

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV-2014-485-009890  
[2015] NZHC 805**

UNDER Schedule 5, clause 2(1) of the Local  
Government Act 2002 ("Act")

IN THE MATTER OF an appeal against a decision of the Local  
Government Commission made under  
clause 6(1) of Schedule 3 of the Act to  
decline the reorganisation application

BETWEEN NORTHERN ACTION GROUP  
INCORPORATED  
Appellant

AND THE LOCAL GOVERNMENT  
COMMISSION  
Respondent

Hearing: 30 March 2015

Counsel: N M Pender and P E McMillan for Appellant  
K L Clark QC and T J Power for Respondent

Judgment: 23 April 2015

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**JUDGMENT OF COLLINS J**

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**Summary of judgment**

[1] On 30 June 2014 the Local Government Commission (the Commission) declined to assess a reorganisation application brought by the Northern Action Group Incorporated (the Action Group) to remove "North Rodney" from the Auckland Council (the Application). The Action Group wanted the Commission to accept that North Rodney should become a separate council.

[2] After the Commission declined to assess the Application, the Action Group filed an appeal in the High Court alleging the Commission made four broad legal errors in its decision.

[3] In this judgment I explain why:

- (1) I am allowing the Action Group's appeal and directing the Commission to reconsider its decision because I am satisfied the Commission made a material error of law when it decided it was not in the public interest to assess the Application.
- (2) I have not found it necessary to decide if the Commission erred when it declined the Application because it did not adequately identify the geographical boundaries of the proposed North Rodney Council.
- (3) I have concluded the Commission correctly decided the Action Group had not demonstrated it had community support in the "district of the affected territorial authority" for the Application.

The fourth ground of appeal which alleges bias was not pursued in the hearing conducted before me.

[4] As the Commission will need to take time to reconsider its decision, the Action Group should be afforded the opportunity to address any lingering concerns about the adequacy of the description of the boundaries of the proposed North Rodney Council and demonstrate community support for the Application within the district of the Auckland Council beyond the boundaries of the proposed North Rodney Council.

[5] Before analysing the reasons for my decision, I shall explain:

- (1) the context to the appeal;
- (2) the key relevant legislative provisions;

- (3) the Application submitted to the Commission;
- (4) the Commission’s decision; and
- (5) the grounds of appeal.

## **Context**

[6] In March 2009 a Royal Commission on Auckland Governance (the Royal Commission)<sup>1</sup> recommended the merging of eight councils and the creation of a single Auckland Council. The Rodney District Council was one of the local bodies that the Royal Commission recommended be incorporated into the new Auckland Council.

[7] The recommendations of the Royal Commission formed the basis of the Local Government (Auckland Council) Bill, which was introduced into Parliament on 13 May 2009. That Bill was referred to the Auckland Governance Legislative Committee (the Committee), which recommended the existing Rodney District Council be split into a “South Rodney” area and a “North Rodney” area, with only the former being incorporated into the Auckland Council. The Committee recommended that the North Rodney area be incorporated into the Kaipara District Council.

[8] During the second reading of the Bill the Local Government Minister lodged a Supplementary Order Paper to reinstate North Rodney into the proposed Auckland Council. That proposal was ultimately accepted by Parliament when the statutes creating the Auckland Council were passed in June 2010.

[9] On 10 December 2009 the Local Government (Auckland Law Reform) Bill was introduced into Parliament. That Bill proposed a moratorium on any further reorganisation of the proposed Auckland Council until after October 2013.

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<sup>1</sup> Royal Commission on Auckland Governance *Tē Kōmihana a te Karauna mō te Mana Whakahaere o Tāmaki-makau-rau.*

[10] The Auckland Law Reform Bill was divided into three Acts, all of which received the Royal Assent on 14 June 2010. For these introductory purposes the most significant section that was enacted was s 9 of the Local Government (Auckland Transitional Provisions) Act 2010 which provides:

**9 Prohibition on reorganisation proposals affecting Auckland until after October 2013 triennial general elections**

- (1) No person (including the Minister or the Auckland Council) may make a reorganisation proposal or reorganisation application affecting Auckland for any matter specified in section 24(1) of the Local Government Act 2002 or section 13A of the Local Government (Auckland Council) Act 2009 until after the completion of the 2013 triennial general elections.
- (2) Subsection (1) applies despite subpart 2 of Part 3 and Schedule 3 of the Local Government Act 2002.

(the moratorium).

