

RMA Reform Report:

The Select Committee Strikes Back

19 August 2009

Analysis of the Select Committee's Report on Phase I

INTRODUCTION

The Local Government and Environment Select Committee¹ reported back on submissions to the Resource Management (Simplifying and Streamlining) Amendment Bill yesterday.

This issue of the Russell McVeagh RMA Reform Report summarises the recommendations made by the Select Committee, the most significant of which are:

- The restrictions on the rights of trade competitors to participate in planning processes and Environment Court proceedings, which are to be retained from the first Bill. The message is clear. Trade competitors tread a fine line and will face "penalties" in terms of costs and damages if they involve themselves in resource management processes and lose.
- The changes to the notification regime for consent applications. As proposed in the original Bill, there is to be no presumption as to notification, with the trigger for notification being effects which are "more than minor" and the trigger for limited notification being effects which are "minor or more than minor (but not less than minor)".
- The retention of the ability to make further submissions, although only for the Council itself, for those with an interest greater than the public generally, and for those representing a relevant aspect of the public interest. A tight timeframe also applies, with further submissions to be made within 10 working days of the notice of the summary of submissions.

- The removal of the originally proposed limitation on appeals on plan changes to points of law only, except with leave of the Environment Court (appeals on national policy statements, are, however, still limited to points of law only).
- The retention of the thrust of the call-in and direct referral provisions (although with a number of amendments for greater clarity around process).
- The deferral of any change in decision maker (ie the proposal to give that power to Councils) in respect of notices of requirement or outline plans of work. The designation provisions are likely to be revisited in Phase II of the Reforms.

The options for further influencing changes to the Bill are limited. While the Bill will come before the House for its second and third readings, any changes will be limited to minor drafting changes unless further changes are introduced through Supplementary Order Papers. These would usually be confined to technical rather than substantive changes (as the public has no ability to participate in those changes).

The proposed changes to the Act are intended to come into force on **1 October 2009**.

The balance of this report summarises the key issues addressed in the Select Committee report.

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REDUCING VEXATIOUS, FRIVOLOUS AND ANTI-COMPETITIVE PRACTICES

Trade competition

While the Bill's original proposals in relation to trade competition had received some support, many other submitters identified a range of issues including many unintended consequences arising from the proposals to limit involvement by trade competitors. There were a number of calls for the issues to be deferred to Phase II. If the provisions were to remain, a number of submissions had sought a clear definition of "trade competitor" to prevent the provisions from applying to people competing for the same resources (eg water by irrigators and generators). Concerns were also raised about the prospect of trade competitors being closed out from involvement in plan changes affecting their own property, as well as the costs and damages provisions.

The Select Committee has essentially retained the substance of the original proposals to restrict participation by trade competitors. For example:

- Despite recognising the submissions questioning the meaning of "trade competition", the Select Committee declined to define it, stating that "there is adequate guidance in existing case law".
- The provisions on surrogates remain, although surrogates must "knowingly receive" direct or indirect help from a trade competitor.
- The original limitations on rights of submitters to make submissions on plan changes has been largely retained, and extended to limit submissions on call-in processes in a similar way.
- The Environment Court continues to have the power to declare a trade competitor (or their surrogate) in breach of the "trade competitor provisions" and order costs up to six years after the close of proceedings.
- The ability to apply to the High Court for damages if the "trade competitor" provisions are breached remains, but is further tightened, with the High Court required to order damages as compensation for economic loss (although with discretion as to amount).

There is little doubt that this new regime will be the source of much litigation and the Select Committee has missed an opportunity to clarify the scope of trade competition. The proposals in the Bill are broader than can be properly justified. They ought to have been removed from the Bill and if necessary, included in Phase II in an improved and refined manner.

Security for costs

The Select Committee retained the provision reinstating the Environment Court's ability to order security for costs. It expects, consistent with the previous practice of the Environment Court, for that power to be exercised sparingly.

The return of security for costs will be welcomed by infrastructure and other interests, who have often experienced significant delays resulting from unmeritorious appeals pursued by incorporated societies, who are largely undeterred by the prospect of cost awards as they will have limited or no funds and will allow themselves to be wound up if unsuccessful.

Interested party status

Minimal changes have been recommended by the Select Committee to section 274, which dictates when persons can join as parties to an appeal. To join as a section 274 party, a person must have:

- an interest greater than the interest that the general public has; or
- made a submission on the relevant provision.

