TCF submission to MFE on principles for an RMA replacement

28 November 2024

Introduction

1. Thank you for the opportunity to offer views on the proposed principles to guide the development of the Bill that will replace the Resource Management Act (RMA).

2. The following comments are provided on behalf of the New Zealand Telecommunications Forum (TCF). The TCF is the telecommunications sector's industry body which plays a vital role in bringing together the telecommunications industry and key stakeholders to resolve regulatory, technical and policy issues for the benefit of the sector and consumers. TCF member companies represent 95 percent of New Zealand telecommunications customers. Our members include network operators, retail service providers and the tower companies that own and operate cell towers.

3. The telecommunications sector provides critical infrastructure and services (such as internet access, messaging and voice calling) that New Zealanders, businesses and government rely on to be able to communicate, access essential services and do business. Telecommunications is also an enabler for other areas of critical infrastructure, such as electricity, fuel, banking, remote health services, and housing. It is hard to imagine the world we live in without the benefits that telecommunications infrastructure enables.

4. We support reforms of the RMA that create a planning system that recognises the importance of critical infrastructure to New Zealand, our locational requirements (including the need to traverse through sensitive environments and enable the delivery of high-quality infrastructure), and establishes a fit for purpose infrastructure consenting regime and process.

5. In this submission we offer thoughts on:

    a. the focus on property rights and how it may have unintended consequences for critical infrastructure

    b. the ten proposed principles (and what is missing)

c. what critical infrastructure such as telecommunications needs from the RMA replacement to meet the needs of New Zealand communities.

The focus on property rights

6. The Cabinet paper *Replacing the Resource Management Act 1991* says the replacement system must be based on the enjoyment of property rights (paragraph 7 and 23). There is also an objective to enable the delivery of high-quality infrastructure for the future (para 23.1). These objectives may not be compatible if the legislation is not carefully framed.

7. It is not clear to us (from the Cabinet paper or the online hui) what enjoyment of property rights will look like in the replacement legislation, and how this will differ from the RMA. The design of the existing RMA also included a focus on property rights. With processes to permit and define, to manage potential tensions, and to give reasonable certainty to anticipated rights to develop properties.

8. We are concerned that the focus on property rights, if not appropriately defined or explained in the replacement legislation, could lead to unintended consequences and make it more difficult to build and upgrade critical infrastructure that communities and businesses depend on. This is because infrastructure such as telecommunications equipment almost always needs to be in locations that are adjacent or near to the property of other persons. Property owners may have concerns about amenity values and feel that the enjoyment of their property rights is adversely affected by the placement of telecommunications infrastructure. There might be a pole in their view, for example, and they may think they have a right to that view. This sometimes needs to happen because communities want connectivity and cell-sites need to be taller than adjoining or surrounding buildings to enable the connection between the user's device and the antennas of the cell-site.

9. The focus on protection of private property rights creates a clear risk of reverse sensitivity effects on infrastructure if taken too far. Enabling reverse sensitivity protection from infrastructure such as a telecommunications facility in road or on the adjoining property is not what we think the Government intended, but it is a highly likely unintended consequence. Critical infrastructure, including telecommunications, needs to be protected from adverse effects, including reverse sensitivity effects, of subdivision, use and development.

10. The TCF recommends that MFE ask the Expert Group to consider how this reverse sensitivity interpretation can be avoided so that infrastructure needs can be met. One way to achieve this could be to direct that visual amenity effects (including scenic views) be disregarded by decision makers in relation to critical infrastructure. Or that telecommunications infrastructure is excluded from amenity effects (e.g. reduced views).

11. It will also be important to recognise the need to manage conflicts between potentially incompatible land uses. As a general principle we propose that the needs of critical infrastructure that provides essential services should be recognised and outweigh individual property rights. Decision makers should be required to take into account existing infrastructure before allowing incompatible land uses to be established. Decision makers

should also have the ability to require financial mitigations if critical infrastructure needs to be moved or modified (e.g. height increase) because of the approved land use.

Comments on the draft principles

12. Most of the principles seem reasonable "in principle". It is, however, difficult to say if we support them without seeing more detail and understanding how they will be applied in the replacement legislation. We strongly recommend engagement with the telecommunications sector (and other stakeholders) as policy for the legislation is developed and before a Bill is introduced. This should include the ability to read and comment on draft legislation and definitions that will be relied upon.

