



**NEW ZEALAND
FOREST INDUSTRIES COUNCIL**

LEVEL 4, 85 THE TERRACE, PO Box 2727,

WELLINGTON, NEW ZEALAND

PHONE: 64 4 473 9220 FAX: 64 4 473 9330

E-MAIL griffiths@nzfic.org.nz



**NEW ZEALAND
FOREST OWNERS' ASSOCIATION
INC.**

LEVEL 4, 85 THE TERRACE, PO Box 1208,

WELLINGTON, NEW ZEALAND

**SUBMISSION BY FOREST OWNERS' ASSOCIATION AND
FOREST INDUSTRIES' COUNCIL
ON THE
RESOURCE MANAGEMENT AMENDMENT BILL**

1. INTRODUCTION

The New Zealand Forest Industries Council (NZFIC) is the pan-industry association of the New Zealand forest industry. Its members include New Zealand's largest forest industry companies and key sector associations. The mission of the Council is to enhance the industry's international competitiveness.

The Forest Owners' Association is a voluntary organisation representing the interests of commercial forest growers. The Association has 215 members whose forest holdings represent approximately 85% of New Zealand's commercial forest estate. The members include all the major forest corporates, the majority of medium sized forest companies, many forest syndicates, and a number of farm foresters.

2. OVERVIEW

Section 32

The Resource Management Amendment Bill (RMAB) does not address the lack of incentive on Local Government to consider resource management as anything other than environmental protection. FOA/FIC have repeatedly sought the inclusion of explicit incentives on regulatory authorities such that they are more able to countenance appropriate use of natural resources. More specifically, the lack of a specific obligation to explicitly identify and account for the costs of regulation within the ambit of the "Section 32" analysis is disappointing.

More detailed suggestions for specific amendments in respect of section 32 are set out in the body of the submission.

Compensation

FOA/FIC are concerned at the absence of any proposal to provide adequate compensation for losses arising from regulatory imposition allowed under the Resource Management Act (RMA). Many local authorities are using the provisions of the RMA to create public interest in private property at the expense of individuals or companies.

Amenity/landscape protection under the RMA provide particular scope for regulatory imposition which is almost entirely a matter of public interest. If an individual wishes to retain those aspects of his/her property he/she is at liberty to do so. Conversely, if the community requires that its expectation for private property be upheld against the wishes of the individual, then it (the community) should be prepared to purchase an appropriate interest in the property.

At present, section 85 of the RMA allows the Environment Court to overturn a rule in a plan if that rule constrains reasonable use of property. We contend that this protection is manifestly inadequate, as it requires a property owner:

- to determine from a proposed plan the intended application of the plan with respect to the property;
- to incur the costs of submission and appeal processes in order to retain an existing or reasonably anticipated use. Such costs are frequently in the tens of thousands of dollars and therefore often exceed the value of the property right and/or the resources of the individual.

FOA/FIC accept that statutes such as the Public Works Act have long provided for public interest to override private interest. However, exercising public rights under the Public Works Act has required fair compensation, (independently determined). The precedent under the Public Works Act is for public acquisition of desired private interest, with the result that ongoing liabilities (rates, pest control etc) become a cost to the public.

The approach under the RMA has been that compensation is not payable with the consequence that Regulatory Authorities and public interest groups can acquire an interest in private property without compensation and without ongoing liability for the costs that that interest represents. The result is total absence of financial incentive on the part of regulators and public interest groups to curtail and/or prioritise their expectations.

FOA/FIC recommend that section 85 be amended to require fair compensation to be paid wherever regulation creates a public interest in private property.

Historic Heritage Provisions

The provisions relating to historic heritage have not formed part of previous Resource Management amendment proposals. Until further consultation with respect to specific provisions within the RMA has taken place, FOA/FIC consider the provisions as drafted to be poorly considered. They will replace a poorly working system with an overly bureaucratic and burdensome system adding further to the inefficiencies inherent in the RMA. Among other matters (raised in the body of the submission), consideration of the conflict between private rights

and the public interest is required before incorporation of the Historic Places Act 1993 (HPA) into the RMA.

