IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2018-485-013
[2020] NZHC 830

BETWEEN	NORTHERN ACTION GROUP INCORPORATED (NAG) Appellant
AND	THE LOCAL GOVERNMENT COMMISSION Decision Maker

Hearing: 30 September 2019 – 1 October 2019

Appearances: J Gardner-Hopkins and H Gladwell for Appellant
B Davies and B Milne for the Decision Maker

Judgment: 28 April 2020

JUDGMENT OF GRICE J
(Appeal against decision of Local Government Commission)

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Introduction

[1] This is an appeal against a decision of the Local Government Commission (the Commission) following an inquiry into local government arrangements for the geographic region covered by the Auckland Council area (the affected area). This incorporates Auckland city as well as more rural areas including the Rodney region, north of Auckland. The appellant, Northern Action Group Incorporated (Northern Action) is made up of residents from the Rodney region. It appeals against the Commission's decision to retain the status quo for the affected area.[1]

[2] Northern Action made an application to the Commission for the North Rodney region to have its own Unitary Authority. The application triggered a wide-ranging inquiry by the Commission into local government for the Auckland Council area. That process took place over approximately a two-year period.[2] In November 2017 the Commission determined that the local government arrangement already in place, with Auckland Council remaining as the local government authority for the affected area was the preferred option.

[3] Northern Action had filed its application with the Commission following the expiry of a moratorium on applications for local government reorganisation in the Auckland Council area. This moratorium had been put in place following a substantial local government reorganisation in the Auckland area which had resulted in the establishment of the Auckland Council and the abolition of individual local authorities for various areas, including Rodney. The previous local authority was one which was merged into the new Auckland Council. A local board was established for Rodney following that reorganisation.[3]

[4] Northern Action's initial local government reorganisation application was lodged in 2013 but was rejected by the Commission. The application was

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1 Our Waiheke also lodged an appeal to this Court against the final decision of the Commission as it affected Waiheke Island. However, it has since abandoned that appeal.

2 The Commission decided to commence the assessment following a reorganisation application made by Northern Action on 13 August 2015.

3 Local boards are unique to Auckland Council. Established under the Local Government (Auckland Council) Act 2009. Their purpose was to allow for democratic decision making for local communities and to better enable the purpose of local government to be given effect to within the local board area.s.10.

subsequently accepted by the Commission following a successful appeal by Northern Action.[4]

Appeal principles

[5] The appeal from the Commission's decision is limited to a question of law as follows:[5]

> **2 Appeal to High Court**
>
> (1) If a party to proceedings before the Commission or the Minister is dissatisfied with a decision of the Commission in the proceedings as being erroneous in point of law, the party or the Minister may appeal to the High Court on the question of law.
>
> (2) The decision of the High Court on the appeal is final.
>
> …

[6] Collins J in earlier proceedings in this matter summarised what amounted to a question of law for present purposes:[6]

> [43] In *Bryson v Three Foot Six Ltd*, the Supreme Court discussed what amounts to a question of law for appeal purposes.[7] The Supreme Court has revisited this topic on other occasions such as in *R v Gwaze*[8] and *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*.[9] 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;[10]
>
> (2) reached a factual finding that was "so insupportable – so clearly untenable – as to amount to an error law";[11]
>
> (3) came to a conclusion that it could not reasonably have reached on the evidence before it;[12]
>
> (4) took into account irrelevant matters; or

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4 *Northern Action Group v Local Government Commission* [2015] NZHC 805, [2005] 3 NZLR 538 ["*NAG v LGC* [2015]"].
5 Local Government Act 2002, sch 5, cl 2.
6 *NAG v LGC* [2015], above n 4, at [43].
7 *Bryson v Three Foot Six* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]-[27].
8 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [50].
9 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50]-[58].
10 *Bryson v Three Foot Six Ltd*, above n 7, at [24].
11 At [26].
12 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153; *May v May* (1982) 1 NZFLR 165 (CA).

(5) failed to take into account matters that it should have considered.

[7] Procedural errors historically associated with judicial review may amount to a point of law in an appeal.[13]

[8] The Supreme Court in *Vodafone*[14] suggested that the issue was whether the decision maker misinterpreted what was required by the legislation. In addition, if what was done was so misconceived that it was clearly wrong and an unlawful decision an appeal would succeed. This might be where there was no evidence to support the decision, or the true and the only conclusion contradicts the decision.[15] However, that is rare. That the Court would have reached a different conclusion of itself does not allow interference on appeal if the decision on appeal was a permissible option. This presents a very high hurdle.[16]

[9] A question about facts and the evidence or the inferences and conclusions drawn from them by the decision maker may sometimes amount to a question of law. However, as this Court said in *Marris*:[17]

> It is not, however, every allegation of a lack of factual basis or incorrect or inappropriate inferences or conclusions from the evidence which will turn the issue of fact into a question of law. In other words, it is not sufficient merely to allege that there is no sufficient evidence as has been done in the case, to raise the point of law.

[10] In a similar vein the Court of Appeal in *Chorus Ltd v Commerce Commission* warned that:[18]

> In the absence of a right of general appeal it is not the role of the Court in an appeal on a question of law to undertake a broad reappraisal of the Commission's factual findings or the exercise of its evaluative judgments.
>
> …

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13 *Kawarau Jet Services Holdings Ltd v Queenstown Lakes District Council* [2015] NZHC 2343 at [45], contemplating a breach of natural justice.

14 *Vodafone v Telecom NZ Ltd,* above n 9, at [50].

15 At [52].

16 *Bryson v Three Foot Six Ltd*, above n 7, at [27].

17 *Marris v Ministry of Works and Development* [1987] 1 NZLR 125 at 127. This decision related to similar provisions in the predecessor to the Resource Management Act 1991, the Town and Country Planning Act 1977. See also *Northern Action Incorporated v Local Government Commission* [2018] NZHC 2823 ["*NAG v LGC* (2018)"] at [68]–[70].

18 *Chorus Ltd v Commerce Commission* [2014] NZCA 440 at [112].

[11] I now turn to the issues on appeal.

Issues on appeal

Bias parked

[12] Northern Action was not legally represented until the substantive hearing. Two of its officers lodged the appeal and spoke on its behalf in the earlier stages of this appeal.[19]

[13] By agreement between Northern Action and the Commission reached shortly after the filing of the appeal, the points on appeal alleging bias and related matters were "parked". These included allegations that the Commission had given preference to or had favoured Auckland Council's views. This was the procedure also followed in the earlier appeal.[20]

Remaining grounds

[14] Mr Gardner-Hopkins for Northern Action reformatted the remaining grounds of appeal under four headings as follows:[21]

> **a. Failure to have regard to the purposes of the local government reorganisation provisions**
>
> Did the Commission err in failing to have regard to the purpose of the local government reorganisation provisions as stated in section 24AA?
>
> **b. "Reasonably practicable options"**
>
> Did the Commission err in its interpretation of its requirement to identify "the reasonably practicable options" under clause 11(2), or otherwise fail to discharge that requirement?

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19 These officers, Messrs Foster and Townsend appeared in interlocutory applications. *NAG v LGC* (2018), above n 17, at [136].

20 *Northern Action Group v Local Government Commission* HC Wellington CIV-2018-485-013, 1 September 2014 (Minute). *NAG v LGC* (2015), above n 4.

21 The grounds of bias and predetermination and preferential treatment of Auckland City were the fourth and sixth issues. These grounds have been "parked". Therefore, I have not referred to those in this decision.

c. Procedural error/failure to take into account APR report

Did the Commission breach the requirements of natural justice and/or otherwise err in refusing to accept and therefore failing to have regard to the APR report?[22]

d. Failure to have regard to information provided by the applicant/failure to give reasons for discounting it

Did the Commission err in failing to have regard to and/or failing to explain the intellectual route taken to discounting information provided by the appellant or otherwise before the Commission?

[15] The decision maker, the Local Government Commission, was established under the Local Government Commission Act 1967 and continues under the Local Government Act 2002 (the Act).[23] The Commission carried out the inquiry under the relevant provisions of the Act.

[16] I note that since the hearing, the Act has been amended by the Local Government Act 2002 Amendment Act 2019. That Amendment Act replaced ss 24AA and 34 and repealed, replaced and amended parts of sch 3.[24] Those provisions are central to this judgment and were in place at all material times during the Commission's decision-making process. All references to the Local Government Act 2002 from this point of the judgment will therefore refer to the Act as at 18 October 2019 (before the amendments in the 2019 Amendment Act).

The Local Government Commission

[17] The Commission is a statutory body with special expertise in local government matters. Its members are appointed for their experience and expertise in local government and related matters.[25]

[18] It is an administrative body and is not expected to act throughout its inquiry as a judicial body in the strict sense.[26] It has a wide discretion as to the manner in which

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22 The APR report is a report commissioned by Northern Action from consultants.
23 Local Government Commission Act 1967 and Local Government Act 2002, s 28.
24 Local Government 2002 Amendment Act 2019, ss 8 and 31.
25 Sections 28 and 33 (membership).
26 Kenneth Palmer *Local Authorities Law in New Zealand* (Brookers, Te Whanganui-a-Tara Wellington, 2012) at [1.9.1], citing *Green Island Borough Council v Local Government Commission* (1987) 7 NZAR 106 (HC) at 109.

it conducts an inquiry. It can set its own procedures and sit with open or closed doors.[27] The Commission must follow the prescribed statutory processes for consultation, objections and conducting hearings.

