



LEGISLATION DESIGN AND ADVISORY COMMITTEE

21 May 2020

Dr Duncan Webb MP
Chairperson
Environment Committee
Parliament Buildings
Wellington

Dear Dr Duncan Webb

Forests (Regulation of Log Traders and Forestry Advisers) Amendment Bill

Introduction

1. The Legislation Design and Advisory Committee (**LDAC**) has been given a mandate by Cabinet to review introduced Bills against the *Legislation Guidelines* (2018 edition) (**Guidelines**). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles.
2. The LDAC's focus is not on policy, but rather on legislative design and the consistency of a Bill with the principles contained in the Guidelines.
3. We note that limited time has been made available for submissions on this Bill. Given this context, we have identified only the most obvious points. Our submission is directed at:
 - new section 63D and the lack of criteria for the power to delegate Forestry Authority functions and powers outside of the Public Service
 - the ability to delegate the Forestry Authority's power to make rules (non-compliance of which is an offence)
 - the lack of criteria within the Bill on what conditions may be imposed on registration of a forestry adviser
 - the accumulative penalty imposed by 63ZQ on unpaid fees, charges, or levies.

New section 63D

Effect of proposed provision

4. New section 63D allows for the Secretary to delegate all or any of the Forestry Authority's functions or powers to a forestry industry body or other person outside the Public Service. This new section provides that the Minister must not approve any such delegation unless satisfied that the proposed delegate has sufficient capacity and resources to properly perform the delegated functions and exercise the delegated powers.
5. In approving the delegation, section 41 of the State Sector Act 1988 also requires that the Minister be satisfied that any potential conflicts of interest will be avoided or managed.

Concern about the proposed provision

6. LDAC notes that although section 41(2A) of the State Sector Act 1988 provides for clearly identified functions or powers to be delegated outside of the Public Service, this does not preclude the need for any such delegation to be consistent with fundamental constitutional principles and the rule of law, especially when the delegation is of a regulatory power.¹
7. LDAC observes that the current test of sufficient capacity and resources does not give any indication to Parliament of what kind of entity the Forestry Authority's powers might be delegated to. At a minimum we recommend there be a positive test for both to *whom* the Forestry Authority's functions or powers could be delegated and *why* the powers or functions would be delegated.
8. We make this recommendation in light of the breadth of the new section 63A purpose and the Forestry Authority's functions in new section 63C and the ability for rules to be made for any of the purposes for which regulations made be made (section 63ZV(2)(a)). These functions appear to extend into economic regulation of the industry through conditions of registration (63ZW(f)), stipulation of the form of contracts that must be used (63ZW(i)), powers to make rules requiring log traders and advisers to adhere to identified forestry industry agreements (63J(b)(ii) and 63N(c)(ii)), and powers to make rules imposing additional obligations on registered persons. It matters to whom the Forestry Authority's powers or functions may be delegated.
9. The Forestry Authority will need to have an appropriate level of authority, expertise, accountability and independence. The ability to delegate this role to a forestry industry body, and therefore to a body which represents specific and potentially partisan interests, is risky. We think either delegation to a potentially partisan body should not be permissible, or if it is, then the functions that may be delegated are circumscribed, so that they do not

¹ Legislation Guidelines (2018 edition) chapter 4.1

include functions which conventionally require independence (particularly economic regulation and law-making).

10. We also consider that the committee should give close scrutiny to those provisions that appear to allow for economic regulation of the industry to determine whether this is intended and that the powers are appropriately framed.
11. LDAC notes and supports the safeguards and protections for the exercise of the Forestry Authority's powers provided by new sections 63E (audit powers) and 63W (right of review) and 63Z (arbitration of unresolved disputes). These are appropriate protections, and sit well with the other protections outlined in the clause by clause analysis of new section 63E the Bill.

New section 63ZV

Effect of proposed provision

12. New section 63ZV empowers regulations to be made allowing the delegated regulator to make rules. The effect of this section is to allow a private body to make law, non-compliance with which is an offence (new section 63ZA) and may result in that person being excluded from their livelihood.

