Report of the Minister for the Environment's Technical Advisory Group

February 2009

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Introduction

The Government is concerned at the widely reported costs and delays associated with process under the Resource Management Act 1991 (RMA or the Act). The causes of these costs and delays are obviously of varying origin and complexity, and we have been asked as the first stage in a reform process, to advise how these issues might be addressed so as to facilitate the early introduction of a Bill that seeks to:

- streamline and simplify processes
- provide priority consenting of major projects
- reduce costs and delays
- speed-up plan making processes
- restrict trade competition, vexatious and frivolous objections.

We have also been asked to:

- consider other amendments put forward by members of the Technical Advisory Group (TAG), local government and support parties, and advise on their suitability for inclusion in the reform bill
- provide advice on other non-legislative reforms that will assist the effective functioning of the RMA
- identify other RMA reforms that require longer term consideration and that should be considered as part of a second phase of reform.

Of course it is not just the incoming government that is concerned at these costs and delays. Applicants, submitters and Councils all bear a burden in one form or another. Nor are these new concerns. It is noteworthy that the Select Committee reporting on the 2005 Amendment recorded that that Bill proposed 'radical surgery' to address 'problems with delays, costs, inconsistencies, uncertainty and a lack of national leadership regarding the Act's processes and in decision making'.

Chapter 1 examines a number of proposals in relation to the plan making process.

Chapter 2	relates to reform proposals in respect of application procedures.
Chapter 3	proposes some improvements to the current consenting process for projects of national significance.
Chapter 4	relates to frivolous and vexatious submissions, and trade competition.
Chapter 5	contains recommendations for further reforms that warrant consideration.
Chapter 6	identifies some other non-legislative reforms that may assist with the functioning of the RMA.
Chapter 7	identifies issues concerning the extent to which our present three tiered governance structure is able to efficiently and effectively deliver the desired environmental outcomes.
Chapter 8	identifies other reforms that require longer term consideration and should perhaps be considered as part of a second phase of reform.

The Technical Advisory Group's process

Reform of the Resource Management Act was very high on the new Government's agenda. The Government determined to introduce a Bill to streamline and simplify the RMA within the first 100 days of being in office. The TAG was brought together in December 2008 to provide independent advice to the Minister for the Environment on Phase 1 of this process. The TAG has been very conscious of the need to complete its work within this tight timeframe. The work has been intense and focused.

The essence of the TAG's work has been 'streamlining and simplification' of the Act – the TAG has deliberately refrained from recommending changes to the environmental standards applicants must address to be granted resource consent. Those thresholds remain where they were before the TAG commenced its work.

There has been a considerable chorus of criticism of the RMA since its introduction. The process changes recommended by TAG are focussed on the removal of process elements that are costly in both time and money and add little if any real value to the outcome. No matter how extensive the process, the reality is that there will still be parties in opposition to any proposal or decision. The aim of RMA processes must be to ensure good outcomes without incurring unnecessary delay and cost.

The TAG does not see its recommendations as limiting in any way the real opportunity for the public at all levels to participate in both plan making and resource consent decision making – what it aims to remove is the use of processes that make no worthwhile contribution to the quality of resource consent decision making.

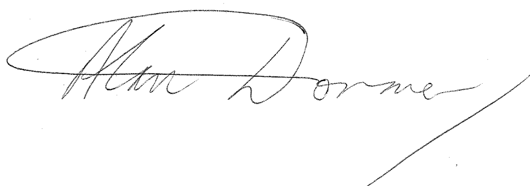
It has not been practical in the time available to assemble an evidence base to match each of the TAG recommendations. Rather, we have taken the judgment of excessive delays, uncertainties and costs as a mandate for change, and we have sought to analyse the origins of these widely perceived problems. In this task we have relied on our own extensive and collective experience and capacity to analyse the issues from various perspectives drawing on advice and submissions received.

In this first phase of the review our analysis of the sources of unnecessary delays, uncertainties and costs focuses mainly on the law itself, but we acknowledge there are other important dimensions. The institutional framework in which the law operates in practice: the multi-layered, elected political governance system; the extensive public participation and hearings processes; the culture and practice within the resource management process; and the relatively high incidence of appeals to the Environment Court on both plan-writing and consent matters, should not be overlooked.

The short time frame for its work meant that some issues could not be fully considered – where that occurred the TAG has recommended those issues be considered in Phase 2.

Acknowledgements

We wish to record our thanks and appreciation to those staff at Ministry for the Environment for all their wonderful and unstinting assistance. We had the benefit of research papers and briefings which were most helpful. We also acknowledge the submissions that were made available to us, and note that some ideas can still be picked up during Phase 2.



Alan Dormer
Chairman

1 The plan making process

1.1 Introduction

The plan making process is an essential part of procedures under the RMA. It is through their plans that city, district and regional councils:

- express their community's aspirations as to how their city, district or region's environment might best be managed
- regulate activities (supposedly by reference to their effects) with a view to achieving the objects of the Act
- provide for the local implementation of national policy statements and national environmental standards.

The official briefing paper prepared for our group identified the issue in the following terms:

> *"Repetitive and costly consultation processes, broad appeal rights, and the time consuming reporting requirements can add tens of thousands of dollars and years to plan preparation and to change processes. This prevents plans being an effective mechanism for addressing identified environmental issues while being responsive to emerging issues."*

A preceding report: *"RMA Schedule 1 Processes – Preliminary Analysis of Options for Future Amendments"* reported that in October 2008 a survey of data derived from the MfE database noted that:

- after 17 years of the RMA five of our 85 local authorities still did not have an operative plan
- only a similar number of local authorities had notified their second generation plans (these are required to be prepared at no greater than 10 year intervals)
- on average it takes local authorities 2.5 years of research and drafting and consultation before a proposed plan is notified

- on average it takes 3.3 years to resolve all appeals after a council has made its decision on submissions
- the average time from start to finish of the plan process was 8.2 years
- the average time from start to finish for plan changes was 3 years.

In our view this long timeframe is likely to mean that by the time the plan becomes operative:

- it may fail in significant respects to properly reflect community needs or aspirations
- environmental issues facing the council are different in form or emphasis from those which were current when preparation work started on the plan
- there will be extended periods when costs are placed on local authorities, resource consent applicants and the community by their having to deal with parallel requirements of currently proposed plans and transitional plans
- Councils may be deterred by cost and delay from promoting desirable changes to their plans.

The same report addressed the cost incurred by councils in producing plans. The first plans on average cost $1.9 million (taken over all of New Zealand's local authorities, that is a total of $130 million). Ericksen et al[1] have estimated that in addition, a further $30 million was expended by central government agencies in relation to plan making. Of the money expended by councils some 37% was spent prior to notification on consultation, researching and drafting, and 27% was incurred in resolving appeals.

The mean cost of plan changes (excluding appeals) was reported in one study of 20 changes as being $109,540.[2]

[1] *Planning for Sustainability: New Zealand Under the RMA* , Ericksen, Berke, Crawford and Dixon, International Global Change Institute, University of Waikato, 2003

[2] Advice from Ministry for the Environment 'RMA Schedule One Processes'

It was the TAG view that, by any measure, this data presented an unacceptable picture. One can only muse as to whether either the environment or society as a whole has been well served by this huge commitment of resources.

There is clearly a pressing need to address issues of both the costs and delays inherent to date in preparing and changing plans.

The costs come in many forms, and benefit no one. It is important to remember that the costs cited above are only those incurred by the councils preparing the documents. They do not include those costs incurred by other public agencies in their involvement in the process, nor those borne by landowners and resource users affected by the documents, nor those of community groups or individuals. To these direct costs must also be added the deadweight losses to the economy, and the higher prices paid by consumers of goods and services.

Self-evidently, reform is necessary.

The TAG was presented with a great number of suggestions as to improvements in the process. Many of these could not be sufficiently well developed in the time frame available, and arguably some should not be proceeded with without a degree of public debate and consultation greater than is afforded by the Select Committee process.

Nevertheless, we believe that there are some changes that can be made relatively easily, and without adversely impacting the rights of participants in the process.

1.2 The appeal process

Clearly the appeal process is a large contributor to both the costs and delays associated with the introduction of new plans and proposed plan changes.

The very concept of an appeal process as regards district and regional plans is to a considerable extent inconsistent with the devolved regime established by the RMA.

The preparation of plans is essentially a legislative function having similarities to the passage of legislation by Parliament, and to the making of by-laws by local government.

Legislative decisions are not generally appealable to the Courts, except to the extent that they may have exceeded the legislative jurisdiction conferred upon the law

making body. Thus, appeals on points of law are entirely consistent with the council's legislative role as regards plan making. Appeals on the merits of the policy direction of the plan are, however, a very different proposition. There is little precedent for Courts having conferred upon them responsibility for legislative functions, other than in the supervisory jurisdictional role alluded to above. The underlying constitutional reasons for this have their origins in the concept of the separation of powers which dates back as least as far as the 18th century French political philosopher Montesquieu. Those who make the laws should not enforce them or interpret them. Those who interpret the laws should not themselves be the law-makers. It is an underlying principle of a democracy that we elect those who govern us, who then make rules for our benefit. Those people we elect are then accountable to us, and we can remove them by the same means by which we chose to install them.

We do not, however, elect our Judges.

A democracy based upon the rule of law rarely provides for the election of Judges. Their role is to interpret and apply the laws passed by those accountable, to whom we have entrusted legislative functions.

That Judges are not directly accountable is a protection against their currying favour with the electorate. It is central to our democracy.

It is also inappropriate for Judges to exercise legislative functions because they are not accountable to the electorate for the decisions they make. Thus, it is the elected representatives who have the responsibility for revenue raising, allocating priorities for expenditure, and explaining their decisions to the people.

Our present system combines the role of elected legislator with an appeal on both the merits and the law to a judicial body, the Environment Court. On constitutional grounds alone, there is therefore much to be said for abolishing the right of appeal on the merits as regards the policy content of plans. Furthermore when taking into account the extent to which the system contributes to the cost and delays, we are satisfied that changes are required.

The TAG was conscious of the considerable extent to which the abolition of this right of appeal may be seen by many as a significant erosion of long held rights, and on balance took the view that consideration of such a reform was best left to Phase 2. There are some additional considerations. Because policy statements and plans

provide the objectives and policies for decision-making on consents, their clarity focuses and influences both the scope of litigation, and costs and delay in the consenting process. Review by the Environment Court of plans has historically provided an important mechanism for quality control and protection of property rights, as well as a means of ensuring that plans do in fact reflect the matters which Parliament has listed as being of national importance.

We therefore recommend that the right of appeal on matters of law be maintained. We are, however, as part of Phase 1, attracted to a system in which the right of appeal to the Environment Court is limited by a requirement to seek the leave of the Court. We would suggest that the following criteria may appropriately limit appeals, namely that the proposed policy statement or plan:

(a) would have a significant impact on existing property rights

(b) would fail to give effect to matters provided in Part 2 of the Act

(c) is of unclear meaning and intent

(d) is manifestly unreasonable.

We are conscious that the majority of appeals on plans are made by landowners concerned with issues in (a) above. It was not possible in the time available for the TAG to assess how far the number of appeals on plans would actually be reduced by the proposed requirement to seek leave, nor to assess whether the benefits under this head would outweigh the additional time and cost of applications and hearings on applications for leave. For this reason, we are recommending further study of this issue in Phase 2 of the reform process.

1.3 Plan reviews

The Act requires that plans be reviewed every 10 years.

As has already been outlined, the TAG reached the view that this was both a time consuming and costly practice. The theory behind the requirement is no doubt to require local authorities to keep their plans up-to-date. Our view, however, was that it was counter-productive in this regard. The compulsory review is, unless a council decides to merely *"roll over"* its existing plan, consumptive of resources that could well in our view be better devoted to researching and preparing periodic plan changes.