[19] The Commission is deemed to be a Commission of Inquiry under the Inquiries Act 2013[28] and has broad information gathering powers under the Commission of Inquiries Act 1908[29] as well as the Local Government Act. However, under the Act (as at 18 October 2019) the Commission does not need to give the opportunity to be heard to any party who has an interest in the inquiry apart from any interest in common with that of the public.[30]

[20] The Commission pointed out that there was no special engagement required of the Commission with original applicants, in this case Northern Action, beyond the statutory notice requirements.

[21] Ms Davies for the Commission submitted that the Commission had natural justice obligations to the whole community and could not lawfully single out one party for inclusion in its processes.

[22] The Commission must act in a manner consistent with its functions[31] and regulate its own procedure, except where provided in the Act.[32] It must ensure that its activities are conducted efficiently and effectively and in a financially responsible manner.[33] The Commission may seek input from those it considers have specialist

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27 Edward Haughey and Edward Fairway *Royal Commissions and Commissions of Inquiry* (AR Shearer Government Printer, Te Whanganui-a-Tara Wellington, 1974) at 31.

28 Inquiries Act 2013, s 38(2)(b) and sch 1. The Commission was also explicitly deemed a Commission of Inquiry in s 34 of the Local Government Act 2002 (as at 18 October 2019).

29 The Commissions of Inquiry Act includes powers to receive as evidence any statement, document, information, that may assist it to deal effectively with the subject of the inquiry (s 4B); as well as summon witnesses and investigate, through requiring production of, and through the inspection of examination of, any papers, documents, records or things (s 4C).

30 Local Government Act 2002 (as at 18 October 2019), s 34(1). All sections except ss 2, 4A and 11 to 15 of the Commissions of Inquiry Act 1908, ss 4-15 applied to the Commission. Section 4A provides that any party or person with an interest in the inquiry apart from that of the public generally must be given an opportunity to be heard and may for that purpose appear by counsel.

31 Local Government Act 2002, sch 4, cl 6(2)(a).

32 Schedule 4, cl 13.

33 Schedule 4, cl 6(2)(b) and (c). See also cls 16 and 29 as to any officers of the Public Service and the Commission Chief Executive Officer.

knowledge or are likely to be of assistance and may engage such consultants as it considers appropriate.[34]

Decision and supporting papers

[23] The final decisions on the reorganisation were made by the Commission at its meeting on 10 November 2017. At the meeting it made the final selection of reasonably preferred options and determined the preferred option.

[24] The decisions and supporting reasons were published as a comprehensive set of decision papers. The Commission said it aimed for the decision papers to provide a complete picture of the reasons for its decisions. It says this provided for transparency of its analysis and allowed the decisions to be understood. The decision papers comprised the following:[35]

(i) a brief formal "decision" containing the conclusions (tab 1);

(ii) minutes of the meeting of 10 November 2017 (tab 2);

(iii) an Options paper headed: Auckland reorganisation process: decision on the reasonably practicable options and the preferred option (tab 3) and various appendices (tabs 4 to 8) containing the following appendices:

(iv) Appendix A – comment on financial analysis;

(v) Appendix B – Morrison Low report entitled Local Government Commission Auckland Reorganisation Process: Auckland Options Assessment dated 20 October 2017;

(vi) Appendix C – Peer Review Panel Minutes;

(vii) "Community of Interest Study – Rodney" dated November 2017;

(viii) "Community of Interest Study – Waiheke" dated November 2017; and

(ix) "Community Support Initiative Report" by Department of Internal Affairs, dated October 2017.

[25] The Options paper sets out the reasons for the decisions and the detailed material supporting those is contained in the appendices. It is formatted as an advice

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34 Schedule 4, cls 16(1) and (2).
35 *NAG v LGC* (2018), above n 17, at [78]-[79].

paper, but the Commission said it had been developed as a series of drafts following discussion and input by Commissioners. The final paper was reviewed, considered and deliberated upon by all Commissioners. It was the subject of agreement by all Commissioners and provides the primary reasons paper for the decisions.

[26] The Commission was required to give notice of its final determination and reasons to each applicant (including alternative applicants) and every affected local authority. In addition, it publicly notified the decision on 30 November 2017. The decision papers included the reasons and conclusions for the selection of the reasonably preferred options although there was no statutory requirement to do so nor to give notice of that selection.

Local Government reorganisation provisions purpose (s 24AA)

[27] In 2012 the Local Government Act was amended to include provisions intended to effect better participation of communities in the initiation, participation and consideration of local government arrangements in their areas.[36] To this end sch 3 of the Act was amended. This schedule has the heading Reorganisation of Local Authorities and sets out the provisions relevant to local government reorganisation applications.[37]

[28] The purpose of the reorganisation provisions was set out at s 24AA. As mentioned above, the 2019 amendments replaced s 24AA. The provision in s 24AA of the Act as at 18 October 2019 is as follows:[38]

> **24AA Purpose of local government reorganisation provisions**
>
> The purpose of the local government reorganisation provisions of this Act is to improve the effectiveness and efficiency of local government by –
>
> (i) Providing communities with the opportunity to initiate, and participate in considering, alternative local government arrangements for their area; and
>
> (ii) Requiring the Commission, in consulting with communities, to identify, develop, and implement in a timely manner the option that best promotes good local government.

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36 Local Government Act 2002 Amendment Act 2012, s 11 and 36.
37 Local Government Act 2002, s 24(2).
38 Local Government Act 2002 (as at 18 October 2019), s 24AA.

[29] The 2012 amendments to sch 3 included inserting provisions for the initiation by, and the participation and consultation of communities in the reorganisation application process. For instance, it permitted anyone to make a reorganisation application where previously only the Local Authority, the Minister or the authority of a petition signed by at least 10 per cent of the electors in the affected area could initiate a reorganisation inquiry.[39]

[30] Northern Action submits that the thread running through the purpose provisions of the Act is one of democracy and community involvement. The relevant purpose sections are:

> **3 Purpose**
>
> The purpose of this Act is to provide for democratic and effective local government that recognises the diversity of New Zealand communities; and, to that end, this Act—
>
> (a) states the purpose of local government; and
>
> (b) provides a framework and powers for local authorities to decide which activities they undertake and the manner in which they will undertake them; and
>
> (c) promotes the accountability of local authorities to their communities; and
>
> (d) provides for local authorities to play a broad role in promoting the social, economic, environmental, and cultural well-being of their communities, taking a sustainable development approach.
>
> …
>
> **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 promote the social, economic, environmental, and cultural well-being of communities in the present and for the future.

[31] I now turn the process for inquiry into the reorganisation in this case.

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[39] Local Government Act 2002 (as at 1 October 2012), sch 3, cl 1(1).

The nature of the inquiry into Local Government reorganisation

[32] The Commission is effectively a permanent Commission of Inquiry for local government reform. Once the Commission decides to assess an application for reorganisation of local government arrangements in an area it must follow the provisions set out under sch 3 of the Local Government Act 2002. A reorganisation outcome may involve one or more of a number of options, including the abolition of a local authority and/or the constitution of a new local authority for a district or region.[40]

[33] The legislative provisions required the Commission to call for alternative proposals and then it move to identify "reasonably practicable options". The Commission was then required to determine the final "preferred option".[41]

[34] The Commission was required to have regard to specified matters set out in sch 3, cl 11 in selecting the reasonably practicable options. Insofar as relevant this provided:

> **11 Commission to determine preferred option**
>
> (1) As soon as practicable after the deadline for the receipt of alternative applications, the Commission must, in accordance with this clause, determine its preferred option for local government of the affected area.
>
> (2) The Commission must first identify the reasonably practicable options for local government of the affected area.
>
> (3) In deciding the extent to which it identifies the reasonably practicable options, the Commission must have regard to–
>
> (a) the scale and scope of the changes proposed; and
>
> (b) the degree of community support for relevant applications that has been demonstrated to the Commission; and
>
> (c) the potential benefits of considering other options; and
>
> (d) the desirability of early certainty about local government arrangements for the affected area.
>
> (4) The reasonably practicable options–

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40 Local Government Act 2002 (as at 18 October 2019), s 24(1)(b) and (c).

41 Schedule 3, cl 11.

(a) must include the existing arrangements for local government; and

(b) may include–

(i) the proposals in the application made under clause 3,

(ii) the proposals in an alternative application made under clause 10; or

(iii) options other than those referred to in paragraph (1) and subparagraphs (i) and (ii), formulated by the Commission; or

(iv) a combination of aspects derived from 2 or more of the options referred to in paragraph (a) and subparagraphs (i) to (iii).