Our comments on specific clauses of the RMAB are as follows:

3. DEFINITION OF ENVIRONMENT - CLAUSE 2

Section 2 of the RMAB redefines “environment” in the principal Act to exclude reference to “social and economic”. Previous discussion documents on amendments to the Act tied the redefinition of "environment" to section 104 amendments. The initial recommendations on section 104 that included reference to social and economic matters have not been followed through into the RMAB. FOA/FIC have repeatedly submitted that if "environment" is to be amended by removing reference to social and economic considerations, it is imperative that such matters continue to be taken into account in making decisions on resource consent applications. Without any reference to social and economic matters in either section 104 or the definition of "environment", regulators seeking to promote sustainable management of the “environment” will have little choice other than to manage for ecological factors, to the exclusion of society and the human economy.

The reason given by the Minister for not pursuing the inclusion of social and economic benefits in section 104 is because it ‘would create fresh legal uncertainty where none presently exists’. It is FOA/FICs' submission that any change to the definition will create fresh uncertainty. Removal of reference to social and economic will allow parties to argue that "social and economic" considerations are no longer relevant. The Minister has argued that section 5 continues to provide ample legal room for arguments about economic and social benefits to be raised, and for sensible judgements to be exercised. It is submitted that the amendment will only create ample room for arguments to exclude social and economic considerations. This is particularly in view of the proposed amendments to section 104 which now exclude consideration of Part II matters for controlled and restricted discretionary activities.

FOA/FIC do not consider the proposed definition of "environment" provides adequate scope for effective management of New Zealand's natural resources. With many activities, the justification for an adverse effect on the environment will be the social and economic benefits arising. Furthermore, it is inconsistent to include reference to anthropocentric matters such as health, safety, amenity and cultural values without reference to social and economic considerations.

Recommendation

Provide adequate scope for “management” of New Zealand’s natural resources by retaining the existing definition of “environment” within the RMA.

In the event that it is determined that the definition of "environment" does require amendment, such amendment should be limited to replacement of subsection (d) so that the definition reads:

"Environment" includes -

- (a) Ecosystems and their constituent parts, including people and communities; and
- (b) All natural and physical resources; and
- (c) Amenity values; and
- (d) the health, safety, social, economic and cultural values of people and communities".

~~The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:~~

4. DEFINITION OF SOIL CONSERVATION - CLAUSE 2(22)

Clause 2(22) of the RMAB defines "soil conservation" as meaning "avoiding, remedying, or mitigating soil erosion and maintaining soil ecosystems" which provides no more practical guidance in the management of soil ecosystems than the overall purpose of the Act, being the avoidance etc of adverse effects on the environment. We are concerned that reference to "and maintaining soil ecosystems" provides an additional regulatory hurdle, which lacks definition. If reference to ecosystems is to be included within the definition, it should provide the option of "avoiding, remedying or mitigating the adverse effects of activities on ecosystems" which provides more options than the requirement to "maintain" ecosystems and may better provide for sustainable management.

The requirement to avoid, remedy or mitigate soil erosion (which is a natural process) interpreted in the context of the amended definition of "environment" that excludes social and economic considerations, is to suggest that most of New Zealand's land uses are unsustainable and therefore inappropriate.

Recommendation

Delete "and maintaining soil ecosystems" from Clause 2(22) of the RMAB. If this clause is to be introduced, do not amend the definition of "environment".

5. MATTERS OF NATIONAL IMPORTANCE - CLAUSE 3

Clause 3 of the RMAB provides for "the protection of historic heritage of special value to people and communities".

Difficulties will arise where the Regulatory Authority and/or a specific sector within the community can achieve protection of historic heritage without incurring any of the direct and/or theoretical losses associated with that protection. Comments made above in respect of Section 85 apply.

FOA/FIC consider that where a site etc is of such special value to a community, it should be scheduled within the relevant district plan. While section 6 can be used to achieve this, it is broad enough to allow subjective "protection" on a case by case basis within the context of a resource consent application. This will create further uncertainty.

The inclusion of the phrase "of special value" creates further confusion within section 6. To ensure consistency with the remainder of section 6 and the application of developing case law, the term "special value" should be replaced with the term "significant" or "outstanding".

Recommendation

Delete the proposed sub Clause (f) in Section 6. If the clause is not deleted, the term "special value" should be replaced with the term "significant" or "outstanding" to ensure consistency with the remainder of section 6 and assistance from developing case law.

