

# LOCAL GOVERNMENT FORUM

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## 1. INTRODUCTION

- 1.1 The Local Government Forum ('the Forum') welcomes the opportunity to make a submission on the Resource Management (Simplifying and Streamlining) Amendment Bill. Overall, the Forum supports the Bill's intent and recommends that it should proceed – subject to specific comments in this submission.
- 1.2 This Bill is designed to address specific problems with the Resource Management Act (RMA) that were identified by a Technical Advisory Group which was formed as a result of the National-ACT confidence and supply agreement. Other issues will be considered as a second phase and the Government has already identified several that will be part of 'Phase 2', including aquaculture, the structure of the Environmental Protection Authority, fresh water management, and urban design and infrastructure issues.
- 1.3 Section 2 of this submission discusses general comments on the RMA. The submission then focuses on the problems identified and on the broad solutions. These are grouped under the following headings:
  - Frivolous, vexatious, and anti-competitive objections (section 3).
  - Decisions on proposals of national significance (section 4)
  - Environmental Protection Agency (section 5)
  - Improving plan development and change processes (section 6)
  - Improving resource consent processes (section 7)
  - Improving central government direction (section 8)
  - Improving the effectiveness of compliance mechanisms (section 9)
  - Improving decision-making processes (section 10)
  - Other matters to improve workability (section 11)
- 1.4 Finally, section 12 of this submission provides comment on Phase 2 reform and issues that should be covered by it.
- 1.5 The Forum also acknowledges separate submissions made by individual members.

## 2. GENERAL COMMENT ON THE RESOURCE MANAGEMENT ACT

- 2.1 The Local Government Forum's 2007 publication, *Democracy and Performance: a Manifesto for Local Government*, had the following to say about the RMA:

"From a regulatory perspective, the Resource Management Act 1991 is the most important statute for local government. It governs many of the regulatory activities undertaken by regional and territorial councils, and has a pervasive effect on individuals and businesses. Three enquiries are made each year to Auckland City Environments for every four citizens.

"The aspirations of the original advocates of the Resource Management Act 1991 remain unfulfilled. The former 'command and control' planning regime was to be replaced by an approach that emphasised the sustainable management of natural and physical resources, including lakes, rivers, coastal and geothermal areas, land, air, buildings and other structures. It was to focus on the effects on the environment of a proposed activity but this is not what has happened in practice. The key problems with the Resource Management Act 1991 include the following:

- It applies where private agreement or common law would provide solutions. It therefore unnecessarily politicises resource-use decisions and is socially divisive.
- Private property rights are overridden without just cause or fair compensation. A requirement to provide compensation where appropriate when such rights are taken would force public agencies to weigh the cost of such compensation against the wider community benefits that are expected to arise.
- The Act contains many ill-defined terms such as 'sustainable management'. The former central planning approaches have continued to be applied. Flaws in the Act rather than poor incentives facing agencies are the primary cause of such problems.
- Consent authorities continue to protect incumbent traders from competition.
- The Act leads to excessive uncertainty, inconsistencies, delays and costs that discourage development. One estimate is that a major project takes an average of 24 months from the date of lodgement of the application to the final court hearing. The delays affecting some projects are legendary. There is excessive scope for insubstantial, vexatious and frivolous objections, including by parties who would be no more affected by the proposed activity than the general public.

"The International Institute for Management Development of Switzerland conducts an annual assessment of business competitiveness that is reported in *The World Competitiveness Yearbook*. In the 2006 survey, New Zealand's environmental laws and compliance were reported to hinder the competitiveness of businesses more than those of any of the other 60 countries examined. In 2003, New Zealand's environmental regulation was ranked the tenth most stringent out of 117 countries in *The Index of Economic Freedom* published by the Heritage Foundation and the *Wall Street Journal*.

"While such harsh assessments might be questioned, there can be little doubt that the Resource Management Act 1991 is flawed. Past attempts to ameliorate concerns have largely failed.

"A first principles review of the Resource Management Act 1991 should be a top priority for any government committed to lifting New Zealand's rate of economic growth and enhancing the overall welfare of the community."<sup>1</sup>

- 2.2 The Local Government Forum is pleased that the Government has made reform of the RMA a high priority. Some of the issues raised above are covered in this Bill while others will be considered as part of 'Phase 2'.

### **3. FRIVOLOUS, VEXATIOUS, AND ANTI-COMPETITIVE OBJECTIONS**

- 3.1 The Bill's intent is to reduce costs and delays arising from submissions and appeals that are frivolous and vexatious, or motivated by anti-competitive behaviour by:

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<sup>1</sup> *Democracy and Performance: A Manifesto for Local Government*, Local Government Forum, February 2007 (see pages 32-33).

