

Ref: DOC 5730277

14 March 2019

Attn: Chief Executive
All Territorial Authorities

Tēnā koe

Subject: The revocation of certain delegations to Territorial Authorities under the Reserves Act 1977

In June 2013, the Minister of Conservation delegated certain powers under the Reserves Act 1977 (the 2013 delegations) to Territorial Authorities. Over the past year or so there have been instances where Territorial Authorities have relied on the delegations to exercise the prior consent role of the Minister in circumstances where they have also made the initial decision to grant the instrument or activity applied for.

In a recent Court of Appeal decision, (*Opuā Coastal Preservation Inc v Far North District Council*)¹ the Court considered a delegation of the Minister’s prior consent role under s 48 of the Reserves Act 1977 to be “highly unusual”. The Court commented that it could be argued that it replaced a two-step process involving two separate decision makers (the Council and the Minister) with a single-step process and a single decision maker. The Court noted that the effect of the delegation was that the Council made both decisions contemplated by s 48(1)(f) of the Reserves Act and observed that “[I]t might be thought that in these circumstances any difference of view between the two decision makers is unlikely”. The Court did not rule on the legality of the delegation because the Appellant had not pursued the matter. Nevertheless, it seems that had the lawfulness of the delegation been in issue the Court would have ruled it to be unlawful.

In light of the above, we have undertaken a review of the 2013 delegations was undertaken, it would appear some are potentially unlawful and would put Councils in a position of conflict of interest, for example;

- a) Those where a Council makes its own decision and then acts under delegation to exercise the prior consent role of the Minister;
- b) Those where the Minister’s power to carry out certain actions has been delegated to Councils, including a requirement for the Minister to consult with a Council before exercising the power. In this situation, a Council would end up consulting with itself.

¹ *Opuā Coastal Preservation Incorporated v Far North District Council & Others* [2018] NZCA 262 20 July 2018.

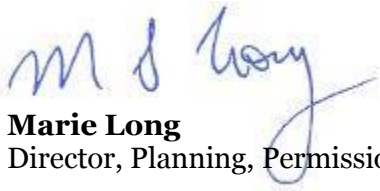
In view of the above, the Minister of Conservation is considering a proposal whether to revoke certain delegations and has requested that the Department seek your comments before the Minister makes a decision. Attachment 1 to this letter sets out the delegations proposed to be revoked and contains a column for you to insert your comments/views.

We also take this opportunity to invite you to identify any new delegation proposals that you believe would improve efficiencies for Councils and that you would like the Minister to consider. We ask that you use Attachment 2 for this purpose.

A table of the sections, the power delegated and the reasoning for the revocation is attached, along with a table for any new items you may want considered.

Please forward your responses no later than 26 April 2019 to Sheryll Johnson, sjohnson@doc.govt.nz. All comments will be collated and forwarded to the Minister for a final decision.

Nāku noa, nā

A handwritten signature in blue ink, appearing to read 'M Long', is positioned above the printed name and title.

Marie Long
Director, Planning, Permissions and Land

Attachment 1 – Proposed Delegations for Revocation

Section Heading	Power Delegated	Reason	Comment
Section 14 Local authority may declare land vested in it to be a reserve for certain purposes	Section 14(4) Minister must consider resolution and cause it to be gazetted or refuse to do so	The Council would be double dipping - i.e. making a resolution and then considering it again in the shoes of the Minister	
Section 15 Minister may authorise exchange of reserves for other land	Section 15(1) Minister may authorise exchange provided that Minister not exercise power in respect of a reserve vested in an administering body except pursuant to a resolution of that body requesting exchange Section 15(3) The Minister or the administering body, as the case may require, may do all things necessary to effect any exchange, including the payment of money	The delegation enables the Council to control the outcome This delegation is not necessary as s15(3) already authorises the administering body to do these things	
Section 24 Change of classification or purpose or revocation of reserve	Section 24(1) If Minister considers the change of classification or purpose advisable or if the local authority notifies Commissioner that pursuant to a resolution of the local authority of proposed changes, Minister may make changes Section 24(2)(e) Before classification or purpose is changed or reservation revoked, the Minister must consider proposal and, in the case of objections made to an administering body, the administering body's resolution	The delegation enables the local authority to make the resolution seeking the changes It also enables it to exercise the Minister's powers to agree to the changes. The delegation to a Council is inappropriate It would be exercising the Minister's powers to consider objections made to the administering body's own resolution	
Section 41 Management Plans	Section 41(1) Administering body must prepare and submit to Minister a management for approval	The delegation seems inappropriate. The administering body ends up preparing the plan and approving it. The intention is that there be a separation of powers	
Section 42 Preservation of trees and bush	Section 42(1) The destruction of trees and bush on any historic, scenic, nature or scientific reserve may not occur without a permit granted under s 48A or with the express consent of the Minister	As noted below it would not be appropriate to delegate to administering bodies the Minister's power under s 48A(3) to impose conditions	

