Agenda – RM Reform Ministerial Oversight Group Meeting #13

Date: Monday 18 October 2021, 5.00 – 6.00 pm

Location: Zoom

Chair: Hon Grant Robertson, Minister of Finance

Deputy Chair: Hon David Parker, Minister for the Environment

Attendees: Hon Kelvin Davis, Minister for Māori Crown Relations: Te Arawhiti

Hon Dr Megan Woods, Minister of Housing

Hon Nanaia Mahuta, Minister of Local Government

Hon Poto Williams, Minister for Building and Construction

Hon Damien O'Connor, Minister of Agriculture

Hon Willie Jackson, Minister for Māori Development

Hon Michael Wood, Minister of Transport

Hon Kiritapu Allan, Minister of Conservation, Associate Minister for the Environment and Associate Minister of Culture and Heritage

Hon Phil Twyford, Associate Minister for the Environment

Hon James Shaw, Minister of Climate Change

Time	Agenda item	Lead speaker	Relevant paper
5.00 – 5.30	**1. An efficient and effective planning and consenting system**	Minister for the Environment	Paper 1: **(pages 14 to 33)**
5.30 – 5.45	**2. Consequential amendments**	Minister for the Environment	Paper 2: **(pages 34 to 39)**
5.45 – 6.00	**3. Protection Mechanisms in the Natural and Built Environments Act**	Minister for the Environment	Paper 3: **(pages 40 to 50)**

Attached for noting:

1. *Glossary of key terms and acronyms (page 51)*
2. *Minute from RM Reform Ministerial Oversight Group Meeting #11 and #12 on 4 October 2021 (pages 52 to 59)*
3. *In-progress action log from previous MOG meetings (pages 60 to 61)*

Attached for supplementary information:

1. *Appendix 1: An efficient and effective planning and consenting system (pages 62 to 73)*
2. *Appendix 2: Protection Mechanisms in the Natural and Built Environments Act (page 74 to 79)*

Ministerial Oversight Group Meeting #13 – Summary of recommendations

Paper 1: An efficient and effective planning and consenting system

Pages 14 to 33

Key messages

- Better quality plans will provide greater certainty on activities and notification and be less reliant on expensive, highly bespoke consenting decisions.
- This paper outlines five key areas where a clear and consistent approach to consenting will support plans to improve the efficiency and effectiveness of the new system.

Activity categories

- A simplification of activity categories is proposed – permitted, controlled, discretionary and prohibited.
- The proposed categories are similar to those currently used within the Resource Management Act 1991 (RMA) but with some changes ie, permitted activities will have a widened scope and controlled activities will have the ability to be declined.
- The intent of each activity category will be outlined in the primary legislation to ensure they are used consistently across all Natural and Built Environments Act (NBA) plans.

Notification

- The three existing RMA notification classes (non-notified, limited notified and publicly notified) should be retained.
- NBA plans will need to specify a notification class for any activities that will require consents or activity category.
- Where notification decisions are delegated to the consenting authority, policies will be required to guide consistent notification decisions.
- There will be an assumption that the most stringent category that triggers consents will be notified, however NBA plans or the National Planning Framework (NPF) may specify otherwise.

General consent processing pathways

- Officials recommend a general processing pathway for consents that provides more defined information requirements in plans.
- Information requirements defined in NBA plans are expected to include requirements for assessments of values important to Māori in areas of significance to Māori or for activities that affect identified values.
- Standardised templates will be used to improve consenting efficiencies.
- Clearer scope and criteria are needed for guiding how consenting authorities suspend applications, extend timeframes, or request further information.

Māori participation in consenting

- Existing agreements and Treaty settlements are used to enable Māori participation in planning and consenting under the RMA for some iwi.
- A stronger role for Māori in developing NBA plans will enable clearer direction on when Māori participation in consenting is necessary.

- Iwi, hapū, and Māori participation in plan making provides opportunities to determine participation in consenting in areas, and for values, of importance to them.
- Enabling plans to specify when Māori participation in consenting must occur (ie, for uses or development affecting mana whenua values) will improve efficiency and effectiveness for all system users.

Additional consent processing pathways

- Officials recommend providing additional pathways that allow large, complex, or contentious applications to be considered by either an independent expert body or a Board of Inquiry.
- This approach incorporates aspects of existing RMA processes (direct referral and proposals of national significance) and of the 'shovel-ready' fast-track pathway provided outside the RMA.

Approach to no compensation

- To achieve outcomes, some planning provisions may preclude the reasonable use of land and create an unfair and unreasonable burden.
- If this occurs, officials recommend the Environment Court has the power to direct either acquiring the land or changing the planning provision.
- Further work is required on developing planning provisions (including any remedies relating to planning provisions under the no compensation provision) in respect of land owned by Māori.

Paper does not preclude options

- This paper seeks recommendations on a system-wide approach and does not appear to preclude any options that may be developed for a new allocation system, options to address Māori freshwater rights and interests, or options for infrastructure.

Officials recommend that the Ministerial Oversight Group (MOG):

Activity categories

1. **note** that MOG #10 agreed that the NBA will have four broad categories of activities and expand the scope of what is known as permitted under the RMA
2. **agree** that the NBA will prescribe the intent of each category to ensure stronger consistency, efficiency, and effectiveness in the future system
3. **agree** that the legislation will require the Minister for the Environment (for the National Planning Framework (NPF)) and the NBA plan committees to make decisions on activity status by applying criteria that reflect the following policy intent:
    a. Permitted activities: where positive and adverse effects (including cumulative) including those relevant to outcomes are known and can be managed through standards and criteria
    b. Controlled activities: where potential positive and adverse effects (including cumulative and those relevant to outcomes) are generally known, but where tailored management and assessment of effects are required
    c. Discretionary activities:
        i. that are less appropriate (and should be discouraged) given they could potentially breach limits or not meet outcomes, or
        ii. where relevant effects including those relevant to outcomes are not known and need consideration, and effects may go beyond the boundaries of the site, or

iii. that are unanticipated activities which may have positive effects and contribute to outcomes (unknown during plan development)

d. Prohibited: activities that will not meet outcomes and/or breach limits, and therefore no resource consents can be applied for.

4. **agree** that the provisions in the NBA will set out the following requirements in relation to each category:

a. Permitted: No consent required if the activity complies with requirements specified for the permitted activity (including but not limited to written approvals from affected persons or certifications from suitably qualified persons). The NPF and/or the Plan may permit activities with requirements (eg, written approvals or certifications), or with no additional requirements. Individual activities, effects, or outcomes are not assessed (as these have been considered in the plan development stage). The NPF and/or Plans can direct if a permitted notice is required before undertaking the activity (to assist with monitoring of plan effectiveness)

b. Controlled: Resource consent and merits assessment required. Councils may grant subject to conditions, or decline. The NPF/Plans will specify level of merits assessment, including outcomes or matters requiring control, and what information is required. Plan makers would be able to restrict matters of discretion to limit grounds for decline

c. Discretionary: Resource consents and merits assessment required. Councils may grant subject to conditions, or decline. Councils may seek a broad range of information or confirmation from the persons proposing to undertake the activities

d. Prohibited: No resource consents can be applied for. This will be directed by the NPF or regional spatial strategy

Notification of applications

5. **agree** to retain the existing notification classes of non-notification, limited notification, and public notification

6. **agree** that NBA plans and the NPF will retain the ability to preclude notification (limited/public) or require public notification

7. **agree** that the presumption for activities in the Discretionary Activity category is public notification but plans or the NPF (if it sets a rule) will be able to specify non-notified or limited notified

8. **agree** that for all activities, the planning committee or the Minister for the Environment (if they set rules in the NPF) will need to specify notification classes for all activities that trigger resource consents

9. **agree** that if the planning committee or the Minister for the Environment (if they set rules in the NPF) does not specify notification classes at the time of development of NPF or plans, they must set policies in plans or the NPF to guide notification decisions, to ensure consistency, improve certainty and effectiveness

10. **agree** that the NBA will enable the planning committee or the Minister for the Environment to identify certain affected persons in plans and the NPF for publicly or limited notified purposes

11. **note** that this would enable a requirement to be included in the NBA or the NPF for limited notification of certain parties (or identified affected persons) such as mana whenua, or infrastructure agencies if, during NBA plan or the NPF development, this is considered appropriate or to give effect to the principles of the Treaty

12. **note** that the requirement for hearings on resource consent applications (or no requirement) and ability to object or appeal will affect the overall efficiency of the future consenting system, and this will be considered in future by the MOG

13. **agree** that the NBA will contain provisions which outline matters for plan makers or the Minister for the Environment (if they set rules triggering consents) to consider when they specify notification for activities (or make policies to guide notification:

    a. public notification is required if:

        i. secondary legislation (including the NPF) and NBA plans require it

        ii. there are clear ambiguities whether an activity could meet or contribute to outcomes, of if it would breach a limit

        iii. there are clear risks or impacts that cannot be mitigated by the proposal

        iv. there are relevant concerns from the community

        v. the scale and/or significance of the proposed activity warrants it

    b. limited notification is required if:

        i. secondary legislation and plans require the consenting authority to limited notify any person (note that this could include mana whenua through Integrated Partnership Processes and/or plan development processes)

        ii. it is appropriate to notify any persons who may represent public interests (eg, mana whenua, or a network utility operator)

        iii. an adjacent property owner may be impacted by the activity

        iv. scale and/or significance of the proposed activity warrants it

    c. non-notification is required if:

        i. the activity is clearly aligned with the outcomes or targets set by the legislation or secondary legislation or NBA plan

        ii. the secondary legislation (including the NPF) or NBA plan precludes notification

        iii. all identified affected persons (could be identified through the NBA plan or NPF) have provided their approval (and no limited notification is required)