6. CERTAIN RULES AND PROPOSED PLANS TO HAVE TEMPORARY OPERATIVE EFFECT - CLAUSES 9 AND 105

Clause 9 attempts to allow, inter alia, rules in a plan to become operative while the remainder of a plan is subject to appeal. FIC/FOA support this amendment to the extent that it rectifies the existing situation where appeal of one part delays the operative status of a proposed plan. However, new section 20 undermines the presumption that rules must follow the public process of submission and appeal before they have complete effect, by giving local authorities unfettered discretion to bypass this process. Where an activity is provided for as a controlled activity under an existing plan, and a new proposed plan provides for the same activity as a discretionary (or non-complying) activity, the local authority may deem the rule in the new plan to become effective immediately, despite significant objection. By way of example, where a forest harvest has been planned with the certainty that a consent would be granted as a controlled activity, but that consent has not been lodged, the release of the new plan with more restrictive operative rules (in accordance with proposed section 20) would significantly affect investor certainty and the economic viability of the operation.

Presently, where a rule under a proposed plan differs from a rule in a transitional plan or operative plan, the resource consent application and consent authority must consider both rules. Case law has determined that the weight given to the respective rules differs according to the progress of the proposed plan. Were a local authority to exercise its powers under proposed section 20, consideration of both rules could not be given despite objection to such a rule.

The Waikato Regional Council regional plan is a good example of how this section could stifle the democratic process. When the Waikato Regional Council's first proposed regional plan was introduced in 1992, it received such significant opposition that it did not progress through the RMA process until it was replaced with a second proposed regional plan in 1998. Had the council had the option of deeming the entire plan or parts of the plan to be operative, the RMA process would have been undermined.

Recommendation

Delete Clauses 9(1) and 105.

7. FUNCTIONS OF REGIONAL COUNCILS UNDER ACT - CLAUSE 11

The Explanatory Note to the RMAB states that revised sections 30 and 31 distinguish clearly between the function of a regional council and a territorial authority.

The summary to the Ministry's Proposals for Amendment to the RMA encapsulated the issues arising with these sections as follows:

"There is potential for overlapping rules caused by both regional and district councils having the power to impose restrictions over land use. As a consequence, both regional and district councils can require consents for the same activity. Such rules are purportedly imposed for very different reasons (regional councils control for soil conservation and water quality reasons; district councils control to manage land use effects)."

FOA/FIC members have incurred significant and unnecessary costs as a result of duplicated consent requirements, particularly where a forest spans several district and regional councils. FOA/FIC supported the intention in the proposal document to address such inefficiencies. However, the proposed amendments set out in the RMAB to sections 30 and 31 do not achieve improved efficiencies for the forest sector.

The changes to sections 30 and 31 do not address the fundamental issue of the control of land use. Section 30 provides for the "control of land for soil conservation" and other purposes while section 31 requires territorial authorities to control the "effects of the use or development of land and associated natural and physical resources". If overlap of functions is unavoidable, then FOA/FIC suggest amendment to section 33 ("Transfer of Functions") to address the potential for duplication as set out below in section 8 of this submission.

FOA/FIC are concerned that the functions of Regional Councils under section 30(1)(b) provide little scope for management of soil resources for any objective other than conservation. The mandate is to "maintain and enhance" both soil and water resources. There is no scope for use of those resources in a way, that does not maintain and enhance them in all instances. The proposed amendments to the definition of "environment" and "soil conservation" only serve to emphasise a restrictive interpretation of a Regional Council's function.

Recommendation

- (a) *Address the issue of duplication by amending section 33 as set out below.*
- (b) *Delete all references to "ecosystems" by deleting new subsections 30(1)(b)(iii) and (d).*

8. TRANSFER OF POWERS - CLAUSE 12

Clause 12 provides for the transfer of powers from one local authority to another. FOA/FIC are concerned at the present situation where overlapping functions require duplicated resource consent applications to multiple authorities as outlined above. We consider that section 33 of the Act could be amended to limit duplication by requiring that territorial authorities transfer their functions etc to regional authorities where duplication exists. For example, where district and regional councils control a specific activity such as forestry, the district council should be required to transfer control of that activity (land use) to the regional council.