[11] The Action Group was formed in response to the inclusion of North Rodney in the Auckland Council. The Action Group comprises people who live in North Rodney, a predominantly rural region, and who ardently believe North Rodney has little in common with most of those who live within the district of the Auckland Council's boundaries.

[12] The Action Group waited for the expiration of the moratorium and on 4 November 2013 filed the Application with the Commission.

[13] Over the ensuing seven months the Commission met with representatives of the Action Group and the Auckland Council, and received advice from its Chief Executive Officer (the Chief Executive).

[14] On 30 June 2014 the Commission explained its reasons for not assessing the Application in a 36 paragraph decision. In summary, the Commission declined to consider the Application for three reasons:

- (1) there was insufficient clarity about the boundaries of the proposed North Rodney Council;

- (2) the applicants had not demonstrated community support within the district of the affected territorial authority for the Application outside of the proposed North Rodney Council area; and
- (3) it was not in the public interest for the Application to be considered.

### **Key legislative provisions**

[15] The Commission was created by s 3 of the now repealed Local Government Act 1974. It continues to be a statutory body by reason of s 28 of the Local Government Act 2002 (the Act). The Commission's broad powers include the promotion of good practice in relation to local government.<sup>2</sup>

[16] Section 24AA of the Act was enacted as part of a suite of changes made to the Act in 2012 relating to reorganisation of local government in New Zealand. The responsible Minister explained to Parliament the reasons for the 2012 amendments to the Act. He said:<sup>3</sup>

The fourth area of reform in the bill is the streamlining of local government reorganisation procedures for the union, abolition, and constitution of districts and regions, and the creation of unitary authorities. Currently, such reorganisations can proceed only if they are supported by more than 50 per cent of the votes cast in each affected district or region, and reorganisation involves a long and complex process. This bill will make it easier for communities and local authorities to apply for a local government reorganisation, and it will give the Local Government Commission more flexibility in considering applications. Reorganisation applications will need significant community support before the commission can progress them.

[17] Section 24AA of the Act explains the purposes of the local government reorganisation provisions of the Act in the following way:

#### **24AA Purpose of local government reorganisation**

The purpose of the local government reorganisation provisions of this Act is to improve the effectiveness and efficiency of local government by—

- (a) providing communities with the opportunity to initiate, and participate in considering, alternative local government arrangements for their area; and

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<sup>2</sup> Local Government Act 2002, s 30(2)(b).

<sup>3</sup> (12 June 2012) 680 NZPD 2839.

- (b) requiring the Commission, in consultation with communities, to identify, develop, and implement in a timely manner the option that best promotes good local government.

[18] The objectives of local government reorganisation compliment the broader purposes of local government found in s 10(1) of the Act which provides:

**10 Purpose of local government**

- (1) The purpose of local government is—
  - (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
  - (b) to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

...

[19] Schedule 3 to the Act (the Schedule) was amended as part of the changes made in 2012. The Schedule applies to local government reorganisation.<sup>4</sup>

[20] The Schedule provides that any person, body or group may make a reorganisation application to the Commission.<sup>5</sup>

[21] The contents of a reorganisation application are referred to in cl 5 of the Schedule. The matters which must be included in a reorganisation application include:

- (1) “a plan or other description sufficient to identify the affected area or affected areas ...”,<sup>6</sup> and
- (2) “information that demonstrates that the application has community support in the district of each affected territorial authority”.<sup>7</sup>

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<sup>4</sup> Local Government Act 2002, s 24(2).

<sup>5</sup> Schedule 3, cl 3(1).

<sup>6</sup> Clause 5(1)(c)(ii).

<sup>7</sup> Clause 5(1)(f).

[22] The steps which the Commission must take after receiving a reorganisation application are referred to in cl 6 of the Schedule. The relevant portions of that clause provide:<sup>8</sup>

- (1) As soon as practicable after receiving a reorganisation application, the Commission must –
  - (a) decide whether to assess the application; and
  - ...
  - (c) if the Commission decides to decline to assess the application ... specify the ground or grounds ... on which the application is declined and explain why the ground or grounds apply ...

[23] The Commission may decline to assess a reorganisation application on any one of eight grounds set out in cl 7 of the Schedule. Those grounds include:

- (1) the application does not contain the information required by clause 5(1).<sup>9</sup>

The relevant requirements of cl 5(1) are that a reorganisation application identify the affected area and demonstrate that the application has community support in the district of each affected territorial authority; and that:

- (2) it is not in the public interest to assess the application.<sup>10</sup>

### **The Application**

[24] In August and September 2013 the Action Group conducted meetings and organised a poll of residents in North Rodney. The poll canvassed 1,912 residents of North Rodney, 90 per cent of whom supported the Action Group's proposal that North Rodney cease to be part of the Auckland Council and be governed by a separate council.

