NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Resource Legislation Amendment Bill

16/3/2016

Submission on the Resource Legislation Amendment Bill

INTRODUCTION

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Resource Legislation Amendment Bill (Bill). This submission covers the following topics:

    a. National direction;

    b. Planning processes;

    c. Environment Court powers and processes;

    d. Resource consent processes;

    e. Miscellaneous Resource Management Act 1991 (RMA) provisions; and

    f. Miscellaneous legislative provisions.

SUMMARY

2. This submission supports:

    a. The introduction of natural hazards as a matter of national significance.

    b. The removal of hazardous substance functions from the RMA.

    c. Improvements to Environment Court procedures.

    d. Recognition of environmental offsets in consent decision-making.

3. This submission opposes:

    a. The national planning template.

    b. Proposed new regulation-making powers.

    c. The introduction of the local authority function for ensuring sufficient development capacity for residential and business land.

    d. The Collaborative Plan Process and the Streamlined Planning Process.

    e. Further restrictions on public participation in both planning and consenting processes.

    f. The new limitations on the scope of submissions on resource consents.

    g. "Fast track" consents.

h. "Deemed permitted activities".

i. Limiting the scope of consent conditions.

j. Restricting appeal rights from consent decisions.

k. Removal of the requirement that a Board of Inquiry be chaired by a judge or former judge.

4. The submission also suggests some drafting improvements.

NATIONAL DIRECTION

5. The national direction provisions include proposals in the following seven areas:

a. National Policy Statement (NPS) and National Environmental Standard (NES) processes;

b. National planning template (NPT);

c. Regulation-making powers;

d. Natural hazards risk management;

e. Housing and development capacity;

f. Minimising land restrictions; and

g. Removal of hazardous substances management functions.

6. The proposals also include introducing new national policy provisions into the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) to allow the government to support decision-making on applications for marine consents. Because of time and resource constraints, this submission does not comment on EEZ Act proposals.

National Policy Statement / National Environmental Standard Processes

Overview of provisions

7. The key changes to the RMA in this area are outlined in the Regulatory Impact Statement – Resource Legislation Amendment Bill 2015 (RIS) as follows:

a. a combined development process for NPS and NES through joint consultation development and publication;

b. clarified scope for NPS to give more specific direction about how objectives and policies should be implemented in plans;

c. allowing NPS and NES to be developed in relation to a specific area to address a local resource management issue that has national significance;

d. enabling council rules to be more lenient than an NES;

e. allowing an NES to specify that local authorities may charge to monitor activities permitted by a NES; and

f. enabling NES to specify requirements for local authorities.

8. The relevant provisions of the Bill include:

a. *clause 25* which empowers the making of NES generally and in relation to specific regions/districts or other areas;

b. *clause 26* which enables an NES to empower a consent authority to charge for monitoring of NES permitted activities and to specify how consent authority functions are to be performed to meet the standard;

c. *clause 27* which provides that a rule or resource consent which is more lenient than an NES prevails if the NES permits this;

d. *clause 28* which states that when an NES is proposed for a specific area, references to public and iwi authorities refer to authorities within that area;

e. *clause 29* which sets out the mandatory and discretionary contents of an NPS (including objectives, policies and directives around monitoring, reporting and collection of information) and provides that an NPS can apply generally or to a specified area;

f. *clauses 30 to 32* which make consequential amendments to provide for when an NPS applies only to a specified area;

g. *clause 33* which affirms the directive nature of NPS;

h. *clause 34* which enables a combined process to be used to prepare both an NES and an NPS; and

i. *clauses 35 and 36* which amend provisions relating to the New Zealand Coastal Policy Statement (NZCPS) to include objectives and to allow the NZCPS or any of its provisions to apply generally or just to a specific area.

Comment

9. Clause 26 amends section 43A (contents of environmental standards) to empower a consent authority to charge for monitoring of permitted activities specified in an NES and to specify how consent authorities must perform their functions to achieve the standard. However, the clause does not specifically state that an NES can *require* a consent authority to monitor the NES permitted activities.

While that may be implicit, for clarity the Law Society suggests that the ability of an NES to require monitoring be expressly stated in the clause.

10. Further, while an NES may provide a local authority with the ability to charge for such monitoring, the monitoring is likely to give rise to other resource implications for some local authorities, such as ensuring it has sufficient trained staff to carry out the monitoring activities. It would be useful to provide an appropriate transitional period, to enable affected local authorities to ensure they have adequate resources in place to undertake these activities. Comments on the issues arising from charging for permitted activities are discussed below.

11. Clause 29 inserts new section 45A (contents of NPS) and clause 36 makes a similar change to section 58 (contents of the NZCPS). Currently NPS and the NZCPS apply to the whole of New Zealand and there is no power to apply these documents only to a specified area. This contrasts with the current position in respect of NES, which can be applied to a specified area by virtue of section 360(2), although none have to date. By their nature, NPS and the NZCPS deal with matters of national significance, and the need for such matters to apply only to a specified area is not explained in any detail in the Bill or RIS.

12. No guidance is provided in the Bill as to when it may be appropriate for an NPS/NZCPS (or for that matter an NES) to apply only to a specified area. Relevant matters to consider in this regard could be why the issue is of national significance, why the matter requires national direction rather than being dealt with at the regional/district levels, and why an NPS/NZCPS is considered appropriate to address the issue rather than other national direction avenues (e.g. issuing voluntary national direction guidance to the relevant local authority or participation in the local government policy and plan-making process).

Recommendations

13. That new subsection 43A(8) (introduced by clause 26) be amended as follows:

> *"A national environmental standard may –*
>
> *(a) empower or require a consent authority to <u>monitor and</u> charge for monitoring any permitted activities specified in the standard; and*
>
> *…"*

14. That section 43 (amended by clause 25) be amended to insert a new subsection (3A) which makes the Minister's ability to instigate the development of a new NES for a specific area subject to pre-conditions:

> *(3A) Where the proposed new national environmental standard relates to a specific area, the Minister must not exercise the power in subsection (3) unless:*
>
> *(a) the Minister is satisfied that a new standard is more appropriate than a change to the relevant regional or district plan or policy statement(s); and*
>
> *(b) the Minister is satisfied that the local resource management issue to be addressed is of national significance.*

15. That new section 45A (inserted by clause 29) be amended to insert a new subsection (3A) which makes the Minister's ability to instigate the development of a new NPS for a specific area subject to pre-conditions:

> *(3A) The Minister must not exercise the power in subsection (3)(b) or (3)(c) unless:*
>
> *(a) the Minister has consulted with all regional councils and territorial authorities within the specific area as to whether the introduction of a new national policy statement is appropriate:*
>
> *(b) the Minister is satisfied that a new national policy statement is more appropriate than a change to the relevant regional or district plan or policy statement; and*
>
> *(c) the Minister is satisfied that the local resource management issue to be addressed is of national significance.*

16. That section 58 (amended by clause 36) be amended to insert a new subsection (3A) which would make the Minister's ability to apply a NZCPS/provisions of an NZCPS to a specific area subject to pre-conditions:

> *(3A) The Minister must not exercise the power in subsection (3)(b) unless:*
>
> *(a) the Minister has consulted with all regional councils and territorial authorities within the specific area as to whether the introduction of a new national coastal policy statement is appropriate:*
>
> *(b) the Minister is satisfied that a new national coastal policy statement is more appropriate than a change to the relevant regional or district plan or policy statement; and*
>
> *(c) the Minister is satisfied that the local resource management issue to be addressed is of national significance.*

National Planning Template

Overview of provisions

17. The Bill proposes that a national planning template (NPT) is introduced to improve the consistency of plans and policy statements. The minimum requirements for the first version of the NPT are:

    a. standardised formatting and structure for plans and policy statements;

    b. references to existing NPS/NES;

    c. (where possible) standardised definitions; and

    d. electronic functionality and accessibility of planning documents.

18. The relevant provisions of the Bill include:

    a. *clause 4* which contains a definition of "national planning template";

    b. *clauses 9 and 10* which set out ministerial functions in relation to the NPT;

c. *clauses 13, 14 and 15* which insert the words “national planning template” into sections 32, 32A and 32AA obligations;

d. *clause 37* which inserts a new heading and new sections 58B to 58J to provide for the NPT;

e. *clauses 39 to 47* which make technical amendments to sections 61, 62, 65 to 67and 73 to 75 to include references to the NPT;

f. *clause 53* which applies the dispute provisions in section 82 to the NPT;

g. *clause 62* which provides for a consent authority to have particular regard to the objectives and policies in the NPT;

h. *clause 66* which amends section 142 to require the Minister to have regard to whether a matter gives effect to an NPS or the NPT;

i. *clauses 71 and 78* which amend sections 149G and 149R to include reference to the NPT;

j. *clauses 82, 83 and 85* which amend sections 168A, 171 and 191 to ensure account is taken of the NPT;

k. *clauses 87 and 88* which amend sections 207 and 212 to refer to the NPT;

l. *clauses 98 and 99* which amend sections 293 and 310 to refer to the NPT; and

m. *clause 104* which amends section 360B to include the NPT.

Comment

19. The Law Society acknowledges that the introduction of an NPT is expected to provide greater consistency in approach between local authorities and reduce plan-making costs over the longer term.

20. However, the matters that the NPT may include are extensive. They go beyond template-type matters and include the substantive content of such plans in terms of specific objectives, policies, methods, rules and other provisions to be determined at the national rather than the local level. Given the breadth of these provisions, the Law Society considers there is a significant risk that local and regional issues will be relegated to secondary importance and that the NPT could dictate the outcome of land use consents in specific zones or for particular activities. In effect the NPT could become a “national plan” rather than a template. If that is the intention, it would be more consistent and transparent to call the NPT a national plan.

21. A national plan (as opposed to a template) is a significant policy shift from the current local planning approach and the benefits and costs of such a shift – particularly for local democracy – do not appear to have been fully assessed. The Law Society considers that the better approach is to limit the scope of the NPT to containing minimum plan requirements.

