ECan 2009 performance (refer to the discussion in section above) and in reality the ECan 2015 performance with Commissioners can hardly be considered an impressive one.
19. The Table claims that CWMS is being implemented and ten zone committees are working in a 'participatory and collaborative way'. Forest and Bird disputes the claim that the zone committees are in fact collaborative. In its experience the committees are chosen by ECan and dominated by the farming sector and the irrigation industry and those with conservation and environmental interests are poorly represented. The Zone Committees are said to be "collaborative" but effectively shut out those who may dissent from the pro irrigation view. It was because of this a number of environmental groups including Forest and Bird withdrew from the Zone Committee process.²
20. Despite the special powers provided to the Commissioners under the ECan Act such as no appeals to the Environment Court, only one regional plan prepared under the special powers is operative. The flagship Canterbury Land and Water Regional Plan is stuck in High Court appeals. The High Court is entirely unsuitable for the task it has been given of resolving plan appeals on questions of law.
21. The only operative plan, the Hurunui Waiau River Regional Plan, is deficient in a critical matter. The rule provided for dryland farming is so deficient that ECan are refusing to enforce it due to unintended consequences. The catchment is currently fully allocated and the deficient rule and the failure to enforce the rule is likely to result in the Plan limits being breached.

4.1 Canterbury governance from the next local government term

22. If it is the case that the Commissioners have particular skills and have developed such a positive relationship with stakeholders they should, for the future health of ECan put in place strategies now in readiness for the end of their term in October 2016. Their expertise is not so irreplaceable that it can justify further extending the term for six of them at the expense of the proper democratic process. If it is the case that the Commissioners' skills are needed by any elected Council or staff they could be called upon when needed or employed by Council on short term contract if that is considered desirable.
23. It is unclear what is meant when the Paper discusses the risk that 'competing interests and a lack of shared vision on the regional council ...this includes finding a path between differing urban and rural perspective on managing Canterbury's freshwater 'might occur without the

²28 August 2013 Letter to ECan Commissioners from Forest and Bird and other parties withdrawing from any CWMS collaborative process.

proposed shared governance model. Is the paper referring to what happens in any democratically elected forum?

24. There are differing points of interest around managing Canterbury's water. These include those within the urban community who have an intense interest in the quality of their waterways for clean drinking water and recreation along with a strong sense of identity with Canterbury's braided rivers. Councils all over the country manage to resolve issues around contested resources. It is not the case that this cannot be done in Canterbury; the region is not that unique.
25. The 'shared vision' referred to in the Paper is unfortunately not a shared vision at all. It is the vision dominated by a particular sector that seeks the use of water for irrigation at all costs, over environmental and recreational concerns. The shared governance model, with the majority to be appointed commissioners and rurally based councillors will continue to promote this sector based vision and facilitate irrigation as was the Crown's intention when it established the ECan Act in 2010. Otherwise the reasons set out to justify the shared governance model under this section simply do not stack up.
26. Forest and Bird seeks that the 2016 local elections provide for a fully elected regional council in Canterbury.

Jen Miller
Conservation Manager-Canterbury West Coast

He tono nā



Te Rūnanga o NGĀI TAHU

ki

**THE MINISTRY FOR THE ENVIRONMENT and
DEPARTMENT OF INTERNAL AFFAIRS**

e pā ana ki te

ENVIRONMENT CANTERBURY REVIEW: A DISCUSSION DOCUMENT

01 Mātahi-ā-te-tau /May 2015

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Mo tātou a mō kā uri a muri ake nei

1. EXECUTIVE SUMMARY

- 1.1 Te Rūnanga o Ngāi Tahu (Te Rūnanga) supports in principle the review of Environment Canterbury and endorses the need to ensure the new governance arrangements reflect a Treaty Partnership with Ngāi Tahu Whānui.
- 1.2 It is the position of Te Rūnanga that iwi participation in decision-making matches the expectation of genuine Treaty partnership.
- 1.3 Therefore, the new governance arrangements must provide for a 50/50 mix of Ngāi Tahu appointed representation and government appointment representation, alongside elected representation – as a minimum.