In either case that person must also not be subject to the trade competition restrictions.

The general tightening up of s274 parties was supported by many submitters.

PROPOSALS OF NATIONAL SIGNIFICANCE AND DIRECT REFERRAL

Call-ins to a Board of Inquiry

A number of submitters had sought refinements to the call-in process, such as for cross-examination to be available as of right (the Bill had proposed for cross-examination to be at the Board's discretion), for current or former High Court judges (as well as Environment Court judges) to be able to chair the Board, for Councils to be reimbursed for their costs incurred in assisting the Board, and that the restrictions on fees to be paid to Board members be removed (in order to attract members of the highest calibre).

The Select Committee has taken some of these submissions on board.

The call-in provisions have been restructured so as to improve the clarity and workability of the provisions. There

are three pathways by which a matter may be called-in by the Minister:

- First, where a matter is lodged with a local authority, the Minister may decide on his or her own initiative to call-in the matter.
- Second, where the matter is lodged with a local authority, the local authority or applicant may request that the matter be called-in.
- Third, an applicant may apply directly to the Environmental Protection Agency ("EPA") for a matter to be called-in, and the EPA will recommend to the Minister whether to call-in the matter.

If the Minister decides to call-in the matter, it will be determined by the Environment Court or a Board of Inquiry.

In terms of some of the issues raised by submitters (recorded above), the Select Committee decided that:

- cross-examination should remain at the Board's discretion;
- retired High Court judges can be appointed to the Board as the chairperson;
- Councils should be able to recover the actual and reasonable costs incurred in complying with the call-in process from the applicant; and
- the restrictions on remuneration for the Board should remain.

The Select Committee also recommended that the Minister consider additional factors when deciding whether a proposal is of national significance. These include taking into account network utility operations which cross district Council boundaries; and proposals which would assist the Crown in fulfilling its obligations regarding public health, welfare, security, or safety.

Direct referral to the Environment Court

The provisions allowing an applicant to seek direct referral to the Environment Court was widely supported in submissions. A number of submissions (by Councils) sought within that framework that the Bill be amended so that Councils may recover their costs in the preparation of the required pre-hearing report. Other submitters sought that the right to request direct referral be extended to requiring authorities in respect of proposed designations, and certain other procedural amendments or clarifications.

The Select Committee recommended that the direct referral process apply to notified applications for resource consents,

requirements for designations and heritage orders (or alterations to them).

Submissions seeking to empower submitters (as opposed to applicants) to force direct referral were not taken up by the Committee.

Generally the modification to the call-in procedures are useful and will enhance the Act.

PLAN DEVELOPMENT AND PLAN CHANGE PROCESSES

Ten year plan reviews

Given the practice of many Councils to adopt a rolling review of their plans, there had been suggestions for the ten yearly review requirement in the Act to be removed. This was proposed in the new Bill. However, submitters pointed out the potential for this to lead to some parts of plans becoming out of date.

The Select Committee recommended an amendment requiring Councils to review any part of their plans which have not been reconsidered for ten years. The Select Committee also extended the application of this requirement to regional plans, regional coastal plans and regional policy statements (which had not been proposed to be subject to the new review provisions in the original Bill, presumably by oversight).

This seems a reasonable compromise that balances the need for reasonably regular reviews of plan provisions with the costs of such reviews. It should also avoid Councils having to re-visit issues recently addressed (in a plan change) just a short time later (in a full plan review). Councils will also still be able to conduct a full review if they wish.

Plan changes not to have interim effect

A number of submitters had supported amendments proposed to the Act to remove the immediate effect of proposed plan changes (subject to some exceptions) or where the Environment Court made orders for the changes to take immediate effect.

The Select Committee recommended adopting these suggestions, but with some further amendments to provide more clarity. The proposed regime is now:

- No rule in a new plan change will have interim effect until the Council's decisions on submissions are notified, unless that rule falls within an "exempt" class having immediate effect or the relevant Council obtains an order from the Environment Court that the change will have immediate effect.