22. In addition to the scope issue, the Law Society has also identified a number of other areas where it considers further clarification or amendment to the NPT provisions is required:

    a. Definition – the NPT is defined in section 2 as the NPT "approved under section 58E, *as amended from time to time*". For clarity the Law Society considers that reference to the section permitting amendments should be made.

    b. Application to specific area – the NPT or any of its provisions may apply generally or to a specific area (new section 58C(4) inserted by clause 37). However, no criteria are specified as to when it is appropriate for an NPT or its provisions to apply to a specified area. The Law Society suggests including a new provision requiring the Minister to specifically consider this issue when an NPT is prepared.

    c. Consideration of matters – at present new section 58D(2) (inserted by clause 37) sets out a list of matters that the Minister *may* have regard to when preparing or amending an NPT. Consideration of those matters is not mandatory. The Law Society considers that the Minister should be *required* to have regard to those matters, in order to provide certainty and transparency in the NPT preparation process.

    d. Whether the NPT is mandatory – it is not clear from the proposed provisions whether the preparation of an NPT is mandatory. New section 58D(1) (inserted by clause 37) appears to give the Minister a discretion as to whether to prepare an NPT ("**If** the Minister determines to prepare" an NPT), whereas new section 58I (inserted by clause 37) requires that the Minister "**must** ensure that the first NPT is approved within 2 years after the date on which Part 1 of the Resource Legislation Amendment Act 2015 receives the Royal assent." Further clarification is required.

    e. Preparation timeframes – the NPT provides an opportunity for efficient plan-making, but more importantly for efficient and consistent consenting across the country. This opportunity will only be realised if the contents of the NPT are carefully drafted to provide clear and concise application. The overall efficiency of the NPT at a consenting level will be determined by its drafting. Both care and adequate time should therefore be taken with its drafting to ensure the goal is achieved. The Law Society considers the two year timeframe for preparing the first NPT is too great a constraint, and is highly likely to result in greater inefficiencies in the long term, both in terms of the engagement process, the roll-out and consenting nationwide.

    f. Implementation timeframes – new section 58H (inserted by clause 37) requires local authorities to make the amendments directed by the NPT (without going through a Schedule 1 process) within a year after the date the NPT is notified in the Gazette or within the timeframe set out in the NPT. Other changes required to give effect to any provision in the NPT (which fall outside the directives) must be made using a Schedule 1 process within five years after the date the NPT is notified in the Gazette or within the timeframe set out in the NPT. The Law Society considers that the difference between these two types of changes could be clarified by referring to where the NPT directs specific changes rather than just where the NPT "directs so", as at present. It is

unclear why a period of one year is required for the first tranche of changes, when similar amendments directed by an NES are required in sections 44A(4)(b) and 44A(5)(b) to be made "as soon as practicable after the date on which the standard comes into force". For consistency, consideration should be given to a similar approach being taken to both.

g. Wording – new subsections 58H(6) and (7) (inserted by clause 37) could be combined and reworded for clarity, as the wording is difficult to follow.

h. Review – while the provisions enable the Minister to amend the NPT by following the same process as is required for its preparation, there is no requirement for the NPT to be reviewed and no specific right for local or iwi authorities to request that a review be undertaken. Given the requirements to review regional and district policies and plans every 10 years, the Law Society considers a similar requirement should be imposed on the NPT. For clarity there should also be confirmation that local and iwi authorities can request and propose changes to the NPT outside the mandatory review periods and that while the Minister is required to consider any such requests the Minister may but is not required to undertake a review nor to make any changes.

i. Fit with other planning processes – it is not clear how the NPT fits with the other plan processes such as the streamlined, collaborative and Schedule 1 processes. For example, if a plan change is notified which includes changes required through the NPT, are submitters able to make a submission on the NPT changes even though the local authority is required to implement those changes? The Law Society recommends that further direction be provided on how the NPT relates to those other planning processes.

Recommendations

23. That the definition of NPT in section 2 (inserted by clause 4(3)) be amended as follows:

> *"means the national planning template approved under section 58E, as amended from time to time <u>under section 58G</u>"*

24. That clarification is provided as to whether the NPT is mandatory, by amending new section 58D(1) (introduced by clause 37).

25. That new section 58I (introduced by clause 37) be deleted to remove the two year timeframe for approving the first NPT.

26. That new section 58D(2) (introduced by clause 37) be amended to require the Minister to consider the matters in that subsection and to require consideration as to whether it is appropriate for an NPT or any of its provisions to apply to a specified area:

> *"(2) In preparing or amending the national planning template, the Minister ~~may~~ must have regard to –*
>
> *(a) the matters set out in section 45(2)(a) to (h):*

(b) whether it is desirable to have national consistency in relation to a resource management issue:

(ba) whether it is appropriate for the national planning template to apply to specific regions or districts or other parts of New Zealand:

(c) any other matter that is relevant to the purpose of the national planning template.

27. That the changes required to be made without following the Schedule 1 process be clarified by amending new section 58H(2) (introduced by clause 37) as follows:

> *"A local authority must amend a document, if the national planning template directs that the document must ~~so, to~~ include the specific provisions set out in the national planning template."*

28. That consideration be given to aligning the default implementation timeframes for the NPT directive changes (i.e. those to be made without use of the Schedule 1 process) to be consistent with those applying to the NES.

29. That consideration be given to extending the timeframe for other NPT changes to 10 years to mirror the statutory timeframe for substantive reviews.

30. That the NPT be subject to review at least 10 yearly, with local and iwi authorities able to request reviews outside these times by amending new section 58G (introduced by clause 37) to insert a new subsection (6) as follows:

> *"(6) The Minister must commence a review of a provision of the NPT if the provision has not been the subject of a review, or a change by the Minister within the previous 10 years."*

31. That new section 58C (introduced by clause 37) be amended to limit the scope of the NPT to template matters by:

    a. Amending new section 58(1)(b) as follows:

    > *"(b) any of the matters specified in section 45A(2) and (4) except subsection 45A(2)(e) (which applies as if the national planning template were a national policy statement):*

    b. Deleting new subsections 58C(1)(c), (d) and (f);

    c. Deleting new subsection 58C(2).

32. That new subsections 58H(6) and (7) be combined and reworded as follows:

> *"(6) ~~However, subsection (7) applies if~~ If an amendment relates to matters that are the subject of a proposed policy statement or plan that was notified under clause 5 or 48 of Schedule 1, but had not become operative before the approval of the national planning template~~.(7) If this subsection applies~~, the local authority –*
>
> *(a) is not required to amend the document within the time specified in subsection 5(b); but*
>
> *(b) must make the amendments under subsection 5(a) within the time specified in the template or (in the absence of a specified time) within five years of the date on which the proposed policy statement or plan becomes operative."*

33. That further direction be provided as to how the NPT is to be regarded and given effect to in any subsequent planning processes.

Regulation-Making Powers

Overview of provisions

34. Clause 105 of the Bill inserts new regulation-making powers in new section 360D relating to land use restrictions to:

    a. prevent and remove local authority planning provisions that duplicate the functions of, or have the effect of overriding, other legislation;

    b. prevent and remove local authority planning provisions that impose land use restrictions that are not reasonably necessary to achieve the purpose of the RMA; and

    c. permit certain land use activities.

Comments

35. The key concern with the proposed new regulation-making powers is that they effectively amount to a Henry VIII clause. This is because the regulations would override the power that local authorities have under the RMA to control land use and could require the removal of provisions in RMA plans which conflict with the regulations. These are changes that should be made by Parliament rather than by the Executive.

36. Another concern is the particular changes required to rules. The regulations can require that rules inconsistent with the regulations be withdrawn or amended "to the extent necessary to remove the inconsistency". However, what is necessary will be a matter of interpretation and the regulations will need to provide clear direction as to the types of changes envisaged. This may be more difficult if the regulations are of general application rather than just applying to a specific area or plan.

Recommendation

37. That the regulation-making power to overrule provisions in RMA policies and plans in new section 360D (inserted by clause 105) be deleted.

Natural Hazards Risk Management

Overview of provisions

38. The Bill includes "the management of significant risks from natural hazards" as a new section 6 matter of national importance that must be recognised and provided for. Consequential changes are also made to sections 106 and 220 to require consideration of risks from all natural hazards in the consenting process.

39. The relevant provisions of the Bill include:

    a. *clause 5*, which adds natural hazards to section 6;

    b. *clause 133*, which amends section 106 to allow a consent authority to refuse or impose conditions on a subdivision consent if there is a significant risk from natural hazards and to require an assessment of natural hazard risk; and

    c. *clause 141*, which amends section 220 to ensure that conditions may be imposed for the protection of land from *all* natural hazards.

40. While the change to clause 5 is proposed to come into force on the day after the Act receives Royal assent, the changes in clauses 133 and 141 are not proposed to come into force until 6 months after the Act receives Royal assent. This is to tie in with the other changes to resource consents which take effect at that time.

Comments

41. The Law Society supports the introduction of the new section 6 matter of national importance and amendments to section 106 and section 220, for the reasons set out in its 8 April 2013 submission (2013 submission) on the Ministry for the Environment discussion document, *Improving our resource management system*.[1] In summary:

    a. the Canterbury earthquakes highlighted the RMA's failure in not prioritising the management of natural hazard risks;

    b. including the management of natural hazards as a section 6 matter will bring greater attention to natural hazards; and

    c. the amendments to section 106 (and now also section 220) will ensure that *all* natural hazards can be appropriately considered in both subdivision and land use consents.

42. It is anticipated that a body of case law will develop over time and inform this new matter of national importance.

43. The Law Society does however consider that the government is missing an opportunity to provide greater national direction as to how such risks should be managed. As noted in the Law Society's 2013 submission, further national direction amendments would "help improve planning for natural hazards, would clarify the role of local authorities and, perhaps most importantly, align resource management with civil defence emergency management planning." In particular, what comprises a "significant risk from natural hazards" (as provided in clause 133) could usefully be the subject of national direction.

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1 Available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0020/64352/l-MfE-Improving-our-resource-management-system-080413.pdf

Recommendations

44. That greater national direction be provided on how such risks should be managed through the development of a natural hazards NPS or NES.

Housing and Development Capacity

Overview of provisions

45. The Bill amends sections 30 and 31 to make it a function of local authorities to ensure there is sufficient development capacity to meet long-term demand for residential and business land.

46. Further national direction and guidance on development capacity is intended to be introduced in two phases: the first in 2016 and the second in 2017.

47. The relevant provisions of the Bill include:

    a. *clause 4*, which introduces a definition for "development capacity" to section 2; and

    b. *clauses 11* and *12*, which amend the functions of regional councils and territorial authorities in sections 30 and 31 to include measures to ensure there is sufficient development capacity in relation to residential and business land.

Comments

48. The proposed changes appear to signal a significant policy shift. Currently, the supply of land for residential or business purposes is essentially left to market mechanisms of supply and demand, with local authority considerations under the RMA focussed on managing effects of proposed subdivisions and development on the environment. The proposed changes to sections 30 and 31 (introduced by clauses 11 and 12) would widen the functions of local authorities to include establishment, implementation and review of objectives, policies and methods associated with ensuring sufficient development capacity in relation to residential and business land to meet anticipated demand. Whether it is appropriate for local authorities to be involved in regulating through the RMA what has to date largely been determined by the market, is a policy question on which the Law Society has no comment, other than to note this would be a potentially significant change to local authorities' functions.

49. Such a change in function has the potential to create tension with local authorities' other functions under the Act, and to impact on how local authorities give effect to section 6 and section 7 matters.

50. The proposed new function requires "sufficient" development capacity to meet the expected "long-term" demands of the region or district. While the term "development capacity" is defined, no guidance is given on the meaning of the terms "sufficient" or "long-term". The phrase "residential and business land" is also undefined and so will be interpreted, over time, through case law. Business land is likely to include land utilised for primary industry businesses, such as farming, forestry and mining.

Long-term growth in such industries may not be realistic in all regions or districts, and for some types of land-based businesses, demand may always exceed supply, and will be subject to market considerations such as land prices.

51. Furthermore, there may be a finite level of land development capacity due to constraining physical characteristics within the region or district because of other competing policy considerations. For example, to achieve the goals of the NPS for Freshwater Management, constraints on the development of land for farming purposes may need to be implemented in a district or region. Accordingly, while strong long-term demand for development and intensification of farm land may be anticipated in a district or region, providing for the development capacity of such "business land" (in this case farming businesses) to meet that foreseeable demand, may conflict with or undermine realisation of other policy goals, or matters of national importance required to be recognised or provided for under the Act.

52. The Law Society also questions whether imposing a requirement on all local authorities to provide such capacity is necessary given that not all areas will be experiencing growth or housing affordability issues. Where a district or region is not experiencing growth (or is indeed experiencing negative growth), requiring local authorities to provide and report on such capacity appears to be an inefficient use of those local authorities' resources.

53. Finally, the RIS notes that further national direction and guidance around these matters will be introduced in two separate phases in 2016 and 2017 respectively.[2] The Law Society questions how useful it is to introduce these functions in the absence of an appropriate national direction policy framework. Since the direction is expected to be available (or at least introduced) in less than two years, it may be more appropriate to defer the introduction of this function until that time. Such an approach would also provide time for further work to be done on how the function might take account of local circumstances and the degree of resource that local authorities will need to perform this function.

