6. RESOURCE MANAGEMENT AND ELECTRICITY LEGISLATION AMENDMENT BILL 2004

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PURPOSE OF REPORT

1. The purpose of this report is to advise the Council of the Parliamentary Select Committee's report and recommendations on the Resource Management and Electricity Legislation Amendment Bill 2004, and the outcome of the Council's submissions on that Bill.

EXECUTIVE SUMMARY

2. The Select Committee considering the Resource Management and Electricity Legislation Amendment Bill 2004 has reported back to Parliament. Many of the more radical features of the Bill have been deleted. Many of the Council's submissions have been adopted, or at least dealt with in some other way. There are a number of new provisions that have been included. There are five matters in the reported back Bill that could be of concern to the Council, as follows:

- **Contaminated land**

  The lack of any readily apparent reason for the new regional council function to identify and monitor contaminated land and the administrative overlaps that will be created because territorial local authorities (TLA's) will also have to collect this information.

- **Infrastructure**

  The lack of any readily apparent reason for the new regional council function of providing for strategic management of the integration of infrastructure with land use policies. Regional Councils are responsible for providing little, if any, infrastructure and territorial councils as the major providers have always had a strong interest in co-ordinating infrastructure and land use.

- **Urban Growth**

  The deletion of any proposal for the regional integration of urban growth.

- **The new section 293 powers combined with the new clause 15A of the First Schedule**

  The extent of these powers is very unclear and will require case law to clarify. Does it include the power to consider matters outside the scope of the original reference? Is it a power to direct Councils to prepare changes under the First Schedule? What is the role of section 32?

- **Timeframes for decisions on Plans**

  The suggested two year time between public notification of a plan and release of decisions on submissions is completely unrealistic.

FINANCIAL AND LEGAL CONSIDERATIONS

3. There are no immediate financial or legal concerns. If, however, the Bill is enacted it will change the way the Council carries out its functions under the Resource Management Act in a number of mostly minor ways, which may have implications for resourcing and progress in the future.

STAFF RECOMMENDATIONS

It is recommended that the Council express its concerns about the five issues of concern to the Minister for the Environment, local MPs and to Local Government New Zealand.

BACKGROUND ON CONFIRMATION OF COMPLIANCE

4. The main features of the reported back Bill which are expected to be of interest to the Council are as follows:

4.1 Powers of the Minister for the Environment

- **Asking for information**

  This proposal enabling the Minister to request information from the Council about performance of its function has been deleted, but only because it was similar to a provision already in the Act. The Council did not submit specifically on this.

- **Directing Councils to take action**

  This proposal was to direct Councils to take actions under the Act. The Council submitted against this on the grounds that the power was too extensive, not restricted by any criteria and cut across the Local Government Act 2002 with its powers of general competence. The provision has been deleted and replaced by a new power to investigate a Council's actions under the RMA and to make recommendations to the Council. If still dissatisfied, the Minister could then invoke a new power to direct Councils to initiate plan changes (see below), or invoke the existing power to appoint a Commissioner to carry out the Council's function. The changes are in accordance with Council's submission.

- **Direct Councils To Initiate plan changes**

  This power has been retained largely unchanged. The Council's submission had requested that the Minister carry out a section 32 analysis before directing such changes. This has not been adopted, with the Select Committee emphasising that the Minister's powers should only be to initiate the process not to direct its content or the final outcome of the process. It is considered the Council can accept this outcome.

- **National Policy Statements (NPS)**

  The Select Committee has retained the option of an abbreviated process for preparing a National Policy Statement. The optional shorter process replaces submissions to and hearings by a Board of Inquiry with a process which still includes submissions, but substitutes a report and recommendations on the submissions. Rather vague criteria are included to guide the Minister in his choice as to which process is used. If the NPS is to contain directions to Councils to change their plans, then the Minister may not use the abbreviated process. The changes are broadly in accord with the Council's submission.

