NEW ZEALAND LAW SOCIETY

NZLS EST 1869

COVID-19 Recovery (Fast-track Consenting) Bill

19/06/2020

Submission on COVID-19 Recovery (Fast-track Consenting) Bill

1. Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) appreciates the opportunity to comment on the COVID-19 Recovery (Fast-track Consenting) Bill (**Bill**).

2. Executive summary

2.1 The Bill has been introduced and referred under urgency for select committee scrutiny, with a very short public consultation period.[1] Consequently, the Law Society's submission has been prepared at very short notice by its Environmental Law Committee and we are grateful for their contribution.

2.2 The submission comments on the following issues:

a. the purpose of the new COVID-19 Recovery (Fast-track Consenting) Act 2020 (**Act**);

b. the application of Part 2 (purpose and principles) of the Resource Management Act 1991 (**RMA**);

c. the scope of the Minister's discretion to refer a project to an expert consenting panel (**panel**);

d. restrictions on appeals and judicial review; and

e. some suggested drafting changes to Schedule 6, to improve clarity, practical workability and alignment with RMA terminology.

2.3 The Law Society does not seek to be heard but is available to assist further with drafting or technical issues if that would be helpful.

3. Purpose (section 4)

3.1 Proposed section 4 sets out the purpose of the new Act as being to:

> "*… urgently promote employment growth to support New Zealand's recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment across New Zealand, while continuing to promote the sustainable management of natural and physical resources.*"

3.2 The Law Society notes that the phrase "to urgently promote employment growth to support New Zealand's recovery" may inadvertently limit the Act's contribution to economic and social recovery by focusing solely on employment growth, rather than on maintaining opportunities or reducing the contraction. The Environment Committee may want to consider amended wording to better reflect the legislative intent; options include deleting "growth" so that it is simply to "promote employment" or replacing "employment growth" with "projects".

4. Application of Part 2 of the RMA (purpose and principles)

4.1 It is stated that the appropriate environmental safeguards, as provided for under the RMA, will be applied to the proposed new panel process.[2]

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1 Introduction, first reading and referral to select committee under urgency, on Tuesday 16 June 2020, with submissions due by Sunday 21 June 2020.

2 Explanatory note to the Bill, at p2: "Appropriate environmental safeguards, as provided for under the RMA, will apply to this process. A panel must apply the purpose of the Bill alongside Part 2 of the RMA."

4.2 However, proposed section 20 does not require an assessment against Part 2 of the RMA to be included in the application.

4.3 This appears to be an oversight, as Schedule 6 clauses 9(1)(g) and 13(1)(d) require such an assessment to be included.

4.4 For a listed project, the panel must also consider whether granting consent would promote Part 2 of the RMA (Schedule 6, clause 27(3)(a)), but presumably only to assist it with the formulation of conditions, since the panel may only decline a project if it would not be consistent with a national policy statement or a relevant Treaty settlement (schedule 6, clause 32).

4.5 The Law Society considers the Bill would be improved by a careful review of the sections referring to Part 2 of the RMA, and particularly those from which it is omitted, to ensure that the intent to apply Part 2 of the RMA, as part of the Bill's purpose of "promot[ing] the sustainable management of natural and physical resources", is achieved.

5. Minister's discretion (section 19)

5.1 The Law Society has two points to make in relation to the Minister's discretion under proposed section 19, as to whether a project helps to achieve the purpose of the new Act.

5.2 First, while many components of the RMA purpose section (s 5) have been included in section 19, it is concerning that key environmental 'bottom lines' have been omitted. In particular, there is no reference to:

- sustaining the potential of resources to meet the foreseeable needs of future generations, and
- safeguarding the life-supporting capacity of air, water, soil and ecosystems.[3]

These might arguably be captured in the shortened phrase in section 19(e) ("whether there is potential for the project to have significant adverse environmental effects") or the catchall in section 19(f) (any other relevant matters), but it would be preferable for an explicit reference to be added to section 19.

5.2.2 Second, the relevant local authorities have been given only 10 working days to provide written comments, but there is no timeframe within which the relevant Ministers listed in section 21(6) need to provide written comments. A timeframe would presumably be desirable to avoid applications languishing for weeks or months.

6. Appeals and judicial review (section 13)

6.1 The Law Society anticipates that the purpose of section 13(2) is to ensure that if an applicant intends to apply for judicial review and to appeal the same decision, then the proceedings are to be filed together. The Law Society supports the requirement that any judicial review of the final decision be lodged together with the appeal on the final decision (if a person elects to do both).

6.2 However, as drafted it also restricts a person from applying for judicial review of a preliminary decision until the appeal can be filed on the final decision. The Law Society opposes the current drafting, which removes the right to judicially review a decision during the process.

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[3] *Cf* RMA s5(2)(a) and (b).