- Reinstating the power of the Environment Court to require security for costs and allowing the Courts to award more extensive costs, including indemnity and punitive costs.
  - Preventing trade competitors from participating in proceedings unless they are directly affected by potential adverse effects of the activity on the environment.
  - Making it explicit that decision-makers are prohibited from having regard to trade competition or its effects in relation to resource consent applications, notices of requirement, the preparation of plans and policy statements, and notification decisions.
  - Discouraging covert opposition of trade competitors through third parties.
- 3.2 The Local Government Forum supports the intent of these amendments. We agree that there is a problem with people objecting to applications based on arguments that have little or no merit. We are also aware that the RMA has been used by trade competitors to stymie developments.
- 3.3 However, while supporting the intent of the amendments, in practice it will still be a matter for interpretation as to whether an objection is 'frivolous and vexatious' or whether an objection is being motivated by trade competition. For example, it would be interesting to see how a dispute between two irrigators would play out given that the arguments might be around security of water supply, which might be of genuine environmental concern. It would also be interesting to see how the discouragement of 'covert' opposition of trade competitors through third parties would be policed.

#### **4. DECISIONS ON PROPOSALS OF NATIONAL SIGNIFICANCE**

- 4.1 The Bill's intent is to reduce the time it takes to reach decisions on significant projects while still maintaining effective public participation and promoting sustainable management of natural and physical resources by:
- Providing guidance to clarify criteria determining eligibility for call-in and enabling councils, applicants and/or requiring authorities that comply with these criteria to submit their resource consent application, notice of requirement for a designation or related private plan change directly to an Environmental Protection Agency (EPA) that will process applications in accordance with an enhanced call-in process.
  - Limiting appeals on decisions of Boards of Inquiry and the Environment Court on matters that are called-in to the High Court and then to the Supreme Court in exceptional circumstances.
  - Enabling parties to apply directly to the EPA for certificates of compliance associated with matters of national significance.
- 4.2 The Local Government Forum supports the intent of these amendments and we agree that many important infrastructure projects have been unduly held up in the planning stages. However, it is also important to recognise that the lack of protection of private property rights is a huge problem with the RMA, a problem that has never been seriously addressed<sup>2</sup>.

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<sup>2</sup> For example, refer to *Protection of Private Property Rights and Just Compensation: An Economic Analysis of the Most Fundamental Human Right Not Provided in New Zealand*, Lewis Evans, Neil Quigley, Kevin Counsell, February 2009; and *Primer on Property Rights, Takings and Compensation*, Bryce Wilkinson, October 2008.

- 4.3 All Forum members are anxious to ensure that compensation is considered as part of the Phase 2 reforms. Federated Farmers considers that, in the absence of any provision for compensation in the RMA, the fast-tracking of significant projects would present a particular problem for affected land owners.

## **5. ENVIRONMENTAL PROTECTION AGENCY (EPA)**

- 5.1 The Bill intends to establish a body that can provide efficient and timely administration of proposals that are called-in by establishing an EPA as a statutory office within the Ministry for the Environment as a transitional arrangement, with the role of statutory officer to be exercised by the Secretary for the Environment.
- 5.2 The Local Government Forum is cautious about the establishment of an EPA. For example, we are concerned about the potential for confusion about its role which could result in duplication of activity and conflict with the Ministry for the Environment on matters of policy. The Forum believes that it needs to be made clear that the EPA will not have a policy function. It is also unclear as to how much added value an EPA would provide compared to the current ability to refer proposals to a Board of Inquiry.
- 5.3 The Forum will also be interested in monitoring whether the costs of establishing and operating an EPA will not outweigh the benefits of the intention that it will result in more efficient, consistent and transparent decision-making.

