RMA REFORM UPDATE

Chair: Duncan Laing
Presenters: Sylvia Allan, Rosemary Dixon, Dennis Bush-King
Sylvia Allan

Outline

- Overall Impression
- Provision for large projects
- Cost Issues
- Issues for groups/organisations
Overall Impression

• Incomprehensible to the ordinary person
• Heaps of “fine print”
• Much undoubtedly beneficial
• Some provisions may never be needed
• Much trying to close legal (rather than practical) loopholes
Provisions for Large Projects

• Now at least 5 options
  - Business as usual
  - Direct referral to Environment Court
  - Call-in by Minister
  - Call-in on request
  - EPA process
• Quite profound implications for proponent of project, but also for affected people and bona fide interest groups
• Risks and costs around “one go” - significant for all
Provisions for Large Projects (Cont’d)

Advantages

• Possible benefits of non-business as usual options
• Speed (possibly)
• Reduced role of Council
Provisions for Large Projects (Cont’d)

Disadvantages

- Information (issues not refined; must cover everything)
- Inevitably unfriendly process for submitters
- Little ability to mediate/negotiate
- Cost risks
- Reduced role of Council
Cost Issues

• Security for costs
  - when likely to be used?
  - who will be most affected?
• Court/Crown costs
• BOI costs
• Council policy issues
• Discounts if timeframes not met
• Charging submitters
• Objections and appeals on costs
Issues for Groups/Organisations

- Resourcing – legal and evidential
- Costs/difficulty of basic participation
- Status
- Risks substantially increased
- Role of Attorney General
- Where best to target effort?
Rosemary Dixon

Outline

- Proposals of national significance
- Call-in
- Environmental Protection Authority
- Direct referral
- National Instruments
- Trade competition
Proposals of National Significance

- Call-in provisions completely rewritten – Part 6AA
- Creation of Environmental Protection Authority (Part 4A) – statutory office within MFE, Secretary of Environment is CEO
- Applications may be lodged directly with the EPA – receives and processes applications (incl notification) – makes a recommendation to the Minister – provides support to Boards of Inquiry (if application directed to BOI)
Proposals of National Significance

(Cont’d)

– supplies information to Court (if application directed to Court)

• Applications fast tracked include reviews of consents, plan changes and NORs

• Applications can also be lodged with the councils in the normal way and called-in by the Minister

• Factors of national significance Minister considers slightly expanded – discretion
Issues with EPA/call-in

Role of Councils
– Prepare report
– Suggest Board members
– What else?

Timelines
– 20 working days from lodgement to provide a recommendation to the Minister (includes assessing completeness)
– 20 working days for submissions
Issues with EPA/call-in (cont’d)

– 9 months from notification to final decision (BOI not Court) = effectively 7 months
– Extension only if “special circumstances” apply

Others
– Call in at Minister’s own initiative
– Whole of Government submission on matter referred to BOI or Court
Call-in is not a silver bullet

• One step process – no first instance hearing process for testing the project and understanding the opposition – direct to the blowtorch

• The fact that the project has been called-in as a “matter of national significance” is largely irrelevant – procedural significance – BOI applies the RMA plus inquisitorial process

• Timeframes were tight and just got tighter
Call-in is not a silver bullet (Cont’d)

- Lay submitters can’t manage the timeframes – don’t consult, don’t prepare evidence, don’t instruct counsel, don’t meet deadlines – rebounds on the applicant
The Applicant
How to Make it Work

Pre Application

• Applicant, EPA and Councils work together to ensure application lodged is complete – technical reports received and peer reviewed, EPA’s reports commissioned

• Avoid s92s

• Processing largely pre application
How to Make it Work (Cont’d)

• EPA currently in discussion around formalising the Council’s role – “involving them directly in support role for the BOI and in assessing applications”

Submission Period
• Appoint “submitters’ friend”

Hearing
• Continuous hearing?
• Simultaneous evidence exchange?
• Evidence taken as read, limited presentation time?
Direct Referral

- Applies to notified resource consent applications and reviews of consents and designations
- Request to council within 5 working days of close of submissions (no right to be heard)
- Council decides whether to agree to direct referral or not within 15 working days
- Applicant can object (s357) and decision is remade. No appeal right.
Direct Referral (Cont’d)

• Transferred to Court via a “notice of motion”

• Council supplies all information to the Court including a report (similar to a s42A report, incl proposed conditions)

• Council can become a party and has residual functions after decision

• Council can recover costs under section 36
Issues with Direct Referral

Would you choose this option?