(5) The Commission must be satisfied that any local authority proposed to be established or changed under a reasonably practicable option will–

(a) have the resources necessary to enable it to carry out effectively its responsibilities, duties, and powers; and

(b) have a district or region that is appropriate for the efficient performance of its role as specified in section 11;[42] and

(c) contain within its district or region 1 or more communities of interest, but only if they are distinct communities of interest; and

(d) in the case of a regional council or unitary authority, enable catchment based flooding and water management issues to be dealt with effectively by the regional council or unitary authority.

(6) For the purposes of subclause (5), the Commission must have regard to–

(a) the area of impact of the responsibilities, duties, and powers of the local authorities concerned; and

(b) the area of benefit of services provided; and

(c) the likely effects on a local authority of the exclusion of any area from its district or region; and

(d) any other matters that it considers appropriate.

…

[42] Section 11 of the Act relates to "Role of local authority" to give effect to the purposes of s 10 and to perform the duties and exercise the rights conferred by the Act or any other enactment.

(7) In deciding whether any proposed charges are reasonably practicable, the Commission may–

(a) request further information from applicants and affected local authorities; and

(b) undertake any investigations and make any inquiries that the Commission considers appropriate.

(8) If the Commission identifies 2 or more reasonably practicable options, the Commission must determine its preferred option, having regard to–

(a) …

(b) the criteria in clause 12(1) in any other case.

The Commission's approach

[35] The inquiry was initiated by Northern Action's application and proposal for alternative local government relating to the Rodney region. On 14 April 2016, the Commission declared the Auckland Council district was the affected area for the purposes of the reorganisation application. This was a decision which dictated the extent of the inquiry and the manner in which the Commission approached it.[43] This included not only Rodney but also a number of other communities.

[36] From there the Commission's process was staged with each of the steps in the process building on information gained from earlier stages. It called for alternative applications and released a summary of those. Included was the alternative proposal by Northern Action for a North Rodney Unitary Authority which varied from its original in terms of governance by the addition of five community boards.[44]

[37] The Commission's approach which then followed was summarised in my earlier decision as follows:[45]

> [31] The Commission released a summary of the alternative applications in July 2016. …
>
> *The long list*

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43 Northern Action's appeal against the affected area decision was dismissed in *NAG v LGC* (2018), above n 17, at [56] and [62].

44 At [105] of this judgment sets out the table of comparative differences between the models for a North Rodney Unitary Authority.

45 *NAG v LGC* (2018), above n 17.

> [32] The Commission then went into a period of extensive information gathering and consultation undertaking public meetings, workshops and surveys. It released a "long list" of reasonably practicable options for reorganisation of local government in the affected area.
>
> [33] Following the development of the long list, the Commission appointed the consultants Morrison Lowe (ML) to assist it. Further consultation and information gathering followed. ML undertook the analysis of the options and produced a report entitled "Auckland Options Assessment". A draft of the report was released to the 39 alternative applicants/proposers as well as the local authorities on 20 July 2017. Feedback on the report was sought by way of submissions and a meeting with relevant parties.
>
> [34] A peer review panel and independent consultancy firm were appointed to undertake a peer review and a technical review of the ML report following feedback. A further survey on community support for various options for reorganisation was undertaken by UMR (an independent research company for the Commission). On 20 October 2017, the ML report was updated in light of feedback. The Commission also finalised the Communities of Interest studies for Rodney and Waiheke areas.

[38] Opportunities for participation by relevant communities, including the Rodney community, occurred at various stages. The major engagement with the communities occurred in the public engagement phase which ran from September to December 2016.

[39] This involved online surveys, public meetings and drop-in centres hosted by the Commission in the Rodney community as well as in other communities. Submissions were received orally as well as in writing. This process allowed for communities across the affected area (the Auckland Council area) to participate in the consideration of alternative local government arrangements.

[40] Northern Action's proposed model, that it refers to as the "community empowerment model", was available online throughout the process as part of the information provided for the public engagement process. A full copy of the proposal and the other alternative applications were available by clicking on a link contained in the pamphlet on the Commissions website.

Community involvement

[41] The focus under the Act is on broad community engagement in reorganisation inquiries. The Commission submitted that the statutory processes to achieve this were set out in the legislative provisions which dealt with:

(a) the point at which persons, bodies or groups may submit alternative reorganisation applications;

(b) empowering the Commission to make its own inquiries and undertake whatever investigations it considers appropriate at various stages of the reorganisation application process;

(c) express provision for the point at which consultation with specified groups is mandatory;

(d) provision for requesting further information as needed from applicants and affected local authorities; and

(e) specifying when public notification of Commission decisions and/or invitations to participate must occur as well as notification to specific groups (such as the applicant or affected local authorities).

[42] The Commission says that it followed the statutory provisions. This included initiating the inquiry on the application by Northern Action, calling for alternative inquiries, and undertaking an information gathering and public engagement process which involved the public in all communities within the affected area including Rodney. It gathered information and received submissions from not only Northern Action and other applicants but a range of sources including other stake holders such as local authorities and community organisations. The Commission also reviewed publicly available research reports and information as well as obtaining expert advice and assistance from internal and external advisors.

[43] The Commission submitted that sch 3 of the Act sets out the provisions by which the purpose set out in s 24AA was to be effected. It says that the separate parts

of the reorganisation inquiry process will not achieve all of the purposes of initiation, participation and consultation, but the provisions taken together did achieve the purpose. The Commission says the provisions set in sch 3 must be considered as a whole. They include:

(i) Stage one: initiating a reorganisation process (cls 3–8);[46]

(ii) Stage two: identifying the Reasonably Practicable Options (RPOs) and a preferred option for local government (cls 9–13);[47]

(iii) Stage three: developing the reorganisation proposal (cls 14–22);[48]

(iv) Stage four: polls by affected electors (cls 23–32);[49]

(v) Stage five: transition processes (cls 33 – 40);[50] and

(vi) Stage six: reorganisation schemes (cl 41s – 54).[51]

[44] In this case the Commission decided that the preferred option was the status quo, therefore the inquiry did not progress beyond stage two to stages three to six.

[45] The Commission says that, following the public engagement process which had involved the Rodney community as well as Northern Action, it selected a long list of possible reasonably practicable options which it assessed with the assistance of consultants, Morrison Low. Those consultants produced a report titled The Auckland Reorganisation Process: Auckland Options Assessment, containing the analysis which was sent in draft to all stakeholders. Submissions on the report were considered following which the Commission made adjustments to the information it considered from the report. It then deliberated to make the final selection of reasonably practicable options and determined the preferred option.

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46 Local Government Act 2002 (as at 18 October 2019), sch 3, cls 3–8.
47 Local Government Act 2002 (as at 18 October 2019), sch 3, cls 9–13.
48 Schedule 3, cls 14–22.
49 Schedule 3, cls 23–22.
50 Schedule 3, cls 33–40.
51 Schedule 3, cls 41–54.

[46] The Commission involved all local communities, not just Rodney, in the public engagement process. One of the reasonably practicable options included in its analysis was a variation on Northern Action's proposed North Rodney Unitary Authority. The final selection of two reasonably practicable options did not include a separate Unitary Authority for Rodney but it did include an option which involved increasing the number of local boards in Rodney to two. It was mandatory to include the status quo in the reasonably practicable options[52] and the Commission determined it was the preferred option.

Appeal issue: failure to have regard to the purpose

[47] Northern Action says the Commission failed to have regard to the purpose of the local government reorganisation provisions as set out in s 24AA of the Act.

[48] In summary the failures alleged are: first, a general failure by the Commission to refer to or demonstrate it had considered the legislative purpose in s 24AA;[53] and secondly, that the Commission failed to allow the participation of Northern Action in the consideration of arrangements in terms of the purpose (s 24AA(a)) or to consult as required under s 24AA(b).[54]

[49] The first general category requires a consideration of the purpose of the reorganisation provisions and statutory purposes generally.

The statutory purpose

[50] The purpose of a statute is relevant to its interpretation. The Supreme Court in *Commerce Commission v Fonterra* put it as follows:[55]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general

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52 Local Government Act 2002 (as at 18 October 2019), sch 3, cl 11(4)(a).
53 First Issue above, (a), (b), (e) and (f) respectively.
54 First Issue above (d).
55 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36 (footnotes omitted).

> legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[51] If the statutory language is plain it may not be necessary to resort to the purpose.[56] At the same time, the decision maker must exercise its powers to promote the statutory purpose. The Courts however are reluctant to interfere with the approach an expert decision maker takes to meeting the purposes of legislation.

[52] The Supreme Court in *Unison Networks*[57] noted that the Commerce Commission's powers were broadly expressed and designed to achieve economic objectives which were expansively expressed. In the context of judicial review, the Supreme Court said:[58]

> [51] Public bodies must exercise their statutory powers in accordance with the statutes which confer them. If they make decisions that are outside the limits of their powers they abuse them. The courts control any misuse of public power through judicial review.
>
> [52] It is unnecessary in this case to attempt a comprehensive description of all circumstances in which the exercise of a statutory power will amount to an abuse. Two conventional instances have been raised for consideration. The first is where the power is exercised for a purpose that is not within the contemplation of the enabling statute. The second, to which we will return, is where the decision-maker applies the wrong legal test in exercising the power.
>
> [53] A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision-maker "so uses his discretion as to thwart or run counter to the policy and objects of the Act".[59] A power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.[60]
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> [54] Ascertaining the purpose for which a power is given is an exercise in statutory interpretation which is not always straightforward. This is partly because legislative regimes differ in the specificity with which they grant powers. In this area the courts are concerned with identifying the legal limits

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56 *Davidson v Registrar of Companies* [2011] 1 NZLR 542 (HC) at [99].

