Office of the Minister for the Environment

The Chair

Cabinet

Reform of the Resource Management Act 1991: Phase One Proposals

1. This paper seeks Cabinet agreement to proposals that simplify and streamline processes under the *Resource Management Act 1991* (RMA) as phase one of reform of the RMA.
2. Phase one of the RMA reform delivers on a promise to introduce legislation into the House within 100 days of the formation of the new government that will improve costs and the timeliness of RMA processes. It is also designed to streamline consenting processes for priority projects and better manage anti-competitive behaviour under the RMA.
3. I also believe that there are further changes that can be made to improve the RMA. These changes relate to more complex issues (such as water allocation mechanisms) with significant and broad-ranging policy implications that require careful scrutiny. It is proposed to progress these 'phase two' changes over a longer timeframe to ensure Ministers have an opportunity to consider and discuss their implications, and to allow a wider process of community engagement.

Executive summary

4. In this paper I propose a package of amendments be made to the RMA as phase one of the review of the RMA. A second phase will follow these phase one proposals in order to address more complex and contentious issues and potential improvements.
5. Since consideration of this paper at CBC on 26 January 2009, I have met with Ministers Finlayson (Attorney-General and Arts, Culture and Heritage), Carter (Agriculture), Joyce (Transport and Communications), Te Heuheu (Courts) and Heatley (Fisheries), and had phone discussions with Ministers Power (Justice and Commerce), Williamson (Building and Construction) and Hide (Local Government). I have also met with officials from the Ministry of Economic Development on commerce matters. No further issues were raised by the Minister of Finance post CBC. I also had an opportunity to meet with the Principal Environment Judge, Judge Bollard, and discuss the operation of the RMA from his perspective. Further advice from the RMA Technical Advisory Group (TAG) has been sought on some of the significant issues raised. These discussions have resulted in several changes that improve the reform package.
6. The main aspects of my phase one proposals to reform the RMA are as follows:
   (a) introducing new measures aimed at reducing the incidence of vexatious and frivolous appeals, and appeals motivated or backed by trade competition. These measures include enabling the courts to seek security for costs and award indemnity costs, and for sanctions against third parties who act on behalf of trade competitors without disclosing this information

(b) amending and adding to the current call-in powers of the Minister for the Environment. This will enable applications and requests for plan changes to be processed by a new Environmental Protection Authority with hearings before a board of inquiry. Decisions of the board of inquiry must be made within nine months of the consent being notified and appeal rights on decisions will only be appealable on questions of law to the Court of Appeal

(c) introducing measures to speed up and reduce costs in the plan preparation and change processes. These measures include the modification of the further submission process to enable local authorities to consult with those who may be affected by matters in submissions as an alternative process, streamlining decision reporting, and removing the ability for appeals to be lodged that challenge entire plans

(d) reducing costs in the resource consent process by further reducing the need for consents to be notified when effects are minor, reducing the delays due to serial/iterative council requests for further information and reducing the reporting workload for consent processing staff

(e) amending and clarifying existing provisions related to national policy statements (NPS) and national environmental standards (NES) to remove problems that have been encountered in their development, and ensure that they can be more efficiently and effectively integrated into plans, and implemented

(f) improving the effectiveness of enforcement mechanisms by creating stronger incentives to comply (updating out of date maximum penalties and introducing a new level of fines for corporate offenders)

(g) introducing a range of technical and small amendments to improve workability, provide more flexibility in decision making arrangements, and clarify appeal rights and processes. Individually these changes would achieve little, but together they support and improve on the gains made in other initiatives

Background

7. The RMA came into force in October 1991 at which time it replaced or amended more than 50 other laws relating to town planning and environmental management.

8. The RMA remains the principal statute for managing the use of natural and physical resources (including the use of land) in New Zealand. Its purpose is to ensure resources are managed in a sustainable way that meets the needs of current and future generations while avoiding, remedying or mitigating adverse effects on the environment (the principle of ‘sustainable management’).

9. The RMA both seeks to enable development and use of resources while at the same time avoiding, remedying or mitigating adverse effects on the environment (including people). Implementation often has to manage conflicting desires and expectations of those undertaking activities on one hand, while also addressing the rights of parties who may be adversely affected by such activities on the other.

10. The inherent tensions and conflicting rights and values the RMA has to manage has meant that a diversity of mechanisms, processes, requirements, checks and balances has had to be incorporated from the start.

11. In the 17 years since the RMA came into force there has been growing criticism of its ability to effectively manage complex environmental issues and the slow and costly plan preparation and consenting processes.

12. Some environmental groups claim the RMA (or its implementation) does not do enough to protect the environment, while businesses claim processes and regulations (predominantly plans) impose a heavy burden of compliance costs, stifle innovation, and contribute to the high cost of land and housing.

13. The Government promised to introduce legislation into the House to amend the RMA within 100 days of the formation of the new government.

14. On 3 December 2008 the Cabinet Business Committee noted that I intended to introduce a Bill to simplify and streamline the RMA by 26 February 2009 and would report back to Cabinet by 27 January 2009 with proposals for reform of the RMA [CBC Min (08) 30/7 refers]. This paper fulfils my obligations to report back to Cabinet and seeks agreement to my proposals. Note that I am now proposing that the Bill be ready for introduction in mid February.

15. On 8 December 2008 Cabinet agreed to the terms of reference for the TAG and noted that a cross-departmental officials working group had also been established to contribute to the policy development on the RMA reforms [CAB Min (08) 45/8].

16. The terms of reference for the TAG were agreed with the ACT party in accordance with the National-ACT confidence and supply agreement.

17. The terms of reference for the TAG included the tasks of:

    (a) providing independent advice to Ministers on reforms to the RMA that will streamline and simplify processes, provide ‘priority consenting of major projects’, reduce costs and delays, speed up plan making processes, restrict trade competition, and vexatious and frivolous objections

    (b) consider other amendments put forward by TAG members, local government and support parties, and advise on their suitability

    (c) provide advice on other non-legislative reforms to assist the functioning of the RMA

    (d) identify RMA reforms that require longer term consideration as part of the second phase of the reform

18. On 8 December 2008 Cabinet also invited me to issue drafting instructions to the Parliamentary Counsel Office to enable it to commence drafting legislation to implement the RMA amendments [CAB Min (08) 45/8 refers].

19. On 15 December Cabinet [CAB Min (08) 46/7] noted that I intended to appoint eight people to the TAG.

20. Membership of the TAG consists of:

    (a) Alan Dormer, Barrister (chairperson)

    (b) Guy Salmon, Executive Director of the Ecologic Foundation

    (c) Penny Webster, Mayor of Rodney District

    (d) Michael Foster, Director of Zomac Planning

    (e) Dennis Bush-King, Environment and Planning Manager at Tasman District Council

(f) Rt Hon Wyatt Creech, businessman and former Deputy Prime Minister

(g) Paul Majurey, Partner, Russell McVeagh

(h) Mike Holm, Barrister

21. The membership of the TAG was agreed with ACT in accordance with the National-Act confidence and supply agreement.

22. On 16 December 2008 I publicly announced the membership of the TAG that was to assist me in developing the policy proposals.

23. Since 18 December 2008 the TAG has held six full day meetings to consider options they themselves had put forward at and in between these meetings, options suggested by officials, and ideas and comments I received from local authorities, other organisations, businesses and the community.

24. On 26 January 2009 I submitted a paper to Cabinet Business Committee outlining my proposals for phase one of the reforms to the Resource Management Act.

25. At the meeting on Monday 26 January 2009 I was invited to meet with the Ministers of Justice, Commerce, Culture and Heritage, Courts, Transport, Fisheries, and Agriculture, the Attorney-General and the Technical Advisory Group to resolve any outstanding issues relating to the phase one proposals [CBC Min (09) 2/7 refers]. I was also invited to submit a new paper, revised as appropriate, in light of these discussions.

26. This paper contains the proposals recommended to me by the TAG, having had consideration to information from a range of sources including comments received during consultation, and additional views, suggestions and advice provided to me by officials. This paper is a revised version of that submitted to Cabinet Business Committee on 26 January 2009, and includes material from discussions with Ministers and their officials.

Comment

27. The RMA is a complex statute that is designed to help manage a wide range of issues, including conflicting values, expectations, and rights in regard to the environment.

28. Management of the diversity of issues, combined with the principle that implementation should be devolved to those who know most about, and are most affected by, local environmental issues (i.e. communities as represented by their local authorities), has meant that the RMA contains a wide array of duties, functions, powers, processes and requirements.

29. To reflect the main functions, powers and duties under the RMA, and to make the changes I propose, this Cabinet paper has been divided into the following eight parts:

(a) Part A – Frivolous, vexatious and anti-competitive objections

(b) Part B – Proposals of national significance

(c) Part C – Environmental Protection Authority

(d) Part D - Improving plan development and change processes

(e) Part E – Improving resource consent processes

(f) Part F – Improving national instruments

(g) Part G – Improving the effectiveness of compliance mechanisms

(h) Part H – Streamlining decision making processes

(i) Part I – Measures to improve workability

30. In order to put phase one of the RMA review into context an overview of what I believe needs to be considered as part of phase two reforms has also been provided at the end of this paper. I will provide a more detailed timetable and terms of reference in a separate paper which I will provide to you by 31 March 2009.

Part A – Frivolous, vexatious and anti-competitive objections

The issues

31. Resource consent and private plan change applicants can experience significant costs and delays as a result of having to defend their applications from challenges made by trade competitors, or frivolous or vexatious objectors.

32. The ability for parties adversely affected by appeals motivated by trade competition to recover the full extent of the costs they have incurred is low.

33. Even in circumstances where a party is ultimately unsuccessful in seeking the rejection of a trade competitor's consent application, the resultant delays and costs borne by the competitor can be sufficient to significantly disadvantage them, or make their proposal unviable.

34. Appeals and objections against proposals of trade competitors can also impose indirect costs to the economy by:

    (a) reducing competition and the necessity for competitive pricing

    (b) denying residents and consumers local access to goods and services, thereby imposing additional transportation costs on them

Background

35. Only a small proportion of appeals against the 6% of resource consent applications that are notified are found to be totally without merit but the costs to applicants, consent authorities and Courts can be significant. A notable case in 2005 was Omokoroa Ratepayers Association versus Western Bay of Plenty District Council which saw costs of around $180,000 awarded against the Association, reflecting the Court's view that its case lacked merit. However these costs were never paid after the Association dissolved itself, leaving ratepayers to pick up the bill for the costs incurred by the council.

36. Objections and appeals involving anti-competitive behaviour are not uncommon. A 1997 study commissioned by the then Ministry of Commerce revealed that 32% of business applications attracted submissions from parties they considered trade competitors. In a further 25% of the cases it was suspected that trade competitors had been involved. It is likely that a similar pattern applies now. In such cases the anti-competitive behaviour can take the form of:

    (a) Unreasonably withholding written approval when they may have been identified as a potentially affected party

(b) Lodging objections on spurious, frivolous, or vexatious grounds in order force a consent to be heard and ensure the trade competitor can appeal to the Environment Court

(c) Appealing decisions to the Environment Court on council decisions (many of these appeals are disguised as legitimate environmental issues however)

(d) Seeking judicial reviews of council decisions when consents have not been notified, or on technicalities of process (either seeking to delay the process while proceedings take place, or overturn decisions on technicalities)

37. Research carried out in 2008 suggests 8% of judicial review proceedings in the High Court related to decisions made under the RMA may have been motivated by trade competition.

38. Depending on the scale of the businesses affected and the degree to which their opponents are prepared to fight the applications through various court stages, the costs and delays to applicants from anti-competitive behaviour can range from thousands of dollars and weeks, through to millions of dollars and years. Administration costs for councils and Courts can also be substantial. Some of the highest costs are incurred in the so-called "supermarket wars", where proponents and opponents have spent millions of dollars fighting each other and delays of years have resulted.

39. Since 1991 various amendments have been made to the Resource Management RMA over its life to deal with frivolous and vexatious submissions and trade competition.

40. Amendments to the RMA in 1996 enabled the Courts to require security for costs against appellants where a case could prove weak and involve a costs order. In the short period the ability to require security for costs was available it was applied sparingly by the Courts. It is considered that security of costs may have deterred some frivolous and vexatious appeals, but it was nonetheless repealed in 2003.

41. Amendments in 2005 enabled a consent authority to strike out submissions considered to be frivolous or vexatious (section 41C(7)) and also provided for limited notification by which "only those affected by a proposal" for activities with minor effects can participate (section 94). Limited notification is increasingly being used by local authorities when processing consents, and its use is likely to increase further as RMA plans are reviewed and able to incorporate provisions to encourage greater use of the tool.

42. Dealing with trade competition under the RMA has proved particularly difficult. Section 104(3) requires that a consent authority must not have regard to trade competition when considering an application and there are similar provisions for plans and plan changes. These provisions have been largely ineffective because of the ability of trade competitors to disguise their commercial motives behind almost any aspect of relevant planning principles, potential effects, provisions in the legislation and other methods available to them. This includes disguising their interests by having third parties front hearings on their behalf.

Outcomes sought

43. Reducing the attractiveness for trade competitors to use the RMA as a tool to delay or thwart projects, through providing a disincentive to such behaviour.

44. Reducing the ability of trade competitors to use third parties to front appeals in an attempt to disguise trade competition motives.

45. Reducing costs and delays arising from frivolous and vexatious submissions and appeals through reducing the attractiveness to submitters and appellants to bring cases with little or no merit.

46. Enabling parties whose proposals are adversely affected by appeals motivated by trade competition to recover a greater proportion of the costs that they have incurred.

Proposed means to achieve the outcomes

47. Consistent with pre-election policy announcements, I propose that the powers of the Environment Court to award security for costs be reinstated. This is supported by local government and the TAG.