Section 45 Erection of shelters, cabins and lodges	Section 45(1) The administering body may with the Minister's prior consent approve certain things	The delegation is inappropriate The administering body makes both the initial decision and the Minister's decision	
Section 48 Grants of rights of way and other easements	Section 48(1) Where reserve vested in administering body, it may with the consent of the Minister grant rights of ways and easements	The delegation is inappropriate The administering body makes both the initial decision and the Minister's decision	
Section 48A Use of reserve for communication station	Section 48A(1) The administering body of a reserve vested in it acting with the consent of the Minister may grant a licence for certain things Section 48A(3) A licence issued under s 48A(1) must be subject to such terms and conditions as the administering body imposes with the approval of the Minister	The delegation is inappropriate The administering body can give itself consent by exercising the delegation The delegation is inappropriate The administering body makes the initial decision on terms and conditions and can then ratify it by exercising the delegated power.	
Section 51 Introduction of flora and fauna	Section 51(1) For the purpose of restoring, promoting or developing certain reserves, the Minister may authorise the administering body to introduce flora or fauna	The delegation is inappropriate In exercising the power of the Minister, the administering body is able to act in its own interests.	
Section 53 Powers (other than leasing) in respect of recreation reserves	Section 53(1)(d) Administering body may prescribe not more than 40 days in any year that the public shall not be entitled to have admission to reserve unless on payment of charges provided that with the Minister's prior consent the number of days may be increased Section 53(1)(e) The administering body may grant exclusive use of reserve but not for more than 6 consecutive days, with power for licensee to charge admission fees provided that the Minister may consent to an increase in the number of consecutive days	The delegation is inappropriate. The administering body is able to increase the maximum number of days to exclude the public from a reserve unless they pay money; and then confirm the decision by exercising the delegated power. The delegation is inappropriate. The administering body makes the initial decision on closure and can then increase the period by exercising the Minister's powers.	
Section 54 Leasing powers in respect of recreation reserves (except farming, grazing, or afforestation leases)	Section 54(1) With the prior consent of the Minister the administering body in which a reserve is vested may lease parts of a reserve to a third party	The delegation is inappropriate. The administering body makes an initial decision to lease and then exercises the Minister's powers to grant prior consent.	
Section 55 Powers (other than leasing) in respect of reserves	Section 55(2)(a) The administering body of a scenic reserve may,	The delegation is inappropriate. The administering body makes both	

	<p>with the prior consent of the Minister, enclose open parts of the reserve.</p> <p>Section 55(2)(d) The administering body of a scenic reserve may, with the prior consent of the Minister, set apart areas for gardens, baths, picnic grounds etc for the public.</p> <p>Section 55(2)(e) The administering body of the scenic reserve may, with the Minister's prior consent, erect buildings on the reserve</p> <p>Section 55(2)(f) The administering body of the scenic reserve may, with the prior consent of the Minister, do such things as it considers necessary, including the erection of buildings and structures for public use to obtain the enjoyment of the sea, lake, river or stream</p> <p>Section 55(2)(g) The administering body of a scenic reserve may, with the prior consent of the Minister, set apart and use part of the reserves as sites for residences etc for the proper and beneficial management and administration of the reserve</p>	<p>the initial decision and the Minister's decision</p> <p>The delegation is inappropriate The administering body makes both the initial decision and the Minister's decision</p> <p>The delegation is inappropriate The administering body makes both the initial decision and the Minister's decision</p> <p>The delegation is inappropriate The administering body makes both the initial decision and the Minister's decision</p> <p>The delegation is inappropriate The administering body makes both the initial decision and the Minister's decision</p>	
Section 56 Leasing powers in respect of scenic reserves	<p>Section 56(1) With prior consent of the Minister, the administering body in the case of a scenic reserve may grant leases or licences</p> <p>Section 56(2) Before granting a lease, the administering body must give public notice</p>	<p>The administering body makes both the initial decision and the Minister's decision</p> <p>This delegation is not necessary</p>	
Section 58 Powers in respect of historic reserves	Section 58(b) With prior consent of the Minister, the administering body may set apart and use part of an historic reserve for residences for officers and staff	The administering body makes both the initial decision and the Minister's decision	
Section 58A Leasing powers in respect of historic reserves	Section 58A(1) With prior consent of the Minister, the administering body of an historic reserve may grant leases or licences	The administering body makes both the initial decision and the Minister's decision	