General consent processing pathways

14. **agree** that the activity categories will specify the level of information required for consents and timeframes

15. **agree** that NBA plans and the NPF will be able to specify information requirements for the consenting and permitting regime

16. **agree** that information requirements will be proportionate to the size and scale of the proposed activity and defined by the activity classes. There will be reduced information required for activities in the 'controlled' category, but a higher level of information required for activities in a more stringent category, where a broader level of assessment is required

17. **agree** to refine the scope of the councils' powers to request information (similar to the approach under s92 of the RMA) to ensure the information requested is proportionate to scale and significance of the proposal and linked to matters identified in NBA plans or the NPF, or relating to planning outcomes specified in the NBA plans or the NPF

18. **agree** that councils will be able to request further information, defer an application, suspend processing of an application, extend timeframes, and return applications if they are incomplete

19. **note** that councils currently can defer or suspend applications if the proposals require additional consents, consenting fees are not paid (at the time of lodgement and notification), and applicants are able to suspend processing of applications, should they consider it to be appropriate

20. **agree** to retain councils' ability to defer or suspend applications and applicants' ability to suspend applications similar to the approach identified in s91 to 91F of the RMA, with all necessary modifications to reflect the new approach

21. **agree** that councils will have powers to extend timeframes similar to the approach under s37 of the RMA with all necessary modifications to reflect the new approach including, clearer parameters regarding when and where councils may extend timeframes to achieve a more effective and efficient system

22. **note** that there will be further MOG decisions to ensure councils will implement their roles effectively and accountable for the decisions they make

23. **agree** to introduce a mandatory pre-application step for discretionary consents where the council and applicant would be able to discuss and determine information to be supplied, engagement, and expectations

24. **agree** that the pre-application step will be encouraged for the 'controlled' category but not mandatory

25. **agree** that pre-application meeting attendees will be based on the requirements and matters (including affected persons if relevant) outlined by the plan

26. **agree** that where a pre-application meeting is mandatory, but does not occur, an application may be rejected

27. **agree** that the existing presumption to not consult for resource consents should continue in the NBA but modified to exclude circumstances where a NBA plan or the NPF specifies that consultation should be undertaken or identifies certain parties to be affected or potentially limited notified, or is required by treaty settlement legislation

28. **note** that engagement/consultation prior to lodgement of a consent application could include mana whenua, infrastructure operators or certain neighbours if identified by plans or the NPF or Treaty settlement legislation

29. **agree** that the Minister for the Environment will have the power to prescribe forms and other templates (including but not limited to forms for applications for consent and forms for assessment of environmental effects) through the NPF and/or regulations, to assist with effectiveness and efficiency established in the NBA

30. **note** that there are opportunities to reduce complexity and improve efficiency and effectiveness by putting matters of process (such as the service of documents and/or the lodgement of applications) into secondary legislation, and further decisions will be sought at a later date

Māori participation in consenting

31. **note** the intent is to provide greater Māori participation in the plan development process (as discussed at MOG #11 and #12) by requiring Māori participation in plan development through technical and mātauranga input, and for plans to be more directive in information requirements, notification (including limited notified parties), and decisions

32. **agree** that one of the purposes of the already agreed Māori participation in plan development is to ensure Māori can influence plan content including (but not limited to) how activities are categorised, notification status, where they may be identified an affected party and the information required for a consent

33. **agree** that Māori can be identified as an 'affected person', have a role as a technical expert and be a submitter (on NBA plans and consents)

34. **note** that officials from the Ministry for the Environment will continue to engage with the Freshwater Iwi Leaders Group and Te Tai Kaha on detailed policy development relating to Māori participation in planning and consenting processes

35. **authorise** the Minister for the Environment and Associate Minister for the Environment (Hon Kiritapu Allan) to make further policy decisions to the recommendations in this paper in relation to Māori participation in the planning and consenting system

Additional consent processing pathways

36. **agree** that there will be an additional processing pathway in the NBA for circumstances where there is a:
    a. request for an independent decision-making body (similar to direct referral);
    b. proposal of national significance; or
    c. 'merits based' simplified pathway ie. similar to the consenting process under the COVID-19 Recovery (Fast-track Consenting) Act 2020
37. **agree** that the NBA will provide an ability for councils and applicants to request that the proposal be decided by an independent body, assessed against specific criteria (based on the Panel's recommendations for direct referral), as follows:
    a. scale, significance, and complexity of proposed activity
    b. whether there is any particular need for urgency
    c. whether participation by the public would be materially inhibited if the request were granted; and
    d. any other relevant matter
38. **agree** that the ability to request an independent decision-making body will be available for notified applications for consents and notified applications to change or cancel consent conditions.
39. **note** that recommendation 38 does not preclude any decisions that may be sought from a later MOG or subgroup to request an independent decision-making body for other types of applications such as notices of requirement
40. **agree** that the NBA will provide an ability for the Minister for the Environment to call in a matter that is or is part of a proposal of national significance, assessed against specific criteria (based on the Panel's recommendations for proposals of national significance)
41. **agree** that the criteria for decision-making on whether a matter is, or is part of, a proposal of national significance will be amended to simplify the drafting, based on the Panel's recommended wording as follows:
    a. in deciding if a matter (defined at present under section 141) is, or is part of, a proposal of national significance and whether to invoke the process under this Part the Minister for the Environment must have regard to—
        i. the nature, scale and significance of the proposal
        ii. its potential to contribute to achieving nationally significant outcomes for the natural or built environments and the social, economic, environmental and cultural wellbeing of people and communities
        iii. whether there is evidence of widespread public concern or interest regarding its actual or potential effects on the natural or built environment
        iv. whether it has the potential for significant or irreversible effects on the natural or built environment
        v. whether it affects the natural and built environments in more than one region
        vi. whether it relates to a network utility operation affecting more than one district or region

vii. whether it affects or is likely to affect a structure, feature, place or area of national significance, including in the coastal marine area

viii. whether it involves technology, processes or methods that are new to New Zealand and may affect the natural or built environment

ix. whether it would assist in fulfilling New Zealand's international obligations in relation to the global environment

x. whether by reason of complexity or otherwise it is more appropriately dealt with under this Part rather than by the normal processes under this Act

xi. any other relevant matter

42. **agree** that the proposal of national significance pathway will continue to be available for applications for resource consent or to change or cancel consent conditions (based on the approach in the RMA). This does not preclude any decisions that may be sought from a later MOG or subgroup to use the proposal of national significance pathway for other matters

43. **agree** that applications accepted onto an additional pathway will be decided by a Board of Inquiry or an independent expert panel

44. **note** that the role of the Environment Court as a decision-maker will be determined in a later MOG when the role of the Environment Court is considered more fully across the system

45. **note** that the details for the merits-based simplified pathway including criteria, who can apply and who the decision-makers should be is linked to work on Regional Spatial Strategies and infrastructure pathways, and will be brought back to a later MOG

No compensation for the effects of planning provisions on estates or interests in land

46. **agree** that the no compensation provision and its exceptions will be based on the approach in RMA s85(1)-(6), but with amendments including the following:

a. if the tests for a remedy are met in respect of a plan change application or appeal to the Environment Court (the Court), it will direct the entity responsible for making final decisions on the NBA plan to do whichever of the following the entity considers appropriate:

i. modify, delete, or replace the provision in the plan or proposed plan in the manner directed by the Court: or

ii. offer to acquire the relevant estate or interest in land under the Public Works Act 1981, and

iii. if the holder of the estate or interest in land does not accept this offer, the planning provision in question remains in force, or comes into force without modification

b. the timing and steps to seek a remedy will align with processes for NBA plan development and change, to minimise the number of processes in the system overall

c. a provision stating that proactive planning to reduce risk does not automatically provide a right to a remedy, where the planning provision is taking a step now to reduce an increase in risk or a future risk

47. **note** that further decisions may be sought from MOG and/or subgroups about the remedies in the no compensation provision, as a result of upcoming governance decisions

48. **note** that further work is required on the development of planning provisions (including any remedies relating to planning provisions under the no compensation provision) in respect of land owned by Māori

Delegation and drafting

49. **authorise** the Minister for the Environment to make further decisions to:

    a. refine the criteria and scope of information requests by councils so that they are proportionate to scale and significance of the activity

    b. refine councils' ability to reject, defer or suspend applications, extend timeframes and applicants' ability to suspend applications

    c. determine consenting timeframes (subject to further MOG decisions on other features that will impact on timeframes, such as appeals)

    d. determine procedural steps in the consenting system, including but not limited to pre-application, lodgement of application (information requirements) and service of documents

    e. refine the detailed selection criteria for each additional processing pathway

    f. determine which entity or agency will apply selection criteria for each additional processing pathway

    g. determine who will provide administrative support for additional processing pathways

    h. determine the nature of the independent decision-making body on additional processing pathways

50. **authorise** the Minister for the Environment to issue drafting instructions to the Parliamentary Counsel Office to implement the decisions set out in this paper (including delegated decisions) through a Bill.