48. Having to provide security for costs is considered to have the following benefits :

    (a) acting as a disincentive against making appeals of dubious merit (particularly those likely to be judged frivolous or vexatious)

    (b) helping to ensure that applicants are able recover a greater proportion of their costs in defending their proposals against appeals lodged by those with anti-competitive, frivolous or vexatious motives

    (c) closing the gap between the financial gain or advantage to be made from lodging an appeal and the costs that may be awarded against the appellant (thereby reducing the 'net benefit' to the appellant)

49. Ministry of Justice officials have noted that the risks associated with security of costs is that it can act as a barrier to those with legitimate cases but little money.

50. In addition to security for costs I propose the following further measures to close various loopholes in the RMA that currently enable trade competitors to circumvent existing provisions. The package is supported by the TAG.

51. I propose that sections in the RMA designed to prohibit consideration of trade competition be amended to make it clear that the prohibition on having regard to trade competition also encompasses its effects. This is necessary because of an attempt by an appellant in a recent case to argue that trade competition has to be disregarded but not its effects. Although this argument was rejected by the High Court there is the potential for it to be raised in other cases.

52. To ensure that the ability of trade competitors to object or otherwise hold up resource consent applications able to be curtailed at the earliest possible stage, I propose that effects on trade competitors be specifically excluded from consideration when local authorities first form an opinion as to whether a resource consent needs to be notified. This then limits the ability of a trade competitor to be considered as an affected party and, with it, their ability to force a resource consent to be notified.

53. I also propose that full standing to participate in hearings be removed from trade competitors that oppose a rival company's consent application or private plan change. Trade competitors should only be able to participate if they are directly affected and the effect does not relate to trade competition. This may be criticised by some as a backward step from the open standing principles of the RMA. Preserving open standing at any cost, however, is not good policy. The open standing provisions of the RMA are being exploited by trade competitors

with the effect that the economy is less efficient and productive and with few benefits, if any, to the environment or society.

54. I propose an amendment to section 274 to limit the ability of trade competitors to be represented at proceedings of the Environment Court as third parties. Removing the potential for trade competitors to enter proceedings under the aegis of representing an interest “greater than the public generally” would close one loophole that might be available to cause delay.

55. I propose that provisions be introduced to prevent the covert opposition of trade competitors through surrogates. Third parties, who represent or who are being paid or backed by a trade competitor should be required to disclose their interest. This is necessary to deal with the possibility that trade competitors would seek to get around partial restrictions on their participation. Further, there should be a sanction for non-disclosure of a third party’s interest.

56. I also propose that provisions be introduced to enable any party whose trading position is adversely affected by the bringing of proceedings that are found by the Courts to have been substantially motivated by trade competition, (brought, financed or encouraged by trade competition) to be able to recover all the costs associated with the appeal. This indemnity cost regime is likely to act as a significant disincentive to the involvement of trade competitors because decisions to become involved usually hinge on financial considerations. It is necessary because the financial benefits of delaying business opponents’ developments have in the past usually significantly exceeded costs awarded, even when these costs have been substantial.

57. The TAG has further recommended, and I support, a punitive regime of indemnity costs awards and damages be introduced where trade competition is behind appeals. Such a regime would apply where the Courts not only feel it is appropriate to compensate a party whose position is adversely affected by a trade competition appeal, but consider it necessary to punish the party that brought (or continued) such an appeal.

58. It is envisaged that the Environment Court would make a finding for contravention of the Act in cases that they considered were brought or continued by motives of trade competition. The party whose position was adversely affected would then seek an award of damages in the relevant Court (if they desired).

59. Some officials consider the introduction of such a scheme would represent a significant policy shift in the RMA with potentially serious implications and an amendment of this significance requires a more detailed assessment than was possible within the time available over the phase one review period. The punitive regime is critical to the package of limiting the trade competition abuse of the RMA. The TAG regard the inclusion of a punitive regime as a critical component to the success of this set of amendments.

Part B – Proposals of national significance

The Issues

60. Significant projects can be subject to unreasonable delays and inconsistent consideration of national level benefits.

Background

61. Under the RMA it is relatively common for decisions on significant roading projects, electricity projects, and other large scale infrastructure projects to be appealed to the Environment Court – either by project opponents or the applicant themselves (against a decision to decline the application or against consent conditions that threaten the financial viability of the project).

62. The holding costs associated with delays and uncertain timeframes, the direct costs of defending or taking appeals and the cost of consent conditions imposed to mitigate localised effects can be significant. In some instances the costs and/or delays can be out of proportion with the scale of expected environmental effects and have the potential to threaten the viability of projects that are in the national interest or have broad, but localised, community benefits.

63. These problems are highlighted by the following cases:

    (a) Project Hayes: Consent applications for the $1.5 billion windfarm of 176 turbines were lodged in 2006. It took a year for the consent to be granted, only for the project to be appealed. The Environment Court held hearings on the appeal in mid-2008 but these have been subsequently adjourned to early 2009 so that the cumulative effects on an adjoining wind farm could be considered.

    (b) Contact Energy Wairakei and Poihipi Geothermal Plants: It has taken Contact Energy six years to gain consent for the existing Wairakei and Poihipi geothermal plants. Consents were lodged in 2001 and granted in 2004. The council decision was subsequently appealed and it took another 3 years before final approval was obtained from the Environment Court in 2007, it became entangled in further appeals and a review of Environment Waikato's RPS and geothermal plan provisions.

64. In contrast Contact Energy's 220 MW Te Mihi geothermal plant, having been called-in by the Minister for the Environment, took 8 months from lodgement through to final decision. This was, however, a more limited application.

65. A review of these and other projects identifies the following key problems with RMA processes:

    (a) delays due to serial/iterative council requests for further information

    (b) delays in appointing commissioners to hearing panels and securing hearing time along with interrupted hearings due to constraints on the availability of experts and/or commissioners

    (c) unnecessary duplication of hearing processes which are inefficient and costly, and open the potential for parties to withhold evidence and/or experts until the Environment Court stage

66. The call-in provisions of the RMA enable the Minister to determine that a matter is of national significance and refer it to a board of inquiry or the Environment Court for a decision.

67. The call-in provisions are used as an alternative to having local authorities making decisions on resource consents where are project is considered to be of national significance. Such circumstances include where a proposal

    (a) has aroused widespread public concern

(b) involves or is likely to involve significant use of natural and physical resources

(c) affects a structure, feature, place or area of national significance

(d) affects one more regions or districts

(e) involves new technology or processes that may affect the environment

(f) impacts on New Zealand's international obligations

68. Five proposals have been called in over the last two years. Experience operating the call-in provisions has highlighted areas where further clarification of the current powers is needed. I consider that these provisions are not utilised enough because of inadequacies in the current provisions.

Outcome sought

69. To provide an efficient and robust process for the consideration of, and decision making on, resource consent applications, plan changes and notices of requirement for large infrastructure or public work projects that are of national significance.

70. To ensure that projects processed under the new efficient and robust process are not subsequently delayed or frustrated by appeals that are frivolous in nature or have little merit.

71. To strike a balance between the efficient board of inquiry process and recognising that proposals can have significant local impacts. The intention of the reform is to make greater use of the board of inquiry process, but to also improve the capacity for local authorities and communities to have confidence and involvement in the board of inquiry process.

Proposed means to achieve the outcome

72. I propose to introduce to the RMA, amendment and additions to the current call-in powers of the relevant Ministers. These will provide improvements to existing processes for proposals of national significance.

73. I also propose to create an Environmental Protection Authority (EPA) to administer the consenting process for proposals of national significance. The establishment of the EPA is dealt with in Part C of the paper. The EPA will process applications I have called in under my existing powers.

74. Applicants will also have the ability to make applications directly to the EPA. Eligibility for projects that can be directly applied to the EPA are to be determined by the existing criteria in the RMA (section 141B(2)). It is the intention for Government to have publicly available guidance on the Minister for the Environment's powers of intervention under the RMA, including call-in.

75. In recognition of the importance of nationwide infrastructure networks, I propose that a new criterion of "concerns the operational infrastructure of a nationwide network utility operator" be added to the factors the relevant Minister may have regard to when calling in a resource consent, plan change, or notice of requirement. This criterion is specifically intended to cover projects that may not individually be considered to be of national importance, but which will play a significant role improving or maintaining the functioning and integrity of nationally significant networks (such as those relating to roads, railways, pipelines and electricity transmission).

76. I propose that I be given powers to refer the application to the relevant local authority to be processed under normal consenting, notice of requirement, or plan change processes, where the application does not meet the criteria.

77. The normal call-in board of inquiry process for consideration of the application will remain. The appointment process for the board will be through the Cabinet Appointments and Honours Committee as it is now. However, I would like the additional requirement of being required to receive nominations for the board from the local authorities within which the application occurs. Further there should be a requirement that I appoint persons to the board with local knowledge.

78. The provisions of section 146(5) require me to appoint a current, former or retired Environment Court Judge as the chairperson of the board. In recognition of there being a limit on the number of judges and the constraints this puts on timely decisions for any proposals considered by a board, I propose to increase the number of judges in the Environment Court from 8 to 10 that may hold office at any one time.

79. Lifting the current cap on Environment Court Judges will ensure that there is capacity to deal with the additional functions and work load expected to arise out of these amendments. Lifting the cap will also enhance the ability of the Environment Court to hear cases faster, reducing delays for those resource consent applications, notices or requirement, plans and plan changes that are appealed.

80. Some officials have expressed concerns in regard to budgetary implications of lifting the cap, and whether the justification is strong enough to warrant raising the cap. However raising the cap on judges does not automatically mean that the full complement of ten judges has to be appointed. It merely provides flexibility for the Court to boost resources at a future date to meet demand without having to seek an urgent legislative amendment.

81. The funding of the process for running the board of inquiry and consent processing will be on the same basis as is used for call in – that is an increase in appropriation is sought from Revenue Other and the actual and reasonable costs of the process are recovered from the applicant.

82. The TAG raised the issue of attracting sufficiently highly skilled commissions for Boards of Inquiry because of the current limits on fees payable. The concern is that these are often less than those paid to independent commissions employed by local authorities to hear consent applications. While I believe this concern does have some validity. I do not consider it appropriate to increase the remuneration fees at this time.

83. A final decision on the application must be made within 9 months of the date of notification. The relevant Minister shall have the power to extend this timeframe if he or she is satisfied by a report from the Board of Inquiry that there is necessary justification for doing so.

84. I propose where supplementary resource consents associated with a proposal that has been or is being considered but not applied for at the time the original application was lodged with the EPA, the Minister shall decide whether:

    (a) the application be processed as a change to the original consent on a non-notified basis and refer it to a 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 the specified timeline for decisions.

85. Currently certificates of compliance confirming that no resource consent is needed for a particular activity can only be obtained from local authorities. This is the case even when resource consent applications for a proposal have been called-in. Obtaining certificates of compliance from individual local authorities can be a cumbersome and time consuming where projects or infrastructure crosses multiple local authority boundaries.

86. I consider it appropriate for the EPA to have a role in issuing these certificates of compliance.

87. I also propose the following minor changes to improve the workability of the procedures for dealing with proposals of national significance:

(a) clarify that a board of inquiry can request information or commission independent reports on matters that have been called in and enable this information to be circulated to all parties attending the hearing.

(b) clarify that comments on a draft decision of the board of inquiry may include comments on proposed conditions and minor or technical issues but can not challenge the decision of the Board on whether or not an application should be granted.

(c) enable board of inquiry members to be given legal protection against actions arising out of any acts or omissions made in good faith

(d) clarifying the relevant Minister can call in a private plan change application (1) after the application has been lodged with the local authority but before that authority has made a decision as to whether to accept, adopt, or decline the application; or (2) after the decision has been made by the local authority with whom it was lodged to accept, adopt or decline it prior to the hearing.

88. I finally propose that appeals in regard to the decisions made by the Board of Inquiry on nationally significant proposals be limited to appeals to the Court of Appeal on questions of law only. This reflects the fact that the decisions made by the Board should have a similar status to those made by a Court (particularly when the Board is chaired by a current judge). Such is the specialist nature of decisions that will be made by the Board, and level of detail involved, I consider them to be more analogous to those issued by the Employment Court or the High Court (where appeals are made to the Court of Appeal) than a lower Court. The overall effect will be to impress upon potential appellants the standing of the Board and the decisions it makes, and discourage appeals of little merit.

Part C – Environmental Protection Authority

The Issues

89. There delays in consent processes for major projects (especially as we enter a period of greater investment in major infrastructure), and there is a desire for more consistency in decisions. There are also concerns that national priorities are not always properly considered in consent decisions.

90. More broadly, the high level of devolution in New Zealand's environmental management systems, and an absence of centralised processes and standards in some areas, is raising the costs of operating the RMA and leading to a lack of capacity and consistency.

Background

91. Pre-election policy announcements signalled my intention to create an Environmental Protection Agency (EPA), similar in nature to EPAs which operate successfully in some other countries, to achieve national environmental goals. More centralisation and nationwide approaches would address some of the issues created by extensive devolution of environmental management in New Zealand.

92. One of the functions I have already specified for a new EPA is to centralise some regulatory roles which are best exercised on a nationwide basis. I consider that processing proposals of national significance to be one of those regulatory functions.

Outcome sought

93. To establish a body that can provide efficient and timely administration of the proposals of national significance. In the longer term, I also expect an EPA to achieve better environmental and economic outcomes by exercising those other specialised technical and regulatory functions which are best performed at the national level.

Proposed means to achieve the outcome

94. As a transitional measure, I propose to establish the EPA as a statutory office. The roles, functions and powers of the EPA will be exercised by the Secretary for the Environment. The Secretary will be able to delegate these functions to his or her employees within the Ministry for the Environment, to allow the administrative work to be carried out by a dedicated unit.