57 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42.

58 At [51]–[55].

59 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] UKHL 1, [1968] AC 997 at 4, 1030 per Lord Reid.

60 *Attorney-General v Ireland* [2002] 2 NZLR 220 (CA) at [42] and [43] and *Poananga v State Services Commission* [1985] 2 NZLR 385 (CA) at 393–394.

> of the power rather than assessing the merits of its exercise in any case. They must be careful to avoid crossing the line between those concepts.
>
> [55] Often, as in this case, a public body, with expertise in the subject matter, is given a broadly expressed power that is designed to achieve economic objectives which are themselves expansively expressed. In such instances Parliament generally contemplates that wide policy considerations will be taken into account in the exercise of the expert body's powers. The courts in those circumstances are unlikely to intervene unless the body exercising the power has acted in bad faith, has materially misapplied the law, or has exercised the power in a way which cannot rationally be regarded as coming within the statutory purpose.

[53] Like the Commerce Commission, the Local Government Commission is a public body with broadly expressed powers to inquire into and determine in its case local government arrangements. It must act within the limits of its statutory powers and exercise its powers to promote the policy and objects of the Act.

Consideration of purpose

[54] Mr Gardner-Hopkins for Northern Action submitted that as well as complying with the statutory provisions for reorganisation applications the Commission was required to refer to the purpose in s 24AA and to turn its mind to or explain how it had taken that purpose into account in its process and decision making. He submitted that the failure was akin to a failure to take into account mandatory considerations.

[55] In support of that submission, he pointed to cases involving appeals from resource management decisions where the Courts had indicated that a decision maker needed to consider and be seen to consider the purpose of the Resource Management Act 1991.[61] The relevant purpose in those cases was a matter which was specifically required to be taken into account in the statute.[62] That is not the case here.

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61 *Shirley Primary School & Anor v Christchurch City Council* [1999] NZRMA 66 (EnvC). This approach to the ultimate question was endorsed by the Court of Appeal in *Ngāti Rangi Trust v Genesis Power Ltd* [2009] NZCA 222, [2009] NZRMA 312 at [23].

62 Section 104 of the Resource Management Act 1991 sets out what a consent authority must have regard to when considering a resource consent. These considerations are expressly subject to pt 2 of that Act which contain the governing principles. The Supreme Court in *Environmental Defence Society v King Salmon* [2014] NZSC 38 at [30] recognised the statutory intention that s 5 and pt 2 of the Act underpinned all resource management decisions.

[56] Mr Gardner-Hopkins also pointed to *Ashburton Acclimatisation Society.*[63] That case was an appeal from a Planning Tribunal's decision on a conservation order. The appellant in the High Court (Federated Farmers) had members interested in taking water for irrigation which would have been jeopardised by the conservation order. It argued primacy should not have been given to conservation. Federated Farmers said the Tribunal should have undertaken a balancing act between conservation and the other factors mentioned in the Water and Soil Conservation Act 1967 including the needs of primary industry.

[57] The High Court allowed the appeal on the basis that the Planning Tribunal had not acted correctly in law by placing primacy on conservation. However, the Court of Appeal upheld the Tribunal's decision. It pointed out that a special object had been inserted in the Water and Soil Conservation Act 1967 in 1981 which gave conservation primacy. The Court of Appeal pointed out that Parliament had taken the unusual step of declaring a special object in the Act and that accorded significance to conservation by specifically referring to the preservation of the natural character of waters.[64]

[58] Even if the purpose in s 24AA was a mandatory consideration it did not need to be specifically referred to in the decision. In *Man O'War Station Ltd*[65] the High Court noted that the failure of the Environment Court to expressly make a finding on a mandatory consideration was not fatal. A reference to the mandatory consideration was not necessary as long as the decision was reached with the statutory purpose "firmly in view". The High Court said:[66]

> [23] I accept there is no express requirement that a consent authority must in considering an application for resource consent make a specific finding in relation to s 5 of the Act...
>
> [24] I am satisfied, however, that the Environment Court reached its decision with s 5 "firmly in view" and in exercise of an overall broad judgment. …
>
> [25] I conclude that, for those reasons the Court did not err in law in failing to make a specific finding in relation to s 5. I reject the first ground of appeal.

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63 *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc* [1988] 1 NZLR 78 (CA).

64 *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc* [1988] 1 NZLR at 87 (footnotes omitted).

65 *Man O'War Station Ltd v Auckland Regional Council* [2011] NZRMA 235 (HC).

66 At [23]-[25] (footnotes omitted).

[59] Where legislation is definitive as to procedure the Courts have often regarded the enactment as expressing all the procedural rights to the exclusion of common law rights.[67] For instance where there is a multi-stage process with a detailed procedural code the Courts will not infer a duty to allow a hearing at stage one when the enactment does not do so, but does contain an express requirement for a hearing at a later stage.[68] The Commission submits that in this case the statutory provisions relating to reorganisation applications are intended to achieve the matters set out in the purpose in s 24AA.

[60] Additionally, the Commission notes that while it did not refer to the s 24AA purpose in its decision it had, following the 2012 amendments, published a simplified guide to the processes adopted to meet the provisions of the Act and the purpose of s 24AA. Its "Guide to Reorganising Local Government" remained available on its website throughout its reorganisation inquiry.[69] The preparation and publication of this guide by the Commission and its availability on the website indicates the Commission was alive to the s 24AA purpose at the time of its inquiry and decision making

[61] The Commission in its decision papers expressly noted the general legislative purposes. For instance, it referred to the role of a local authority as set out in ss 10 and 11 of the Act and the reference in that section to the purpose of Local Government.[70] It said:

> 68. Section 11 states the Council's role is to give effect to the purpose of local government in section 10 and perform the duties, and exercise the rights, conferred on it by or under this Act and any other enactment. Section 10 states the purpose of local government is to enable democratic decision-making by, and on behalf of, communities; and to meet current and future needs of communities for good-quality local infrastructure, local public services and regulatory functions in the most cost-effective way for households and business.

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67 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [87]-[88]. In that case the statutory provisions covering use of confidential information were held to allow limited scope for imposition of common law duties of procedural fairness in commercial contracting by the defendant.

68 Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Te Whanganui-a-Tara Wellington, 2018) at 576.

69 Mana Kāwanatanga a Rohe Local Government Commission "Local government reorganisation" <www.lgc.govt.nz>.

70 Local Government Act 2002 (as at 18 October 2019 and in the current version), ss 10 and 11.

[62] The s 24AA purpose sets out the intended purpose of the local government reorganisation provisions as follows:[71]

> The purpose of the *local government provisions of the Act* is to improve the effectiveness and efficiency of Local Government by: …

[63] The Commission did not need to refer to s 24AA in its decision. The wording of the purpose is an expression of intention as to the outcome of the application of the legislative provisions. The Commission was required to apply those provisions in its inquiry and decision making. The purpose did not add an additional overlay of mandatory requirements on the Commission. At the same time the Commission was required to bear in mind that purpose as it applied the relevant provisions of the Act. It could not act in a manner which would thwart or counter the policy and objects of the Act including the purpose as set out in s 24AA.

[64] The wording of s 24AA does not impose a statutory mandatory consideration in the same way as the special object set out in the Water and Soil Conservation Act did in *Ashburton Acclimatisation Society*. In that case the object inserted in the Act to recognise and sustain waters in their natural state created primacy of that factor over others.[72] Whereas the relevant provisions referred to in s 24AA for the initiation, participation and consultation of communities in the reorganisation process are largely set out in sch 3 of the Act.

[65] A further point under this ground of appeal raised by Northern Action was that the public engagement process which ran from September to December 2016 was a legal consultation process on its proposal. It says that the Commission failed in its consultation obligations in that regard.

Consultation or Engagement?

[66] Northern Action says that a consultation obligation was imposed as a result of the reference in section 24 AA (b) to consulting with communities.[73] In addition it argues that the Commission, by undertaking the public engagement process, was

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71 Section 24AA. (Emphasis added).
72 Water and Soil Conservation Amendment Act 1981, s 2.
73 Local Government Act 2002 (as at 18 October 2019), s 24AA(b).

committed to a legal consultation process on the Northern Action proposal. This obligation it says was reinforced by some references by Commission staff to the process as being one of consultation. It says that the process as a consultation on Northern Action's Unitary Authority proposal was defective at law

[67] The exact requirements of consultation in any case are fact dependent and will vary considerably depending on the circumstances. The leading case in New Zealand remains *Wellington International Airport Ltd v Air New Zealand.*[74] In that case the Court of Appeal noted the observations of the Privy Council in *Port Louis Corporation v Attorney-General of Mauritius:*[75]

> Their Lordships were referred to observations made in regard to consultation and certain decided facts … Helpful as the citations were, the nature and object of consultation must be related to the circumstances which call for it.