2. OVERALL RECOMMENDATIONS

- 2.1 The following recommendations are made by Te Rūnanga o Ngāi Tahu:
 - The most significant issue for Ngāi Tahu is that resource management matters should be founded on the Treaty partnership.
 - The partnership must recognise Ngāi Tahu interests and values at the core of resource management, and particularly freshwater management. This can only be achieved through meaningful representation of Ngāi Tahu at the governance level.
 - The governance framework must facilitate the ability of iwi to enable their interests being provided for in a contemporary post-settlement framework
 - the extent to which iwi participation in decision-making reflects a genuine Treaty partnership must build on the momentum achieved with mechanisms such as Tuia and Te Tutohu Whakatōpū i te Waihora.
 - The values of sustainability and preparing for future generations would lead us to think about ways in which youth perspectives can be included in the design and implementation processes. It might be useful to consider ways to include the expert contribution of specialists such as the Parliamentary Commissioner for the Environment; Whānau Ora Commissioners or the Children's Commissioner in establishment processes.
 - A additional goal should be added, reading: *'Mana whenua are able to fulfil their kaitiaki responsibilities through cultural leadership and successive generations are nurtured to be strong, vibrant, champions of culture'*.

- Te Rūnanga would like to see a level of equity around the table not only in the design but also the implementation of the new governance arrangements.
- Te Rūnanga o Ngāi Tahu seeks the authority to appoint the Ngāi Tahu members within the usual processes of appointment employed by our organisation.
- An amended proposal that provides for a 50/50 mix of Ngāi Tahu representation and government appointment representation, alongside elected representation, would better achieve Treaty partnership objectives.
- Provision for appointment on committees.
- Environment Canterbury must build on the momentum achieved with mechanisms such as Tuia and Te Tutohu Whakatapu i te Waihora to demonstrate the extent to which iwi participation in decision-making reflects a genuine Treaty partnership;
- The need to build a productive relationship with Ngāi Tahu and engaging in a constructive and progressive partnership.
- The development of an equitable governance model; greater accountability of the regional council to iwi and the community the involvement of a planning framework and processes; and greater regional awareness of the commissioners and their roles and function
- The governance framework must facilitate the ability of iwi to enable their interests being provided for in a contemporary post-settlement framework
- To consider ways to include the expert contribution of specialists such as the Parliamentary Commissioner for the Environment; Whānau Ora Commissioners or the Children's Commissioner in establishment processes.
- The development of Key Performance Indicators which enable the voice of Ngāi Tahu to be demonstrated in the operational detail
- That the special resource management powers are retained to enable opportunities for discussion leading to informed decision-making.

3. TE RŪNANGA O NGĀI TAHU

- 3.1 This response is made on behalf of Te Rūnanga o Ngāi Tahu Te Rūnanga is statutorily recognised as the representative tribal body of Ngāi Tahu Whānui and was established as a body corporate on 24th April 1996 under section 6 of Te Rūnanga o Ngāi Tahu Act 1996 (the Act).
- 3.2 This submission for the Environment Canterbury Governance review is the collective response of all the Papatipu Rūnanga who hold mana whenua

within the Canterbury rohe; this includes Te Rūnanga o Kaikōura, Te Ngāi Tūāhuriri, Te Hapū o Ngāti Wheke, (Rāpaki), Te Rūnanga o Koukourārata, Te Rūnanga o Wairewa, Te Rūnanga o Ōnuku, Te Rūnanga o Taumutu, Te Rūnanga o Arowhenua, Te Rūnanga o Waihao, and Te Rūnanga o Moeraki.

3.3 We note the following relevant provisions of our constitutional documents:

Section 3 of the Act States:

“This Act binds the Crown and every person (including any body politic or corporate) whose rights are affected by any provisions of this Act.”

Section 15(1) of the Act states:

“Te Rūnanga o Ngāi Tahu shall be recognised for all purposes as the representative of Ngāi Tahu Whānui.”

3.4 The Charter of Te Rūnanga o Ngāi Tahu constitutes Te Rūnanga as the kaitiaki of the tribal interests.

3.5 Te Rūnanga respectfully requests that the Ministry and the Department accord this response the status and weight due to the tribal collective, Ngāi Tahu Whānui, currently comprising over 50,000 members, registered in accordance with section 8 of the Act.

4. TE RŪNANGA INTERESTS IN THE ENVIRONMENT CANTERBURY REVIEW

4.1 The cultural redress elements of the Ngāi Tahu Settlement are aimed at restoring the ability of Ngāi Tahu to give practical effect to its traditional and contemporary kaitiaki relationship with the environment. Our relationship with the natural environment is at the heart of Te Kerēme – The Ngāi Tahu Claim, and much of the Ngāi Tahu Settlement gives expression to our relationship with the takiwā. These tools are immensely significant to the iwi as symbolic recognition of our whakapapa, but more importantly, they allow us to honour our values of kaitiakitanga (environmental guardianship).