We therefore recommend that in the case of city and district councils a requirement to produce a new plan every 10 years be replaced with a general duty to keep the plan up-to-date. As regional councils have no statutory obligation to prepare plans, (except a regional coastal plan), this recommendation applies to city and district councils only.

1.4 Effect of proposed plan changes

As previously indicated, the costs of delays in the plan preparation process are not borne entirely by the local government agency preparing the plan. Significant costs are borne by owners of property affected by the plan, in terms of the direct costs they incur in seeking to protect their interests. Similarly of course individuals and community groups seeking changes to the proposed plan also incur significant costs. Further costs are borne by the applicant, the councils and submitters by virtue of any proposed development or resource use having to be considered by reference to two documents, the existing plan and the proposed change or proposed review. In some cases, as the Select Committee noted in its 2005 report, some councils have many layers of plans, including transitional plans, proposed plans, proposed variations to plans, and proposed variations to proposed variations. This creates uncertainty and complexity, and increases the likelihood of time delays and appeals from all sides. It also results in additional costs for applicants, objectors and councils.

These latter costs are a direct consequence of all proposed plans and proposed plan changes having effect or force from the date of their public notification.

One can readily appreciate that in a few, limited circumstances, it is essential for the new planning instrument is to be immediately effective to, for example, preserve historic buildings or notable stands of trees, or set an allocation limit for water. If the rule did not have immediate effect, then the building or trees could be demolished or destroyed, or there could be a rush of applications to circumvent the new limits.

However, that does not apply in the bulk of cases. In those cases where the new rules are to be more restrictive of owners' rights, or resource users' opportunities, we recommend that the rules have no effect until after the council decision on submissions is released.

At least by that time, the council's legislative intentions will have been tested by the submission and hearing process in similar fashion to that undergone by a Bill in its passage through its Parliamentary stages.

We see two benefits in this proposed reform. First, the burden in assessing a project against multiple sets of criteria will be lifted. This simplification will assist both councils and those participating in the application process. Secondly, this reform will provide an incentive for councils to proceed more quickly with the hearing of submissions on proposed plan changes.

In relation to those cases where immediate effect is important, we recommend a procedure whereby an application can be made to the Court or the Minister for an appropriate order.

1.5 Consultation

The initial plan preparation period accounts, as indicated, for a considerable part of the costs and delays associated with the plan making process. The effect of Clause 3C of Schedule 1 is that consultation which a council has already undertaken under another enactment has to be undertaken all over again, if that consultation took place more than 12 months preceding notification of the proposed policy statement or plan that the matter relates to. This is a contributor to these costs and delays. We recommend that this period be increased to 36 months.

1.6 General objections

The hearing of submissions and making of decisions is at present unnecessarily complicated by councils having to specifically address each and every point of submission and cross-submission in their decisions. We recommend that this part of the process be streamlined by allowing councils to make their decisions in terms of subject matter or content.

This difficulty is exacerbated on some occasions by submitters opposing the proposed plan in its entirety. In itself, that will be appropriate on occasion, but unnecessary costs and delays are brought to bear by appeals seeking similar relief. The Court has no power to order the withdrawal of an entire plan.

We recommend that this right of general challenge be curtailed in respect of plans, but be retained in respect of proposed plan changes. Clearly the latter will often be of very restricted compass, and a general right of objection need necessarily be retained.

1.7 Cross submissions

The cross-submission process clearly adds considerably to the cost, complexities and delays associated with the preparation of a proposed plan or plan change. It does, however, also provide an important, and some would say necessary protection for property owners whose land is affected by the submissions of those who seek alterations to the plan as notified. Similarly it provides an important/necessary avenue for involvement for those interest groups seeking to protect the environment.

The costs associated with the process include the preparation of a summary of submissions. (Although in our view much of this would be incurred by the council in any event, as it would be needed as part of the ordering of the hearing process). The complexity and costs are further added to by the need under the Act to issue decisions specifically referring to each individual submission and cross-submission. We recommend that this requirement be deleted.

The delays are further contributed to by the lengthy cross-submissions period of up to three months. We recommend that clause 8 of Schedule 1 set a 20 working day maximum.

A common complaint with the cross submission process is that people can "wake up one morning" and find that their range of permitted activities has been significantly eroded by way of a council decision on a submission of which they were completely unaware. We therefore suggest that a council decision may not limit an owner's land use rights more than was proposed in the proposed plan or plan change. If a council wishes to accede to a submission which would have that effect it is to do so by way of a plan change or variation. An exception to this could be made in respect of those submissions which impact upon only a limited number of properties, and of which the council has given notice to the affected owners.

Such a reform would both serve to address this genuine problem, and also have the almost certain effect of reducing the number of cross submissions, thereby contributing to savings.

We would however only propose this reform in respect of land use issues, not discharge or other resource use rights. The basis for this distinction is that the Act contains a presumption that owners should be able to do with their land as they wish, subject to the rules of a plan; whereas discharge and water take rights and the like

are the subject of the reverse presumption, namely that they may be undertaken only in accordance with a rule in a plan.

1.8 Combined plans

Currently the Act provides for local authorities to produce combined plans; although it is unclear whether it allows the combining of regional policy statements into such a document.

It is disappointing that more use has not been made of this power.

One would have perhaps thought that, in areas such as the Waikato, where there are a number of territorial authorities facing very similar resource management issues, councils would have seen the cost benefits in combining to produce a single district plan. We are aware that local authorities in the Wairarapa have joined to produce a combined district plan, and that the Manawatu/Wanganui Regional Council has produced its "One Plan". We think there is merit and much to be gained by more collaboration.

We recommend that as part of Phase 2 of the reform project, consideration be given to empowering the Minister to require councils to co-operate for this purpose.

1.9 Section 32 (and section 32A)

The intention behind section 32 was to ensure a high level of rigour and discipline in the Plan development and rule making process. Before making decisions, councils are required by this section to undertake a proper cost benefit analysis and fully consider any alternatives. The "section 32 report" would then be available to demonstrate that their planned proposals are justified. Publicly available reports would ensure that these considerations were open to scrutiny.

While the practice varies between councils (some perform well and others less so), advice to the TAG indicated that overall this section is not achieving its objective. As currently operated, s.32 is in all too many cases driving officials to produce voluminous reports that are not only costly, but also fail to make the expected contribution to ensuring the ongoing efficiency and effectiveness of the process.

There was a case recommending that section 32 be repealed completely; removing it would save time and cost. The TAG was not convinced of that however, for to do so would remove the key provision in the RMA intended to ensure ongoing rigour in

planned development. The consensus of the TAG was that further work should be undertaken in Phase 2 so that the intent of section 32 is better achieved.

1.10 Consents for minor matters

Our analysis as part of this exercise, and our experience in the operation of the Act, has raised concern about the extent to which Plans so frequently require consents for minor matters. This pervasive presence of the RMA in matters of low level environmental significance is a cause of constant public criticism. In order to reduce the need for consents in such cases, the associated cost and effort, and to reduce inconsistencies in practice, while at the same time protecting the environment from harmful or adverse effects, there may be merit in the Government being able to define those activities which should not require consent, or which should have an "easier" pathway to approval.

The Building Act 2004 already establishes the principle; the First Schedule to this Act defines building work that is exempt from the requirement for building consent. There are also powers of regulation in the RMA in relation to discharges but they don't go far enough. One model might be to amend section 360 to allow the Minister to make a permitted activity order.[3] Such a facility would allow Government to take a leadership role, bring about national consistency (where appropriate), and remove the need for consent for activities it believes should be permitted. The effect of such an order would be to read the provision into any plan without the need for any change.

Another option for reducing the consent burden would be to give local authorities the ability to fast-track minor consents where there is a technical breach but where the environmental effects are of little consequence. Examples include minor encroachments of decks or balconies into side yards, gables encroaching into daylight angles and the removal of small quantities of gravel from riverbeds. The proposition would be to give a power of dispensation from the full process requirements. Our suggested changes to section 113 might help but more can be gained through further work in Phase 2[4].

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[3] Something similar already exists in regulations permitting election signs
[4] A power of dispensation existed in the Town and Country Planning Act 1977 but what we are suggesting here is an ability to issue an approval with the minimum of fuss and bother

A further circumstance that frustrates ordinary Kiwis in going about their business is where consents are often required from two separate authorities for the same item – a case in point is septic tanks in rural New Zealand – here a discharge to land consent is required from the regional council and a building consent is required from the territorial authority. More collaboration between councils could address this frustration. The TAG raises the issue here as notice of an area of crossover requiring attention both as the RMA reform process proceeds, and as the Government moves to reduce the impact of red tape on citizens.

However there is a more immediate change that should happen now. The Ministry advises us that approximately 4,500 consents are issued annually to allow the trimming, pruning and removal of non-scheduled trees in a relatively small number of urban Councils. This represents about 10% of the national total consent of applications for very little gain, as virtually all are, we understand, granted.

We consider that such an ill-targeted rule is inappropriate, and propose that councils should not be able to impose such rules. We therefore recommend that the Act be amended so as to set aside any such existing rules, and prevent the introduction of further similar rules. We appreciate that there may be a transitional issue involved, and for that reason recommend that this change to the Act not come into force until one year after the rest of the Amendment Act so that those councils which have these general controls have time to effect a plan change in consultation with affected land owners and the local community so as to afford protection to those trees which are of specific value. (Ironically, we are informed that Christchurch, the "Garden City" has no such general rule. Its rules specifically list approximately 1500 "notable trees".)

2 Application procedures

2.1 Introduction

The cost and delays commonly attributed to the resource consent process flow from a variety of factors. Some are related to the participatory philosophy of the Act. Many flow from council practices. These latter in turn often flow, inter alia, from:

1. complicated RMA processes and reporting requirements
2. the complexity of many plans
3. the risk averse culture of many councillors and council planning staff
4. a lack or misallocation of resourcing at both national and local level
5. a lack of national guidance
6. the perceived or actual poor quality of consent authority decision making
7. the perceived or actual poor quality of applications.

It is one of the great tragedies of the RMA that little central assistance or direction was given in the earlier days following the Act coming into force, and this is no doubt a large factor in many of the problems experienced today.

The Government has expressed to us a desire to remedy this situation, and indeed the former Government's initiation of a number of national policy statements and national environment standards indicated a similar desire on its part. We would however record most strongly that the leadership required from central government will not come cheaply or easily. We hope that the enthusiasm for change is matched by an appropriate level of resourcing (both financial and intellectual), and that the outcome is clear and relevant national guidance. If it is not, then we can confidently predict that many of the problems will persist, and the impediments to economic growth that many see in the Act will remain unaddressed.

There are, however, a number of changes that can helpfully be made to the Act as part of Phase 1 of the reform process; and more which, with time, can be introduced in the future.

2.2 Section 92 requests

One of the more frequent complaints as regards the complexity of the processes is that Councils are requiring too much information prior to deciding whether an application will be notified, or prior to making the actual decision. (We understand from the Ministry that 40% of all applications are subject to section 92 requests, but the situation may well be worse than that figure suggests, as there is no data on the number of successive requests.) To an extent this reflects no doubt an overly risk averse culture on the part of many planning staff. However, it also represents a misuse of the process whereby councils *"buy time"* by issuing requests so that they can *"stop the clock"* and claim a greater degree of compliance with the statutory time frames. The way in which requests are made when an application is to be notified, also often reflects a misunderstanding that some information will quite reasonably emerge during the hearing process.

In an endeavour to address this issue, the former Government amended the Act to allow applicants to refuse to supply the additional information and to allow councils to more easily reject inadequately prepared applications. Perhaps because of the complexities associated with those amendments, little use seems to have been made of them.