[25] On 4 November 2013 the Action Group lodged the Application with the Commission. The Application explained the reasons the Action Group wanted

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<sup>8</sup> Local Government Act 2002, sch 3, cl 6(1)(a) and (c).

<sup>9</sup> Clause 7(b).

<sup>10</sup> Clause 7(h).

North Rodney to become a separate council. Those reasons can be distilled to four key grounds.

[26] First, North Rodney is a rural community with little in common with the large urban communities that comprise the bulk of the Auckland Council district.

[27] Second, the Action Group is concerned North Rodney is not being governed effectively by the Auckland Council, which is focused on its urban constituents.

[28] Third, the North Rodney region comprises 1.7 per cent of the population of the Auckland Council but contributes 3 per cent of the rates collected by the Auckland Council, most of which is spent out of the North Rodney region.

[29] Fourth, the Action Group's concern that since the formation of the Auckland Council, local government services in North Rodney, including road maintenance, have declined.

[30] The Application proposed:

- (1) that a boundary be drawn approximately between the upper tidal reaches of the Makarau River in the west and the Waiwera River in the east. It was proposed that the area north of that boundary currently within the Auckland Council, including Kawau Island, but excluding the south head of the Kaipara Harbour, be the territory of the new North Rodney Council; and
- (2) the North Rodney Council would comprise a mayor and five councillors elected from five wards.

### **The decision**

[31] On 3 December 2013 the Chief Executive of the Commission notified the Auckland Council that the Commission had received the Application.



[32] On 12 December 2013 the Commission considered an initial report from the Chief Executive. The Commission was advised of the issues it needed to consider when deciding whether to decline to assess the Application.

[33] In his initial report the Chief Executive advised:

- (1) that as there was only one territorial authority affected by the Application, namely the Auckland Council, the Action Group had to demonstrate support for its proposal “in the district of the Auckland Council”. The Chief Executive pointed out the Action Group had “only attempted to demonstrate support in the area of the proposed [North Rodney Council] district, not the remainder of [the] Auckland [Council]”.
- (2) the description of the proposed North Rodney Council did not provide sufficient detail to identify the affected area. The Chief Executive suggested the Action Group be required to provide a more detailed description of the boundaries of the proposed North Rodney Council.
- (3) there were no public interest reasons for declining to assess the Application.

[34] The Chief Executive recommended the Commission meet with the Action Group, the Auckland Council and the Rodney Local Board to discuss any issues requiring resolution.

[35] Thereafter there were a series of communications between the Chief Executive and the Auckland Council. The Commission met with the Auckland Council and the Chairman of the Rodney Local Board on 3 February 2014. The Auckland Council opposed the Application. The Commission met representatives of the Action Group the following day and thereafter received further submissions from the Auckland Council and the Action Group, including a comprehensive response from the Action Group dated May 2014 in which the Action Group challenged the Auckland Council’s opposition to the Application.

[36] On 19 June 2014 the Commission considered a further report from the Chief Executive, who recommended the Commission decline to assess the Application.

[37] The recommendations from the Chief Executive to the Commission at this stage contained a material change from the Chief Executive's initial report that had been considered by the Commission on 12 December. In the report considered by the Commission on 19 June 2014 the Chief Executive advised that it was not in the public interest for the Commission to assess the Application.

[38] The Commission's decision of 30 June 2014 declining to assess the Application substantially reflected the advice which it had received from the Chief Executive. There are three key points to the Commission's decision which require emphasis.

[39] First, the Commission recorded that the Application did not contain sufficient information to adequately identify the affected area. However, the Commission explained this deficiency was not in itself a sufficient reason to decline to assess the Application and that an applicant would normally be given the opportunity to correct this shortcoming in an application.<sup>11</sup>

[40] Second, the polls undertaken by the Action Group demonstrated support for its proposal within the North Rodney community. The Commission said, however, "it is not clear ... that this level of support necessarily exists elsewhere in Auckland". The Commission said the Action Group had to demonstrate support for its proposal in the district of the Auckland Council and that as it had failed to do so, the Action Group had failed to satisfy the mandatory criteria set out in cl 5(1)(f) of the Schedule which needed to be established before an application could be assessed. The Commission said it would have given the Action Group the opportunity to remedy this deficiency in the Application if this and the Commission's concerns about the adequacy of the description of the affected area were the only two bases for declining to assess the Application.<sup>12</sup>

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<sup>11</sup> Local Government Commission Decision, 30 June 2014 at [12].