95. The creation of the EPA as an independent statutory office gives the necessary degree of separation from the Ministry for the Environment's core business. The EPA will have a public profile that can be easily recognised and accessed by stakeholders. It also allows the EPA, in its establishment stages, to call upon the Ministry's existing RMA expertise and experience in managing call-in processes and supporting Boards of Inquiry.

96. The EPA's roles, functions and powers with regard to the proposals of national significance will be clearly set out in the RMA. These roles and functions are as set out above.

97. Another option that has been considered is to locate the administration within the Environmental Risk Management Authority (ERMA), and change its name to the EPA to reflect its broadened role. This is not recommended as part of the Phase 1 amendments. There would be practical difficulties in incorporating new functions into ERMA within the timeframes of Phase 1, as ERMA has been established for a different purpose and has a governance structure operating under different legislation.

98. The location of the EPA within the Ministry for the Environment is intended only as a transitional measure. Phase 2 will consider options for expanding on the existing role of ERMA and establish an EPA with a broader range of

responsibilities, with an appropriate status, governance structure and legislative provisions to exercise that fuller range of functions.

Part D – Improving plan development and plan change processes

The Issues

99. Repetitive and costly consultation processes, broad appeal rights, and time consuming reporting requirements can add tens of thousands of dollars and years to plan preparation and change processes. This can reduce the effectiveness of plans in addressing identified environmental issues and their ability to respond in a timely manner to emerging issues.

100. The diversity and complexity of plans produced under the RMA adds time and cost to resource consent applications (through interpretation difficulties) and adverse effects on the timeliness and certainty able to be achieved in drafting and implementing NPS and NES.

Background

101. Policy statements and plans play a critical part in the implementation of the RMA. It is predominantly policy statements and plans that determine how the RMA is implemented at local authority level to address national and local issues and reflect community aspirations. In most cases, plans also determine whether a resource consent will be required, and if so, what type of consent. Policy statements and plans also provide the objectives and policies for decision-making on consents, so their clarity and focus impacts on the scope of litigation, cost and delay in the consent phase.

102. Policy statements and plans are required to be reviewed every 10 years, but changes can be made at almost any time (and when requested by any party). Such changes may be necessary to keep plans up to date due to changing community aspirations, evolving environmental issues, or to allow for developments or activities in areas or circumstances not envisaged by the plan at the time of writing.

103. Experience with the first generation of plans produced under the RMA has shown the process to be expensive and time consuming. On average the time from initial consultation prior to drafting a plan to the resolution of appeals was in excess of eight years and at an average cost of nearly two million dollars.

104. Experience has shown that a number of Environment Court decisions on plan appeals, while addressing the concern of the appellant, can inadvertently change the policy direction, structure and flow of the plan. It is also leading the Environment Court to make policy decisions in place of councils. On the other hand, Court review of plans has provided an important mechanism for quality control, as well as ensuring that plans do in fact reflect the matters which Parliament has listed as being of national importance.

105. Research conducted in 2004 and updated in 2008 found that:

    (a) an important contributor to cost and time were appeals to the Environment Court (averaging more than three years and $600,000). In some cases unspecific appeals to entire plans were made that delayed plans becoming

operative for years (creating uncertainty and compliance costs for resource consent applicants in the interim)

(b) consultation and plan drafting was the other main contributor (2.5 years and $670,000 on average)

(c) at present the plan preparation process involves two rounds of submissions. The second round (the further submission process) when combined with the requirement for submissions to be summarised, added, on average, more than six months and tens of thousands of dollars to the process. However, analysis of local authority decisions and interviews with local authority staff found that further submissions overall, added comparatively little toward improving plan quality

106. The administrative burden associated with plan preparation is a contributing factor to all the costs and time outlined. Notifying parties, summarising submissions, making decisions on each submission and then ensuring each submitter has a copy of decisions made is time consuming and resource intensive.

107. The plan change process is similar to that for the preparation of plans, though the period over which the first round of submissions is sought is shorter. In the period 2006-2008 the number of plan changes notified was approximately 200 per year.

108. Data available for plan changes is less comprehensive than for plan development. However, for those where data has been collected, it was found that:

(a) on average plan changes took 18 months to proceed from being drafting to becoming operative, but some large plan changes were still not operative after six years

(b) total costs of plan changes showed great variability commensurate with scale, complexity and the level of opposition encountered. Costs ranged from around $19,000 to more than $800,000

(c) as with plan preparation, the greatest proportion of costs were associated with preparation of the plan change and resolving appeals

(d) a large majority (80–95%) of further (second round) submissions appeared to have no bearing on the final decisions made in respect of the plan changes. Additionally, the majority of further submissions were made by those who had already made first round submissions

109. In addition to the substantive cost and time matters above, it is also noted that there are some technical issues around the interpretation of the RMA in respect of plan making processes. There is currently a lack of clarity around the notification requirements for the decisions made on submissions on plans (under clause 10) and the way this relates to clause 11 (notification of decisions). In particular, what is a notice of decision is not clear and this has created confusion when interpreted with the options for notifying a summary of decisions.

Outcomes sought

110. To reduce the cost, time and complexity of the plan preparation process by:

(a) minimising the time and effort local authorities spend in handling and undertaking administrative tasks relating to submissions

(b) ensuring appeals on plans are focussed on addressing specific concerns and do not delay other provisions, that are of no real concern, from becoming operative

111. To enable the government to intervene in the preparation of plan changes where they impact on matters of national significance, or where there are local authority resourcing and capacity issues that hinder the resolution of policy issues in a timely and effective manner.

112. To reinforce the role of local authorities as the primary policy making body.

Proposed means to achieve the outcomes

113. I propose that the ability for appellants to make general challenges and to seek the withdrawal of entire proposed policy statements and entire plans prepared under the RMA, be removed.

114. Removing the general 'whole plan' appeal right would also bring appeal rights into line with the powers of the Environment Court (who have no power to order the withdrawal of entire plans in any case).

115. I also propose the following measures to reduce time and costs associated with preparing and changing plans (including private plan change requests):

(a) clarifying and enabling provisions to allow the notification of proposed plans, variations and plan changes, via the internet and email (in addition to the means of notification already available)

(b) enabling local authority initiated plan changes to be subject to the same range of Ministerial intervention powers as private plan changes (including the power to call-in plan changes)

(c) extending the period under which consultation carried out in fulfilment of other legislative requirements can be used for RMA plan preparation purposes from 12 months to 36 months

116. I consider that the requirement for local authorities to summarise submissions and call for further submissions on proposed policy statements and plans under Schedule One of the RMA should be modified to require the local authority to seek the views of any person the local authority considers may be adversely affected by matters raised in submissions as a replacement to calling for further submissions. These matters must be taken into account in the councils hearing and decision.

117. The TAG were of the view that preservation of rights of those who may be affected by submissions should go further and should include an ability for such persons to appear at hearings. An alternative view offered by Ministry for the Environment officials is that the same protection could be afforded in a simpler, less fraught, manner by limiting the scope of submissions to matters already proposed in the plan and not allowing them to extend to new matters. If new matters are to be introduced then it should be done through the more transparent plan change process at a later stage. This would ensure that the new matters are subjected to a rigorous evaluation with proper consultation and an ability to consider implications in a more in-depth manner than what is afforded by submissions to an entire plan.

118. I propose to clarify the RMA in relation to the requirements around when and how to notify decisions on submissions and what documentation is to be provided (or made available).

119. I consider that the RMA should explicitly state that local authority decisions on submissions do not need to be made in respect of each individual submission but are to be made according to issues raised. I consider that this will reduce the administrative burden for local authorities as well as promote greater integration and consistency in decision making. I also propose that as part of this amendment that the provisions around how the summary of decisions are notified and how the decisions are to be made available for public inspection be clarified to remove the current confusion over what is required.

120. The TAG has recommended and I propose that the non-complying class of activities be deleted from the RMA three years after the Amendment comes into force together with a deeming provision that these activities become full discretionary.

121. Some officials have considered this option but have concluded that the impacts of such a change are significant and should be studied further as part of phase two. This activity class covers those activities that are considered generally inappropriate within a given jurisdiction but consent can still be granted where effects are minor or where it is not contrary to a plan. It is a class that is often used in circumstances where the allocation of a natural resource is at, or close to, its sustainable limits.

122. They consider that removal of the non-complying category would impose costs to local authorities and to the community in the transitional period as plans would need to be updated in response to this change. The 36 month transitional should be sufficient to enable local authorities to amend their plans to take into account the removal of non-complying activities.

123. I propose to amend the RMA to enable all local authorities within the same region to combine to prepare a single document that fulfils the requirements of a regional policy statement, regional plans, and districts plans. Existing provisions regarding the ability of local authorities to produce combined plans already exist in the RMA, but are unclear in respect of combining the regional policy statement into such a document. I propose that this lack of clarity be rectified also. Together these amendments will enable and encourage local authorities to produce a single document for their region that fully integrates regional and district council functions, obligations and powers, while reducing the cost burden to each local authority by encouraging them to share these costs of policy statement and plan preparation.

124. I propose to remove the requirement for territorial authorities to review their plans every 10 years. On advice from the Technical Advisory Group, I consider it more cost effective for territorial authorities to change their plans as and when required.

125. I propose, consistent with TAG recommendations, that the rules in proposed plans should have no legal effect until such time as decisions that have been made on submissions have been notified, except where such rules are required to protect a natural resource or historic heritage, or provides for a proposed aquaculture management area. A local authority will be able to apply to the Environment Court to have particular rules take effect earlier if they do not meet the above criteria.

126. Officials consider that the implications of changing when plans have legal effect and the weighting to be accorded to rules during this process are significant and should be considered as part of phase two of the RMA review. Their main reason is that this change increases the lead-in before rules have legal effect, and may

give opportunities to unscrupulous parties to rush in multiple consent applications aimed at beating the rule coming into effect, thereby undermining what the plan may have been seeking to achieve.

127. In addition to the above I propose that appeals on plans be limited to questions of law, except in cases where the appellant has sought the leave of the Environment Court. Ministry for the Environment officials support this suggestion but Ministry of Justice and other officials consider the appeal right is a fundamental right, there has been insufficient time to consider the implications of this option, and that it should be considered at phase two.

Part E – Improving resource consent processes

The Issues

128. Complex consent applications and extensive processing requirements add time and cost to projects. Some local authorities have a shortage of experienced decision makers to sit on resource consent hearings.

Background

129. Resource consents are required when a proposed activity, development or land use fails to meet standards, terms or conditions that a plan, or national environmental standard, prepared under the RMA requires them to meet.

130. The purpose of resource consents is to allow local authorities to check, and be satisfied, that adverse environmental effects can be appropriately managed or that a proposed development itself is not going to be adversely affected by matters such as natural hazards.

131. More than 50,000 resource consents are processed by local authorities each year. More than 99% of these applications are approved. Around one percent (500 per year) of resource consent applications are appealed to the Environment Court.

132. The main concern of applicants is with the time and cost it takes to obtain a resource consent.

133. Generally notified resource consents (those subject to public submissions and hearing processes) are more time consuming and expensive than non-notified consents. Notification is required if effects are more than minor.

134. Statutory timeframes 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 is notified. While official statistics indicate that 74% of non-notified consents and 56% of notified consents are processed on time, this leaves many consents not processed within time limits (and even those that are, may be subject to delays that are not recorded).

135. Ministry for the Environment reviews of resource consent processing performance carried out in 2008 found that factors that contributed to lengthy timeframes included:

    (a) complicated process and reporting requirements (such as local authority staff having to produce reports on whether a consent should be notified, reports for hearings, and detailed reports for decisions)

(b) local authority reliance on ‘paper-based’ systems and communication

(c) poor quality resource consent applications (meaning local authorities often spent additional time working through issues with applicants or requesting further information)

(d) shortages of skilled consent processing staff

(e) consent staff dealing with irrelevant or peripheral issues

136. In 2005/2006 the median council charges for processing resource consents range from $440 (for non-notified small scale land-use consents) to $10,800 (for notified coastal permits). However research conducted in 2008 indicates that council processing charges typically make up a small proportion of the costs faced by resource consent applicants (for example 7% of costs faced by subdivision consent applicants). Other costs faced by applicants can include:

(a) consent application preparation costs (which can include the cost of engaging experts such as surveyors, engineers, acoustic consultants and various other types of consultant experts)

(b) compliance costs (the cost of undertaking additional work not envisaged by the applicant as a result of consent conditions)

(c) holding costs (such as not being able to make productive use of capital while awaiting a consent decision or the additional costs associated with the increase in the price of labour or building materials over the time it takes to obtain a consent)

(d) appeals to the Environment Court (and higher Courts in some cases)

137. In many cases the greatest proportion of costs faced by resource consent applicants whose consents are not appealed are associated with preparing consent applications.

138. While only 1% of consents are appealed and just 10% of those appeals go to a hearing, they can add tens of thousands or hundreds of thousands of dollars to the overall cost of the consent process and result in delays of up to a year or more.

Outcomes sought

139. To reduce the costs and delays in the resource consent process for consent applicants and local authorities.

140. To assist local authorities to process resource consents more efficiently through reducing the administrative burden of repetitive and unnecessarily complicated assessment and reporting requirements.

141. To facilitate more efficient lodgement, distribution and service of documents by widening and clarifying when such documents can be communicated by electronic means, such as the internet and email.

Proposed means to achieve the outcomes

142. To reduce cost and delays faced by resource consent applicants I propose:

(a) removing the current presumption that resource consents need to be notified as most resource consent are not notified, and amending the criteria for when public notification is required to projects with more than minor effects on the wider environment. .