Recommendation

Amend clause 12 to require the transfer of the control of land uses to the regional council where there is any overlap of functions.

9. CONSIDERATION OF ALTERNATIVES, BENEFITS AND COSTS - CLAUSE 11

The proposed amendments to section 32 differ substantially from those set out in the Ministry's discussion document. Although the section has been simplified, in FOA/FICs' view it continues to fall short of achieving a robust cost/benefit analysis. Separating subclauses 3(a) and (4) into two parts waters down the intent of the existing section 32. Without evaluating the costs and benefits of policies, rules and other methods, such analysis is pointless. Worthwhile analysis can only be undertaken by reference to related objectives, policy and method when read in context.

Subclause (3) fails to identify to whom the assessment of costs and benefits should fall. Is it the community as a whole, the council or particular sectors? In our view, individuals or possibly sectors should be considered, and this should be made explicit. We have experience of a number of "section 32 assessments" where those costs falling on the council have been considered, and others where the "nebulous" community as a whole is cited, despite a rule having direct economic impact on one particular sector.

Subclause 32(3)(b) attempts to embody the concept of the precautionary approach. The current section and the version set out in the Minister's Proposals concentrated on no action, meaning no regulatory action. This has been removed from the proposed subclause (3)(b) and should be reinstated. No

regulatory action does not mean that other action cannot be taken. This subclause should also be amended to refer to both the risk and the cost of taking or not taking regulatory action.

Subclause 32(4) allows the evaluator to give reasons as to why they are satisfied that the objectives etc meet the tests set out in subclauses (a) and (b). The revised section is likely to be less effective than existing section 32(1)(b) and (c) which specifically provide for a review of the likely implementation and compliance costs and require the evaluator to assess the efficiency and effectiveness of the policy etc relative to other means. These elements of the assessment are not referred to in new subclause 32(4).

The requirement in subclause (5) to provide the report at the time of notification is supported.

Overall, without requiring that individuals or specific sectors are identified in the cost/benefit analysis, and without requiring a cost/benefit analysis of rules as well as objectives, the majority of the amendments to section 32 mean there will be no significant improvement to the current section 32. In fact, some of the amendments proposed in the RMAB may lead to poorer quality section 32 analyses.

Recommendation

Revise subclauses (3) (a) and (b) and 4(a) and (b) so that the benefits and costs of objectives, policies, methods and rules are assessed together with their efficiency and effectiveness.

Amend the proposed revision of Section 32 by including a new subclause 32(3)(c) requiring Councils to list those persons and groups of persons or property rights holders and groups of property right holders who will face an increase in cost or a diminution in the value of an existing property right as a consequence of the proposed plan, proposed policy statement, change or variation. A statement as to the loss accruing to each of the above parties must be required to be included in the analysis.

Temper reference to the precautionary principle by stating that taking no action means taking no regulatory action and by requiring that the risk and the cost of action be specified in the evaluation. Amend subclause (3)(b) as follows:

~~"take into account"~~ specify the risk and cost of taking or not taking regulatory action ~~acting or not acting...~~ "

10. MAKING OF NATIONAL POLICY STATEMENT - CLAUSE 20

Clause 20 repeals sections 46 to 52 of the RMA and removes the checks and balances presently provided by the notification requirements and the Board of Inquiry. FOA/FIC are concerned that the process by which the Minister for the Environment can establish a National Policy Statement (NPS) has been substantially eased. Our members' experience is that the Minister and his Ministry act as proponents or advocates for the environment. The role of the

Board of Inquiry is to provide an independent assessment of the proposed NPS with recommendations to the Minister. With removal of the notification and recommendation process, an NPS will be subject only to the political will of the then current Minister. Reducing the regulatory checks and balances on the development of NPSs represents a substantial risk to resource users, having as it does implications for existing property rights including resource consent conditions on existing multi-million dollar investments where these are subject to review conditions.

Recommendation

Delete clause 20 of the RMAB in its entirety. If this is not accepted, restrict the Minister for the Environment's capacity to develop NPSs by requiring him or her to obtain the prior support and agreement of the Minister of Commerce to any NPS development programme. The Minister of Commerce should have a role in the determination of appointees to an Advisory Committee to provide advice to Ministers on the NPS and the submissions made on that statement.