Principle one - narrow the scope of the RM system and the effects it controls

Incompatibility

13. The commentary on this principle begins by saying "the starting point for the replacement system should be the enjoyment of property rights". It is difficult to reconcile this aspect of the principle with other principles and with the stated objective to enable the delivery of high-quality infrastructure. It seems to us that the potential impact on critical infrastructure has not been considered in the development of this principle. We expand on this above in the points made about the focus on property rights.

Think about the broader system

14. The regulatory regimes that infrastructure has to navigate to be able to build high-quality networks is vast and increasingly complex. We are concerned that the review and replacement of the RMA may not deliver the simplification that is being talked about if the review does not consider and address challenges in the wider regulatory system. Taking the time to consider the broader system will deliver better results and avoid unintended consequences from the intended simplification.

Narrowing scope

15. Paragraph 30 provides some other examples of narrowing the scope of the resource management system. We agree that it makes sense to avoid duplication so that matters are not dealt with through the resource management process as well as through dedicated policy interventions. Duplication in the historic heritage area is a problem for telecommunications. Other examples include:

    a. Earthworks: often dealt with in both district and regional plans

    b. Bylaws: councils creating different standards in their bylaws.

Principle two - establish two acts with clear and distinct purposes

16. It is difficult to comment on this principle without further detail on how the two acts would work. We can see potential benefits and risks of having two separate acts, but on balance

think the risk of splitting into two will exceed the benefits. This is because of the relationship between enablement and effects.

17. We acknowledge there have been some problems balancing enablement and the scope of environmental effects within the existing resource management system. However, they could be made to work together in a single act if the things around the edge (the large amount of contradictory national direction) were designed to talk to each other. Our experience is that comprehensive regulatory frameworks can enable both the development of environmental standards and development and infrastructure. When there is competing legislation for different outcomes that leads to complexity, uncertainty and high costs. It will be simpler to have just one act.

18. Framing and drafting to ensure consistent interpretation of the legislation by councils and the courts will be critical, whether we end up with one act or two. The drafting of legislation needs to be clear and simple so it's easy to implement. The practice culture of the organisations in central and local government who will be administering the new regime also needs to be taken into account. In our experience this culture tends to be conservative and safe. Not curious and open to opportunities. This needs to be considered when deciding what language to use in the replacement legislation.

Principle three - strengthen and clarify the role of environmental limits and how they are to be developed

19. The legislation will need to provide for environmental limits or outcomes while still enabling critical infrastructure. The infrastructure needed to run national telecommunications infrastructure will sometimes need to be located in sensitive or hazard prone areas, to enable the provision of essential telecommunications services to people who live in the area. While our members will always try to avoid this, sometimes it is necessary if there is no practical alternative location. Infrastructure and networks are designed to take account of natural hazards and environmental conditions[1].

20. We also think that better national information (data and modelling) is needed to be able to set and understand environmental limits. For example, databases with hazard information that would enable long term collaborative planning about hazards and the location of infrastructure. Without nationally consistent data and modelling we will continue to have regional inconsistency in the identification of environmental limits and the regulatory responses to protect these. National consistency for critical infrastructure is essential when maintaining and expanding our networks. Regional and local government do not have the funding to support research and development of environmental limits.

[1] The MFE user guide on regulation 57 of the National Environmental Facilities supports this view. Section 6.11 notes that “resilience is already factored into industry practice” and that telecommunications “will either avoid hazard areas or engineer structures to be resilient to the hazard risk”.

Principle four - greater use of national standards to reduce the need for resource consents and simplify council plans

21. We support this idea in principle. As operators of national networks it helps us if the same standards are applied nationally and time consuming and costly resource consents are not needed. This is the reason we have been calling for the National Environmental Standards for Telecommunications (NESTF) to be updated.

22. However, we are concerned about the expanding complex web of national directions that are often in conflict with each other. At last count there were 22 sets of national direction (including the new ones proposed for 2025). For this reason we support the development of a National Policy Statement for Infrastructure.