- The exempt class of rule changes that will have interim effect are rules that:
 - protect or relate to water, air or soil (for soil conservation);
 - protect areas of significant indigenous vegetation;
 - protect areas of significant habitats of indigenous fauna;
 - protect historic heritage; or
 - provide for or relate to an aquaculture management area.
- Councils must also clearly identify in any new plan changes whether a rule is to have interim effect or not.

This is a positive change that may reduce the complexity of having multiple layers of rules, as well as protect business and other groups from having to comply immediately with ill-conceived or poorly thought out rules pending the submissions processes. However, the provisions only refer to "rules", so it appears that conflicting (or at least multiple) objectives and policies could still need to be considered and applied.

Plan appeals - not restricted to points of law

The proposal in the Bill to remove rights of appeal on plan changes, except with the leave of the Environment Court, was a controversial one. Many submitters were concerned that requiring leave could work against the objectives of streamlining the appeals process and that such a restriction was unreasonable.

The Select Committee agreed it was not satisfied that limiting plan change appeals to points of law would deliver fairness and natural justice (except in the case of national policy statements). It therefore recommended that the proposed restrictions not be adopted.

This is a good result and will ensure that ill-conceived Council decisions can be re-assessed through the appeal process.

The Select Committee report also records that further consideration is needed to determine how best to reduce the time involved in the plan development process and reaffirm the role of local authorities as primary policy makers. It is likely then that this issue will return for further consideration as part of the Phase II reform.

Non-complying activities to remain

Some submitters supported the removal of the non-complying activity status in the Bill, despite any short term costs for Councils in having to review their plans to remove

and revise activities that are currently identified as "non-complying". It was considered that this process could be viewed as an opportunity for Councils to adopt clearer objectives and policies to guide applicants and other participants in the context of a discretionary consenting process.

The Select Committee has recommended that the non-complying category of activity remain and not be deleted. The Committee was concerned that removal of non-complying status was a crude means of trying to simplify the categories of consent, and that it could potentially increase complexities and costs associated with the planning process rather than reduce them.

This outcome will generate a mixed response. Many developments seem to unnecessarily fall into the non-complying activity category for minor technical reasons. On the other hand, the non-complying status, at least in the context of some plans, can provide a useful indication as to the appropriateness of an activity that could have been lost with a move to discretionary status. It can also be useful for sensitive activities that may generate reverse sensitivity effects.

Further submissions remain

Many submitters opposed the Bill's removal of the further submissions process, as it enables affected persons to participate in the making of decisions that will directly affect them. However, it was also recognised that the existing further submissions process is both costly and time consuming.

The Select Committee has recommended that Councils be required to prepare and advertise a summary of submissions. A Council, any person representing a relevant aspect of the public interest, or a person with an interest greater than the public generally, can then lodge a further submission within 10 working days of public notification of the summary of submissions. Further submitters will have the right to be heard and appeal. The Committee considers that the proposed provisions will balance the rights of potentially affected parties with the need to ensure that the plan development process is not unduly burdensome.

The proposal will to some extent reduce compliance costs for Councils, but may not significantly reduce the number of further submissions made. The 10 working day limit will be tight for large policy statements or plans where there may be hundreds of submissions received.

A number of submitters also sought that further consideration be given in Phase II of the reforms to limiting the nature of relief that can be sought in submissions, on the basis that if relief was more tightly confined, there may be less need for further submissions.

This may be something worth exploring further, given the frequency with which jurisdictional issues already arise as to whether a submission is "on" a plan change or variation.

Blanket tree protection removed

The original Bill proposed a prohibition on Councils adopting blanket tree protection rules in their plans.

The Select Committee has recommended retaining the prohibition on blanket tree protection rules, but has changed the proposed wording slightly, including adding a new definition of "urban environment" for additional clarity.

This is a controversial proposal but should be of assistance to land owners and the public generally in reducing compliance costs.

RESOURCE CONSENT PROCESSES

Notification revisited

The proposed changes to the notification provisions received many conflicting submissions given the departure from the "presumption" of notification. Submitters also raised difficulties with some of the concepts that had been proposed (such as the use of the term "beyond the immediate environment").