[68] The Commission says the public engagement process was not called a consultation process nor was it intended to be a legal consultation process on the Northern Action proposal. The Commission said in its summary of feedback published following the public engagement process:

> The purpose of the engagement was to hear from the Auckland community, particularly residents and/or ratepayers of Rodney and Waiheke Island, about Auckland local government arrangements.

[69] The Commission contrasted the public engagement process with the statutory obligation on it to consult on a draft proposal for reorganisation which is required at a later stage of a reorganisation process. Schedule 3 of the Act sets out the details of that consultation process which lists the bodies, including the applicant, which must be consulted and the nature of the material to be provided to them in the process. The Commission in that consultation process is required to consider each submission and may hold a hearing.[76]

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74 *Wellington International Airport Ltd v Air New Zealand* (1993) NZLR 671 (CA).

75 At 674 citing *Port Louis Corporation v Attorney-General of Mauritius* (1965) AC 1111, [1965] 2 WLR 67 at 1124.

76 Local Government Act 2002 (as at 18 October 2019), sch 3, cl 20.

[70] The Commission says this process was a wide-ranging public engagement across the affected area which gave all local communities the opportunity to make submissions on issues concerning local government arrangements. Members of the communities were provided with relevant information but that was not limited to the Northern Action proposal. The questions set out in the pamphlet were general to enable it to obtain wide feedback but the submitters were not limited to making their comments based on the questions.

[71] Northern Action says the questions put out by the Commission in the process should have included some related directly to its proposal of a Unitary Authority for Rodney.

[72] The circumstances here related to local government arrangements in the Auckland area. It was not restricted to the Rodney community or the Northern Action proposal. The Commission needed to engage with and consider the feedback from each community involved including North Rodney and it was not required to limit the inquiry to proposals made. It was with that in mind that the Commission undertook the public-engagement process. A pamphlet it published for use in the engagement process indicates the nature of the process.

Pamphlet

[73] The pamphlet entitled "Local Government in Auckland. What do you think?" contained relevant information for submitters to consider. It was published on the Commission's website and distributed by the Commission. It was made to available to the public and to the local communities.

[74] The pamphlet was available in electronic form as well as hard copy and referred to and was linked to the Commission's website for further information. It noted that the Commission sought the views of the communities on local government arrangements in the affected area being the Auckland Council area. The pamphlet outlined the process it intended to follow and the need for it to identify reasonably practicable options for local government in the Auckland Council area. It contained an electronic link and reference to the alternative proposals which included a full copy of the Northern Action amended proposal for a North Rodney Unitary Authority. The

pamphlet set out a number of questions to encourage feedback about local government. It specifically stated that submissions were not limited to responses to those questions. The questions were:

1. What do you like about the way council services are delivered in your local area now?

2. Is there anything about the way council services are delivered in your local area that you would like to change?

3. Do you think there would be any advantages in changing local government arrangements in Auckland?

4. Do you think there would be any disadvantages in changing the current local government arrangements in Auckland?

5. How satisfied are you with your ability to influence decision-making about issues that affect your local area?

[75] The engagement by the Commission with the relevant communities included drop-in centres and face-to-face community meetings at venues in the various community areas as well as an online questionnaire. Meetings and drop-in centres were held in the Rodney community area as well as in the other Auckland communities.

Summary of feedback

[76] The results of the feedback from the public engagement process were collated and published in March 2017.

[77] The summary included a specific section on the Rodney area. The summary noted that the feedback indicated that many people in the Rodney area felt they had little or no ability to influence Council decision making about issues that affected their local area. Also noted was the dissatisfaction with some aspects of the existing local government arrangements. Suggestions were put forward to strengthen local influence such as better representation by increasing ward members and giving the local board more power and responsibility.

[78] The engagement revealed that many people thought improvements could have been made to local government arrangements in Auckland to reflect the local needs of more isolated and/or rural areas in Auckland. However, there was a wide variety of

views about what improvements were needed and how they could be achieved. For example, some suggested a separate council for their local area while others wanted the benefits of being part of Auckland but supported enhancements to the existing local board arrangements.

[79] The summary noted that while the submissions included criticisms of the status quo there was also support for it. One response expressed concern that changing arrangements would lead to higher local body rates and less service.

[80] In its summary of feedback on public engagement process the Commission noted that some common themes emerged which it summarised as follows:

> Theme 1. Local government that enables local influence and an effective role indecision-making
>
> Theme 2. Local government that reflects the local context, identity and values
>
> Theme 3. Local government that communicates well and is responsive
>
> Theme 4. Local government that delivers fair rates
>
> Theme 5. Local government that is financially responsible and sustainable
>
> Theme 6. Local government that supports efficient and effective governance
>
> Theme 7. Local government that is transparent and accountable to ratepayers
>
> Theme 8. Local government that delivers quality roading and transport

[81] There was no specific requirement to engage or consult with Northern Action or affected parties, other than Auckland Council, beyond giving it notice of the preferred option.[77] In particular the Commission was not under any legal obligation to consult on the narrow issue of Northern Action's proposal. However the Commission made the proposal available as part of the information for purposes of the public engagement.

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[77] The Commission has no obligation to provide any party interested in the inquiry beyond the public with an opportunity to be heard. The Commission is a commission of inquiry, but Section 4A of the Commissions of Inquiries Act specifically does not apply to the Commission. That section provides that any party or person with an interest in the inquiry apart from that of the public generally must be given an opportunity to be heard and may for that purpose appear by counsel.

[82] I do not consider that the fact that some staff in passing described the process as a consultation is necessarily an error. It was a wide and general engagement and could be described as a general consultation to obtain views on local government issues and problems and obtain input into options for reorganisation arrangements.

[83] The Commission's inquiry was a broad inquiry and not a consultation on a specific proposal. It was not nor was it required to be a narrow consultation on a proposal or the alternative applications.

[84] The information the Commission provided referred to the alternative applications and made full copies of those available including the Northern Action proposal. Adequate information about the process and the issues involved in the reorganisation inquiry including Northern Action's proposal was provided or made available to enable submitters to adequately inform themselves in order to make useful responses. Given the nature of the process involved nothing further was required.[78]

Other engagement with Northern Action

[85] At the outset of the inquiry the Commission had suggested to Northern Action that they enter a Memorandum of Understanding setting out the process for engagement for the inquiry. However, Northern Action declined to be involved in that arrangement following the Commission's proposal that Auckland Council be a party. That Council would be the local authority affected by any change in local government arrangements. While this memorandum did not eventuate it shows a willingness on the part of the Commission to engage with Northern Action in various ways.

[86] Northern Action was regularly involved in discussions with the Commission and made submissions at various stages of the process. This included submissions on the long list and the proposals for the analysis and assessments of reasonably practicable options as well as the analysis of the options contained in the draft report.

[87] In December 2016, following consideration of the feedback from the community engagement process, the Commission approved a list of potential

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[78] As stated earlier, issues relating to bias or pre-determination as may relate to the obligation to consult have been "parked".

reasonably practicable options. In March 2017 the Commission staff and consultants met with, among others, Northern Action on the modelling and assumptions to be used for the assessment of the potential reasonably practicable options.

[88] On 20 July 2017 the draft report, "Auckland reorganisation process: Auckland Options Assessment" prepared by Morrison Low was circulated to interested parties including to Northern Action, seeking feedback and submissions. Northern Action asked for underlying data, some of which was supplied but some was not on the basis that it was confidential.[79] Northern Action met with the Commission and consultants about the draft report in August 2017. On 7 September following the grant of an extension of two weeks at Northern Action's request, it sent its submissions on the report to the Commission. This was some seven weeks after the draft report had been sent out.

[89] The Commission had used Auckland Council costs as a basis for estimating the costs of providing local services to the North Rodney area and for calculating the likely financial impact of a North Rodney Unitary Authority. That Unitary Authority was included in the potential reasonably practicable options analysed. It was a variation on Northern Action's proposal formulated by the Commission

[90] Following submissions on the report by Northern Action the Commission had initiated a peer review of the report by an expert local government panel on the reasonableness of the key assumptions in the report. In addition, it tested the integrity and accuracy of the logic contained in the financial model used by commissioning an independent international consultancy firm to review the report. It included relevant information from those reviews in its decision and included an appendix on the technical financial model review.[80] As a result of those reviews the Commission made material adjustments which decreased the costs of the relevant unitary authority modelled.

[91] The Commission also obtained further survey information on community support and moved into its final deliberations. It had indicated during the community

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79 *NAG v LGC* (2018), above n 17, at [91]–[115].
80 Decision Paper, [31]–[37]. Appendix A.

engagement that it intended to deliver its decision on the preferred option in the second half of 2017. It made a final selection of two reasonably practicable options and from those determined the preferred option on 10 November 2017.

[92] One of those reasonably practicable options, was to establish two local boards for Rodney.[81] The other was the status quo which became the preferred option.

[93] A further point that Northern Action raised was that the Commission refused its request to participate in the Commission's deliberations.