(b) repealing provisions that would have enabled the Environment Court to review decisions made in regard to the notification of resource consents (note these have not come into force)

143. The following are proposed to reduce local authority consent processing costs and time:

(a) clarifying and enabling notification provisions to allow notification of resource consents and public notices, and documents served via the internet and email (in addition to the existing means of notification already available under the RMA)

(b) enabling a notified resource consents to be served on affected parties by email, public notices to be displayed on the consent authority's website, further clarification that submissions can be made by email, and that notices of hearings and the exchange of evidence for hearings may be by electronic means. These measures complement rather than replace the existing means.

(c) introducing discretion for local authorities to 'adopt' a resource consent applicant's assessment of environment effects so that it does not have to repeat material in subsequent notification, hearing, and decision reports.

(d) reducing the reporting requirements and administrative burden in regard to issuing consent decisions by specifying that the full reporting requirements under sections 113 of the RMA need only to apply to notified resource consents, and that non-notified resource consent decisions need only record the decision itself and the principle reasons for that decision.

144. I proposed to reduce the number of consent applications that need to be made for minor matters by removing the ability for local authorities to impose 'blanket tree protection rules' in urban areas. TAG estimates that more than 4,000 resource consent applications per year would not be needed if such rules were banned.

145. In order to reduce the time and cost faced by resource consent applicants in responding to further information requests I propose to remove the ability of the local authority to stop the 'consent processing clock' for further information requests beyond the first request for information. This would mean that local authorities could not use further information as a tactic to gain extra processing time to meet statutory timeframes.

146. The TAG further suggested that the provisions of section 92 and 92A be simplified so if the applicant refuses to supply the information requested, processing of the application would continue and decision makers would be required to consider the adequacy of information provided in making their decision. The current set of appeal and objection rights would be removed. This resolves the 'gap' in the current process which was identified by the *Palmerston North Industrial vs PNCC* case.

147. I propose that if there are outstanding requests for further information on a resource consent application and the information has not been supplied, then the application lapses after 12 months from the date of the original request.

148. These changes may result in possible increases to the number of resource consent applications that are declined. There would be consequent costs to applicants arising from this which need to be considered by the applicant in deciding whether or not to supply requested information. However, there has been general support for these changes from local government and businesses.

149. Further consideration in phase two may be needed as to whether there should be a commensurate increase in powers under section 88(3) to return incomplete and deficient applications to applicants.

150. I propose that consideration of Part II matters for resource consents for controlled activities and restricted discretionary activities be limited in scope to those matters over which a council has expressly reserved control or discretion over in its plan.

151. Confusion about the scope of what can be considered arose following the Environment Court's decision in *Auckland City Council v. John Woolley Trust*. This change will reinstate the previously held belief that for restricted discretionary activities, consideration of Part II matters are limited to those which the council has retained discretion. This should be the same for controlled activities.

152. This will reduce the matters that applicants and local authorities would have to consider in preparing and processing resource consents for controlled and restricted discretionary activities. As a consequence, processing of these straightforward applications will be simplified and costs reduced.

153. At present there is little incentive for local authorities to process resource consents in a timely fashion. In most cases the only sanction against tardy processing practices appears to be adverse publicity. The Minister's powers to take over the functions of the local authority in respect of the RMA have never been used, and could be excessive in all but the most extreme cases of non-performance.

154. I consider that councils need greater incentives to comply with statutory timeframes. I intend to require all councils, within 12 months, to develop a discount policy in respect of late consent processing. Councils must have a complaints process and, where the local authority is at fault, the applicant shall receive a discount on the application processing fees and charges. The 12-month lead in time provides time for councils to develop policies.

155. I consider that such an idea would improve the incentives and mean that local authorities will be more focussed on processing consents in a more timely way.

156. There is an emerging trend of consent authorities adjourning but not closing resource consent hearings at their completion. The effect of this is that the proceedings are in limbo and not subject to any statutory timeframes for releasing a decision.

157. I propose to require resource consent hearings to be formally closed no later than 10 working days following completion of the last parties presentation at the hearing. This will reduce the delays commonly faced by all parties in getting a decision on a resource consent application.

Part F – Improving national instruments

The Issues

158. Councils face significant costs to implement new national environmental standards and national policy statements, a significant proportion of this is derived from plan change processes (consultation, hearings, appeals etc)

necessary to give effect to national policy statements and refer to national environmental standards.

159. There is a need to coordinate national policy statements and national environmental standards commencement dates to promote efficiency and to streamline implementation processes.

160. The relationship between the provisions of existing and future national policy statements is unclear and could conflict. At present there is no means to establish which provision will have precedence when this occurs, placing local authorities in a position where they may not be able to give effect to one or more provisions and, technically, be in breach of their duties. There is also a need to enable efficient resolution of issues associated with provisions of national policy statements that conflict with each other.

161. There is currently a lack of consistency between national environmental standards provisions and other sections of the RMA. This has led to uncertainties about what standards can or can not achieve.

162. Roles and responsibilities for national environmental standards are not clearly defined in current provisions. This leads to uncertainty over what roles different authorities play once national environmental standards are in force.

Background

163. 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.

164. NPS and NES are tools under the RMA which the Government can use to provide direction on specific national, regional or local issues.

165. There are a significant number of new NES regulations and NPS policies expected within the next 18 months. Most of these new regulations and policies will have to be given effect to immediately, or within five years. Councils will face significant implementation costs.

166. Implementation of the telecommunications facilities NES and the process of preparing drafting instructions for the electricity transmission NES has highlighted a number of amendments that are required for councils to implement these standards effectively.

167. NPS objectives and policies need to be reflected in regional policy statements and district and regional plans by the introduction, modification or removal of objectives and policies and possibly also implementation methods, from these district and regional planning documents to achieve consistency with, and give effect to, an NPS.

168. The plan change process (Schedule One of the RMA) for changing these district and regional planning documents can be costly and lengthy (and includes consultation, hearings, appeals etc). However, there is an ability to apply a shortened process when the NPS has been developed through a board of inquiry process, provided this is specified in the NPS.

169. NPS are government mandated and, in all cases, go through a robust hearings process in their development. The potential benefits of a second public process to reflect these policy statements at the local and regional level needs to be balanced with the time and costs associated with this second process.

170. Recent experience with the development and implementation of NPS has identified areas where amendments are required to increase clarity and the speed by which local authorities can give effect to a NPS.

171. For many years, the New Zealand Coastal Policy Statement was the only national policy statement produced under the RMA. Since March 2008 a national policy statement on electricity transmission has come into force, and a number of others are in advanced in their preparation.

172. The preparation of the newer national policy statements has highlighted an issue of consistency between them. With no hierarchy as to which takes precedence there is the potential for those having to give effect to their provisions (such as local authorities) failing to comply with one policy statement while trying to give effect to the conflicting provisions of another.

173. The methods (including rules) for giving effect to an NPS are left to the discretion of each council and are not specified in the NPS development process. It is currently not clear in the RMA whether these can be included in plan changes through the shortened Schedule One process.

174. There is currently no power to cancel, postpone or re-start NPS development once the process has commenced, consequently an incomplete NPS proposal remains in a statutory limbo (even when the need for it may have passed).

Outcomes sought

175. To provide greater certainty for councils, applicants and the community by:

    (a) clarifying duties in relation to NPS and NES;

    (b) streamlining the development and implementation of NES and NPS; and

    (c) improving linkages between NES provisions and other RMA provisions, particularly relating to resource consents and enforcement.

176. To enable the cancellation, postponement or recommencement of NPS development in circumstances where the need for the NPS has ceased to exist, or there is a need to place the NPS 'on hold'.

177. To avoid the unnecessary promulgation of national policy statements by ensuring that their necessity, effectiveness and efficiency relative to other means is tested before a decision is made to commence with their preparation.

Proposed means to achieve the outcomes

178. I propose for there to be Ministerial powers to cancel, postpone and restart the development of a proposed NPS at any point in time. This enables an incomplete NPS proposal to be cancelled and restarted, rather than it remaining in a statutory limbo.

179. Because of the robust public process followed when developing a NPS, I propose to enable national policy statements to direct that a local authority must change the objectives and policies of policy statements and plans without further formality regardless of which process is used to develop the NPS.

180. In order to ensure speedy implementation of a NPS, I proposed to limit appeal rights on plan changes and changes to regional policy statements where these changes are to give effect to the objectives and policies of a NPS to 'points of law'. It is considered that as NPS already go through a public process and policy statements and plans must give effect to an NPS, appeals on the merits of plan

changes that comply with the objectives and policies of NPS would achieve relatively little benefit in comparison to the costs involved.

181. Limiting appeal rights in this way will reduce delays and costs for councils to give effect to NPS, and is appropriate for changes at the district and regional level to ensure consistency with NPS policies and objectives is achieved in a timely and cost effective manner.

182. I also propose the following changes to improve linkages between NES/NPS provisions and other RMA provisions. The strengthening of these linkages between the NPS and NES instruments and other provisions in the RMA will increase consistency and clarity. These are :

    (a) including a requirement that consent authorities must have regard to the relevant provisions of a NES when making decisions on resource consents;

    (b) amending the provisions of the RMA that relate to duties and restrictions under the RMA explicitly to recognise the effect of national environmental standards and other regulations made under the RMA in relation to those duties and restrictions;

    (c) giving local authorities an explicit ability to issue certificates of compliance in instances where activities comply with the provisions of a NES;

    (c) enabling me to make minor amendments to and/or corrections on a NESs already in force without requiring a full public process under section 44;

    (d) incorporating provisions into the RMA to allow local authorities to refer to a NES and to remove any provisions from plans that directly conflict with, or have been made redundant by, a NES without formality (having to go through the plan change process set out in Schedule One of the RMA)

    (d) clarifying that local authorities are responsible for ensuring compliance with a NES and carrying out enforcement;

    (f) clarifying the effect of a NES on existing resource consent applications

Part G – Improving the effectiveness of compliance mechanisms

The Issues

183. Limitations in the ability to apply enforcement powers consistently and quickly restricts the effectiveness of enforcement actions taken under the RMA.

184. The costs faced by local authorities when carrying out enforcement actions serves as a disincentive to use some enforcement powers.

185. There is little incentive for offenders to comply with the RMA and plans when the financial gains to be made from non compliance are higher than the penalties imposed.

Background

186. The effectiveness of any law is dependent on the degree of compliance with it. Compliance can be achieved by incentives, but inevitably there is also a need for effective deterrence also.

187. International research has found that an effective deterrence-based regime requires:

(a) a credible likelihood that non compliance will be detected

(b) responses and penalties to be swift and certain

(c) responses, including penalties, to be appropriate

(d) offenders knowledge of a-c above.

188. The resourcing of RMA monitoring and enforcement throughout New Zealand is variable such that in some areas the ability to detect non-compliance is low, as is the ability to take enforcement when non-compliance is detected. A contributing factor is the inability for local authorities to recover a sufficient proportion of costs, or ensure the repeat offenders are appropriately penalised, to make enforcement worthwhile.

189. Maximum fines for prosecutions under the RMA were set at $200,000 in 1991 and have not been changed since the RMA came into force. If brought up to date in line with increases in the consumers price index (CPI) over the same period, the maximum fine for prosecution should be closer to $300,000.

190. Comparisons with some overseas jurisdictions suggest that New Zealand penalties for prosecution are relatively light. The RMA penalty regime also does not differentiate between offences committed by corporate entities and private individuals (who are likely to have less ability to pay and may be less likely to have been motivated by commercial gain).

191. In New South Wales and Canada the maximum fines are set in millions of dollars and differentiate between companies and individuals:

(a) New South Wales: the maximum fine is $AUD 5 million for a corporation and $AUD 1 million for an individual.

(b) Canada: the maximum fine is $C6 million for a company and $C4 million for an individual (upon first major violation).

192. Because the ceiling on fines in New Zealand is relatively low, fines imposed by the Courts have averaged less than $8,000 in the period 2001 to 2008. Anecdotal evidence from enforcement officers suggests that in such cases the adverse publicity (and the possibly that income may be lost as a result) tends to be more of a deterrent than the fine itself.

193. Other than fines or imprisonment, another means of providing a deterrent would be the cancellation or alteration of existing consents. Such an outcome ultimately affects the legal ability of a party to undertake work or activities allowed by the consent, such as subdividing land (thereby affecting any profit that may be obtained). However, no such explicit ability for the Court to impose such penalties is currently provided by the RMA (though a variation of this approach was considered in a Queenstown case where trees were cut down in breach of the resource consent).

194. The ability of enforcement officers and local authorities to carry out their duties in ensuring compliance is currently hampered by minor technical matters and an inability to recover a substantial proportion of their costs.

195. In regard to the former, enforcement officers have had problems positively identifying offenders as they do not have the power to require the offender to provide their date of birth. This is also an issue in regard to recovery of fines.

196. To be effective the enforcement powers also need to be applied consistently across all activities. The general duty under section 17 to avoid, remedy or

mitigate adverse effects on the environment currently does not apply to section 10B (activities associated with existing buildings and building work). This needs to be remedied.

197. The RMA is an Act that binds the Crown, but Crown organisations are immune from enforcement action taken under it. This means that Crown is treated differently from companies or private individuals, and there is no deterrence (other than bad publicity) for non-compliance.

198. Prior to 2002 (noting the RMA was drafted before 2002) there was a long standing principle that the Crown was indivisible and immune from prosecution.

199. Following the Cave Creek tragedy it was considered that there was need to provide incentives for the Crown to avoid systemic failures and accountability should such failures occur.

200. As of 2002 Crown organisations are able to be prosecuted for a limited range of offences under the Crown Organisations (Criminal Liability) Act 2002. However the application of this Act is currently limited only to offences under the Building Act 2004 and the Health and Safety and Employment Act 1992. Offences under the RMA are not included.

