

Resource Management (Simplifying and Streamlining) Amendment Bill 2009 – Forest & Bird background issues paper

Introduction

The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 represents the first phase of the Government's changes to the Resource Management Act 1991 (*RMA*). Submissions on the Bill close on 3 April and the report back to the House is due by 3 June.

The second phase of the RMA Review is also underway. The Government has signalled that this phase will address infrastructure, water (allocation, tradability, quality and ownership), urban design and the functions of the Environmental Protection Authority.

Objectives of the Bill

The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 (*Bill*) has nine objectives:

1. reduce costs and delays from frivolous, vexatious or anti-competitive submissions and appeals
2. streamline processes for applications of national significance
3. establish an Environmental Protection Authority (*EPA*) to administer applications of national significance
4. improve (by reducing time and costs to participate in) planning processes
5. improve (by reducing time and costs to participate in) resource consent processes
6. increase the effectiveness of national instruments
7. strengthen the enforcement provisions
8. improve decision making processes
9. enhance the workability of the Act

Issues

There are a number of proposed changes in the Bill that could restrict public participation and/or reduce the quality of decision-making under the RMA. These include:

- removing the presumption in favour of notifying resource consent applications and changing the criteria for public notification
- allowing the Environment Court to require security for costs
- limiting appeals on policy statements and plans to questions of law (except with the leave of the Environment Court)
- allowing applicants, with the agreement of the council, to have their application heard by the Environment Court in the first instance (direct referral)
- removing the ability of third parties 'representing a relevant aspect of the public interest' to join an appeal under s274
- deleting non-complying activities (with a three year transitional period)
- removing the Minister of Conservation's decision making role in respect of restricted coastal activities
- removing the ability to lodge further submissions in the planning process
- preventing rules in plans from having any effect until decisions on the rules have been notified
- expanding the existing call in powers for proposals of national significance.

Other notable changes in the Bill include:

- restricting opportunities for trade competitors to object to applications and participate in proceedings
- removing Crown immunity
- removing the role of requiring authorities to make decision on their own notices of requirement
- removing the requirement that planning documents be reviewed every 10 years
- removing the ability to use general tree protection rules

Discussion

Participatory democracy is central to decision making under the RMA. Limiting public participation would be a fundamental shift in the Act's philosophy.

Third party participation ensures that a decision maker has good information before it. Although there is an obligation on applicants to provide an Assessment of Environmental Effects (*AEE*), the applicant cannot be expected, nor relied upon, to advocate in the public interest, particularly when it may run counter to their objectives.

While there is no public agency that is mandated to provide a comprehensive and reliable overview of the environmental effects of a proposed activity, third party participation provides an important check to test the rigour of the information that has been provided by the applicant. This participation becomes even more important if consent authorities rely more heavily in their reporting and decision making on the AEE provided by an applicant, as provided for in the Bill (clause 30).

Plans

The Government has proposed many changes to speed up the process of developing district and regional plans. While there is no question that the first generation of RMA planning has taken much longer than all parties would have wanted, it is likely that the second generation of plans will be much faster (the plans are already in place and only those bits which need adjusting need be dealt with). The Bill's changes may actually slow the process as affected parties go to the Courts to establish standing and to argue that questions of merit rather than just questions of law need to be considered. Quick, but poorly formulated plans, are likely to create confusion and greater opportunities for litigation.

1. Removing the requirement that planning documents be reviewed every 10 years (clause 56).

The Bill proposes to remove the requirement that planning documents be reviewed every 10 years, although the Minister is given a new power to direct a review of a plan, in whole or in part. This change is motivated by a concern about the length of time it took to complete first generation plans; however, we can assume that second generation plans will be an opportunity to address problems with the existing plan, rather than starting from scratch, and will take substantially less time. In the absence of a plan review requirement, improving and updating plans will become reliant on private plan changes, which are ad hoc, expensive and likely to be driven by those with a financial and development interest.

2. Removing the ability to lodge further submissions in the planning process (clause 148)

The Bill removes the further submissions stage in the planning process. This stage enables comment on submissions that have been lodged on a plan or policy. Without further submissions, there is no opportunity to respond to anything new that has been sought by other submitters, which may significantly change or even reverse the provisions in the plan. Instead of further submissions, the Bill allows local authorities to seek the views of anyone that it considers might be adversely affected by matters raised in a submission. While those views must be taken into account in the decision, there is no right to appear at the hearing or lodge an appeal on that part of the policy statement or plan. This means that under the Bill a submitter could request that rules be removed or altered to allow for more intensive development (for example a reduction in minimum lot sizes in the rural zone) and there would be no opportunity to oppose that relief or participate in the process (except, to a limited extent, at the discretion of the local authority). This change will result in weaker plans and more litigation in the High Court, as people resort to judicially reviewing the decision of the local authority.