54. In discharging their planning functions, local authorities are in practice very aware of the need to provide for present and future activities in their districts and regions. Regional and District Plans have almost universally reflected the imperative to predict and provide for the future. The current statutory provisions allow for them to do so. In this sense, the amendments add nothing of substance.

Recommendation

55. That the commencement of the new functions be delayed until national direction and guidance on the scope, content and meaning of this function are available.

2 RIS, paragraph [120].

Minimising Land Restrictions

Overview of provisions

56. New duties have been introduced in Part 3 of the Bill to ensure the use of land (private, Crown-owned and council-owned) is not unreasonably restricted.

57. The relevant provisions of the Bill include:

    a. *clause 6* which inserts new subsection 12(7) to confirm regional councils have the power to remove unpermitted structures from the common marine and coastal area;

    b. *clause 7* which amends section 14 to widen the water use exemption to include stock owned by body corporates as well as individuals;

    c. *clause 8* which inserts new section 18A to list new procedural principles which apply to all persons exercising powers or functions under the RMA;

    d. *clause 54* which amends section 85 to expand the powers of the Environment Court to remove unreasonable restrictions on land in plans;

    e. *clause 55* which makes a consequential change to section 86; and

    f. *clause 84* which amends section 189 to prohibit a heritage protection authority that is a body corporate from issuing a notice of requirement for a heritage order over private land.

Comments

58. The Law Society's comments relate to the procedural principles introduced by clause 8 to section 18A and the changes made by clause 54 to section 85 which relate to the removal of unreasonable restrictions on land.

Procedural principles

59. While supporting the introduction of the procedural principles in new section 18A, the Law Society considers further clarification or amendment is required in five areas:

    a. The opening words "every person exercising powers and performing functions under this Act", may be contrasted with similar wording used in sections 6, 7 and 8, being "In achieving the purpose of this Act, all persons exercising functions and powers under it …". For consistency the wording in new section 18A should follow that in sections 6, 7 and 8.

    b. The requirement in new section 18A(a) to use timely and efficient processes overlaps with the duty in section 21 to avoid unreasonable delay. The section 21 requirement could be deleted or brought within the procedural principles section.

c. There is a conflict between the requirement in new section 18A that "every person exercising powers or functions" under the RMA must carry out the procedural principles in subsections 18A(a) to (c), and the scope of subsection 18A(b) which relates only to policy statements and plans. As drafted, the clause would require all persons exercising powers (even if those powers are unrelated to policy or plan formulation) to comply with new subsection 18A(b). This would clearly not be achievable where the powers being exercised relate to consenting rather than plan formulation. New subsection 18A(b) should be amended to make it clear that it only applies to those persons exercising powers in relation to policies and plans.

d. The requirement in new subsection 18A(c) to "promote collaboration between or among local authorities on their common resource management issues" may not be relevant to every exercise of power or function. It should be made clear that this principle only applies where relevant.

e. It is unclear if new section 18A is intended to be an enforceable obligation and that provisions in plans may be struck out or found not to be enforceable if the procedural principles outlined in the new section are contravened. This should be clarified. If the procedural principles are not intended to be enforceable, the Law Society recommends the addition of a subsection similar to the current section 17(2).

Recommendations

60. That section 21 be deleted and a new procedural principle be added to clause 8 as follows:

> *"(aa) <u>where no time limits are prescribed, exercise those functions or powers as promptly as is reasonable in the circumstances</u>;*

61. That procedural principle 18A(b) (inserted by clause 8) be amended as follows:

> *"(b) <u>where the powers and functions relate to policy statements and plans</u>, ensure that policy statements and plans…"*

62. That procedural principle 18A(c) (inserted by clause 8) be amended as follows:

> *"(c) <u>where relevant</u>, promote collaboration between or among local authorities on their common resource management issues."*

Unreasonable restrictions on land

63. Clause 54 introduces new subsection 85(3A) which enables the court to direct the local authority to modify, delete or replace a provision in a plan in the manner directed by the court, or to acquire the land by agreement with the owner under the Public Works Act 1981 (PWA) if certain requirements are met. The choice as to which of these options to implement is left to the local authority.

64. The Law Society considers that the wording of this subsection should be amended to clarify that:

a. The two matters are alternatives, by adding the word "or" between subparagraphs 85(3A)(a)(i) and (ii); and

b. where the PWA requirements are not met, the local authority is still required to modify, delete or replace the provision in the plan as directed by the court.

Recommendation

65. That new section 85(3A) (inserted by clause 54) be amended to clarify that where the requirements of subsection (3D) are not met, the local authority will still be required to modify, remove or replace a provision of the plan as directed by the Court:

> *"(3A) The Environment Court, if it is satisfied that the grounds set out in subsection 3B are met, may –*
>
> *(a) in the case of a plan or proposed plan (other than a regional coastal plan or proposed regional coastal plan), direct the local authority to do whichever of the following the local authority considers appropriate:*
>
> *(i) modify, delete, or replace the provision in the plan or proposed plan in the manner directed by the court: or*
>
> *(ii) if the requirements of subsection (3D) are met, by agreement with the person with an estate or interest in the land or part of it, acquire all or part of the estate or interest in the land under the Public Works Act 1981; and*
>
> *(ab) <u>If the requirements of subsection (3D) are not met, then the local authority must modify, delete, or replace the provision in the plan or proposed plan in the manner directed by the court</u>:*

<u>Removal of Hazardous Substances Management Functions</u>

Overview of provisions

66. The Bill removes the explicit function of local authorities to manage hazardous substances.

67. The relevant provisions of the Bill include:

a. *clause 11 and 12* which delete references to hazardous substances in sections 30 and 31;

b. *clause 40* which removes the reference to hazardous substances as forming part of regional policy statements; and

c. *clause 109* which removes the reference to hazardous substances in clauses 6 and 7 of Schedule 4.

Comments

68. The Law Society understands that the intention of these changes is to remove or at least reduce duplication with controls imposed by the Environmental Protection Authority under the Hazardous Substances and New Organisms Act 1996 (HSNO). At present the provisions only remove or substantially reduce hazardous substances controls in plans. However, no guidance is provided as to:

    a. How and when local authorities must amend their plans to remove such functions.

    b. The status of the provisions prior to removal and whether consents will be required in the interim period. This is particularly important because the RIS notes that changes may be made over time as part of a policy or plan review.

69. Another concern is that no mention is made of genetically modified organisms (GMOs), which is the other major area regulated by HSNO. While the RMA does not specifically mention GMOs some RMA documents (such as the Northland Regional Policy Statement and the Bay of Plenty Regional Policy Statement) do include provisions in relation to GMOs.

70. The issue of whether the RMA has jurisdiction in relation to GMOs was raised by the Environment Court in *NZ Forest Research Institute Ltd v Bay of Plenty Regional Council*.[3] However, as the issue was not specifically argued before the Court and since all parties generally agreed the RMA could have such jurisdiction the Court did not see the need to resolve the issue.

71. To remove any uncertainty and to give effect to the aim of removing unnecessary duplication between the two regimes, the ability for local authorities to regulate GMOs under the RMA should also be removed.

Recommendations

72. That the Bill include provisions to clarify:

    a. how and when local authorities are to remove hazardous substances functions;

    b. the status of hazardous substance provisions prior to removal and whether consents are still required in the interim period; and

    c. that the regulation of genetically modified organisms is not a function of local authorities under the RMA, by amending sections 30 and 31 to add new subsection 1A:

    "(1A) <u>The functions specified in subsection (1) do not include the management and control of genetically controlled organisms (which are regulated by the Hazardous Substances and New Organisms Act 1996).</u>"

[3] *NZ Forest Research Institute Ltd v Bay of Plenty Regional Council* [2013] NZEnvC 298.

PLANNING PROCESSES

Collaborative plan process

Overview of provisions

73. Clause 52 inserts new subpart 4 (section 80A) to Part 5 of the RMA to introduce a new Collaborative Plan Process (CPP) as an alternative to the existing Schedule 1 process. This is supported by the insertion of a new Part 4 (clauses 36 to 73) into Schedule 1 of the RMA, by clause 108 of the Bill.

74. The essential features of the CPP as proposed are:

    a. The local authority must consider whether the CPP is the best planning approach for the resource management issue to be addressed and that use of the process would not be inconsistent with the local authority's obligations under any applicable iwi participation legislation or agreement.

    b. A Collaborative Group is established, with membership and terms of reference (including timeframes) set by the local authority.

    c. The local authority then prepares the proposed policy statement, plan or plan change, which gives effect to the consensus position reached by the Collaborative Group, except where this would not comply with relevant provisions of Parts 4 and 5 of the RMA.

    d. The proposed policy statement, plan or plan change must be notified, with submissions on that considered by a Review Group appointed by the local authority, which then makes recommendations to the local authority.

    e. Where the local authority accepts the recommendations of the Review Group, appeals are limited to points of law only, with these determined by the Environment Court. There can still be merit appeals to the Environment Court where the Review Group's recommendations are rejected (or changed), unless the local authority records in its decision that the change has been made to ensure compliance with relevant provisions of Parts 4 and 5 of the RMA.

Comments

75. The Law Society questions the need for, and efficacy of, introducing an alternative to the current Schedule 1 process for preparing policy statements, plans and plan changes. While there have been some notable exceptions (which is to be expected), as the RIS records (at paragraph 143) over the last 10 years by far the majority of plans (77%) and plan changes (92%) have been successfully determined within two years of notification. This reflects the outcome of the analysis undertaken by the Environment Court in the first Annual Review undertaken in 2014.[4] In short, it has not been

[4] Environment Court of New Zealand *Annual Review by Members of the Court* 2014 http://www.justice.govt.nz/courts/environment-court/documents/2014-annual-review

demonstrated that there is an existing issue that the CPP (or any other alternative plan-making process) is required to address.

76. Where there have been issues and significant delays with the adoption of planning instruments, the unavoidable reality is that policy and plan-making is generally a complex exercise with significant repercussions. Accordingly, local authorities and communities must be provided with sufficient time to undertake their task effectively. It should also be anticipated that proposed planning instruments will on occasions give rise to critical issues requiring robust debate and judicial determination. This does not (and should not be taken to) reflect a failure in the existing Schedule 1 process.

77. There are currently two plan-making processes underway, for the proposed Auckland Unitary Plan and proposed Christchurch Replacement District Plan, where an alternative to the Schedule 1 process is being followed. At a minimum the process in Auckland is highly likely to result in merit appeals to the Environment Court as a result of the Auckland Council disagreeing with the conclusions of the independent panel hearing submissions. In these circumstances, the promised benefits of the alternative processes may be unachievable. It is premature to introduce alternative planning processes before completion of the Auckland and Christchurch processes. It will only be at the conclusion of those processes that a proper assessment can be made of their efficiency and effectiveness, areas for improvement and the challenges to be addressed.

78. It is also not clear how any alternative plan preparation process is to fit with, or be influenced by, any National Planning Template that is prepared in accordance with the Bill as currently drafted.

79. That said, the Law Society agrees in principle that durable, high quality planning instruments are best developed via consensus rather than litigation, where this is possible. It also supports incentivising local authorities to undertake meaningful and robust front-end engagement with the full range of community interests and stakeholders when preparing planning instruments. However, it is not clear why this objective could not be achieved by making appropriate amendments to the current Schedule 1 process, rather than through the introduction of an entirely new alternative plan-making process. A number of local authorities are already undertaking early consultation and engagement as best practice, so this may not need to be enforced or legislated for.