6.3 Schedule 6, clause 42(3) removes the right to appeal to the Supreme Court. It is unconstitutional and undesirable to wholly exclude the ability of the Supreme Court to hear appeals under the Act. The function of the courts is to provide scrutiny of the legality of actions taken by the Executive branch of government. As explained in the Explanatory Note, the Bill "*provides the Government with a range of powers to bypass usual consenting process steps, including public consultation, hearing processes, and appeals to the Environment Court*".[4]

6.4 In this context, the role of the courts takes on added significance and it would be inconsistent with the constitutional standing of the Supreme Court to exclude appeals to that Court.

6.4 If Parliament is minded to limit appeal rights, a preferable alternative for doing so would be to utilise the process in section 149V of the RMA, which governs appeals from boards of inquiry (for projects of national significance) and provides a fast and constrained appeal process.

7. Schedule 6: drafting points

7.1 The Law Society commends parliamentary drafters for the careful balance and clear and concise drafting in the Bill. In the limited time available, the Law Society has identified a small number of potential drafting changes in Schedule 6 that could be considered.

7.2 **Clause 9** is a well-crafted and comprehensive list of the matters that must be included in the consent application, with clause 13 the equivalent for notices of requirement. Both require an RMA Part 2 assessment. Clause 9(1)(g) requires an assessment of the activity "in light of" Part 2 of the RMA, while clause 13(1)(b) uses "against Part 2", which is more akin to the terminology in the RMA. The Law Society suggests clause 9(1)(g) should be reworded to refer to "against" (rather than "in light of") Part 2.

7.3 **Clause 10(1)(d)** requires a description of the mitigation measures to be undertaken to "help prevent or reduce" the effects. The terminology of the RMA is to "avoid, remedy or mitigate" the effects. It would be preferable to use the same terminology for the same concepts. An option is to reword clause 10(1)(d) to:

> *A description of the measures (including …) to be undertaken to help avoid, remedy or mitigate the effects.*

7.4 **Clause 10** should also be amended to include, where appropriate, offsetting of compensation measures offered by the applicant to further reduce any residual effects. Doing so would be consistent with the ability in clause 27(1)(b) and 29(1)(b) for the panel to have regard to any offsetting or compensation proposed by the applicant.

7.5 **Clause 11** should require an assessment to include any effects on climate change. Doing so would be consistent with the General Policy Statement that the Bill supports "the transition to a low-emissions economy".[5]

7.6 **Clause 13** has similar issues to clause 10, with the focus solely on mitigating, rather than also avoiding, remedying, offsetting and compensating.

7.7 **Clause 13(1)(j)** also requires the preparation of a cultural impact assessment (**CIA**) by the relevant hapū or iwi, prior to the application being made. If the iwi or hapū are unwilling or refuse to do so, there is the opportunity to submit without the CIA. However, the experience

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4 Explanatory note, p7.

5 Explanatory note, p1.

of the members of the Law Society's Environmental Law Committee is that CIA are often absent at the time of lodgement of an application due to resourcing and timing delays, and are submitted later. Requiring the CIA to be ready in order for an application to be considered complete has the potential to delay projects. A better alternative may be to require the application to include a list of the relevant iwi or hapū that have been asked to prepare a CIA and an indication given as to when the CIA is expected to be available.

7.8 **Clause 17(2)** gives the panel 10 working days from when the EPA receives an application or notice of requirement, to invite written comments. It is unclear from the Bill what the time delay, if any, will be between the EPA confirming the application is complete and the panel receiving the material. Given the potential for a delay between these two steps, it would be more appropriate for the time period to run from when the panel receives the material, so it can undertake an initial review of the material and identify "any other person" it considers appropriate to seek comment from.

7.9 **Clause 28(5)(b)** removes the RMA restriction that conditions can only be imposed on controlled and restricted discretionary activities that are within the matters of control (for controlled activities) or discretion (for restricted discretionary activities) specified in the relevant plan. It is not clear to the Law Society what the rationale is for removing this restriction. The restriction aligns with the scheme of the RMA and the spectrum of activity status within it, as well as with the purpose of the Bill and the refinements to the fast-track process.

7.10 **Clause 29(7)**: the list of activities in clause 29(7) should include discretionary activities.

7.11 **Clause 32**: the terminology and phrasing used in clause 32 is sufficiently different to the RMA that it may result in litigation to determine its meaning. The Law Society puts forward the following alternative wording for consideration:

(a) The panel considers that granting a resource consent or confirming a designation, with or without conditions, would be inconsistent with any national policy statement;

(b) The panel considers that granting a resource consent or confirming a designation, with or without conditions, would be inconsistent with the terms of any relevant Treaty settlement;

7.13 As a final point, the Law Society notes there may be merit in inserting in Schedule 6 an equivalent to section 17 (which sets out how the Minister satisfies his/her Treaty of Waitangi obligations under section 6), to clarify how the panel is to satisfy its section 6 obligations.[6]

Herman Visagie
NZLS Vice President
19 June 2020

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[6] Section 6: "In achieving the purpose of this Act, all persons performing functions and exercising powers under it must act in a manner that is consistent with-(a) the principles of the Treaty of Waitangi; and (b) Treaty settlements".