3. Providing that rules will generally have no effect until decisions on the rule have been notified (clause 16, 59)

Under the Bill a rule in a plan does not have legal effect until decisions are notified unless: there is no opposition to the rule; or the local authority passes a resolution that the rule will take effect earlier; or the rule protects water, air, soil, significant indigenous vegetation, significant habitats of indigenous fauna or historic heritage; or the rule provides for an aquaculture management area. Generally rules will not take effect until decisions on submissions are notified, which will increase the lead-in time for new rules and may encourage parties to rush through applications to avoid new regulation; for example if a proposed plan reduces the maximum building height, developers could build up to the higher limit set under the old rule until decisions are made on the more restrictive rule, without any regard for the new rule or the policy reasons behind it.

4. Limiting appeals on policy statements and plans to questions of law (except with the leave of the Environment Court) (clauses 132,136 and 148)

The Bill reduces appeals on planning decisions to points of law (except with the leave of the Environment Court to appeal questions of merit). Often a planning decision requires an evaluative judgement based on facts, such as whether or not an area of indigenous vegetation is significant under s6(c) of the Act. This amendment will make it more difficult to contest a council's determination about these kinds of questions of fact.

It is a considerable burden on participants to have to seek the leave of the Court to appeal questions of merit. Having to apply for leave to appeal questions of merit will add further cost and complexity to the process. It could see the Environment Court bogged down with applications of this sort. It could also result in more litigation on resource consent applications because plans contain inconsistencies or ambiguities, which would have otherwise been resolved through the planning process.

Reducing appeal rights also reduces the accountability of local authorities, particularly when coupled with the proposal to remove the obligation on councils to review their planning documents every ten years.

There is greater community support for planning documents where the issues have been properly and adequately considered. The majority of planning appeals are resolved without the need for a hearing. Mediation at this stage enables parties to work through issues that will ultimately improve the quality of the document and increase community buy-in. In fact, it is not uncommon for a council to appeal its own plan or to support the appeal of another party where there is a mistake or an unintended consequence in the plan. Removing the opportunity for parties to appeal on merit will ultimately reduce the quality of plans.

In addition, this change could substantially reduce the Environment Court's specialist environmental jurisdiction.

The Minister of Justice has commented that it is a basic requirement of the NZ Justice System that there is a first right of appeal with leave required only for subsequent appeals. It is not consistent that the leave of the Environment Court to appeal plans and policies on anything other than questions of law should be required to lodge a first appeal.

5. Deleting non-complying activities (within a three year transitional period) (clauses 147 and 152)

The Bill removes the non-complying activity status (these activities are deemed to be discretionary if the Council has not changed or varied their plans to reclassify them within three years of enactment).

There is a presumption in the Act that non-complying activities are not granted consent unless the effects of the activity will be minor or it will not be contrary to the objectives and policies of the relevant plans (the threshold test in s104D). The threshold test is very broad and it is almost always met; however, the non-complying activity status sends a signal to consent authorities and applicants that the activity is less appropriate than discretionary activities and falls on the more restrictive end of the spectrum. This may be an opportunity to tighten the non-complying test in s104D (by, for example, amending s104D so that an application must satisfy **both** limbs of the test before consent is granted). The removal of the non-complying activity status is likely to weaken environmental protection currently afforded by these rules.

In addition, the removal of non-complying activity status may undermine the policy and objectives in the plan, if a non-complying activity is deemed to be discretionary.

Resource consents

6. Removing the presumption in favour of notifying resource consent applications and changing the criteria for public notification (clause 68)

The Bill removes the presumption in s94 that resource consent applications will be notified. The Government claims this change will bring the law into line with what is the practice; however, this is likely to further reduce levels of notification and limit opportunities for public participation because the onus will shift back to the community to argue in favour of notification. The Bill also raises the bar for public notification by changing the test to 'adverse effect of the activity *beyond the immediate environment* will be more than minor' (s94AA). Further, even where a relevant effect is more than minor, a consent authority need not notify where a rule in a plan provides otherwise (s94AAD).