We propose that councils be permitted to continue to make consecutive requests for further information; but that only the first should serve to *"stop the clock"*. We would hope that by this mechanism the present abuses of the system in order to appear compliant with timeframes will be reduced and that more councils will devote appropriate resources to the area. The clock would then restart at the provision of the information or the applicant's refusal to provide the further information.

To enhance the incentives in this direction we also propose that as part of Phase 2 of the reforms, a charges rebate scheme whereby charges are reduced if timeframes are not met, be considered. (See the discussion later in this chapter under the heading *"Time Limits"*.) We think also that Councils should not be able to use section 37 powers to extend time frames in a manner that would circumvent our suggested changes to section 92.

Councils can still use their section 88 powers and reject inadequate or incomplete applications.

We have prepared appropriate replacement sections for section 92 and section 92A and they are **attached** as Appendix 1 to the report. Note in particular that a corresponding amendment is also suggested to section 104 to make explicit the obligation of a council considering an application to consider *"the adequacy of the information provided"*.

The TAG is conscious of the possibility of adverse, unintended consequences arising from this change. It is commonly the case for example that *"lower level"* or *"common place"* applications incorporate a lower level of professional input than is frequently so with more significant matters.

It will inevitably be the case from time to time that what appears as relatively simple to professional planners and similarly skilled individuals, is viewed by those unfamiliar with the processes as being complex, obscure and/or difficult. This is likely to be aggravated by the natural desire of individuals making simple, low level applications to minimise their potential costs, including that spent on professional help.

Thus it is the case that some Councils report a reasonably high level of deficiency in initial applications for lower level consents. To counter this, some Councils have moved to pre-lodgement meetings in order to ensure that applicants are aware of the information requirements that they will need to satisfy. Indeed, used for this purpose, we would regard such meetings as best practice in action.

Thus, whilst consent authorities are empowered to reject applications; they will often encourage their officials to work with applicants to resolve outstanding issues.

Where applications do arrive with incomplete information, the use of section 92 to obtain further information (in part to properly complete the application) is unquestionably a valid and responsible use of this power.

However, such is the prevalence of complaints regarding the misuse of the power in order to *"buy time"* that we are satisfied that it is appropriate to introduce this reform as part of Phase 1. We see no reason why this need have the effect of limiting appropriate opportunities for planner/applicant collaboration: the overall outcome sought is the efficient processing of applications in all instances.

A minority view on the TAG holds that the proposed changes to section 92 and section 92A shift the balance of power between the applicant and the regulatory

authority in favour of the former, in a way that significantly increases the risk of decisions being made with inadequate information. Failure to act in a precautionary manner in the absence of sufficient information is widely recognised as a significant source of environmental degradation and of over-commitment of potentially renewable resources, and legislation such as the Fisheries Act explicitly recognises this. On the minority view, the recommended changes to section 92 and section 92A could only be acceptable if there was an additional provision in the Act requiring authorities to take a precautionary approach to decisions in those cases where there is significant uncertainty, and the potential for significant adverse effects on natural and physical resources which it would be difficult or costly to reverse.

2.3 Number of consent categories

One of the complexities of the Act is the number of consent categories. We have been asked to consider whether there really is a need for so many, and see the potential for the elimination of two: the restricted coastal activity and non-complying activity categories.

With the elimination of the Ministerial veto in respect of activities within the coastal marine area, which we understand to be government policy, there would at first sight seem to be little point in retaining the category of restricted coastal activity. All that it essentially would achieve, given the absence of the veto, is to enable the Minister of Conservation to appoint a member of the hearing panel.

The position is however more complex than such an analysis might suggest. The Crown has ownership interests in the coastal marine area which are separate from the regulatory interests of local or regional authorities.

It is normally the case that any use and development of land requires at least two consents; the consent of the owner, and the consent of the regulatory authority under the RMA.

The current RMA regime for the coastal marine area, which combines both consents into a single consent process, rests heavily on the concept of avoiding any duplication of public processes on environmental matters. The consent of the owner, i.e. the Crown acting through the Minister of Conservation, is determined under a different statutory framework from that of the RMA, notably the Conservation Act, the Foreshore and Seabed Empowering Act, the National Parks Act, and the Reserves Act.

We understand that members of the Government have previously promoted a more collaborative approach to conservation and environmental policy, including applying the principle of *"net conservation benefit"* to the Department of Conservation's (DOC) dealings with the private sector. Under this principle, DOC would agree to concessions and development proposals on the conservation estate, foreshore and seabed, when, and only when, the benefits of conservation gains significantly exceed the adverse effect on conservation values.

If such a net conservation benefit policy were to be implemented, the Minister of Conservation would need to be able to exercise the normal powers of an owner, such as negotiating with respective developers over price or rental, to receive competitive bids from a particular site, and to choose between those bids, and to agree or refuse to agree to contract. It is difficult to see that such a policy could in practical terms be implemented through a procedure such as a joint hearings panel with local authority regulators.

A net conservation benefit policy would therefore necessitate separating the consent of the landowner from the RMA consent. If that were done and the two consents were dealt with separately in the same manner as for land elsewhere, there would then be no justification for having restricted coastal activities as a consent category under the RMA.

At this point however it was the majority view of the TAG that the restricted coastal activity category should not be abolished until the direction of government policy as regards the exercise by the Crown of its ownership responsibilities was better ascertained.

We therefore recommend that the future of restricted coastal activities be considered under Phase 2 of the reform process.

The category we do consider could be helpfully abolished is the non-complying activity category.

Both discretionary activities and non-complying activities are considered by reference to the same criteria, namely those set out in section 104 of the Act. The difference, however, is that in order to qualify for that consideration, non-complying activities must first meet one of the two "gateway tests": namely, that the effect of the proposal would be no more than minor, or that it would not be contrary to the objectives and policies of the plan. In the view of the TAG, it would be unusual that a council would

decline consent for an activity the effects of which were indeed no more than minor; and to grant consent to an activity which was "repugnant" (for that is the sense in which the Courts have interpreted the words of the Act) to the plan's objectives and policies.

Yet, much staff time and consideration is given in the early stages of consent processing, and much attention given at the later hearing, to the issue as to whether the activity meets either or both of the gateway tests. In the TAG's view nothing is gained by this analysis that would not be gained merely by undertaking the same sort of consideration that is given to discretionary activities under s.104. We therefore recommend the abolition of the non-complying activity consent category.

We were reinforced in this view by an opinion obtained from Professor Miller of Massey University's Planning Department. Dr Miller is a former planning practitioner who has taken a particular interest in the evolution of relevant New Zealand legislation. She provided us with a note as to the historical origin of the non-complying activity category. This is **attached** as Appendix 2. It was her view that the non-complying activity category existed in the RMA: *"only as the result of a relatively thoughtless transition from the TCPA 77 rather than because logic supports the continued existence of two different categories."*

Others have suggested that the retention of the category was less "thoughtless" than it was ill-conceived; and that the problem really lies in the 1993 amendment to the RMA which provided that a plan could specify non-complying activities.

Regardless of which view is preferred however, retention of the category does in our view have little to commend it; and its abolition would certainly go some way to simplifying the Act.

We record our thanks to Dr Miller for her contribution.

We are, however, aware that there may be transitional issues, where plans may specify non-complying activities if this change were to be implemented immediately. We therefore recommend, in order to allow councils time to consider the effects of this reform and amend their plans if need be, that this part of the amendment not come into force until a further year after the rest of the Bill.

2.4 Public notification

At present the Act contains a presumption that all applications will be publicly notified – see section 93. Section 94 then goes on to provide for certain applications not to be notified.

There is however, as the TAG sees it, a basic “disconnect” between what an informed reader of the Act might expect to be the case, and what is in fact the reality of the situation, namely that approximately 95% of applications are not notified.

In our view this “disconnect” gives rise to both unreal expectations on the part of many lay folk, and to the commitment of an inordinate amount of time and resources to justifying the decision not to notify. Given that despite this statutory presumption, so many are not notified, it is the view of the TAG that the Act should be amended to delete the presumption. This will not only more honestly reflect the reality of the position, but will also in our view have the result of, often considerably, speeding up the eventual decision as to whether consent should be granted or refused.

In those cases which are destined for notification, the time and resources spent on deciding the notification issue would be saved.

In those cases which are destined for non-notification, the time and resources spent on justifying a decision not to notify would similarly be saved.

In that minority of cases where the decision to notify or not is clearly a close call, then the present situation will prevail; but given that these are but a minority, the savings would in our view be substantial.

We would propose instead a regime in which the Council would first determine whether the level of effects on either the wider community or the immediate locality; are they merely minor, or more than minor. If the wider effects are more than minor, then full notification is in order. If the wider effects are but minor, and the localised effects are more than minor, then limited notification to those potentially affected is clearly appropriate (unless their consents have already been obtained). If neither of the effects is more than minor, then the application should proceed on a non-notified basis.

Thus we would not, for example, anticipate that this could give rise to a situation in which residents in a low or medium density zone would wake up one morning to find that a multi-storied high rise had been approved for next door. Such a proposed

development would inevitably have more than minor local effects, and could not therefore have been approved without either public notification or the consent of all affected persons.

2.5 Consideration of controlled activities and restricted discretionary activities

One of the apparent successes of the RMA in enabling public confidence in plans[5] setting the parameters for future assessments has been controlled activities and restricted discretionary activities. It had been generally understood among RMA practitioners that where activities are so classified under a plan, being the product of public participation, the plethora of Part 2 considerations are not re-litigated.

A High Court decision (*Auckland City Council v John Woolley Trust* [2008] NZRMA 260) has raised some confusion on this position as it relates to restricted discretionary activities.

The Court confirmed that in relation to a consideration of the plan, a council could only consider matters over which discretion had expressly been reserved. However, the Court interpreted the RMA such that restricted discretionary activity applications are nonetheless subject to the Part 2 matters. Further, that while any Part 2 matters not provided for in the relevant part of the plan could not be used to decline consent, they could be taken into account in deciding to grant an application.

This outcome was surprising and means that consent authorities now have to consider a wider range of matters than those expressly set out in the plan (adding complexity and time to the consent process).

The TAG therefore recommends:

- Section 104C (particular restrictions for restricted discretionary activities) be amended to reflect what was understood to be the position, i.e. <u>any</u>

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[5] As stated by the Chief Justice in *Discount Brands Ltd v Westfield (New Zealand)* Ltd [2005] 2 NZLR 597:

> "[10] The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed."

consideration of a restricted discretionary activity be limited to those matters over which council has expressly reserved its discretion in the plan

- A similar amendment be made to section 104A (determination of applications for controlled activities) to ensure that the imposition of any conditions be limited to those matters over which discretion has expressly been reserved in the plan.

The outcome sought by these amendments is to reduce the matters that applicants and local authorities have to consider in preparing and processing resource consents for restricted discretionary activities and controlled activities.

2.6 Hearing commissioners

At present the Act allows councils to hear applications themselves or appoint independent commissioners for that purpose. The 2005 amendments to the Act introduced a certification regime for both Councillors and independent commissioners, and this programme appears on the limited information to date to have significantly improved the quality of hearing processes.

However, almost as important as the quality of the hearing process itself, is the degree to which participants in the process regard themselves as having had a fair hearing. If feelings of unfairness prevail then the process will not be respected, the RMA and local government itself will be brought into disrepute, and the likelihood is increased that disappointed participants will appeal the decision to the Environment Court.

There is a very considerable public benefit in RMA decisions being acceptable to all; and there is a significant level of feeling in the country that councillors too often apply/enforce their own agendas rather than the plan, and that they are *"vulnerable"* to *"coercion"* by the weight of popular feeling for or against a particular proposal. Certainly, an applicant faced with widespread popular objection to a proposal can be forgiven for feeling that he or she may well not get a fair hearing from councillors who are elected by opponents of the project.