## **6. IMPROVING PLAN DEVELOPMENT AND CHANGE PROCESSES**

- 6.1 The Bill's intent is to improve the quality of plans and facilitate timely plan development and amendment to enable rapid responses to changing conditions or emerging environmental issues, while retaining an appropriate degree of public participation and legal right to redress by:
- Increasing the flexibility of processes governing plan development, the correction of minor errors and reporting on decisions.
  - Increasing the range of available alternatives for service and notification of plan changes and associated procedures.
  - Removing the 'non-complying' class of activities.
  - Removing the mandatory obligation to review district plans every ten years and encouraging the development of combined district and regional plans and policy statements.
  - Removing the requirement for local authorities to summarise submissions or call for further submissions, and requiring local authorities to consult with and have regard to the views of anyone who they consider may be affected by matters raised in submissions.
  - Clarifying the time at which the proposed plan provisions have legal effect.
  - Limiting appeals on plans to the Environment Court on questions of law, except in cases where the appellant has gained the leave of the Court to appeal on the merit of a decision.
- 6.2 The Local Government Forum agrees with the intent of these amendments. Planning processes are cumbersome and change is needed. The amendments are mostly

sensible, particularly those clarifying the time at which proposed plan provisions have legal effect and the removal of the requirement to review plans every ten years.

- 6.3 A lot though will depend on implementation by councils and the Forum is concerned about the proposal to remove the requirements to summarise submissions and to call for further submissions: doing so would prevent submitters from rebutting claims made by other submitters that may be incorrect and/or misleading. We are also concerned about the proposal to limit appeals to points of law: a decision made might be correct in law but have a significantly negative impact on the rights of landowners, for example. Such decisions should be able to be appealed on their merits.
- 6.4 With regard to the proposed removal of the 'non-complying' class of activities, there is concern that without having this class of activities there is a risk of an unintended consequence of pressure being applied to make more types of activities 'prohibited' activities. A solution might be that rather than removing the 'non-complying' class of activity, councils should instead be required to apply a higher threshold for non-complying activities than is currently the case (perhaps something significant that is not anticipated in normal course of events).

## **7. IMPROVING RESOURCE CONSENT PROCESSES**

- 7.1 The Bill's intent is to reduce the cost and time it takes to come to a decision on resource consent applications, while maintaining an appropriate degree of public participation and legal right to redress, by:
- Modifying notification requirements to clarify criteria for notification.
  - Increasing options for service and notification.
  - Narrowing the scope of matters decision-makers are required to have regard to when considering applications for controlled and restricted discretionary activities.
  - Simplifying the reporting requirements for minor activities and proposals that do not require public notification.
  - Deleting existing blanket tree protection rules in urban areas and prohibiting local authorities from imposing rules of this type in the future.
  - Requiring all councils to develop a discount policy in respect of breaches of statutory timeframes.
- 7.2 The Forum agrees that there is a great need for better performance in the processing of resource consents. The amendments proposed are generally supported but Business New Zealand is concerned that there could be unintended consequences that will need to be managed carefully. For example, deleting blanket tree protection rules in urban areas due could result in a flood of applications to protect specific trees. We also question why blanket tree protection rules are to be deleted only for urban areas when we are aware of councils that impose blanket tree protection rules across entire districts, urban and rural<sup>3</sup>.
- 7.3 We also agree with the requirement for councils to develop policies for discounts when statutory timeframes are breached as it should provide an incentive for

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<sup>3</sup> For example, we understand that Papakura District Council is currently proposing such a blanket tree protection rule across the entire district and Auckland City Council also has a blanket rule which applies to rural areas (e.g., Hauraki Gulf islands) as well as the urban area.

efficiency. However, there is likely to be a need for guidance on how these policies will be applied and perhaps even on the quantum of the discount. We note that the RMA Technical Advisory Group recommended a discount of at least 50% of the prescribed charges<sup>4</sup>.

## **8. IMPROVING CENTRAL GOVERNMENT DIRECTION**

8.1 The Bill's intent is to increase the efficiency and effectiveness with which national RMA instruments are developed and implemented by:

- Broadening the scope of matters the Minister of Conservation and the Minister for the Environment are able to call in.
- Providing the relevant Minister with explicit powers to cancel, postpone, and restart a national policy statement process before it has been gazetted, and powers to make minor amendments to national environmental standards in an efficient and timely manner.
- Truncating the process for amending plans and policy statements in response to national policy statement and national environmental standards, and limiting the scope of appeals on changes.
- Clarifying the responsibilities of local authorities in relation to national environmental standards and the effect of these standards.

8.2 Most members of the Local Government Forum would agree with the intent to improve certainty about when central government will intervene in RMA processes and the need for effective national RMA instruments. However, under the current environment, Federated Farmers is concerned about the increased use of national instruments that go above and beyond high level statements of policy. This is due to the potential for the interests of private landowners to be over-ridden 'in the national interest' (particularly when the RMA does not provide for compensation for takings of rights in property) and concerns more generally about taking a 'one-size-fits-all' approach that might not be relevant or desirable for specific areas.

