SIMPSON GRIERSON

Simpson Grierson submission to the Environment Committee on the Fast-track Approvals Bill (31-1)

April 2024

Introduction

Simpson Grierson welcomes the opportunity to submit on the Fast-track Approvals Bill (**Bill**).

Simpson Grierson wishes to be heard on this submission.

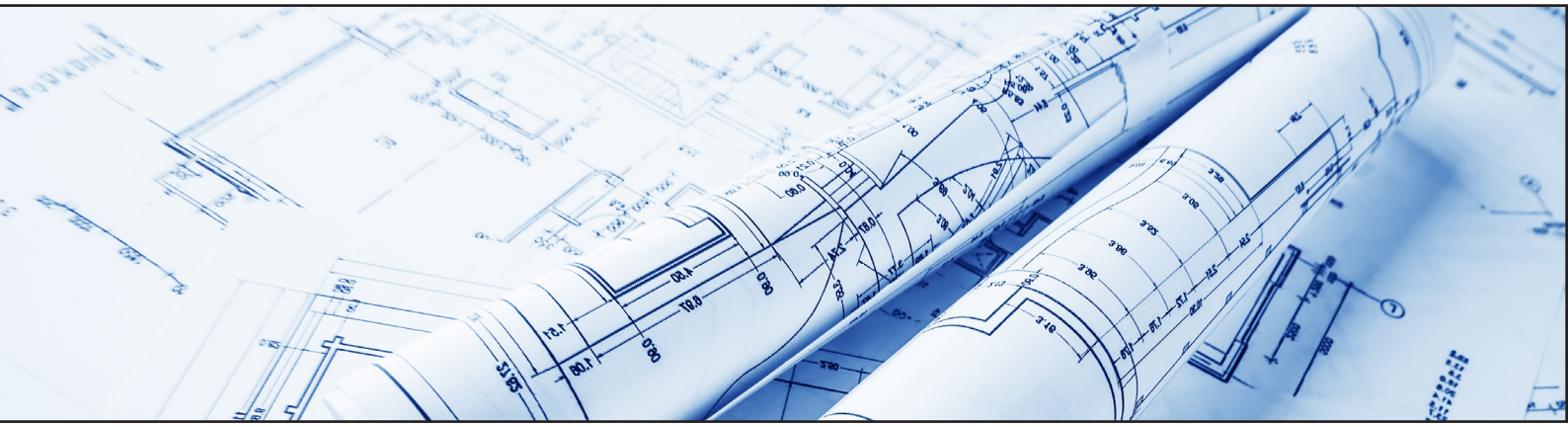
Simpson Grierson is a leading national commercial law firm, with offices in Auckland, Wellington and Christchurch. We have the preeminent resource management and urban development practice, and assist a wide range of central government, local government and private industry actors to manage their environmental risks and responsibilities, and consent and deliver some of New Zealand's largest projects. This includes advising on projects in the energy, property development, transport, water and wastewater, forestry, manufacturing, retail, waste management and mining sectors. We also regularly participate in other streamlined planning and consent processes including Board of Inquiry and direct referral processes under the Resource Management Act 1991.

We also frequently advise and act for a range of clients (applicants, submitters, and decision-makers) in relation to Crown permitting and approval processes, including acting in judicial review proceedings both challenging Crown decision-making and resisting challenges to approvals our clients have been granted.

From these experiences, we are very familiar with the costs, delays, and litigation risk associated with progressing large projects in New Zealand.

We are also very familiar with previous bespoke and streamlined processes. Simpson Grierson was the lead law firm in the development of the Auckland Unitary Plan and the replacement Christchurch City Plan, both of which were prepared under bespoke, streamlined processes.

In more recent times, we have also been heavily involved in processes under the Urban Development Act 2020 and the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**COVID 19 Fast-track Act**). We have acted for a number of applicants in Fast-Track consents. Several senior Simpson Grierson colleagues (current or immediately retired) have chaired expert consenting panels appointed to consider and decide applications for consent under the COVID-19 Recovery (Fast-track Consenting) Act 2020. We have spoken to these colleagues in preparing this submission and reflect their practical experiences chairing Fast-track panels. We also acted for the COVID-19 Recovery (Fast-track Consenting) Act 2020 Panel Convenor in litigation concerning an exercise of their functions under that Act.