[94] The Commission was entitled to receive its experts, consultants and staff advice in confidence, exchange views and deliberate in confidence. It was the Commission which was required to identify, develop and implement in a timely manner the option that best promoted good local government.[82] In short it was the Commission's job to make the decisions and it was not required to include third parties in its deliberations.[83] Northern Action had no right to participate in the Commission's deliberations.

[95] The Commission demonstrated it did consider the submissions made by Northern Action. It was not required to consult in a narrow legal sense on the Northern Action proposal. Its community engagement processes supported the s 24AA purpose by giving communities the opportunity to participate in the consideration of alternative local government arrangements and enabled consultation to the extent necessary with the communities in the identification of options that best promote local government. As no change was required the Commission did not embark on the legislative provisions for the development and implementation of a new local government arrangement. The statutory provisions relating to consultation on a proposal were not engaged until and unless a change in local government was determined as the preferred option.

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81 Local boards are unique to Auckland Council. Established under the Local Government (Auckland Council) Act 2009. Their purpose was to allow for democratic decision making for local communities and to better enable the purpose of local government to be given effect to within the local board area.s.10. Rodney already had one local board.

82 Section 24AA.

83 *NAG v LGC* (2018), above n 17, at [96].

[96] I now turn to consider Northern Action's allegation that the Commission wrongly excluded its proposed model of a Northern Rodney Unitary Authority and substituted its own version of Northern Unitary Authority without reasons for doing so. This requires consideration of the Commission's approach to identifying the reasonably practicable options.

Appeal issue: reasonably practicable options – Northern Action's proposal

[97] The Supreme Court in *Wellington International Airport Limited v New Zealand Airline Pilots Association Industrial Union of Workers*[84] noted that "practicable" took its colour from the context. What was practicable must take account of the particular context and what could reasonably be done in the circumstances.[85]

[98] A wide range of factors could be taken into account by the Commission in determining what was a reasonably practicable option. The Commission did not need to define what "reasonably practicable options" meant for its purposes. But it was required to take account of the provisions set out in sch 3, cl 11 which I set out again:[86]

> **11 Commission to determine preferred option**
>
> (1) As soon as practicable after the deadline for the receipt of alternative applications, the Commission must, in accordance with this clause, determine its preferred option for local government of the affected area.
>
> (2) The Commission must first identify the reasonably practicable options for local government of the affected area.
>
> (3) In deciding the extent to which it identifies the reasonably practicable options, the Commission must have regard to the scale and scope of the changes proposed; and
>
> (a) the degree of community support for relevant applications that has been demonstrated to the Commission; and
>
> (b) the potential benefits of considering other options; and

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84 *Wellington International Airport Limited v New Zealand Airline Pilots Association Industrial Union of Workers* [2017] NZSC 199, [2018] 1 NZLR 780.

85 At [65].

86 Local Government Act 2002 (as at 18 October 2019), sch 3, cl 11.

(c) the desirability of early certainty about local government arrangements for the affected area.

….

(5) The Commission must be satisfied that any local authority proposed to be established or changed under a reasonably practicable option will –

(a) have the resources necessary to enable it to carry out effective its responsibilities, duties, and powers; and

(b) have a district or region that is appropriate for the efficient performance of its role as specified in section 11; and

(c) contain within its district or region 1 or more communities of interest, but only if they are distinct communities of interest; and

(d) in the case of a regional council or unitary authority, enable catchment-based flooding and water management issues to be dealt with effectively by the regional council or unitary authority.

(6) For the purposes of subclause (5), the Commission must have regard to–

(a) the area of impact of the responsibilities, duties, and powers of the local authorities concerned; and

(b) the area of benefit of services provided; and

(c) the likely effects on a local authority of the exclusion of any area from its district or region; and

(d) any other matters that it considers appropriate.

[99] The Commission was not required to select the initial application or any of the proposals put forward as alternative applications as a reasonably practicable options.[87] It could include a combination derived from proposals or alternative proposals and it could also formulate its own options. The Commission was required by the statute to include the status quo as a reasonably practicable option.[88]

[100] The Commission took a staged process to identifying the reasonably practicable options.[89]

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87 Local Government Act 2002, sch 3, cl 11(4).

88 Local Government Act 2002 (as at 18 October 2019), sch 3, cl 11(4)(a).

89 While it could include any alternative application option it was not required to do so: Local Government Act 2002 (as at 18 October 2019), sch 3, cl 11(4)(b).

[101] In December 2016, after considering 39 alternative applications for reorganisation of the Auckland Council area local government arrangements, the Commission approved seven options to undergo further analysis. This is referred to as the long list. The options were:

(i) The status quo;

(ii) Two local boards for the current local Rodney Board area;

(iii) To merge a portion of North Rodney (Wellsford) with Kaipara District Council;

(iv) A North Rodney Unitary Authority (an alternative model to that proposed by Northern Action);

(v) A Waiheke Unitary Authority; and

(vi) A North Rodney District Council and Waiheke District Council.[90]

[102] The North Rodney Unitary Authority on the list was a model that the Commission had formulated and it varied from the Northern Action proposal.

[103] As Northern Action's proposed Unitary Authority model did not make the long list of reasonably practicable options it says its model was never properly analysed by the Commission and so was not up for selection as a reasonably practicable option.

[104] The Commission instead included its formulated version which increased the membership of the community boards to the statutory minimum and the number of councillors to a level it considered more appropriate for the functions needed to be undertaken by the Unitary Authority.

[105] Northern Action provided a comparison of elements of the North Rodney Unitary Authority models as follows:

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[90] District Councils for North Rodney and Waiheke was not realistic as the legislation allowing the establishment of District Councils had not been passed nor was it likely to be passed within the foreseeable future.

Northern Rodney Unitary Authority	Northern Action original application	Northern Action alternate application	Commission option	Morrison Low option
Councillors/Mayor	Five ward councillors, and one Mayor elected at large	Five ward councillors, and one Mayor elected at large	10 ward councillors and one Mayor elected at large	10 ward councillors and one Mayor elected at large.
Community Board		Five community boards (one for each ward), each with three Community Board members	Two community boards, one for Wellsford (four Community Board members) and one for Warkworth (six Community Board members)	Community Boards will not be established. However, a scenario including five community boards, each with four board members) is considered for financial modelling.

[106] The Northern Action Unitary Authority proposal contained the minimum number for a council (a total of six members of the Council including the mayor) but less than the mandatory minimum of community board members. The prescribed minimum is four and the maximum is 12 including the chair.[91] The Commission was also of the view that the number of council members at six, was less than could properly undertake the governance of the authority given the statutory responsibilities and functions imposed on it by the legislation.

[107] Northern Action's proposed Unitary Authority model was a territorial authority. A territorial authority has significant statutory responsibilities and duties including obligations under the Resource Management Act such as dealing with resource consent applications. It also would have some regional responsibilities. The Commission was of the view that the proposal included too few council members to

[91] Mandatory requirements for the number of members on territorial authorities, local boards and community boards are incorporated into the Act at ss 48E(a) and 50(a) by reference to the Local Electoral Act 2001 Local Electoral Act 2001, s 19F. The Local Electoral Act requires every governing body of a territorial authority (the Unitary Authority in this case) must consist of not fewer than six members nor more than 30 members including the mayor, as members of the territorial authority. The required membership of local boards is not fewer than five members nor more than 12 members including the chairperson. For community boards membership must be not fewer than four members nor more than 12 members: Local Electoral Act 2001, ss 19A, 19EA and 19F.

meet the governance requirements for various aspects of the authority's functions.[92] It gave the example of the need, under s 39 to separate the responsibility and processes for decision-making in relation to regulatory responsibilities from the responsibility and processes for decision-making on non-regulatory matters.[93]

[108] The Thames-Coromandel District Council from which Northern Action drew for its proposed Northern Rodney Unitary Authority relied on community board assistance. Northern Action considered that the inclusion of community boards in its model could eliminate wasteful spending as well as increase democratic decision making and meet of local needs. It said the community boards would provide local support and have delegated decision-making in the relevant wards. In addition its model could use voluntary support (from community boards) instead of staff in some instances and share resources and staff as well as use contractors in the place of costly staff for technical and other functions.

[109] Morrison Low's analysis of a North Rodney Unitary Authority modelled options of two or five community boards as well as no community boards. It also noted that the Thames Coromandel District Council was a district council and did not have the more significant responsibilities and functions of a unitary authority. The report noted the benefit to the community of establishing such boards including increased representation but that they also increased costs. The Commission noted in its decision paper (Appendix A):[94]

> **Community boards**
>
> 19. Morrison Low was advised by officers not to include sensitivity analysis on the Thames-Coromandel District Councils style of community boards in the base model of the proposed North Rodney Unitary Authority. This is because officers do not consider these are typical arrangements for a local authority of this size and type. Further, we consider this is a matter for consideration at the draft proposal stage of a reorganisation process or as a matter than an incoming council may deliberate on. However, given feedback from the original applicant, we decided to model community boards as a potential scenario.

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92 Local Government Act 2002, s 12(2)(a).
93 Section 39(c).
94 Appendix A, at [19]–[22].