80. There are a number of concerns with the CPP itself, as currently proposed. In particular, for the process to operate effectively:

    a. The Collaborative Group must be sufficiently representative of the whole range of relevant community interests and values, rather than open to being dominated by the most vocal/active interest groups. There is significant risk of the latter occurring under the provisions of the CPP as currently drafted, because of the lack of direction around the appropriate composition of a Collaborative Group.

b. The Collaborative Group must also be given sufficient time and resources to undertake its functions. At present the Bill leaves open the possibility that members of the Collaborative Group may not be paid at all, and the timeframes for undertaking their task are entirely at the discretion of the local authority. This calls into question both the representativeness and quality of members in a Collaborative Group and (by implication) the outcomes it can achieve.

81. Further, while the process is premised on consensus decision-making, this of course cannot be enforced or legislated for (as the Bill acknowledges). There is a very real possibility the Consensus Group may only reach an agreed position on a small number of issues, with the rest unable to be resolved. In those circumstances there could be significant time, cost and effort expended for very little (if any) benefit in terms of quality planning outcomes.

82. The local authority has a very broad discretion to override any consensus position that is reached, both when preparing the relevant planning instrument and again in making its decisions on the Review Group's recommendations, on the basis that this is necessary to "ensure compliance with relevant provisions of Parts 4 and 5 of the RMA" (new clauses 45 and 54 of Schedule 1). Of even more concern is the restriction on appeal rights in such circumstances in new clauses 58 to 60 of Schedule 1. There appears to be little value in the Consensus Group undertaking its work unless the local authority's scope for disregarding it is more circumscribed.

83. Finally, the Law Society supports the proposal in new clauses 59 and 60 of Schedule 1 that both the rehearing of the merits and any appeals on points of law are determined by the Environment Court. Experience shows that case management is the key to early resolution of appeals. Having the appeals split between two jurisdictions, subject to separate case management processes and potentially limited communication and co-ordination, will create unnecessary difficulties and inefficiencies. The proposal is an improvement on the processes being followed for Auckland and Christchurch.

84. Overall, there are significant questions as to the need for and potential effectiveness of the CPP as currently proposed. Much of what it is seeking to achieve is already reflected in practice or can be achieved by existing mechanisms in the RMA (such as through joint management agreements and advisory groups). The Law Society accordingly considers the CPP is unlikely to achieve its intended objectives, or any significant cost or time savings (or better planning outcomes) than those under the existing Schedule 1 process. On the contrary, it may in fact result in much repetition, wasted resource and inefficiency.

Recommendation

85. That the Collaborative Plan Process (inserted by in clauses 52 and 108) be deleted.

<u>Streamlined planning process</u>

Overview of provisions

86. Clause 52 inserts new subpart 5 (sections 80B and 80C) to Part 5 of the RMA to introduce a new Streamlined Planning Process (SPP) as a further alternative to the existing Schedule 1 process. This is

supported by the insertion of a new Part 5 (clauses 74 to 93) into Schedule 1 of the RMA, by clause 108 of the Bill.

87. Local authorities can request approval from the Minister to use the SPP, where this is considered necessary to:

    a. implement a national direction;

    b. urgently address a matter of public policy;

    c. meet a significant community need;

    d. address unintended consequences that have arisen from a proposed planning instrument;

    e. develop a combined planning instrument under section 80; or

    f. address a circumstance comparable or relevant to (a) to (e) above.

88. If the request is accepted, the Minister then sets the streamlined process that the local authority must follow. Any SPP directed by the Minister must, at a minimum, provide for:

    a. consultation with affected parties (including iwi);

    b. the planning instrument to be either publicly notified or limited notified;

    c. an opportunity for written submissions and report showing how those submissions have been "considered" (note there is no specific requirement for a hearing); and

    d. an assessment of costs and benefits.

89. The Minister can add additional process steps, such as technical review, if the matter is highly technical in nature. The Minister also sets the timeframes within which the process is to be completed.

90. Once agreed, the local authority must follow the SPP as set out in the Minister's direction, and not Schedule 1. It must send its draft decision on the proposed policy statement, plan or plan change to the Minister for approval. Ultimately, this can result in the Minister declining to approve the proposed planning instrument in its entirety. There are no appeal rights on decisions made under a SPP except by way of judicial review.

Comments

91. The Law Society has already commented on the need for and efficacy of introducing any alternative to the current Schedule 1 process for preparing policy statements, plans and plan changes. In addition, it has significant concerns regarding the SPP as currently proposed.

92. Most critically, the Law Society considers that the SPP will exacerbate the public participation and access to justice issues that have become evident in the processes established in special legislation for both the proposed Auckland Unitary Plan and proposed Christchurch Replacement District Plan.

93. Experience with both these processes has demonstrated that a significant number of affected parties and residents have been prevented from engaging with these planning instruments (or have chosen not to engage), because they have not been able to do so effectively in the prescribed timeframes. Many who tried to participate have also had difficulties in obtaining necessary professional (legal, technical and planning) advice to support and guide their involvement. This is due to the overall timeframes and number of clients requiring representation, resulting in advisors becoming overwhelmed with work.

94. That is in no way a criticism of the manner in which the hearings have been conducted. The Auckland Hearing Panel (Panel) in particular has employed numerous techniques and resources to support and guide those who wish to participate. The Panel has also endeavoured to assist those participating to manage the required workloads as far as possible. However, the size of the task and statutory timeframes has meant there is only so much that could be done.

95. Under the SPP as proposed in clause 77 of Schedule 1, the timeframes for developing similar combined planning instruments would be completely at the Minister's discretion. They could therefore be even shorter than those provided for in the proposed Auckland Unitary Plan. This would have significant implications for people's ability to participate fully and to be heard on the development of proposed planning instruments.

96. In addition, under new clause 77 of Schedule 1 the Minister can:

    a. explicitly limit participation rights by directing that the SPP proceed by way of limited rather than full public notification (although the Bill does not specify the circumstances in which there can be limited notification, and the criteria by which this is to be determined);

    b. prescribe how written submissions on the proposed planning instrument are to be "considered" by the local authority (there is no specific requirement that a public hearing be held); and

    c. specify changes which must be incorporated into the proposed planning instrument once it is submitted for approval, or decline to approve the proposed planning instrument in its entirety.

97. In practice, these changes mean that timeframe issues aside, local residents and other stakeholders may have only limited (or no) opportunity to have input on relevant planning instruments. The SPP also affords the Minister an unprecedented level of discretion to determine unilaterally the planning framework for the region, district or area concerned, irrespective of local views. This is reinforced by the lack of appeal rights from the SPP, except by way of judicial review (new clause 93 of Schedule 1).

98. Such outcomes and constraints are particularly inappropriate in the context of developing planning instruments, which significantly impact people's environment and property rights. Devolution of decision-making powers to local communities and providing for public participation were two of the

fundamental principles of the RMA as originally enacted, for good reason. They underpin the central purpose of the Act – the sustainable management of natural and physical resources – which relies on community input to achieve quality planning and environmental outcomes. Both these principles have since been progressively eroded through legislative amendment. There is no justification for this trend to be further continued through introduction of the SPP.

99. Finally, the Law Society also questions:

    a. the extent to which local authorities would elect to utilise the SPP, given the complete abandonment of their plan-making functions to the Minister this would entail, and the risk that they could be left without a new planning instrument at the end;

    b. whether the SPP would result in any significant time and cost savings, compared to what can generally be achieved using the current Schedule 1 process (as noted, the Law Society considers the existing plan preparation process has proved to be an effective and efficient mechanism for developing the vast majority of planning instruments to date); and

    c. the removal of appeal rights.

Recommendation

100. That the Streamlined Planning Process (inserted by clauses 52 and 108) be deleted.

Schedule 1 amendments (including limited notification)

Overview of provisions

101. The Bill proposes three changes to the current (standard) plan-making process to improve efficiency and provide clarity:

    a. Clause 108 inserts new clause 5A to Schedule 1, to introduce limited notification as an available option for plan changes where directly affected parties can be easily identified.

    b. Clause 152 inserts new clause 10A to Schedule 1, to require local authorities to request approval from the Minister for the Environment to extend the two year time limit for making decisions on a proposed policy statement, plan or plan change.

    c. Clause 51 amends section 80, to clarify that local authorities may give effect to a proposed RPS when preparing a combined plan that includes a proposed RPS.

Comments

102. The Law Society supports these proposed amendments in principle, subject to the following comments.

Limited notification

103. The Bill does not define "*directly affected parties*" nor how the local authority is to identify if there are any parties directly affected by a plan change. Presumably it is intended that these "*directly affected parties*" are the same as an "*affected person*" requiring limited notification in accordance with section 95B and currently defined in section 2AA. If so, the new clause 5A should refer to "*affected persons*", not "*directly affected parties*". If not, amendment is needed to clarify what is meant by "*directly affected parties*", and how such parties are to be identified.

104. It is also not clear whether the Bill intends to restrict participation in 'limited notification' plan changes solely to those with interests in the land or area covered by the plan change (i.e. only landowners and infrastructure providers). If so, this raises the issue whether public interest and industry groups should also be provided with an opportunity to participate as "*directly affected parties*" in such plan changes. These organisations have the capability (and resources) to make very useful contributions to these processes. Consideration should therefore be given to providing scope for these organisations to participate in plan changes that proceed via limited notification. Similarly, the Bill should clarify (or confirm) that iwi would be considered "*directly affected parties*" for such plan changes.

105. It is important that planning engages not only affected owners and occupiers but also persons and organisations with a relevant resource management interest in the subject of the plan change. "Directly affected parties" and "affected persons" do not achieve this outcome.

Requiring Ministerial approval for timeframe extension

106. With respect to requiring the Minister's approval to extend the timeframe for making decisions on a proposed policy statement, plan or plan change:

    a. There may well be little practical benefit in this proposal, beyond creating an additional administrative requirement for local authorities. The RIS notes (at paragraph 143) that by far the majority of plans (77%) and plan changes (92%) are determined within two years of notification. Where this has not occurred, the Law Society considers there are generally likely to be good reasons why that has not been possible, which would result in the Minister granting a requested extension if required.

    b. New clause 10A(3)(b) of Schedule 1 requires that a local authority, before applying for an extension, must take into account "the interests of the community in achieving adequate assessment of the effects of the proposed policy statement or plan or change to a policy statement or plan". The words "in accordance with Part 4 of this Act" should be added, so that policy statements, plans and plan changes are more appropriately considered (in the context of the functions, powers and duties of local authorities set out in Part 4 of the RMA).

    c. The Bill should specify what happens if the Minister declines a request to extend the timeframe. For example, does this mean that the local authority is required to abandon the plan or plan change, and start again? Or will it have to try and complete that process in what has proved to be an inappropriate timeframe? The former would result in wasted resources and delays in

addressing significant resource management issues through the planning framework. The latter could result in sub-standard planning documents and inappropriate environmental outcomes.

Giving effect to a proposed RPS in the context of a combined proposed plan (clause 51)

107. The need for this (or similar) amendment was clearly demonstrated by the proposed Auckland Unitary Plan process (given it was overlooked in drafting the specific legislation for that process). However, this issue could equally be resolved by way of appropriate (and very simple) amendment to the definition of an RPS.

Recommendations

108. That clause 5A of Schedule 1 (introduced by clause 108) be amended to:

    a. replace the phrase "persons directly affected" in clause 5A(2) and "persons identified as being directly affected" in clause 5A(3) with "affected persons"; and

    b. define "affected persons" to include any person owning or occupying land affected by the proposed change and any person with a relevant resource management interest affected by the proposed change.

109. That clause 10A of Schedule 1 be deleted. If this submission is not accepted:

    a. that clause 10A of Schedule 1 be amended to specify the consequences of a ministerial refusal to extend time; and

    b. that clause 10A(3)(b) of Schedule 1 be amended to read (amendment underlined):

    (b) the interests of the community in achieving adequate assessment of the effects of the proposed policy statement or plan or change to a policy statement or plan <u>in accordance with Part 4 of this Act</u>".