Summary of submission

Simpson Grierson supports the intention of the Bill to create a more coordinated, coherent and efficient consenting and approvals 'one-stop' shop.

The focus of this submission is on the technical and process related aspects of the Bill. Parts of the current Bill are closely modelled on the earlier Fast-track consenting regime. From our experiences, we are intimately familiar with both the advantages and pitfalls of this earlier regime.

We do not comment on the major political decisions, which we will leave to others. The suggestions in this submission are intended to offer feedback and recommendations on how the Fast-track Approval process in the Bill could be improved.

We note for completeness that Simpson Grierson has assisted a number of clients with their submissions. However, this submission represents the views of Simpson Grierson, and not necessarily those of any of our clients.

This submission covers the following themes:

a. the need for a single application and panel deliberation process against all approval types;

b. timeframes for decision-making;

c. decision-making tools;

d. appeal and judicial review rights;

e. consultation; and

f. panel appointments.

A. A single, consistent, process is needed for all approval-types

Issue(s)

1. Our principal suggestion to ensure that this Bill operates as intended, is that there should be a single application and expert panel deliberation process, considering all types of approvals that may be sought under the Bill for a project, in a wholistic and coordinated matter.

2. The Bill's process begins this integration, but it is incomplete. In particular, it appears that the broad shape of previous and existing "fast-track' consenting regimes have been imported into the Bill and are intended to do the majority of the administrative 'work' for the functioning of the Bill. However, the resource consent processes are not sufficiently connected to the other approvals which will be considered for a complex project. In its current form, the Bill does not fulfil its ambition of genuinely being a 'one-stop' shop.

3. Currently:

    a. Schedule 3 is the only Schedule that deals with matters that apply across each of the approval regimes. There are a number of matters that should be common across all the approval regimes, which are not currently in this Schedule. For example:

        i. As noted, Schedule 4 (RMA approvals) has been modelled on the previous fast-track legislation. It is relatively comprehensive and provides a useful 'spine' for the process. However, certain processes and considerations in that Schedule should be modified to encompass all approval types.

        ii. Provision of application for approval to the Environmental Protection Authority (**EPA**): There needs to be a clear and comprehensive single scheme for providing

the necessary application material to the EPA once any project is listed or referred.

iii. Completeness check of material by EPA and provision to Panel: this is provided for under Schedule 4, but should be a requirement for all approval types.

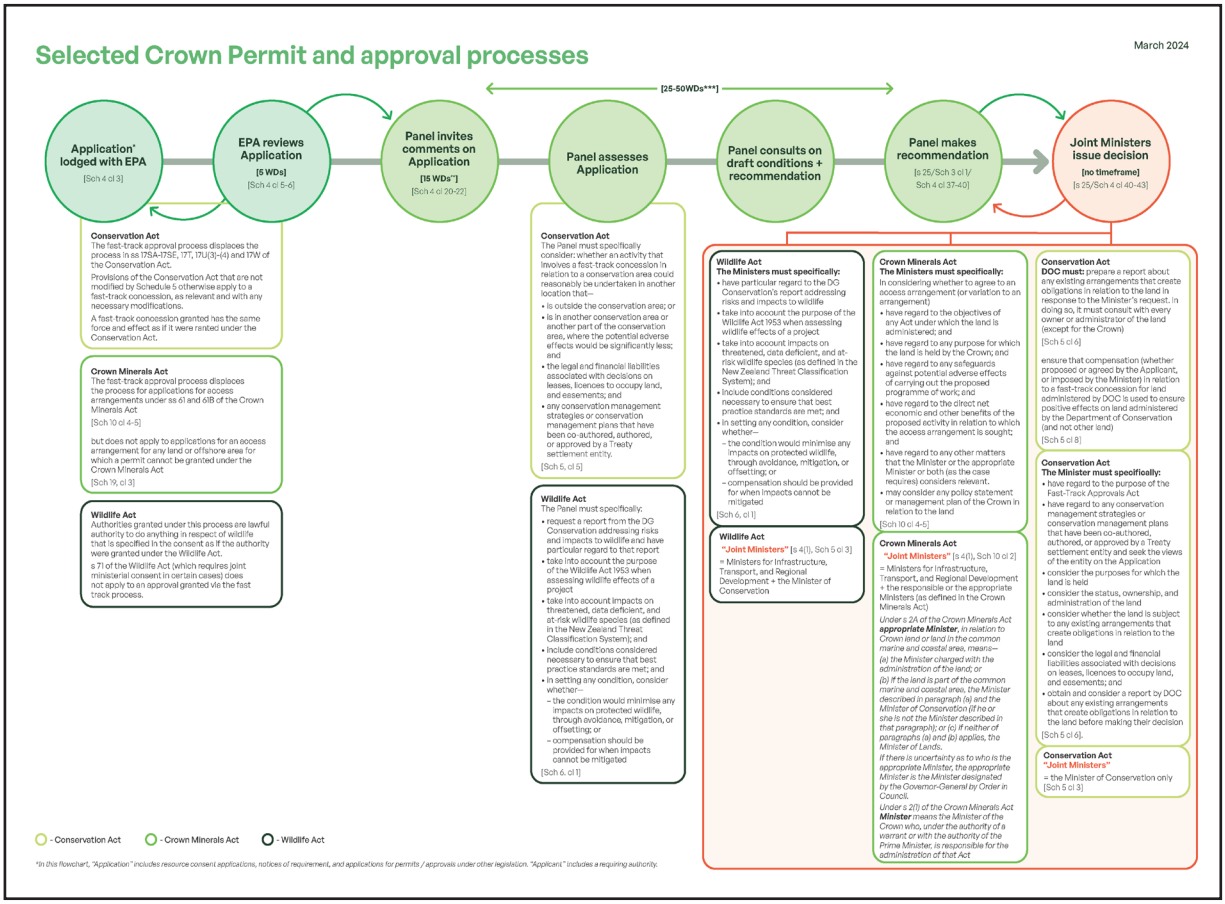
iv. Use of hearings: Only Schedules 4 (Resource Management Act 1991 (**RMA**)) and 9 (Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012) expressly allow for hearings. As discussed further below, we consider that hearings and workshops will be useful for considering many, if not all, applications.