4.2 Above and beyond statutory obligations, Environment Canterbury has committed with Ngāi Tahu leadership to engage in a constructive and progressive relationship. This commitment is based on the recognition that the relationship of Ngāi Tahu with their ancestral homeland is inextricably linked to the powers and functions of Environment Canterbury.

4.3 The appointment of the Commissioners created a framework for Environment Canterbury to become a national leader in the management of sustainable development in the region - achieving economic growth without compromising our standard of living or environmental sustainability.

4.4 The governance arrangements adopted for Environment Canterbury will

likely set precedence and will influence future governance arrangements across the takiwā. We are keen to ensure that decision-makers institute arrangements which provide a model in terms of regional councils meeting their treaty obligations.

4.5 Te Mana o te Wai provides a holistic approach to freshwater management through its inclusion in the National Policy Statement for Freshwater Water (NPS-FW). There is value in extending the application of this overarching korowai further than just freshwater as it can be used as a integration tool across a range of responsibilities at local government level.

4.6 Te Rūnanga notes the following particular interests in the proposed activity classifications in the ECan Review:

Treaty Relationship

- Te Rūnanga o Ngāi Tahu have an expectation that the Crown will honour Te Tiriti o Waitangi and the principles upon which the Treaty is founded.
- The management of the environment and resources within the takiwā, for which Ngāi Tahu Whānui have kaitiaki responsibilities and maintain rangatiratanga status consistent with the principles of the Treaty of Waitangi.

Kaitiakitanga

- In keeping with the kaitiaki responsibilities of Ngāi Tahu whānui, Te Rūnanga has an interest in ensuring sustainable management of natural resources, protecting taonga species and mahinga kai resources for future generations
- Ngāi Tahu whānui are both users of natural resources, and stewards of those resources. At all times, Te Rūnanga is guided by the tribal whakataukī: “*mō tātou, ā, mō kā uri ā muri ake nei*” (for us and our descendants after us).

Whanaungatanga

- Te Rūnanga has a responsibility to promote the wellbeing of Ngāi Tahu Whānui and ensure that the management of Ngāi Tahu assets and the wider management of natural resources supports the development of iwi members.

- 4.7 Te Rūnanga has a specific interest by virtue of the Ngāi Tahu Claims Settlement Act 1998. The Act provides for Ngāi Tahu and the Crown to enter an age of co-operation. An excerpt of the Act is attached as Appendix One, as a guide to the basis of the post-Settlement relationship which underpins this submission.
- 4.8 The Crown apology to Ngāi Tahu recognises the Treaty principles of partnership, active participation in decision-making, active protection and rangatiratanga.
- 4.9 With regards to the Ngāi Tahu takiwā, Section 5 of the Te Rūnanga o Ngāi Tahu Act 1996 statutorily defines those areas “*south of the northern most boundaries described in the decision of the Māori Appellate Court ...*” which in effect is south of Te Parinui o Whiti on the East Coast and Kahurangi Point on the West Coast of the South Island.
- 4.10 Section 2 of the Ngāi Tahu Claims Settlement Act 1998 statutorily defines the Ngāi Tahu claim area as being:

“the area shown on allocation plan NT 504 (SO 19900), being—

- (a) the takiwā of Ngāi Tahu Whānui; and*
 - (b) the coastal marine area adjacent to the coastal boundary of the takiwā of Ngāi Tahu Whānui; and*
 - (c) the New Zealand fisheries waters within the coastal marine area and exclusive economic zone adjacent to the seaward boundary of that coastal marine area;—*
- and, for the purposes of this definition, the northern sea boundaries of the coastal marine area have been determined using the equidistance principle, and the northern sea boundaries of the exclusive economic zone have been determined using the perpendicular to the meridian principle from the seaward boundary of the coastal marine area (with provision to exclude part of the New Zealand fisheries waters around the Chatham Islands).”*

(See the map attached as Appendix Two)

- 4.11 As set out above, the traditional and statutorily recognised interests of Ngāi Tahu in the Canterbury Region are significant, which is why appropriate management of the environment is of such importance to the iwi.