We would not wish these comments to be taken as a criticism of the majority of Councillors who sit in judgment on applications. Many do a fine job, and a good number fail to gain re-election by virtue of having done so. Nevertheless, the popular

contention remains and indeed continues to be fuelled by some councillors' poor behaviour.

Further, just as the separation of powers argument applies to the question of appeals on policy decisions being made to the Environment Court (see Chapter 1) so too it applies to councillors sitting in judgment on applications being made for consents in terms of the plan rules in respect of which the councillors themselves have been the legislators. There is a clear argument to be made preventing councillors from sitting on hearing panels for applications altogether.

However, rather than recommend such a drastic step as part of these Phase 1 reforms, we decided to recommend that, where either the applicant or a submitter wishes the application to be heard by a panel of independent commissioners, they will be entitled to require the council to appoint such a panel. Any extra costs so incurred are to be charged against the person making the request. (We should add that we also have reservations as regards the process by which the commissioners are appointed, but this too can be left as a Phase 2 issue.)

At least by this means, those who are predisposed to question the independence of the elected councillors, or who feel that a better quality of decision would emerge from an independent panel, would be entitled to have their concerns remedied in advance.

The TAG also makes two further recommendations in regard to the appointment of independent commissioners. A majority of the TAG were satisfied that such was the importance of there being a high degree of transparent objectivity in the decision making process that all hearing panels should have at least one independent commissioner.

We also recommend that where a council is itself a submitter on an application, that none of its councillors be permitted to sit on the hearing panel. The sight of elected councillors sitting as judges when their own council is a party to the proceedings is likely to significantly enhance the sense of a lack of fair play felt by many participants in the process. Yet it is far from being an uncommon practice in joint hearings, and one which the TAG views as a factor in the degree to which people are dissatisfied with the Act's implementation.

2.7 Designations

A point related to these natural justice issues arises in relation to decisions on designations. Although not strictly part of consent processing, it is convenient to deal with it at this point.

At present when a designating authority, such as a port company, highway agency or airport company, serves notice of a proposed designation on a local authority, it is the local authority which hears the submissions on the proposed designation. However it is not given the task of making a decision, merely a recommendation to the designating authority. The designating authority then makes a decision. That is to say, the designating authority makes a decision on its own designation.

In today's environment where many designating authorities are private entities as distinct from Crown agencies; such a procedure is even more lacking in theoretical justification than may have been the case when designation powers were confined to the latter.

In addition, this extra stage in the process adds a short period, usually about a month, to the time taken to finalise the proposed designation.

We therefore recommend that as part of Phase 1 of the Government's endeavours to simplify and streamline the RMA, that the power of decision making on their own designation be denied to designating authorities, and that the council's recommendation be the decision on the proposal.

2.8 Contents of decisions

Another of the valuable changes made by the last Government was to amend section 113 of the Act which sets out the requirements as to what must be included in council decisions on applications. This has certainly improved the quality of expression of decisions, and made the process more transparent. However, it also applies, or has been widely interpreted as applying, to decisions on notification. This adds to the administrative burden of Councils, and we recommend that section 113 be amended to make it clear that it applies only to decisions on applications, not to the various procedural decisions along the way.

The commendably strict requirements of section 113 do also on occasion add unnecessarily to the cost and delays in processing applications. For example, in the case of simple applications where no third parties are involved and there have been

no areas of contention or dispute, the requirements of the section can seem onerous, and do cause unnecessary duplication and delay in processing time.

We recommend that the requirements in section 113 be amended to simply require that for non-notified applications, or where there are no submitters in opposition, the decision merely states the reasons for the grant of consent.

Similarly, where no hearing is held or the decision is consistent with a staff report which adequately addresses the requirements of section 113, we recommend that the decision makers be simply empowered to adopt the section 42A report rather than spend time on a separate decision report.

The drafting of section 113 has also given rise to some differences in interpretation. The term *"main findings of fact"* has been interpreted by most Councils correctly, to refer to the findings on the *"principal issues in contention"*. Some however have interpreted it to merely require that the factual matters be clearly set out. To remedy that situation, we recommend that the reference to *"main findings of fact"* be replaced with *"conclusions on each of the principal issues in contention"*.

2.9 Time limits

At present the Act sets out various time limits within which Councils must process and decide applications. There is no sanction in the event of non-compliance with these requirements. We understand that in New South Wales, Queensland and the United Kingdom, the law confers upon applicants the right to treat this non-compliance as a *"deemed refusal"*, thereby conferring upon them an automatic right of appeal.

We did not recommend the introduction of such a procedure as part of Phase 1 of the reform. It has obvious implications in so far as community participation is concerned, and may even give rise to perverse incentives. We do however recommend that it be considered as part of Phase 2 of the process.

We do consider that more than an automatic right of appeal would be required. The degree of local authority non-compliance is obviously variable, but it is significant. The 2005/06 survey conducted by the Ministry for the Environment showed that only 56% of publicly notified applications are processed within the statutory timeframe. This is less than 63% and 69% reported in the 1999/2000 and 2001/2002 surveys

respectively. Of all consents, only 74% were processed within statutory time frames, down from the 82% reported in 2001/2002.

This is clearly unsatisfactory, not only in terms of its cost impacts upon participants in the process, but also in terms of Parliament's intentions being thwarted. There would seem little point in Parliament passing legislation if it is not to be given effect by the agency to whom its instruction is directed.

In the TAG's view, where the Act prescribes a time frame for the completion of a particular process, that process should be completed within the designated statutory time frame. There needs to be a sanction to incentivise consent authorities to comply. The TAG therefore recommends, by a majority, that where a consent authority fails to complete the process within the time frame designated by the statute, the consent authority must remit at least 50% of the prescribed fee that it would charge for the process.

This change will no doubt incentivise a change in council behaviour. Local authority managers will see it as an important consideration that processes are completed within the statutory timeframe. There is also the clear possibility that it could incentivise perverse behaviour that will add cost and/or delay. A financially prudent manager wanting to ensure that general ratepayers do not have to bear the costs could introduce measures such as requiring appointments before applications are to be lodged, increasing charge out rates, and/or employing more staff/consultants to ensure the statutory time frames are met.

To avoid some of these consequences, the TAG recommends that work be undertaken to ensure that the time frames as currently set out are not too short to work in practice. If this recommendation is accepted, then the TAG also recommends that those operating the system be given a chance to submit on the time frames so that all can be assured that they are indeed reasonable.

The TAG therefore recommends as part of Phase 2 of the report reform process, officials should seek submissions on the statutory time frames, and after undertaking a careful examination of those submissions, consider whether the time frames currently set by the statute are reasonable. Any changes to the time frames should then be recommended as part of Phase 2 of the reform process.

Our reason for scheduling the issue in this two stage way is as follows: the Phase 1 change will establish that Parliament is serious about creating discipline in this area.

The review of the statutory timeframes will be conducted in the context of that proposal. Consent authorities will have the opportunities to turn their minds to the reasonableness or otherwise of the periods set out in the Act and with that additional consideration, we would hope that all could then be confident that the statutory timeframes would be reasonably achievable, and a general culture of compliance with the prescribed timeframes would then become the norm. We therefore recommend that an amendment to the Act be included to require the rebate of 50% of the prescribed charges in the event of non-compliance with the time frames; this amendment to come into effect after the completion of the Phase 2 process.

We further recommend that as part of the Phase 2 process, an examination be undertaken of the existing statutory timeframes, and any refinements that may be required be undertaken in the Phase 2 Bill.

2.10 Adjournment of council hearings

Statutory time frames for the processing of resource consents range from 20 working days (effectively a calendar month) to 85 working days (four months), depending on whether a consent application is notified. While official statistics indicate that 74% of non-notified applications and 56% of notified applications are processed on time, this leaves many which are not processed within the statutory time limits.

An emerging trend which exacerbates this significant level of delay is consent authorities adjourning, but not closing, resource consent hearings at their completion. In those cases, the proceedings remain *"in limbo",* and are not subject to any statutory time frames for the release of a decision.

The TAG therefore recommends by majority that consent hearings must be closed no later than 10 working days following completion of the last party's presentation at the hearing. This should give those hearing the application enough time to undertake a site visit after the hearing or to receive any final incidental information. Our expectation is that this will serve to reduce delays in the making of decisions, or at the very least, add credibility to the council's compliance statistics.

The minority view is that this simply adds 10 working days to the 15 day period within which decisions should be released. It would be better for the law to make it clear that a hearing concludes following the right of reply when delivered orally, or on receipt of the right of reply by the local authority when delivered in writing.

2.11 Third party participation in appeals – section 274

An issue of standing arises in relation to appeals against council decisions, not only on applications and proposed designations, but also on plan matters.

Section 274 provides an entirely appropriate procedure whereby those who made a submission on an application, the decision on which is subsequently appealed to the Environment Court, may file with the Court a notice of their intention to participate in the appeal.

However, people who did not exercise their rights of participation in the first instance may also join in at the second round and participate in the appeal. Furthermore, when agreement is reached between the applicant and the appellant as to the appropriate resolution of the appeal, section 274 parties may carry on the appeal even though the appellant no longer wishes to pursue it.

We recommend that that section 274 parties who are not themselves appellants no longer have the right to carry on an appeal which the appellant does not wish to pursue.

Further, anyone intending to exercise the rights of section 274 parties at present has 30 working days (i.e. 6 weeks) to write a simple letter to the Court advising of that intention. By contrast, intending appellants have only 15 working days (i.e. 3 weeks) to file a notice of appeal with the Court. We see no need for this extended period of 30 days, and recommend that, in an endeavour to further streamline the Act, this be reduced to 15 days.

There is also a level of uncertainty as to the date from which the period for the filing of a section 274 notice runs. To overcome this, we suggest that the Act be amended to specifically provide that a notice is to be filed within 15 days from the date of the closing of the appeal.

We also recommend that section 274 be amended by removing the entitlement to join appeal proceedings currently enjoyed by persons who did not make an original submission, but who later claim to represent a relevant aspect of the public interest. Anyone is able to make a submission on a publicly notified application, and it is important to encourage those with concerns either of a public or private interest nature to participate from the outset, and not to delay raising merits issues until a late

stage by way of section 274. This would provide a greater level of certainty for appellants and consent authorities.

2.12 Direct referral to Environment Court

The granting of an automatic right of appeal to the Environment Court against council decisions on consent applications, and the *de novo* nature of that appeal, mean that applicants and submitters are often put to the expense of putting their own case twice; once to the council and again to the Environment Court.

We considered whether the *de novo* aspect of the appeal should be removed and all appeals just decided on the papers, with leave being required to adduce further evidence. On balance, however, we considered that would not be an appropriate response, bearing in mind that applications often evolve in their detail between the two hearings, that questions of credibility do arise, that the Environment Court needs to have the ability to hear the witnesses, and that as there is no cross-examination at council hearings, the Court benefits from hearing the evidence afresh.

That is not to say that improvements could not be made in the way in which the Courts hear appeals, and indeed welcome changes have been made in that regard over recent times.

There are a number of cases however, where all parties to the council hearing know that the hearing is just a prelude, a first round of a process which is inevitably destined to reach the Environment Court.

In those cases, the first hearing can be seen as a largely unnecessary, expensive and time consuming exercise. We are not saying that the Council hearing is without benefit. That is clearly not so. We are however saying that those benefits are outweighed by the burdens imposed by the additional costs and delays.

We therefore recommend that a right of direct referral to the Environment Court be introduced, so that with the agreement of the council, the first hearing may be dispensed with and the application proceed immediately to the Court.

This reform would not merely be of benefit to applicants. We are aware of the difficulties faced by many community groups in resourcing, both in terms of funding and time commitment, their appearance at two hearings. The files of the Environmental Legal Aid (ELA) fund provide ample testimony of this. The burden of raising for example $10,000 – $20,000 or more for the Council hearing (which is not

able to be funded by the ELA), then a further amount, often considerably larger, for the inevitable appeal hearing, is often more than can be reasonably contemplated. We consider that this reform will be of considerable benefit to both community groups and applicants.

