

Resource Management (Simplifying and Streamlining) **Amendment Bill**

KEY CONTENTIOUS ISSUES (version 3)

1. REDUCING APPEAL RIGHTS ON PLANS

The Bill amends the RMA so that on a plan matter a party can only appeal a Council's decision on a point of law. This means that a party cannot contest the merits of a Council's decision on a plan matter in the Environment Court.

However, a party can apply to the Environment Court to extend the scope of any appeal on a plan matter if:

- (a) the decision has a significant impact on existing property rights;
- (b) fails to give effect to part II of the RMA; or
- (c) is unclear in meaning or effect.

Refer to Clause 132, 136 and 148 of the Bill and Section 280A and Clause 14 of Schedule 1 of the Act.

Such a change will increase costs and delays through more interlocutory procedures, will reduce the accessibility of the Court to interested parties, and most importantly, will substantially reduce the quality of resource management decision making. Reasons for this include:

- Without the ability to appeal a council decision on its merits to the Environment Court, public participation in plan appeals will be substantially reduced.
- Without the ability to appeal plan matters on the merits, council decisions will lead to more lower quality plans being made. The Environment Court is a specialised Court with considerable expertise in determining resource management cases. This can be contrasted to local councillors who are subject to a three-year election cycle, are focused on local issues and frequently have little experience in planning. Local councillors, with these limitations, should not be in a position of final decision maker.
- The Court is an independent body and is not subject to political influence, whereas local councillors are.
- The Environment Court provides a higher level of consistency to plan making and ensures a national perspective is applied to a wide range of cases.
- Without cross examination at council hearings, decisions will be made without proper testing of evidence. This will increase the number of flawed decisions and resultant judicial review of decisions.
- The process at council hearings will become far more formalised and require professional input. This increase in formality of hearings will deter public participation in the process.
- No legal aid is available for council hearings. Under the proposed amendments, parties would be required to present all their evidence at the council hearing and would probably need to engage legal counsel. Members

of the public, community groups and environmental NGOs will struggle to participate at this level without financial assistance.

- The proposed amendment will result in plan making processes becoming bogged down in legal challenges as to whether the appeal falls within the 3 categories listed above, and is therefore able to challenge the merits of a decision
- To determine whether an appeal fails to give effect to Part II of the Act, the Environment Court will have to hold a hearing and hear evidence on the matter. In effect, this means that the Environment Court will be conducting pseudo hearings on the merits of appeals.
- There will be delays if the Environment Court declines an application to extend the scope of an appeal and that decision is appealed to higher Courts.
- Much time, effort and expense will be spent on these procedural issues rather than on the merits and substance of the case. This will not simplify and streamline the plan making process. Nor will it result in better environmental outcomes for the environment.

Oppose and seek removal from Bill.

2. REMOVING NON COMPLYING ACTIVITY STATUS

The Bill removes the non complying activity classification from the RMA. It means each local authority will have to undertake a plan change or variation to remove non complying activity status from the plan and replace it with another activity status, with any associated changes in assessment criteria.

Three years after the commencement of the Act, activities still referred to as non-complying, will automatically be treated as references to a discretionary activities.

Refer to Clause 147 and 152 of the Bill.

It is not necessary to remove non complying activity status from the Bill. This amendment will result in a substantial amount of money and time being spent unnecessarily on changing plans and will not result in positive environmental outcomes. Reasons for this include:

- Having regard to the objectives of the Bill, the reasons for removing the non complying activity category are not clear from the published information available.
- In a strategic sense, the non complying category is helpful in establishing a clear and transparent bottom line. It is an important category that sets up the presumption against granting consent to an activity. Removal of the activity status will weaken plans unnecessarily.
- Non complying activity status is now well embedded in plans. Changes to plans would not only be required to activity tables, but also to objectives, policies and assessment criteria throughout each plan.
- A choice will need to be made to change the non complying activity to either a discretionary activity or a prohibited activity. The latter will be fraught with section 32 issues and will be hard to justify. Therefore, the discretionary route is likely to be the preferred activity category.