Ministerial Oversight Group Meeting #13 – Summary of recommendations

Paper 2: Consequential amendments

Pages 34 to 39

Key messages

- This paper seeks decisions on managing consequential amendments arising from replacing the Resource Management Act 1991 (RMA) with the Natural and Built Environments Act (NBA) and Strategic Planning Act (SPA). 219 pieces of legislation have been identified as requiring consequential amendments, ranging from simple to substantial.
- Due to the likely volume of amendments needed, it would not be efficient to take decisions on consequential amendments to the Ministerial Oversight Group (MOG). Therefore, this paper proposes to delegate decision-making for consequential amendments to the Minister for the Environment, subject to consultation with the relevant Minister or local authority.
- [redacted]

The Ministerial Oversight Group is recommended to:

1. **authorise** the Minister for the Environment to approve consequential amendments (to the associated legislation and Bills referred to in the appendices, and to secondary legislation made under the RMA) stemming from existing and future MOG decisions about the NBA, subject to consultation with:
    a. the Minister of the agency responsible for administering the affected legislation and Ministers of other affected agencies; or
    b. the relevant local authority or other entity for local Acts
2. **note** this delegation does not extend to iwi participation legislation or Bills (including Treaty settlements and Takutai Moana legislation as defined in the RMA) or the Urban Development Act 2020 and the Marine and Coastal Area (Takutai Moana Act 2012), as decisions on the necessary amendments will be sought separately.

Ministerial Oversight Group Meeting #13 – Summary of recommendations

Paper 3: Protection Mechanisms in the Natural and Built Environments Act

Pages 40 to 50

Key messages

The Resource Management Act 1991 (RMA) contains provisions that substantially modify the protection of some significant places. These provisions are:

- Water Conservation Orders (RMA s199-217)
- Heritage Orders (RMA s187-198)
- Limitations on urban tree protection (s76 4A-4D).

Officials have considered the role of these provisions and concluded that they should be carried into the new system. This paper recommends:

- carrying over existing Water Conservation Orders (WCOs) into the Natural and Built Environments Act (NBA)
- bringing the policy intent of the Water Conservation Order process into the National Planning Framework, while also retaining a mechanism in the NBA for new Water Conservation Orders, subject to a threshold test.
- carrying over heritage orders as "protection orders" in the NBA and reconsidering the policy framework so that it furthers the purpose of the NBA and provides a role for iwi, hapū, and Māori to protect significant places in their rohe
- changing current limitations to recognise that it is a legitimate obligation for councils to protect urban trees, in a way that recognises and balances interrelated and competing outcomes. Further work is underway to assess options and mechanisms on what that looks like.

Recommendations

Officials recommend that the Ministerial Oversight Group:

Water Conservation Orders

1. **agree** that existing WCOs will be transitioned into the NBA
2. **agree** that protection of newly identified nationally significant water bodies will be managed primarily through the National Planning Framework (NPF) but that new WCOs are able to be sought in exceptional circumstances
2. **note** that if Ministers agree that WCOs are carried over, officials will undertake further work to develop a threshold test for any person to apply to seek new WCOs
3. **note** that this further work will include what rights people have to take action in circumstances where they consider sufficient protection has not been provided through the NPF
4. **note** that outstanding water bodies are already managed through the National Policy Statement for Freshwater Management (NPS-FM), and the policy intent is that the NPS-FM will be integrated into the NPF

Heritage orders

5. **agree** that there is a need for a protection order process in the NBA, and that this process will be based on heritage orders in the RMA

6. **note** the Panel's view on simplifying and improving heritage orders, and that this will guide policy development for protection orders

7. **agree** that their purpose is to provide interim protection for a significant place

8. **agree** that protection orders should relate to a place that advances one or more protection-oriented outcomes under the NBA

9. **note** that officials will undertake further refinement of protection orders with iwi, hapū, and Māori groups so that the mechanism will give effect to the principles of te Tiriti and uphold te Oranga o te Taiao

10. **note** that officials will undertake further work on appropriate methods to transition existing heritage orders into the new system

11. **agree** that further development on a role for mana whenua as Heritage Protection Authorities will be informed by engagement with iwi, hapū, and Māori

12. **authorise** to the Minister for the Environment to make further policy decisions on the process and other remaining details needed to draft protection orders, in consultation with other Ministers as appropriate

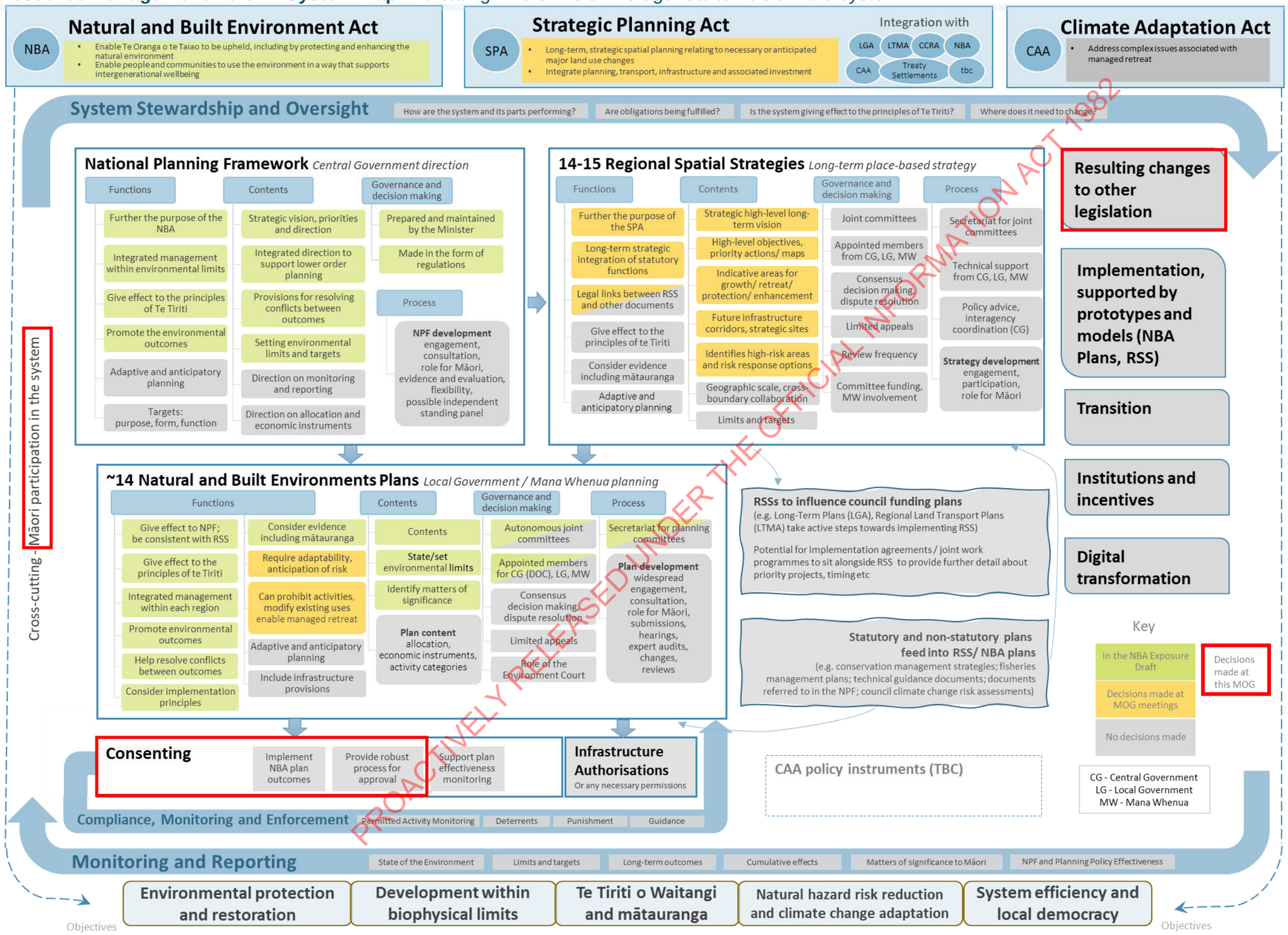
Urban tree protection

13. **agree** in principle that there is a need to protect urban trees in a way that recognises and balances interrelated and competing outcomes and addresses perverse barriers and consequences

14. **note** that further work is being undertaken to better understand the challenges associated with the current urban tree protection provisions and to identify a range of options and mechanisms to address these challenges within the NBA system

15. **authorise** the Minister for the Environment to make further policy decisions on the process and other remaining details needed to draft urban tree protection provisions, in consultation with other Ministers as appropriate.

Resource Management Reform System Map: indicating where MOG #13 agenda items sit in the system



Paper 1: An efficient and effective planning and consenting system

This paper is supplemented by Appendix 1, supporting item 1: Summary of Treaty impacts analysis (pages 62 to 73); Appendix 1, supporting item 2: Māori participation in the NBA (page 64); Appendix 1, supporting item 3: Panel's recommendations on RMA activity categories (page 65); and Appendix 1, supporting item 4: Options assessments – Māori participation in planning and consenting (pages 66 to 73).

Purpose

1. This paper builds on policy decisions made at the Ministerial Oversight Group (MOG) #10 meeting on 11 August 2021 (MOG #10). It seeks recommendations on consenting, including the role for Māori. It also seeks recommendations on the no compensation approach to planning provisions.

2. This paper covers the:

    a. consenting system:

        i. activity categories – refinement on the intent and relationship with consents

        ii. notification – participation at the consenting level

        iii. processing pathways - information requirements and procedural steps

    b. role of Māori in consenting

    c. planning regime

    d. no compensation for effects of planning provisions.

3. These matters were delegated to be considered by the Transactional Efficiencies and Māori Interests subgroups but are instead brought to the MOG as a result of scheduling changes and the impact of COVID-19.

4. [redacted]

Previous Ministerial Oversight Group decisions

5. The primary role of consenting in the Natural and Built Environments Act (NBA) is to implement NBA plan outcomes and the National Planning Framework (NPF), and manage effects. It is proposed that NBA consenting will adopt an enabling approach to activities within environmental limits and have a clear process and decision-making framework for approval or decline of activities.