11. MATTERS TO BE CONSIDERED BY REGIONAL COUNCIL - CLAUSE 25

Clause 25 of the RMAB amends the RMA to require Regional Council's to "take into account" any planning document recognised by an Iwi Authority affected by the Regional Plan as opposed to "have regard" to such documents.

The absence of a public process in the development of Iwi planning documentation could compromise the open processes by which District and Regional Plans are intended to be developed. We accept that the obligation to "take into account" provides a capacity for amalgamation of the objectives of Iwi and other sections of society. However, the requirement to "take into account" such documents may unduly constrain the Regional Council in devising the optimal means by which such objectives are achieved.

Recommendation

Delete clause 25.

12. CONTENTS OF REGIONAL PLANS - CLAUSE 26

FOA/FIC are concerned that the replacement of subclause 67(1)(d) has amended the wording from:

"The methods being or to be used to implement the policies including any rules" to:
"The methods (including rules) to implement the policies".

The change in wording indicates a presumption that rules will be used to implement policies compared to the existing wording which includes the word "any" and contains no assumption that rules are the appropriate means of

implementing the policies. Creating assumptions that rules are necessary and the most appropriate means of achieving environmental outcomes overlooks the myriad of non-regulatory options available to local authorities, for example 'education'. If the intention of the RMAB is to improve efficiency, the word "any" should be included in new subclause 67(1)(d) after the word "including".

Recommendation

Include the word "any" in new subclause 67(1)(d) after the word "including".

13. MATTERS TO BE CONSIDERED BY A TERRITORIAL AUTHORITY -
CLAUSE 28

Comments raised above in respect of Clause 25 apply equally to the changes proposed in Clause 28.

Recommendation

Delete Clause 28.

14. CONTENTS OF DISTRICT PLANS - CLAUSE 29

The comments in relation to clause 26 apply to clause 29: new subsection 75(1)(d).

Recommendation

Include the word "any" in new subclause 75(1)(d) after the word "including".

15. DISTRICT RULES - CLAUSE 30

FOA/FIC support the amendments contained in clause 30 of the Bill. In particular, the repeal of section 76(4)(e) will restore the permissive presumption in relation to land use originally intended when the Act was introduced and will prevent the "catch all" provisions found in many plans. Activities not initially considered by plans can be remedied by way of variation.

Recommendation

Retain clause 30 of the RMAB.

16. MAKING AN APPLICATION - CLAUSE 34

Clause 34 of the RMAB allows an applicant to lodge a resource consent application to a “consent processor”. Subclause 4 of proposed section 88 gives a local authority the power to determine that an application is incomplete in terms of the Fourth Schedule or the information required by regulations. The local authority may then return the application.

FOA/FIC contend that allowing the local authority (rather than the consent processor) to assess the appropriateness of the application creates unnecessary duplication and negates any advantage offered by provision of consent processing independent of the local authority.

Determination of the adequacy or otherwise of information provided with a resource consent application should be made by the consent processor. If he or she has the skills and experience to determine the application then by implication he or she has the capability to determine the adequacy of the information provided.

In the event that an application is considered to be incomplete and a resubmission of that application is to be treated as a new application, is the first application null and void? It is submitted new section 88(5) is unclear in this regard. If the application is null and void, this may affect an application for resource consent under section 124 of the principal Act. This matter requires clarification.

Recommendation

Delete Subclause 88(4) or amend it to allow the “consent processor” identified in sub Clause 88(1) to have the responsibility and power to determine the need for additional information to be provided.

Clarify the relationship of subclause 88(5) with section 124 and other sections that specify a time frame for the lodging of applications (e.g. sections 10A and 20 of the principal Act.)

17. FURTHER INFORMATION MAY BE REQUIRED - CLAUSE 37

Clause 37 of the RMAB amends Section 92(2) of the principal Act to provide discretion to an applicant for a resource consent to either comply with a request for further information or require the Consent Authority to proceed with the application without supplying further information. Subclause (3) of this same section states that “any further information must be available at the office of the Consent Authority no less than 10 working days before the hearing of the application.” It is unclear whether further information must be available (i.e. provided before an application can be considered) or whether the discretion provided in 92(2) applies.