- **National Environmental Standards**

  The RMA already contains a power to make National Environmental Standards. These can cover matters such as land use, coastal issues, rivers and lakes, water quality and quantity, contaminants, and noise. Various technical changes are made to these provisions. Standards would prevent local authorities from setting more stringent standards than those provided in the standard, e.g. in rules or resource consents. The Select Committee confirms the intent of the Bill is to provide greater certainty and consistency, and improved environmental outcomes through the absolute standards. A rule or resource consent may be more stringent than a national environmental standard only if the standard explicitly allows it. National environmental standards will not override existing resource consents until such time as the consent is reviewed. National environmental standards would also override bylaws in appropriate circumstances. Standards would also apply to designations for future works. The Council made only a small technical submission on the wording of the provisions, relating to the use of the term "prohibited activity". Its submission has not been accepted, but it is not a serious issue.

- **Call in on matters of National Significance**

  The RMA already contains provisions allowing the Minister to call in and decide resource consent applications for matters of national significance. This is now extended to applications for private plan changes and notices of requirement. The powers are extensively rewritten and now appear to contain greater safeguards. If the Minister decides to call in an application then he or she can refer it to a Board of Enquiry, which must be chaired by a current or retired Environment Court Judge, or refer it directly to the Environment Court. If it is not called in the Minister may making submissions, appoint a project co-ordinator, require joint hearings, and appoint an additional Commissioner. The Council made no submissions on these provisions and there appears to be no new cause of concern with them arising out of the Bill.

4.2 Relationships with Regional Councils

- **Giving effect to Regional Policy Statement (RPS)**

  District Councils will now have to give effect to regional policy statements, rather than the former requirement to be not inconsistent with it. The Council made a submission on this, accepting in principle the need for regional integration, but raising concerns about the process by which an RPS might be prepared. The Council suggested a model based on the Civil Defence Emergency Management Act 2002, but the Select Committee has instead proposed that processes for consultation between regional and district councils over an RPS be set out in triennial agreements under the Local Government Act. A dispute resolution mechanism has been included, including mediation, or final decision by the Minister, or his appointee if agreement cannot be reached. This appears to achieve what the Council was advocating in its submission.

- **Contaminated land**

  A more satisfactory definition of contaminated land has been developed than the one in the original Bill. Distinct regional and district powers have been created. Regional councils have the function of investigating land for the purposes of identifying and monitoring contaminated land; and territorial authorities have the function of preventing or mitigating adverse effects from the development, subdivision, or use of contaminated land. The new regional function is now diminished from the original proposal, which was the location, monitoring, investigation, and remediation of contaminated land. Regional Councils would no longer have any responsibility for remediation. All this is in accordance with the Council's submission, but other problems remain. The implication is that regional councils will be responsible for identifying the sites and district councils will implement any necessary land use restrictions. In allocating land for urban development, the possible presence of contamination is sometimes a key factor. As this allocation is by territorial authorities through district plans, and territorial authorities are also responsible for issuing land use consents, subdivision consents, land information memoranda and building consents then unless the regional council has been proactive and effective in identifying contaminated land, the territorial authority will either have to gather the information itself, prevent development or proceed in ignorance. Practical problems have also occurred in Christchurch over information sharing and duplication of information systems. Contaminated land issues can also be of very local significance only and not of regional significance. There seems little logic in regional government being involved with land contamination, unless it is of regional significance, or affects matters that regional councils have primary responsibility for, such a water and air quality. There is potential for duplication of information and inefficiencies in the Select Committee's proposals.

  An example of City Council responsibility that would remain, even if the new regional function had been in place is the Sandilands matter. Giving the regional council the power to identify the land would have contributed little to its resolution, except perhaps delay and an extra layer of bureaucracy.

- **Infrastructure**

  A satisfactory definition of infrastructure has been created, broadly in accord with the Council's submission. The original Bill proposed to give regional councils the function of promoting the timely provision of infrastructure. This has been replaced with a function of providing for strategic management of the integration of infrastructure with land use policies. It is unclear why this has been included, or how in fact the regional council would be able to achieve anything in this regard, other than the adoption of objectives and policies. Certainly this Council already gives close attention to integrating infrastructure with land use in its district and it may be that the regional council is able to assist with a regional overview of this.