6. At MOG #10 it was agreed the new consenting regime would provide a robust process for consideration of activities. Four broad categories of activities were agreed:

    a. permitted activities with expanded scope[1];

    b. prohibited activities; and

    c. two categories that trigger resource consent for activities that:

        i. need some level of merits-based assessment, akin to controlled and restricted discretionary activities in the RMA

[1] The scope of permitted activities is expanded to reduce the number of consents that require merits assessment (eg, the impacts are on certain persons and there is no impact on wider environment, and consent is only triggered in order to notify them/obtain their written approval, or control is intended to require certification from a suitably qualified professionals).

ii. may or may not meet outcomes and require a higher level of assessment, akin to discretionary and non-complying activities in the RMA.

7. It was also agreed that the NPF and NBA plans will play a stronger role in categorising activities, directing who to notify, which approval pathways to take and a process to register permitted activities to enable better monitoring.

8. The primary role of consenting in the NBA is to implement NBA plan outcomes and the NPF, and manage effects. It is proposed that NBA consenting will adopt an enabling approach to activities within environmental limits and have a clear process and decision-making framework for approval or decline of activities (MOG #10).

9. At MOG #11 and #12 it was identified that consenting changes will necessitate a realignment of Māori participation away from reactively responding to consents to proactively engaging upfront on plan development. Nonetheless, Māori participation in the consents process will still be an important element of the future system.

10. At MOG #10 it was also agreed that no compensation will be payable for the effect of planning provisions on land, with an exception if land has been rendered incapable of reasonable use in a way that cannot be justified.

Efficiency and effectiveness assessment

11. The new system must be more efficient and effective, to achieve the outcomes of reform. The approach must balance enabling appropriate activities with:

    a. the need to provide participation in consenting where appropriate

    b. the ability to manage activities that will have adverse effects on the environment

    c. proportionate consenting pathways

    d. the continuation of the no-compensation approach to planning provisions.

12. There are five key areas where a clear and consistent approach will improve efficiency and effectiveness:

    a. **Activity categories** – a reduced number of activity classes with a clear framework for how they should be used.

    b. **Notification of applications** – a clearer understanding of who to consult.

    c. **Māori participation in consenting** – plans are developed with Māori, they specify where and how Māori should be engaged in consenting, and specify when information requirements, such as environmental and cultural impact assessments, are required.

    d. **Processing pathways** – all types of applications have a proportionate and flexible pathway available.

    e. **No compensation for effects of planning provisions** – people have certainty about the continued use of their land while ensuring that NBA plan committees have strong powers to make plan provisions that achieve NBA outcomes.

13. Advice on each of these key areas are detailed in the following sections.

Activity categories

Problem

14. Activity categories play a key role in identifying whether activities are permitted, trigger resource consents, or are prohibited under the RMA. The RMA states what a consenting authority may or may not do when they consider consents, but does not provide adequate guidance or criteria for when and how to use activity categories in plans or national direction.

15. Activity categories should signal the significance and scale of an effect or activity, but ineffectively and inconsistent use by plan makers has resulted in uncertainty and inefficiency in the system. In practice there has resulted in no clear difference between how the two most stringent categories that trigger consents – resulting in uncertainty for decision-makers and applicants, and ineffective management of the planning outcomes.

Current approach in the RMA

16. The RMA currently enables plan makers to categorise activities into six categories. Four of these trigger the need to apply for a resource consent:

    a. controlled activities are the least stringent consent category and consenting authorities must grant these consents if they meet the relevant requirements in plans

    b. restricted discretionary activities enable a consenting authority to assess whether or not to grant consent and impose conditions, but only in respect of matters it has restricted its discretion in the plan or is specified in another regulation

    c. discretionary activities enable a consenting authority to exercise full discretion whether or not to grant consent and what conditions to impose on the consent if granted

    d. non-complying activities are the most stringent consent category and are intended for activities that are considered inappropriate and requiring a strong and robust consideration against planning objectives and policies. A consenting authority can exercise full discretion whether or not to grant consent and what conditions to impose on the consent if granted.

17. The RMA allows councils to monitor consents and charge for consent processing, monitoring, and enforcement. There are limited abilities to recover costs for permitted activity monitoring in the RMA.

Panel recommendations

18. The Panel recommended a need for better guidance for activity category use and retaining five of the six existing categories by removing the non-complying activity status. They considered this category ineffective, its outcomes similar to discretionary activities, and that its removal would help reduce complexity. The Panel recommended the following categories:

    a. Permitted – no consent required

    b. Controlled – triggers consent, but it must be granted

    c. Restricted Discretionary – triggers consent, but it may be granted or declined

    d. Discretionary – triggers consent, but it may be granted or declined

    e. Prohibited – no ability to apply for consent.

Advice

19. The efficiency of consenting and permitting is driven by the direction given by the NPF and NBA plans. How activities are categorised will influence the overall number of consents in the system. For example:

    a. the NPF can permit or prohibit activities across the system if it is considered necessary to protect the environment or provide for housing

    b. making activities which require farm plans or activities that have minimal environmental impact associated with infrastructure ‘permitted’ will reduce the number of consent applications, while maintaining appropriate environmental protections.

20. MOG #10 agreed to four broad activity categories and to expand the scope of the permitted activity category.[2] A key rationale for the proposed four categories is to drive stronger consistency and effectiveness in the system. Officials considered the activity categories as proposed by the Panel, but recommend the four categories outlined in Table 1 below.

Table 1: Proposed resource consent activity categories

Proposed activity categories	Intent	Relationship with the permitting and consenting regime
1. Permitted	Activities where positive and adverse effects (including cumulative and those relevant to outcomes) are known and can be managed through standards and criteria. Includes management plans and neighbour's approval.	**No resource consent required is required:** • *No further assessment of activities, effects, and outcomes, as these have been considered fully during plan development.* • *The NPF and/or NBA Plans may permit activities with no additional requirements (eg, no written approvals or certifications are required) or with requirements.* • *The NPF and NBA Plans will also direct if a permitted notice is required before undertaking the activity (to assist with monitoring of plan effectiveness).*
2. Controlled	Activities where potential positive and adverse effects (including cumulative and those relevant to outcomes) are generally known, but where tailored management and assessment of effects is required.	**Resource consent is required but it will probably be granted:** • *A merits assessment is required.* • *Councils may grant approval subject to conditions, or decline.* • *The NPF and NBA Plans will specify outcomes or assessments that they require or control.* • *The NPF and NBA Plans are able to restrict matters of discretion (limiting grounds to decline) if they choose.* • *Information sought is limited to matters specified in the Plan or the NPF (if applicable).*
3. Discretionary	This category is for activities: • that are less appropriate as they could potentially breach limits or not meet outcomes, • where relevant effects on outcomes are not known and need consideration, and effects may go beyond the boundaries of the site, and • that are unanticipated activities which may have a positive outcome (unknown during plan development)	**Resource consent is required and it might be granted:** • *Councils may grant approval subject to conditions, or decline.* • *Councils can seek a broad range of information or confirmation to undertake the activities.*
4. Prohibited	These activities will not meet outcomes and/or breach limits, and therefore no resource consents can be applied for.	**No consent can be applied for.**

21. This approach is broadly consistent with the Panel's recommendation, with the key difference being that only one activity category, (instead of two) ,is proposed for instances where effects are generally known, but where an assessment of effects is required. While the 'controlled' category is intended to be retained, the intention of this category will shift from its current use under the RMA where a consent must be granted, to enable limited discretion to decline consents – similar to the current restricted discretionary category.

22. The four proposed categories have the following advantages:

[2] This would effectively replace deemed permitted boundary activities under the RMA, where small scale activities that breach yard setbacks could get exemptions from consents if they get approval of the affected persons.

a. reduces complexity and aligns with an outcome-focussed framework:

   i. the NPF and NBA plans will be stronger and more certain, including identifying what activities are permitted and prohibited

   ii. expanding the scope of permitted activities removes the trigger consents for monitoring/cost recovery purpose where merits assessment is not required

b. better signals scale, significance and complexity:

   i. clearly defined activity categories will be able to signal expectations, including information requirements relative to scale and significance

c. prompt more effective considerations during transition and promote culture shift:

   i. better definition of activity categories will require reconsideration of activity categorisation in existing plans, and whether existing categorisations are appropriate in an enabling and outcomes-based approach.

23. Officials agree with the Panel's recommendation that stronger guidance for activity categories is required. Ineffective categorisation of activities has reduced certainty and undermined the role of activity categories to signal the scale or significance of activities to users and decision-makers.

24. The legislation should be clear about the intent of each category, to drive effective categorisation of activities in plan development. Officials recommend the legislation clearly outline the intent for each category as identified in Table 1.

25. Figure 1 on page 22 provides an overview of the consenting and permitting regime as proposed in this paper. A comparison of these proposals against the Panel's recommendations are contained within in Appendix 1, supporting item 3 (page 65).

26.

Examples of permitted activities in the new system

Example 1 – Building a culvert

Current system - limited scope of permitted activities

Building a culvert (a structure that channels water) requires a resource consent as a controlled or restricted discretionary activity. Consent could be required because of the need to impose conditions and to recover costs for monitoring purposes.

New System – expanded scope of permitted activities

The culvert could be permitted (possibly subject to scale, significance, and environmental limits outlined in the NBA plan). The expanded scope of permitted activities allows permitted activity monitoring (decided at MOG #10) and cost recovery for monitoring of permitted activities. Prescribed permitted activity standards would increase efficiency and certainty.

Example 2 – Third party certification

Current System – limited scope of permitted activities

The RMA does not explicitly provide third-party certification as conditions for permitted activities and councils have been reluctant to adopt this approach as a result of the legal uncertainty.