Recommendation

Amend the proposed sub Clause 92(3) as follows:

"Any further information supplied in accordance with subsection (2) must be available at the office of the consent authority no less than 10 working days before the hearing of the application".

18. CHANGE OR CANCELLATION OF CONSENT CONDITION ON APPLICATION BY CONSENT HOLDER - CLAUSE 48

FOA/FIC support the proposed amendment to section 127 removing the requirement for an applicant to show a change in circumstances. It has been the forest industry's experience that consent conditions have been shown to be unnecessary or impractical after they have been in place for some time. The amendment will allow this anomaly to be rectified.

However, subclause 3 of the proposed rewording of Section 127 requires that where a resource consent holder seeks to change or cancel a condition, the application as a whole must be reconsidered. With reference to the application of sections 88 to 121, it appears as if the intention is to treat any application for a change of a consent condition as a de novo application. Proposed Section 88 provides that an application for resource consent must include an assessment of environmental effects. It should be made clear that a new assessment is not required for a change or cancellation of condition - i.e. only those matters that are relevant to the change sought should be provided. To fail to distinguish between approvals for a change of condition versus a de novo application would make section 127 economically prohibitive. Costs would be further compounded where a new committee were to hear the application. Where no more than a minor change is sought, provision should be made to consider the change with reference only to those aspects of the consent that are relevant.

FOA/FIC consider it inequitable to treat a change of condition as a discretionary consent application where that application may have been initially considered as a controlled or a restricted discretionary activity. To treat the application as a discretionary application could reopen the initial application to relitigation of those matters previously decided, including full notification.

Recommendation

Amend Clause 48 of the RMAB to provide the holder of a resource consent the capacity to seek change to one or more conditions without relitigation of the full consent. As a minimum, the revised Section 127 of the principal Act should provide a discretion to seek alteration of a consent condition without recourse to the full processes where the change requested is, in the opinion of the Consent Authority, minor. This change could be addressed by way of minor amendments to section 88 and clarification of section 127.

19. CIRCUMSTANCES WHEN CONSENT CONDITIONS CAN BE REVIEWED - CLAUSE 49

Clause 49 of the RMAB provides for the review of consent conditions in response to the promulgation of an NPS by the Minister for the Environment. Current processes for the development of an NPS under the RMA are proposed to be significantly altered through the RMAB. The opportunity for individuals and companies actually or potentially disadvantaged by proposals in a draft NPS will be significantly reduced if these clauses of the Bill are enacted. FOA/FIC are concerned at the potential for disincentive to invest in New Zealand where the economics of that investment could be altered arbitrarily through modification of the terms and conditions of operation.

Recommendation

Delete clause 49 or in the alternative, amend Clause 49 to make provision for compensation to be paid where significant losses are incurred as a result of modification of the terms and conditions under which a resource consent is operated if the modification is imposed:

- *where a resource consent would otherwise enable an activity to continue for a period of five years or more; and*
- *the resource consent holder has sought modification of the NPS during its formulation by way of submission.*

20. FORM AND EFFECT OF MINISTER'S DIRECTION - CLAUSE 50

Clause 50 of the RMAB provides for the Minister to "... recover from an applicant for a resource consent the actual and reasonable costs incurred by the Minister in exercising the Minister's powers under Sections 140-150." FOA/FIC are opposed to cost recovery where the Minister, at his or her discretion, has undertaken to call in a consent application. The basis for Ministerial "call in" is that the application has national implications and/or represents a significant precedent where national oversight and direction is of value to the country as a whole. The implication is that by invoking the Minister's powers, he or she is exercising democratic political power in the interests of the country as whole. It is therefore unreasonable and a form of selective taxation to recover the costs of national policy development from a single applicant.

Deliberation on the merits of a resource consent by a local Consent Authority would (by definition) involve a more localised or restricted consideration. It is logical to assume that Local Authority decision-making would be a less costly process, than the more expansive national deliberations contemplated by the Minister's call in powers. We reiterate our view that to expect an individual or company to meet the costs of the Ministerial call-in represents selective or differential taxation. These provisions have the potential to act as a disincentive to significant investment and innovation in New Zealand.

