

1 March 2024

Hon Paul Goldsmith, Acting Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Fast-track Approvals Bill**

### **Purpose**

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1. We have considered whether the Fast-track Approvals Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 25945/3.1), received on 28 February. This version of the Bill is a work in progress, subject to confirmation of some policy decisions and quality control processes. We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with section 27(1) (right to the observance of the principles of natural justice). Our analysis is set out below.

### **The Bill**

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4. The Bill provides a fast-track approval<sup>1</sup> process for eligible activities. The fast-track approval process aims to facilitate the delivery of infrastructure and development projects with significant regional or national benefits. Projects may include infrastructure, housing, resource extraction, aquaculture, agriculture, and other developments.
5. There are three stages in the fast-track approval process:
  - a. Joint Ministers determine whether an application should be referred into the fast-track approval process and to an Expert Panel.
  - b. The Expert Panel, with the advice and support of the Environment Protection Authority (or other relevant statutory authority), will assess the application and make a recommendation on whether approvals should be granted (and what conditions they should have) or declined.
  - c. Joint Ministers will consider the recommendations and make the final decision on whether the approvals should be granted or declined.

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<sup>1</sup> Approval is defined in the Bill to include a resource consent, notice of requirement, certificate of compliance, licence, permission, clearance, or other activity.

6. The Bill creates two pathways for accessing the fast-track process, either by being a listed project in the Bill, or by joint Minister<sup>2</sup> referral.

## **Consistency of the Bill with the Bill of Rights Act**

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### **Section 27(1) - the right to the observance of the principles of natural justice**

7. Section 27(1) of the Bill of Rights Act affirms that every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
8. Part 2 of the Bill outlines the procedure at the various stages of the fast-track approval process for eligible projects. The procedure involves targeted rather than public consultation and expedited timeframes.
9. Clause 21 of the Bill provides that before deciding if an application should be referred to the Expert Panel, joint Ministers will seek comments from specified persons or groups and may invite comments from any other person. Invited persons or groups have 10 working days to provide comment, and any comment provided after that time may be considered at the Ministers' discretion.
10. Likewise, clause 30 of the Bill provides that the Expert Panel must invite written comments from specified persons or groups, and any other person the Panel considers appropriate. Invited persons or groups have 10 working days to provide comment, and any comment provided after that time may be considered at the Expert Panel's discretion.
11. The principles of natural justice include the right to be heard. What is reasonably required will vary depending on the nature of the interests that are affected and what procedures are necessary to give those affected a proper opportunity to be heard. The more significant the decision, the higher the standards (for example, natural justice operates at its highest level in criminal cases, but the requirements for natural justice in civil matters may be less stringent<sup>3</sup>).
12. The 10-working day timeframe may be considered to engage s 27(1) on the basis that the timeframe may not be adequate for those persons or groups to participate in the approval process. To the extent that the Bill might limit opportunities to be heard for people or groups whose rights and interests are at issue, we consider the limitation is justified under s 5 of the Bill of Rights Act. This is because:
  - a. The Bill serves an important objective – the Bill provides a fast-track process that facilitates the delivery of infrastructure and development projects with significant regional or national benefits. While there is no test for regional or

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<sup>2</sup> The joint Ministers are the Minister for Infrastructure, Minister of Transport, and Minister for Regional Development. The Minister of Conservation will be one of the joint Ministers for any Wildlife Act approvals and the Minister responsible for the Crown Minerals Act will be one of the joint Ministers for relevant decisions under that Act. The Minister of Conservation will remain the decision-maker for Conservation Act approvals.

<sup>3</sup> Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* [4.5].

national significance, it is clear the projects aim to benefit the community at large, rather than individuals.

- b. There is a rational connection to the objective – truncating the timeframes in which a person or group may provide comment will aid in speeding up the approval process.
  - c. The right is minimally limited:
    - i. applicants are required to identify those persons and groups that are affected by the project and provide a summary of any consultation on the project already undertaken (see cl 16(3)(h) and (i)). Further, applicants must engage with certain specified groups prior to lodging a referral application (see cl 18). Because of these requirements, and because the responsible agency must decide whether the referral application is complete, it is therefore highly likely that those persons and groups whose rights and interests are at issue will likely have already engaged with the project prior to lodging.
    - ii. there is more than one opportunity to provide comments. As we note above, both joint Ministers and the Expert Panel must invite comments on the application. Further, joint Ministers may seek further comments from any affected party prior to deciding whether to approve or decline the project.
  - d. The Bill does not prevent the principles of natural justice from applying to decisions or actions of the joint Ministers and the Expert Panel, and nothing in the Bill affects the right to apply for judicial review. The limitations are therefore in due proportion to the importance of the objective.
13. We understand that the Bill is also intended to modify the application of the Public Works Act 1981 in relation to Environment Court processes. We have not yet seen these aspects of the Bill and are not in a position to provide advice on them. From what we know of these amendments, they may engage s 27(1) of the Bill of Rights Act. We will update our advice if necessary, when we receive an updated version of the Bill.
14. For these reasons, we consider that any limits within the Bill on the right to natural justice are justified under s 5 of the Bill of Rights Act.

## **Conclusion**

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15. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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