New System – expanded scope of permitted activities

Proposed changes will clarify and explicitly enable permitted activities to require a third-party certification. Potential examples are:

1. farm plans prepared by a suitably qualified professional
2. agri-spraying undertaken by qualified and certified individuals
3. sediment control plans prepared in accordance with a template provided by the consenting authority
4. a cultural values assessment prepared by an iwi within an area identified as having significant value to Māori.

Notification of applications

Problem

27. There has been unnecessary litigation and process in determining consent notification. Successive amendments to the RMA have added complexity to the notification process.

28. Although most consents are non-notified (up to 96.5%)[3] and only a small proportion of consents are either limited notified or publicly notified, a lot can be at stake for applicants and interested parties in the consenting system. A notified application provides rights to object and appeal and can significantly increase costs and delays for applicants.

29. Councils have tended to be risk-averse and have often taken a conservative approach to notification decisions, given the potential risk of judicial reviews. Iwi, hapū, and Māori have also been excluded from participating in the system, and the process of identifying statutory acknowledgements in treaty settlements exists as a workaround.

Current approach in the RMA

30. The RMA currently enables the use of national direction and district or regional plans to preclude notification. The use of preclusions in plans has increased in recent years, particularly for controlled or residential related activities.

31. The ability to preclude all notification is explicit, however the ability to prescribe limited notified parties under the RMA is not. This has resulted in a lack of clarity about whether there is a sound ability to prescribe limited notified parties under the RMA or whether it is ultra vires.

32. The current notification thresholds are focussed on 'adverse effects' on 'affected persons' or the environment. This has created an imbalance where 'notified' or 'interested' parties have a strong influence on the outcome of the consent, which may not necessarily reflect the approach identified in the plan.

Panel recommendations

33. The Panel recommended the following:

    a. retain the ability to non-notify, limited notify and publicly notify

    b. remove the less than minor, minor, and more than minor tests

    c. link activity categories with notification classes:

        i. the most stringent activity categories (discretionary) that trigger resource consents will be publicly notified; and

        ii. the least stringent category (controlled) that triggers resource consents will be non-notified in most cases, with some discretion for councils to notify for restricted discretionary (but plans must direct).

Advice

34. The existing notification provisions in the RMA are not fit for purpose and have driven risk-averse behaviour including requiring unnecessary written approvals for activities, or publicly notifying activities that could be reasonably expected within a zone.

35. Officials have considered the following options:

    a. **Option one**: Notify all consents

    b. **Option two (preferred):** Retain three classes of notification and allow the NPF and NBA plans to direct the type of notification.

36. Appendix 1, supporting item 4 (pages 66 to 73) supplements the following analysis of option two (preferred).

[3] 2014-2020 data from the National Monitoring System.

Retaining three classes of notification

37. Officials recommend retaining three notification classes, as key advantages to this approach are:

    a. small scale and lower risk activities accepted and agreed during plan development can be non-notified or limited notified, speeding up and increasing certainty for applicants

    b. limited (direct) notification provides the opportunity to notify specific parties where there is an impact on a specific aspect of the environment but not the wider environment, such as where activities have an impact on an area of significance to mana whenua or where activities might impact infrastructure assets. Notification examples are outlined below.

NBA Plans and the NPF must specify notification class in rules

38. Officials recommend the notification status for all activities in the controlled and discretionary categories be specified in NBA plans or the NPF (if applicable). Officials also recommend that if the decision on notification is delegated to a council or by the NPF, there is a requirement to have policies to guide how notification decisions will be made. This to ensure consistency, improve certainty and effectiveness of the system.

39. NBA Plans and the NPF will also need to be able to preclude notification or require limited or public notification. In addition, the system should include a new ability to prescribe specific parties as affected persons for public or limited notification purposes. The NPF can support standardising notification requirements in the NBA plans.

40. The proposed approach will reduce the uncertainties relating to notification and improve the efficiency and effectiveness of the system.

Presumption to publicly notify discretionary activities; option to specify otherwise

41. The Panel's proposal to require public notification of discretionary activities might result in undesired outcomes: it could stifle innovation or drive behaviours such as categorising unsuitable activities into a less stringent category. As outlined in Table 1, officials propose that the 'discretionary' category be able to cater for three broad types of activities:

    a. activities that are close to breaching limits and may or may not meet outcomes

    b. activities where relevant effects on outcomes are not known and need consideration, and effects go beyond the boundaries of the site

    c. activities that may not be anticipated by plans but contribute to outcomes directed by a plan or the NPF.

42. These types of discretionary activities will benefit from both broader notification and limited notification to ensure that that approach adopted is proportionate to the scale and significance of matters being considered.

43. Officials recommend that the presumption for discretionary activities is to publicly notify, but with the ability for plans or the NPF to specify other notification classes (eg, non-notification or limited notification) where appropriate. This will ensure the overall process is proportionate to the scale and significance of the matter being considered and reflects local knowledge.

Examples of how the proposed notification works in the NBA

Example 1 – Public notification required by the NBA Plan
A consent for any water take in Catchment A will be publicly notified as required in the NBA plan. Mana whenua and water supply network operators will be directly notified as they have been identified as affected parties in the NBA plan.

Example 2 – Limited notification required, and affected persons identified in the NBA plans.
A consent for a road located adjacent to a wahi tapu site (identified in the NBA plan) will be limited notified to Heritage New Zealand Pouhere Taonga and the relevant mana whenua as they have been identified as affected parties in the NBA plan.

Example 3: No notification, precluded by the NPF
A consent for a housing development (five units) in an area identified as suitable for residential intensification purposes, not exceeding 12m in height and 60% site coverage is non-notified as the NPF has precluded notification for housing developments of a certain scale in medium and high-density residential zones.

Matters to support notification under the NBA

44. Overall, officials recommend that NBA plans and the NPF must specify notification classes for any activities that trigger consents (the default approach). If notification classes are not specified and delegated by the planning committee or the Minister for the Environment (in relation to the NPF) to consenting authorities, plans or the NPF must provide guidance through policies on how notification decisions are made. There may be times that delegation is required to respond to local circumstances, and to ensure flexibility to address unanticipated activities.

45. Specifying the matters that must be considered for the planning committee (NBA Plans) or the Minister for the Environment (the NPF) and consenting authorities when making these notification decisions/policies are required to ensure consistency, improve certainty, and effectiveness of the system.

46. Officials recommend the following approaches:

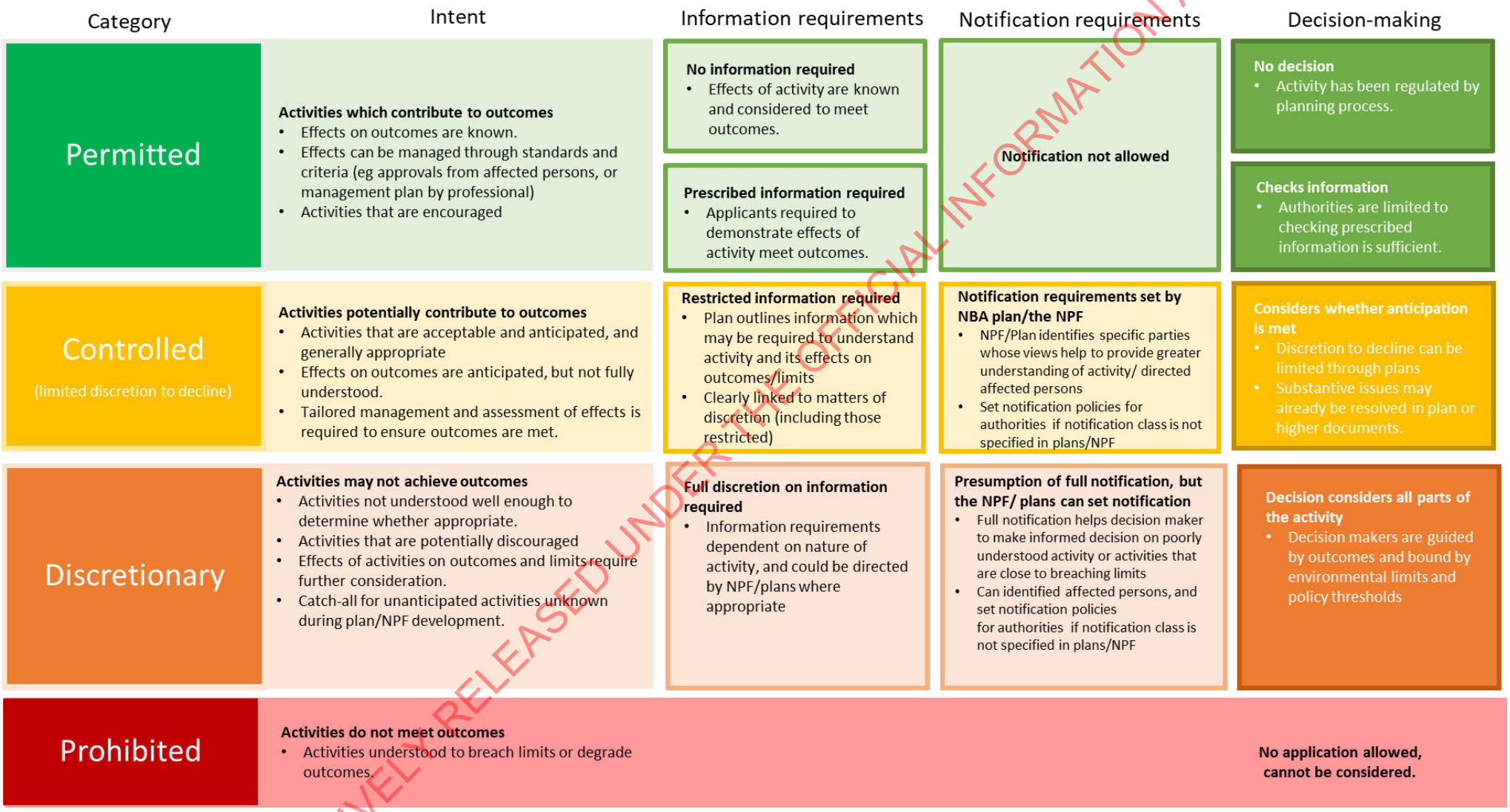
    a. public notification is required if:
        i. secondary legislation (including the NPF) and plans require it
        ii. there are clear ambiguities whether an activity could meet or contribute to outcomes, or if it would breach a limit
        iii. there are clear risks or impacts that cannot be mitigated
        iv. there are significant, relevant concerns from the community
        v. the scale and/or significance of the proposed activity warrants it