> 20. Morrison Low modelled five community boards but increased the number of elected representatives to four instead of three (as was proposed by the original applicant). This is because the legal minimum of elected representatives for a community board is four. The cost of each community board modelled was $150,000 per annum resulting in a total of $0.75m per annum.
>
> 21. The modelling assumed key costs such as remuneration, venue hire, governance and policy advice but did not include the full costs of administering the Thames Coromandel District Council community boards. These additional costs reflect a higher level of empowerment for community boards in Thames-Coromandel than is standard in New Zealand. This requires additional staff resource and therefore expenditure (ie four extra managers and 7.5 support staff in the case of Thames Coromandel). Including these additional resources would potentially double the total cost of the community boards for the North Rodney Unitary Authority.
>
> 22. It follows that the community boards would significantly increase the size of the deficit of the proposed North Rodney Unitary Authority irrespective of the number of boards or the extent of the delegations to the boards.

[110] Northern Action also said its cost-saving options were overlooked by the Commission. The Commission in its decision looked at these options but it concluded they were not realistic particularly in view of the scarcity of the particular specialist skills which would be required by the authority and the need to maintain some core competencies internally. It also expressed concern about the use of voluntary members to undertake various functions. These voluntary members would have delegated authorities for community board responsibilities. The Commission was of the view that it could not base its analysis on hypothetical possibilities and in any event, it was not satisfied that the proposed arrangements were achievable.[95] It said:

> 64. When assessing the reasonably practicable options we have designed the options based on a typical local authority of a similar size and type to that being proposed. This includes setting modelling parameters on aspects of local government such as boundaries, number of elected members, wards and community boards. These parameters should be considered indicative at this stage of the process as they would need to be reconsidered in consultation with affected communities during any future stages of the reorganisation process (assuming they progress to future stages).
>
> 65. We have not included in our assessment elements of proposals where the Commission is unable or limited in its ability to include them in a reorganisation scheme and which may result in significant variances

[95] Decision Paper, s 3.6, para 64 and 65 as set out above.

to costs for that council. For example we have not made assumptions about:

- A new council's level of service or its governance and policy references (eg whether or not a new council would reduce current service levels, use more community volunteers to place paid employees, or reverse planned development capacity in the short to medium term); or
- Agreements that could be negotiated between a new council and an adjoining council (eg cross subsidy arrangements to fund costs associated with visitor flows from one council area to another).

The Commission's decisions

[111] The Commission made its decisions on 10 November 2017. Following the provisions of sch 3, cl 11 it first identified the extent of the reasonably practicable options meeting the statutory criteria for assessment and then selected the reasonably practicable options. It then determined the preferred option having regard to the criteria in cl 12(1).

[112] The Commission determined that it would limit the extent of its consideration of reasonably practicable options to the identification of options which:

(a) had a scale and scope specific to the Rodney and Waiheke local board areas of Auckland Council;

(b) provided early certainty given the length of the process to that date and the legislative inability to pursue options such as a district council being established within the area of a unitary authority;

(c) had some community support as demonstrated to the Commission.

[113] The following were considered as possibilities from which to identify the reasonably practicable options:

(a) Two local boards for the current Rodney Local Board area;

(b) A North Rodney Unitary Authority; and

(c) A Waiheke Unitary Authority

[114] The Commission did not identify either of the Unitary Authorities as reasonably practicable options. In the case of the North Rodney Unitary Authority it concluded it could not be satisfied that it had the required resources or that it had the district or region that was appropriate for the efficient performance of its role. These were two of the matters that the Commission was required to be satisfied of before an option for establishment of a local authority could be selected.[96] The Commission said:

> 114. While the proposed North Rodney Unitary Authority is an adequate size for a district council in New Zealand, it would not have a region that is appropriate for the efficient performance of an authority that must also undertake regional functions. This is due to the scale and scope of the council in absolute terms as well as the scale and scope of a council that would share co-governance of two large sensitive marine areas. For example, North Rodney's population of around 24,000 would make it the smallest unitary authority in New Zealand at only half the population size of Marlborough District Council – currently the smallest unitary authority in New Zealand.
>
> …
>
> 116. The proposed North Rodney Unitary Authority would also not have the resources necessary to enable it to carry out its responsibilities, duties and powers effectively… (Appendix A), financial analysis shows an annual operating deficit of between $7.6m and $5.6m for a North Rodney Unitary Authority in 2015/15 base case used for modelling. Total rates would therefore need to increase by 20 to 27 per cent in one year to offset this deficit (assuming it was funded entirely by rates).

[115] Following the review of the financial analysis in the Morrison Low report, the Commission had applied a material reduction to the net operating costs of the Unitary Authority. and a reduction of the debt of 25 to 50 per cent. Nevertheless, it noted the operating deficit remained significant even after allowing for potential margins of error.

[116] The Commission in its decision noted that access to and use of expert staff and/or consultancy services would likely be outside the resources of a small authority such as proposed. The Commission pointed out that some core capacity was required

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[96] Local Government Act 2002 (as at 18 October 2019), sch 3, cl 11(5)(a) and (b).

in relation to specialist skills. In addition, the expertise required was in short supply, many consultants were at capacity and there was strong evidence of local authorities finding it difficult to secure the specialist skills required in some areas.

[117] The Commission was required to have regard to the likely effects on a local authority of the exclusion of any area from its district or region. In this case the Auckland Council would be affected. The Commission said:

> 15. The Act also requires the Commission to consider the effects on Auckland Council of the exclusion of any area from its region. The financial effects on Auckland Council from the exclusion of either North Rodney or Waiheke would likely be minimal. However, the exclusion of North Rodney would impact on Auckland Council's statutory responsibilities under the Resource Management Act 1991 (RMA) to manage land and infrastructure strategically and ensure there is sufficient development capacity to meet demand. This is because it would fragment the current and future metropolitan areas of Auckland and constrain the Council's ability to manage growth in an integrated way.

[118] The Commission identified the status quo (which it was obliged to include) and two local boards for Rodney as the reasonably practicable options. It considered two local boards for Rodney would be affordable and might provide democratic representation appropriate to the region's role.

[119] When discussing these options it said:

> 140. Both options enable democratic decision-making and action by, and on behalf of, communities. However, officers consider that the status quo best enables it because there are issues with local board effectiveness under the status quo which would not be resolved by the creation of an additional local board in Rodney and the status quo is fairer on the rest of Auckland (outside Rodney). Further, an additional board in Rodney (or any other area of Auckland) may increase the magnitude of these issues.

[120] The detailed analysis and economic workings upon which those comments are based are set out in the staff paper and Morrison Low report which forms part of the Commission decision of 10 November 2017.

[121] In my view the Commission had in mind the purposes of Local Government and the Act in particular as it related to community empowerment and democratic decision-making when it was assessing the options for Local Government. This is

apparent from its decision papers. In particular these purposes were reflected in in the process of public engagement that the Commission adopted, its consideration of a North Rodney Unitary Authority model and community boards, its selection of two local boards as a reasonably preferred option and its comments concerning further action that might be possible by referring to the Auckland Council issues which had come out of the public engagement and research on the existing governance arrangements.

[122] Northern Action's real complaint goes to the merits of the Commission's determinations. This goes beyond questions of law to which this appeal is limited. The Commission is an expert body which has applied its knowledge expertise and experience in carrying out the inquiry, assessing the substantial information before it and evaluating the options in order to reach its conclusions.

[123] It has made no error of law in its identification of the reasonably practicable options or the preferred option.

Appeal Issue: Failure to act on issues raised by Northern Action

[124] Northern Action complains that the Commission did not respond with reasons on each point it raised with the Commission which was not adopted or acted upon.

Obligation to give reasons

[125] The obligation to give reasons by bodies acting in a judicial or quasi-judicial role is an aspect of open justice.[97] The giving of reasons is a discipline which is encouraged in order to maintain public confidence in the decision-making process. It also imposes on the decision maker the discipline of formally martialling its reasons and enables an appellate court to more readily spot an error or mistake by the decision maker.[98]

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97 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZRMA 535, [2019] NZCA 175 ("*Belgiorno-Nettis*") at [46].

98 At [47]–[50].

[126] The extent of the reasons required will depend on the nature and function of the decision maker. It also depends on whether the giving of reasons is an obligation imposed on it by statute or otherwise. In the case of a court the requirement to give reasons is more stringent than might be required than of a body entrusted with wide powers of inquiry following a non-adversarial process. On occasions, even for a court, the reasons may be abbreviated, or they may well be evident without express reference.[99]

[127] The decision maker must generally provide reasons which are intelligible, adequate and enable an understanding of why the matter has been decided in the way it has and why the conclusions have been reached on important issues. The reasons need only to refer to the main issues in dispute not every material consideration.[100] The decision must show that the decision maker has addressed its mind to the criteria it was required apply.[101]

[128] In *Belgiorno-Nettis*[102] the decision maker was a hearings panel set up under legislation to make recommendations to a local authority. It was under a statutory obligation to give reasons for the rejection or acceptance of submissions. The Court of Appeal noted that the hearing panel, was not only required to give reasons but in addition it was chaired by an Environment Court judge. It found that it was the task of the panel to analyse all of the submissions and include reasons for rejecting a submission whether in a group or otherwise. It was an error of law not to give reasons in the face of that express statutory requirement when a submission had been rejected. The hearings panel, which had adopted a quasi-judicial process, had given no reasons at all for rejecting the submission, nor was there any articulation of the panel's thinking.[103] The matter was remitted to the panel for it to give reasons for the rejection of the submission.

