# Te Hunga Roia Maori o Aotearoa
# (Maori Law Society Inc.)


## SUBMISSION: Resource Management (Simplifying and Streamlining) Amendment Bill

**3 APRIL 2009**

# TE HUNGA ROIA MAORI O AOTEAROA, SUBMISSION REGARDING THE RESOURCE MANAGEMENT (SIMPLIFYING AND STREAMLINING) AMENDMENT BILL

## 1 Appearance

1.1 Te Hunga Roia Māori o Aotearoa / The New Zealand Māori Law Society Inc (THRMOA) does wish to appear before the Committee.

## 2 Executive summary

2.1 The focus of this submission is the impact of the Bill on Maori. The key points are:

a. The Bill should not erode Maori participation in the decision-making process. Decision-makers under the Act need to have Maori values and concerns before them, so that they can weigh the evidence and make informed decisions.

b. Community participation should be preserved within both the RMA and the structure of local government.

## 3 Te Hunga Roia Maori o Aotearoa

3.1 This submission is made for and on behalf of Te Hunga Roia Maori o Aotearoa (THRMOA).

3.2 The THRMOA has a membership totalling more than 350 Maori lawyers. In addition to these members THRMOA also includes students studying towards a Bachelor of Laws (LLB).

3.3 THRMOA ensures the effective networking of members, holds a mandate to make submissions on a range of policies and proposed legislation, ensures representation of its membership on selected committees and organises regular national hui which provides an annual opportunity for Maori lawyers to discuss and debate issues relevant to Maori.

3.4 The current co-presidents of Te Hunga Roia are Damian Stone and Jolene Patuawa.

## 4 Maori participation

4.1 Because of their role as Treaty partners with the Crown, and the traditional relationship that they have with their ancestral lands, water, sites, wāhi tapu and taonga, and unique role as kaitiaki of their rohe, Maori ought to be involved at an early stage in resource management decision-making processes. Maori also expect that their concerns and values will be reflected in the decisions made by RMA decision makers.

## 5 Objectives of the Bill

5.1 We note the objectives of the Bill (and of the ongoing reforms of the RMA). We are concerned that some of the perceived issues are not borne out by the evidence.

5.2 In our submission, the Reforms should consider the causes of the delay and be based on evidence, not hyperbole. Despite the media commentary that delays are caused by submitters, the reality is that:[1]

a. Approximately 52,000 resource consents are processed by councils each year, about 73% of them within the statutory timeframes.

b. Just 4.1% of RC applications are publicly notified (open to public submissions). About 1.5% are served on affected parties only (people that are directly affected).

c. Just 1% of consents are appealed to the Environment Court, generally those for large projects.

5.3 The number of consent applications that are not processed within the statutory timeframes is concerning. However, given that just under 6% of consents have any public participation at all, the delays appear to be due to delays within Councils, not necessarily because of public participation. Therefore, adequate resourcing to Councils is fundamental to enable them to carry out their workload (which this Bill does not address).

5.4 We also note that delays can also be caused by developers, some of whom are able to draw out processes in order to either overwhelm submitters and deplete their limited resources or to be "first in, best dressed" and undercut trade competitors when in reality the application is not ready to proceed. We have seen examples of this in the wind farm industry.

## 6 Reducing delays for resource consent applications

6.1 The Bill will remove the existing presumption that all applications should be publicly notified and introduces a new presumption (as amended s94) that a consent authority has discretion on whether to publicly notify (subject to the Act). The Bill also allows applicants to request direct referral to the Environment Court (with the local authority's permission) (new s87C).

6.2 This will remove direct involvement by local communities, and ramps applications directly into a more formal (and expensive) process. It is inequitable that security for costs may be levied against submitters/appellants while at the same time applicants are being given a right to go directly to the Environment Court (which imposes more costs on other parties).

6.3 We request deletion of clause 68 of the Bill.

## 7 Defining who is 'adversely affected' by an application for RC

7.1 Clause 93A provides that a person is not "adversely affected"[2]

a. Unless the effects of the activity on the person are more than minor, or

b. If, the plan permits an activity with that effect, or

c. If the activity is controlled or restricted discretionary, and the adverse effects relate to matters that the plan does not reserve control or discretion on, or

[1] Briefing to the incoming Minister for the Environment, 2008.

[2] If a person is adversely affected by an application for RC, the Consent Authority must notify that person of the application.

d. It is unreasonable to seek the written approval of the affected person.

7.2 To make a robust decision, Council must be informed of the values that determine whether an effect is more than minor. In terms of effects on Maori, Councils need to understand what (and where) are the resources, the values and histories associated with them. Very few Councils (if any) currently have that knowledge. This creates immense burden on Councils to develop their knowledge of Maori issues, and in the meantime imposes a real likelihood that bad decisions will be made, with the effect of eroding Maori heritage values.

7.3 We request deletion of clause 93A.

## 8 Public notification

8.1 Public notification is required if the adverse effects of an activity beyond the immediate environment will be more than minor. Immediate environment is not defined. Does it mean:

a. Within a certain distance (eg within 20 metres? A kilometer? 10 kilometers?)

b. Outside of the boundary of the property on which the activity occurs?

c. Within a township?

d. Some other definition that is subjective and changes depending on circumstances?

8.2 The lack of definition makes this clause meaningless and open to interpretation.

8.3 We seek deletion of the words “beyond the immediate” from clause 94AA(a) and be replaced with the words "…of an activity on the environment…"

## 9 Costs

9.1 Clause 133 of the Bill would allow the Environment Court to make an order for security for costs (essentially a bond paid by appellants before an appeal is heard). Clause 134 allows the Court to award more extensive costs, including indemnity and punitive costs. The filing fee for appeals to the Environment Court will be increased to $500.