201. The Building Act and Health and Safety and Employment Act both deal with issues that can directly put the safety of people at risk. This is not necessarily so under the RMA and is likely to have been a consideration as to why the RMA has not been included in the Crown Organisations (Criminal Liability) Act.

Outcomes sought

202. To provide greater disincentives in regard to non-compliance with the RMA, RMA plans and resource consent conditions.

203. To more fairly reflect the ability of offenders to pay the fines for their non-compliance.

204. To improve the consistency in how enforcement duties, powers and tools apply across all types of activity and environments and to offenders.

205. To remove barriers preventing the efficient and effective implementation of enforcement duties under the RMA.

Proposed means to achieve the outcomes

206. I propose that enforcement officers be able to direct a person suspected of committing an offence under the RMA to supply information relating to their date of birth.

207. I propose that the maximum fine for offences under the RMA differentiate between individuals and companies to reflect the differing ability of each to pay such fines. For individuals I propose that the maximum fine be $300,000 (as an updated equivalent to the $200,000 set in 1991 allowing for CPI increases), and $600,000 for companies (twice that of the fine for individuals to reflect ability to pay and likely commercial motives). Ministry of Justice criminal law officials have noted that the proposed levels appear appropriate though they are awaiting the final drafting before final comment.

208. To provide a wider range of remedies and penalties to address non-compliance, I propose that the Courts be given the power to direct a review of a resource consent (including conditions) that may have been granted to repeat offenders

where such consents (or conditions of the consent) have been breached through offending, or are directly related to the offending.

209. I also propose to remove the provisions from the RMA which protect the Crown from enforcement actions, to ensure that the RMA applies consistently to all parties. This issue was raised by the Parliamentary Commissioner for the Environment in a report on the Mapua contaminated site clean-up and noted in the National Party's 2008 Environment Policy. I propose that provisions be similar to the Building Act and that local authorities be the only persons able to take action.

210. Other measures I propose to improve the consistency and ease of application of enforcement functions and processes under the RMA include:

    (a) that notices of hearings and the exchange of written evidence in enforcement proceedings be able to be served by email where this is practicable and parties agree. This would help improve the timeliness and reduce costs of paperwork in enforcement processes.

    (b) to extend the general duty to avoid, remedy or mitigate adverse effects under section 17 of the RMA to cover adverse effects associated with the existing uses of land or buildings under section 10B.

Part H – Streamlining Decision Making

The Issues

211. There are ongoing concerns from some applicants, whose resource consent application or plan change request has been notified, about the ability of some decision makers to remain objective and whether they have the appropriate skills or knowledge.

212. Appellant, local authority, respondent and Court time and resources can be wasted through the filing, consideration and hearing of frivolous or ill-merited appeals to local authority decisions or further appeals on Environment Court decisions.

213. It is unclear whether local authorities have the ability to delegate decisions on plan changes to persons who are not elected representatives. While it is common practice where local authorities have a conflict of interest, they can face a legal challenge on their decision to delegate decisions to an independent person or panel.

214. Applicants, submitters and decisions makers are often faced with duplication of process, cost and time resulting from applications having to go through a council hearing and then be re-heard again in the Environment Court, even though it was known from the start that the application was of such a nature that appeals were inevitable.

Background

215. Statutory decisions made under the RMA occur within and across planning, consenting and enforcement process, and at a variety of levels for example:

(a) Local authority staff (where delegated) in regard to whether to accept a resource consent, notify a resource consent, or approve a resource consent application

(b) Local authority elected representatives in respect of decisions to approve resource consents, accept or adopt plan changes, decisions on plans (including whether to commence preparation of a plan)

(c) Commissioners who have been delegated decision making powers to act on behalf of local authority elected representatives

(d) The Courts in respect to appeals, judicial reviews, declarations, enforcement proceedings, and making plans operative in part.

(e) The Minister of Conservation (in respect of preparing the New Zealand Coastal Policy Statement, approval of regional coastal plans, and resource consents for restricted coastal activities and decisions to call-in matters in respect of the coastal marine area)

(f) The Minister for the Environment (in respect of decisions to call-in applications, preparation of national policy statements and national environmental standards for example).

216. While decision making occurs at a variety of levels, the vast majority of decisions relate to resource consents, and are made at local authority level.

217. With a few notable exceptions, decisions on whether to notify resource consent applications are made by local authority officers. Local authority officers also make around 87% of decisions on whether to grant or decline resource consent applications (generally non-notified). Independent commissioners make around 1% of decisions on resource consent applications and the rest are made by elected representatives.

218. Though only 12% of decisions on resource consents are made by elected representatives there is still concern amongst applicants around the objectivity, skills and knowledge of elected decision makers.

219. The 2005 amendments introduced a requirement for Chairs of hearing panels to be trained and accredited, as do the majority of panel members.

220. To date more than 1,200 people have been trained and accredited as RMA decision makers. However, applicant concerns persist. Officials note that, upon investigation, a small number of complaints which have been made do appear to have some degree of validity.

221. While elected decision makers make decisions on a comparatively small proportion of resource consents, levels of involvement in plan changes tend to be higher. This may be in part due to all plan changes being required to be notified, but it is also likely to be because plan changes often relate to matters that may impact on local authority policy. An additional factor is the lack of clarity around whether decisions on plan changes are able to be delegated.

222. Some private plan changes applications appear similar to a resource consent application in that they are designed to allow a particular project to take place in a particular area. In other cases, a plan change may relate to a local authority's own project, land, or assets, resulting in a potential conflict of interest. In both circumstances it can be beneficial for the local authority to have the ability to delegate decisions on the plan changes to persons other than elected representatives.

223. Many local authorities do in fact delegate some decisions on plan changes to independent commissioners, but the lack of clarity around the matter was made apparent in *Kapiti Environmental Action v Kapiti District Council* (W085/07). In that case the Court did hold, albeit stating that it was a tentative view, that decisions on a plan change could be delegated. However, it is considered that clarifying the RMA would assist in avoiding the expense of future challenges on the subject.

224. Ongoing concern has also been expressed by a variety of parties in regard to the role of the Minister of Conservation in regard to coastal activities.

225. A perception exists that the roles of the Minister in preparing the New Zealand Coastal Policy Statement, approving regional coastal plans, having representatives on hearings for restricted coastal activity consents, being able to submit on such consents, and having an ability to make the final decision on those consents are conflicting or excessive. This perception was reinforced by the drawn out Whangamata marina consent application process that gained media profile in 2005/2006.

226. The Environment Court appeal filing fee of $55 was set in 1988, being a modest increase to the fees set in 1978 regulations. It has remained unchanged since. By comparison the New South Wales Land and Environment Court has standard filing fees of $AUD718 and filing fees for corporations of $AUD1,436.

227. In March 2004, consideration was given to increasing the filing fees for appeals to the New Zealand Environment Court as part of a wider review of Court fees. Proposed was a lodgement fee of $245, with subsequent 'per day' hearing fees ($440 for the first day, and $220 for each day subsequent). It was estimated at that time the real cost lodging a appeal with the Environment Court was $1,280. Cabinet at the time agreed to an increase in filing fees, but this was never implemented.

228. Comment has been made by RMA practitioners and lawyers that low Environment Court filing fees do little to discourage vexatious and frivolous appeals being lodged, and do not indicate to appellants the seriousness of the consequences and expense all parties will incur if the appeal proceeds further.

229. Approximately 1% (500 per year) of local authority decisions on resource consents are appealed to the Environment Court each year. In the vast majority of cases, these applications will have been notified, and been through a submission and hearing process at a local authority level. In a proportion of these cases, applicants knew (even before lodgement), that there was a high likelihood that the application would end up being heard by the Environment Court. Although the numbers are less, a similar scenario exists in regard to applications for private plan changes and notices of requirements.

230. The RMA was amended in 2005 to require the Environment Court to give consideration to the decision of a local authority when considering appeals on applications; however, practice has shown that almost all appeals are heard de novo - all over again. This results in a duplication of costs and time for all those who wish to participate (applicants, appellants and local authorities). The costs and time implications can result in delays ranging from months to years, and many thousands of dollars.

231. The 'proposals of national significance' process outlined in Part B of this paper is one means of addressing the costly and time consuming duplication that can

occur, but that process may not be suitable for smaller projects, which while contentious, do not necessarily qualify as nationally significant.

Outcomes sought

232. To increase applicant confidence and certainty in the independence and soundness of decisions made on their applications.
233. To reduce the costs of the decision making process in relation to plan changes by enabling and clarifying that decisions can be made by persons other than the elected representatives of a local authority.
234. To discourage frivolous appeals to the Environment Court (or higher courts) that would prove to be an abuse or misuse of the appeal process or an unmerited waste of appellant, respondent/local authority and Court resources and time.
235. To ensure members of Boards and special tribunals are able to fulfil their decision making roles in an open and consistent manner without the distraction of possible legal action arising from acts or omissions made in good faith.
236. To reduce the time and cost associated with re-hearing resource consents, plan change applications and notices of requirement where there is a high likelihood that a local authority decision will be appealed to the Environment Court.

Proposed means to achieve the outcomes

237. I propose that there be an ability for resource consent applicants or submitters to choose whether they have a notified application (and any directly related notice of requirement and private plan change) considered by elected representatives of the local authority or by one or more independent commissioners selected by the local authority from the pool of persons accredited under the "Making Good Decisions" programme.
238. I consider including the ability for the applicant or submitter to elect whether they want the application heard by an independent or local authority representative panel will provide them with an alternative for circumstances where there are concerns about the impartiality or adequacy of knowledge of a particular decision maker (or decision makers). In every case it will be up the applicant to weight up the merits of the decision making options with the costs that the applicant must pay.
239. I propose that where a submitter has required a notified consent application to be heard by an independent commissioner or panel of commissioners, the submitter must pay for the additional costs of the hearing (being the difference between the costs of a hearing before elected representatives and the costs of a hearing before commissioners, in instances where the latter are greater).
240. I also propose to clarify that local authorities be able to delegate the power to make decisions on plan variations and changes to staff or other persons, such as hearings commissioners, authorised under section 34A. This amendment reflects common practice amongst many local authorities and the position taken by the Environment Court in *Kapiti Environmental Action v Kapiti District Council* (W085/07).
241. I propose that, to act as a deterrent to frivolous and ill-merited appeals with the Environment Court, that the filing fee for the lodgement of appeals to the Court be raised from $55 to $500 (inclusive of GST). Raising the fee lodging appeals with the Environment Court does not require a change to the RMA, but will require regulations under the RMA to be amended.

242. Officials note raising the filing fee for appeals in the Environment Court to $500 will still not cover the costs incurred by the Court. They have also suggested that the filing fees be considered as part of a wider review of Court fees (as proposed in 2004). The result of a review may require an amendment being made to regulation making powers under the RMA. This work has yet to be carried out and could be incorporated into phase two of the RMA review programme.

243. I propose to remove the Minister of Conservation's powers in respect to decision making on restricted coastal activities. The current recommendation of the hearing panel to the Minister would become the decision.

244. The Minister of Conservation has a number of other responsibilities in relation to the coastal marine area, including the approval of the New Zealand Coastal Policy Statement, approval of Regional Coastal Plans, and has the ability to nominate a representative onto hearing panels for restricted coastal activities. I consider that removing the decision making power for restricted coastal activities still leaves the Minister with sufficient oversight of activities in the coastal marine area through his other powers.

245. The TAG has recommended that the restricted coastal activity process be removed from the RMA entirely. Officials have mixed views as to the net benefit of such an option and note that the timing in phase one does not allow for implications for the New Zealand Coastal Policy Statement review process (already underway) to be considered or for linkages to the Minister of Conservations' (on behalf of the Crown's) administration function under the Foreshore and Seabed Act 2004 and Treaty settlement implications (such as the Ngati Porou foreshore and seabed agreement) to be considered. Officials have therefore suggested that this be considered as a possible phase two amendment.

246. I consider the RMA should provide protection for members of Boards or Special Tribunals appointed under the RMA against any legal action arising out of any acts or omissions made in good faith

247. At present the final decision a notice of requirement to use land for a designated purpose (such as an airport, road or prison) is made by the party (the requiring authority) who will have responsibility for the designation. Notices of requirement are processed by local authorities in a manner similar to notified resource consents; however, local authorities only have the power to make recommendations rather than decisions. The final decision (if not appealed to the Environment Court) is made by the party responsible for the designation. Traditionally, the Crown was the main requiring authority but today state owned enterprises, private utility providers, and even consortia of landowners can gain requiring authority status. For requiring authorities to have the power to decide their own applications seems to run counter to the principles of natural justice. I consider there is strong public outcry on this current provision and it should be rectified. I also consider it to be hangover of the 1980's where public works were undertaken by public bodies. This is no longer the case.

248. I propose to amend the Act so that decisions on notices of requirements are made by the relevant territorial authority. This will bring the decision-making process for designations into line with other processes in the Act, increase the timeliness of decision-making (by removing a step in the process). It will improve confidence in the independence and rigour of decision-making.

249. I propose that applicants for resource consents and notices of requirement be able to request that their application be determined in the Environment Court

without the need to first go through local authority consenting processes, provided that the local authority has first agreed. Such an option will be of benefit to those applicants who, through consultation or other means, have come to the conclusion that the application they are considering lodging will be inevitably be appealed.

250. I see the direct referral process as being complementary to the 'proposals of national significance' process, providing an alternative streamlined process path for those applications that may not fit the criteria of being nationally significant.

Part I – Other matters to improve workability

Process timeframes

251. Various amendments, particularly those made in 2003 and 2005 changed the timeframes for various processes under the RMA, and how those compliance with those timeframes is measured.