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99 At [51] citing *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [81].

100 *South Buckinghamshire District Council v Porter (No 2)* [2004] UKHL 33, (2004) 1 WLR 1953 at [36] per Lord Brown of Eaton-under-Heywood.

101 *Bovaird Board of Trustees of Lynfield College v J* [2008] NZCA 325 at [74].

102 *Belgiorno-Nettis,* above n 97, at [51].

103 At [63] and [65].

Categories of submissions

[129] Northern Action says there was a failure to address or give reasons for not responding in four broad areas.

[130] The first area relates to the points raised in the submissions Northern Action made on the Morrison Low report. Northern Action says it pointed out many flaws, errors and other deficiencies in the draft report and it did not receive a response addressing each of those points.

[131] It is apparent that the Commission responded to the important points by appointing a review panel and commissioning independent consultants to look at the issues which had been raised to test the rigor of the model and the analysis. As a result of that feedback various changes were made to the report. Importantly in relation to Northern Action's complaint the costs associated with the Northern Regional Unitary Authority model assessed by the Commission were reduced. The reassessment is set out in the decision papers. The Commission was not required to give reasons as to why it had not adopted every point that Northern Action had made.

[132] The second area which Northern Action says the Commission failed address was on the feedback it received from the Rodney community in the public engagement process and subsequent questionnaire.

[133] The Commission demonstrated it was alive to the community feedback and the concerns expressed by some submitters about the present governance arrangements. It published a summary of that feedback, analysed options for alternative local government arrangements including a North Rodney Unitary Authority and selected as a reasonably practicable option the establishment of two local boards for Rodney. While that was not the preferred option nevertheless the Commission noted that it would look for other possibilities to deal with the concerns raised by the applicants and the community. It said in its conclusion:

> 18. In addition, officers will provide advice to the Commission at the December meeting on the potential to use powers under section 31 of the Act to make non-binding recommendations to Auckland Council. Our advice will consider how the Commission may want to address a number of operational concerns raised by the applicants and the

> community which appear well-founded but do not fall within the scope of a reorganisation proposal.

[134] It was not required to give reasons for not adopting or responding to every point raised. Nevertheless, it demonstrated it had considered the important issues raised in the feedback and that it considered options to address them.

[135] The third area related to the failure to refer to information the Commission had gathered about Queensland's local government arrangements. The Commission in its submissions said it had visited Queensland as part of its general information gathering when it was undertaking another inquiry in relation to local government arrangements some years earlier. Northern Action said the Queensland information should have been specifically referred to in the Commission's decision.

[136] The information gleaned by the Commission from its visit was general information which formed part of its background knowledge and expertise in local government matters. However, there was no requirement on the Commission to refer to the Queensland experience in its decision.

[137] The process in this case is not judicial or even quasi-judicial. The decision maker had wide ranging powers of inquiry.[104] The Commission is required by statute to give reasons for some decisions such as the preferred option.[105] It was not required under the Act to give reasons for its decision identifying reasonably practicable options nor to give reasons for not adopting or otherwise respond to each submission made by Northern Action. Such a requirement could considerably slow down the progress of the inquiry.

[138] However the Commission gave comprehensive reasons for its determinations as set out in the decision papers. These reasons dealt with the important issues that it was required to consider. It is apparent from the decision papers that the Commission applied the reorganisation application provisions of the Act and kept in view the

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104 Local Government Act 2002 (as at 18 October 2019), s 34(1): the Commission is not required to comply with s 4A of the Commissions of Inquiry Act 1908 which gives a right to be heard to a party to or having interest apart from that of the public.

105 Local Government Act 2002, sch 3, cl 13(1)(a).

purposes of the legislation. It is also apparent that it took into account submissions and feedback on important issues.

[139] I conclude that the Commission made no error of law under this head.

Appeal issue: refusal to extend deadline for submissions

[140] On the 22 September 2017 the Commission advised interested parties including Northern Action that would be deliberating to make its decision. It had received the comments of the expert panel as well as the independent technical review of the Morrison Low report and made the required adjustments to the financial modelling. It also indicated it would carry out further limited research, using the research firm UMR, into community support for the various options for local government reorganisation in Auckland. The Commission then made its final decisions at a meeting on 10 November 2017.

[141] On 15 November 2017 Northern Action submitted its APR consultants review to the Commission. The Commission refused to reopen the process or accept the APR consultants review. It responded to Northern Action that it had closed submissions and that the report had been submitted some two months after it had started deliberations. It pointed out that if it did allow further submissions and material as a matter of fairness it would need to allow further evidence and information from other interested parties including other applicants.

[142] Northern Action says the Commission breached natural justice by refusing to reopen the process and receive the APR report.

[143] Any requirements of natural justice in so far as they applied to the Commission's inquiry and decision making had been met. Northern Action provided its submissions on 7 September having been granted an extension of two weeks from the original deadline. In total close to two months had been allowed for Northern Action to file its submissions. The Commission had allowed Northern Action sufficient time to make its submissions

[144] Following the lengthy inquiry process the Commission was entitled to set a deadline for submissions and go ahead and make its decision without providing a further opportunity for submissions. Further submissions, particularly a late report would have obliged the Commission to reopen its process to enable other parties to make submissions and provide material in response.[106]

[145] The inquiry took nearly 18 months from the deadline for alternative applications until the final decision was made. The Commission was required to determine its preferred option as soon as practicable after that deadline.[107] It was required to make its decision in a timely manner and to that end was entitled to impose deadlines for submissions. The Commission had given Northern Action an extended period to make its submissions and was entitled then to proceed to deliberate. There was no obligation on the Commission to delay or to reconsider its decision any further

[146] It made no error of law under this head.

Conclusion

[147] As is apparent I conclude that the appeal must fail. Northern Action has not established a question of law nor pointed to any errors of law made by the Commission. Northern Action's appeal is largely focussed on the merits of the decisions and the factual evaluations and the weighting that the Commission gave to the various factors that it was required to consider in order to reach its decisions.

[148] The Commission is an expert body and has the experience and expertise to conduct the inquiry, gather the relevant information and carry out the evaluation required in order to make the decisions in this case. To undertake a broad reappraisal of the Commission's factual findings or the exercise of its evaluative judgments would be inappropriate and beyond the scope of this Court's function.

[149] The first issue was whether the Commission erred in failing to have regard to the purpose of the local government reorganisation provisions as stated in section

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106 The Commission was required to have regard to the impact on Auckland Council of any proposal to establish or change a local authority arrangements.

107 Local Government Act 2002, sch 3, cl 11(1).

24AA. It is apparent from the decision that the Commission kept in view the purposes of the Act in the course of the inquiry and in its decisions. In addition, it followed the provisions of the Act, envisaged by the purpose set out in s 24AA, for dealing with applications concerning reorganisation.

[150] It is apparent from an examination of the process that the Commission provided the opportunity for initiation and for the participation and consultation of local communities as it was required to do. There was no public law duty to consult specifically on Northern Action's proposal.

[151] The second issue was whether the Commission erred in its interpretation of the requirement to identify "the reasonably practicable options" under clause 11(2) of the statutory provisions in light of the s 24AA purpose leading to the determinations. I have found it did not and it gave adequate reasons for its decisions.

[152] The third issue was whether the Commission made a procedural error by breaching the requirements of natural justice and failed to take into account Northern Action's APR report. The Commission did not breach the requirements of natural justice or otherwise err. It had allowed adequate time for submissions and had already extended the deadline at Northern Actions request. The inquiry took nearly 18 months from the deadline for lodging alternative applications to the final decision. The Commission was required to determine its preferred option as soon as practicable after that deadline.[108] It was entitled to close the submission process and move to deliberate. It had no obligation to allow more time for the filing of any further submissions or reports.

[153] The fourth issue was whether the Commission failed to have regard to information provided by the applicant or to give reasons for discounting it. The Commission was not required to respond to all points made in submissions by Northern Action. Overall it gave adequate reasons and responses in relation to the important issues raised in the course of the inquiry as set out in its decision papers.

[154] The appeal is dismissed.

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[108] Local Government Act 2002 (as at 18 October 2019), sch 3, cl 11(1).

Costs

[155] The usual position would be that the successful party is entitled to costs. The appropriate categorisation in this case appears to be 2B. If the parties are unable to agree on costs any application should be made by way of a memorandum setting out submissions in support of the application. The memorandum should be filed and served on or before ten days of the date of delivery of this decision with any response within a further ten days and any reply within a further three days.

Next steps

[156] As the appeal grounds relating to bias have been "parked" it is necessary to consider the next steps. The matter will be set down for a case management conference before me. A joint memorandum should be filed in the usual manner. The Registrar will liaise with counsel to set a suitable time.

Grice J

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