b. Schedules 5 to 12 of the Bill relate to non-RMA approval types. These Schedules contain varying degrees of detail as to the considerations and information requirements for each approval type.

i. It is of particular concern that some Schedules require the joint Ministers to have regard to different factors and information than an expert panel when making their respective recommendations/decisions.

In some cases, the Schedules expressly direct Ministers to obtain and consider new information after a panel has already considered and made its recommendation on an application.

ii. The lopsided nature of the information requirements for some non-RMA processes is clear from the following flowchart, which illustrates the Conservation Act, Crown Minerals Act and Wildlife Act Schedules' requirement. *[Click diagram to enlarge]*



c. Additionally, there is a lack of clear distinction between the "referral application" process in the substantive part of the Bill and the "approvals/substantive application" process in some of the Schedules. Relatedly, the role(s) of the joint Ministers and the expert panel's role in assessing proposed approvals do not appear to be treated consistently in the various Schedules.

d. The approach to decision-making is also not consistent between Schedules, with some requiring primacy to be given to the purpose of the Act (consistent with the main text of the Bill) while others do not mention the Act's purpose as a decision-making consideration at all. For some approvals, such as those addressed in Schedule 5, the Minister of Conservation is given specific (and in places, exclusive) decision-making powers.

e. There is also inconsistent treatment of appeal rights between the body of the Bill and its Schedules. For example, appeal rights are expressly available for RMA approvals and archaeological authorities under the Heritage New Zealand Pouhere Taonga Act 2014 (Schedule 7, cl 15), but other Schedules are silent on appeal rights.

f. The current lack of cohesion between the Schedules also means that there is a risk of duplication of the information required or the relevant considerations for different approval types. For example, there is currently no provision in the Bill that reconciles the potential overlap or inconsistency between guidance in the RMA and in the Wildlife Act 1953 when recommending conditions in relation to effects on indigenous biodiversity.

Our proposed solution

A single, comprehensive application

4. In our view, what is needed to address the issues identified above is a common application, referral, and expert panel process for all approvals applied for under the regime.

5. This should be contained in a standalone Part of the Bill or a schedule. Amendment to the body of the Bill would be the preferred solution, as the current structure of the Bill is difficult to navigate (this was also an issue with the COVID 19 Fast-Track Act).