Forest and Bird, through its members' work in particular districts, has been recognised as an affected person and consulted early in the consent process where a consent application adversely affects indigenous vegetation or habitats of indigenous fauna; under the Bill, groups such as Forest and Bird are unlikely to be given this status.

The Bill also removes the ability to review notification decisions through declaratory proceedings in the Environment Court (although these are not currently in force they were included in the RMA to balance the introduction of limited notification).

7. Allowing applicants, with the agreement of the council, to have their application heard by the Environment Court in the first instance (direct referral) (clause 60)

Provided that the local authority agrees, an applicant can have their application determined by the Environment Court in the first instance (direct referral). Direct referral can discourage public participation (the Environment Court hearing would involve greater costs and more formality). It may also clog up the Environment Court. Direct referral may be used by councils seeking to avoid making difficult or unpopular decisions.

Costs of going to the Environment Court

8. Allowing the Environment Court to require security for costs (clause 133)

The Cabinet paper suggests that security for costs will reduce anti-competitive behaviour. Unfortunately, security for costs would significantly reduce all third party participation (a case of throwing the baby out with the bathwater); in particular:

- Despite security for costs being used sparingly under the previous provisions (1996-2003), defending a spurious or weak application for security for costs would drain a third party's resources, significantly limiting the ability of that group or individual to participate in the substantive hearing. This was occasionally used as a device by unscrupulous parties with substantial funds.
- There is no evidence that security for costs deters frivolous, vexatious and/or anti-competitive appeals; security for costs creates a barrier to those with little money. In the majority of cases, security for costs is unlikely to prevent anti-competitive appeals (where there is a financial interest and greater available resources); it will however reduce the participation of those with legitimate cases but little money (the cabinet paper notes that a similar comment was made by the Ministry of Justice officials).
- Security for costs is intended to ensure that a party is able to pay costs where an order has been made against them; however this may be able to be addressed in other ways (such as greater support and guidance for participants to ensure that do not proceed with a case that lacks merit and that any case that is taken is efficiently managed). Recently, a number of high profile cases have seen an appellant group fold rather than pay a substantial costs award against them (Happy Valley, Omokoroa Residents Assoc and Upland Landscape Protection Soc); this has brought the issue back into the public eye.

9. Removing the ability to join an appeal under s274 when ‘representing a relevant aspect of the public interest’ (clause 131)

Under the Bill, a party can only join under s274 if they were an original submitter or are directly affected (ie with an interest greater than the public generally). The Bill removes the opportunity to become a party where a group or individual represents a relevant aspect of the public interest (unless you are the Attorney General). The Bill also reduces the period for lodging a s274 notice from 30 working days to 15 working days.

Removing the Minister of Conservation decision making role in respect to restricted coastal activities

10. Removing the Minister of Conservation decision making role in respect restricted coastal activities (clauses 20, 82 and 83)

Removing the Minister of Conservation decision making role in respect of restricted coastal activities is intended to remove a perceived conflict of interest where the Minister of Conservation sets the policy, submits on the consent application and then makes the decision. The amendment is intended to bring the Minister of Conservation’s role more closely in line with the Minister for the Environment’s role. The Whangamata marina case is often cited when the Minister’s consenting role is discussed.

The Minister of Conservation’s consenting role recognises the values associated with the coastal environment and only applies in respect of restricted coastal activities. It also recognises the position of the Minister as landowner. The Minister, as landowner, should be afforded the opportunity to refuse access to the coastal environment (and to collect rents where access is granted). This issue may be better considered in phase two of the RMA reform.

Other issues

11. Expanding the existing call in powers for proposals of national significance (Clauses 35, 91-106)

The Cabinet Paper suggests that roading, electricity and other large scale infrastructure projects are delayed as a result of numerous council requests for further information (s92), duplication of the Council hearing process in the Environment Court (with the potential for some parties to withhold experts until the Environment Court stage) and procedural delays (appointment of commissioners and setting the hearing time).

The Bill establishes an Environmental Protection Authority (initially within Ministry for the Environment) responsible for the administration of applications for proposals of national significance. This includes applications for resource consent, notices of requirement and private plan changes.

The EPA will make recommendations to the Minister about whether an application should be called in. The Bill provides that the Minister will be able to call in a private plan change application, even after the local authority has declined it.

The EPA will have the power to grant certificates of compliance for permitted activities (clause 90).

There is an indication that the role of the EPA may broaden significantly in the second phase of RMA reform and the EPA could have a decision making function on national planning instruments and, potentially, applications that have been called in.