3 Matters of national significance

3.1 Proposals of national significance

Just as run of the mill applications for consent can be subject to unreasonable delays, so too can significant projects of national importance. In the case of the latter, the realisation of significant economic benefits to the community as a whole is thereby deferred. There remain a number of highway projects which have been calculated as having a high benefit-cost ratio, and yet for a variety of reasons have not been programmed for implementation. With the Government's commitment to increased infrastructure spending, some of these will very likely gain a greater priority than hitherto. It would be unfortunate if the country were to be deprived of the clear economic benefit of that completion through delays in the approval process.

The delays are therefore a matter of national concern; especially given the current economic situation.

The Act does make provision for the Minister to "call-in" projects he or she considers to be of national significance, and to appoint a Board of Inquiry to hear the application or to refer the matter directly to the Environment Court. The Board of Inquiry is required to be chaired by a present, retired or former Environment Judge, and appeals are available on points of law only to the High Court.

This is clearly an appropriate mechanism for determining such applications in which there is often an inherent conflict between the benefit to be derived by the community as a whole, and the environmental burdens which are more often borne disproportionately by those in the locality of the works.

We shall refer shortly to the need for central government to make greater use of national policy statements and national environmental standards, and note with approval the moves in this direction by the former Government.

However, despite the availability of the call-in procedure, it has been used only on a handful of occasions in the 18 year history of the Act. We are unaware as to whether this reflected a political reluctance or the shortcomings in the Act's procedures. Nevertheless, we understand that the Government is determined to make greater use of call-ins, and we suggest a number of enhancements to the Act as it presently stands.

There is presently a potential gap in the law such that uncertainty exists as to whether projects which of themselves may not individually be seen as being of national significance, but which are part of the infrastructure of a nationwide network utility operator, are eligible for consideration under the call-in procedure. Such projects will often play a significant role in improving or maintaining the functioning and integrity of nationally significant networks e.g. those relating to roads, railways, pipelines and electricity transmission. We recommend that the Act be amended to ensure that these projects are eligible for call-in also.

A criticism of the present procedure is that the Board of Inquiry contains no local representatives. It would be impractical to require this in every case, for example many projects may cross the boundaries of several local authorities. We do however recommend that the Minister be required to appoint at least one person with local knowledge to the Board, and that he or she be required to seek nominations for the Board from the local authority or authorities in the area.

An increased use of the call in procedure is likely to introduce a short term increase in the workload of the Environment Judges. At present their number is capped at eight. We recommend that this be raised to ten.

An increased use of the call in procedure is also likely to make heavy demands on the available pool of suitably qualified and experienced hearing commissioners. At present their remuneration is fixed by reference to the Fees and Travelling Allowances Act 1951. We would anticipate that the Minister may well find it difficult to attract sufficient commissioners of the required calibre under such a limited remuneration scale, and recommend that the Act be amended to delete this restriction. (The maximum payable to a member of a Board is $510 per day, and $800 per day for the Chair). There are no financial implications for the Crown in this reform, as the costs of the hearing are met by the applicant.

We also recommend that the Board of Inquiry be subject to mandatory timeframes similar to those applying to a local authority in the processing and consideration of applications. However, given the large scale of some of the projects likely to be called-in, we recommend that the decision be made within nine months of the date of notification, with a power for the Minister to extend this period should he or she be satisfied that further time is required.

It is also often the case that supplementary resource consents associated with a proposal are not all applied for at the time of lodging. We recommend that the Minister be empowered to decide whether:

(a) the application be processed as a change to the original consent on non-notified basis and referred to the Board of Inquiry for a decision; or

(b) to notify the application and refer it to a Board for a decision; or

(c) to refer the application to the relevant local authorities for processing in accordance with notification directions and a specified timeline for decisions.

The permitted baseline is a relevant factor in the evaluation of many projects, large and small. The extent of the baseline is often resolved by the applicant obtaining a certificate or series of certificates of compliance. Obtaining certificates of compliance from individual local authorities can be a cumbersome and time consuming process when projects cross many local authority boundaries. We recommend that a central body, most helpfully the Environmental Protection Agency which we understand the Government intends to establish, be empowered to issue certificates of compliance in respect of nationally important projects.

A number of minor changes are also desirable to enhance the conduct of the call in procedure, and we recommend that:

(a) the Act be clarified to make it clear that a Board of Inquiry can request information or commission independent reports of matters that have been called in, and to enable this information to be circulated to all parties attending the hearing

(b) the Act be clarified to make it clear that the comment procedure following upon the issue of the draft decision of a Board does not provide the opportunity to challenge the Board's decision as to whether or not the application should be granted, and is confined to comments merely on the proposed conditions

(c) Board of Inquiry members be given legal protection against actions arising out of any acts or omissions made in good faith.

At present, appeals against decisions of Boards of Inquiry are heard by the High Court. Appeals from that Court can, with leave, be taken to the Court of Appeal. This can introduce a further period of delay, and in recognition of the national importance of the project under consideration, and the calibre of the Board, it is our recommendation that an appeal is to be made direct from the Board of Inquiry to the Court of Appeal.

3.2 Sections 6, 7 and 8

Sections 6 and 7 of the Act set out the matters of national importance and other matters which are to guide decision makers.

Section 8 relates to the Treaty of Waitangi. The TAG discussed issues surrounding section 8 and concluded that this section has not presented any significant difficulties in practice. As a related matter, it is noted that the 2005 amendments to the RMA provided that there is no duty under the Act to consult about resource consent applications and notices of requirement.

Sections 6 and 7 are at present rather a hotch-potch collection of sentiments, all directed at "environmental" issues (as that term is commonly understood), rather than the economic, cultural and social questions which are also central to the sustainability issues which lie at the heart of the Act.

From time to time, calls emerge for an amendment to sections 6 and 7 to correct this "imbalance" and insert in those sections references, for example, to "affordable housing" or "the development of infrastructure".

The TAG has considered these suggestions, and a related proposal to amend the definition of "environment", and recommends that no changes be made as part of Phase 1 of the reform process.

The TAG is concerned that any changes to these sections be thoroughly considered and widely consulted upon, both as to their societal acceptance and their legal effect. It would be unfortunate indeed if an amendment designed to simplify and streamline the Act, were to result in further doubts arising as to the interpretation of, and the weight to be given to, its most important provisions.

3.3 Improving national instruments

Central government guidance and direction can simplify the framework within which consent authorities make decisions, by setting clear environmental thresholds and targets, and clarifying relationships between potentially competing national strategies and matters of national importance.

National policy statements and national environment standards are tools under the RMA, which the government can use to provide direction on specific national, regional or local issues. As noted elsewhere, it is unfortunate indeed that it has taken central government so long to appreciate the importance of utilising these tools; and some of the blame for the perceived failures of the Act can be attributed to central government's unwillingness in this regard.

As one learned commentator has put it:

> *"Local Government has been left to implement the RMA in a policy vacuum in the absence of any National Policy Statements having been prepared by the Government. Against this background it is not surprising that achieving the right balance between national and local interests should still be a matter of concern."*[6]

A number of new national policy statements and national environment standards are expected within the next 18 months. The implementation of these is expected to impose significant financial burdens upon local government. Indeed, the Ministry estimates that these costs would be as high as $250 million. We cannot help but feel that if the Government is determined to spend $250 million on the environment, there must be more deserving causes.

The plan change process (Schedule 1 of the RMA) for changing district and regional plans and policy statements can be costly and lengthy. However, there is an ability to apply a shortened process where the national policy statement has been developed through a Board of Inquiry process.

National policy statementa are government mandated and in all cases go through a robust hearing process in their development. The potential benefits in the second level public process to reflect these policy statements at local and regional level needs to be balanced with the time and costs associated with a second round

[6] Daya-Winterbottom *NZ Journal of Environmental Law*, Vol. 8, 214

examination of these issues. We recommend that to enable national policy statements to be implemented with a minimum of cost and delay, local authorities be required to change their Plans without further formality.

We also recommend that linkages between national policy statements, national environmental standards and other provisions of the Act be strengthened by:

(a) including a requirement that consent authorities must have regard to the relevant provisions of a national environmental standard when making decisions of resource consents

(b) amending the RMA so that duties and restrictions under the Act explicitly recognise the effect of national environmental standards

(c) giving local authorities an explicit power to issue certificates of compliance in instances where activities comply with the provisions of a national environmental standard

(d) enabling the Minister to make minor amendments and/or alterations to a national environmental standard already in force without requiring the full public process under section 44

(e) incorporating into the Act provisions to allow local authorities to refer to a national environmental standard and remove any provisions from plans that directly conflict with or have been redundant by the national environmental standard, without further formality

(f) empowering the Minister to cancel, postpone or restart the development of the proposed national environmental standard at any point.

The TAG is keenly aware that one way to improve the quality of environmental management and to streamline and simplify the processes, is to make greater use of national instruments. It must be recognised however that if central government wishes to determine issues through national instruments, then there is a collateral responsibility on it to ensure that such instruments are clear in purpose and intent and that inconsistencies between instruments are resolved. It is hardly reasonable to send to local government, policy statements which they are required to implement yet which between themselves contain conflicting or unclear requirements.

The TAG is agreed that there is a need for overall strategy for the use of national RMA instruments, and furthermore that these instruments must themselves be clear as to what is expected of those responsible for their implementation.

A fundamental responsibility for resolving conflict and the requirement between national policy statements and other instruments rest with central government rather than local government. Whilst good process will limit the number of conflicting issues between instruments, the reality is that from time to time such an outcome will emerge. As the use of national instruments becomes more important, the need for a resolution mechanism to deal with any conflicts between instruments will correspondingly become more important. There are various central government inter-departmental forums already in place that endeavour to construct a whole of government approach to issues, and we recommend that as part of Phase 2 of the reform process, consideration be given to a – hopefully simple – procedure whereby local authorities experiencing difficulty with apparent conflicts between national instruments might seek a binding determination.

4 Frivolous and vexatious submissions and trade competition

One of the reforms instituted by the last Government as part of the 2005 Amendment Act was the conferring upon local authorities of the power to disallow a submission on the grounds that it was frivolous or vexatious.

This power has been so sparingly used that no member of the TAG is aware of it ever having been exercised at all.

There are nevertheless still complaints from both Councillors and applicants that hearings are being prolonged by such submissions.

The reluctance of hearing panels to invoke the new powers is probably founded upon a natural and commendable desire to allow submitters to have their say, and a realisation that if the power was to be invoked any submitter so struck out could seek a High Court order invalidating that decision, thereby giving rise to the need to re-determine the application. This would of course in fact delay the process rather than streamline it.

A minority of the TAG favoured the introduction of a standing or status test for submitters similar to that formerly in place under the Town & Country Planning Act 1977. The minority saw merit in restricting the right to make a submission on an application to those with a greater interest in the matter than the public generally. Such a reform, it was felt, would limit the number of vexatious submitters and focus discussion on the key issues and effects. This was seen as a particularly helpful way of countering opposition to projects from submitters who may live distant from the subject site, but who nevertheless filed a submission in opposition to a development.

The majority, however, felt that such a change would run counter to the participation-orientated nature of the RMA, and would in any event not be particularly effective in addressing the problem of frivolous or vexatious submissions. Certainly, that was the experience of those members of the TAG who had worked under both the former regime and the present Act.

We therefore recommend that no action be taken in relation to those suggestions to reinstate a status or standing test.

The question of trade competition is however quite a different matter. Particularly in the supermarket business, we have seen for many years the spectacle of traders opposing resource consent applications filed by their competitors. The objectors invariably appeal any favourable decision to the Environment Court, and commonly to the High Court and beyond. Indeed, a number have even reached the Supreme Court.