6. In either case, it could be largely modelled on Schedule 4. Some examples of aspects the Schedule 4 that could easily be expanded to cover all approvals are:

   a. Clause 4, which allows resource consents to continue in force while applications are being processed. If an application is made under this Bill that includes multiple approvals, it would be logical for the same approach to applied consistently across the existing approvals relied on by the applicant.

   b. The EPA completeness check process in clauses 5 and 6 of Schedule 4 should be applied to the applicationas a whole.

   c. The information required in an application in clause 12. That section could be generalised to cover the information likely to be required by each application. An express provision requiring information about thepositive and adverse effects, including any proposed compensation or offsets, would be appropriate. (We note that the content of clause 14 is already covered in section 13(1)(a)).

   d. The process in clause 20 of Schedule 4 that relates to obtaining comments should apply to all applications made under the regime.

Comprehensive evidence, comments and advice at commencement of Expert consideration

7. To enhance the quality of the recommendations and conditions of the Expert Panel, they should have access to all relevant information at the outset of the process, and that information should be of a high quality.

8. The current process provides for a significant volume of departmental advice to be provided to Ministers towards the end of the process. It is not clear that this advice would be provided to the Expert Panel as part of their consideration.

9. We suggest that all relevant information, evidence and comments should be sought at the beginning of the Expert Panel process, to allow the Panel to consider the best possible evidence and ensure robust, coherent conditions for projects. This would also remove the need for duplicative consultation at a number of key points.

10. Legislation-specific schedules will still be necessary to include additional, approval-specific requirements under the respective legislation. However, we consider it is crucially important that all of the relevant information for any approval type is provided to an Expert Panel at the outset of its deliberation, to inform its recommendation to the joint Ministers. None of the schedules should include requirements for Ministers to be provided new information at the end of the process. This is inefficient, risks undermining the quality of panel recommendations, and creates unnecessary appeal and judicial review risk.

A common test when considering all approvals for project

11. A matter of considerable importance is the "test" that expert panels and joint Ministers must apply to the approvals. At the moment, the tests are in different places for different approvals and are inconsistent. This does not provide sufficient guidance to the Panel about the approach they are to take and the thresholds to be applied for conditions. In particular, the provisions in clause 2 of Schedule 3 and clause 32 of Schedule 4 that list the weighting of different legislation is unnecessarily complicated and is likely to lead to confusion.

12. A common test and threshold would simplify and significantly improve the Bill if a single, comprehensive test is included that applies across the multiple approvals.

    a. If the intention is for the Bill's purpose to "outrank" the provisions of the originating legislation, then that could be achieved through far simpler drafting. For example, expert panels could be required to "give effect to" or "implement" the Bill's purpose in their recommendations. Those terms have well understood meanings through case law.

    b. To achieve the intended ranking, expert panels could be required to "take into account" the originating legislation, which is a lesser requirement but is also a well understood term.

13. The "test" in the Bill need not confine itself to the purpose of the Bill nor the four corners of existing legislation. For example, the Bill could include a provision that specifies how adverse environmental effects are to be addressed. If the intention is for positive and adverse effects to be weighed in the balance, then the Bill should say so directly, rather than indirectly.

14. There are also matters of detail which should be considered. If, in relation to effects on indigenous biodiversity, compensation and offsets are to be taken into account (which in our view they should – in the orthodox way), the standard that is be achieved by an applicant should be specified, with flexibility for an applicant to go further if they volunteer to do so. That approach would offer considerable certainty to all participants in the regime.

Key Ministerial involvement in all relevant stages

15. Similarly, to the need for a common test, we suggest common decision-makers.

16. Where there is benefit in an additional Minister being involved in the decision-making process, we suggest that the particular Minister become a "joint Minister" throughout the process, rather than being given additional or exclusive decision-making powers at a late stage.

17. We suggest that the Minister of Conservation could usefully be included as a 'joint Minister' for all approvals where they are responsible for the legislation. Given that, we suggest that they are also given a role where the projects involve the Conservation Act 1987 and Reserves Act 1977 – at present, the Bill gives the Minister of Conversation a role as a joint Minister only in relation to Wildlife Act permits. Inconsistent with that approach, the Minister of Conservation has exclusive decision-making powers in Schedule 5 of the Bill.

18. There may also be a role for the Minister of Resources for applications that concern mineral extraction, and a role for the Minister for Housing for applications that include a residential housing development.

