Greenpeace submission on the Fast-track Approvals Bill

SUBMITTER DETAILS

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Introduction

We thank the Select Committee for the opportunity to submit on this Bill.

Greenpeace strongly opposes the Bill. The draft legislation is anti-democratic, anti-transparency and creates vulnerability to corruption. It lacks any semblance of environmental protection, and in fact, removes existing protections.

The Bill's title is misleading. It does not implement a fast-track consenting process. Fast-track consenting involves accelerated processing and decision-making on consent applications applying the general law, including resource management law. This Bill does not apply the general law to applications, it in fact exempts applicants from having to comply with the requirements of the general law, replacing legal requirements with almost unfettered Ministerial discretions. The over-riding consideration on any application is nothing more than perceived national or regional benefit. That consideration over-rides all of the legal consent requirements a project would otherwise have to meet.

Because these are the evident and primary purposes of the Bill Greenpeace does not intend to provide a provision-by-provision critique of the Bill. That is because the Government's objectives, as embodied in the Bill, are to exclude community voices and to over-ride the general law by placing almost unchecked decision-making power in the hands of the decision-making Ministers. Given those objectives Greenpeace apprehends that the Government in fact has little interest in hearing from the community on the Bill itself, and is consulting on it as a matter of obligation and for appearances only.

In these circumstances Greenpeace makes this submission in line with one of our guiding principles – bearing witness to acts of environmental degradation – and our submission focuses on observing the true effects of the Bill.

The Bill has three fundamental problems:

- It sweeps away key environmental protections and bottom lines in New Zealand's statute book. While the Bill includes machinery that creates an appearance that existing laws will be closely followed if not applied, that appearance is misleading. When considering applications the decision-making Ministers do not have to apply any statutory criteria relating to environmental harms and to the extent they are required to consider environmental effects as part of the process required by the Bill, they can disregard all environmental effects when deciding whether to grant an application.

- By and large, the Bill removes rights of the public to participate in decision-making about their environment and communities. Participatory principles have underpinned

environmental management in Aotearoa New Zealand for decades. This is especially significant as the Bill focuses on removing public input on the most significant projects nationally but also locally. Concerningly, the Bill also reduces the opportunities for meaningful engagement with iwi and hapū.

- The combination of concentration of power, broad discretions and absence of transparent process in decision making creates fertile ground for the corruption of decision-making processes.[1] Those who want their projects to go ahead will be incentivised to curry favour and influence with officials, elected representatives, and those close to them. Equally, those who want to stop projects — being almost entirely unable to participate in the process itself — will also see these avenues as their best avenue. Laws of this nature promote practices that are corrosive to democracy. These can range from influence peddling through to bribery. New Zealand prides itself as a country where levels of corruption are low. That is not an accident. It is a product of good law-making, which requires public input, clear legal criteria for decision making, treating like cases alike, and transparency. The Bill includes few of the important hallmarks of the good, transparent, and predictable government that Aotearoa New Zealand has enjoyed. It is a significant departure from those things, the result of which is inherent susceptibility to corruption.

Greenpeace opposes the Bill

The Bill has no effective environmental protection provisions. Although applicants are required to prepare environmental assessments, the ultimate evaluation of the project does not require any weight to be given to harmful environmental outcomes.

- The Bill requires the expert panel to give more weight to the purpose of the Fast Track Act than the purpose of the RMA (for resource consents) or conservation purposes (for concessions). The Fast Track Bill does not contain any reference to sustainable development in its purpose section, unlike the previous Covid-19 Recovery Fast Track Act, nor to the conservation of natural resources. The legislation explicitly directs decision-makers to prioritise the delivery of infrastructure and development projects over any and all environmental impacts.

- The Bill enables projects to be approved even where they include an activity that is a prohibited activity under the relevant plan. Prohibited activities are not designated lightly, and under the status quo, it is impossible to obtain a consent to undertake them. Local government and their community have deemed them too harmful to ever be carried out in their area. Similarly, sch 4, cl 35(5) disapplies s 104D of the RMA, which prohibits the granting of consents for non-complying activities unless the applicant demonstrates the adverse environmental effects are minor. Under this Bill, all of that is pushed away.

- The Bill removes the ability of the Minister of Conservation to decline applications that are obviously inconsistent with the Conservation Act. It also removes the obligation to only grant concessions consistent with the purpose of the Conservation Act, the purpose the land is held for, and any conservation management plans/strategies. Conservation management plans and strategies need only be "considered", and only where co-authored by a Treaty settlement entity.

[1] See for example Transparency International *Corruption in Urban Planning* (2023) at 2–3; and Transparency International *Mining Awards Corruption Risk Assessment Tool* (2020, 3rd ed) at 6–12.

- Similarly, there is nothing to prevent Ministers approving projects that have already been declined by existing expert panels, the Environment Court and the appellate Courts, particularly where the project was declined on the basis of its harmful environmental impacts.

Secondly, the Bill lacks any real checks and balances to ensure transparency and accountability.

- Clause 25(8) suggests that Ministers are not required to give reasons if a project is approved. This renders the already limited appeal rights illusory. If no reasons are provided for approving a project, in circumstances where the decision rests largely in the discretion of the Ministers, then it is difficult to identify where an error of law may have occurred. Beyond that, the entire scheme of the Act appears to be designed to be discretionary. It has so few restraints or requirements on decision-making, that options to challenge the decision for the Ministers are likely to be limited.