<sup>12</sup> At [35].

[41] The Commission provided a detailed analysis of what it considered to be the elements of the “public interest” requirement in cl 7(f) of the Schedule. The Commission then identified four key reasons why it concluded that it was not in the public interest to assess the Application. Those reasons were:<sup>13</sup>

- Having the Commission assess the application for North Rodney at this time may create confusion and uncertainty for the residents and ratepayers of Auckland. The public of Auckland have relatively recently become part of the current Auckland district, with a single unitary authority responsible for that entire area. Creating such uncertainty at this time could be expected to undermine the Auckland public’s confidence in, and understanding of, the Auckland Council and its district.
- A more general impact on the Auckland Council would be the uncertainty created by the Commission’s assessment of the North Rodney application. For example, the Council in undertaking some of its work streams would almost certainly need to provide for scenarios where North Rodney remains in its district and where it does not (and for any other possible reasonably practicable options that might impact on Auckland Council). This uncertainty would likely create additional work for the Council, and might even delay some of the integration work that is currently being undertaken.
- Assessing the North Rodney application could also impact on some North Rodney residents in an undesirable fashion. Some members of the public in North Rodney are contributing to the Auckland Council’s proposals. For instance, they are engaging in the Council’s consultation process on the Proposed Auckland Unitary Plan and how it impacts on North Rodney. To assess the North Rodney proposal at this time might cause confusion, and potentially deter such members of the public from continuing to engage in the Auckland Council’s proposals. This seems undesirable given the importance of the transformation work being undertaken at this time by the Auckland Council.
- Lastly, having the Commission assess the application at this time would divert some of the Auckland Council’s focus from the task of further integrating the organisation and meeting the requirements of the legislation that established it.

## **The appeal**

[42] A dissatisfied party or the Minister responsible for administering the Act may appeal to the High Court any decision of the Commission on a question of law.<sup>14</sup> The decision of the High Court is final.<sup>15</sup> The powers of the High Court after

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<sup>13</sup> Local Government Commission Decision, above n 11, at [30].

<sup>14</sup> Local Government Act 2002, sch 5, cl 2(1).

<sup>15</sup> Clause 2(3).

hearing an appeal are set out in r 20.19 of the High Court Rules.<sup>16</sup> Those powers include the jurisdiction to make any direction which the High Court believes should have been made and directing the Commission to reconsider its decision.

[43] In *Bryson v Three Foot Six Ltd*, the Supreme Court discussed what amounts to a question of law for appeal purposes.<sup>17</sup> The Supreme Court has revisited this topic on other occasions such as in *R v Gwaze*<sup>18</sup> and *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*.<sup>19</sup> From these and other authorities, and for present purposes, the Commission may have made an error of law if it:

- (1) applied the wrong legal test;<sup>20</sup>
- (2) reached a factual finding that was “so insupportable – so clearly untenable – as to amount to an error law”;<sup>21</sup>
- (3) came to a conclusion that it could not reasonably have reached on the evidence before it;<sup>22</sup>
- (4) took into account irrelevant matters; or
- (5) failed to take into account matters that it should have considered.

[44] The Action Group’s three grounds of appeal that were pursued before me were helpfully distilled by Ms Pender, senior counsel for the Action Group, to the following three questions of law.

[45] First, whether in declining to assess the Application as being “not in the public interest”, the Commission:

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<sup>16</sup> Local Government Act 2002, sch 5, cl 2(3).

<sup>17</sup> *Bryson v Three Foot Six* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]-[27].

<sup>18</sup> *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [50].

<sup>19</sup> *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [5].

<sup>20</sup> *Bryson v Three Foot Six Ltd*, above n 17, at [24].

<sup>21</sup> At [26].

<sup>22</sup> *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC); *May v May* (1982) 1 NZFLR 165 (CA).

- (i) acted outside its powers by effectively extending a statutory moratorium and/or prohibiting a reorganisation application affecting Auckland for an indeterminate period;
- (ii) misconstrued the nature of the decision-making power under cl 6(a) of the Schedule; and
- (iii) took into account irrelevant considerations (the impact on Auckland Council) or conversely, failed to weigh these considerations against other relevant considerations (the impact on local democracy and community empowerment in North Rodney).