- Councils will need to develop discretionary activity status policies and criteria that essentially provide for an upper limit beyond which effects are regarded as being inappropriate (or an environmental bottom line). In effect, this will act as a non complying activity substitute.
- Once in place, these new provisions would then be subject to interpretation and debate in resource consent processes. Even well drafted provisions would not send out a clear message. Is this activity anticipated in the plan subject to some conditions of consent, or is it generally not expected to occur? This will result in uncertainty for applicants and other interested parties.
- All of the above issues would require councils to carefully and thoroughly think through the changes. This would be an enormous task, fraught with introduction issues. The cost associated with the myriad of plan changes and variations necessary has not been calculated, but in our opinion will be extremely expensive (in the millions throughout the country).
- Councils will be required to change plans within 3 years, these changes must go through the public consultation process. However if, after 3 years, non complying activity status remains in some plans, this category will automatically change to discretionary without public consultation.

Oppose and seek removal from Bill.

3. PROVISIONS OF PROPOSED PLANS HAVING NO IMMEDIATE EFFECT

The Bill states that a rule in a proposed plan will not have legal effect until:

- (a) the Council has notified its decision on submissions;
- (b) the time for making submissions or lodging appeals has expired and
 - i. no submissions in opposition have been made or appeals have been lodged;
 - ii. all submissions in opposition and appeals have been determined;
 - iii. all submissions in opposition have been withdrawn and all appeals withdrawn or dismissed.
- (c) the council makes a resolution before the plan is notified that it will be immediately operative.

A proposed rule will be immediately operative if:

- (a) from the date it is publicly notified, the rule protects water, air, soil, SNA's or historic heritage.
- (b) the Council applies to the Environment Court to have the rule exempt from not having legal effect and the Court grants the application.
- (c) the Council rescinds its resolution above that a rule has legal effect immediately.

Until the time that rules have legal effect, applicants will be able to undertake activities that are contrary to the proposed rules.

Refer to Clauses 6, 9, 10, 11, 12, 13, 16 and 59 of the Bill and Sections 9, 11, 12, 13, 14, 15, 19 and 20 of the Act.

It appears from these sections that rules in proposed plans will not have legal effect until the above provisions apply. This may lead to “gold rush” applications seeking to obtain consent before a proposed plan becomes operative.

For example, consider the situation where an activity is a controlled activity in an operative plan and a discretionary activity in a proposed plan. Currently, an application for the activity will have to be assessed as a discretionary activity (that being the more restrictive of the two categories). However, under the proposed amendments, the activity will be assessed as a controlled activity, because the proposed discretionary rule will not have legal effect (until proposed section 86A applies). An applicant will be able to see that the activity status for that particular activity is about to change and will be able to lodge “gold rush” applications in order to secure consent at the easier category.

However, it is very difficult to understand the intention of the provisions as they are badly drafted and are full of conflicting provisions. (is this the case given John Burn’s comments?)

The proposed amendments limit the circumstances of when a proposed rule has legal effect to rules that expressly protect water, soil, areas of significant indigenous vegetation, or areas of significant habitats or indigenous fauna, or historic heritage. If these criteria are to remain, they should be expanded to include matters pertaining to section 6 of the Act, particularly, section 6(b) and outstanding natural landscapes and features.

The introduction of criteria under proposed section 86A(2)(a) will increase the amount of legal argument over whether a proposed rule falls within the section. Such arguments will necessarily lead to an increase in judicial review proceedings of decisions on this matter. This outcome will not contribute to streamlining and simplifying the Act.

Oppose and seek removal from Bill.

4. REMOVING THE ABILITY OF A PERSON REPRESENTING A RELEVANT ASPECT OF THE PUBLIC INTEREST TO JOIN PROCEEDINGS UNDER S 274

The Bill removes the ability of a person ‘representing a relevant aspect of the public interest’ to become a party to appeals. This would eliminate community groups who did not submit in the first instance from joining an appeal.

The Bill also shortens the timeframe for joining an appeal from 30 days to 15 working days.

Refer to Clause 131 of the Bill and Section 274 of the Act.

This amendment will reduce public participation. It will lead to community groups having to submit on more notified matters, and being excluded from proceedings if they don’t.

Oppose and seek removal from Bill.

5. REMOVAL OF BLANKET TREE PROTECTION

The Bill removes any rule in a plan that provides for the protection of any tree, or group of trees, unless they are listed in a schedule or part of a reserve. This comes into effect two years after the Bill becomes law.

The Bill also prohibits the creation of a rule in a plan that provides for the protection of any tree, or group of trees, in an urban environment, unless specifically identified, located within a reserve, or subject to a conservation management plan.

Refer to Clause 52 and 151 of the Bill and Section 76(4A) of the Act.