Common set of conditions

19. Finally on this point, we suggest that the Bill give direction about the final form of the conditions recommended by the Panels and approved by the joint Ministers. We suggest there are some key considerations in relation to these conditions that should be required by the legislation.

    a. The conditions should be coherent and consistent across multiple approvals.

    b. The conditions should clearly specify where the same condition is found in multiple permits, in a way that avoids an accretion of obligations.

    c. To encourage efficiency, the conditions should also be presented in a form (perhaps draft permits themselves) that enables the relevant regulatory authorities to identify the conditions that are applicable to them and which they are responsible for monitoring and enforcing.

    d. That the Expert Panel be required to provide draft conditions, even where they otherwise recommend declining the project. This approach is used in current s 42A Resource Management Act reports, and ensures that decisions makers have material to work with if they disagree with the recommendation.

20. Over time, we would also encourage the Convenor to develop a set of pro-forma minimum conditions, to be used by applicants and Panels as a starting position for some of common issues. This approach would further enhance consistency and efficiency within the system.

B. Realistic and clear timeframes for decision-making

Issue(s)

21. The projects that will be processed under the FTA Bill will be some of the country's largest and most important. Adequate time is needed to generate robust outcomes that enable these projects to proceed in a cost and time effective manner, while ensuring that decisions are of a high quality, and mitigating against errors that lead to successful appeals or judicial reviews.

22. One of the most significant practical issues with the COVID 19 Fast-track regime was that the timeframes for panels to assess projects were too tight. This placed significant pressure on all parties involved, and may have affected the quality of decision-making. It also discouraged potential Panel members from participating in the process.

23. While we appreciate that the FTA Bill emphasises efficiency and certainty of timeframes, the strict timeframes imposed on a number of steps in the decision-making process are unrealistic. They place undue pressure on applicants, decision-makers and persons providing comments on applications, and in turn, risk rushed or poor decision-making, and as a result, generating appeal or judicial review risk.

24. In particular, the:

    a. EPA's review of applications for completeness (5 working days).

    b. Provision of written comments by persons invited to comment on an application (10 working days - see section 19(5) and Schedule 4 clause 21(1)). It is highly unlikely that any person will be able to consider the application material, that is likely to run into many hundreds of pages, take advice and provide meaningful comments within 10 working days.

    c. Panels' deliberations (25 working days with a maximum 25 working day extension). Board of Inquiry processes under the RMA run for 9 months and are achievable, but place a huge strain on all participants. Those processes only concern RMA approvals, whereas applications under this regime can include approvals from other regimes, which will increase the workload. Given this experience, we consider 25 working days is unrealistic on any measure. It will also make attracting panel members much more difficult.

25. Conversely, there are a number of steps in the process for which no timeframes are prescribed. A lack of timeframes on these steps may lead to delays or bottlenecks, particularly if there are a large number of complex projects in the decision-making pipeline, including for:

    a. the provision of referral applications assessed as completed to the Ministers;

    b. the appointment of expert panels for referred or listed projects; and

    c. Ministerial decision-making (at both referral and substantive decision-making stages.

Our proposed solution

26. It is appropriate to have deadlines for many steps in the process, as well as an overriding duty for all persons to perform their functions without delay. However, the "fast" aspect of the Bill will be achieved through the removal of de novo appeals to the Environment Court and the combined processing of the suite approvals necessary for a project.

27. It is crucial that the approval process includes adequate timeframes for decision-makers to meaningfully engage with the likely significant volumes of material and participants' comments for each project, and adhere to natural justice principles

28. Different projects will require different amounts of time to consider so it is also important that any timeframes imposed by statute are reasonable and that there is scope for flexibility if necessary to allow an application to be properly considered.

29. We recommend that the timeframes for decision-making are amended as follows:

    a. The 5 working day timeframe for the EPA to carry out its completeness check of applications is likely to prove too tight considering the volume of material that will require review for each application, and depending on the number of applications received.

       10 working days may be more appropriate. We encourage the Committee to obtain the views of the EPA on this topic.

    b. The EPA (not a panel) should be required to seek comments from the listed persons as soon as an application is assessed as complete.

       Under the COVID 19 Fast-track regime, comments are not sought until after a panel is appointed. Appointing panels proved to take some time. There is no need to wait for that to occur before comments are sought.

