

## **Environment Canterbury (Temporary Commissioners and Improved Water Management) Act**

### **Throwing out the Baby, the Bathwater, or Both?**

Last night (Wednesday 31 March) Parliament passed a new Act ("the Ecan Act"), which has significant and widespread implications for Canterbury. The new Act was passed into law under urgency and as such was not the subject of any Select Committee or formal public input process. The Bill was tabled for the first time at 5.30pm on Tuesday; and was passed without amendment at 8pm on Wednesday.

#### **Key Aspects**

In response to a critical review of Environment Canterbury (The Creech Report), the Ecan Act removes the 14 existing Ecan Councillors, replacing them with between 4 and 7 government appointed Commissioners, led by Dame Margaret Bazley. The Act provides the new commissioners with a range of additional powers as outlined below.

#### **Canterbury Water Management Strategy**

The Act gives statutory weight to the Canterbury Water Management Strategy (CWMS),<sup>1</sup> requiring that all decisions in respect of water have regard to the vision and principles of that Strategy.

The CWMS is a non statutory document, prepared with limited public input and not subject to the usual statutory tests or thresholds, nor the usual processes of review or appeal. This differs from other instruments that are typically considered under the RMA which are subject to well defined legal tests, strict procedural requirements for public participation, and with rights of appeal to the specialist Environment Court.

#### **Moratoria**

Subject to the approval of the Minister, the new Commissioners have been given the power to impose moratoria on applications to take water in respect of any area in Canterbury. Such decision is to be made having regard to the vision and principles of the CWMS, the extent of allocation and demand and the purpose of the Ecan Act.

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<sup>1</sup> The CWMS Vision is:

*To enable present and future generations to gain the greatest social, economic, recreational and cultural benefits from our water resources within an environmentally sustainable framework.*

The CWMS Principles include a general acknowledgement that water is a public resource, but also that a range of potentially mutually exclusive values are required to be taken into account in decision making. The first order priority considerations to guide planning of water use are:

*The environment, customary uses, community supplies and stock water*

The second order priorities are:

*Irrigation, renewable energy electricity generation, recreation, tourism and amenity.*

These provisions effectively elevate the CWMS to the status of a Regional Policy Statement and have the potential to freeze water take applications for an indefinite period. There is no right of review or appeal. In our analysis exercise of this power would have the effect of creating more uncertainty, not less, for those landowners who wish to advance proposals to abstract water. This will affect not only new applications, but also those applications which are currently being processed, but which have not yet been heard or determined.

### **Water Conservation Orders**

The Ecan Act also changes the legal test to be used for the creation, amendment or revocation of Water Conservation Orders in Canterbury. Previously, priority has been given to protection of water bodies that stand out on a national basis. Although WCOs have long been recognised as an important tool this environmental safeguard is substantially weakened by the new legislation. It is arguable that the new legal test results in no meaningful difference between a WCO and a regional plan. This would significantly affect the ability to create the "national park" equivalent on Canterbury's rivers, despite the stronger statutory tool being available to other regions.

The Commissioners will be given processing and decision making powers in respect of WCO applications in Canterbury, removing that role from the Minister-appointed Special Tribunal and the specialist Environment Court.

It is important to recognise that WCOs have never been processed or decided upon by regional councils. As they were created to address issues of national importance, WCOs have always been considered outside of the regional forum (although factors such as integrated management are still relevant to the decision making process). Accordingly, the progress of WCOs is neither aided nor hindered by a particular regional council's capabilities. For this reason it is difficult to reconcile this amendment with the Ecan review. Moreover, if the intent is to streamline Ecan's processes, it seems counter-productive to load this additional processing and decision making burden onto that organisation.

These amendments to the WCO process are particularly critical in respect of the Hurunui WCO. The Environment Court was scheduled to hear this WCO application for 6 weeks starting on 31 May. The process would have been completed by mid July, with a decision issuing soon thereafter. However, the new legislation has removed the Environment Court from the process entirely. Instead, the new Ecan Commissioners, once appointed, will take over.

The WCO applicants will then be given a 30 working day period within which to amend the application in light of the new legal test outlined in the Act. A new public submission period will ensue, despite a full public process having already been undertaken resulting in several hundred submissions.

The Ecan Commissioners will hold a new hearing, and will not be required to take any account of the prior Special Tribunal decision despite that body sitting for 5 weeks in 2009 hearing detailed evidence from all stakeholders. Contrary to the process in other parts of the country, the decision of the Commissioners will not be appealable to the Environment Court but only to the High Court on a point of law.

### **Regional Plans**

The ECan Act also seeks to "fast track" regional plans by revoking appeal rights to the Environment Court. This will affect Canterbury's principal regional plan (the Proposed Natural Resources Regional Plan ("PNRRP")), which has been the subject of lengthy hearings over the past several years but which is not yet the subject of decisions.

Under the Ecan Act the independent commissioners who have sat through those hearings may have their decision making delegations revoked. They would then be replaced by the new Ecan commissioners, or new commissioners with delegated powers, who have the power to issue their own decisions. Although the new commissioners have powers to call a new hearing they are not obliged to do so and instead may simply reach a view based on the submissions and evidence filed to date.

Critically, the basis upon which decisions are to be made is being amended by virtue of the Act to have greater regard to the CWMS. Unless the discretion to order a new hearing is exercised submitters will have no opportunity to address the decision makers on this new criteria

Regional plans are important policy and regulatory documents that generally cover complex technical matters.<sup>2</sup> In our view there is an inherent injustice in amending the process for determining a regional plan two-thirds of the way through the process. Moreover, if there is no appeal right to the Environment Court the initial decision making process must be rigorous. Council hearings are prevented by the provisions of the RMA from allowing cross examination which is in our view an essential tool for testing and confirming the evidence. Accordingly there must be some uncertainty as to whether this amended decision process will result in robust decisions.

## Conclusion

In summary, the Ecan Act introduces significant changes to water related matters in Canterbury. The Act has an immediate impact on anyone who has made an application for a water take or a submission on the PNRRP or the Hurunui Water Conservation Order. In addition the amendments to the WCO process and the curtailing of appeal rights will have significant long term effects throughout Canterbury and nationally.

If you require specific advice on how these changes affect you please contact us.

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<sup>2</sup> note: PC1 to the RPS will not be affected by the legislation as it stands, as the ECan Act only affects an RPS notified by ECan after commencement of the Act.