The Select Committee recommended the removal of the statutory presumption in favour of notification and endorsed a more neutral position. The Committee, however, reformatted the notification provisions to be "more readable" and to address certain other concerns raised, such as the uncertainty with the term "beyond the immediate environment". The recommendations are now for:

- Public notification to occur where adverse effects "may be more than minor" (as opposed to where they "will be more than minor", the test as notified in the Bill). This lowers the threshold of certainty required for notification. In considering whether the effects are more than minor for the purpose of public notification, effects on the owners or occupiers of the relevant land or adjacent land are to be disregarded (such owners or occupiers would potentially be able to participate under the next test).
- Limited notification to occur where effects on a person are minor or more than minor (but are not less than minor). This strikes a balance between the existing threshold of "de minimis", which is considered to be too low, and that proposed in the original Bill of "more than minor".

- In both cases, adverse effects *may* (rather than *must*) be disregarded if a rule in a plan or a national environmental standard permits an activity with that effect. In other words, Councils have a discretion as to whether to apply a permitted baseline.

In striking this balance, the Select Committee report acknowledged concerns that the proposed changes could unduly restrict public participation, but (the majority at least) considered the changes justified and that any residual concern could be reduced by public participation at the plan development stage.

Any change to the notifications provisions of the Act will have significant implications for business, neighbours, community and environmental groups - basically everyone who deals with the Act. This is particularly the case where a substantial body of case law from the highest Courts (including the Supreme Court and Court of Appeal) has stressed the emphasis in the Act of enabling public participation. Generally industry supported the thrust of the new provision and the Select Committee has improved some of the new wording.

Independent commissioners can be required

Submissions sought that any party at a Council hearing on an application on the Bill for consent, be empowered to require the Council to appoint a panel of independent hearing commissioners. As drafted, the Bill only required a Council to appoint one independent commissioner to the hearings panel. Submissions also suggested that the right to require independent commissioners be extended to designating authorities in respect of Notices of Requirement.

The Select Committee recognised that the presence of just one independent commissioner may not provide a panel with the necessary independence, experience, or expertise if they are in the minority. Accordingly, the recommendation is that upon an applicant's request (within five days of the close of submissions), a Council must delegate its powers to hear and decide the application to one or more independent hearings commissioners.

The Select Committee did not recommend extending this power to designations, no doubt because, as discussed below, it recommended deferral of the changes proposed to the designation process.

The ability for applicants to ensure that their proposals are heard and determined by independent commissioners will go some way to assuring applicants of a fair hearing. For example, some submitters raised concerns that Councils could appoint "independent" commissioners known to be sympathetic to that Council's views or that are regularly retained by that Council. It is difficult to see a way around this, unless there is some regional or national "pool" from

which commissioners are selected at random. The downside with that approach however, is that Councils will lose the ability to select commissioners with particular expertise relevant to the application at hand. Further consideration could be given to these sorts of procedural issues as part of Phase II of the reform.

Discounts for slow processing

Submitters strongly endorsed the proposal that Councils be required to introduce a discount policy to apply where they do not adhere to statutory processing timeframes.

The Select Committee has recommended that Councils introduce discount policies where statutory processing timeframes are breached and has provided for regulations to be made by the Minister for the Environment setting a default discount policy for late processing of consent applications. The regulations are to be made following consultation with Councils, and within nine months of the amendment Act coming into force. Councils will be able to override this default policy only with a policy more generous than the default one.

The Select Committee also recommended a restriction on a Council's ability to extend the timeframe within which it must process a resource consent application. Any extension must have the applicant's agreement, or result from "special circumstances" (eg a pandemic).

This proposal will be welcomed by all developers and should provide an incentive for quicker processing of consents.

Submissions also sought that further consideration be given to the statutory timeframes through Phase II of the reforms. That would also seem sensible, given the difficulties Councils have in particular meeting the timeframes for major proposals.

DESIGNATIONS - ANOTHER TIME ...

Council decisions on Notices of Requirement

Key infrastructure providers submitted in opposition to the provisions of the Bill which proposed that decisions on Notices of Requirement and outline plan of work should be made by the Council rather than the relevant requiring authority.

This Select Committee did not recommend the retention of these provisions. The Committee was concerned about transferring this decision-making power to Councils, in the absence of a wider review of the way in which major infrastructure projects are managed. The Select Committee noted that there was a high risk of increased costs and inefficiencies relating to compliance with territorial requirements, and potential appeals to the Environment Court by requiring authorities.

This is a good result for requiring authorities. The prospect of change remains, however, with the potential for a more radical overhaul of the designation provisions as part of Phase II of the reforms.

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