       Seeking comments before a panel is appointed could also allow a longer period of time for comments to be made, and for an applicant to respond (as discussed below) without affecting the overall time required for a panel to consider an application. This will be particularly important if our suggestion that departmental comment and reports are provided at this stage in the process.

    c. It is not realistic to expect local authorities, iwi, and other listed persons to review and provide comments on what are likely to be voluminous and technically complex applications within 10 working days. A timeframe in the **range of 30 working days** would be more realistic. Applicants will also need a fair opportunity to respond to the comments made on their applications. That could take place as part of a hearing process.

    d. The timeframe within which panels are required to complete their assessments of applications needs to be able to be expanded to be commensurate with the size of the task in some of the anticipated projects.

       Some projects will be considered in shorter timeframes than others.

       Some projects with well understood and localised effects could be considered within 50 to 60 workings days, with an ability to extend by a further 50 to 60 working days, if necessary. An example of a project that could fall into that category could be a regionally significant residential development, in an area identified for urban growth.

       Other more complicated projects, such as major roading, infrastructure and renewable projects, will need considerably more time. For those projects, a standard processing time of **100 working days** (approximately 5 months) with the ability to extend the timeframe by a **further 50 working days** would be more realistic.

       Even that framing could prove to be challenging. However, in combination with the suggestion below, thosetimeframes should be achievable.

    e. Timeframes for processing referred applications should automatically be placed on hold while an applicant responds to any requests for further information made by a panel. Importantly, this will disincentivise applicants from making substandard applications. This was an issue for the Covid 19 Fast-track process and should be avoided. It would also ensure that panels are not put under unwarranted time pressure to complete its tasks when faced with incomplete or inadequate application documentation.

If this suggestion is not accepted, then the timeframes recommended above should be further extended.

An option for the Committee to consider is whether there are two options for timeframes: shorter timeframes for "standard" projects, and more generous timeframes for complicated projects. A decision about the appropriate timeframes could be made by the panel convener, in consultation with the applicant, when expert panels are appointed.

f. The Committee might also consider whether timeframes should be imposed on the Ministerial decision-making processes and/or the provision of departmental advice. It is inconsistent with the balance of the regime that the other participants are placed under very tight timeframes but none are in place for Ministerial decisions. While Parliament may not wish to direct Ministers, it may want to place guidelines on the timeframes for departmental advice or reports (noting that elsewhere we suggest that this material is provided at the commencement of the process).

C. Panel appointments

Issue(s)

30. Schedule 3 outlines the processes and requirements for the appointment of the convenor and members of expert panels. Clause 2, subclause 5 and clause 6 provide for the convenor to appoint panel members (and replacement panel members) "in consultation with" the Minister for Infrastructure. We recommend against that consultation requirement.

31. The expert panels' core function is to impartially consider and make recommendations to the joint Ministers on listed and referred projects assigned to them. It is important that the public has confidence that these panels are independent and that their analysis and recommendations will be robust. Requiring panel appointments to be made in consultation with the Minister for Infrastructure (who is also one of the joint Ministers that will determine fast-track approvals) risks appointments being perceived as being political and may harm the panels' legitimacy.

Our proposed solution

32. We suggest that the Minister for Infrastructure should not be consulted in relation to the appointment of panel members. The decision to appoint members should sit solely with the Panel Convenor.

D. A wider range of process tools should be made available to expert panels

Issue(s)

33. We are concerned that the Bill does not currently provide the innovative tools a Panel may wish to deploy to create robust decisions, work through the issues and prepare quality conditions and recommendations in the time available.

34. There is currently a presumption *against* holding hearings in the Bill.

    a. Schedules 4 and 9 state there is no requirement for a panel to hold a hearing (except at its discretion) and no person has a right to be heard by a panel. The other Schedules are silent as to whether hearings may be held.
    b. The Bill instead requires the exchange of written comments on applications and on draft conditions, and in some cases, the commissioning of reports.

35. The Bill's current approach replicates the COVID Fast-track model. This proved highly problematic for larger applications. Relying solely on the exchange of written material was inefficient, time consuming and sometimes became confusing for participants.

36. In our experience, some of the innovative practices from the resource consenting sector could be used here:

    a. hearings, workshops, mediation and expert conferencing are helpful and efficient tools to understand and resolve or narrow issues in dispute, and develop better conditions for managing the effects of a project than the exchange of written material in isolation.

    b. expert conferencing in particular is a crucial aspect of any large consent or designation process and should be enabled in this regime.