An application that has been called in can be considered by a board of inquiry or the Environment Court (at the discretion of the Minister). A board of inquiry can request information or commission reports. The board of inquiry releases a draft decision for comment before making a final decision. Comments on the draft decision are limited to conditions and minor or technical issues (not whether or not a consent should be granted).

A call in may be at the request of the Minister or the applicant. This is intended to prevent situations where a Minister is reluctant to call in an application because of its political nature. The Minister can process minor applications related to another application that has already been called in on a non-notified basis. A decision on a called in application must be made within 9 months of the application being notified unless an extension has been sought (up to a maximum of 18 months).

Decisions on applications that have been called in can only be appealed to the High Court on questions of law. Originally it was proposed that call in decisions could only be appealed to the Court of Appeal. While this has been changed, any appeal from the High Court is to Supreme Court (rather than the Court of Appeal) and only if the Supreme Court finds that there are exceptional circumstances to hear the matter.

In the call in process, the decision maker (board of inquiry or Environment Court) must have regard to the Minister's reason for calling the matter in. One concern that has been raised is the possibility that the Minister's reasons for calling in an application may be given greater weight than the matters in Part II. It is essential that the call in process does not become a mechanism for avoiding the purpose and principles that underpin the RMA. In order to achieve this, the Bill should be amended so that the decision on a called in application is expressly 'subject to Part II'. This should also avoid further litigation on this point.

Given that the call in process relates to applications of 'national significance' that often cross many local authority boundaries, it should have at least the same procedural safeguards as a local authority consent decision – s32 reporting and public participation. The benefit of a call in is to provide a comprehensive 'one stop shop' for applications of this kind, not to short cut the checks and balances in the process.

Other notable changes introduced by the Bill include:

- Restricting opportunities for trade competitors to object to applications and participate in proceedings (clause 139, and cross references throughout). The Bill requires disclosure of third parties' interests with regard to trade competitors. The Bill introduces indemnity costs (ie full costs) where a trade competitor is behind an appeal (either being brought or continued). How does that affect sponsorship, membership or contributions made to fundraising?
- Removing Crown immunity from prosecution to increase public accountability.

- Removing the role of requiring authorities to make decision on their own notices of requirement (clauses 110 and 120). This is consistent with the principles of natural justice: an applicant should not be the decision maker on their own application.
- Removing the ability to use general tree protection rules (clauses 52 and 151). This section restricts the use of rules that protect trees or groups of trees – this could overlap with rules designed to protect significant indigenous vegetation under s6(c). The Government is concerned with the costs associated with general tree protection rules in urban areas such as North Shore City (the Cabinet Paper suggests that there are approx 4000 applications/year as a result of these rules). General tree protection rules should be drafted so their application is limited to trees of high value: for example over xm high or historically significant or located in a reserve or adjacent to a reserve or a significant landscape feature or rare or ecologically significant (these criteria would be further defined). The requirement to schedule particular trees puts a considerable administrative burden on the Council and is also open to error. Further a requirement to schedule notable trees, rather than providing for tree protection in a general rule, sets a precedent regarding the use of general rules as opposed to schedules in other areas, for example rules that protect significant indigenous vegetation or landscapes. The Bill provides that general tree protection rules will be revoked on enactment.
- Removing the opportunity to appeal an entire policy statement or plan (clause 148). This requires appeals to be more detailed at the outset. What about a private plan change designed to enable a particular development in a particular area?
- Increasing the Environment Court filing fee from \$55 to \$500 (the original filing fees were set in 1988). This acts as a disincentive for parties with limited resources (and it is unlikely to affect the participation of parties motivated by trade competition).
- Clarifying that public notice can be provided through the internet and service by email.
- Reducing councils reporting requirements so that plan and policy decisions can be made in relation to each issue, rather than each submission.
- Amending the statutory timeframe for processing consents so that it will only be suspended for the first further information request under s92. This has broader implications than simply speeding up the processing time for applications, as there must be a certain amount of information that is required by a consent authority before it is able to make a reasonable decision. The Bill also removes the ability for consent authorities to decline an application due to insufficient information (clauses 65 and 67).
- Removing consideration of Part II matters for controlled and restricted discretionary applications except where they are relevant to the council's control/discretion. Section 6 relates to matters of national importance – should we allow councils, through the plan process, to limit or prevent the consideration of these matters?
- Increasing the maximum fine from \$200,000 to \$300,000 for individuals or \$600,000 for corporations. It allows the Environment Courts to review a resource consent where the consent holder is repeatedly in breach of the consent conditions (clause 141).