110. That the amendment to section 80 (introduced by clause 51) be enacted.

<u>Reducing Board of Inquiry cost and complexity</u>

Overview of provisions

111. The Bill introduces the following changes aimed at reducing the cost and complexity of Boards of Inquiry ("BOI"):

    a. Clause 72 inserts new section 149J(3B) to require the Board to conduct its inquiry in accordance with any Terms of Reference set by the Minister.

    b. Clauses 68, 69 and 70 amend section 149C, 149E and 149F to simplify and reduce the costs of procedural requirements (such as the reduction of the public notice requirements and allowing for electronic provision of information).

c. Clauses 74, 75 and 81 expand the role of the Environmental Protection Authority (EPA) by:

   i. allowing it to make decisions that reduce the cost of administrative matters that are incidental to the conduct of an inquiry (new section 149KA inserted by clause 74);

   ii. enabling it to provide planning advice if the Board requests it (section 149L amended by clause 75); and

   iii. allowing it to suspend processing where there are outstanding debts, and to recover debt (new section 149ZG inserted by clause 81).

d. Reducing costs of the BOI by making the current requirement that a BOI be chaired by a judge optional (section 149J(3)(b) amended by clause 72), and including a consideration of legal expertise, experience managing cross-examination within its skills and experience, and relevant technical expertise (section 149K(4) amended by clause 73).

e. Requiring BOI to carry out their duties in a timely and cost-effective manner and to have regard to forecasted budgets (section 149L amended by clause 75).

f. Removing the requirement for a BOI to produce a draft report (section 149Q repealed by clause 77).

Comments

112. The Law Society supports the intent of ensuring the cost of BOI hearings is appropriately and prudently managed, as these are borne by the applicant (and in effect often taxpayers, given the type of proposals most likely to be called in and heard by a BOI). As the RIS notes (at paragraph 468) these costs are not insignificant, being in the range of $1m to $3m. The Law Society accordingly does not comment further on the majority of the provisions in the Bill aimed at reducing BOI cost and complexity, other than to note that many of these simply reflect measures that have already been adopted in practice.

113. The Law Society does have concerns about removing the present requirement that BOIs be chaired by a current or former High Court or Environment Court Judge (or indeed to have on BOIs anyone with legal training). By their very nature, applications that come before BOIs are likely to be large and complex proposals. They require evidence from a wide range of technical experts and attract potentially hundreds of submissions. Cross-examination is permitted, and a robust decision must be produced (under current requirements) within nine months of the application being publicly notified.

114. It is unlikely that people without specific judicial (and at least legal) training and experience will be able effectively to manage a hearing of such scale and complexity, and within the required timeframes. For example, given cross-examination is not permitted at a first instance hearing under the RMA, no others (not even accredited decision-makers) will have the necessary skills or experience in managing cross-examination to chair a BOI hearing effectively. The lack of process guidance around BOI hearings in Part 6AA of the RMA also means Board Chairs must be particularly adept at managing the raft of

procedural issues that inevitably arise in such hearings. In reality, judges are the only people who will have the necessary skills.

115. While the proposed amendment may result in an overall lower per diem for the BOI, any such savings are likely to be far outweighed by the additional costs and time delays incurred as a result of the hearing not being appropriately and efficiently managed. It is also likely the quality and robustness of BOI processes and decisions will be adversely affected, if the Board Chair is not a current or former judge.

Recommendation

116. That the current requirement for Boards of Inquiry to be chaired by a current or former judge of the High Court or Environment Court be retained.

ENVIRONMENT COURT POWERS AND PROCESSES

Overview of provisions

117. The Bill proposes amendments to Environment Court processes that are intended to support efficient and prompt resolution of appeals.

118. The Law Society comments on the following aspects of these amendments:

a. Changes to the range of orders that Environment Judges and Commissioners can make when sitting alone (sections 265, 279 and 280 amended by clauses 89, 94 and 95).

b. Mandatory consideration of post-lodgement conferences (section 267(1) amended by clause 90).

c. Mandatory participation in alternative dispute resolution (ADR) processes (new section 268A inserted by clause 91).

d. Considerations for a Registrar's waiver, reduction or postponement of court fees (section 281A replaced under clause 96).

e. Changes to the requirement to have regard to the first instance decision (section 290A replaced under clause 97).

Comments

Changes to the range of orders that Environment Judges and Commissioners can make when sitting alone

119. The Law Society supports the proposed amendments to sections 265, 279 and 280 in clauses 89, 94 and 95, which provide greater flexibility in the use of Environment Court decision-makers by enabling Environment Judges and Commissioners sitting alone to make a wider range of orders. The increased

flexibility offered by the amendments will allow the Environment Court to operate in a more efficient and adaptable manner.

Mandatory consideration of post-lodgement conferences

120. Clause 90 replaces section 267(1) with three new subsections. They require an Environment Court Judge to consider convening a conference as soon as practicable after the lodging of proceedings with the Court. Where a decision is made to convene a conference, the judge may require the parties to attend. Attendance can be by way of a representative, as long as the representative has authority to make decisions on behalf of the party "in respect of matters that may arise at the conference".

121. The Law Society does not object to this amendment, although it suggests that the amendment is unlikely to bring about a significant change from the status quo. The requirement to consider whether to convene a conference largely reflects current case management practice in the Environment Court, where post-lodgement conferences are frequently convened after a standard-form report is received from the parties.

122. The Law Society proposes a minor amendment to proposed section 267(1B) to accommodate situations where unforeseen matters arise at conferences, where representatives (through no fault of their own or the person they represent) do not have sufficiently broad authority.

Mandatory participation in ADR processes

123. There are many forms of ADR. However, the process most commonly employed in environmental matters is mediation. Under the RMA, mediation is a voluntary process which parties agree to participate in. This is reflected in Part 5 of the Environment Court's Practice Note 2014.

124. Clause 91 replaces section 268 and inserts new section 268A into the RMA. In general terms, these provisions empower the Environment Court to:

    a. initiate a mediation (along with other ADR processes), and

    b. to compel parties to attend.

125. In the case of mediation, this is a significant departure from the status quo and may be regarded as antithetical to the inherently voluntary nature of the mediation process. Nevertheless, the Law Society does not oppose the proposed amendment, because of the availability of judicial discretion (accessible through an application for leave from the Court) to allow parties not to participate in mediation.

126. The only qualification is that the Law Society does not consider mandatory participation in ADR is appropriate for all classes of proceeding. In particular, ADR may either be ineffective or inappropriate in relation to declaration or enforcement proceedings, depending on the issues arising. Any potential difficulties could be avoided by requiring the Court to hear from the parties before directing ADR.

Considerations for a Registrar's waiver, reduction or postponement of court fees

127. The Law Society supports the clause 96 changes (new section 281A) which enable a prescribed process and forms for applications to the Registrar to waive, reduce or postpone the payment of court fees. A prescribed process and forms will eliminate some of the uncertainty under the current provision.

128. Waivers appear to be readily granted. Often other parties are not advised that a waiver has been given. The Registrar should record the decision in writing with reasons and provide a copy of that decision to all persons served with the proceedings. Those parties are entitled to know they are dealing with an impecunious litigant. This may have implications for the conduct of the proceedings and for costs.

Changes to the requirement to have regard to the first instance decision

129. Clause 97 replaces section 290A. Section 290A is a provision that is seldom given any material weight in appellate decision-making, often because the scope of an application and/or the evidence before the Environment Court on appeal has evolved from that put before the consent authority at first instance.

130. The RIS indicates (at paragraph 377) that the change to section 290A will require the Environment Court to have 'particular' regard to the consent authority's first instance decision. This is not reflected in proposed section 290A, which maintains the current provision's requirement to 'have regard to' the earlier decision. The only change is that, in the case of an appeal against a decision on a resource consent application under section 120, the Environment Court must also have regard to any reports prepared by the consent authority and the outcome of any pre-hearing meeting or ADR process.

131. The Law Society does not object to the changes proposed to section 290A. However, the changes are unlikely to bring about any meaningful shift in approach relative to the status quo. As noted above, the Environment Court seldom gives material weight to first instance decisions under section 290A. This is in large part because the proposal has so often changed from that put forward at the local authority hearing and the issues are much more confined than those considered at first instance. It is even less likely to be influenced by the report prepared for the initial hearing. If the legislative intent is to attach greater significance to the consent authority's first instance decision, then this amendment is unlikely to achieve that. A requirement to have 'particular' regard to the first instance decision, as suggested in the RIS, would be a stronger signal as to the weight to be given to the first instance decision. However, even that wording would be unlikely to result in any marked change in practice. A more fundamental revision of section 290A is required, if that is the underlying policy objective.

Recommendations

132. That proposed section 267(1B) (amended by clause 90) be amended:

> (1B) However, a person (**person A**) may represent a person required to be present at a conference (**person B**) only if person A has the authority to make decisions on behalf of person B in respect of matters that may <u>reasonably be expected to</u> arise at the conference.

133. That proposed section 268A (introduced by clause 91) be amended to require the Court to give the parties an opportunity to be heard before making a direction.

134. That proposed section 281A (clause 96) be amended to require that the Registrar record his or her decision in writing, together with reasons, and provide a copy of the decision to all parties served with the proceedings.

RESOURCE CONSENT PROCESSES

Fast-track consents

Overview of provisions

135. Clause 151 inserts new section 360F to provide a new regulation-making power to enable the Minister to prescribe:

    a. particular activities or classes of activities as fast-track; or

    b. prescribe methods or criteria a consent authority must use to identify fast-track activities; and

    c. the information that an application must include (rather than the information required by Schedule 4).

136. Clause 121 inserts new section 87AAC under which all controlled activities (other than subdivisions) will also be fast-track applications.

137. For such applications:

    a. less information may be required to be submitted with the application;

    b. a decision on the application is to be made within 10 working days after the application is made (rather than the usual 20);[5] but

    c. the fast-track status ceases to apply if the application is notified or a hearing is held. At that stage, the information normally required under Schedule 4 can be sought by way of a section 92 request.

Comments

138. While the Law Society does not take a position on whether the reduced processing timeframe is appropriate, it questions whether a 10 working day difference will be of material value to applicants, given the range of other factors that typically affect the delivery timeframe for projects requiring resource consent.

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5 New section 115(4A) inserted by clause 134.

139. The 10 working day processing timeframe is expected to provide certainty as to timing (and potentially cost) for applicants. The competing consideration is whether the timeframe is feasible for local authorities.

140. It is only the timeframes that have been changed; there are no differences to the processing requirements or the matters for consideration. The Ministry for the Environment discussion document *Improving our resource management system* indicated that some reduction in the standard processing requirements for resource consent applications would be required if local authorities were compelled to comply with a 10 working day processing timeframe. This has not occurred.

141. Irrespective of how the new process is framed, it will need to be very clearly prescribed, as will the requirements for eligible applications. Uncertainties in either regard are likely to compromise the feasibility of the 10 working day processing timeframe. Uncertainties may also give rise to litigation, which is antithetical to the goal of providing certainty to applicants as to timing and cost.

142. While there will be obvious benefits to resource consent applicants from faster consent processing, it remains to be seen whether local authorities will have the capacity to process all fast-track applications within the required timeframe. In particular, it cannot be assumed that all controlled activities are simple enough to be dealt with this quickly (and as a general proposition there are some downsides to linking consequences to activity status in ways that could not have been contemplated when the rules were made).

143. The applications classified as "fast-track" can vary greatly in complexity. For example, the ability to meet new timeframes for controlled activities will depend on the number and nature of the matters over which the Council has reserved control.