The commercial incentives clearly favour such tactics.

Even if required to pay costs, the unsuccessful competitor will invariably be substantially ahead in a financial sense by virtue of not having to face competition for the decade or more that it has succeeded in "protecting its patch". The effect of this anti-competitive behaviour is to erect untenable barriers to entry in the market place, increase the prices paid by consumers, introduce delays in the hearing of other matters in the Environment Court, and to generally bring the RMA into disrepute.

We therefore propose a suite of measures which, if enacted as a package, we are confident will put an end to this practice.

We recommend that:

(a) all current provisions in the Act that prohibit consideration of trade competition, be amended so as to also prohibit the consideration of the effects of trade competition

(b) it also be made clear that the effects of trade competition are not matters for consideration when a view is formed as to whether the effects on the environment require that a resource consent be notified or not

(c) Schedule 1 be amended to provide that a submission on a proposed policy statement, or plan change that concerns the activities of a trade competitor can be made by any person, provided that the person is directly affected and the effect concerned does not relate to trade competition

(d) an obligation be imposed on parties to disclose to the Court if they are being supported, funded or encouraged by a trade competitor

(e) the ability of trade competitors to take part in appeals as third parties be removed

(f) indemnity costs be awarded against a party who brings proceedings motivated by trade competition, or who supports proceedings based on a similar motivation

(g) a damages regime be introduced whereby persons adversely affected by the anti-competitive behaviour of trade competitors will be able to recover damages associated with the bringing of any appeal proceedings.

5 Other proposed reforms

In this chapter we examine some further proposed reforms:

- that are common to both application and plan procedures
- that relate to designations.

5.1 Common matters

5.1.1 Council replies

At present section 289 of the Act requires that upon the filing of an appeal against any council decision under the Act, the first step is for the council to file with the Court a Reply to the appeal. The purpose of this document is to appraise the appellant and other parties of the grounds upon which the appeal is to be opposed.

In the TAG's view, the reply no longer fulfils any valuable purpose, and councils should be relieved of the obligations to prepare and file such a document.

Following the passage of the amended section 113 in 2005, the council decision on applications is now required to be sufficiently full to provide all the particulars required of a reply. Our experience is that council decisions on plan submissions are almost universally sufficiently complete in their expression, such that there is similarly no need for a reply to be filed.

Repeal of this obligation will not only reduce, albeit slightly, councils' legal fees in defending appeals; but will also, again slightly, reduce the delays arising from complying with the present regulations.

5.1.2 Security for costs

We are aware that it was part of the Government's election platform, that it would reintroduce the power of the Environment Court to order appellants to give security for costs. We agree with this proposed reform.

We are aware of a number of recent examples of unsuccessful appellants against whom awards of costs have been made, being unable to meet the same. The Environment Court's practice is to award costs against community interest groups only in cases where they have acted with a degree of irresponsibility.

It is unfortunate that such default means that a successful applicant is deprived of securing a contribution to its costs. However, an applicant is in a sense a *"voluntary participant"* in the process. Thus is could be said to be even more unfortunate when a small council, such as the Buller District in one case of which we are aware, was put to the considerable expense of defending its decision, only to win and be unable to recover any of its expenses. Another notable case is that brought by the Omokoroa Ratepayers Association against the Western Bay of Plenty District Council in 2002. The Association opposed a major development. The Councils' costs totalled over $300,000.00. The Court ordered the Society to pay a little over $150,000.00. These costs were never paid and the Association dissolved itself. The burden then fell directly upon the already overburdened sector of the community, the general ratepayer (in addition to the applicant). Councils have much more deserving avenues for the commitment of their environmental budget than paying lawyers.

We are aware of a number of cases in which the Courts have found community groups to have acted vexatiously, frivolously, improperly or otherwise in abuse of process. If some of those appellants had been ordered to give security for costs; their proceedings may well have been better conducted.

Our understanding is that when the power to Order security for costs formerly existed, the Environment Court would but rarely make such an order; and in our view the restoration of this power would be unlikely to represent a significant barrier to responsible public participation.

5.1.3 Filing fee for Environment Court appeals

The fee for filing an appeal to the Environment Court was set at $55.00 in 1988, i.e. over 20 years ago. We understand that in 2004 Cabinet agreed to increase the fee, but for reasons unknown to us, the increase has never been given effect.

Even in 2004, it was estimated by officials that the real cost of filing an appeal was $1,280.00, a figure that would obviously be more today.

We recommend that the filing fee be increased, and that at some future convenient time, consideration also be given to bringing the Environment Court into line with other courts, by way of charging daily hearing fees.

Some may fear that raising the filing fee may serve as a deterrent to community participation in the process. Given the high cost of pursuing an appeal, we very strongly doubt that an increase to something in the vicinity of $500.00 would do anything more than deter the most casual of appellants; and that would not necessarily be a bad outcome.

We note that the Environmental Legal Aid Fund has recently increased its maximum grant from $30,000.00 to $40,000.00; and so have an added level of comfort that an increase in the fee is unlikely to deter serious, responsible public interest appellants.

5.2 Designations

In Chapter 2, we recommended that the Act be amended so that requiring authorities no longer make the decision on their own designations, and that the Council's recommendation be the decision on the proposal.

A further point in relation to designations is that at present a designation only relates to the land use aspects of a proposed work.

As the Act is currently drafted as regards designations, and in particular sections 168 and 168A, a designation issued by a requiring authority is a *"land use"* focused permit relating to a public work. Consents that may be required at the implementation/construction stage covering such matters as earthworks, stream diversion, stormwater discharges, authority to modify or remove an historic site (under the Historic Places Act 1993), reserve revocations (under the Reserves Act 1977) and so on, are a separate suite of consents that are either sought concurrently or immediately prior to the detailed design/construction phase under the RMA or other legislation. This is considerably at odds with the *"one stop shop"* principle which was such an influential factor in the introduction of the Act.

As a result, significant time delays can occur. The ALPURT B2 project, for example, suffered some implementation delays because of the need to obtain additional resource consents, and the need to significantly modify existing consents already obtained.

In the TAG's view, significant modifications to the existing provisions relating to designations and their associated consents are warranted. In our view, once a designation is approved, any consequential consents required should be deemed to

be a controlled activity where the focus of conditions is on avoiding, remedying and/or mitigating any adverse effects.

The TAG accepts that the level of amendments required to give effect to such a change in status for designations is likely to be far reaching and beyond the scope of the Phase 1 streamlining process. We therefore recommend that the Government gives particular consideration to the use of project related approvals as part of the Phase 2 deliberations. If a particular infrastructure review work stream is contemplated, then this proposal would fit well within such a brief.

6. Non-legislative reforms

The RMA attracts a lot of criticism. Some of that criticism is often more appropriately directed to the way the Act is perceived, administered and interpreted. While we have identified changes to the law to reduce complexity and improve processes, there is also much to be gained through non-legislative initiatives and improvements.

Costs arise in a number of ways. In the period since 1991 when the RMA was introduced, local authorities have generally reported a significant increase in complaints about breaches and environmental nuisances. Consultation processes have become more extensive. Many feel that small groups have been able to use RMA processes unreasonably to delay or even stop proposals advancing. Where substantiated, law reform can assist in addressing these matters but more is needed.

In recent years the Ministry for the Environment, local government, and professional bodies such as the New Zealand Planning Institute and Resource Management Law Association have done much to promote best practice. We are sure that each though, could do even more. The Quality Planning website is a fine resource, well worthy of the awards it has received. It receives an average 23,000 hits a month, and provides an opportunity for the Ministry to further advance the cause of best practice. More best-practice research (including comparisons with processes operating in other countries), more education and more sharing of ideas between authorities would pay in improved outcomes. Further publicity for successful applications of the Act would enable others to benefit from the positive experiences of others. Any such effort requires resources.

Issues with regard to the resourcing of RMA processes are not new – one school of thought argues that the implementation of the RMA would have proceeded much more smoothly had more effort of this type been applied right at the start in 1991. To properly improve the processes, the Ministry for the Environment in particular needs to apply the appropriate level of resources required to successfully implement these reforms (especially improved national instruments). In times of very tight government finances, the TAG is reluctant to suggest further appropriations – there is however a strong case for reprioritisation of resources within votes to make certain that this legislation works for New Zealand.

The expenditure of additional dollars at a central level can often result in multiples of that expenditure in savings at the level of local government. Too frequently in the past our 73 district and 12 regional councils have felt themselves to be reinventing the wheel. Inherently too, the individual councils will lack the research capability of central government, and such research as they may numerously and variously undertake will not produce optimal returns. If central government is unable or unwilling to devote the necessary level of resources, it should not be surprised if the present problems with the Act continue to prevail, and the impediments to economic growth and development remain unresolved.

It is not just a matter of resources. Realising the full benefits of any law change will also require changes in behaviour and culture throughout the system. City, district and regional councils need to be sure that they have systems and procedures in place to deliver smart, efficient, and effective services. As a matter of course councils should monitor the outcomes generated by their plans, and ensure that they are meeting their communities' needs. While this has been an obligation since 1991, little progress has been made in this area, and if the effectiveness of plans is not being monitored, how councils can know whether they are achieving a relevant and contemporary purpose?

Applicants need to be further encouraged to put in good applications. Clear and concise advice on requirements and expectations from councils will assist. The gains from some of the changes we have suggested such as the adoption of assessments of environmental assessments, and other practice improvements, such as pre-lodgement meetings, will be enhanced if the Ministry, local government, and RMA professional bodies actively promote continuous improvement and best practice. While it is important to maintain targets when processing applications, we think it is also important to focus on the overall quality of the service provided by councils in handling applications. The TAG recommendation to remit a portion of the fees they would otherwise charge when councils fail to meet the statutory deadlines provides an incentive to meet processing times. There is always a balance to be struck in these matters, but clearly there is a need for councils to be encouraged to be less risk averse while at the same time fulfilling their statutory obligations. Councils should consider what further incentives could be put in place to enhance their delivery of their responsibilities.

We are mindful that the lack of consistently good performance across the sector reflects in part the different capabilities of those involved. This can be addressed in

part through structural reforms which go beyond our current brief, but there are also smarter ways for local authorities to collaborate, to share resources and to learn from each other's experiences.

The training of accredited decision makers is one way that has led to improvements in practice, and the Ministry, Local Government New Zealand and the New Zealand Planning Institure are to be congratulated for their efforts in this regard. We consider that there is much that could be done to recognise and foster good performance and outcomes through similar programmes developed for other practitioners.

A more conscious and concerted effort to effectively communicate RMA performance might also help to better understand RMA processes and the effects that poor performance has on people, the economy, and environment. The Ministry reports biennially in a quantitative way on local government performance, and we have benefited from some of this information in our investigation. The Government has also foreshadowed expected improvements in reporting on environmental outcomes. The TAG agrees that more effort in these areas will ensure that RMA practice and processes are proportionate, responsive, and effective.

One of the issues that did emerge in our work was that people, either applicants or submitters, were often frustrated in not knowing to whom to complain about poor performance, or what was considered to be unfair treatment. The idea of an RMA Ombudsman was suggested. We are aware that the Minister, Members of Parliament, the local Mayor, the Parliamentary Commissioner for the Environment, and also the Ombudsman all receive from time to time complaints about performance and behaviour. Without wanting to set up yet another bureaucracy, the TAG is of the view that improvements can and should be made in this area. Our proposals to deal with untimely performance will only go so far. Councils could also adopt 'Customer Service Charters' which clearly establish how people can address behaviour or performance issues.