Recommendation

Delete Clause 50 and/or modify the proposed amendment such that the Minister's capacity to recover costs from an applicant should not exceed those

costs that might reasonably have been incurred if the application had been decided at a local level and/or by independent consent processor.

21. DIRECT APPLICATION TO THE ENVIRONMENT COURT - CLAUSES 39 AND 52

FOA/FIC support the concept of direct referral of matters to the Environment Court for consideration. However, the current relationship of proposed sections 100A (clause 39) and 150A and B (clause 52) is unclear.

Section 100A provides that prior to fixing a hearing date, an applicant may, with the consent of the local authority, refer the matter to the Environment Court. If the intention of the legislation is to allow direct referral where both parties agree, thereby removing the need to meet the considerations set out in section 100A(3), the intent of the drafting is supported, provided this is clarified. However, the present drafting leaves open to interpretation whether consent of the local authority is required before an application can be made under section 100A. Any requirement for consent of the local authority would remove any efficiencies to be gained by direct referral in the event that such consent is declined.

Recommendation

Redraft clauses 39 and 52 to clarify the relationship, such that consent of the local authority is only required in order to bypass the application for referral under section 150A.

22. MEANING OF “DESIGNATION”, “NETWORK UTILITY OPERATOR”, “REQUIRING AUTHORITY”, AND “WORK” - CLAUSE 54
RECOMMENDATION BY TERRITORIAL AUTHORITY - CLAUSE 58
EFFECTIVE DESIGNATION - CLAUSE 60
OUTLINE PLAN - CLAUSE 61
ALTERATION OF DESIGNATION - CLAUSE 62

Clause 54 of the RMAB contains an amendment to section 166 of the principal Act relating to designations and network utility operators. FOA/FIC are concerned that the opportunity to amend the RMA has not included further consideration of the role of network utility operators.

FOA/FIC are opposed to the inclusion of electricity operators or electricity distributors (as defined in Section 2 of the Electricity Act 1992) as having powers of designation. We are specifically concerned that the costs of maintaining the routes of electricity transmission lines and liability for outage in the event of damage to lines under the Electricity Act 1992 is unreasonable. The ability to impose such costs, in perpetuity through statutory designation powers should be prevented.

FOA/FIC have long contended that the commercial interests of line companies are of no greater merit than the commercial interests' of landowners. Statutory

protection for one group of resource users over another is inconsistent with the purpose and principles of the RMA, being the sustainable management of the environment. At a generic level, the subsidy enjoyed by line companies creates a commercial disincentive or impediment to investment in alternative means of electricity supply such as locally located generation (e.g. photo voltaics, wind power etc.). Maintenance of a traditional electricity network to many isolated areas could be uneconomic if the true costs (including environmental costs) of maintenance of the network were taken into account. In some locations lines pass through and impact on native vegetation which would otherwise remain undisturbed.

FOA/FIC are unclear as to:

- why a Territorial Authority should wish or be required to provide for electricity distribution within its District Plan any more than any other private commercial activity. The powers proposed within these clauses to the RMAB appear to be a carry over from the Town and Country Planning Act where Local Government was also responsible for many utility services.
- many existing electricity lines are an encumbrance on Maori land or Crown owned land that is under claim by Maori. The lack of title by Maori to land which has been recovered from Crown ownership at the time that the Crown or its agents established electricity lines suggests that fair (or any) compensation cannot have been paid. This in turn raises the legality of those existing lines, particularly where installation has or is likely to have resulted in modification of, damage to, or destruction of the whole or any part of an archaeological site.

Recommendation

Include an additional amendment to Section 166 (c) of the Principal Act by excluding electricity operators from the definition of "Network utility operator" .

FOA/FIC recommends the amendment of Clauses 54 to 66 to remove reference to electricity line distribution as requiring authorities.

23. REPRESENTATION AT PROCEEDINGS - CLAUSES 76 AND 77

Clause 76 repeals section 271A and clause 77 substitutes a new section 274. The increased time frame from 15 to 30 days is supported.

Recommendation

Retain clauses 76 and 77

24. FIRST SCHEDULE AMENDMENT - CLAUSE 90

FOA/FIC support the increased time limit for the lodging of appeals under the First Schedule.

Recommendation

Retain the amendment to clause 14 of the First Schedule increasing the time limit for the lodging of appeals to the Environment Court.