[46] Second, whether when finding that the Application did not contain a sufficient description of the proposed district to identify the boundaries of the affected area, the Commission misinterpreted and/or misapplied the statutory criteria in cl 5(1)(c)(ii) of the Schedule.

[47] Third, whether when finding that the Application did not contain sufficient information that demonstrates that the Application has community support in the district of the Auckland Council, the Commission misconstrued:

- (i) the statutory criteria in cl 5(1)(f) of the Schedule;
- (ii) the interrelationship between cls 5(1)(f), 8, 24 and 25(1) of the Schedule; and
- (iii) the definition of ‘affected area’ as it relates to the Application.

[48] Ms Clark QC, senior counsel for the Commission, accepted the Commission’s decision speaks for itself. However, because the statutory provisions relevant to the appeal have not previously been tested in the High Court, Ms Clark structured her submissions to assist me in understanding the legislative framework under which the Commission functions. In the absence of any contradictor, Ms Clark’s submissions also provided a sound basis to assess the merits of the Action Group’s appeal.

[49] In addition, the Commission filed a report dated 24 October 2014. This was done pursuant to sch 5, cl 5 to the Act following directions made by Mallon J on 1 September 2014 at the request of the Action Group. In that report the Commission answered a series of questions that had been posed by the Action Group.

## **Reasons for decision**

### **First ground of appeal**

[50] As I have explained in paragraph [45] of this judgment there are three limbs to the first ground of appeal.

#### *First limb*

[51] The first limb of the first ground of appeal alleges the Commission acted outside of its statutory powers when it declined to assess the Application. The essence of this aspect of the Action Group's case is that Parliament imposed the moratorium to address the issues that the Commission relied upon when deciding it was not in the public interest to assess the Application and that the Commission effectively extended that moratorium indefinitely.

[52] As part of its case, the Action Group points to the four reasons advanced by the Commission when it said it would not be in the public interest to assess the Application. Those reasons can be summarised as being the Commission's concern that assessing the Application might create confusion and uncertainty as well as direct resources from integrating the Auckland Council.

[53] The first limb of the first ground of appeal alleges the Commission effectively extended the moratorium indefinitely.

[54] I do not think this aspect of the Action Group's appeal is correct. In its decision the Commission stated:<sup>23</sup>

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<sup>23</sup> Local Government Commission Decision, above n 11, at [30].

Having the Commission assess the application for North Rodney *at this time* may create confusion and uncertainty for the ratepayers of Auckland.

(Emphasis added)

The Commission's decision to decline to assess the Application was for the time being. It was not a decision that would last indefinitely. I accept, however, the Commission could have made this aspect of its decision clearer.

[55] There is, however, a more fundamental flaw in the first limb of the first ground of appeal.

[56] While the moratorium had the effect of excluding any reorganisation application for three years, it does not automatically follow that the Commission was required to assess a reorganisation application in relation to Auckland upon the expiration of the moratorium. Instead, Parliament conferred upon the Commission the jurisdiction to decline to assess a reorganisation application on one or more of the eight grounds specified in cl 7(a)-(h) of the Schedule.

[57] In this case, the Commission considered whether or not it was in the public interest to assess the Application at that time. The public interest assessment required a careful contextual analysis. Provided the Commission undertook a proper assessment of the public interest it would not have exceeded its statutory powers by declining to assess the Application notwithstanding the Application was filed after the expiration of the moratorium prescribed by Parliament. This point leads logically to the second and third limbs of the first ground of appeal.

#### *Second limb*

[58] The second limb of the first ground of appeal alleges the Commission misconstrued the nature of its decision-making power under cl 6(a) of the Schedule.

[59] The essence of the second limb of the Action Group's first ground of appeal is that cls 6 and 7 of the Schedule are screening provisions. The Action Group says applications for reorganisation of local government should be accepted for assessment other than in exceptional circumstances. The Commission was therefore

required to interpret the meaning of “public interest” in cl 7(h) of the Schedule in the context of declining to assess applications only in exceptional circumstances.

[60] Allied to this is the Action Group’s submission that the Commission failed to determine to assess the Application “as soon as practicable” as required by cl 6 of the Schedule. Instead of deciding “as soon as practicable” to assess the Application, the Action Group submits the Commission erroneously engaged in a merits based inquiry which led the Commission into taking into account irrelevant considerations.

[61] I agree with the Action Group that the statutory grounds to decline to assess a reorganisation application must be exceptional. In addition, the grounds for declining to assess an application must be clear and compelling. This approach reflects the following legislative provisions.