- There is a lack of information transparency and significant information asymmetry between the applicant and decision-makers and any other person affected by an application that renders participation rights nugatory.

    (i) If the Ministers decide to invite comment from a person on a referral application, this may be the first time the person sees the application (the applicant has likely had several months or years to prepare). They have 10 working days to respond. If the person responds late, the Ministers may ignore their response.

    (ii) Similarly persons invited to comment by the panel only have 10 working days to comment and if received after that date, the comments may be ignored. There is an embedded asymmetry stacked against those affected by the project.

    (iii) The panel may not have a hearing, and if it does, it may exclude the public and suppress information in its ultimate discretion, whether or not the LGOIMA criteria to withhold information apply.[2] Although the LGOIMA principles of information availability under Part 1 of that Act apply to panels, Part 2, which enables information requests, does not apply.

- The scaling back of participation rights has real and concerning consequences for iwi and hapū.

    (i) The prohibition on notification excludes participation by Māori groups other than registered iwi authorities. There is no right, for instance, for hapū to comment independently, which is problematic where Māori groups have a range of differing economic, environmental, cultural and social interests at local, regional and national levels.

    (ii) The restriction of appeal rights, lack of any obligation to take into account or give effect to Te Tiriti o Waitangi, and subjugation of tikanga interests to the development purpose of the Bill reduces the ability for iwi/hapū/Māori to challenge environmentally and culturally harmful projects.

[2] Sch 4, cl 24(10) and 24(11).

(iii) The expert panel may determine what weight it wants to give to iwi management plans, Mana Whakahono ā Rohe and joint management plans. It is expressly directed to give these instruments less weight than the purpose of the Bill. This means that engagement that occurred prior to the Bill with iwi and hapū is devalued and undermined.

Thirdly, there is a complete lack of constraint and independence in relation to the referral and approval of projects.

- The referral criteria are self-fulfilling.

  (i) Clauses 17(2)(a) and (d) are effectively identical (i.e., providing a national or regional benefit). The Ministers may satisfy this by identifying it as a priority project or listing it as an infrastructure priority,[3] which is entirely circular.

  (ii) Clause 17(2)(b) is redundant, as the lack of controls and short deadlines in the Bill will inevitably mean the project is processed quicker and cheaper.

  (iii) Subclauses (c) and (e) are unrelated to the substance of the project.

  (iv) In any event, the Ministers may simply bypass this by listing projects in Schedule 1, which is apparently to happen at some late stage in the Parliamentary process.

- The Ministers may also, it appears arbitrarily, decline to refer a project, even if it meets all of the eligibility criteria. This highlights the susceptibility of the regime to practices corrosive to democracy.

- It is well-know that the construction industry internationally faces significant issues with corruption, including in Australia, a common market.

- The Ministers appoint the panel convenor, and then must be consulted on the membership of panels and the chairperson of each panel. There is little scope, if any, for independence in the expert panels. If a panel member does not meet the convenor's favour they may be removed with "as little formality and technicality and as much expedition" as is permitted by the bare minimum of natural justice rights. Because there is a duty to act promptly, any panel member raising queries or opposition risks being criticised as slowing down the process or near-summary removal for breach of duty. Lack of secure tenure and basic protections against unjustified removal erode independence.

- In any case, the Joint Ministers are not required to follow the panel's recommendations, making any constraints on decision-making imposed at that stage theoretical only. However, if the Ministers want the appearance of their decision to be informed by "independent" experts, they may simply make the panel reconsider its recommendation, and direct *how* it should reconsider.

- There is a general regulation-making power that allows for regulations providing for "anything incidental that is necessary for carrying out, or giving full effect to, this Act". It is not clear what the anticipated use of this power is.

[3] Clause (17)(3)(a).

Concluding comments

The fundamental premise of the Bill can be discerned from its machinery. It is designed to grant almost untrammelled power to Ministers to grant consents for projects they perceive to be significant at the exclusion of existing laws, democratic participation and transparency, and at the expense of the environment. Greenpeace does not, and could not, support a Bill with this objective, however drafted.

We wish to be heard in support of our submission.

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Annex 1 - About Greenpeace Aotearoa

Greenpeace is a global, independent campaigning organisation that acts to protect and conserve the environment and to promote peace. Greenpeace is one of the world's largest and oldest environmental organisations, operating for half a century, since 1971, and now works in more than 55 countries. The New Zealand branch of Greenpeace (Greenpeace Aotearoa) was founded in 1974 and has grown to represent 32,000 financial donors and many tens of thousands of supporters. Our mission is to ensure Earth's ability to nurture life in all its diversity.

Greenpeace Aotearoa recognises Te Tiriti o Waitangi signed in Te Reo Māori on 6 February 1840 as the foundation for the relationship between the Crown (and so the New Zealand Government) and the indigenous hapū of Aotearoa. Greenpeace Aotearoa recognises that Te Tiriti o Waitangi affirmed the sovereignty of the tangata whenua, which has never been relinquished despite the violent colonisation of Aotearoa.