SECTION A: GENERAL COMMENTS ON THE ENVIRONMENT CANTERBURY REVIEW

5. TREATY PRINCIPLES

- 5.1 The Local Government Act 2002 provides principles and requirements for local authorities to facilitate participation by Māori/iwi in local authority decision-making processes (section 4, Treaty of Waitangi). This is to recognise

and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-making processes. Section 14 of the Local Government Act provides explicit direction that *"a local authority should provide opportunities for Māori to contribute to its decision-making processes"*. From a Treaty partnership perspective, the governance framework must facilitate the ability of iwi to enable their interests being provided for in a contemporary post-settlement framework.

- 5.2 While the Act sets out provisions relating to all Māori, it is recognised that within the Canterbury region, Ngāi Tahu are the mana whenua. In addition to the Local Government Act obligations, the Resource Management Act 1991 gives regional councils specific obligations regarding kaitiakitanga, the principles of the Treaty of Waitangi and the relationship between Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. They have a special status in terms of Environment Canterbury's resource management activities and are not just another interest group.
- 5.3 The Ngāi Tahu Deed of Settlement provides for a new spirit of co-operation between Ngāi Tahu and the Crown and therefore, Ngāi Tahu assert an interest in the review as a process which is intended to restore the good faith partnership between Ngāi Tahu and the Crown. It is emphasised that in order to be effective, any such co-governance arrangement must provide for the ability for Ngāi Tahu to actively express its traditional and contemporary kaitiaki relationship with the environment. This was reinforced in the Ngāi Tahu Settlement Act, which afforded Ngāi Tahu an enhanced status, new roles and affirmations of existing rights in a way that recognises and reflects the mana of Ngāi Tahu in the management of their environment.
- 5.4 It is universally accepted that Māori are systemically under-represented in local authorities throughout New Zealand. Nationwide only about 4% of councillors are Maori yet tangata whenua make up 15% of the population. We believe it is timely in the current reconfiguration of Environment Canterbury to consider opportunities to enhance and enact the obligations associated with treaty responsiveness and mana whenua representation.
- 5.5 The governance framework must be laid out in the legislation to ensure the expectations and commitments of Ngāi Tahu and the Ministers are given effect to. In doing so, legislators should build on precedents, such as the relationship agreement signed between Ngā Papatipu Rūnanga and Environment Canterbury (Tuia) in February 2013¹. Ngāi Tahu also participates in current co-governance arrangements such as Te Waihora

1 Noting that section 81 provides even clearer direction that a local authority must (a) establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority; (b) consider ways in which it may foster the development of Māori capacity to contribute to the decision-making processes of the local authority; and (c) provide relevant information to Māori for the purposes of (a) and (b).

which provide valuable lessons regarding the success and challenges of governance arrangements.

- 5.6 *Te Tutohu Whakatopu i te Waihora – the Relationship Agreement for Te Waihora (Lake Ellesmere)* between the Ministry for the Environment, Canterbury Regional Council and Te Rūnanga o Ngāi Tahu is another aspect of a shared approach to management of natural resources in Canterbury. Te Rūnanga o Ngāi Tahu has also created the Mahaanui Iwi Management Plan to help guide the decisions of councils and other agencies about environment protection.

Recommendations

- 5.7 Te Rūnanga recommends the following:

- The governance framework must facilitate the ability of iwi to enable their interests being provided for in a contemporary post-settlement framework
- the extent to which iwi participation in decision-making reflects a genuine Treaty partnership must build on the momentum achieved with mechanisms such as Tuia and Te Tutohu Whakatopu i te Waihora.
- We recommend an amended proposal that provides for a 50/50 mix of Ngāi Tahu representation and government appointment representation, alongside elected representation, to better achieve Treaty partnership objectives.
- The values of sustainability and preparing for future generations would lead us to think about ways in which youth perspectives can be included in the design and implementation processes. It might be useful to consider ways to include the expert contribution of specialists such as the Parliamentary Commissioner for the Environment; Whanau Ora Commissioners or the Children's Commissioner in establishment processes.