23. Several other issues would need to be worked through if there is to be greater use of national standards:

    a. Councils can interpret standards in different ways, which can defeat the purpose of national standards. We have identified three solutions to this problem:

        i. Framing and drafting standards with enough detail (and guidance) so they are more likely to be interpreted consistently. More comprehensive standards will help to avoid local variation, but it will not address the issue entirely.

        ii. Putting in place a national authority to administer the National Environmental Standards for Telecommunications (this could also work for other national infrastructure with national environmental standards). Under this model the national authority would make decisions about telecommunications infrastructure, with councils becoming affected parties.

        iii. Local government reform. Having fewer local authorities will reduce the amount of local variation.

    b. Councils can also develop bylaws that apply to subject matter already regulated by national standards, trumping the standard or at least causing confusion about what standard prevails. We recommend that councils not have the power to make bylaws for matters that are covered by an existing national standard.

    c. Doing more in national standards will make it even more important to ensure that conflicts between standards in different national directions are addressed. This would ideally be considered when standards are being developed. The proposed Planning Tribunal or existing Environment Court would need a process to deal with conflicts. If a set of criteria were developed it would be important to ensure that infrastructure outcomes are not always trumped by environmental ones. There is also a job to do sorting out and stripping back the existing body of national direction.

    d. There is value in a set of national standards that apply across network utilities, rather than having separate standards covering the same issues (e.g. noise levels and

earthworks). We have started this process before. A well facilitated process and a decent amount of time would be needed to work through sectoral differences.

e. Sectors need to be involved in the development of national standards that affect them. Experts from sectors can bring technical expertise that MFE is unlikely to have.

f. The relationship between the standards and plans would need to be clear - clarifying that councils cannot deviate from national standards in a way that would be less enabling or more stringent. This has been a problem for the telecommunication sector. For example, NESTF provides that natural hazard rules will not apply in certain circumstances but some councils still try to apply them.

g. Agencies need to be resourced to develop national standards and review and update them regularly. This is particularly important for industries such as telecommunications where technology is rapidly evolving, and our standards (NESTF) haven't been updated for nearly a decade.

Principle five - shift the system focus from ex-ante consenting to strengthened ex post compliance monitoring and enforcement

24. We support the proposed shift. Having a wider set of guard rails with more permitted activities and stronger enforcement will enable more infrastructure to be built and upgraded.

25. If more activities are to be permitted we appreciate it would be necessary to inform councils of the activity, to enable them to monitor and when appropriate take enforcement action. What we have in mind here is a simple registration process to a national body or agency. Not a pseudo-consenting regime like the permitted activity notices (which could be declined) proposed by the previous government. If an activity meets permitted standards, then while it is appropriate to register the activity, the ability to refuse that activity occurring would defeat the purpose.

Principle six - spatial planning and a simplified designation process

26. We support both aspects of this principle.

<u>Spatial planning</u>

27. Spatial planning provides a valuable opportunity to think about future infrastructure needs in communities, incorporate climate change information, and coordinate across infrastructure and with land use development. It needs to be included in the replacement legislation and not left to Local Government Act processes. A process and platform will be needed to have the spatial planning conversations.

28. Having a national spatial plan could help to ensure that national infrastructure priorities are picked up at the local level in the plan making process.

Designations

29. The preferred approach is to go back to basics and change the mindset with designations. The concept should be one of infrastructure corridors that provide for all sectors that need to put infrastructure in or on the road.

30. Designations should not be used as a tool to exclude other infrastructure from designated corridors. An example of this is where councils designate all roads, as has been done in Auckland by Auckland Transport. This adds more regulatory control and excludes other infrastructure providers.

31. There is also value in having a process where designations for common activities are easier to get. For example, where a designated authority will need to comply with a set of standard conditions, not bespoke ones.

Principle seven - realise efficiencies by requiring one regulatory plan per region jointly prepared by regional and district councils

32. We support the principle of moving to one regulatory plan per region. Reducing the number of plans will reduce the amount of local variation and the resourcing needed for our members to engage in plan changes.

33. However, if local government reform is not being considered (we understand from your presentation that it isn't) support would be needed for regional and district councils to work together.