• No right of appeal
• Non-submitters can join as parties if they qualify under s274, so 2 tiers of parties
• May not save time – about 3 months for the various procedural steps and then no guarantee as to which track the Court will choose – could be the “standard track”
Issues with Direct Referral (Cont’d)

• Mediation difficult without first instance hearing/decision and may not be available

• Role of council loose – report – then witness if also party?

• Costs (s285) fall on the applicant – presumption that Crown costs will be paid by applicant and that a s274 party incl submitters will not have costs awarded against

• In what circumstances is an applicant likely to use direct referral?
National Instruments – what concerns have not been met?

NPS
- Minister has power to withdraw, suspend inquiry, or provide further information
- NPS can direct the insertion of objectives and policies into a plan without formality (not rules)
- Appeals on plan changes implementing NPS on points of law only (s290AA)

NES
- COCs for NES
- Councils have an enforcement role
- Councils must remove plan provisions that conflict with NES without further formality
Trade Competition

- Intent is to make it harder and less attractive for trade competitors to use the RMA to delay or thwart projects of rivals

- Submissions
  - If you are a trade competitor:
    - You must be directly affected by an effect of the activity to which the application relates
Trade Competition (Cont’d)

– The effect must be an adverse effect on the environment
– The submission may not be on trade competition

Appeals

• If you are a trade competitor:
  – Your purpose may not be to protect yourself from trade competition
  – Your purpose may not be to deter the applicant or prevent the applicant from engaging in trade competition
Will it work?

• What is a trade competitor?

• Open to abuse - sanctions
  – Declaration that Part 11A breached leads to indemnity costs
  – Declaration can be used in the High Court to seek damages (s308G-H)
  – Sanctions apply to surrogates
Outline

• Context
• Plan Making
• Roles & Responsibilities
• Consent Processing
• Enforcement
• Odd Ball
Context

• If not the RMA then what?

• Amendment maintains basic structure of the Act, but there are some deliberate adjustments
Plan Making

• Did Parliament drop the ball?
• Combined plans – *de facto* amalgamation or opportunity for better and more integrated management?
• Legal effect of rules – delayed effect subject to 3 exceptions - there will be operational challenges, but no affect on objectives and policies.
• Rolling Reviews – obligation to keep plans relevant and current
• Further submissions – still there, but new test may be a challenge
Plan Making (Cont’d)

• Plan hearing decisions – grouping of matters will reduce administrative burden but how will people know what changes have been agreed to?
Roles and Responsibilities

- Is the EPA to be seen as a threat to local government or an opportunity?
- A tendency towards greater direction from the centre
- New responsibilities for the Environment Court
Consent Processing

• Notification – “will have or is likely to have adverse effects that are more than minor – is this different from “unless satisfied the adverse effects will be minor”?

• Must notify if no response to s 92 requests or deadline not met

• Affected persons – adverse effects must be minor or no more than minor (but not less than minor) see s95A

• Further information – statutory clock stops only twice (once after submissions close)

• Hearing Commissioners – has accreditation failed?

• Charging policy – the devil will be in the detail
Enforcement

• Crown bound a little bit more
• Penalties increased – will this see a change in LA enforcement practice?
• Review of consent on successful prosecution cf s339(5)
Odd Ball

• No more replies to appeals – a saving on legal costs?
CALL-IN PATHS

Application lodged with EPA

Recommendation from EPA

Application lodged with Council

Applicant lobbying/request to Minister to call-in

Minister initiates call-in

Minister's decision whether to call-in

call-in

Board of Inquiry

Environment Court

decline call-in

EPA notifies call-in decision submissions period

EPA hearing process

E. Ct hearing process

E. Ct Appeal

Council hearing process

Council notifies application/submissions period

Council hearing process

Council hearing process

Council hearing process

E. Ct Appeal

E. Ct Hearing

draft decision

comments

final decision

E. Ct Hearing

E. Ct Appeal
Resource Consents - Notification

1. Effects more than minor? or NES or rule requires notification?
   - Yes: Section 95D tests apply
   - No: Special circumstances?
     - Yes: Affected parties?
       - Yes: Notified
       - No: Limited notified
     - No: Non-notified

2. Special circumstances?
   - Yes: Affected parties?
     - Yes: Notified
     - No: Limited notified
   - No: Non-notified
Capital Leadership - in the national interest?
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