    b. limited notification is required if:
        i. secondary legislation and plans require the consenting authority to limited notify any person (note that this could include mana whenua through IPP/plan development processes)
        ii. it is appropriate to notify mana whenua or any persons who may represent public interests (eg, infrastructure providers)
        iii. an adjacent property owner may be impacted by the activity
        iv. scale and/or significance of the proposed activity warrants it

    c. non-notification is required if:
        i. the activity is clearly aligned with the outcomes or targets set by the legislation or secondary legislation or the plans
        ii. secondary legislation (including NPF) or plans precludes notification
        iii. all identified affected persons (could be identified through plans or the NPF) have provided their approvals (and no limited notification is required).

47. The wording above outlines the policy intent of the matters that need to be covered. The specific wording may change depending on the approach to drafting to ensure it is legally robust.

Figure 1: Summary of consenting pathways in the new system



General processing pathways

Problem

48. There have been successive amendments to the RMA to improve consenting processes administered by councils. The more significant changes relating to information requirements and timeframes (including suspensions) occurred in 2013 and 2017.

49. The changes included tracks created within the general consenting system for smaller scale district activities[4] and deemed permitted activities for 'boundary activities'.[5]

50. While the amendments expedited some minor consents, there are still concerns that existing pathways are not proportionate to the scale and significance of the matter. The current processes are unnecessarily complex and costly for users, which stems from poor plan quality and lack of consistency between plans. The existing information requirements and timeframes allowing suspension or extension for a consent application, regardless of complexity and significance, have resulted in uncertainties.

51. Māori have often been excluded from decisions on consents, especially if the consent has not been notified. They are often involved later in the process, where they have limited time and resources to respond effectively.

Panel Recommendations

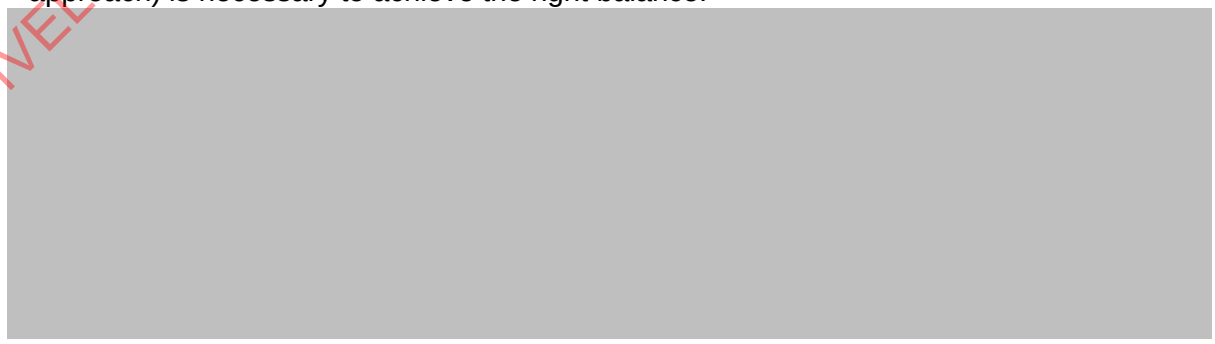
52. The Panel did not provide detailed recommendations on the processes that are administered by local authorities but considered timeframes and information requirements were still fit for purpose.

Advice

53. Officials recommend more defined and reduced information requirements for activities in the 'controlled' category, but a broader level of information requirements for activities in a more stringent category where a broader level of assessment is required. NBA Plans or the NPF will also be able to specify information requirements for specific activities or types of consents.

54. Consenting authorities will still require powers to request information, defer applications, extend or suspend timeframes (and return applications), if the application is not complete or contains insufficient information to enable decision-makers to ensure the planning outcomes will be met. Applicants should also retain powers to suspend timeframes and the processing of applications, as currently provided for under the RMA.

55. It is important to strike a balance between providing certainty for users of the system, and the need to have the right information to determine compliance or understand the effects of an activity. Refining the scope of powers to request information and providing clearer parameters for when timeframes can be suspended or extended (eg, s37 of the RMA approach) is necessary to achieve the right balance.

56. 

57.

[4] Non-notified Controlled Activities in Territorial Authority plans.

[5] Section 87BA of the RMA – intended for activities that breach boundary setbacks/sunlight recession planes – would be replaced by the expanded scope of permitted activities.

58. Providing a pre-application process for activities in the discretionary category will help to resolve issues with applicants not engaging early. It also reduces the likelihood of incomplete applications being submitted.

59. There is a risk of being too prescriptive and stifling good practice. Refinement of the pre-application process will be required including consideration of circumstances (where these may not be required, who must attend, and cost-recovery). Officials consider who attend will be reliant on the scale, significance of the matter as signalled through the plans, the NPF and activity categories.

60. Officials consider there will be a need for powers to prescribe relevant forms and templates through secondary legislation to ensure consistency and reduce complexity in the NBA.

61. The RMA explicitly states that there is no duty to consult for resource consents,[6] the rationale being that the notification process (where used) is the consultation mechanism. This has created a system where applicants consider there is no need to engage with iwi/hapū or other potentially affected parties (such as infrastructure providers). This results in iwi/hapū and other parties being submitters.

62. The policy intent is that NBA plans and the NPF are clearer on who affected parties are, and who should be limited notified parties prompting or requiring applicants to engage early before lodging an application.

63. Officials recommend this clause be modified, to ensure that where plan or the NPF identifies certain parties to be affected or potentially limited notified (eg, mana whenua or infrastructure providers) then the applicant must engage or consult with those identified parties.

64. Decisions are yet to be made about alternative dispute resolutions, hearings, and appeals, and these will impact on timeframes for consenting pathways. These decisions are also important for Māori participation. There is a need to ensure the timeframes are proportionate to the scale and significance of a matter.

65. Officials recommend delegating decisions on the following matters for the permitting and consenting regime for the Minister for the Environment:

    a. refine the criteria and scope of information requests by councils so that they are proportionate to scale and significance of the activity

    b. refine councils' ability to defer or return or suspend applications, extend timeframes and applicants' ability to suspend applications

    c. determine consenting timeframes (subject to further MOG decisions on other features that will impact on timeframes, such as appeals)

    d. determine procedural steps in the consenting system, including but not limited to pre-application, lodgement of application (information requirements) and service of documents.

66. The key source of complexity in the RMA is the significant prescription on matters of process, and successive reforms have made this prescription more complex.[7] Officials are considering options to reduce complexity through the use of secondary legislation, such as regulations, to control processes.

67. Figure 1 on page 22 provides an overview of the consenting and permitting regime as proposed in this paper.

[6] Under s36A of the RMA – introduced in the 2005 amendment to the RMA

[7] Identified by the Legislation Design and Advisory Committee (LDAC).

Māori participation in consenting

Problem

68. Māori currently have limited ways to influence plan content and accordingly little ability to influence notification decisions. Although the RMA requires the consenting authority to consider statutory acknowledgements when determining who is an affected person, Māori are often not notified by councils as affected persons.

Current approach in the RMA

69. There is an explicit requirement in the RMA to consult with Māori[8] during plan making, but the RMA does not include a requirement to consult with any party (including Māori) on resource consents.

70. Treaty settlement legislation has been used to identify statutory acknowledgement areas to signal to local authorities, the courts, and other agencies when and how Māori wish to be involved in the system, including consenting and monitoring

71. Iwi, hapū, and Māori may also use other legal instruments such as iwi management plans, Mana Whakahono a Rohe (MWaR), or Joint Management Agreements (JMAs) to influence planning and consenting.

Treaty settlements and statutory acknowledgements in planning and consenting

72. Resource management statutory acknowledgements have enabled Māori to participate in RMA processes in relation to places of significance, by requiring local authorities to have regard to the special association for Māori with places or values of significance.[9]

73. RMA statutory acknowledgements have also provided several other mechanisms such as enabling Māori to give evidence in plan development and consenting processes, appointing hearing commissioners, recognising and providing for restoration strategies, decision making on consents, co-writing of consent planning reports, agreeing processes to feed into assessment of environmental effects, and the ability to specify conditions and notification pathways.

74. In the absence of statutory acknowledgements, some local authorities and agencies provide participation opportunities for iwi, hapū, and Māori, and acknowledge and respond to concerns or aspirations for places of significance.

Panel's recommendations

75. The Resource Management Review Panel (the Panel) recommended mana whenua representation on planning committees. Each committee would need a secretariat for administration, plan drafting, policy analysis, coordination of public engagement, and commissioning expert advice. The Panel noted that mana whenua will need to be resourced to enable them to participate effectively in planning committees and the secretariat.

76. The Panel also recommended an Integrated Partnerships Process (IPP) to replace Mana Whakahono a Rohe (MWaR) and support Joint Management Agreements (JMAs) and transfers of power. These mechanisms are not addressed in this paper.