144. The "fast-track" procedure will limit the ability of a consent authority to assess applications effectively and will diminish the quality of decisions. In addition, the "fast-track" procedure may well discourage the use of a controlled activity status in future planning instruments.

145. The "fast-track" procedure assumes a simplicity which does not reflect reality, nor the way the plans have been drafted.

Recommendations

146. That the fast-track provisions be deleted.

<u>Deemed permitted activities</u>

Overview of provisions

147. Clause 122 inserts new section 87BB to allow a consent authority, in its discretion, to notify a person (either before or after an application for consent is made) that an activity is a permitted activity, if:

a. the activity would be permitted but for a "marginal or temporary non-compliance" with the relevant standards;

b. any adverse environmental effects of the activity are "no different in character, intensity, or scale" than they would be in the absence of this non-compliance; and

c. any adverse effects of the activity on a person are less than minor.

Comments

148. In its submission on the Ministry for the Environment discussion document *Improving our resource management system*, the Law Society raised concerns with a number of aspects of the proposal at that time. Some of these have been addressed. In particular:

a. Criteria will no longer be used to describe, or shift, the permitted activity thresholds.

b. An application is required, and a notice issued confirming the permitted status.

c. The local authority has an unfettered discretion as to whether the notice should be issued.

d. There is no specified timeframe for making the decision.

149. However, the Law Society's concerns about the proposal to allow an activity to be "deemed permitted" (by giving local authorities power to decide that resource consent is not required, on a case-by-case basis) have not been addressed. The proposal has potential to:

a. cause confusion for the public as to the requirements around RMA resource consents; and

b. generate complaints and/or litigation in relation to activities that proceed without resource consent.

150. The reasons for the Law Society's view are set out below.

Uncertainty

151. It is well established in case law that a rule describing a permitted activity must not contain any element of discretion. In effect, it must be clear to an applicant, the consent authority and the community whether an activity meets the requirements for a permitted activity, without any level of subjective assessment. Either an activity is permitted or it is not. This is the very essence of a permitted activity. Any element of uncertainty or subjectivity renders the permitted activity rule voidable. The proposal to allow consent authorities to determine subjectively whether an activity is or is not a permitted activity by reference to its effects cuts directly across the settled case law. This murky threshold will create litigation risk for applicants and consent authorities and will further erode the opportunity for justified public participation.

Objection or appeal rights

152. The Law Society considers that any provisions for "deemed permitted" activities must include objection or appeal rights, and identify persons who have standing to participate in either process.

Availability of certificates of compliance

153. Section 139 of the RMA allows for a certificate of compliance to be issued, stating that an activity can be done lawfully in a particular location without a resource consent. Two competing arguments can be made as to the availability of certificates of compliance for "deemed permitted" activities:

    a. It can be argued that a certificate of compliance should not be available because a "deemed permitted" activity is, by definition, not truly a permitted activity. By extension, a person should not be able to enjoy the protection from future plan changes offered by a certificate of compliance for activities that cannot be carried out as of right (i.e. without recourse to the relevant local authority for the approval of a "deemed permitted" activity).

    b. The competing argument is that a certificate of compliance is issued where an activity can be lawfully done in a particular location without resource consent – as would be the case where an activity was confirmed as a "deemed permitted" activity. There is accordingly no reason to withhold the certificate of compliance, which would protect the "deemed permitted" activity from subsequent plan changes.

154. The Law Society considers that the second of these arguments is the stronger. However, regardless of which argument is preferred, the creation of a "deemed permitted" activity regime will necessitate changes to section 139 of the RMA to avoid uncertainties about its application. The link (or lack thereof) between "deemed permitted" activities and section 139 must be made clear.

Enforcement implications

155. There is significant potential for confusion about the application of a "deemed permitted" activity regime. It is likely to lead to arguments about resource consent requirements and debate about whether enforcement action can be taken when a "deemed permitted" activity has been carried out but prior authorisation has not been obtained from the relevant local authority. These problems will complicate enforcement under Part 12 of the Act for local authority enforcement staff and members of the public. They also have the potential to degrade the public's perception of the robustness of the RMA and the integrity of plans.

Recommendations

156. That the "deemed permitted activity" provisions in new section 87BB (inserted by clause 122) be deleted.

Limits on submissions

Overview of provisions

157. New clause 41D(2) (inserted by clause 120) requires a consent authority to strike out a submission if one or more specified circumstances applies, unless the consent authority considers that doing so would materially compromise its ability to fulfil its obligations under Part 2 (purpose and principles) of the RMA. The specified circumstances are where the consent authority is satisfied that the submission:

    a. does not have a sufficient factual basis;

    b. is not supported by any evidence;

    c. is supported only by evidence which purports to be independent expert evidence but which is prepared by a person who lacks the requisite independence or expertise; or

    d. is unrelated to the activity's actual or likely adverse effects, if those effects were the reason for notifying the application or review (this appears to be a reference to the new requirement to identify the relevant effects in a notification decision).

158. Submissions can be struck out before, during or after a hearing.

Comments

159. This is part of a suite of measures which reduce public participation in consent decisions, in this case by limiting the scope of submissions (and consequential appeals). Public participation was one of the key tenets of the RMA when first enacted.

160. From a technical point of view, there are several issues that warrant careful consideration.

161. There is a disjunct between the scope of submissions and the consent authority's decision-making power. While submissions will be limited to the reasons the application was notified and the effects related to those reasons, the consent authority will still presumably be obliged to take into account the full range of matters that may be relevant under section 104 of the RMA (depending on activity classification). In practice, that will mean the consent authority will consider many matters solely on the basis of the views put forward by the applicant and its own appreciation of the issues. There are a number of problems with that approach:

    a. When notified, consent authorities are guided principally by the applicant’s assessment of effects on the environment. Applicants and consent authorities do not always get it right. They often miss or misstate effects.

    b. Consent authorities are often strongly guided by submitters in understanding the effects of a proposal. If evidence from submitters is limited to matters that the consent authority has predetermined are relevant, much of that input may be lost. The quality of consent authority decisions can be expected to decline accordingly.

c. It is also unclear whether this will have any material benefit for applicants. Although submissions on certain topics may be excluded, the consent authority will still need to consider the full range of issues and environmental effects that arise. The authority will simply do so in a less informed way, since information from submitters on some topics will not be available.

d. The approach is also arguably unfair, as it will essentially impose a restricted discretionary approach on submitters while the applicant and consent authority will be able to engage on a broader basis.

e. Limiting submission rights to the particular reasons an application was notified overlooks the practice of framing planning instruments to use a single factor as a trigger for a broader range of considerations. Limiting submission rights will require planning instruments to be reworked to reflect the new notification requirements.

162. These changes are intended to have the benefit of speeding up hearing processes and avoiding (or narrowing the scope of) Environment Court appeals (given the related change to appeal rights, discussed below). While these outcomes would clearly benefit applicants, they also have the potential to add considerably to the costs faced by those who want to participate in resource consent processes for legitimate reasons:

a. For example, currently a party can elect whether to give evidence or make a submission but under the changes, evidence will need to be given on all aspects to ensure the party's submission is not struck out.

b. In addition, the effective restriction of submissions to certain kinds of effects (where the effect is the reason the application was notified) is inconsistent with the principle that any effect can appropriately be considered for discretionary activities, and that in choosing (unrestricted) discretionary activity status in its plan the relevant local authority must have intended that all effects could be the subject of submissions.

163. The new section 41D(2) power for a consent authority to strike out submissions is more extensive than the equivalent Environment Court power under section 279 of the RMA. It is anomalous for a consent authority to have wider powers. The new section 41D(1) – which allows submissions that are frivolous, vexatious or an abuse of process to be struck out – is sufficient to deal with any misuse of the consent process.

Recommendation

164. That proposed section 41D(2) (inserted by clause 120) be deleted.

Limits on appeal rights

Overview of provisions

165. Clause 135 amends section 120 to remove rights of appeal to the Environment Court in respect of certain kinds of resource consent decisions (including, it appears, by an unsuccessful applicant). These are decisions in relation to:

    a. a boundary activity;

    b. a subdivision (unless the subdivision is a non-complying activity); and

    c. a residential activity that is to occur on a single allotment in a residential zone (i.e. where the land is intended to be used "solely or principally for residential purposes"), unless the activity is non-complying.

166. In addition, submitters will only be able to appeal in relation to a matter raised in their submission (excluding any part that was struck out).

Comments

167. It is unlikely to have been intended that unsuccessful applicants are unable to appeal, either against a decision refusing consent or to challenge conditions. This needs to be rectified.

168. There is also no rationale for removing appeal rights for subdivision and residential land use activities unless the activity is non-complying.

169. A misalignment is created through the proposal to limit third party appeal rights to the reasons the application was notified and the effects related to those reasons. This will have the peculiar effect of limiting appeal rights with reference to something other than the consent authority's final decision on an application. It will not necessarily be the case that concerns provoking an appeal against a first instance decision will be those identified at notification stage. There is potential for material injustice to submitters if they are unable to appeal on matters arising from evidence and the consent authority's substantive decision, because those matters did not happen to be identified in the consent authority's earlier notification decision.

170. This issue also serves to illustrate the heightened importance of a consent authority's notification decision. Care will need to be taken to identify all potentially relevant categories of effects and to explicitly state who they affect, and to what extent. Because the notification decision will materially affect a submitter's standing at first instance and on appeal, notification decisions made in this context can be expected to be subjected to rigorous scrutiny.

171. Applications for judicial review may follow, where submitters face the prospect of being shut out of the process. Local authorities may well be liable for negligent misstatement, if they overlook or wrongly describe an actual or potential adverse effect.

Recommendation

172. That current appeal rights be retained.

Notification changes

Overview of provisions

173. Clauses 125 to 129 propose significant amendments to limit the circumstances in which, and persons to whom, applications for resource consent can be notified. The overall "effects thresholds" for notification are not proposed to change, in that the threshold for public notification remains whether effects on the environment are "more than minor" (under section 95D), and the threshold for limited notification remains whether effects on persons are "minor or more than minor (but are not less than minor)".

174. However, additional requirements, tests and eligibility criteria are as follows:

    a. Public notification will be precluded where the application is for one or more of the following, but no other, activities:

        i. a controlled activity;

        ii. a restricted discretionary or discretionary application for a boundary activity, a subdivision, or a residential activity; or

        iii. an activity prescribed in regulations under new section 360G.

    b. Limited notification is precluded if the application is only for a controlled activity other than a subdivision, and/or an activity prescribed in regulations.

    c. Except for "regional consents" (i.e. activities that can only be granted by a regional council) and most non-complying activities, new "eligibility criteria" restrict who can potentially receive limited notification of an application (i.e. if they are also sufficiently affected to qualify as "affected persons"). The following persons are eligible to be considered affected:

        i. for a boundary activity, the owner or occupier of an allotment with an affected boundary;

        ii. for an activity (other than a non-complying activity) on land that is subject to a designation, the requiring authority responsible for the designation;

        iii. for a subdivision (unless the subdivision is non-complying), the owner of infrastructure associated with providing services to the land, the medical officer of health, the Fire Service, and the relevant Civil Defence Emergency Management Group; and

        iv. for any other kind of activity (not being a non-complying activity), the owner or occupier of an allotment that is "adjacent" to (i.e. adjoining or across a road, right of way, or

watercourse from) the application site, as well as the owner of any infrastructure assets that pass through, over, or under the application site.

d. Additional eligibility criteria for prescribed activities (which override the criteria above) can be specified in regulations under new section 360G (inserted by clause 151).

175. In assessing whether the effects of the application will be "more than minor" or "minor or more than minor", the consent authority will have a discretion to "disregard an adverse effect of the activity if the adverse effect, considered in the context of the relevant plan or proposed plan, is already taken into account by the objectives and policies of that plan". (This is in addition to the existing requirement to disregard effects over which control/discretion is not reserved/restricted, and the existing discretion to disregard effects of permitted activities, etc).

