

## **In Confidence**

### **Office of the Minister for the Environment**

#### **Chair, Economic Development Committee**

### **Resource Management Amendment Bill: Climate Change Commencement Dates and Making Technical COVID-19 Amendments Permanent**

#### **Proposal**

1. This paper seeks your agreement to amend the Resource Management Amendment Bill 2019 (the Bill) by supplementary order paper (SOP), to:
  - enable the current proposed commencement dates for climate change amendments to be extended by Order in Council
  - make permanent two technical amendments that were made on a temporary basis by the COVID-19 Response (Further Management Measures) Legislation Act 2020 (the CRLA).

#### **Executive summary**

##### *Climate change commencement dates*

2. The Resource Management Act 1991 (RMA) does not currently provide for climate change mitigation to be considered in plan-making or consenting. In light of submissions on the Bill, and the recent enactment of the Climate Change Response (Zero Carbon) Amendment Act 2019, Cabinet agreed to a package of amendments to enable RMA decision-makers to consider climate change mitigation [CAB-20-MIN-0051.01 refers]. These changes were added to the Bill by the Environment Select Committee, which presented its report on 30 March 2020.
3. Amendments affecting local authority decision-making are currently proposed to commence on 31 December 2021. This date aligns with the statutory deadline for publication of the first emissions reduction plan under the Climate Change Response Act 2002 (CCRA)<sup>1</sup>.
4. National direction will be needed to support local authorities in considering climate change mitigation by the time these changes commence. Cabinet agreed to deliver national direction by 31 December 2021. However, in light of Government resources needing to be focused on the COVID-19 response, this deadline may be difficult to achieve.
5. To address this, I propose that the Bill be amended to enable the commencement date for these amendments to be extended by Order in Council if necessary, to a date no later than 30 November 2022. The current commencement date of 31 December 2021 would be retained in the primary legislation as the nominal date if national direction is able to be issued by then.

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<sup>1</sup> As an interim backstop, amendments to enable decision-makers on matters of national significance 'called in' by the relevant Minister to consider climate change mitigation are proposed to commence immediately.

### *Making RMA changes enacted by the CRLA permanent*

6. The CRLA included two minor and technical amendments to the RMA, to clarify the use of audio-visual links (AVL) in hearing procedures, and provide for electronic publication of documents. These included provisions to ensure natural justice is upheld. The amendments have a sunset clause with a 31 October 2021 expiry date.
7. These changes were supported by submitters to the Epidemic Response Committee, including the New Zealand Society of Local Government Managers (SOLGM), who submitted that these changes should be made permanent. I agree that this should occur, in order to maintain certainty that this technology can continue to be used as it becomes more widespread.
8. It is uncertain at this stage whether there will be any further opportunity to amend the RMA before the 31 October 2021 sunset clauses take effect. In order to make the use of these technologies certain, I propose we use the Bill as a vehicle to make these changes permanent.

### **Background**

9. The Bill includes several amendments to enable climate change mitigation (greenhouse gas emissions) to be considered in RMA decisions. In particular, it proposes to repeal the statutory bar in the RMA that precludes local authorities from considering greenhouse gas emissions in plan-making and consenting decisions. The Bill also proposes to formally link the RMA and the CCRA through references to emissions reduction plans and national adaptation plans in the RMA.
10. These amendments will allow the Government to use the RMA as a direct lever to reduce emissions and support New Zealand's climate change targets through the planning system.
11. On 15 May 2020, the CRLA made two minor and technical amendments to the RMA to ensure that the processes under the RMA are able to continue through the COVID-19 response period, by providing for the use of AVL technology in hearing procedures and publication of documents by electronic means. Each of these amendments are set to expire on 31 October 2021, as the CRLA was not considered an appropriate vehicle to make permanent legislative changes.