[62] First, the purpose of local government, as set out in s 10 of the Act includes enabling “democratic local decision-making and action by, and *on behalf of, communities ...*” (emphasis added).<sup>24</sup> The reference to “communities” in s 10(1)(a) of the Act underscores the clear legislative intention that communities be the focal point of the way local government is organised.

[63] Second, a purpose of the 2012 local government reorganisation provisions of the Act was to provide “communities with the opportunity to initiate, and participate in considering, alternative local government arrangements for their area ...”.<sup>25</sup> The amendments made to the Act in 2012 reflect Parliament’s intention that communities be more empowered to influence the basis upon which local government is reorganised.

[64] Third, cls 6(a) and 7 of the Schedule require the Commission to promptly decide whether to assess a reorganisation application. The criteria for declining to assess a reorganisation application are carefully prescribed in cl 7 and focus upon circumstances in which it is clearly inappropriate for the Commission to waste

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<sup>24</sup> Local Government Act 2002, s 10(1)(a).

<sup>25</sup> Section 24AA(a).



valuable time and public resources in considering an application which is plainly inappropriate.

[65] The term the “public interest” is a notoriously difficult term to define. It was once described by the Court of Appeal as a “yardstick of indeterminate length”.<sup>26</sup> While its limits are almost impossible to discern,<sup>27</sup> the term is frequently found in statutes and judicial decisions, and has been the subject of sustained academic debate.<sup>28</sup> What is clear is that when the term the “public interest” is found in a statute its meaning must be determined from the context in which it is used.

[66] The public interest criterion for declining to assess a reorganisation application involves a high threshold. The Commission recognises this in its publication on local government reorganisation guidelines.<sup>29</sup> At footnote 5 of that document the Commission says:

The term “public interest” is not defined in the Act. It is possible that situations will occur from time to time where it would be prudent for the Commission to consider applying the “public interest” criteria as the reason to decline to assess an application. This could apply to an application that is valid but where the circumstances make it inadvisable to proceed with an assessment. An example is a region or city/district that has been exposed to a natural disaster or other circumstance where local government reorganisation could not reasonably be considered in the short to medium term.

[67] The Commission should not decline to assess a reorganisation application on public interest grounds unless the reasons for doing so are obvious and compelling. This reflects the fact that declining to assess a reorganisation application has the effect of denying communities the opportunity to “participate in considering, alternative local government arrangements for their area ...”, which Parliament clearly provided for in s 24AA(a) of the Act.

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<sup>26</sup> *Attorney-General v Car Haulaways (NZ) Ltd* [1974] 2 NZLR 331 (CA) at 335.

<sup>27</sup> The term “public interest” or slight variations thereof, can be found in approximately 1450 sections in over 375 statutes and has been referred to 328 times in Court of Appeal and Supreme Court judgments over the past 15 years.

<sup>28</sup> For an insightful overview of the various viewpoints see E McLeay “The Public Interest in New Zealand” in M Francis and J Tully (eds) *In the Public Interest: Essays in Honour of Professor Keith Jackson* (Cambridge University Press, Christchurch 2009) at 25-33.

<sup>29</sup> “Local Government Reorganisation Guidelines: An overview of the new statutory processes to assist those wishing to make an application to reorganise local authority structures, responsibilities or boundaries”, Local Government Commission, Wellington, January 2013.

*Third limb*

[68] The third limb to the first ground of appeal alleges the Commission took into account an irrelevant consideration, namely the impact upon the Auckland Council of assessing the Application.

[69] The Action Group says that even if the Commission was able to take into account the impact of assessing the Application on the Auckland Council, the Commission also needed to consider the impact of not assessing the Application on the ability of the North Rodney community to influence and participate in its own local government arrangements.

[70] I agree with this aspect of the Action Group's appeal. In my assessment, while the legislation does not preclude the Commission from notifying affected local authorities of a reorganisation application, the legislation appears to contemplate the Commission will consult with affected local authorities after it decides to assess a reorganisation application. Support for this can be derived from two legislative provisions.

[71] First, cl 6(d) of the Schedule provides that "if the Commission decides to assess the application, [it must] notify the affected local authority of its decision".

[72] This is the first reference in the Schedule to the Commission notifying an affected local authority that it has received a reorganisation application. It is significant the Commission is only required to notify affected local authorities of a reorganisation application after the Commission has decided to assess the application.