Principle eight - provide for rapid, low-cost resolution of disputes between neighbours and between property owners (possibly through a new Planning Tribunal similar to the Disputes Tribunal)

34. We appreciate the policy intent of this principle, to make dispute resolution simple and affordable, and to deal with problematic council decisions. However, we think the proposal to have a Planning Tribunal similar to the Disputes Tribunal could have unintended consequences. The following issues arise:

    a. Matters concerning plan interpretation are fairly complex legal issues and should really be dealt with by Environment Court or through existing mediation processes.

    b. Infrastructure is already difficult because of third party appeals. Providing a process that makes it easier for people to take disputes about its placement would run counter to the Government's objective to enable delivery of high-quality, efficiently-delivered infrastructure for the future.

35. We have identified two options to address the problem in (b). One is to exclude critical infrastructure from the new disputes tribunal if it went ahead. The other is for disputes to be dealt with by a national authority responsible for national environmental standards for infrastructure (proposed in para 23 (a)(ii)) - this option would at least remove local variation.

Principle nine - upholding Treaty settlements and the Crown's obligations

36. The Crown should honour all its obligations under Te Tiriti o Waitangi/Treaty of Waitangi.

Principle ten - provide faster, cheaper, and less litigious processes within a shorter, less complex and more accessible legislation

37. MFE has asked for ideas on how decisions on plans, resource consents and other resource management instruments could be made faster, cheaper and less litigious. We have compiled some suggestions below.

38. Our first suggestion is to develop a comprehensive infrastructure national direction. This would be a similar concept to the proposed national planning framework, but less complex. It would be comprehensive in the sense it would provide a policy and rules framework covering all aspects of how infrastructure can be developed where it's needed in New Zealand. It would be a one stop shop, with infrastructure exempt from the requirements of other national direction and regional plans. To support the simplicity of the system we suggest:

    a. Administration of and consenting under the infrastructure national direction would be via a national agency (such as the EPA).

    b. Development of a national portal for the lodgement and processing of consent applications. The fast-track process for large projects would not be affected.

    c. Local government only has the opportunity to comment on a consent application.

    d. During the development of the infrastructure national direction local government would be considered a stakeholder, alongside each of the infrastructure sectors.

39. Other suggestions include:

    a. Only permitting appeals to the courts on points of law.

    b. Operators or infrastructure providers that have a track-record of compliance being afforded more trust in up front projects and consenting leniency without prescriptive conditions that don't allow for unexpected issues that occur and the need for variations to consent.

    c. Exploring options for agile planning systems using digital tools. For example, using a digital twin would enable real-time data to be modelled to trigger reviews or changes to the regulatory framework or planning documents.

    d. Providing better information on environmental impacts through a national network of environmental monitoring sensors and satellites.

    e. Requiring councils to embed positive outcomes in their plans and think about what they will achieve for the future.

f. Rebooting the implementation culture for professionals working in the resource management system. For example by including training, guidance and professional development as part of the implementation of the new legislation.

g. National direction and moving to one plan per region will be useful. Our suggestion is that they need to be tested for implementation ability. The aim will be to ensure the rules are practical, able to be implemented and there are no conflicts with other national directions. This can be achieved by sharing drafts and seeking comments from stakeholders (including infrastructure and local government) before regulations are made. Ensuring there is diverse stakeholder participation and collaboration on the "one plan per region" will also save time later.

What is most important for critical infrastructure in the RMA replacement

40. The Government wants the new legislation to enable the delivery of high-quality infrastructure. We think the following things will be essential to achieve legislation that is more enabling of infrastructure:

    a. Having comprehensive national environmental standards that keep up with industry developments, with conflicts between them worked out.

    b. Including a clear definition of critical infrastructure, which includes telecommunications.

    c. Ensuring that critical infrastructure is engaged early in the planning process and before decisions are made to approve developments. Developments should not get the go ahead until there is a plan for the utilities, including telecommunications.

    d. Changing the approach to designations to provide for shared infrastructure corridors.

    e. Requiring developers to make financial contributions for both public and private infrastructure developments.

    f. Providing for developers or property owners to pay compensation to network operators impacted by reverse sensitivity effects on existing infrastructure (e.g. when infrastructure has to be moved).

    g. Having a national body to take responsibility for national environmental standards for infrastructure and processing consents (at least for national networks such as telecommunications).

41. If you have any questions about this submission please contact kim.connolly-stone@tcf.org.nz in the first instance.

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