252. In some instances the 2003 and 2005 amendment inadvertently omitted timeframes that local authorities were supposed to comply with. In other instances, some current provisions effectively penalise local authorities by including in the calculation of time, matters that are the responsibility of applicants.

253. To address the situation I propose:

    (a) to require local authorities to send a copy of hearing reports to hearing participants so that they receive it at least 15 working days before the hearing (if the local authority has exercised its ability to require evidence to be provided within a set time limit). If the local authority has not exercised its power to require evidence to be provided within a set time limit, the hearing report must be provided at least 5 working days before the hearing (RMA section 42A). This corrects an omission arising out of a merger of sections in the 2005 amendment.

    (b) to amend section 88B so that the time it takes for applicants to respond to requests for information or written approvals is excluded from the time calculation for the commencement of hearings (section 101(2A)) and notification of decisions (section 115(b)) for notified or limited notified consents when hearings are held. This corrects an oversight in the wording introduced by the 2005 that restricted the application of this exclusion to the circumstances where applications are not notified, or applications that are notified but where there is no hearing.

    (c) to amend section 88C to include reference to section 91 to exclude from the calculation of time the period where a local authority is waiting for the applicant to submit other resource consents related to the same project. This would help ensure that a local authority is able to consider all consents together in an integrated manner and affected parties are able to understand a project in its totality without exceeding statutory timeframes.

Replacement consent notice authentication process

254. Sections 221(2) and 224(f) of the RMA require local authorities to authenticate consent notices issued in association with subdivision consents. A difficulty has

emerged whereby that authentication is required to be carried out under section 252 of the Local Government Act 1974.

255. Part 17 of the Local Government Act 1974 (which incorporated section 252) was repealed in 2005 by the Public Records Act 2005 without incorporating a replacement process for authenticating consent notices.

256. Consent notices are important legal documents that need to be checked and confirmed as being up to date and correct before being authorised for official use. I propose the authentication be retained as a step through incorporating the requirements for authentication wholly within subsection 221(2) of the RMA.

257. A consequential amendment to section 224(f) should be made to replace the reference to 252 of the Local Government Act with a reference to the authentication process under the amended section 221(2).

Notices of reply in response to appeals

258. Section 289 of the RMA currently places a mandatory requirement for a person whose decision is appealed against (invariably a local authority) to lodge a written reply to the matters raised in appeal noticed with the Environment Court and serve a copy of the notice:

    (a) On the appellant (within 20 working days)

    (b) Any other party to the proceedings (within 30 working days).

259. Theoretically the provision has the function of enabling a consent authority to explaining to the Court that the decision the consent authority made was correct in law and was the preferable decision based on the facts. However in reality many local authorities provide a neutral reply that is of little assistance to the Courts (other than as an acknowledgement that the notice of appeal has been received).

260. Given the largely administrative nature of notice of reply requirement I propose that it be removed from the RMA. I do not consider any party will be disadvantaged by such a move as the ability of appellants to establish a consent authority's response to, and position on, an appeal still remains in the form of Environment Court call-overs and in the pre-circulation of evidence.

Third party participation in appeals

261. Under section 274 of the RMA currently parties other than an appellant or respondent have 30 working days (effectively six weeks) to file a notice in the Environment Court of their intention to join an appeal.

262. Shortening the notice period to 15 working days brings it into line with the same timeframes the original appellant had to lodge their appeal and reduces the length of the period in which there is uncertainty amongst all participants as to who is participating in an appeal.

263. A further consequential amendment is suggested to clarify that the 15 working day period for lodging notices to join appeals commences on the last day for lodgement of appeals with the Court. At present the RMA provides no certainty as to whether the appeal joining notice period starts concurrently with, or after, the period in which appeals must be lodged with the Court

264. I propose limiting the ability of some parties to join an appeal on a resource consent or private plan change, so that parties are not able to join an appeal only on the basis of representing a relevant aspect of the public interest. Parties

would only be able to join if they have already made a submission or were directly affected (having an interest greater than the public generally). Any person is able to make a submission on a publicly notified resource consent, and it is important to encourage those with concerns of either a private or a public interest nature, to participate from the outset and not join at a late stage in the proceedings through section 274. This provides greater certainty for appellant and consent authorities.

Limited notification for notices of requirement

265. Notices of requirement signal the start of the designation process by which network utilities and other public works can make use of land in such a way that may otherwise have required a resource consent.

266. In some process matters the processing of notices of requirement by local authorities resembles the resource consent application process. However, notice of requirement must be publicly notified.

267. In some cases the land area subject to a notice of requirement may be relatively small and the activity proposed for that land may have quite minor effects. In such circumstances there may only be a need to notify parties directly affected by those effects (i.e. limited notification as in the resource consent process). However the current process specifies the full notification process.

268. Applying the same limited notification provisions that exist for resource consents to notices of requirement could reduce the costs for some small to medium scale network or infrastructure projects, and lessen the chances of those projects being the subject of objections or appeals from parties who may in no way be affected.

Minor and technical amendments

269. In addition to the matters outlined above, a number of minor and technical amendments are necessary to clarify interpretation, and correct errors and omissions arising out of previous amendments to the RM. These are included as **Attachment One** to this paper.

Administrative matters relating to the paper

Resource Management Review - Phase Two

270. As announced prior to the 2008 general election it has always been intended that the reform of the RMA will comprise at least two phases. The second phase follows a slower timeframe to ensure Ministers have adequate time to consider options and implications and enable a greater degree of consultation on likely complex or contentious issues.

271. The second phase of the resource management review will comprise a minimum of four work streams, with both legislative and non-legislative elements:

    (a) Infrastructure - Improving infrastructure provision by providing more generous compensation for landowners in the Public Works Act, and a streamlined and better-integrated process.

    (b) Water - Considering alternative approaches to water allocation for a fairer and more efficient system of fresh water management.

(c) Urban design - Exploring new approaches to city development, and encourage more collaboration between planners and developers

(d) Environmental Protection Authority – Developing further its structure and functions

272. I will report back to Cabinet committee by 31 March 2009 with proposed terms of reference and timelines for each of these work streams.

273. Furthermore, barriers to sustainable and cost effective aquaculture planning and development are currently being considered under a separate but related work stream. The Minister of Fisheries and I expect to report to Cabinet on options for aquaculture reform by May 2009.

Consultation

274. On 1 December 2008 I wrote to all local authorities in New Zealand seeking their comment on how the RMA could be improved.

275. On 10 December 2008 I invited any person who wished to do so to send comments to me on how the RMA could be improved.

276. The period for receiving comments for both local authorities and the wider community closed on 20 December 2008.

277. I received 45 letters containing written comments from local authorities and 76 letters and emails from other groups, businesses and individuals. The Minister of Local Government received over 500 letters after appearing on Close Up on the matter. The views and ideas put forward were considered in the preparation of this paper.

278. A cross-departmental officials group were consulted with and discussed options that have been included in this paper. The officials group included representatives from: Department of Building and Housing; Department of Conservation; Department of Internal Affairs; Department of the Prime Minister and Cabinet; Ministry of Agriculture and Forestry; Ministry of Culture and Heritage; Ministry of Economic Development; Ministry of Fisheries; Ministry for the Environment; Ministry of Justice; Ministry of Transport; New Zealand Transport Authority; Te Puni Kokiri; and The Treasury.

279. The cross-departmental officials group met four times in the lead up to the production of this paper. A draft copy of this paper and draft regulatory impact statement was circulated to the group for comment on 13 January 2009 with comments being due, and received on, 14 January 2009. Other agencies consulted include the Ministry of Tourism (through MED), Energy Efficiency and Conservation Authority and New Zealand Transport Agency.

280. Since consideration of this paper at CBC on 26 January 2009, I have met with Ministers Finlayson (Attorney-General and Arts, Culture and Heritage), Carter (Agriculture), Joyce (Transport and Communications), Te Heuheu (Courts) and Heatley (Fisheries), and had phone discussions with Ministers Power (Justice and Commerce), Williamson (Building and Construction) and Hide (Local Government). I have also met with officials from the Ministry of Economic Development on commerce matters. No further issues were raised by the Minister of Finance post CBC. I also had an opportunity to meet with the Principal Environment Judge, Judge Bollard, and discuss the operation of the RMA from his perspective. Further advice from the RMA Technical Advisory Group (TAG)

has been sought on some of the significant issues raised. These discussions have resulted in several changes that improve the reform package.

281. Areas were there is still contentions are noted below.

Views on proposals for frivolous, vexatious, and anti-competitive objections

282. The Treasury and the Ministry of Justice are concerned about imposing punitive costs and indemnity cost regimes as it considers the benefits are unclear and are not satisfied they outweigh the costs. I note that the TAG was very firm on their advice on this matter. They considered that the indemnity costs regime is appropriate. They considered such a remedy was needed to reflect the gravity of the proceedings and dissuade trade competition.

283. The Ministry for Economic Development also expressed concerns on trade competition. These were in the context of a wider review being undertaken by that Ministry. Ministry of Economic Development officials have met with me and have agreed to work with my officials to resolve the areas of concern during the passage of the legislation.

Views on proposed changes for proposals of national significance

284. The Ministry of Justice is concerned about shifting appeals of decisions from the board of inquiry from the High Court to the Court of Appeal. I note that decisions of the employment court can only be appealed to the Court of Appeal so do not accept that this creates a precedent and further more I am concerned that removing this reform from projects of national significance will increase the times required to get decisions on infrastructure vital the government's programme.

Views on proposals to improve plan preparation and plan change processes

285. The Ministry of Justice is opposed to any limitation on appeal rights in relation to any part of the RMA. It does not support any suggestion that leave may be required to lodge a first appeal. The Ministry of Justice notes that it is a basic requirement of the New Zealand Court system that there is a right to a first appeal, with leave required for subsequent appeals.

286. The Ministry of Justice has expressed concerns that the proposed requirement to seek the leave of the Environment Court to appeal plans on matters other than questions of law. The Ministry of Justice had not provided a solution to these concerns at the time of lodging this paper and it may raised at Cabinet.

287. I consider the burden of the review a significant cost to councils. I also note that I have the power under the RMA to direct any council to review their plan or prepare a plan change where the plan is considered to be significantly out of date.

288. The Ministry of Transport, Department of Building and Housing, Department of Internal Affairs, Ministry of Culture and Heritage, and Te Puni Kokiri consider that there should be further consideration of potential implications of removing the non-complying activity class. They consider the removal of the category will impose significant costs on councils as they will need to review their plans. They also suggest it is likely to have other practical implications for councils which there has not been sufficient time to consider in phase one.

289. I note that there are too many consent categories and that it National Party policy to reduce the number of categories. Although the debate has been finely balanced, the benefit of removing non-complying activities will in the long run

outweigh the immediate costs due to necessary plan amendments. I note I have also provided a three year transition for the introduction of this provision.

Views on proposals for improving the effectiveness of compliance mechanisms

290. Operational departments and the Ministry of Justice have concern about the financial implications for the Crown of removing crown immunity from enforcement action. At present the Crown is immune from enforcement action (section 4(5) of the RMA). Defending against enforcement action could involve significant time and costs associated with legal representation, even when the case has no merit. I consider it appropriate to purse this matter. The Crown can not expect the rest of New Zealanders to comply with the RMA when it does not have to. I propose that provisions be similar to the Building Act and that local authorities be the only persons able to take action.

Financial implications

291. The Board of Inquiry for nationally significant projects that is recommended in this paper will need to be funded to remunerate members and meet administration costs. It is proposed that the actual and reasonable costs of administration and hearings be met by recovering the costs from applicants (as used for call-ins at present).

292. Many of the administration costs incurred by the EPA in administering the applications for nationally significant projects will be able to be cost-recovered from applicants. The construction of a stand-alone unit will require staff resources plus the establishment of new systems and processes.

293. To be fully effective it is important that the RMA reforms are rolled out to local government and RMA practitioners. This includes web-based guidance and workshops around New Zealand. The select committee process for the Amendment Bill and roll out after enactment is expected to cost $600,000.

294. Increasing the filing fees from $55 to $500 for appeals in the Environment Court is likely to have minor financial implications for those Crown agencies that lodge such appeals. Given the relatively low number of appeals lodged by Crown agencies, these additional costs are likely to be less than $10,000 per annum.

295. Removing the immunity of the Crown in respect to enforcement actions under the RMA will open the way for departments to be fined, if found guilty, for offences under the RMA. The maximum fine for each offence currently stands at $200,000 but could increase to $600,000 if fines are increased as proposed by this paper. Departments may also incur significant expenditure in defending themselves from enforcement action (including from parties with vexatious motives).

296. The changes to proposals of national significance and increasing the number of Environment Court Judges from 8 to 10 will have funding implications.

Human rights

297. The proposals contained in this Cabinet paper do not appear to be inconsistent with the New Zealand Bill of Rights Act 1990, or the Human Rights Act 1993. A final view as to whether the proposals will be consistent with these Acts will be possible once final decisions have been made on the recommendations put forward and the legislation has been drafted.

298. Officials from the Ministry of Justice and Ministry for the Environment will work together to ensure that the legislation is consistent with the Bill of Rights and Human Rights Acts.

Treaty of Waitangi Implications

299. Consultation with the Maori Party indicated strong opposition to any modification or change in section 8 in respect of the Treaty of Waitangi obligations.

300. Officials considered whether it was appropriate to modify references to the Treaty of Waitangi within the RMA. It was considered that in light of practice, the growing body of case law, and changes made to the RMA in 2005 that difficulties with references to the Treaty of Waitangi had become a less significant issue.

301. Overall the number of RMA appeals where a breach of the Treaty is listed as grounds for appeal is low. Even in cases where it is cited, it is often not the main reason for the appeal, such that even if it was not listed, the appeal may well have proceeded on the other grounds alone.