[73] Second, cls 6 and 7 of the Schedule put in place a screening mechanism to enable the Commission to promptly determine whether or not to assess a reorganisation application. A decision to decline to assess a reorganisation application can only be made when the criteria for declinature set out in cl 7 of the Schedule are clearly satisfied. This leads to the conclusion that the Commission should be extremely hesitant to consult with an affected local authority at the screening stage prescribed in cls 6 and 7 of the Schedule. As has happened in this

case, engaging in extensive consultation with the affected local authority before deciding whether or not to assess a reorganisation application risks the Commission engaging in a merits assessment at the preliminary stage of its inquiries.

[74] The second and third limbs of the Action Group's first ground of appeal are substantially correct. In this case, rather than making a prompt evaluation of whether there were clear and obvious public interest grounds for declining to assess the Application, the Commission allowed itself to become engaged in an initial assessment of the merits of the Application. In doing so the Commission conflated its preliminary screening function with the task it should have undertaken once it had decided to assess the Application. It is ironic the Chief Executive was probably correct when he said in his initial assessment that there were no public interest reasons for declining to assess the Application.

[75] The Commission misapplied the public interest criterion set out in cl 7(h) of the Schedule. Instead of making an initial decision on whether there were clear and obvious public interest reasons for not assessing the Application, the Commission allowed itself to become engaged in a consideration of the merits of the Application and the arguments advanced by Auckland Council for opposing the Application. This meant the Commission took into account irrelevant considerations and in doing so made a material error of law.

[76] I had considered substituting the Commission's decision with the decision which I believe it should have made in the circumstances of this case. However, there are other issues raised by the Commission that the Action Group should be given the opportunity to address. Those issues are canvassed under the second and third grounds of appeal. In addition, the Commission is an expert authority with intimate knowledge of the workings of the Act and local government issues. In these circumstances, I believe the appropriate course is for me to remit the decision back to the Commission for it to reconsider the Application in light of the contents of this judgment.

## **Second ground of appeal**

[77] The second ground of appeal alleges the Commission erred when deciding the Application did not contain a sufficient description of the district of the proposed North Rodney Council to identify the boundaries of the affected area.

[78] The Action Group accepts the Application contained a map with only a “broad description of the proposed new district”. The Action Group explains in its submissions however that the proposed southern boundary would revert to the same ward line that applied when the district was part of the Rodney County Council. In other words, the Action Group is proposing a southern boundary that previously existed and a northern boundary that is currently the northern limit of the Auckland Council.

[79] It would be surprising if this revised description of the proposed boundaries was not sufficient to “identify the affected area” as required by cl 5(1)(c)(ii) of the Schedule. However, the Commission noted that its concerns about the adequacy of the description of the affected area was not determinative of its decision to decline to assess the Application.

[80] As I have previously explained I am remitting the Application back to the Commission for further consideration. I would expect if there are any lingering issues about the adequacy of the description of the affected area the Commission will explain its concerns to the Action Group and provide a reasonable opportunity to remedy any deficiencies to this aspect of the Application.

[81] The course of action I am taking renders it unnecessary for me to determine the second ground of appeal.

## **Third ground of appeal**

[82] The third ground of appeal alleges the Commission erred in law when it concluded the Application did not contain sufficient information that demonstrated the Action Group’s proposal had community support in the district of the Auckland Council.

[83] The Commission accepted the Application had demonstrated adequate support in the North Rodney area for the proposed reorganisation. What is in issue is whether the Commission erred in law when it said that it required evidence demonstrating “that this level of support” existed elsewhere in Auckland.

[84] Pivotal to the third ground of appeal is the meaning of cl 5(1)(f) of the Schedule which specifies a reorganisation application must include “... information that demonstrates that the application has community support in the district of each affected territorial authority”.

[85] The Action Group says that a district as large and diffuse as that which is governed by the Auckland Council comprises many “communities”. From this position the Action Group submits there is no requirement in the Act to obtain support from every community within an affected district and that it is sufficient for the Application in this case to have established support from those in the North Rodney area.

[86] The Action Group points to the definition of “affected area” in cl 2 of the Schedule.<sup>30</sup>

[87] The Action Group says the area of the proposed North Rodney Council is an affected area within the meaning of paragraph (a) of the definition of “affected area”, and that the area of the Auckland Council is not an “affected area” under any limb of that definition.