6. IWI GOVERNANCE AND REPRESENTATION

- 6.1 There is a range of co-governance arrangements across the country that provide more equitable representation for iwi. Precedence set in the Hawkes Bay, Waikato and Te Arawa should serve as benchmarks for future governance arrangements. Recent developments in Taranaki also provide an interesting context for reviewing mechanisms for Maori representation.
- 6.2 As a particular case study it is useful to consider the progress of discussions between the Crown, the Hawke's Bay Regional Council, Tūhoe, and tāngata whenua of Hawke's Bay in the context of Treaty settlement negotiations. These discussions identified a need for greater tāngata whenua involvement in the management of natural resources in the Regional Planning Committee region.
- 6.3 The Hawke's Bay Regional Planning Committee Bill aims to establish a statutory body called the Hawke's Bay Regional Planning Committee as a joint committee of the Hawke's Bay Regional Council and tāngata whenua members. The body would give effect to the commitment made by the Crown, as a form of Treaty settlement redress, in the Ngāti Pāhauwera Deed of Settlement and recorded in the Maungaharuru-Tangitū Hapū Deed of Settlement.
- 6.4 The committee would be a joint one of the Hawke's Bay Regional Council and tangata whenua members. It is intended to provide for nine iwi or hapu groups to have input into the development and review of the regional policy statement and regional plans for the Hawke's Bay Regional Council region.

SECTION B: SPECIFIC COMMENTS ON THE ENVIRONMENT CANTERBURY REVIEW

7. MOST SIGNIFICANT REGIONAL ISSUES (QUESTION 1)

- 7.1 The most significant regional issue for Canterbury is to take appropriate account of the principles of Te Tiriti o Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-making processes.
- 7.2 The role of Ngāi Tahu in governance arrangements, and the opportunity to promote and sustain the positive progress achieved in the relationship symbolised under Tuia, should be referred to. Te Rūnanga would like to see a level of equity around the table not only in the design but also the implementation of the new governance arrangements.
- 7.3 Under the existing governance structure, Papatipu Rūnanga have a single representative at the decision-making table where policy direction is set, performance is monitored and reviewed, national requirements are given effect to and council resources are allocated. This appointment is both at the Minister's discretion in terms of representation and appointment. While an

improvement on past governance practice, Papatipu Rūnanga seek a strengthened role that better reflects the Treaty partnership principle and recognises that the role of the regional council in managing the natural resources of Ka Pakihi Whakateka o Waitaha/Canterbury directly overlaps with the kaitiaki responsibilities of mana whenua.

- 7.4 As identified in the discussion document, improved freshwater management is a key driver for the proposal to enable a proportion of the council to include statutorily appointed governors with particular expertise. Improved freshwater management is also key to resource management policy and aspirations for the region. Achieving that improvement must be done with an equal balance of Ngāi Tahu representation and government appointed experts if the Treaty partnership is to come to life in the region. Te Rūnanga o Ngāi Tahu seeks the authority to appoint the Ngāi Tahu members within the usual processes of appointment employed by our organisation.
- 7.5 Developing a **shared long-term plan** which prioritises the strategic issues facing the region remains a priority. This plan needs to predict future conditions and realities, internal and external, identify optimal arrangements to achieve effective Māori representation, maximize areas of mutual interest and set out form and function of the regional governance. In doing so, it will establish a long-term governance framework which provides a level of certainty for the delivering of the long term plan.
- 7.6 The success of all pathways forward is reliant on **improving the capacity and capability at a regional level**. There needs to be a focus on policy, programmes, and processes to enable and empower iwi capability and capacity with a focus on building on strengths and addressing weaknesses. The quality of leadership, and the willingness to engage is fundamental in underlining effective representation.
- 7.7 We have appreciated the opportunity for consensus decision-making that has distinguished the current arrangements, and have incentivised all parties to work together in the interests of good faith, collaboration and engagement matched to community outcomes.
- 7.8 The government has recognised that iwi have rights and interests in freshwater. In the spirit of good faith the government needs to ensure that this governance model adopted is fit for purpose and provides a platform for the full suite of iwi rights and interests to be recognised from decision-making and management, limit setting and flows and values and relationship to allocation.
- 7.9 Canterbury is facing significant water quality challenges and many catchments are over allocated. Te Mana o te Wai recognises that the health and wellbeing of water bodies must be provided for before any water can be allocated for other purposes. Pragmatic resource management decisions need to be made and mechanisms such as claw back employed to transition

the region to a more sustainable freshwater management model.

Recommendations

7.10 Te Rūnanga recommends the following:

- Te Rūnanga would like to see a level of equity around the table not only in the design but also the implementation of the new governance arrangements.
- Te Rūnanga o Ngāi Tahu seeks the authority to appoint the Ngāi Tahu members within the usual processes of appointment employed by our organisation.