9.2 We understand the intention behind this is that it is intended to help applicants recover a greater proportion of their costs and also to punish frivolous and vexatious opponents.

9.3 We submit that the power to strike out is the most effective way to address frivolous objections – it avoids the actual costs and delay of a hearing and provides early certainty to the parties. The Court already has the power to strike out (dismiss) “frivolous and vexatious” objections (section 279 of the RMA). Between 2006 and 2008 33 cases were struck out under section 279 of the RMA.

9.4 Cases that are not ‘frivolous and vexatious’, which raise serious and legitimate issues should be heard by the Court. Security for costs is likely to be an insurmountable barrier for legitimate cases. Security for costs, indemnity costs and punitive costs are likely to disincentive legitimate appeals.

9.5 We request deletion of clause 133 and the Select Committee considers amendments to the RMA to strengthen the strike out provisions. This may be a matter for phase 2 of the RMA reform.

## 10 Consents in the coastal marine area

10.1 The Bill will remove the Minister of Conservation's power to make decisions on restricted activities in the coastal marine area (such as sewage discharges or marinas). This will mean that Regional Councils will be the sole decision-maker on coastal activities.

10.2 Maori clearly assert interests and rights over the coastal marine area, which are protected by the Treaty of Waitangi. Unlike the Minister of Conservation, local government is not bound by the Treaty of Waitangi; the RMA does not require local government to act in a manner that is consistent with the Treaty.

10.3 This aspect of the Bill therefore removes important protections for Maori and their rights under the Treaty and is inconsistent with the protections and guarantees promised under the Treaty of Waitangi.

10.4 It may be that the current procedures within the RMA around the exercise of the Minister's powers should be reviewed and clarified. However, this provision goes too far.

10.5 We request that clause 20 be deleted and the matter referred to the panel currently reviewing the Foreshore and Seabed Act. This would allow the Treaty implications to be considered in the context of the wider issues around access to and protection of the coastal marine area.

## 11 Appeals against plans

11.1 The Bill limits the right to appeal a Council Plan decision to points of law only. Appeals on broader grounds can only be taken with the leave of the Environment Court.

11.2 This will require a further procedural step (seeking the Environment Court's leave) before legitimate concerns can be brought before the Court. It will increase the delay in achieving certainty, and will increase costs (both for the Court and the parties).

11.3 It will also exacerbate existing concerns that local authorities are judges in their own cause, without adequate, independent overview from the Courts. Further, the Environment Court is well-placed to provide an independent view, because it has knowledge of the spectrum of approaches to significant issues around the country. The Environment Court can also test evidence by allowing cross-examination (which local government hearings do not permit).

11.4 We request that clauses 132 and 136 be deleted.

## 12 Designations

12.1 The Bill will provide that local authorities will make decisions on designations.

12.2 This amendment is supported, as it provides for a greater degree of independence on decisions.

## 13 Matters of National Significance

13.1 The Bill will establish the Environmental Protection Authority to hear applications of national significance (new s141AA).

*Timeframe*

13.2 The Bill provides greater certainty around the hearing process for nationally significant projects. However it also reduces the timeframes for matters that truly are significant (and usually complex). That is concerning in terms of how robust the decision will be, and the ability of all parties (applicants and submitters) to develop and provide their evidence consistent with the statutory timeframes. Applicants have the advantage that they can prepare their evidence before making application, submitters do not.

13.3 In our view nine months for a call-in is unrealistic. For example, the Transpower North Island Grid Upgrade was called in by the Minister – that hearing alone (leaving aside the exchange of evidence and the time the Board needs to reach a decision) comprised 72 days over seven months.

13.4 We request deletion of clause 103.

**14 Integrated plans**

14.1 The Bill provides that regional council and territorial authorities within a region may produce combined planning documents integrating district plans, regional plans, and regional policy statements (new s80).

14.2 We support this provision as it enables integrated management.

**15 Hearing commissioners**

15.1 The Bill provides a new opportunity for submitters to request appointment of an independent hearing commissioner. We agree that such appointments should be encouraged and provided for.

15.2 However there is a risk that consent authorities actually decrease the number of appointments they make, thereby forcing submitters and applicants to request an independent hearing commissioner (and therefore bear the cost). In effect, this means that good decision making becomes the preserve of those who can afford it.

15.3 We ask that the select committee ask the Ministry for the Environment to monitor the use of this new provision, the frequency of requests (and by whom).

**16 National Environment Standards**

16.1 The Bill provides that the Minister must publicise the subject matter of a proposed NES. Given the effect of an NES, there ought to be a process including public notification of a draft and the opportunity to make submissions. We therefore request amendments to provide for a public process. In the alternative we request that this matter be deferred until stage two of the reviews to allow better definition of the process.

**17 Representing the public**

17.1 Clause 131 of the Bill provides that only the Attorney-General can represent the public interest in proceedings in the Environment Court.

17.2 Iwi authorities (along with other members of the community such as interest groups and and industry representatives) will often be better placed in terms of institutional knowledge, inclination and resources to represent the public interest than the Attorney-General.

17.3 We therefore seek an amendment to subclause (c) [replacing section 274] by inserting “or an iwi authority” after the words “Attorney-General”.

**CONTACT PERSON REGARDING THIS SUBMISSION**

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