37. There is no particular need for expert panels to be bound to an Environment Court style adversarial hearing process (although that might be appropriate in some instances). Instead, other targeted processes may be useful for narrowing issues and preparing draft conditions. We have seen workshops used with good effect in a range of Environment Court / Environment Judge led processes (such as the 'sleeves rolled up' workshops in the replacement Christchurch City Plan).

Our proposed solution

38. In our view, an applicant should have the right to request a hearing in the same way that a panel can elect to hold a hearing. It is our experience that hearings are generally useful for an applicant as it gives the applicant and its experts an opportunity to explain the application and work through the issues in person with the panel and other participants.

39. We consider that the Bill should expressly allow flexibility for panels to utilise a range of formal and informal tools to assist their decision-making, including mediation, expert conferencing, workshops on conditions and hearings. The use of these tools should be encouraged in the Bill.

40. Hearings could be more inquisitorial in nature than adversarial. For example, a panel could schedule topic specific hearings or workshops that centre around specific questions the panel has identified about an aspect of the project or proposed conditions.

E. Consultation

Issue(s)

41. The FTA Bill provides multiple opportunities for affected or interested parties to be consulted on a proposal throughout the decision-making process, three of which are mandatory:

    a. when applicants consult with certain parties before an application is lodged (s 16) (mandatory);

    b. when the joint Ministers invite written comments on an application for referral (s 19) (mandatory);

    c. when a panel invites written comments on an application that has been referred to it (Schedule 4, cl 20) (mandatory);

    d. if a panel holds a hearing (Schedule 4, cl 24);

e. if a panel requests further information (Schedule 4, cl 28);

f. before a panel recommends an approval, draft conditions must be circulated for comment (Schedule 4, cl 37); and/or

g. if the joint Ministers seek further comments (s 25(6)).

42. The extent of consultation provided for in the Bill risks duplication of information and delay, without meaningfully enhancing the quality of expert panels' and Ministers' decision-making.

Our proposed solution

43. We consider that there is scope to rationalise the extent of mandatory consultation required by the Bill in a manner that is consistent with natural justice principles and does not undermine the quality of information that decision-makers have access to.

44. An area of particular duplication is the pre-application consultation required by applicants and then the consultation that is required by the joint Ministers before they make referral decisions. Under both provisions, a number of the same persons have an opportunity to comment. The justification for both rounds of consultation is not clear to us.

45. We suggest rationalising that consultation. Given that the scope of the Ministers' consultation under s 19 of the Bill is broader than that required of applicants under s16, we suggest that of the two processes, this should be retained, and the pre-application consultation requirement removed. There is no mandatory consultation requirement in either the RMA or the EEZ Act - on the contrary, the RMA expressly states that there is no duty on applicants to consult on applications for resource consents (s 36A).

46. We note that quality consultation is a matter of good practice for applicants. Our expectation is that applicants will likely continue to consult regardless of any mandatory requirement (as is most often the case now).

47. Regardless of when consultation is required, we note as matters of detail that:

a. the timeframes for the responses to the joint Ministerial consultation are unworkable at 10 working days.

b. Clause 19 requires "written comments" from the persons listed in section 19(1) but the joint Ministers must "consult" the persons listed in section 19(2). The difference between requiring written comments and consultation is not clear and is likely to be a source of confusion, and in turn, litigation.

F. Greater certainty is needed regarding the scope of appeal rights

Issue(s)

48. The current structure of appeal rights under the FTA Bill is that specified persons have a right of appeal, only on a question of law, to the High Court against the whole or part of the joint Minister's final decision to grant or decline an approval.

49. The persons and groups with this appeal right are:

a. the applicant for approval;

b. any relevant local authority;

c. the Attorney-General;

d. any person or group who provided comments on an approval application in response to an invitation given under the Act; and

e. any person with an interest in the decision that is greater than that of the general public.

50. We see a number of issues with this list:

a. Providing the Attorney-General with a statutory right of appeal against a ministerial decision, would essentially mean the Crown could sue itself, which is clearly undesirable.

b. Schedule 4, cl 20 contains a list of people and groups that the Panel must invite to comment on an approval application. Under Schedule 4, cl 20(4) and (6), a panel may also invite written comments from any other person the Panel considers appropriate. This is ambiguous and provides considerable discretion to the Panel.