176. If an activity is notified or limited notified because it exceeds the relevant "effects thresholds", the consent authority must specify in the notice the adverse effects that it considers to be relevant under section 95D or 95E (as the case may be). This affects the matters that can be raised in submissions (as discussed above).

Comments

177. Public participation is a vital means of protecting individuals' rights (especially in respect of proposals that may impact on their quality of life), and is also an important means by which the objective of sustainable management can be achieved. It is a core theme of the Act, which has been eroded over time.

178. The latest proposal is a significant policy shift.

179. It is unclear whether notification processes are still causing undue delays, or whether the significant amendments made in 2009 have addressed most concerns. If there is delay, it is likely to be only in some parts of the country. In reality, the fault lies with only some (not all) local authorities.

180. Resource consent applications can have wide-reaching implications, and notification is fundamental if individual rights are to be protected. Notification enables citizens to learn about significant proposals, for example, for a road, sewage treatment facility, multi-storey building or parking facility on their boundary or in their neighbourhood. It also enables citizens to be involved in decision-making regardless of activity status (unless there are rules precluding notification in the relevant plan). The Law Society does not consider that the right balance has been struck in the proposed amendments.

181. The focus of the changes is on enabling smaller developments (particularly residential activities and subdivisions) to proceed unencumbered by opposing submissions and/or the delay of a hearing. The restrictions will result in situations where parties who are affected and "should" be notified lose the opportunity to participate. Given the special treatment given to subdivision activities, there is a particular risk of reverse sensitivity effects arising as a result of the inability to submit on such applications.

182. More generally, there is a potential for unintended consequences where the new mechanisms are linked to rules or activity status in ways that could not have been anticipated when those provisions were drafted. For example:

    a. some local authorities have historically used non-complying status more than others, which will now affect the extent to which applications within those districts are notified; and

    b. some rules may trigger the need for resource consent (e.g. as a discretionary activity) according to a given metric (such as gross floor area or parking spaces) with the intention that a wider range of effects will be able to be considered in the consent process itself.

183. The eligibility criteria are unduly narrow. It is important to take into account that some of the criteria are not cumulative: for example, a subdivision application that is not non-complying can only be limited notified to the persons specified; there is no ability for an adjacent landowner (or person responsible for infrastructure on adjacent land) to be notified.

184. The ability to disregard effects that are already taken into account in the objectives and policies of a plan reflects one of the proposals in the Ministry's discussion document, which would have required an application to be assessed against the objectives and policies of the plan before notification could be considered (so that applications would be non-notified if the type of activity and its effects had been planned for and anticipated). The Bill is more moderate, as it only affords a *discretion* to disregard effects. However:

    a. It is illogical to disregard the effects "already taken into account by the objectives and policies". The rule framework falls out of the objectives and policies. Rules are set after the objectives and policies are prepared, and are intended to give effect to the wording of the objectives and policies. The rules are then the triggers for resource consent. The mere fact that a consent is required if the rules are triggered means (in theory) that the effects of the activity need to be assessed in order to meet the objectives and policies. If those very effects must be disregarded, nothing is gained by requiring consent to be obtained. It is those very effects which should be considered.

    b. Requiring an assessment of the objectives and policies at the notification stage is, in essence, bringing the substantive section 104 assessment forward to the notification stage. The focus of the notification inquiry should principally be on the effects of the activity.

    c. Local authorities already have the ability to restrict their discretion or control (or preclude notification altogether) at the planning stage through rules as to activity status and in a manner that is more certain than shoe-horning an evaluation of objectives and policies into notification decisions.

    d. The one benefit of this mechanism is that it effectively allows for certain kinds of effects to be disregarded at the notification stage, while still being relevant to the exercise of the consent authority's discretion or control (currently restricting discretion or control is an "all or nothing approach" as it limits both the matters for notification and for the substantive consideration and

conditions). A more straightforward and certain way of achieving this decoupling would be to allow local authorities to specify separately in plans:

i. the matters over which control or discretion is reserved (in the case of controlled or restricted discretionary activities); and

ii. the categories of effect that are relevant for notification (for any class of activity).

185. The ability for regulations also to prescribe which activities shall not be notified is also of concern. In the absence of (largely) standardised plans, regulations that purport to arbitrarily preclude notification of certain types of application would be likely to have unexpected effects across the country.

186. As the RMA currently stands, this difficulty is alleviated where an NES imposes a non-notification requirement, as the NES also has the capacity to modify other aspects of planning instruments so that the non-notification requirement is sensibly integrated. Regulations focused solely on notification matters are unlikely to function in that way.

187. Local authority plans can stipulate that applications for certain activities must be processed on a non-notified basis. Regulations directing notification requirements that differ from those in local authority plans therefore represent an Executive override of the public-participatory plan development process.

188. The Law Society considers that a power to make regulations in proposed section 360G (inserted by clause 151) to dispense with statutory notification requirements is objectionable. It is in substance a Henry VIII clause. It allows the Minister to override plan provisions and the framework underpinning them to avoid or restrict notification. The concerns about this power are exacerbated by the absence of any mandatory consultative public process, before such regulations are made.

189. Overall, the new provisions relating to both public and limited notification introduce a greater level of complexity to the consent process. That is undesirable. There are potential costs in the lack of public participation, including loss of public confidence in the consent process and a reduction in the quality of decision-making.

Recommendation

190. That the proposed amendments to notification provisions in clauses 125 to 129 and proposed section 360G (inserted by clause 151) be deleted.

Section 104 changes: environmental compensation

Overview of provisions

191. Clause 62 amends section 104 to provide that a consent authority must, when considering an application for resource consent, also have regard to:

> 104(1)(ab) any measure proposed by the applicant for the purpose of ensuring positive effects on the environment to offset any adverse effects on the environment that will or may result from allowing the activity; and

Comments

192. The Law Society supports this amendment. This addition usefully provides that consent authorities must consider volunteered offsetting conditions as part of their evaluation of a resource consent. There has been some uncertainty as to the appropriate context to consider such conditions following case law finding that offsetting or positive effects do not constitute mitigation (so could only be considered as an "other matter" under section 104(c), if the consent authority considered it relevant).

193. The Law Society proposes a minor amendment to the clause to clarify that positive effects are created, without the potential argument that no net loss is required.

Recommendation

194. That proposed section 104(1)(ab) (inserted by clause 62) be amended to read:

> any measure proposed by the applicant for the purpose of ~~ensuring~~ creating positive effects on the environment to offset ~~any~~ the adverse effects on the environment that will or may result from allowing the activity; and

Limiting the scope of conditions

Overview of provisions

195. Clause 64 inserts new section 108AA to provide that, except where the applicant agrees otherwise, a condition must be "directly connected" to either an adverse effect of the activity on the environment, or an applicable district or regional rule (being a rule that is the reason, or one of the reasons, why consent is required).

Comments

196. The Law Society is concerned about the proposal to limit the types of conditions that can be imposed on resource consents, for the reasons set out in its submission on the Ministry's discussion document. In the Law Society's view:

    a. No compelling evidence has been presented (and experience does not suggest) that consent conditions create:

        i. any unworkable confusion on the part of consent authorities, the courts, enforcement agencies, or applicants/consent holders or submitters; or

        ii. any significant unnecessary litigation.

    b. There are significant and well established common law controls on the validity of consent conditions. The common law rules are not codified by the Bill. The Bill's provisions, if enacted,

would make the range of conditions that can be imposed much narrower. At common law, conditions must be logically connected to the consented activity and serve a resource management purpose. The common law approach is much more likely to achieve the statutory purpose of the RMA, than the proposed section 108AA.

197. Conditions of consent are very important mitigating factors that have a material bearing on consent decisions. They are often determinative when the matters arising under section 104(1)(a) and section 5(2)(c) of the RMA are assessed.

198. If the flexibility that consent authorities currently enjoy in relation to consent conditions is eroded to the degree proposed in the Bill, a likely outcome is that many consent applications that would otherwise be granted subject to conditions will need to be declined.

199. Linking conditions to the provision of the plan which has been breached is problematic. It assumes that all relevant concerns arising in relation to a proposal can be linked to an identified plan "breach" and a discrete associated effect. In contrast, it is not uncommon for planning instruments to use a single factor as a trigger for a broader range of considerations.

    a. For example, one device that can be used in this way is the establishment of a 0m height limit for buildings in a particular zone. The approach ensures that all proposed buildings will require a resource consent, without requiring an exhaustive suite of rules and an assessment of how they are/are not breached. If the proposal is given a discretionary or non-complying status, then the full range of relevant issues and effects generated by the proposal can be taken into consideration and moderated by conditions of consent (subject to the usual common law restrictions).

    b. If the filter was applied to this sort of rule, conditions could only be imposed in relation to the height of the building. However, imposition of the constraint should be tempered with the realisation that many planning instruments will need to be fundamentally reworked if a constraint along these lines is imposed.

    c. It is seldom that a rule articulates the reason for a resource consent. The rationale may be found in the objectives or policies or other rules, and sometimes consent may be required by the RMA itself (sections 12 – 15) or by an NES.

200. It is noted that the Bill does not amend the range of potential conditions that can be imposed on subdivision consents under section 220. Any limits imposed on section 108 should also address the flow-on implications for section 220.

201. The proposed section 108AA is an unnecessary fetter and introduces a further layer of decision-making complexity.

Recommendation

202. That new section 108AA (inserted by clause 64) be deleted.

MISCELLANEOUS RMA PROVISIONS

Section 32 reports

Overview of provisions

203. Clause 13 amends section 32 to provide an express requirement for section 32 reports to summarise all advice, and the response to that advice, received from iwi authorities concerning the proposal.

Comments

204. The Law Society supports these amendments as they will provide for greater transparency in relation to consultation concerning plan and plan change proposals.

Charges

Overview of provisions

205. Clauses 20 and 26 amend sections 36 and 43A respectively to extend the powers of local authorities to fix and recover charges for the monitoring of permitted activities, where this is empowered under an NES.

Comments

206. Depending on the extent to which an NES empower such charging, this is potentially a significant shift from the current charging regime. This is primarily limited to cost recovery from applicants in relation to (for example) resource consents, designations and heritage orders. Different fairness and natural justice issues arise if persons are subject to a charging regime when carrying out permitted activities, than those that apply to applicants or holders of a resource consent. Persons undertaking a permitted activity may have no knowledge that undertaking that activity may result in liability for charges. It will be important that any NES in this respect specifies a fair and reasonable charging regime, and includes procedural fairness requirements, such as an obligation to inform persons of the charges applicable before they are incurred, and an opportunity to object to any charges considered unreasonable. The Law Society recommends that the process of objection set out in sections 357B to 358 should be expressly applicable to charges imposed in relation to monitoring of permitted activities.

207. Clause 20 also provides for additional charges and requires an estimate to be given, if requested, of any additional charge likely to be imposed by the local authority. In practical terms persons may be unaware of the potential for additional charges to be imposed, and so may not make a request. The Law Society recommends that the local authority, once it becomes aware of any circumstances that make the imposition of an additional charge likely, is obliged to advise persons who may be subject to an additional charge, of that possibility and their right to seek an estimate.

208. The opportunity to recover costs from persons relying on permitted activity rules in Regional and District Plans has not been taken. This creates an equity issue if the persons relying on permitted

activity provisions in an NES are subject to charges. There is also an anomaly that charges can be recovered from consent holders, but not from persons who rely on a rule in a Regional or District Plan. A permitted activity rule is, in truth, a generic resource consent.