The process of writing plans ought, as far as practicable, to be a consensus-building process. Collaborative governance processes are beginning to be used to develop council policies, with the Canterbury Strategic Water Study being a high-profile current example. There is promising evidence of the effectiveness of these processes in several overseas countries. However, we are aware that in New Zealand, the institutional structures and adversarial traditions surrounding resource

management create disincentives for groups to participate seriously in collaborative governance efforts. Phase 2 of the current reform provides an important opportunity to consider how current structures and processes could be reformed to create a more positive environment for collaborative governance.

7 Issues relating to the existing governance structure

7.1 Introduction

In the New Zealand resource management system, elected political governance is provided at three levels: national, regional and district/city. While district and city councils have land use planning responsibilities under the RMA, the main burden of environmental management, including the management of water, air, soil, the coastal marine area, and land uses which impact on water bodies, falls to the regional councils. This level of government comprises twelve regional councils and four unitary authorities.

The Government has signalled its intention to strengthen the technical underpinning of governance at the national level by establishing an Environmental Protection Authority (EPA). This leaves open the question of how the boundary between the powers and responsibilities of the EPA and those of regional government will be drawn.

At the same time, research just completed at Massey University[7] has provided a strong critique of regional government's performance of its primary environmental management function, suggesting it is adding little public value. Public value was broadly assessed, considering substantive value, authorising agency and operational feasibility, and drawing on published data and a survey of perceptions held by resource management practitioners and stakeholders. Usefully this research also provides an analytical framework for considering alternative governance arrangements.

In 2009, regional councils will have operated for twenty years. The TAG believes this is an appropriate time for a reappraisal of their performance. This should be carried out in the context of a larger question: whether New Zealand's three-tier political governance arrangements for resource management represent an efficient and effective framework for managing the environment, or whether a two-tier system might serve the country better.

[7] J. K. McNeill 2008, *The Public Value of Regional Government: how New Zealand's regional councils manage the environment.* Ph D dissertation, Massey University.

While it is beyond the TAG's terms of reference to consider all the issues that would need to be considered in reviewing and forming recommendations on the future of the regional level of government, we recommend that there should be such a review. One of the options that should be considered is to move toward a two-tier resource management system, in which the functions and activities currently performed at the regional level are split between the new EPA, which would need to have a regional presence, and territorial local authorities. We have set out below some of the matters which we consider should be taken into account in such a review.

7.2 Legitimacy and democratic effectiveness of regional government

The turnout in voting for regional councils 1989-2004 averaged 50.5%[8]. This is low compared with national elections, but is about the same as turnout for city councils, suggesting a similar level of public interest. However, these turnout figures may reflect the fact that voting for regional councils is carried out at the same time as voting for local government, rather than being a reflection of significant voter awareness of and support for regional government. A series of public awareness surveys conducted by Environment Canterbury (Ecan) every two years since its formation shows a fairly consistent pattern: only about two percent of Canterbury residents can name their local, elected ECan councillor, and only about ten percent can name the chairman of the council. It is likely that a similar pattern holds for other regional councils. The lack of a strong political mandate appears to hamper many regional councils in their dealings with other councils and with sector groups. This creates a risk of sector capture, and contributes to an evident difficulty in resolving contentious issues.

In some countries, regional government attracts a high political profile through playing a broad and important governmental role covering sectors like health and education, and by raising substantial taxes at the regional level to finance these activities. This creates strong accountability and legitimacy, and an ability to establish strong public mandates for policies. However, we detect no appetite for establishing a broad, multi-functional and powerful level of regional government in this country. It is possible that current consideration of a regional governance structure for Auckland will lead to the creation of a high-profile, multi-function regional

[8] Department of Internal Affairs data compiled in McNeill 2008 op cit page 142

authority in that city. Something similar might evolve in the other large metropolitan areas, where the provision of public transport services and/or infrastructure is already a major function of regional councils.

Elsewhere, it seems likely that a continuation of the regional council model would involve governance entities of weak legitimacy having key responsibility for resource management. This can be expected to mean a continuance of long delays in dealing with issues, and weak capacity for conflict resolution.

7.3 Effectiveness of regional government in achieving environmental objectives

The Massey University study, while noting some data deficiencies, nonetheless concludes that "despite some improvements, and some regional variation, overall environmental conditions have deteriorated nationally since 1989 [when regional councils were established]… Councils collectively appear to be unable to manage the difficult and important environmental challenges, such as non-point agricultural discharges that have arisen from agricultural intensification, so that the environment is worse than when they took responsibility."[9]

Freshwater management provides an interesting case study. A number of public opinion surveys have recorded that water pollution is the single most important environmental priority for the public,[10] and regional councils, following public consultation in the early 1990s, set water quality improvement objectives in their regional policy statements. In general, these objectives have not been realised; indeed aspects of water quality are getting worse in areas that are dominated by intensive land use.[11]

Prior to 1989, water-related issues were dealt with by catchment boards and regional water boards, which had made considerable progress in controlling water pollution from point sources using a consent system. In the meantime, the focus of water management in Europe and the United States had moved onward, to address the

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[9] McNeill 2008 op cit pp i & 248

[10] See for example K F D Hughey, G N Kerr and R Cullen 2006, *Public Perceptions of New Zealand's Environment 2006* Lincoln University; Gravitas Research and Strategy Ltd 2007, *Environmental Awareness, Attitudes and Actions 2006: A Survey of Residents of the Waikato Region.* Environment Waikato Technical Report No. 2007/06; A Masilamani 2007, *Public Awareness Survey 2007* Environment Canterbury.

[11] Ministry for the Environment 2008, *Environment New Zealand 2007* chapter 10.

more intractable problem of pollution from non-point sources, comprising run-off or seepage of contaminated water from the land surface.

Regional councils in New Zealand have not been effective in addressing this issue. Following Olsen's analysis of collective action problems,[12] this may be attributable in part to capture by a particular sector with strong interests at stake: in 2006, farmers comprised 38% of all regional councillors, and formed a majority on five of the twelve regional councils.[13] Most councils produced regional plans which established unlimited fertiliser applications and livestock access to waterways as "permitted activities" or provided for the use of education rather than rules to address these issues.

On the other hand, Environment Canterbury, which did strive to produce some more sophisticated planning to address the interface between agriculture and water, has had great difficulty in progressing the water chapters of its regional plan. Following consultation, objectives for water were put forward in a draft regional policy statement by 1994. Planning then moved to how to implement these objectives. Following two further rounds of public consultation, the proposed regional plan water chapters were notified in 2004. There were more than eight thousand submissions; analysis and hearing of these is unlikely to be completed until the end of 2009, after which a multi-year process of appeals to the Environment Court, including a period of mediation, is expected to follow.

In the meantime, public concern about inadequate environmental protection of freshwater resources in the face of major new projects for irrigation and land use intensification has led councillors to agree in principle to introduce a variation to the not-yet-operative plan. The likely earliest time that the revised plan could be made operative is 2013 – more than twenty years after the planning process began. Meanwhile, irrigation consent applications already in the approval process mean that most of the expected land use intensification is likely to be committed before the regional plan is finalised.

It is not clear that elected regional governance, and the associated cumbersome processes of public participation, has been particularly useful in protecting the people

[12] M Olsen, 1971, *The Logic of Collective Action: Public Goods and the Theory of Groups.* Rev ed. Harvard University Press.
[13] McNeill op cit page 143

of Canterbury from poor management of their water resources. Nor is this problem confined to Canterbury.

Between 1990 and 2002, the number of dairy cows in the South Island increased six-fold, with a large impact on the quality of lowland streams. During this time, not a single council successfully introduced a rule to control livestock access to such streams. In the light of this failure, the initiative had to be taken by central government, which in 2002 negotiated the Clean Streams Accord with Fonterra. This provided targets for stream fencing, nutrient budgeting to limit fertiliser use, and wetland preservation. The wetland preservation aspect of the Accord has not been successful because, in the years since 2002, most regional councils have failed in their responsibility to identify the "regionally significant wetlands" which the Accord commits to preserve.

7.4 Potential for national instruments to improve regional council performance

Policy failures of the sort described in the freshwater case study above are often attributed to the failure of central government to produce the national policy statements and national environmental standards which were originally envisaged to be part of the three-layered governance system of the RMA. However the TAG considers there are significant questions concerning whether such instruments can be effective, and whether they can be made operative without unacceptable delay and cost.

The review of the effectiveness of the New Zealand Coastal Policy statement was not encouraging.[14] The recently published national policy statement for freshwater management[15] also raises many concerns about its likely effectiveness, not least because of the cumbersome way in which it has to be implemented through the multi-layered governance system.

In order to avoid fettering regional decision-makers, the proposed freshwater national policy statement provides only the most general guidance, and mostly by prescribing processes that must be followed. After a lengthy Board of Inquiry process at the

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[14] J Rosier 2004, *Independent Review of the New Zealand Coastal Policy Statement.* Report prepared for the Minister of Conservation.
[15] The draft statement is available at:
www.mfe.govt.nz/rma/central/nps/**freshwater**-management.html

national level it is to be implemented at the regional and local level through triggering three layers of policy and plan changes, respectively to regional policy statements, regional plans, and district plans, each involving years of hearing public submissions, making political decisions, and then dealing with appeals to the Environment Court. The delay, uncertainty and cost involved in this cumbersome process is considerable.

The second type of national instrument, the national environmental standard is inherently less ambiguous as to its meaning, but the recent national environmental standard for ambient particulate air pollution has highlighted that central government lacks an effective and fair way to ensure it is actually implemented and enforced by regional government. Failure to clean up a regional airshed to meet the standard by 2013 leads only to an inability to issue new resource consents. This shifts the penalty for regional council failure to those applying for consents. In practice, those regional councils which have taken no little or action on air pollution over recent decades now appear to be in a position to insist on the application of the standard simply being deferred, possibly indefinitely.

7.5 Regional government's compliance enforcement activities

Most OECD countries have national level environmental enforcement agencies, and the OECD recommends centralised national accountability for enforcement activities. This is in order to maintain institutional integrity when subject to pressure from interest groups. However, in New Zealand, RMA compliance enforcement responsibilities are devolved to local and regional government.

A recent study of RMA compliance and enforcement in New Zealand highlighted the divided and scattered nature of enforcement practice in this country, the lack of funding for compliance activities and the inadequate separation of compliance activities from political influence.[16]

Prosecution policies for offences under the RMA appear to vary greatly between regions. During 1991-2001 almost half of all RMA prosecutions were brought by just three regional councils: Auckland, Waikato and Southland. During 2005-2008, five councils accounted for 68% of the 180 prosecutions brought by regional councils and

[16] W Adler 2008, *The state of the compliance and enforcement regime under the Resource Management Act 1991.* Strategik Group for the Ministry for the Environment.

unitary authorities, while two councils have brought no prosecutions during the last seven years.[17]

Even making allowance for population differences between regions, the devolution of compliance enforcement responsibilities in New Zealand appears to have led to a situation in which justice is not being even-handedly applied, but instead depends on local political considerations. This does not necessarily imply political interference in individual decisions to prosecute (although this may occur), but it is clear that there is wide variation between regions in the extent to which elected councils decide to provide resources for monitoring and compliance enforcement.

While Taranaki Regional Council has maintained an active compliance monitoring programme since its inception (and accounted in the late 1990s for almost 90 percent of abatement notices issued in New Zealand), Environment Waikato only established a significant programme in 2006-7, and some other councils continue to do very little compliance monitoring, especially of conditions attached to the generally permitted farming activities.

7.6 Use of technical and financial resources

The TAG accepts there are sound reasons for conducting integrated planning and management functions for major environmental resources (especially water) on a regional basis, with catchment-based boundaries for regions. This implies the need for regionally-based technical staff and public consultation activities; the issue is whether there also needs to be regionally-based governance and resourcing of those activities.