Advice

77. A stronger role for Māori in plan development enables significant values and places to be identified in plans, along with appropriate activity classes for activities that may affect those

[8] Clause 3 of Schedule 1 of the RMA requires councils to consult with the tangata whenua of the area through iwi authorities, and any customary marine title group in the area.

[9] There are at least 55 settlements Acts that currently include statutory acknowledgement by the Crown of a hapū, iwi or collective's particular cultural, spiritual, historical, and traditional association with specified areas.

values. It allows Māori to have a say in how they want to participate in consenting for areas and values of significance to them.

78. Early participation by Māori in the plan development process and the ability to influence plan content provides certainty for users and local authorities, enables Māori to participate efficiently, and ensures that matters of concern to Māori are considered in decision-making. This is a significant change and shifts Māori participation away from reactively responding to consents with limited time, to proactively engaging upfront on plan development.

79. Officials recommend that plans determine when and how mana whenua should be engaged in consenting. In addition, it is recommended that the different roles that Māori may undertake, including as technical experts (eg, providing cultural values assessments) and as submitters be recognised.

80. Further work is required to identify the role Māori will have in the secretariat, the Independent Hearings Process (IHP), and the NBA planning committee, to ensure there is participation across the plan development, evaluation, and decision-making process.

81. The diagram in Appendix 1, supporting item 1 (pages 62 to 63) shows what Māori participation could look like in the consenting process, and the possible role of IPP arrangements in supporting NBA Plans. As noted above, further advice will be provided on the IPP.

82. The approach within this paper does not appear to preclude any options to address Māori freshwater rights and interests. Cabinet has yet to agree on next steps to progress the freshwater allocation and rights and interests work programmes, including engagement with the iwi/Māori groups and iwi, hapū, and Māori more broadly.

Additional consent processing pathways

Problem

83. The RMA provides two additional pathways: direct referral to the Environment Court,[10] and call-in by the Minister as a proposal of national significance, where the Minister may direct the proposal to either the Environment Court or a Board of Inquiry.[11] Outside the RMA, there is a third additional pathway through COVID-19 response legislation (the fast-track 'shovel-ready' pathway).

84. Additional pathways create complexity in the system and are used for a small number of large proposals. The Panel observed that five cases were directly referred in 2018 and four in 2019, and that there have been 16 proposals of national significance completed since 2010.[12]

Panel's recommendations

85. The Panel recommended retaining direct referral and the proposal of national significance pathways with some amendments. The Panel did not recommend retaining the temporary 'shovel-ready' fast-track process currently outside of the RMA.

86. For direct referral, the Panel's recommended changes were:

[10] The types of notified applications for which direct referral is available are consents, changes or cancellations to consent conditions, notices of requirement for designations or heritage orders, and notices of requirement for alterations to designations or heritage orders.

[11] Proposals of national significance may include applications for resource consent or to change or cancel consent conditions, preparation of a regional plan (other than a regional coastal plan), changes to district or regional plans, notices of requirement for designations or heritage orders, and notices of requirement for alterations to designations or heritage orders.

[12] Panel Report at pages 283 and 289.

a. new selection criteria[13] as follows:
    i. scale, significance and complexity of proposed activity
    ii. whether there is any particular need for urgency
    iii. whether participation by the public would be materially inhibited if the application were granted
    iv. any other relevant matter
b. giving applicants a right of appeal to the Environment Court if the consent authority refuses to refer the application.[14]

87. For proposals of national significance, the Panel's recommended changes were:
    a. minor drafting clarifications to the statutory criteria
    b. removing the EPA's supporting role to the Minister for the Environment in the selection process, with support from MfE instead
    c. removing Boards of Inquiry, so that all proposals of national significance applications go to the Environment Court.
88. Time and cost savings where proposals are likely to be appealed, and ensuring that nationally significant proposals are heard in one clear independent process, were the principal reasons given.[15]
89. The Panel characterised the 'shovel-ready' pathway as a measure to boost economic activity in the short term and did not consider how it could be used differently in the new system.
90. The Panel indicated that applicants should bear costs and potentially contribute to costs of opposing parties. Decisions on costs are not being sought through this paper.

Advice

91. Additional pathways provide a proportionate way to process the largest applications with public participation and avoid putting parties to the delay and cost of multiple hearings. They have also been used to address delay, lack of capacity in local government and the need for extra rigour or robustness in decision making.
92. The new planning system will require fewer consents overall, especially for activities that are consistent with the NBA plan. However, larger, more complex proposals are still likely to require multiple consents. For example, a wind farm could be enabled through an indicative location in the RSS, and further enabled through a permitted or controlled category in the NBA plan. However, consents would likely be needed for associated activities such as earthworks and other detailed design matters.
93. The new system needs to provide appropriate processing pathways to manage complex or large applications efficiently, without imposing unnecessary costs and complexities and without relitigating policy decisions about what is enabled or anticipated through the RSS and NBA plan.
94. Decisions about how many processing pathways are needed requires a trade-off between reducing system complexity (through having a single consenting pathway), versus providing additional proportionate pathway(s).

[13] There are currently no criteria for local authority decisions on whether to directly refer applications. There is a requirement for referral to be granted if the investment value of the proposal is over a particular threshold, but regulations have never been made to set a threshold, so there are no criteria in practice currently.
[14] Currently objections can be made to the local authority under the process in s357 RMA.
[15] Panel Report at pages 283 and 289.

95. Officials recommend providing additional pathways that allow large, complex, or contentious applications to be considered by an independent body. This approach incorporates aspects of the existing direct referral, nationally significant proposal, and merits-based fast-track pathways. This is Option 3 in supporting item 4 of Appendix 1 (pages 66 to 73) which provides a detailed options assessment.

96. Four options were assessed:

    a. **Single pathway**: general consenting pathway only

    b. **Panel approach**: includes the general consenting pathway, direct referral, and proposals of national significance

    c. **'Panel plus' (preferred)**: includes the general consenting pathway and additional pathway that incorporates request for independent body, proposals of national significance, and a 'merits-based simplified pathway' similar to 'shovel-ready' COVID-19 legislation[16]

    d. **Two pathways**: general consenting pathway + Panel of Commissioners

97. Option 3 is recommended because it provides a proportionate range of pathways; minimises the risk of delay and cost through appeals on large proposals; and minimises relitigating of previous policy decisions to enable or encourage a proposal through RSS and plans. Option 3 strikes the most appropriate balance between reducing system complexity and providing proportionate pathways.

98. Examples of the types of activities that would likely follow additional pathways in Option 3 are:

    a. request for independent body – activities not provided for, or discouraged, in the plan (eg, a supermarket in a low intensity residential zone away from where the RSS anticipates growth), that are likely to be controversial at a regional level but not raising issues of national significance

    b. proposals of national significance – activities raising issues of national significance, and likely seeking to respond to new circumstances or utilise technology not foreseen when the RSS and plan were developed (eg, new renewable energy technology)

    c. 'merits-based simplified pathway' – activities where the RSS anticipates a general location, the NBA plan enables the activity more explicitly, and some associated parts of the proposal require consent (likely construction related activities). Infrastructure activities or large housing developments could follow this pathway if provided for in the RSS and plan.

99. For the proposals of national significance and 'request' pathways an expert independent body or a Board of Inquiry would be used. If a proposal is not accepted onto an additional pathway, officials recommend a local level objection process, rather than the Panel's recommendation of a new appeal right to the Environment Court.

100. Engagement with local authority technical experts indicates the local level objection process is cost effective and agile, and there is no need to unnecessarily draw on the Court's capacity. Where the decision-maker is a Minister, a judicial review would be the appropriate means of challenge. It will be important to ensure that appointees to Boards of Inquiry and expert panels understand treaty settlements, tikanga, and have expertise in mātauranga Māori where necessary.

101. The 'merits-based simplified pathway'[17] allows applicants to request a pathway with reduced participation and appeal rights, on the basis that key policy decisions to provide

[16] COVID-19 Recovery (Fast-track Consenting) Act 2020.

[17] A different name for this pathway may be recommended when detailed policy decisions on it are sought.

for the activity have already been made in the RSS/NBA plan and as such has already had a level of public engagement through submissions, hearings, and appeals.

102. The request would be assessed using selection criteria in the NBA, that capture the enabling and anticipated aspect in the planning documents. If accepted onto the 'merits-based simplified pathway', decisions would be made by an expert consenting panel with limited appeal rights (noting that detailed decisions on appeals will be sought from a later MOG). Detailed policy should be developed alongside policy for infrastructure in the new planning system and should ensure a decision-making role for Māori.

103. Decisions about detailed policy for additional pathways (including who applies selection criteria and the nature of the independent body) will be required and officials recommend that these be delegated to the Minister for the Environment.

No compensation for effects of planning provisions

Problem

104. The shift to an outcomes-based system, stronger strategic direction in plans and the ability for NBA planning committees to modify or extinguish existing uses[18] is likely to lead to an increase in challenges to how restrictive planning provisions can be, without providing a remedy.

105. Currently, many aspects of s85 are problematic. The process, the tests for what can be considered in determining if land has been made "incapable of reasonable use" (especially in the context of risk) and what "places an unfair and unreasonable burden" are unclear. Case law must be used to understand these provisions.

106. The tests and remedies are not easily applied and may hinder proactive responses needed to achieve the outcomes focus of the new system such as addressing contaminated land, the reduction of risks from natural hazards and mitigation of, and adaptation to, the impacts of climate change.

107. The question of what can be considered to determine whether a rule renders land 'incapable of reasonable use' and places an unfair and unreasonable burden' has been considered on several occasions by the courts.[19] Its application is unclear in plan changes aimed at reducing increasing risk, or future risk.