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<sup>30</sup> **affected area**, in relation to a reorganisation application, draft proposal, or final proposal, means—

- (a) an area that would be included in the district or region of a new or different local authority if local government in relation to the area were to be reorganised in accordance with the reorganisation application, draft proposal, or final proposal:
- (b) an area that remains in the district or region of a local authority, but the local authority’s responsibilities would be changed if local government in relation to the area were to be reorganised in accordance with the reorganisation application, draft proposal, or final proposal:
- (c) the area comprising the whole district or region of an affected local authority if the Commission has declared it to be an affected area because the operational scale, scope, or capability of the local authority would be materially affected if local government were to be reorganised in accordance with the reorganisation application, draft proposal, or final proposal:
- (d) in the case of a local board reorganisation application, or a draft proposal or final proposal resulting from such an application, the area comprising the whole district of the affected unitary authority.

[88] The Action Group also refers to the definition of “affected” in s 5 of the Act. That provision states:

**affected,—**

- (a) in relation to a local authority, means a local authority whose district or region is or contains an affected area:
- (b) in relation to a territorial authority, means a territorial authority whose district is or contains an affected area.

[89] The Action Group accepts the Auckland Council is an “affected territorial authority”. However, the Action Group also says that as North Rodney is currently part of Auckland City, evidence of support from that area is all that is required to establish support in the “district of [the] affected territorial authority”.

[90] The Action Group stresses that cl 5 of the Schedule is a preliminary provision. Issues relating to community support only become pertinent once the Commission decides to assess a reorganisation application. Some support for this approach can be derived from cl 8 of the Schedule. The first part of that clause reads:

**8 Community support**

- (1) If the Commission decides to assess a reorganisation application, the Commission must first be satisfied that there is demonstrable community support in the district of each affected territorial authority for local government reorganisation in the affected area.

...

[91] Clause 8 then proceeds to specify the matters which the Commission may consider for the purpose of sub-cl 8(1).

[92] The Action Group submits that the ultimate test of community support occurs when a final proposal is issued by the Commission. Affected electors can demand a poll to determine whether the final proposal should proceed, by presenting a petition signed by at least 10 per cent of “affected electors” enrolled in the “district of a

territorial authority”.<sup>31</sup> If a poll is conducted, only electors within the “affected area” are eligible to vote.<sup>32</sup>

[93] In summary, the Action Group submits there is no need for it to demonstrate community support outside of North Rodney in order to comply with cl 5(1)(f) of the Schedule.

[94] In my assessment, this aspect of the Action Group’s appeal is not correct. My reasons for reaching this conclusion can be stated succinctly.

[95] There was only one territorial authority affected by the Application, namely the Auckland Council. The Application was defective because it demonstrated support only in the area of the proposed North Rodney Council and not community support in the district of the Auckland Council.

[96] Parliament’s intention when it passed cl 5(1)(f) of the Schedule was that applicants for reorganisation need to demonstrate community support in the district of the affected area, not simply one subsection of the district of the affected area. If Parliament had intended that an application for reorganisation needed to only demonstrate support in the district of the proposed new local authority it would have said so in cl 5(1)(f) of the Schedule.

[97] In this case the issue for the Commission was whether the polls undertaken by the Action Group demonstrated support in the district of the Auckland Council. This required the Action Group to demonstrate community support for the Application within the district of the Auckland Council within and beyond the boundaries of the proposed North Rodney Council.

[98] In my assessment, the Commission’s approach reflected a proper understanding of the statutory criteria.

[99] I appreciate that the plain language of cl 5(1)(f) of the Schedule may seem inappropriate in the circumstances of the present case where the area governed by

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<sup>31</sup> Local Government Act 2002, sch 3, cl 24(2).

<sup>32</sup> Clause 25(1).

Auckland Council is large and diverse. It is conceivable that many people living within the district of the Auckland Council would have little to no knowledge of North Rodney. Nevertheless, the language of cl 5(1)(f) of the Schedule is plain. The Action Group will need to demonstrate community support for its reorganisation application within the district of Auckland Council within and beyond the boundaries of the proposed North Rodney Council.

### **Conclusion**

[100] The appeal is allowed on the basis the Commission erred in law when it decided it was not in the public interest to assess the Application.

[101] The Commission is to reconsider its decision in light of this judgment. Before doing so the Commission should afford the Action Group a reasonable opportunity to:

- (1) address any lingering concerns the Commission may have about the description of the boundaries of the affected area; and
- (2) demonstrate that the Application has community support in the district of the Auckland Council beyond the boundaries of the proposed North Rodney Council.

[102] The Action Group has succeeded in relation to the main part of its appeal but it has also failed in relation to the third ground of appeal. I believe the most appropriate course is for the Action Group to be awarded two-thirds of the costs payable on a scale 2B basis.

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**D B Collins J**

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