### **Extending the timeframes for the climate change provisions in the Bill**

*National direction will be critical for ensuring the successful implementation of the climate change provisions in the Bill*

12. It is important that national direction be in place by the time these changes commence. Without this, local authorities would have to navigate these amendments themselves, risking inconsistency, extra cost, investment uncertainty and the potential for double regulation for those who have obligations under the New Zealand Emissions Trading Scheme.
13. Cabinet has agreed that national direction (most likely a national environmental standard (NES) at minimum) be completed by 31 December 2021, to support local government with making consistent decisions regarding climate change mitigation [CAB-20-MIN-0051.01 paragraph 13 refers].
14. In light of the current proposed commencement date, developing national direction for climate change will be a priority work stream for the Government's climate change work programme. However, with Government resources needing to be focused on the COVID-19 response, there is a risk that national direction may not be completed by 31 December 2021.

*The Bill can be amended to allow some flexibility in the commencement dates, should timeframes for national direction change*

15. I propose that the existing commencement date in the Bill be retained as the nominal date for these amendments to come into effect, to ensure the Government prioritises national direction as soon as possible. However, I recommend that some flexibility be added to enable extension by Order in Council. This would provide the option to extend, closer to the end of next year, if this timeframe is unable to be met.
16. It is important that the primary legislation set a limit on any potential extension, to ensure these amendments cannot be extended indefinitely and do come into force at some point. I propose that the latest date this may be extended is 30 November 2022, which is the latest possible date of gazettal of the first national adaptation plan (NAP) under the CCRA. Using the NAP date as a backstop retains alignment of dates between the CCRA and the RMA, in support of the policy objective to 'link' the two Acts [CAB-20-MIN-0051.01 refers].
17. Overall, this proposal retains the ambition of the existing commencement date, while allowing some flexibility around the timeframe for national direction, should resourcing and timing become a problem.

*Deferring the report back to Energy, Environment and Climate Committee on timeframes for national direction*

18. Cabinet invited me to report back to the Energy, Environment and Cabinet Committee (ENV) on detailed timeframes for national direction by 31 May 2020 [CAB-20-MIN-0051.01 paragraph 12 refers]. I propose to defer this report back to 31 July 2020 to allow my officials more time to scope the proposed national direction instrument(s).

#### **Making RMA changes enacted by the CRLA permanent**

19. The RMA changes recently enacted by the CRLA provide for the use of technology to enable efficient conduct of RMA processes. While the CRLA only made these changes to allow RMA processes to continue in response to COVID-19, I consider that these changes should be made permanent as they promote good practice and efficiency while protecting natural justice.
20. If these changes are not made permanent, there will be uncertainty about the legality of these practices (which will become increasingly established) following 31 October 2021. This would be particularly undesirable regarding the use of AVL, for which the expiry of the changes may make their use less legitimate than is currently the case.
21. I consider that these changes would fit well within the purpose of the Bill, which includes objectives to reduce complexity, provide for certainty, and public participation. There is currently no other process planned to amend the RMA which may be completed in sufficient time to provide certainty for these processes prior to 31 October 2021. More comprehensive changes may eventuate following consideration of the Resource Management System Review Panel's recommendations but these will not be in place before 31 October 2021.
22. I therefore propose that these changes be made permanent by SOP to the current Bill.
23. I also propose that this SOP include any further changes that may be necessary to clarify that AVL can be used in hearings conducted by boards of inquiry and special tribunals on water conservation orders. These hearings are intended to be captured by the CRLA amendments allowing AVL use, but have additional requirements for physical hearings to be located near the subject site. I wish to clarify, if necessary, that AVL may be used despite these requirements.

## Consultation

24. The following departments were consulted in the preparation of an earlier version of this paper which addressed the climate change aspect of this proposal: the Department of Internal Affairs, the Department of Conservation, the Environmental Protection Authority, the Ministry for Primary Industries, the Ministry of Business, Innovation and Employment, the Ministry of Housing and Urban Development, the Ministry of Transport, the Energy Efficiency and Conservation Authority, and the Treasury.
25. Two submissions were received by the Epidemic Response Committee (from the Auckland District Law Society and SOLGM) on the amendments to the RMA made through the CRLA. Both of these were in support of the changes, with SOLGM suggesting they be made permanent. All government agencies were informed of these temporary RMA changes through the CRLA via the Chief Legal Advisors network.

## Legislative implications

26. If the proposal is agreed, it will be included in a Government SOP for consideration by Cabinet, in advance of the Committee of the whole House stage.