The scope and effect of this amendment is not entirely clear. Clause 151 says all existing rules that protect any tree, or group of trees, are revoked. However, clause 52, which deals with district plan rules, only specifies that a rule must not provide for the protection of any tree, or group of trees, in an urban environment. Does this mean that in the future, district plans can contain rules that protect trees in non urban environments?

The appropriate approach to dealing with this issue (the time and expense of dealing with consents for minor matters, particularly tree removal) would be for individual councils, who are experiencing problems, to promulgate a plan change to remove or lessen the scope of rules relating to tree removal.

These proposed amendments represent the issuing of a national directive for something that is of local concern. If the Minister wants to change district plan provisions there are other appropriate avenues provided for under the Act.

Trees are an important component of the landscape, both private and public, rural and urban. These amendments pose a huge risk to this natural resource.

Oppose and seek removal from Bill.

6. CROSS SUBMISSIONS

The Bill removes cross or further submissions from the plan making process under Schedule 1 of the Act. Instead the proposed amendments provide an opportunity for councils to seek the view of a person affected by matters raised in submissions.

Refer to clause 148.

These amendments are unnecessary, will result in weaker plans and will result in more submissions being lodged on plans.

Presently, cross submissions do not add that much time to the plan making process. This would be especially so if the period for lodging cross submissions is reduced to 20 working days as recommended by the TAG.

Cross submissions are a necessary protection for property owners whose land is affected by submissions that seek to amend the proposed plan. Without cross

submissions, property owners have no ability to comment on (or appeal) submissions that directly impact their land

Cross submissions are also an important way for environmental groups to keep an eye on the environment. It provides an opportunity for groups to cross submit in opposition to submissions which seek to relax plan provisions. Without this ability, plan provisions can be significantly weakened without any checks of balances.

The proposed amendments will result in parties having to submit on every single aspect of the proposed plan that is of relevance, even if it is in support of the provisions. Presently, there is no impetus to submit in the first instance on parts of the plan that parties agree. This will increase the number of submissions received on proposed plans and will require councils to invest more time and effort into the process.

Combined with amendments limiting plan appeals to matters of law, this amendment will significantly limit public participation in the plan making process, exclude directly affected parties from being able to comment on plan provisions, will result in weak plans and will subsequently result in an increase in negative environmental outcomes.

Oppose and seek removal from Bill.

7. SECURITY FOR COSTS

The Bill removes a prohibition on security of costs so that the Court can impose security of costs on parties to an appeal. This means that if the Court sees fit, it may require a party to an appeal to pay a certain amount of money first, as security for any future award of costs against that party.

Refer to Clause 133 of the Bill and Section 284A of the Act.

Case law is quite clear on the principles and criteria for assessment of an application for security of costs. Briefly, the ratio of the cases is as follows:

1. Is there reason to believe that the person against whom security of costs has been sought will be unable to pay costs?
2. If no, then security of costs is not necessary.
3. If yes, then the Court has a discretion to make an order, taking into account the following matters:
 - i. Merits of the case of the party against whom security of costs are being sought
 - ii. Whether the making of an order for security might prevent the party proceeding with a bona fide claim
 - iii. The conduct of the parties
 - iv. Likelihood of a costs order
 - v. Public interest

Courts do not condone threatening behaviour. In both cases where this occurred, the application for security was rejected by the Court.

However, the engagement of legal counsel was a significant consideration and comfort for the Court when making its determination. Community groups and individuals are not always able to engage legal counsel due to the expense. Without legal representation, members of the public will be less inclined to appeal decisions in fear of a security of costs order. Overall, this amendment will have a chilling effect on public participation.

Oppose and seek removal from Bill.

8. REVERSING THE PRESUMPTION ON NOTIFICATION

The Bill reverses the presumption on notification so that instead of there being a presumption in favour of notification, there is now a presumption in favour of non notification.

Refer to Clause 68 of the Bill and Sections 93 and 94 of the Act.

The amendments will have a chilling effect on public participation in resource management matters.

The proposed amendments change the requirement to notify “if the adverse effects of the activity on the environment will be minor” to “if the adverse effects of the activity beyond the immediate environment will be more than minor.” This means that there is no requirement to notify an application, even if the adverse effects on the environment are more than minor, because the effects are within the immediate environment of the activity. There is no guidance provided as to what immediate environment means. This is likely to be a hotly contested issue in judicial review proceedings.