## **9. IMPROVING THE EFFECTIVENESS OF COMPLIANCE MECHANISMS**

9.1 The Government wants to ensure that the RMA enforcement regime acts as an effective deterrent to non-compliance by:

- Increasing the flexibility and scope of enforcement powers and responsibilities.
- Raising the maximum fine for committing an offence.
- Giving the Environment Court power to direct a review of a resource consent where it is connected to an offence that has been committed.
- Remove the provisions of the Act that protect the Crown from enforcement action.

9.2 The Local Government Forum generally agrees with the intent of these amendments and agrees that it is important that there should be an effective deterrent for non-compliance.

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<sup>4</sup> Report of the Minister for the Environment's RMA Technical Advisory Group, February 2009, section 2.9.

- 9.3 However, Federated Farmers is concerned that increasing the maximum fine will raise the bar on all fines, regardless of the level of offending or more importantly the relative effect of the activity – i.e., fines could rise steeply for technical breaches as well as effect-based breaches. While potentially a good idea for dealing with repeat offenders, Federated Farmers is also concerned that allowing the Environment Court to review consents could result in the power being applied in an ad hoc manner, so eroding certainty, which is a key issue for business investment.

## **10. IMPROVING DECISION-MAKING PROCESSES**

- 10.1 The Bill's intent is to increase the efficiency of decision-making processes under the RMA by:

- Allowing applicants for and submitters on resource consents and notices of requirement to require at least one independent commissioner on a decision panel, provided that the party making the request bears any additional cost.
- Enabling applicants for resource consents and notices of requirement to request that their application be directly referred to the Environment Court for a decision, provided that the permission of the local authority that would otherwise have made the decision has been obtained.
- Clarifying that local authorities can delegate the power to make decisions on plan changes to staff or any other person.
- Increasing the filing fee for lodging appeals with the Environment Court to \$500 (inclusive of GST).
- Removing the Minister of Conservation's final decision-making role in relation to restricted coastal activities and matters called-in by the Minister.
- Requiring hearings to be formally closed no later than ten working days after the last party has completed presentations.
- Requiring decisions on applications for designations to be made by the relevant local authority.

- 10.1 The Local Government Forum agrees with the statements in the Bill's Explanatory Note about problems with decision-making and we generally support these changes.

## **11. OTHER MATTERS TO IMPROVE WORKABILITY**

- 11.1 The Bill's intent is to remove and replace redundant or erroneous technical provisions with enforceable ones, and make minor procedural changes to avoid unnecessary delays and improve processes.

- 11.2 The Local Government Forum has no comment to make on these amendments.

## **12. RMA REFORM - 'PHASE 2'**

- 12.1 This Bill addresses issues that were considered in a first phase of RMA reforms. Phase 2, which will be commencing soon, will consider more complex issues requiring more detailed policy work. The Government has already signalled that Phase 2 will cover issues such as aquaculture, the structure of the EPA, fresh water management, and urban design and infrastructure issues.

- 12.2 While agreeing that these issues should be considered, and noting that Business New Zealand has commented extensively in its submission on water issues, one particularly important issue that has not been signalled for consideration in Phase 2 is the protection of private property rights. Recent studies have pointed out that one of the greatest flaws with the RMA is that it fails to adequately protect or promote property rights by not providing for compensation when there are takings of property or takings of rights in property<sup>5</sup>.
- 12.3 Members of the Local Government Forum are keen to ensure that Phase 2 of RMA reforms consider the issue of protecting private property rights and rights in property and will be making representations accordingly.

### **13. ABOUT THE LOCAL GOVERNMENT FORUM**

- 13.1 The Local Government Forum comprises organisations that have a vital interest in the activities of local government. Its members include Business New Zealand, the Electricity Networks Association, Federated Farmers of New Zealand, New Zealand Business Roundtable, New Zealand Chambers of Commerce, and New Zealand Retailers' Association. The Forum was established in 1994 to promote greater efficiency in local government and to contribute to debate on policy issues affecting it.
- 13.2 Forum members are each significant representatives of ratepayers in their own right but the Forum's perspective is to advance community welfare through the advocacy of sound public policy. We believe that local government can best serve the interests of the community and ratepayers by focusing on the efficient provision of public goods at a local level.

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<sup>5</sup> For example, refer to *Protection of Private Property Rights and Just Compensation: An Economic Analysis of the Most Fundamental Human Right Not Provided in New Zealand*, Lewis Evans, Neil Quigley, Kevin Counsell, February 2009; and *Primer on Property Rights, Takings and Compensation*, Bryce Wilkinson, October 2008.