## Financial implications

27. There are no financial implications of the proposals in this paper.

## Regulatory impact analysis

28. No regulatory impact analysis has been carried out on the climate change aspect of this paper. This is consistent with the decision made by Cabinet on 23 March 2020 to suspend the regulatory impact analysis requirements on regulatory proposals responding directly to the COVID-19 pandemic that are submitted to Cabinet before 1 September 2020 [CAB-20-MIN-0138 refers].
29. The proposed climate change amendments were subject to initial regulatory impact analysis, which was attached to the previous Cabinet paper considered in February 2020.
30. The Ministry for the Environment's Regulatory Impact Analysis Panel has reviewed the Regulatory Impact Summary (RIS) document "Making permanent recent RMA changes to allow documents to be made accessible electronically, and hearings to use remote access facilities" (Appendix 1). The Panel considers the document partially meets the quality assurance criteria for regulatory impact analysis. The RIS is clear and concise and makes a convincing case for the changes proposed. While the analysis has been informed by some consultation on the COVID-19 response legislation, consultation on these specific changes through the Bill has not been carried out. While the known impacts are adequately articulated, the lack of a proper consultation process raises a risk that there are impacts on stakeholders that have not been able to be identified.

## Climate Implications of Policy Assessment (CIPA)

31. The CIPA requirements do not apply to the proposals in this paper as the threshold for significance is not met.

## Population implications

32. There are no significant population implications of the proposals in this paper.
33. Making the RMA changes enacted by the CRLA permanent will ensure the public access and participation elements provided for by these changes continue after 31 October 2021. Directions to use AVL for hearings can only be issued under section 39AA if it is appropriate

and fair to do so, and the authority is satisfied that necessary remote access facilities are available to parties.

## Human rights

34. There are no inconsistencies between the proposal and the Human Rights Act 1993.

## Proactive Release

35. If Cabinet agrees to this proposal, I propose this paper be proactively released after the relevant SOP is tabled in the House. This may be later than the usual 30 business days after the paper is considered, depending on House timeframes.

## Recommendations

The Minister for the Environment recommends that the Economic Development Committee:

### *Climate change commencement dates*

1. **note** that Cabinet agreed to a set of amendments for inclusion in the Resource Management Amendment Bill for climate change, to take effect from 31 December 2021 in alignment with the first emissions reduction plan [CAB-MIN-0051.01 refers]
2. **note** that national direction for climate change is critical to ensuring successful implementation of the climate change amendments in the Resource Management Amendment Bill but, in light of COVID-19, national direction may not be able to be in place by 31 December 2021
3. **agree** to amend the original Cabinet decision [CAB-MIN-0051.01 paragraphs 8 and 9 refer] to retain the current date in the Bill but allow commencement to be extended by Order in Council, with a backstop deadline of 30 November 2022

### *Making RMA changes made by the CRLA permanent*

4. **note** that the COVID-19 Response (Further Management Measures) Legislation Act 2020 inserted sections 2AC and 39AA to the RMA, enabling the use of electronic publication and use of audio-visual links in RMA hearings
5. **note** that these sections are set to expire on 31 October 2021
6. **agree** to amend the RMA to make sections 2AC and 39AA permanent
7. **agree** to amend the RMA, if necessary, to clarify that section 39AA enables the use of audio-visual links in hearings conducted by boards of inquiry or water conservation orders

### *Next steps*

8. **authorise** the Minister for the Environment to instruct the Parliamentary Counsel Office to draft an amendment to the Resource Management Amendment Bill in accordance with recommendations 3, 6 and 7
9. **agree** to include these amendments in a supplementary order paper (SOP) to the Resource Management Amendment Bill
10. **invite** the Minister for the Environment to submit the SOP directly to Cabinet for approval so that it can be introduced at the Committee of the whole House stage of the Resource Management Amendment Bill
11. **agree** to amend the original Cabinet decision [CAB-20-MIN-0051.01 paragraph 12 refers] inviting the Minister for the Environment to report back to Cabinet by 31 May 2020 on detailed timeframes for national direction to 31 July 2020.

Authorised for lodgement.

Hon David Parker

**Minister for the Environment**

Proactively released

**Appendix 1:** Impact Summary - Making permanent recent RMA changes to allow documents to be made accessible electronically, and hearings to use remote access facilities

Proactively released