This amendment is at odds with the amendment to exclude parties that represent a relevant aspect of the public interest joining Environment Court appeals. On the one hand the amendments allow for notification of applications if the effects go beyond the immediate environment, signaling that wide spread effects are of interest to the general public. But then on the other hand, the amendments do not allow groups representing this broader public interest to join in proceedings.

In judicial review proceedings on notification decisions, the High Court is more likely to uphold a council’s decision not to notify an application because of these amendments.

If the following amendments were deleted or changed, the proposed amendments relating to notification would be acceptable:

- Proposed section 93A(2)(a). Delete the words “*unless the effects of the activity concerned on the person are more than minor*” from the definition of “affected party”. The section will then read:

93A Forming an opinion on whether person adversely affected

...

(2) A person must not be treated as being adversely affected-

- (a) *if, in relation to the adverse effects of the activity on the person, the plan concerned permits an activity with that effect; or*
- (b) *in relation to a controlled or discretionary activity, if the adverse effects of the activity on the environment do not relate to a matter specified in the plan or proposed plan concerned as a matter for which-*
 - (i) *control is reserved for the activity; or*
 - (ii) *discretion is reserved for the activity; or*
- (d) *it is unreasonable in the circumstances to seek the written approval of the person.*

...

- Clause 131. Add in the words “*a person representing a relevant aspect of the public interest*” to the list of persons who may be a party to any proceedings before the Environment Court. The section will then read:

274 Representation at proceedings

- (1) *The following person may be a party to any proceedings before the Environment Court:*
 - (a) *the Minister;*
 - (b) *a local authority;*
 - (c) *the Attorney general representing a relevant aspect of the public interest;*
 - (d) *a person who has an interest in the proceedings that is greater than the interest that the general public has, but the person’s right to be a party is limited by section 308D is the person is person A as defined in section 308A and the proceedings are an appeal against a decision under this Act in favour of person B as defined in section 308A:*
 - (e) *a person who made a submission to which the following apply:*
 - (i) *it was made about the subject matter of the proceedings; and*
 - (ii) *section 308B(2) and clauses 6Z94) and 29(1B) of Schedule 1 were irrelevant to it:*
 - (f) *a person who made a submission to which the following apply:*
 - (i) *it was made about the subject matter of the proceedings; and*
 - (ii) *it was made in compliance with whichever of section 308B(2) or clauses 6(4) or 29(1B) of Schedule 1 was relevant to it:*
 - (g) *a person representing a relevant aspect of the public interest.*

- Insert a clause (d) in proposed section 94AA that reads “*there is any uncertainty as to whether the effects on the environment will be more than minor or not*”. Such a clause would encapsulate the precautionary approach intended by the TAG that in situations of doubt, an application should be notified.

94AA Circumstances in which consent application required to be publicly notified

A consent authority must publicly notify an application for a resource consent if-

- (a) *it is satisfied that the adverse effects of the activity beyond the immediate environment will be more than minor; or*

- (b) *in respect of a resource consent application to which section 92A or 92B applies, a require for further information or response to a notification-*
- (i) *is not responded to by the deadline concerned; or*
 - (ii) *the person concerned refuses to provide the information or agree to the commissioning of a report; or*
1. *the applicant requests that the application be notified; or*
 2. *there is any uncertainty as to whether the effects on the environment will be more than minor or not.*

Support in part

9. FURTHER INFORMATION

Currently the Act allows councils to reject a proposal if “*it has insufficient information to enable it to determine an application*”. This provision is proposed to be deleted in the Bill. The proposed amendments insert a requirement to proceed with section 104 decisions even without sufficient information.

Refer to clause 65 and 67 of the Bill and section 92 of the Act.

Considering applications without sufficient information is not best practice and is a waste of the council, the submitters and the applicant’s time. There is no point proceeding on a matter if the full effects of an application cannot be assessed.

The proposed amendment will also result in councils succumbing to local politics and not requiring influential applicants to provide further information. The amendment will give applicants more weight in refusing to provide the extra information.

The amendments should only proceed if a precautionary requirement is added to the Bill. This would mean that where there is a lack of information the council should take a precautionary approach and turn the application down. This will push reluctant councils into declining applications where the applicant has refused to supply sufficient information.

The precautionary language could be added either to the consenting and plan-writing sections of the Bill, or alternatively and perhaps better, to Part II of the Act.

Support subject to introduction of precautionary wording

Note: this advice document is work in progress and may change as more analysis is done.