A disadvantage of the existing governance system is that it produces a tendency to reinvent the policy wheel in each area, with an additional cost which is not easy to justify by reference to differing conditions in each area. A further disadvantage is that resources available to regional authorities to implement regional activities are highly variable, reflecting mainly whether or not the regional authority has a large rating base, and whether or not it owns port company shares. This often leads to a mismatch between needs and resources. Some regions with large and potentially costly environmental issues are among the least well-resourced to tackle them, and some regional councils and unitary authorities struggle to employ specialist technical

[17] Ministry for the Environment data.

staff that are required, for example to obtain adequate knowledge of groundwater resources or to manage air quality.

The review we recommend should consider whether a nationally-accountable EPA working directly with territorial authorities would offer a more promising configuration for effective, efficient and equitable use of the financial and technical resources available for regional planning and resource management.

A minority view on the TAG holds that any review of regional government with a view to nationalising some or all of the functions currently exercised needs to be based on more than selective 'public' surveys and *ad hoc* student research. Similarly, any qualitative criticisms of environmental outcomes needs to be more sophisticated than observing how many regional councils comprise farmers. Thus, for example, regional councils such as Environment Waikato could note the following achievements in securing qualitative and quantitative environmental outcomes: the Lake Taupo catchment nitrogen restrictions; the water allocation regime under Variation 6; the provision for aquaculture in limited areas; and a geothermal allocation regime largely upheld by the Environment Court. Another option that should be considered in any review is for the fusion of regional and district councils.

Given the time constraints there was but limited opportunity to consider this matter. At the end of the day New Zealanders want good quality governance. But this matter of governance structures is a very big issue – it cannot be addressed except as part of a major review exercise, and only then if the Government is prepared to support investigating the issue. Certainly the expected Royal Commission on Auckland Governance Report may provide this opportunity.

8. Second phase of reform

We are very conscious of the fact that there is much more to be achieved if the Act's objectives are to be realised, and which could not be considered as part of this immediate reform process.

We have no doubt that the reforms suggested here will make a significant and positive contribution to the overall operation of the Act. Nevertheless, there is much that could be improved in the Act that requires further consideration and a greater degree of consultation than has been possible as part of this exercise.

Furthermore of course there is much that is central to the achievement of good environmental outcomes that lies outside the scope of the Resource Management Act entirely.

We are aware of the Government's intention to establish an EPA, and that amongst its proposed tasks is the development of national instruments. We look forward to the beneficial change that this will bring, and consider that there is much else that such an agency could do to enhance practice under the Act, for example by way of assisting in the achievement of a greater uniformity of approach to matters of national importance.

As part of Phase 2 we would propose that consideration be given to how the role of the EPA might appropriately be expanded.

This first phase has quite deliberately not dwelt upon many complex issues relating to resource allocation, particularly water. That must clearly be addressed as a matter of urgency.

We are concerned as to whether the current local government structures represent the most suitable model to deliver optimal environmental outcomes, and again recommend that consideration be given to this issue as part of Phase 2.

Other matters we suggest for consideration, and this list is by no means to be considered as exhaustive, include:

- resolving interface issues with other statutes such as the Building Act 2004, the Historic Places Act 1993, the Conservation Act 1987, the Local Government Act 2002, the Hazardous Substances and New Organisms Act

1996 and Fisheries legislation in respect of aquaculture, the objective being to reduce overlap, duplication, and lack of consistency (including in respect of definitions)

- ensuring that the Government has in place a mechanism for resolving the local application of *"conflicting"* national policy statements (noting that this is clearly a central government responsibility that should not be passed to lower levels of government to resolve)

- determining the future status of restricted coastal activities and resolving issues relating to the Crown's ownership interests

- reviewing the effectiveness of the coastal occupation charge regime and considering whether responsibility for it should be moved to central government

- examining the definition of *"environment"'* to ascertain its current suitability (noting that any changes should be very carefully considered as the present definition has now been considerably defined by practice and court decisions)

- examining the desirability or otherwise of amendments to sections 6 and 7 to include reference to social and economic factors, and to a general rationalisation of those sections

- determining what more can be done to bring about the rigour which section 32 intended to introduce to the plan making process, without making the process too onerous or complicated

- considering what more can be achieved by central government in an endeavour to encourage local authorities to combine their plan processes

- reviewing the extent of the burdens imposed on or the benefits gained by land owners, for example by the introduction of significant natural areas and examining the appropriateness of compensation/reward mechanisms for same

- investigating what steps could be introduced to reduce the need for consents for minor matters and to minimise the burden of the consent process for minor applications

- revisiting the question of the right of appeal to the Environment Court on plan matters
- examining questions of reverse sensitivity and the right of existing lawfully established operations to continue in business notwithstanding the introduction of new activities nearby
- considering whether the current default provision for the lapsing of designations should be extended, and how designations may be extended beyond land use matters
- examining the introduction of *"concept approvals"* or *"approvals in principle"*
- examining the acceptability of the present statutory time frames as regards the processing of applications for resource consents and the possible introduction of a *"deemed refusal"* where the decision is not made within time
- considering the introduction of an independent mechanism for the appointment of commissioners
- considering the use of regulations to bring about greater consistency in terminology and standards, and more guidance on the structure, format, and expression of plans
- considering how better to handle complaints about performance and behaviour of those involved in RMA implementation
- considering how institutions and processes could be reformed to create more favourable incentives for the use of collaborative governance processes for the development of policies and plans
- considering how to address cumulative effects more effectively, especially through the development of provisions which encourage councils, wherever relevant and reasonably practical, to set quantitative environmental objectives which specify limits for cumulative effects for defined resource units or landscape units.

Appendix 1: Further information requests

"**92. Further information may be requested**
(1) A consent authority may send a written notice requesting the applicant to provide further information relating to the application.

(2) Any notice under subsection (1) shall only be made if it -

> (a) is necessary to understand the nature of any potential adverse effect on the environment; and
>
> (b) it contains the authority's reasons for the request.

(3) A consent authority may commission any person to prepare a report on an application if -

> (a) the authority considers on reasonable grounds that-
>
> > (i) the activity for which the resource consent is sought will have a more than minor effect on the environment; and
> >
> > (ii) the report is necessary for the purpose of understanding the nature of the more than minor effect on the environment; and
>
> (b) the notification contains the authority's reasons for the request."

"**92A. Responses to request**
(1) An applicant who receives a request under section 92 may:

> (a) provide the information to the consent authority; or
>
> (b) tell the consent authority that the applicant refuses to provide the information."

- Section 88B remains (processing provisions from which periods described in section 88C are excluded)."

"**88C. Description of excluded periods**
(1) The period that must be excluded from the provisions listed in section 88B is the period -

> (a) starting with the date the first request under section 92 is received by the applicant; and
>
> (b) ending with the date on which -
>
> > (i) the written information provided by the applicant is received by the consent authority; or

(ii) the applicant tells the consent authority in a written notice that the applicant refuses to provide the information, including the applicant's reasons for the refusal."

Appendix 2: Opinion of Professor Miller

NOTES TO ASSIST THE RESOURCE MANAGEMENT ACT 1991 REVIEW COMMITTEE

Non-Complying Activities

The *Town and Country Planning Act 1953 (*TCPA) was the first planning legislation in New Zealand which defined categories of planning consents. It identified two very distinct categories. Conditional uses were land uses which were deemed generally suitable in every zone but not appropriate for every site. As such the assessment of such applications revolved around the effects of the activity and the nature and character of the site, neighbourhood and environment in which the activity was to take place. The second category was the specified departure, applications for which were originally made directly to the Town and Country Planning Appeal Board, though for a relatively short time. These were applications to undertake land uses that were not provided for either in that zone or in that District Scheme and which might be expected to offend the provisions of a District Schemes. As such assessment of them involved an examination of the application in relation to the District Scheme as a whole and led to it being assessed against the policy part of the District Scheme, eth Scheme Statement with its objectives etc. In short the TCPA 1953 and its successor the *Town and Country Planning Act* 1977 (TCPA77) created two distinct categories of activity/land use in conditional uses and specified departures which had no overlap. This also meant that District Schemes could provide for land uses as Predominant and Conditional Uses but could not render a specific land use a Specified Departure. In essence the Specified departure was default category for any zone and the Scheme.

When the *Resource Management Act* 1991 (RMA) was written this distinction in the different categories of activities seemed to have got a little lost. The new act provided for a range of application categories including discretionary activities. The transition provisions of the act now deemed all conditional uses to be discretionary activities. However, the RMA now allowed all types of activities to be deemed to be permitted, controlled, discretionary (and eventually restricted discretionary), prohibited and non-complying activities, in a District or Regional Plan. It is interesting to note here that the wording used to describe the assessment required of non-complying activities was taken essentially word for word from the TCPA77. Most importantly however the RMA provided specific evaluative directions for the assessment of both discretionary and non-complying activities. With discretionary activities a quite logical assessment checklist was provided by s104 but this now included consideration of the policies and objectives of the Plan. With non-complying activities various sections (now S104D) required exactly the same assessment to be undertaken for a non-complying activity as is done for a discretionary activity. The only difference lay in the wording. Thus if the assessment of a non-complying activity led to it being approved or declined then the same outcome would be achieved if the assessment had been done as a discretionary activity. I would claim from the perspective of a planning historian and former practitioner that the two categories exist in the RMA only as the result of a relatively thoughtless transition from the TCPA77 rather than because logic supports the continued existence of the two different categories.

However, now that non-complying activities exist as a category of activity that can be provided for in a plan they have taken on a sort of ‘super discretionary activity’ status which encourages poor plan writing and consent assessment. Plan writers and politicians can use them as a ‘too hard’ category when writing plans and when they are in plans they can and are viewed as being unlikely to be granted in the way specified departures were. This however is

wrong as the assessment of both categories requires consideration of all essentially the same elements both plan based i.e. objectives and policies and site based i.e. effects on the environment. As such there is no long any logical reason to have both categories and there has not been so since 1991.

A Specific Review Body for the Policy Parts of Plans

Again historically the RMA introduced a plan structure which stressed the policy aspects of the plan replacing the modest Scheme Statement with issues, objectives, policies etc. This was reflective of the times when policy was emerging as a specific undertaking and planning tended to be viewed a sub-set of policy. However, because the policy parts of a plan can be altered by submission and appeal, what ends up in a plan may no longer form a coherent statement from which the rules can logically be seen to have been derived. This has been made worse by the objectives and policies being frequently mangled by legal consideration which tend to create much narrower bands within which to construct provisions. Thinking of it logically only planners have the policy aspects of their plans held up to public scrutiny and alteration and this is presumably why many plans have no internal consistency. Equally the policy aspects of plans can be contested but they should not be subject to legal attack as they are statements of what may result, what it is hoped will result and the interpretations of the world on which those desired outcomes are based. This is in contrast to rules which essentially allow someone to do something, stop them from doing it or modify the way in which the do it. These are legally contestable in a way the policy aspects are not, because the do affect the basic property right and how we exercise our ‘right’ to use resources.

Thus if you follow this interpretation of what plan is then the policy aspects of a plan should not be subject to legal appeal but rather should go through a mediated process which tries to create as close to an agreed position as is possible. Given the consultation and hearings associated with plan writing then you might regard that as being what the process has done. The fact it does not please everyone is perhaps more reflective of human nature than anything else. If we could please everyone then wouldn’t we live in a utopia? Again if you accept this position then the policy parts of a plan should not be open to legal challenge and at most should go through a higher level mediation. That would leave rules to be fought over by the lawyers, the planners and the courts but might leave the policy aspects of the plan with more of a logical and coherent structure. This would however be a quite revolutionary proposition, requiring both planners and lawyers to change their outlook. Historically we have not always had a judicially based review and appeal system. Under the *Town-planning Act* 1926 the Town Planning Board was an expert board and ran a relatively successful system from 1927 to 1953.

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