209. In addition, the confused interaction between the existing "fixed charges" in section 36(1) and "additional charges" in section 36(3) has not been addressed.

Recommendation

210. The purpose and provisions of section 36 require a more than piecemeal amendment. Any changes should be deferred until a comprehensive review has been undertaken, to ensure that charges apply logically and consistently.

Compensation

Overview of provisions

211. Clauses 54 and 55 amend section 85 and 86 respectively to provide for the Environment Court to direct, in certain circumstances, that a local authority acquire by agreement with a landowner, land which because of a provision or proposed provision in a plan or proposed plan, is rendered incapable of reasonable use, or in respect of which an unfair and unreasonable burden is placed on any person who has an interest in that land.

Comments

212. This is a potentially significant shift from the current position that compensation is not payable in respect of controls on land imposed through a district or regional planning process.

213. In practice, the new provisions could potentially place substantial financial burdens on small local authorities with limited ratepayer bases, particularly where significant land-based natural resources are located in a district or region. In practice, if significant constraints on land use are imposed on private land through a planning process, this is likely to be so as to recognise and provide for a matter of national importance described in section 6.

214. There is also a need to consider the potential implications of the new section 6(h) (inserted by clause 5), which will require local authorities to recognise and provide for the management of significant risks of natural hazards when preparing district and regional plans. If land is subject to natural hazards and this is reflected in planning provisions (with consequential controls on the subdivision, use or development of that land) the local authority could potentially be subject to a requirement to make a compensation payment in relation to that land if it is found that those controls render the land incapable of reasonable use, and place an unfair and unreasonable burden on the owner (although in reality, if not perception, it is the hazard, not the planning control, which limits the use of the land).

215. While constraints on land use may be required to recognise and provide for section 6 matters of national importance, under the proposed amendments it is local authorities that may be required to

fund compensation to land owners. Accordingly there appears to be a disjunct between the source of the obligation, in section 6 of the Act (which results in the need for land use controls), and the obligation to fund compensation for those controls (which would fall on local government).

216. The Law Society recommends expanding proposed new section 85(3C) to include two additional matters which the Environment Court is to have regard to before exercising its discretion to make a direction under subsection 3A. These additional matters are: the requirements of Part 2 and the extent to which any controls on the use of land are required to recognise and provide for matters of national importance; and the financial resources of the local authority.

Recommendation

217. That new section 85(3C) (inserted by clause 54) be amended to require the Environment Court to have regard to Part 2 of the RMA and the extent to which any controls in the use of land are required to recognise and provide for matters of national importance, and to the financial resources of the local authority.

MISCELLANEOUS LEGISLATIVE PROVISIONS

Reserves Act 1977 amendments

Overview of provisions

218. Clauses 162 to 165 amend the Reserves Act 1977 (RA).

219. New section 14A (inserted by clause 163) provides for exchanges of reserves. In doing so it largely carries over the provisions of section 15 of the RA, but provides a more integrated approach to authorising exchanges of recreation reserves, when proposed as part of a resource consent application, or change to a plan prepared under the RMA.

Comments

220. The Law Society's submission on this point is limited to drafting matters.

221. New section 14A(3)(b) refers to a change having been made "to a district plan". However, new subsections 14B(1)(a)(ii) and 14B(1)(e) refer to changes to a district or regional plan. For consistency, the Law Society submits that new section 14A(3)(b) should be amended so as also to refer to a regional plan.

222. New section 14A(4) relates to public notification of an administering body's resolution authorising an exchange of a recreation reserve. The proposed section carries over the existing requirement in section 15 of the RA, that the public notice either be in the district of the administering body, *or* in the district or locality of the people who benefit or enjoy the reserve. It is difficult to see the rationale for publication in the district of the administering body, where this differs from the district or locality of

the persons who enjoy or benefit from the reserve. The Law Society recommends deletion of new section 14A(4)(a)(i).

223. New section 14A(4) refers to “interested parties”. The Law Society recommends that this be amended to “interested persons”. Arguably, until submissions are filed, the only parties are the applicant, and the administering body of the reserve in question. It is the process of lodging submissions which determines who the interested parties will be.

Recommendations

224. That new section 14A(3)(b) (inserted by clause 163) be amended to refer to both regional and district plans.

225. That new section 14A(4)(a)(i) (inserted by clause 163) be deleted.

226. That new section 14A(4) (inserted by clause 163) be amended by replacing “interested parties” with “interested persons”.

Public Works Act 1981 amendments

Definition of “owner”

Overview of provisions

227. Clause 170 amends section 59 with respect to the definition of “owner”.

Comments

228. The references to a “weekly tenancy agreement” and “monthly tenancy agreement” have been retained in amended section 59(a)(ii). In relation to the monthly tenancy agreement this has been superseded by section 207 of the Property Law Act 2007 (PLA) which refers to "statutory tenancy". This may be narrower than a “monthly tenancy”. The Law Society suggests "short-term lease" as provided under the PLA should be substituted. This would cover leases for a term of one year or less, periodic tenancies for less than one year and statutory tenancies.

Recommendation

229. That the definition of “owner” in section 59 (amended by clause 170) be amended by replacing “weekly tenancy agreement” and “monthly tenancy agreement” with “short-term lease”.

Amount of compensation to be paid

Overview of provisions

230. Clause 172 inserts new section 72A to provide for up to $50,000 compensation where a principal place of residence is taken. $35,000 is paid immediately, a further $10,000 is paid if an agreement is reached

within 6 months of the negotiation start date and a further $5,000 is payable at the discretion of the local authority or the Crown if warranted.

Comments

231. Notwithstanding the qualifications for the further $10,000 and $5,000, owners may be inclined to expect and rely on the additional $15,000 being paid and the Crown and local authorities will be under pressure to make the additional money available. The focus is likely to move quickly to why it should not be paid rather than whether it is warranted.

232. For the moderately small amount of $5,000 (from the perspective of the Crown or local authority) negotiating officers will likely recommend its payment rather than have to justify not doing so. Much administration could be saved by deleting new subsection 72A(1)(c) and increasing the $35,000 under new subsection 72A(1)(a) to $40,000. The end result is likely to be the same.

233. The words "a further $10,000 must be paid to the owner if" in new subsection 72A(1)(b) leave open the issue of whether the Minister or local authority has a discretion to pay the $10,000 if an agreement is not reached within 6 months. Negotiations that have taken some time to finalise could ultimately fail because they have drifted over the 6 month time limit and the Minister or local authority declares it is unable to pay the additional $10,000. If the 6 month negotiation period is intended to be a pre-requisite for the $10,000 payment, consideration should be given to a prohibition on paying the $10,000 if agreement is not reached within the 6 months. There is a risk that a practice may develop of paying out the $10,000 regardless of negotiation time in order to get the deal settled and the incentive value of the additional $10,000 would therefore be lost.

234. There should also be clarification as to whether an owner is entitled to compensation under new section 72(1) if they have required the whole of their property to be acquired under section 34, or if the land as originally notified excluded the dwelling but the owner insisted on the whole being taken. The Crown and the local authority will often acquire the whole property in order to settle the acquisition of the land they actually need for the public work, even if it would not qualify under section 34.

235. The possibility of $50,000 compensation over market value could lead more owners to require the whole of their property to be acquired. A statement that the $50,000 is not available if the dwelling was not originally notified might clarify the position.

Recommendations

236. That new section 72A (inserted by clause 172) be amended to:

    a. Clarify whether $10,000 is or is not payable if negotiations exceed 6 months.

    b. Ensure payment under section 72(1) only occurs when the dwelling was part of the land notified in the first instance.

237. That the desirability of the $5,000 payment in new section 72A(1)(c) (inserted by clause 172) be reconsidered.

Additional compensation for acquisition of notified land

Overview of provisions

238. Clause 172 inserts new section 72C to provide for up to $50,000 additional compensation to be paid for the acquisition of notified land. Section 72C(4)(b) requires the compensation to be apportioned between the qualifying owners in proportion to the individual value each owner has in the land.

Comments

239. The new provisions may lead to delays in the acquisition of land for a public work while qualifying owners dispute their entitlements. Consideration should be given to a mechanism for resolving this issue, or for the issue to be put aside for later resolution.

Recommendations

240. That consideration be given to introducing a mechanism for resolving apportionment disputes under new section 72C(4)(b) (introduced by clause 172).

Conservation Act 1987 amendments

Overview of provisions

241. Clauses 176 to 182 amend the Conservation Act 1987 (CA), in particular the provisions relating to processing of concessions.

Comments

242. Overall the Law Society supports the proposed changes, subject to a number of recommended drafting amendments.

243. New section 17SA(1) provides that the Minister "may" determine, within 10 working days, if the concession application complies with section 17S (contents of application). It is unclear why this is described in discretionary terms. If it is determined that the application does not comply with section 17S then under new section 17SA(2), the application must be returned to the applicant. It may be that the Minister's ability to determine that the application does not comply with section 17S is expressed in discretionary terms because it may not be possible to make that determination within the 10 working days specified. If that is the reason, then the 10 working days should be lengthened to a period that will enable this assessment to be undertaken. The Law Society recommends that section 17SA be amended so that the Minister *must* determine whether the application complies with section 17S (i.e. it is complete). This will promote greater certainty for applicants and other parties.

244. New proposed section 17SB is headed, "Minister may decline application that is inconsistent". The word "may" is inconsistent with the text of this new section. The section states that the Minister "must" decline an application that is inconsistent with the CA, or relevant strategy or plan. The Law Society submits that the word "may" in the heading should be amended to "must".

245. New proposed section 17SC provides for public notification of applications. This is a shift from the current requirement to notify the Minister's intention to grant an application. The Law Society supports the change in approach. It is consistent with other consent notification processes, in particular under the RMA.

246. Clause 179 inserts new section 17T(2). The effect of section 17T(2)(b)(ii) appears to be that an application is deemed to be complete where further information has been requested by the Minister (but has not been provided by the applicant) and the time for providing that information has passed. In that situation, the Law Society submits that logically the application should be deemed to be incomplete. It is recommended that section 17T(2)(b)(ii) be deleted.

247. Clause 181 amends section 49 so as to provide a minimum 20 working day period for public notification of concession applications. The new section 49(2)(b) refers to "interested parties". It is recommended that this be amended to "interested persons". Arguably, until submissions are filed, the only parties are the applicant, and the Minister as consent authority. It is the process of lodging submissions which determines who the interested parties will be.

248. It is noted that the definition of working day under the CA differs from that under the RMA. In particular, working days cease on 20 December under the RMA, but 25 December under the CA. Working days commence on 10 January under the RMA, but 15 January under the CA. If the intention in providing a 20 working day notification period for concession applications is to provide greater alignment with the timeframe for public notification under the RMA, then alignment of the definitions of working days between the two statutes is also desirable.

Recommendations

249. That new section 17SA(1) (inserted by clause 178) be amended by replacing "may" with "must".

250. That the heading to new section 17SB (inserted by clause 178) be amended by replacing "may" with "must".

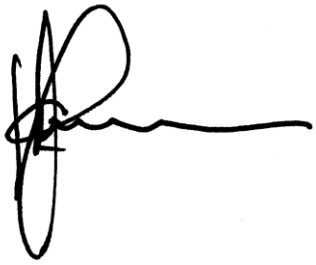
251. That new section 17T(2)(b)(ii) (inserted by clause 179) be deleted.

252. That section 49(2)(b) (amended by clause 181) be amended by replacing "interested parties" with "interested persons".

253. That a single, common definition of "working day" in the RMA and CA be adopted.

Conclusion

254. The Law Society does not wish to be heard, but is available to meet with the officials advising on the Bill if the Committee considers that would be of assistance.



Chris Moore
President
16 March 2016