- **Urban growth**

  The proposed regional function of promoting sustainable urban form has been deleted. Curiously the Committee noted that there was no reason for this to be a regional function, whereas in reality at present there is strong potential for adjoining local authorities to take quite different approaches to urban growth, undermining each other and leading to very unco-ordinated and unsustainable outcomes. The Council's submission acknowledged the desirability of regional integration on urban growth, but was more concerned with the process by which regional consensus on urban growth may be achieved, than with getting this process deleted. The Council's submission asked for this matter to be reconsidered, not abandoned. Arguably there is already the power for regional councils to influence urban growth, as has been demonstrated by cases involving the Auckland Regional Council.

4.3 Consultation with Tangata Whenua

- **Extension to hapu**

  The duty to maintain records about iwi groups and their planning documents has been extended to hapu. A hapu is a sub tribe, often based on a particular marae or locality. In some instances these will have their own organisational structure and be the most informed and appropriate group to provide the tangata whenua input on a local issue. The Act now specifically recognises that such groups may overlap rather than observing a tidy set of mutually exclusive boundaries. The amended Bill deletes well intentioned but unhelpful provisions that stated there would be no need to consult iwi/hapu over resource consents, provided there was in existence an established protocol prepared under the amended Act. The difficulty with that was that there could be no such protocol in existence prior to the Act being amended, and existing protocols would have been invalidated. The Select Committee has accepted this part of the Council's submission. It has retained the rather unrealistic assumption that the Crown will be able to inform local authorities of the existence of the relevant iwi and hapu. It has also retained detailed provisions relating to consultation with iwi/hapu when new plans are being prepared.

4.4 Council Hearings

A key feature of the original bill was changes to local authority hearing processes (for plans and resource consents). They sought to ensure a substantially more robust first hearing, which must be given greater weight at the Environment Court, should the Council's decision be appealed. While there was some local authority support for the intent of these changes, the majority of submitters were concerned they would lead to less public participation because of the greater formality of the hearing, and increased costs, time delays, complexity and uncertainty. The Christchurch City Council submitted against these changes for these reasons. The submission has been largely successful.

These changes to Council hearing processes were strongly linked to the Bill's proposal to limit Environment Court hearings to a rehearing approach, with limited scope for de novo hearings. Many submitters were opposed to a number of the changes and the Select Committee has made amendments to address their concerns.

Most significantly, it has recommended a return to de novo hearings in the Environment Court, while retaining the Bill's proposal that greater regard be given to the Council's first hearing decision. In practice this may not mean a great deal as the Court has to reach its own conclusions from the evidence in front of it. The Council decision will be part of the evidence but the Court will be able to reject the Council decision if it wishes to do so. Many of the changes discussed in the following two sections describe amendments to the Council processes in the light of the amendments to the Environment Court processes. The submissions made by the Council have been broadly accepted. One consequence of this change is that it will not be necessary to have transcripts of Council hearings produced, as was originally feared. This would have been a significant cost.

- **Prehearings processes**

  The proposal that Councils could call compulsory prehearing conferences has been continued in modified form. The Council can require attendance at meetings on resource consents only if the applicant agrees, because the applicant is likely to be paying for the process. Applicants or submitters who do not attend such a meeting may have the applications cancelled or their submissions ignored. This decision cannot be appealed or objected to under s357. With reference to hearings on plans, pre-hearing meetings are to be voluntary because the Select Committee believes success is more likely with willing parties. The power to strike out submissions from parties who do not attend a pre-hearing meeting on plan matter has been deleted. The Council did not make a submission on this matter.

- **Mediation**

  Councils may refer matters raised in submissions under both resource consents and plan matters to mediation, but only with the consent of the parties concerned. The Council did not make a submission on this matter.

- **Management of hearings**

  New powers have been included for Councils to require evidence for hearings from applicants and any expert witnesses to be circulated in advance, to direct the order of proceedings, to take evidence as read, to set time limits for evidence, to seek further information from submitters, to order evidence not be presented if it is irrelevant or not in dispute, or to strike out submissions that are frivolous, vexatious, disclose no reasonable case or would be an abuse of process. The Council did not make a specific submission on this matter, although it does relate to the Council's overall concern that hearings not be made too complex and intimidating. It should be noted that these powers are optional not mandatory. They have the potential to be of assistance in hearings over major matters, but need to be exercised with caution, or the Council itself would be bringing about the result it was concerned about, i.e. complex, intimidating, Court-like hearings.