8. GOALS FOR ECAN GOVERNANCE (QUESTION 2)

8.1 The current goals are too narrow in scope and do not reflect the cultural significance of mana whenua in the Canterbury region and the role and responsibilities that come with tangata whenua and their role as kaitiaki. An additional goal needs to be added which reads: *‘Tangata whenua are able to fulfil their kaitiaki responsibilities through cultural leadership and successive generations are nurtured to be strong, vibrant, champions of culture’.*

8.2 In case there is any question about the relevance of cultural capacity to environmental management, the pillars of Ngāi Tahutanga, as identified in the Ngāi Tahu Cultural Strategy, represent the breadth and depth envisaged:

- *Whakapapa*: kinship
- *Tikanga* : protocols and customs
- *Mahi toi*: creative expression
- *Whenua*: landscape, place and locality;
- *Mahinga kai*: food and gathering practices
- *Ngā uara*: values and beliefs
- *Ā kainga*: ā Hapū, ā iwi : community engagement and participation
- *Mana tangata*: self-determination, self-confidence, self-purpose, self-transcendence.

Recommendations

8.3 Te Rūnanga recommends the following:

- An additional goal needs to be added which reads: *‘Tangata whenua are able to fulfil their kaitiaki responsibilities through cultural leadership and successive generations are nurtured to be strong, vibrant, champions of culture’.*

9. IMPORTANCE OF GOALS (QUESTION 3)

- 9.1 All the elements identified as goals are important and must be present, with an active Treaty partnership helping to drive excellence in all areas i.e. leadership, economic growth, environmental stewardship, accountability to communities and financial management.
- 9.2 Papatipu Rūnanga supports the goals being woven into the long-term plan for the regional and supports the marrying of these goals to the extent that they build strong prosperous and resilient iwi, whānui, hapū and communities. Ngāi Tahu are committed to working together in a way that promotes mutual respect, transparency, trust and good faith for the in partnership for the benefit of Ngāi Tahu, other Māori and the wider community.
- 9.3 Robust governance arrangements which provide for the role and contributions of mana whenua are essential to deliver these outcomes. We also expect to see these goals translated across the various levels of the organisation. For example, how are Ngāi Tahu able to contribute to the consent process; how can we ensure that mana whenua expertise is represented on the Planning Committee? It may not necessarily be that Papatipu Rūnanga are specifically included on every committee, but there should at least be the opportunity that if they so choose to participate, that there is an avenue by which to do so. In this regard, we would note that there has been considerable satisfaction from one of our Papatipu Rūnanga with the implementation of the Service Level Agreement², in which dedicated resources and financial momentum has been allocated to give effect to the relationship.

Recommendations

- 9.4 Te Rūnanga recommends the following:
- The goals translated across the various levels of the organisation and workstream management.

10. PROPOSAL FIT FOR CANTERBURY (QUESTION 4)

- 10.1 One of the main drivers for the appointment of Commissioners was the poor relationship between Environment Canterbury and Papatipu Rūnanga. The current proposal is lacking proper recognition of the treaty relationship and important elements to support continued enhancement of that relationship, and more importantly, to improve resource management outcomes of importance to mana whenua.
- 10.2 Papatipu Rūnanga are supportive of elements such as building on the momentum achieved during the period that the Commissioners have been in

² Service Agreements exist between Environment Canterbury and some Papatipu Rūnanga. These agreements canvas environmental matters such as consents, plans, projects and management.

place. However the proposed mixed governance does not provide the confidence that this momentum will continue. Neither does it provide sufficient recognition of the Treaty partnership and is not reflective of other governance arrangements across the country.

10.3 If Canterbury is to continue to play a leadership role in this space there needs to be:

- an equitable governance model that represents the treaty partnership;
- greater accountability of the regional council to iwi and the community;
- the continual evolution of planning framework and processes in a manner which gives effect to tangata whenua and community aspirations whilst reflecting national regulation; and
- greater regional awareness of the commissioners and what they stand for.

Recommendations

10.4 Te Rūnanga recommends the following:

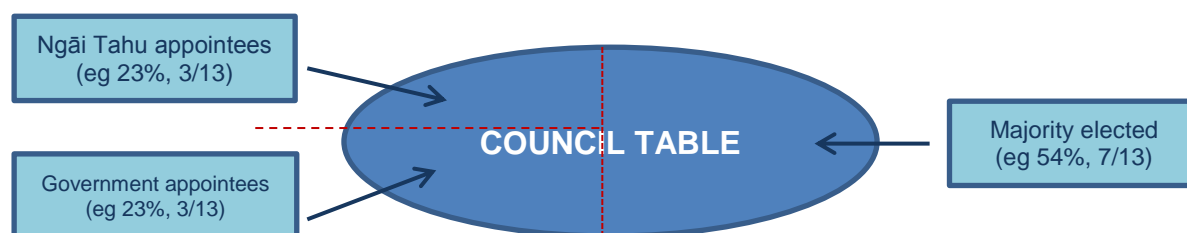
- The development of an equitable governance model; greater accountability of the regional council to iwi and the community the evolution of a planning framework and processes; and greater regional awareness of the commissioners and their roles and function.