<p>Section 59A Granting of concessions on reserves administered by Crown</p>	<p>Section 59A(1) The administering body may grant concessions</p>	<p>This seems inappropriate. If administering bodies of vested reserves need the prior consent to Minister to grant leases and licences, why should administering bodies of controlled and managed reserves be able to grant concessions?</p>	
<p>Section 67 Leasing</p>	<p>Section 67(1)(b) With prior consent of the Minister, the administering body may lease a recreation reserve set apart for racecourse purposes to a racing club</p>	<p>The administering body makes both the initial decision and the Minister's decision</p>	
<p>Section 72 Farming by another person or body</p>	<p>Section 72(1) Where a recreation reserve or local purpose reserve is not required for purposes of classification the administering body may enter into an agreement or lease with the Minister to provide for a third party to carry out farming</p>	<p>The delegation is inappropriate as the administering body would end up entering into an agreement with itself</p>	
<p>Section 73 Leasing of recreation reserves for purposes of farming, grazing, afforestation or other purposes</p>	<p>Section 73(1) Where recreation reserve not currently required for purposes of its classification, the administering body may with the prior consent of the Minister if reserve vested in the administering body, grant a lease, otherwise only Minister can grant leases</p> <p>Section 73(2) Likewise, for afforestation</p> <p>Section 73(3) Leases of recreation reserves where inadvisable or inexpedient to revoke reservation of recreation reserve</p> <p>Section 73(5) Prior consent of Minister before any member of administering body becomes the lessee of land under control of administering body</p> <p>Section 73(6) Any lease under s 73 may with approval of administering body be surrendered</p>	<p>The administering body makes both the initial decision and the Minister's decision</p> <p>The administering body makes both the initial decision and the Minister's decision</p> <p>The administering body makes both the initial decision and the Minister's decision</p> <p>Delegation is inappropriate</p> <p>Delegation is unnecessary</p>	

Section 74 Licences to occupy reserves temporarily	Section 74(1)(b)(ii) Licences may be granted in the case of any reserve except a nature reserve by the Commissioner	This delegation is misconceived. This power relates to Crown vested reserves managed by the Department	
Section 75 Afforestation by administering body	Section 75(1) With prior consent of the Minister an administering body of a recreation reserve may afforest it. Section 75(2) Minister may refuse to give consent	The administering body makes both the initial decision and the Minister's decision The administering body makes both the initial decision and the Minister's decision	
Section 16 Classification of reserves	Section 16(1) Minister must by GN classify reserves according to their primary purpose provided that where reserves are controlled or managed by a Council the Minister must not classify without consulting it Section 16(4) Before classifying a reserve, the Minister must give public notice	The delegation effectively means the Council consults with itself. If the previous delegation is revoked this will need to be revoked as well	
Section 18 Historic reserves	Section 18(2)(e) Except where the Minister otherwise determines, the indigenous flora and fauna and natural environment of an historic reserve shall as far as possible be preserved	The Minister may wish to maintain control of these decisions	
Section 19 Scenic reserves	Section 19(2)(a) Except where the Minister otherwise determines, the indigenous flora and fauna and natural environment of a scenic reserve classified for its scenic values shall as far as possible be preserved and exotic fauna and flora shall be exterminated Section 19(3)(a) Except where the Minister otherwise determines, the flora and fauna, ecological associations and natural environment and beauty of a scenic reserve classified for the purpose of providing suitable areas to develop for purposes of generating scenic beauty or interest, shall as far as possible be preserved	The Minister may wish to maintain control of these decisions The Minister may wish to maintain control of these decisions	

<p>Section 24 Change of classification or purpose or revocation of reserve</p>	<p>Section 24(3) No change of classification or purpose of a scenic, nature or scientific reserve to a recreation, historic, government purpose or local purpose should be made except where the Minister considers the purpose etc no longer appropriate because of destruction of bush or natural features</p> <p>Section 24(5) Minister may change the classification or purpose or revoke the reservation of an historic reserve by reason of destruction of historic features</p>	<p>The Minister may wish to maintain control of these decisions given the importance of the type of reserve</p> <p>The Minister may wish to maintain control of these decisions given the relative importance of historic reserves</p>	
<p>Section 42 Preservation of trees and bush</p>	<p>Section 42(1) Minister must consent to cutting or destruction of bush on any historic, scenic, nature or scientific reserve except in accordance with a permit under s 48A or with the express consent of the Minister and subject to any terms and conditions the Minister chooses to impose</p>	<p>The section 48A permit issue has been dealt with in the table above The Minister may wish to maintain control over the circumstances of providing express consent to destroying or cutting down bush.</p>	
<p>Section 50 Taking or killing of fauna</p>	<p>Section 50(1) The Minister in the case of a scenic, historic, nature or scientific reserve and the administering body of any recreation, government purpose or local purpose reserve may grant any qualified person authorisation to take and kill any specified type of fauna and authorise the use of firearms etc.</p>	<p>The Minister may wish to maintain control over authorisations on the killing etc of fauna on scenic, historic, nature and scientific reserves</p>	

Attachment 2 – Proposals to amend / expand delegations

Section Heading	Power Delegated	Reason	Comment