- **Accreditation**

  The original Bill's proposal that sole Commissioners, Hearings Panel Chairpersons and the majority of Hearings Panels be accredited is retained. Curiously, the requirement for the majority of a panel to be accredited is deferred for two years to enable the training programme to be carried out, but there is no such deferment in the case of single Commissioners. The Council did not submit on this.

  A report will be presented to the Council in the near future regarding a policy on Hearings Panels and the use of elected members who hold certificates under the RMA Making Good Decisions Programme.

4.5 Applications for resource consents

- **Information & Reports**

  The proposal to give Councils power to decline or cancel applications for resource consents, where applicants decline to provide further information or do not agree to the commissioning of reports has been deleted. The Council must continue to process the application but may decline it if it considers it has insufficient information. An additional safeguard has been included that if there is any appeal, then if the Environment Court considers the information should have been provided, it must decline the appeal. This should ensure that applicants do not prepare token applications in order to get a fast track to the Environment Court, and make more serious efforts at the Court. However the Council's submission supported the original Bill because preparing a simplistic application and having it deferred for further information has been used as an effective way to postpone enforcement action, where activities had already commenced without a resource consent. The Select Committee has tried to deal with this by giving applicants no more than 15 working days to provide the information, refuse to provide it, or agree to provide it. In the last case the Council may then set a reasonable time for the information to be provided. The situation will therefore be better than the status quo by enabling Councils to bring such matters to a head without lengthy or indefinite delays by applicants as was previously possible.

- **Environment Court Review of notification decisions**

  The right to apply to the Environment Court against a decision not to notify an application has been retained. Technically this is not an appeal, but an application for a declaration. The Select Committee has added a new power for the Court to set aside any consent granted on a non-notified basis and refer the original application back for reconsideration. This power is now the same as the existing power held by the High Court, which is to be repealed. It is expected to be exercised more frequently, due to the greater accessibility and lower cost structure of the Environment Court. This provision is deferred until a date to be set, to allow existing backlogs of cases in the Environment Court to be reduced.

4.6 Environment Court powers

- **De novo hearings**

  Hearings in the Environment Court will now generally be "de novo", ie starting again from the beginning. This is in accordance with the Council submission. A new provision is that the Court will be obliged to have regard to the Council decisions. In practice it is unclear what difference if any this will make.

- **Power of decision on plan matters**

  The proposal to take away the Court's powers of decision on plan matters and give it only powers of recommendation back to the Council has been deleted and the Court will be able to decide matters if it chooses to do so. The present section 293 process, under which the Environment Court had the power to direct a new proposal be publicly notified for submissions and hearings directly before the Court has been deleted. However the replacement s293, together with new changes to clause 15 of the 1st schedule provides a new power to the Environment Court to refer matters back to the Council for reconsideration, including possibly rehearing the matter, and to prepare changes to the plan for referral back to the Court for final decision. It is quite unclear how far this power might extend. For example is it intended it be as extensive as the present s293, which allows for changes to the plan outside the scope of the reference to be put forward and publicly notified for further submission? It is also arguable that the use of the word "change" means the Court may have been given power to direct Councils to introduce full changes to their plans under the publicly notified First Schedule process. Section 293 has been very difficult and unsatisfactory to date for this Council. If this proposal proceeds then further rounds of case law are inevitably going to be required to clarify what is meant. The Council did not make a submission on this aspect, having been satisfied with the previous proposal.

4.7 Other matters

- **Timeframes for decisions on Plans**

  The Select Committee has proposed a new requirement that decisions on plan matters be issued within two years of public notification of a plan. This is considered to be a completely unrealistic requirement. The Christchurch City Council is one of the largest in the country by population, contains urban, rural, and coastal and hill areas, and deals with a very diverse range of issues. Its plan is accordingly large. 2,500 people made 3,900 submissions covering 12,000 topics. A further 1,500 people lodged further submissions. There were over 630 days of hearings which is more than three years in working days, let alone the additional time required for submissions, further submissions, administration, reporting, consideration and preparing decisions. Christchurch City Council achieved this in four years, by using two hearings panels and a number of Commissioners. This created logistical pressures to service two panels and the Commissioners and issues arose with consistency between them. Smaller Councils with less resources may well experience a similar diversity of issues and find it even harder. The two year proposal is considered to be impossible in the case of a major plan review and will only give critics of the RMA another stick to beat the Councils and the RMA with. However two years is probably realistic for plan changes or variations. This is unlikely to be a problem for this Council for many years unless it decides to review the City Plan at an early time.