Concern about the proposed provision

13. LDAC is concerned with the legitimacy of this new section. New section 63ZV appears to be novel in its empowerment of an undefined private body to make law. It is highly unusual for the law provide for the delegation of a law-making power at all, let alone to a private entity.
14. The person authorised to make secondary legislation should be appropriate having regard to the importance of the issues and the nature of any safeguards that are in place.² Traditionally, secondary legislation is made by the Governor-General on the advice of Ministers, or by the relevant portfolio Minister, and occasionally by a State regulator. The more significant the power, the more likely it is that it should be exercised by the Governor-General in Council.
15. LDAC observes that although the rules are likely to be technical in nature and require expertise to develop, the power to make these rules is not an insignificant power:
 - the rules may set standards for any matter relating to forestry operations and the delivery of forestry adviser services.
 - a failure to comply with rules is an offence (with fine not exceeding \$40,000 for an individual and \$100,000 in any other case).

² Legislation Guidelines (2018 edition) chapters 14.3 and 14.4

- the rules apply not to a limited group of persons but across all log traders and forestry advisers.³

16. Given the above, there appears to be a lack of justification for allowing the power to make rules to be delegated to a private sector body. An appropriate starting point is that secondary legislation should be made by regulations unless it is demonstrably justifiable why regulations are not suitable. And if there are to be rules, then it would be usual for those rules to be made by a Minister (perhaps on the recommendation of a regulator). As with new section 63D, our concerns are heightened by the potential for delegation to a partisan body.
17. If a delegated regulator is to have the power to make rules, we which do not recommend, there should be a more comprehensive procedure for making those rules (including a positive test for when those rules can be made and a more extensive consultation requirement, and potentially a cost benefit analysis).

New section 63T

18. New section 63T empowers the Forestry Authority to impose any conditions it thinks fit on the registration of a forestry adviser. There is little guidance within the Bill on what these conditions can comprise – this lack of specificity and safeguards is all the more important if this Forestry Authority power is delegated to a private body.⁴
19. LDAC notes the ability for conditions of registration to be restricted by regulation, but observes that such regulations do not need to be in place before the section 63T powers to impose conditions can be exercised.

New section 63ZQ

20. New section 63ZQ provides for an accumulating penalty of an initial 10 percent followed by 10 percent every 6 months after the due date, for where a person fails to pay any fee, levy or charge. LDAC queries the justification for this accumulating penalty.⁵ We note that new section 63ZS will provide the ability to withdraw services until the debt is paid, avoiding ongoing accrual of costs for the Forestry Authority. We question whether it is intended that the failure to pay a fee, levy or charge would also comprise an offence with the associated penalty (as a breach of obligations covered by new sections 63J(f) and 63N(h))?

³ See new section 63ZZC

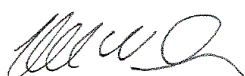
⁴ Legislation Guidelines (2018 edition), chapters 18.5 and 18.6

⁵ Legislation Guidelines (2018 edition), chapters 22.1 and 22.2

Recommendations

21. For the above reasons, we recommend:
- the inclusion of a positive test for both to *whom* the Forestry Authority's functions or powers could be delegated and *why* the powers or functions would be delegated.
 - against allowing the delegation of significant regulatory functions or the power to make rules to a private body, particularly an industry or other potentially partisan body.
 - the committee give close scrutiny to the provisions in the Bill that appear to provide for economic regulation of the forestry industry.
 - that rules should be made by regulations or potentially as rules made by the Minister (instead of as rules made by the Forestry Authority) unless there is a demonstrably justifiable reason for doing otherwise.
 - if rules may be made by a delegate, a more comprehensive procedure for making the rules ought to be specified in the Act in order to ensure a high quality result.
 - consideration be given to including more guidance about the types of conditions that the Forestry Authority may impose on the registration of a forestry adviser.
 - consideration be given as to the justification for including the new section 63ZQ penalty for non-payment of fees, charges and levies.
22. Thank you for considering our submission. We wish to be heard briefly.

Yours sincerely



Karl Simpson
Chair
Legislation Design and Advisory Committee