11. BETTER GOVERNANCE MODEL (QUESTION 5)

11.1 The proposed mixed governance model does not provide sufficient recognition towards the Treaty partnership. It is considered that the proposal would be a step backwards for Canterbury as a number of other regions have moved towards equitable representation for iwi at a governance level. Instead it is recommended that the mixed model for Canterbury consists of: ***An amended proposal that provides for a 50/50 mix of Ngāi Tahu appointed representation and government appointment representation, alongside elected representation, as per the following diagram would better achieve Treaty partnership objectives.***

11.2 This will ensure Ngāi Tahu are represented at the table (as a Treaty Partner), whilst allowing for positions to be filled through a democratic process. This model lends itself to be most effective in delivering on Environment Canterbury's long terms strategic goals (2012-2022) and would put Environment Canterbury in a leadership role and set the region on a trajectory to meet Canterbury Water Management Strategy targets.

FIG 1: NGĀI TAHU PROPOSED ALTERNATIVE GOVERNANCE MODEL



11.3 As part of this proposal Papatipu Rūnanga representatives expect to have a real voice and influence over all matters pertaining to the natural environment governance and management decision making powers over all areas of importance.

11.4 The Hawkes Bay Regional Planning Committee is a recent example where the 50/50 partnership principle will be applied. There is an opportunity to take a similar approach in the case of Environment Canterbury governance.

Recommendations

11.5 Te Rūnanga recommends the following:

- An amended proposal that provides for a 50/50 mix of Ngāi Tahu appointed representation and government appointment representation, alongside elected representation, as per the diagram above would better achieve Treaty partnership objectives

12. TRANSITION MEASURES (QUESTION 6)

12.1 Adopting a model that better reflects the Treaty partnership principle would require working with Ngāi Tahu to facilitate nominations for appointment within an appropriately agreed framework and timeframe. There must be a requirement for Environment Canterbury to continue the momentum of building a productive relationship with Ngāi Tahu to engage in a constructive and progressive partnership.

12.2 The transition needs to be seamless – the wider community needs certainty that ECan’s progress will be maintained – irrespective of the regulatory framework or who becomes responsible for accountability. There needs to be certainty and continuity. Community confidence would be eroded if the review results in substantive changes to the planning framework and processes already in place.

12.3 Continuity between the terms of the commissioners is critical in addition to the reappointment of a minimum of three commissioners whom have served a prior terms. Continuity will help to ensure that progress that has been made under the reign of Environment Canterbury Commissioners maintains

its momentum. We seek particularly to maintain the clause in the Commission's Terms of Reference and extend it from the current '*seek advice from Te Rūnanga on Ngāi Tahu on issues that impact on Ngāi Tahu*' to '*work in partnership with Te Rūnanga on all issues throughout the region*'.

- 12.4 Key Performance Indicators: The governance framework will require negotiation and agreement of Key Performance Indicators which enable the voice of Ngāi Tahu to be demonstrated in the operational detail. The expectation is that Ngāi Tahu will be involved upfront in the design and development of initiatives; rather than a clip-on after the event. The Key Performance Indicators will be captured within an Annual Work Programme which will bring together both relevant goals from the Freshwater National Policy Statement (Objective D), Te Mana o Te Wai, and Ngāi Tahu strategies.

Recommendations

- 12.5 Te Rūnanga recommends the following:

- The development of Key Performance Indicators which enable the voice of Ngāi Tahu to be demonstrated in the operational detail

13. SPECIAL RESOURCE MANAGEMENT POWERS (QUESTION 7)

- 13.1 Papatipu Rūnanga engage in regional processes in good faith, consistent with the principles of Te Tiriti o Waitangi. Papatipu Rūnanga recognises that the Environment Court has always been a place of last resort. From the Papatipu Rūnanga perspective, this method of decision-making has required processes to be initiated which provide for opportunities for discussion. In many ways, this suits Papatipu Rūnanga as it enables free and frank discussion, rather than proceeding through a legal route. Papatipu Rūnanga are comfortable with the special resource management powers being retained providing both parties are working collaboratively in a co-operative manner to find win-win solutions to integrated water management.