302. It is however important that any bill drafted be checked against the provisions in Treaty settlement legislation such as example statutory acknowledgements and co-management arrangements, to ensure it will not in any way diminish those provisions. For example section 41 of the Ngaa Rauru Kiitahi Claims Settlement Act 2005 requires that to require consent authorities, the Environment Court and the Historic Places Trust to have regard to the statutory acknowledgements as provided for in sections 42 to 44, and to require consent authorities to forward summaries of resource consent applications to the governance entity.

Legislative implications

303. There are legislative implications arising from the proposals in this paper.

304. This paper will require the drafting of a government Bill to implement its recommendations. I am proposing that the Bill be known as the Resource Management (Simplify and Streamline) Amendment Bill 2009. Cabinet has already invited me to issue drafting instructions to the Parliamentary Counsel Office.

305. A place will need to found for the Resource Management (Simplify and Streamline) Amendment Bill 2009 in the government's legislative programme for 2009.

306. Consistent with the principal Act (the RMA) it is proposed that the Resource Management (Simplify and Streamline) Bill 2009 will bind the Crown.

Regulatory Impact Analysis

307. A Regulatory Impact Statement (RIS) has been prepared, and the regulatory impact analysis (RIA) and RIS have been independently reviewed by the Treasury's Regulatory Impact Analysis Team (RIAT). The regulatory impact statement that has been prepared is attached to this paper as **Attachment three**.

308. RIAT considers the RIA to be adequate in relation to most of the proposals in the policy package, though the timeframe for its development has limited the scope for full consultation on all aspects of the package. However, this has been mitigated by the long-standing consultation and discussion that has occurred on many of the issues, as well as the targeted consultation that has been undertaken within the available time.

309. However, RIAT considers the RIA in relation to some aspects of package, notably proposals to address anti-competitive use of RMA provisions and the change to when rules in a proposed plan have legal effect, to be inadequate as these proposals were developed extremely late in the process and were not able to be subject to appropriate analysis and consultation.

310. RIAT considers that the RIS contains the required information and accurately reflects the analysis undertaken

311. I seek agreement to make minor and technical changes to the RIS for editing purposes prior to its publication to ensure that it appropriately reflects decisions made by Cabinet.

312. I seek agreement to attach an abbreviated version of the RIS to the Bill that will be tabled in the House.

Gender implications

313. There are no gender implications associated with the proposals in this paper.

Publicity

314. There has been, and I expect there will continue to be, significant interest in the package of proposals that make up phase one of the RMA review. It is also anticipated that there will be significant interest and speculation as to what phase two of the RMA review will include.

315. As noted by Cabinet on 8 December 2008 [CAB Min (08) 45/8] I intend to release this paper under CAB (08) 582, subject to any appropriate withholdings, at an appropriate time. I also intend to release the report of the TAG.

Recommendations

316. I recommend the Cabinet:

1. **note** that the National – ACT confidence and supply agreement states:

National and ACT agree to promote investment, jobs, wages, employment and prosperity, as well as environmental improvement, through amendments to the RMA. The National-led government will establish a high quality advisory group to recommend short-term amendments to the RMA, including but not confined to those which National has put forward, as a basis for select committee consideration early in 2009. The membership of the group and its terms of reference will be agreed between National and ACT.

Beyond the short term, consideration will be given to further improvements, including better mechanisms for water allocation and compensation for regulatory takings of property rights. High quality advisory groups will be established for such tasks.

2. **note** that in accordance with the National – ACT confidence and supply agreement the RMA review is being carried out in two phases. The changes proposed are phase one amendments that simplify and streamline RMA processes

3. **note** that process for phase one of the RMA review included:

(a) Consultation and discussion of options amongst officials through an cross-departmental officials group;

(b) The establishment and operation of a technical advisory group (TAG) to provide independent advice and consideration of options to amend the RMA;

(c) An opportunity for local government, the public and businesses to provide comment, and make suggestions, on ways in which the RMA can be improved (76 letters and 45 email comments were received).

Frivolous, vexatious and anti-competitive objections

4. **agree** that the Environment Court's ability to require security for costs be reinstated

5. **agree** that all current provisions of the RMA that prohibit consideration of trade competition be amended to also prohibit consideration of the effects of trade competition

6. **agree** that effects of trade competition be excluded from consideration when forming an opinion as to whether the effects on the environment require a resource consent application to be notified or not

7. **agree** that the RMA be amended to state that a submission in opposition to a resource consent or private plan change application by a trade competitor can be made by any person provided that person is directly affected and the effect concerned does not relate to trade competition

8. **agree** to amend Schedule One (plan making and changing processes) to state that a submission on a proposed policy statement, plan or plan change that concerns the activity of a trade competitor can be made by any person provided that person is directly affected and the effect concerned does not relate to trade competition

9. **agree** that an obligation be imposed on third parties supported, funded, or encouraged by a trade competitor to an applicant to disclose that information

10. **agree** that the ability of trade competitors to take part in appeals as third parties be removed from the RMA

11. **agree** that sanctions be imposed by the Court for non-disclosure of trade competitor backing, funding or support of a third party when that third party lodges an appeal under the RMA

12. **agree** the sanctions for non disclosure of trade competitor backing, funding or support will take the form of a costs award against the third party for all the costs and expenses incurred by the party whose application was the subject of the appeal

13. **agree** that the Courts be provided with an explicit power under the RMA to award indemnity costs to a party whose position, in the opinion of the Courts, was adversely affected by an appeal motivated by trade competition

14. **agree** that the RMA be amended to incorporate a punitive regime for proceedings brought by a person against a trade competitor. This new provision should indicate that if an appeal is brought, financed or encouraged by trade competition motives, then the party whose position was adversely affected by the appeal may seek to recover all the damages associated with the appeal

Proposals of national significance

15. **agree** to amend the process for decisions on proposals of national significance (section 140 to 150AA of the RMA) by allowing applications for a resource consent, a request for a private plan change or regional plan, or a notice of requirement for a designation or a heritage protection order to be directly applied to a proposed Environmental Protection Agency (EPA) established in accordance with recommendations 35-40
16. **agree** that works concerning the operational infrastructure of a nationwide network utility operator be included in the factors the relevant Minister may have regard to whether an application is nationally significant for a resource consents, plan change or notice of requirement.
17. **agree** that the call-in provisions be amended to allow the relevant Minister to refer a call-in application to the EPA for processing
18. **agree** that the relevant Minister has the authority to send applications that found not to be proposals of national significance to the relevant local authority for consideration and determination under the appropriate RMA processes
19. **note** that a board of inquiry will continue to consider and decide on the proposals of national significance
20. **agree** that additional criteria be added to the appointment process for the board of inquiry that requires the relevant Minister to seek nominations from local authorities within whose jurisdiction the proposal relates and to appoint a person with local knowledge
21. note that the Attorney-General, Minister for Treaty of Waitangi Negotiations and the Minister for the Environment have agreed that this review of the RMA will not compromise the integrity of any obligations made under an existing Foreshore and Seabed Deed of Agreement or Historical Treaty settlement.
22. **agree** to increase the number of Environment Court judges that may hold office at any one time from 8 to 10
23. **note** that any increase in the number of Environment Court judges shall not be at the expense of the number of District Court judges
24. **invite** the Minister for the Environment, in consultation with the Minister for Courts, to report back means to address the financial implications of increasing the number of Environment Court judges by end of March 2009
25. **agree** that a time limit be placed on the decisions of Boards of Inquiry of nine months, commencing with the date of notification, and ending with the release of final decision
26. **agree** that the nine month time limit can only be extended by application to, and agreement from, the relevant Minister
27. **agree** that supplementary resource consents associated with a proposal that have not applied for at the time the original application was lodged with the EPA, can be forwarded to the EPA and the relevant Minister will decide how it should be processed
28. **agree** to enable the EPA to issue certificates of compliance.

29. **Either** [Supported by Minister of Infrastructure, Minister of Economic Development, Minister of Energy and Resources, Minister for the Environment and the Technical Advisory Group]

29.1 **agree** that appeals on decisions made by the Board of Inquiry can only be made to the Court of Appeal and are restricted to questions of law

OR [Supported by the Attorney-General]

29.2 **agree** that appeals on decisions made by the Board of Inquiry can only be made to the High Court on questions or law, and that any further appeal to a higher court shall only be made with the leave of that court

30. **agree** that amendments be made that clarify that a board of inquiry can request further information or commission independent reports on matters raised by an application and circulate this information to all parties attending hearings

31. **agree** that comments on a draft decision of the board of inquiry may include comments on proposed conditions and minor or technical issues but can not challenge the decision of the Board at to whether or not an application should be granted

32. **agree** that board of inquiry members be given legal protection against actions arising out of any acts or omissions made in good faith

33. **agree** that the provisions of the RMA relating to call-in powers be amended to clarify the relevant Minister can call in a private plan change request

(a) after the plan change request has been lodged with the local authority but before that authority has made a decision as to whether to accept, adopt, or decline the request; or

(b) after the a decision has been made by the local authority with whom is was lodged to accept, adopt or decline the plan change request

34. **note** that I intend to direct officials to prepare public guidance on the Minister for the Environment's powers of intervention under the RMA, including call-in

Environmental Protection Authority

35. **agree** to the creation of the Environmental Protection Authority as a Statutory Office

36. **note** that creation of a Statutory Office of the Environmental Protection Authority is intended to be a transitional measure, pending consideration of options for the creation of an Environmental Protection Authority with a broader range of functions in the near future

37. **agree** that the Environmental Protection Authority will have roles, functions and powers as set out for receiving and processing proposals of national significance

38. **note** that the Environmental Protection Authority will also provide secretariat and support services to the board of inquiry

39. **agree** that the Secretary for the Environment will hold the office and exercise the powers, functions and duties of the Environmental Protection Authority

40. **agree** that the Secretary for the Environment may delegate some or all of his or her powers, functions and duties as the Statutory Officer for the Environmental Protection Authority to his or her employees

Improving plan development and plan change processes

41. **agree** that the ability for appellants to make general challenges or that seek the withdrawal of entire proposed policy statements and plans be removed

42. **agree** the provisions of the RMA be amended to enable and clarify that proposed plans and plan changes can be notified via the internet and notice served on affected parties by email in addition to service through existing means

43. **agree** that local authority initiated plan changes shall be subject to the same range of Ministerial intervention powers as private plan changes (including the power to call-in plan changes)

44. **agree** to extend the period under which consultation carried out in fulfilment of other legislative requirements can be used for RMA plan preparation purposes from 12 months to 36 months

45. **agree** that the requirement for local authorities to summarise submissions and call for further submissions on proposed policy statements and plans under Schedule One of the RMA be replaced by to requirement for local authorities to consult any person the local authority considers may be affected by matters raised in submissions and that these matters must be taken into account in the council's hearing and decision

46. **agree** that the non-complying activity class of activity be removed from the RMA within three years of the Amendment Act coming into force together with a deeming provision that these activities become classified as full discretionary activities after a transitional period of 36 months

47. **agree** that the RMA state that local authority decisions on submissions do not need to be made in respect of each individual submission but are to be made according to issues raised

48. **agree** to amend the RMA to clarify the requirements around when and how to notify decisions on submissions to plans and what documentation is to provided (or made available)

49. **agree** that the RMA be clarified to enable the regional council and all territorial authorities of a region to combine to produce a single RMA document that fulfils the joint purposes, functions and requirements of:

    (a) the regional policy statement for the region; and

    (b) the regional plans (including a regional coastal plan) for the region; and

    (c) district plans for all the constituent territorial authorities

50. **agree** that process for the development of combined regional policy-regional plan-district plan document be the same as existing requirements for when local authorities combine to prepare plans

51. **agree** that the requirement for district plans prepared by territorial authorities to be reviewed every 10 years be replaced with a requirement that such plans be changed or reviewed as and when considered necessary

52. **agree** that rules in proposed plans shall have no legal effect until such time as decisions made on submissions have been notified, except where such rules are required to protect a natural resource, or historic heritage . A local authority may apply to the Environment Court to have particular rules take effect earlier if they do not meet the above criteria.

53. **agree** that rules in plan changes that provides for an aquaculture management area shall have immediate legal effect from the time they are notified.

54. **agree** that appeals on proposed policy statements and plans be limited to questions of law, except in cases where the appellant has sought the leave of the Environment Court on the basis that the proposed policy statement or plan would:

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

    (b) fail to give effect to matters provided in Part II of the Act, or

    (c) are of unclear meaning and effect

Improving resource consent processes

55. **agree** to remove the current presumption in favour of notification of resource consent applications as most applications are not notified

56. **agree** to amend the criteria for when public notification is required to projects with more than minor effects on the wider environment

57. **agree** that sections that would have allowed the Environment Court to review notification decisions, but have not come into force, be repealed and the review function be left with the High Court

58. **agree** the provisions of the RMA be amended to enable and clarify that notified resource consent applications can be notified via the internet and documents served on parties by email (in addition to existing means)

59. **agree** that local authorities be given an ability to adopt the assessment of environmental effects supplied an applicant to remove the need for that material to be repeated or restated in subsequent hearing reports or decision reports

60. **agree** to specify that the full reporting requirements under sections 113 of the RMA need only apply to publicly notified resource consents, and that non-notified resource consent decisions need only record the decision itself and the principle reasons for that decision

61. **agree** that provisions be inserted into the RMA that remove the ability for blanket tree protection rules to be imposed in urban areas

62. **agree** that the ability for local authorities to ‘stop the processing clock’ during requests for further information from applicants be limited to the first request only and that from the time the applicant either supplies the information, or refuses to supply it, there is no further ability for the local authority to stop the clock in conjunction with further requests for information. The local

authority must have regard to the adequacy of information supplied when making a decision on a resource consent

63. **agree** that the remaining provisions of section 92 and 92A be simplified so that if the applicant refuses to supply the information requested, processing of the application is to continue and decision makers are to be required to consider the adequacy of information provided in making their decision

64. **agree** to remove specific appeal and objection rights relating to further information requests

65. **agree** that if there are outstanding requests for further information on a resource consent application and the information has not been supplied, then the application lapses after 12 months from the date of the original request

66. **agree** that consideration of Part II matters for resource consents for controlled activities and restricted discretionary activities be limited in scope to those matters over which a council has expressly reserved control or discretion over in its plan.