- **Effects of variations**

  The Select Committee has not accepted a submission from the Council regarding the different treatment of variations and changes to a plan. To understand this it is necessary to understand a fundamental difference between variations to proposed plans and changes to operative plans. When a Council alters a proposed plan that is called a variation. If it alters an operative plan that is called a change. For some reason not understood at this Council the RMA treats these differently in one important respect. A variation has immediate effect. The original wording is replaced, even though submissions and appeals have not been heard, and despite the fact that the provisions may be changed as a result of hearings. That is the effect of Clause 16B(2) of the 1st Schedule. On the other hand, a change to an operative plan does not have immediate effect. Both the change, and the existing provisions exist side by side and both have to be considered in any proceedings. At the initial stages, greater weight is usually given to the original version, because the new provisions are untested by submissions. Over time, as hearings occur the changed provisions assume greater weight. Once the City Plan becomes operative, this will not be important until the next review, except on the rare occasions when the Council might introduce a change and then propose a variation to the change.

- **Making plans operative in part**

  The original Bill proposed that Councils could make plans operative in part without having obtained the consent of the Environment Court. This is retained with some minor technical changes. If this were done, any outstanding variations would automatically be converted to plan changes. The timing of this will be interesting as the Council is about to apply to the Environment Court for consent under the existing Act, and it is unclear whether the Bill will be enacted before the Court decides this.

- **40 days for subdivisions**

  The Council had requested that the period for considering larger subdivisions be increased to 40 working days but this has not been accepted.

- **Pre-consultation on resource consent**

  The Council had requested that applicants for resource consent be obliged to consult with Council prior to lodging the applications. This has not been accepted but the changes to s92, which deal with requests for information, strengthen the incentives for people to do so.

- **Objectives and other provisions**

  The original Bill had proposed simplifying the mandatory contents of plans to just policies and rules, leaving the other matters such as issues, non-regulatory methods, reasons, and anticipated environmental results as optional. The Council's submission was that objectives, and reasons should also be mandatory to make plans more explicit and easily understood. The Select Committee has reinstated just objectives as a mandatory requirement along with policies and rules. The Council remains free to include the other matters if it wishes.

4.8 Main matters of concern in the reported back Bill

- **Contaminated land**

  The lack of any readily apparent reason for the new regional council function to identify and monitor contaminated land and the administrative overlaps that will be created because TLA's will also have to collect this information.

- **Infrastructure**

  The lack of any readily apparent reason for the new regional council function of providing for strategic management of the integration of infrastructure with land use policies. Regional Councils are responsible for providing little if any infrastructure and territorial councils as the major providers have always had a strong interest in co-ordinating infrastructure and land use.

- **Urban Growth**

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- **The new section 293 powers combined with the new clause 15A of the First Schedule**

  The extent of these powers is very unclear and will require a round of case law to clarify. Does it include the power to consider matters outside the scope of the original reference? Is it a power to direct Councils to prepare changes under the First Schedule? What is the role of section 32?

- **Timeframes for decisions on Plans**

  The suggested two year time between public notification of a plan and release of decisions on submissions is completely unrealistic.

OPTIONS

5. The options are:

   (a) Do nothing. Accept the Bill as it now stands and implement it when and if it is enacted.

   (b) Lobby government and Local Government New Zealand about the remaining matters of concern.

PREFERRED OPTION

6. The preferred option is (b).

ASSESSMENT OF OPTIONS

7. There may be little opportunity to now influence the Bill as the Government has said it intends to enact it before the forthcoming General Election. However the issues are of sufficient concern to warrant the attempt, which will not in any case necessitate a great deal of work.