In turn, this creates judicial review risk and it also provides a large pool of potential parties with appeal rights under the FTA Bill, presenting risk of increased litigation and consequent delay.

c. The link between persons invited to comment on an application and appeal rights could also lead to unusual and unintended outcomes. For example, Ministers with the portfolios listed in Schedule 4, cl 20(3)(h) and by extension, their departments could have standing to appeal a decision of the joint Ministers.

d. Currently, non-governmental organisations and other interest groups appear to have no ability to comment on an application (unless invited by a panel) but under this provision could potentially secure, or attempt to secure, rights of appeal as persons with "an interest greater than that of the public". This could widen the scope of appeal and participation rights significantly at the back end of the process, in a manner that may be incongruous with the remainder of the Bill, which limits participation to a select list of persons/groups.

Our proposed solution

51. We recommend:

a. Removing the Attorney-General from the list of people with standing to appeal a decision of the joint Ministers.

b. Introducing a more logical separation between the people/groups with standing to appeal from the list of those invited to comment to address the other unintended consequences and inconsistencies discussed above.

Thought could be given to whether an expanded class of persons could have a right to participate in the expert panel process, but not necessarily have appeal rights. That approach could encourage participants to direct their energy and resources towards the merits of any applications, thereby improving the quality of the decision-making process.

c. Considering removing or limiting the Panel's discretion to invite comment from whomever they consider appropriate. The exercise of such a broad discretion is likely to be a source of judicial review proceedings.

An alternative drafting approach is to expressly identify any additional groups that the Government considers should be able to comment on a proposal. This was the approach taken in the Covid 19 Fast-track model. That approach would provide more certainty and would remove an obvious source of litigation.

Careful selection of who has an opportunity to comment would be necessary to ensure an appropriate range of views are available to the expert panels.

d. The inclusion of appeal rights to persons who are considered to have an interest in approvals greater than the general public should be removed.

In addition to the vague and uncertain drafting, it is quite unusual to give appeal rights to people who have not participated in the process leading up to a decision that is capable of an appeal.

G. It may be appropriate to limit duplication of appeal and judicial review proceedings

Issue(s)

52. The right to apply to the High Court for judicial review of a decision made under the FTA Bill exists independent of the statutory rights of appeal in the Bill. Without appropriate limitations on applications for judicial review, and due to having existing rights of appeal, duplicative proceedings and delays could occur, undermining the efficiency objectives of the FTA Bill.

53. Such limits are found in other statutes and we would encourage the Committee to consider what options could be used here, which appropriately balance the purposes of the Bill and the importance of judicial scrutiny of public decision-making.

Our proposed solution

54. There may be scope to place procedural limitations on judicial review rights, to address the risk of duplication and improve certainty of outcomes for applicants, without curtailing the important right to apply for review of public decision-making.

55. Consideration could be given to the following options, which are employed in other legislation including the Immigration Act 2009 and the (now repealed) COVID-19 Recovery (Fast Track Consenting) Act 2020:

a. imposing timeframes on applications for judicial review that match appeal periods;

b. requiring applications for judicial review and appeals to be lodged together, and within a certain timeframe after final decisions are made by the joint Ministers on an application; or

c. requiring judicial review applications to be lodged only after any appeal processes are exhausted, and within a certain timeframe.

Conclusion

56. In conclusion, we emphasise that the power and efficiency gains of the "one-stop" shop should not be overlooked - it has real potential to improve timely decision-making for large projects. We consider that the process suggestions outlined in this submission will also help to ensure that the process leads to good quality decision-making and decisions that will have more enduring benefits than simply the speed of the process. We trust the Committee will consider our suggestions about how the processes in the Bill can be improved.

Sally McKechnie, Partner
DD 04 924 3456 | **M** 021 180 7236
sally.mckechnie@simpsongrierson.com

Hamish Harwood, Senior Associate
DD 04 924 3508 | **M** 021 916 779
hamish.harwood@simpsongrierson.com

Auckland
Level 27, 88 Shortland Street
Private Bag 92518
Auckland 1141
New Zealand
+64 9 358 2222

Wellington
Level 5, 40 Bowen Street
PO Box 2402
Wellington 6140
New Zealand
+64 4 499 4599

Christchurch
Level 1, 151 Cambridge Terrace
West End, PO Box 874
Christchurch 8140
New Zealand
+64 3 365 9914