67. **agree** to require all councils to develop a discount policy in respect of late consent processing, within 12 months of enactment. Councils must have a complaints process and, where the local authority is at fault, the applicant shall receive a discount on the application processing fees and charges.

68. **agree** to require resource consent hearings to be formally closed no later than 10 working days following completion of the last parties presentation at the hearing. This will reduce the delays commonly faced by all parties in getting a decision on a resource consent application.

Improving national instruments

69. **agree** that the Minister for the Environment (and Minister for Conservation in respect of the New Zealand Coastal Policy Statement) be given explicit powers to cancel, postpone and restart a national policy statement development process that has already commenced at any time before it is gazetted

70. **agree** to enable national policy statements to direct that a local authority must change the objectives and policies of policy statements and plans without further formality regardless of the process used to develop the national policy statement

71. **agree** that appeals on changes to plans and regional policy statements that are implementing objectives and policies of a national policy statement shall be limited to points of law only

72. **agree** that consent authorities must have regard to the relevant provisions of a national environmental standard (NES)_when making decisions on resource consents

73. **agree** that the provisions of the RMA that relate to restrictions and duties under the RMA explicitly recognise the effect of a NES in relation to those restrictions and duties

74. **agree** that consent authorities be given an explicit ability to issue certificates of compliance where activities comply with the provisions of a NES

75. **agree** that powers be introduced to the RMA to easily allow the Minister for the Environment to make minor amendments to, and correct errors in, a NES that are already in force

76. **agree** that provisions be incorporated into the RMA to allow local authorities to remove provisions from plans that directly conflict with a NES, or have been made redundant by a NES, without formality (having to go through the plan change process set out in Schedule One of the RMA)

77. **agree** that NES are able to be referred to in a plan without the requirement for formal plan change processes

78. **agree** that local authorities are responsible for ensuring compliance with a NES and carrying out enforcement to ensure compliance

79. **agree** that provisions in the RMA be amended to clarify the effect of a NES and existing resource consent applications

Improving the effectiveness of compliance mechanisms

80. **agree** that an enforcement officer can direct a person suspected of committing an offence under the RMA to provide their date of birth (in addition to their name and address) to assist in establishing the identity of the person

81. **agree** that the maximum fine for committing an offence under the RMA be raised from $200,000 to $600,000 for corporate offenders and $300,000 for offenders who are private individuals so as to provide a stronger disincentive to non-compliance and recognise that there is a likely difference in motives and ability to pay between businesses and individuals

82. **agree** that the Court be given the power to require a review of a resource consent held by an offender if the offence relates to an act committed in specific breach of that consent or its conditions.

83. **agree** that amendments be made to the RMA to enable enforcement action (enforcement orders, abatement notices, excessive noise directions or prosecutions) to be taken against the Crown by local authorities similar to the Crown liability under section 6 of the Building Act

84. **agree** the provisions of the RMA be amended to enable and clarify that notices can be served on parties by email and that the exchange of written evidence can also take place via email where parties consent

85. **agree** that the general duty to avoid, remedy or mitigate adverse effects be extended to cover adverse effects associated with the existing uses of land or buildings under section 10B

Streamlining decision making

86. **agree** that any applicant or submitter to a notified resource consent (and any private plan change where heard in tandem) be able to choose whether the application is heard before one or more independent commissioners selected from a pool of persons accredited under the Making Good Decisions programme, or by elected representatives of the local authority (or authorities in the event of joint hearing)

87. **agree** that any submitter requiring a notified consent application to be heard by an independent commissioner or panel of commissioners must pay for the additional costs the hearing (being the difference between the costs of a

hearing before elected representatives and the costs of a hearing before commissioners, in instances where the latter are greater)

88. **agree** that local authorities be able to delegate the power to make decisions on plan variations and changes (excluding those made to regional coastal plans) to staff or other authorised persons such as hearings commissioners

89. **agree** that applicants for resource consents, plan changes and notices of requirement be able to request that their application be directly referred to the Environment Court for a decision, provided that the permission of the local authority that would otherwise have made the decision has been obtained.

90. **agree** that the filing fee for appeals with the Environment Court be raised from $55 to $500 through separate amendment regulations made under the RMA

91. **agree** that the Minister for Conservation's powers to make the final decision on applications for restricted coastal activities under section 119 be removed from the RMA

92. **note** that further consideration will be given to the removal of restricted coastal activities from the RMA as part of phase two amendments to allow further consideration of implications including those pertaining to the Foreshore and Seabed Act and the current review of the New Zealand Coastal Policy Statement

93. **agree** that the RMA provide protection for members of Boards or Special Tribunals appointed under the RMA against any legal action arising out of any acts or omissions made in good faith

94. **agree** to amend the Act so that decisions on notices of requirements are made by the relevant territorial authority.

Other matters to improve workability

95. **note** that as a result of previous amendments several changes need to be made to the calculation of time limits for processing resource consents

96. **agree** to consequential amendments relating to timeframes for sending the hearing report to parties, clarifying timeframes that apply when waiting for the response to further information requests and when additional consents are required.

97. **agree** that authentication of consent notices be contained wholly within section 221(2) of the RMA by replacing the out of date reference to the Local Government Act 1974 with authentication under the RMA (signified on the consent notice by way of affixing the signature of authorised persons)

98. **agree** that section 224(f) replace the reference to authentication under 252 of the Local Government Act 1974 with a reference to the amended authentication process to be incorporated into section 221(2) above.

99. **agree** that the timeframe within which third parties must lodge their notice to participate in appeals be shortened from 30 working days to 15 working days. The timeframe shall be calculated from the last day for lodgement of appeals.

100. **agree** that section 274(1)(d) be removed so that parties are not able to join an appeal only on the basis of representing a relevant aspect of the public interest

101. **agree** that the limited notification provisions that currently only apply to resource consents be extended to cover notification of notices of requirement

102. **agree** that the requirement for parties whose decisions are appealed against to lodge a reply with the Environment Court and serve copies of the reply on the appellant and other parties to the appeal be removed

103. **agree** to include transitional provisions as required to ensure the proposed amendments are give effect to in a manner, and over a timeframe, that ensures fairness of process and a practicable transition of functions, powers, duties and processes to comply with amended provisions

104. **agree** that the minor and technical amendments set out in Attachment 1 be made to the RMA so as to improve its workability

Phase two of the Resource Management review

105. **note** that phase two the Resource Management review will cover:
    (a) improving infrastructure provisions
    (b) consideration of better freshwater management
    (c) exploring approaches to better urban design
    (d) sustainable and cost effective aquaculture planning and development

106. **note** that the Minister for the Environment intends to address the establishment, role and functions of a new environmental protection authority (EPA) as part of phase two of the Resource Management review.

107. **invite** the Minister for the Environment to report back to Cabinet with proposed terms of references and timelines for each of the work streams of phase two of the Resource Management review by the end of March 2009

108. **note** than a Cabinet paper on the scope of a national policy statement on urban design will be reported back to Cabinet by the end of March 2009

109. **note** that the Minister of Fisheries and the Minister for the Enviornment expect to report to Cabinet on options for aquaculture reform by the end of May 2009

Legislation

110. **note** that the legislative amendment arising out of the phase one review, as proposed in this paper, is to be called the "Resource Management (Simplify and Streamline) Amendment Bill 2009

111. **note** that a place on the 2009 Legislation Programme will need to be sought for the Resource Management (Simplify and Streamline) Bill 2009

112. **note** that the Resource Management (Simplify and Streamline) Bill 2009 will bind the Crown

113. **note** that any outstanding issues relating the policy will be address at Cabinet's consideration of this submission on 2 February or when the Bill is submitted to Cabinet Legislation Committee on 12 February for approval for introduction

114. **invite** the Minister for the Environment to issue drafting instructions for the Parliamentary Counsel Office to give effect to decisions made on proposals to amend the RMA

Publicity

115. **authorise** the Minister for the Environment to publicly release this paper, subject to any withholdings, at an appropriate time

Regulatory Impact Statement

116. **agree** to the Minister for the Environment making minor and technical changes to the RIS for editing purposes prior to its publication.

117. **note** that I intend to include an abbreviated version of the RIS as a preface to the bill that will refer to the full RIS attached to this cabinet paper

____

Hon Dr Nick Smith
Minister for the Environment
_____ /______ /______

Attachment 1 – Minor and technical amendments

Definitions

1. Amend the definition of "*Board of Inquiry*" by deleting the words "to consider an application of a resource consent" (RMA section 2). The functions of a Board of Inquiry have been expanded over successive amendments to the RMA to include consideration of a range of matters wider than resource consent applications. It is not considered necessary to specify the matters that can be considered by a Board in the definition when these are covered elsewhere in the RMA.
2. Amend the definition of "*public notice*" to ensure that it covers public notices published via the internet (RMA section 2). The internet is an increasingly common and cost effectiveness means for advertising public notices. This amendment is designed to confirm and legitimise publication of notices via the internet.

Functions and duties of the Minister for the Environment:

3. Remove reference to functions, powers and duties of the Hazard Control Commission under Part 13 (RMA section 24(g)). Part 13 of the RMA was repealed in 1996.

Hearings

4. Broaden the scope of the information that must be provided by the consent authority to applicants and submitters during a hearing from "copies of the report" to "any further information requested and a copy of any report prepared" (RMA section 41C(5)). Section 41C(5) inadvertently restricts the information that must be provided to only reports and this should be wider. There a natural justice and decision-making quality issues if all participants in a hearing are not provided with the same information, including any further information the consent authority has requested during the course of a hearing.

Resource Consents

5. Remove reference to the Schedule 2 of the RMA (sections 77(4) and 230(1)). Schedule 2 was repealed in 2003.
6. Replace references to the District Land Registrars or Registrars of Deeds with Registrar General of Land (RMA sections 218, 220, 221, 224, 226, 226A, 228, 232 – 243, 246, 352, 355, 417). District Land Registrars and Registrars of Deeds have been superseded by the Registrar General of Land.
7. Replace the reference to the "Survey Act 1986" with "Cadastral Survey Act 2002" (RMA section 245). The Survey Act 1986 was repealed in 2002.

Requirements to provide copies of documents

8. Delete reference to the "appropriate regional manager for the Ministry for the Environment" in section 154(b)(ii) and clause 20 of Schedule One of the RMA. All records and copies of plans and plan changes are now held by the Ministry for the Environment head office in Wellington only. Sending copies of plans and documents to regional offices in Auckland and Christchurch is no longer necessary as most plans are available for viewing on the internet.

Applications for works in the Coastal Marine Area

9. Delete references to the Minister of Transport in section 395 and replace these with Maritime NZ. Under s395 of the RMA the Minister of Transport has various functions with respect to resource consents for activities in the coastal marine area. These

functions are now carried out by Maritime New Zealand, rather than the Minister of Transport.

Plan preparation and plan change processes

10. Substitute the word "territorial" for "local" (clauses 4(4) and 5(1A)(a) of RMA Schedule One). Territorial authorities are a subset of what are termed local authorities. These subclauses were only intended to relate to territorial authorities and not include all types of local authority.

11. Include reference to policy statement in clause 10(4) of Schedule One (which relates to decisions to amend plans). Reference to proposed policy statements was inadvertently omitted when this clause was amended in 2005.

12. There are a number of places in the RMA where the current wording specifies "policy statements and plans" which by definition are plans that are already operative (and thereby have already been approved) which are intended to apply to proposed policy statements and proposed plans as the power in the section has to apply to a policy statement or plan that is not yet operative. It is proposed to correct these instances.

13. Amend subclause 16(1) of Schedule One by deleting the reference to 292. The reference to s.292 is incorrect (it should have been section 293)and given current practice (and other amendments) is now unnecessary.

14. Amend subclause 16(3) of Schedule one by inserting the word "proposed" before "policy statement or regional plan or district plan". The word was inadvertently left out, making the subclause inconsistent with the rest of clause 16.

Schedule 10: Creation of Esplanade Strips and Access Strips

15. Replace references to the Noxious Plants Act 1978 and Agricultural Pests Destruction Act 1967 with "Biosecurity Act 1993" (clauses 2(g) and 2(h) of RMA Schedule 10). Both the Noxious Plants Act and Agricultural Pests Destruction Act have been repealed.

Attachment 2 – Further measures to simplify and streamline

The following matters were discussed by the cross-departmental officials group and the Technical Advisory Group but were either not progressed, or had no decision made on them due to time constraints.

Improving plan development and change processes

- Regulations to standardise the structure, format and expression of plans
- A standardised set of definitions for use in national policy statements, national environmental standard and plans to improve consistency

Improving resource consent processes

- Removal of restricted coastal activities from the RMA
- Addressing overlaps and related processes under other legislation for example:
    - Building Act
    - Conservation Act
    - Forests Act
    - Hazardous substances and New Organisms Act
    - Local Government Act
    - Fisheries (in respect to aquaculture)
- Scope and application of section 37 (ability to extend or waive compliance with timeframes)
- Strengthening and clarifying the relationship of section 88(3) (ability to return incomplete consent applications) with section 92 (further information requests)
- Managing reverse sensitivity

Improving central government direction

- Development of a comprehensive strategy to guide government in timing and use of Ministerial powers and intervention mechanisms

Other matters to improve workability

- Definition of Environment