25. ARCHAEOLOGICAL SITES PROVISIONS - CLAUSES 2, 3, 4, 5, 7, 8, 25, 28, 98, 108, 109, 110, 111, 112, 113, AND 114

Overview

The RMAB introduces, for the first time in the RMA review process, a substantial repeal of the HPA (clause 98) and replacement of that Act with a whole new regime dealing with heritage and archaeological matters.

FOA/FIC consider that the proposed RMAB provisions are premature. There has been no apparent consideration of;

- (a) the financial and administrative regime required to deal with such issues at the local and regional level; or
- (b) how private property owners will be compensated; or
- (c) The extent to which local authorities have already provided for historic heritage in plans.

Definition of archaeological site - clause 2

In general terms, without a specific designation, the HPA only triggers the requirement for an authority to modify, damage or destroy a site where that site is:

- " (a) Either-
 - (i) ...associated with human activity that occurred before 1900; or
 - (ii) Is the site of the wreck of any vessel where that wreck occurred before 1900; and
- (b) Is or may be able through investigation by archaeological methods to provide evidence relating to the history of New Zealand:"

The proposed RMAB definition of archaeological site significantly broadens the definition of archaeological site contained in the HPA.

Restrictions on use of land - Clause 5

Clause 5 of the RMAB amends section 9 to include a new paragraph (d) which defines "use" as "modification, damage, destruction or invasive investigation of the whole or any part of an archaeological site in, on or under any land".

With the extension of the definition of archaeological site set out in clause 2 of the RMAB, a resource consent application will be required for virtually any place that is, or may be, able to provide evidence of heritage. The amendment to section 9 and the proposed definition raise two issues:

- The definition is more subjective than the HPA, thereby creating confusion and uncertainty;
- When read in conjunction with the new definition, section 9 will require a resource consent where any damage occurs to an archaeological site, even though the person undertaking the activity may not be aware of the existence of a site or could not be aware that the site is a site in terms of the definition until after damage or modification has occurred. Whereas the HPA creates an offence for damage, modification etc only where the damage etc is intentional, the offence provisions under the RMA are strict liability.

Transitional Rules for archaeological sites - Clause 108 and Clause 109

Clause 108 revokes all rules in plans or proposed plans relating to archaeological sites on land, in beds or rivers and lakes or coastal marine areas until new rules under the amended RMA are developed. Until then invasive activities relating to archaeological sites are prohibited without resource consent. These clauses fail to take into account the significant consultative processes that many councils have undertaken in developing plans. Changing the status of all activities relating to archaeological sites to discretionary undermines the significant efforts, process and costs that have been incurred to date in developing such rules. In many cases, unnecessary resource consents will be required leading to increased inefficiencies and delay. Furthermore, due to the broad definition of archaeological sites and historic heritage, the RMAB will potentially unnecessarily encompass far more archaeological sites than under the current HPA or local authority plan requirements.

Exercise of authority granted under the HPA - Clauses 111 and 112

Clauses 111 and 112 provide for the exercise of an existing authority for a period of two years. FOA/FIC consider that it is inappropriate to limit the life of an existing authority when assessments of a site have already been undertaken pursuant to the HPA.

Recommendation

Do not proceed with the proposed amendment to heritage and archaeological matters until a comprehensive review and assessment has been undertaken, including consideration of the conflict between private rights and the public interest.

If the HPA provisions are to be incorporated into the RMA, as a minimum, new offences provisions should be created for the modification, destruction etc of archaeological sites that is not intentional, consistent with the HPA offences provisions.

The definition of archaeological site should remain consistent with the current definition within the HPA.

26. CONCLUSIONS

FOA/FIC are concerned that the overall tone of the amendments to the RMA is unlikely to resolve resource users concerns with the Act. The apparent disregard of private property rights and the cost implications of regulatory intervention possible under the RMA leads us to suggest that this Bill be withdrawn and revisited in draft form before its reintroduction to the House. We are concerned that making the amendments promulgated in this Bill will not materially alter the situation currently confronting resource users under the RMA.

We are anxious to avoid the situation whereby further amendment to the RMA is discounted on the grounds that the RMAB has addressed industry's concerns.

We would appreciate the opportunity to be heard in support of these submissions before the Select Committee.