Recommendations

- 13.2 Te Rūnanga recommends the following:

- That the special resource management powers are retained to enable opportunities for discussion leading to informed decision-making.

APPENDIX ONE: TEXT OF CROWN APOLOGY

The following is text of the Crown apology contained in the Ngāi Tahu Claims Settlement Act 1998.

Part One – Apology by the Crown to Ngāi Tahu

Section 6 Text in English

The text of the apology in English is as follows:

- 1 The Crown recognises the protracted labours of the Ngāi Tahu ancestors in pursuit of their claims for redress and compensation against the Crown for nearly 150 years, as alluded to in the Ngāi Tahu proverb ‘He mahi kai takata, he mahi kai hōaka’ (‘It is work that consumes people, as greenstone consumes sandstone’). The Ngāi Tahu understanding of the Crown’s responsibilities conveyed to Queen Victoria by Matiaha Tiramōrehu in a petition in 1857, guided the Ngāi Tahu ancestors. Tiramōrehu wrote:

“This was the command thy love laid upon these Governors ... that the law be made one, that the commandments be made one, that the nation be made one, that the white skin be made just equal with the dark skin, and to lay down the love of thy graciousness to the Māori that they dwell happily ... and remember the power of thy name.”

The Crown hereby acknowledges the work of the Ngāi Tahu ancestors and makes this apology to them and to their descendants.

- 2 The Crown acknowledges that it acted unconscionably and in repeated breach of the principles of the Treaty of Waitangi in its dealings with Ngāi Tahu in the purchases of Ngāi Tahu land. The Crown further acknowledges that in relation to the deeds of purchase it has failed in most material respects to honour its obligations to Ngāi Tahu as its Treaty partner, while it also failed to set aside adequate lands for Ngāi Tahu’s use, and to provide adequate economic and social resources for Ngāi Tahu.
- 3 The Crown acknowledges that, in breach of Article Two of the Treaty, it failed to preserve and protect Ngāi Tahu’s use and ownership of such of their land and valued possessions as they wished to retain.
- 4 The Crown recognises that it has failed to act towards Ngāi Tahu reasonably and with the utmost good faith in a manner consistent with the honour of the Crown. That failure is referred to in the Ngāi Tahu saying ‘Te Hapa o Niu Tirenī!’ (‘The unfulfilled promise of New Zealand’). The Crown further recognises that its failure always to act in good faith deprived Ngāi Tahu of the opportunity to develop and kept the tribe for several generations in a state of poverty, a state referred to in the proverb ‘Te mate o te iwi’ (‘The malaise of the tribe’).

5. The Crown recognises that Ngāi Tahu has been consistently loyal to the Crown, and that the tribe has honoured its obligations and responsibilities under the Treaty of Waitangi and duties as citizens of the nation, especially, but not exclusively, in their active service in all of the major conflicts up to the present time to which New Zealand has sent troops. The Crown pays tribute to Ngāi Tahu's loyalty and to the contribution made by the tribe to the nation.
6. The Crown expresses its profound regret and apologises unreservedly to all members of Ngāi Tahu Whānui for the suffering and hardship caused to Ngāi Tahu, and for the harmful effects which resulted to the welfare, economy and development of Ngāi Tahu as a tribe. The Crown acknowledges that such suffering, hardship and harmful effects resulted from its failures to honour its obligations to Ngāi Tahu under the deeds of purchase whereby it acquired Ngāi Tahu lands, to set aside adequate lands for the tribe's use, to allow reasonable access to traditional sources of food, to protect Ngāi Tahu's rights to pounamu and such other valued possessions as the tribe wished to retain, or to remedy effectually Ngāi Tahu's grievances.
7. The Crown apologises to Ngāi Tahu for its past failures to acknowledge Ngāi Tahu rangatiratanga and mana over the South Island lands within its boundaries, and, in fulfilment of its Treaty obligations, the Crown recognises Ngāi Tahu as the tangata whenua of, and as holding rangatiratanga within, the Takiwā of Ngāi Tahu Whānui.

Accordingly, the Crown seeks on behalf of all New Zealanders to atone for these acknowledged injustices, so far as that is now possible, and, with the historical grievances finally settled as to matters set out in the Deed of Settlement signed on 21 November 1997, to begin the process of healing and to enter a new age of co-operation with Ngāi Tahu."

APPENDIX TWO: NGĀI TAHU TAKIWĀ