108. Under s85 of the RMA, if the Court finds that the planning provision makes the land incapable of reasonable use and places an unfair and unreasonable burden, the Court can only order (and the Council can only opt to), undertake a Public Works Act (PWA) taking if the person with the estate or interest in the land agrees.

109. Alternatively, the planning provision would need to be amended to provide 'reasonable use', hindering proactive planning for issues such as erosion, sea level rise or landslides.

110. The shift to an outcomes-based system and stronger planning provisions is likely to lead to an increasing number of challenges to plan provisions and exceptions to the no-compensation principle will be increasingly tested. The stronger the proactive planning provision, the more likely that remedies will need to be provided.

How the existing provisions have been applied

111. There are cases where landowners have challenged planning provisions which rezoned residential land to a more restrictive zoning that prohibits an activity (eg, residential) to reduce risk.

112. The courts have generally upheld councils' zonings as not falling within the exceptions to s85(1) and have not directed any change to the zonings and relevant plan provisions (or

[18] As agreed in MOG #10.

[19] See, for example, a summary here: Supplementary information and advice requested 7 and 14 April 2016 - New Zealand Parliament (www.parliament.nz)

a Public Works Act taking).[20] The courts have looked at all the circumstances in determining if the changes in zoning made the land incapable of reasonable use or placed an unfair or unreasonable burden. It is less clear what might happen where land is re-zoned to prohibit residential use in respect of future risk, rather than immediate risk.

113. None of the cases involved the Court directing that the Council acquire all or part of the land under the Public Works Act 1981[21] as the grounds for the exceptions were not met. The power to direct an acquisition has only been available in s85 since amendment in 2017 and there have been few cases applying s85. Prior to this, the Court's only power was to modify or delete the provision in question.

Panel's recommendations

114. The Panel recommended reviewing the function of s85 generally, and specifically in the context of natural hazards and managed retreat. It noted that there have been difficulties in applying s85 and that the tests and associated remedies may hinder the proactive responses needed to address climate change issues.

115. The Panel considered that the conditions that may lead to the need for risk reduction, such as inundation from sea level rise, are inherently uncertain in magnitude and timing even if the eventual outcome is inevitable. The tests under s85 lead to a "timing conundrum", where in the absence of a risk reaching a certain level, it may not be possible to act proactively by imposing planning provisions. Yet, when the risk is realised, the opportunity to take proactive (and more cost-effective) action has passed[22] preventing proactive, adaptive and cost-effective planning, particularly in the management of risk.

116. The Panel noted that the remedies currently provided when the s85 test are met may frustrate planning policy. Where the tests are met, in order for the planning policy to be implemented as intended, the person with the estate or interest in the land must agree to it being purchased. If they do not agree the local authority must modify, delete or replace the relevant plan provision.

Advice

117. Two options were assessed:

    a. **Option 1 –** Minor drafting amendments: clarity and alignment with other NBA processes

        i. clarify the process steps for when and how a plan provision can be challenged or appealed, and align with the processes for NBA plan development and change

        ii. modernise the drafting generally while keeping the policy intent of the tests the same

    b. **Option 2 (preferred) –** Builds on option 1, and amends remedies so that if the tests are met, the Environment Court directs the entity responsible for NBA plans to do whichever of the following that entity considers appropriate:

        i. modify, delete, or replace the provision in the plan or proposed plan in the manner directed by the court: or

        ii. offer to acquire the relevant interest in land under the Public Works Act 1981

        iii. if the holder of the estate or interest in land does not accept this offer, the planning provision in question comes into force without modification.

[20] Cases reviewed include: *Hastings v Manukau Harbour Protection Society Incorporated* Environment Court A068/2001, 6 August 2001, *Francks v Canterbury Regional Council* [2005] NZRMA 97 and *Awatarariki Residents Inc v Bay of Plenty RC* [2020] NZEnvC 215.

[21] Under s85(3A((ii)).

[22] Panel at page 187.

118. Appendix 1, supporting item 4 (pages 66 to 73) provides a detailed options assessment. Officials recommend option 2, which follows the Panel's approach to review s85 of the RMA to enable proactive planning to:

    a. contain a clear process where remedies can be sought

    b. remove the requirement for landowner consent to acquisition (while avoiding compulsory acquisition)

    c. ensure that proactive planning to reduce risk does not automatically provide a right to a remedy where a planning provision is taking a step now to reduce an increase in risk or a future risk.

119. Option 1 has benefits but could lead to more litigation due to the ability for landowners to frustrate planning objectives by refusing acquisition. It may also lead to potential disputes over what is meant by the tests (especially in the context of risk reduction), and to slower planning responses in the system due to reduced ability to plan proactively.

120. Option 2 allows NBA planning committees to plan proactively and achieve NBA outcomes, creating more efficient planning while balancing the interests of landowners.

121. Option 2 may not necessarily be appropriate for land owned by Māori, and further consideration of how planning provisions applying to land owned by Māori is required. This includes how the NBA equivalent of RMA s85 should apply. Decisions on a range of matters relating to Māori land will be sought at a later MOG.

122. Option 2 strikes the most appropriate balance between enabling efficient proactive planning to achieve NBA outcomes, while providing a check on the reasonableness of planning provisions. Enabling proactive planning to reduce risk increases clarity, allows for adaptive planning to reduce increased (or future) risk, and reduces the extent to which the courts are required to provide guidance.

123. As final decisions on governance are yet to be made, officials recommend that the remedies under s85 may need to be revisited depending on the outcome of governance decisions. Governance decisions may have implications for which entity is responsible for acquiring land with associated financial ramifications.

124. This paper takes a system-wide approach, noting that managed retreat is following a separate workstream that may propose additional or different options.

Treaty impact analysis

125. A summary of the analysis of the Treaty impacts of the recommendations of this paper is provided in Appendix 1, supporting item 1 (pages 62 to 63).

Engagement

Agency

126. Agreement and support were generally reached over the approach to activity categories, notification, processing pathways, and approach to no compensation. Agencies reiterated the importance of the processes being simple and efficient.

127. Certain agencies have a preference to retain the Controlled Activity category (for which consent must be granted) as it provides certainty, but MfE officials consider the certainty will be provided through the proposed clearer plans, expanded scope of permitted activities, and identification of affected persons in plans or the NPF (if applicable). Reducing the number of categories will reduce complexity.

128. Certain agencies have concerns that enabling 'neighbours' involvement in the consenting and permitting would result in a negative impact on the outcomes of the reform (eg, to increase housing supply). MfE officials consider there is a need to continue to provide for means of participation at the consenting level, but these decisions will not be made at consenting level, unlike the current system where most of these decisions are made at

consenting level. The level of community involvement will be determined at the planning level (NPF or the NBA Plan), including policies to make notification decisions if needed.

129. The proposed expansion of the scope of permitted activities to include third party approvals (eg mana whenua approval, certifications or potentially neighbours) agreed at MOG #10 is intended to reduce number of consents that do not require merits assessment. This is similar to the RMA approach of 'deemed permitted boundary activities'.[23] It is not proposed to provide for additional neighbours involvement. Activities are categorised (including rules) through the plans and the NPF. MfE officials consider the ability for the Minister for the Environment (in relation to the NPF) or the NBA planning committee (the NBA plans) to preclude any third-party involvement for any permitted activities or consents after plans are made will mitigate these concerns. For example, the NPF will determine housing of certain scale or location (or zone) to be permitted (eg, no consents) with no further conditions such as written approvals from 'neighbours'.

130. Agencies emphasised the importance of clear selection criteria for the 'merits-based simplified pathway' for processing consents, and that the trade-off for reducing notification and appeal rights is upfront engagement in RSS and plan development earlier in the process.

131. The importance of ensuring that Māori land and land subject to Treaty settlement legislation is not rendered incapable of reasonable use without an appropriate remedy was highlighted. As noted above, MfE officials recommend that decisions for Māori land should be sought from a later MOG or subgroup.

Local government

132. Local government is generally supportive of the approach to activity categories. Some councils consider the notification provisions could be clearer and that the current approach is not efficient. No significantly different approach has been suggested.

133. Feedback from local government indicated that there is a need to provide additional consenting pathways for large or complex proposals. They were also supportive of retaining the approach to no compensation for planning provisions, but with amendments to ensure that there is an approach that enables proactive planning to reduce risk.

134. Culture change and behaviour shifts are needed to realise efficiencies in the new system. Implementation guidance will help address local government concerns.

Iwi/Māori groups

135. Material on the proposed approach to consenting has been presented to the Freshwater Iwi Leaders Group and Te Tai Kaha. Discussions focused on a how a role for Māori can be provided for in consenting, while considering the role for Māori in plan development – in particular, the ability for plans to specify how iwi, hapū, and Māori should be consulted and on what activities.

136. Relevant feedback on the overall approach from iwi/Māori groups included:

    a. the reform must uphold Te Oranga o Te Taiao and Te Mana o Te Wai; give effect to Te Tiriti o Waitangi; ensure greater efficiency and effectiveness; address deficiencies of the system for iwi and hapū; and address iwi and hapū rights and interests in freshwater

    b. there are two clear areas in consenting that will be crucial to giving effect to a Te Tiriti partnership. The first role is for iwi and hapū to have affected party status within their rohe, to uphold Te Oranga o te Taiao in situations where they are not the applicant. There will then be a space where Māori economic authorities may be

[23] Consents triggered that only infringes 'boundary rules' (eg, sunlight access, side yard encroachment)) and impacts on certain neighbours (refer to s 87BA of the RMA)

consent applicants in the process, and be encouraged to stimulate economic development within environmental limits

c. iwi and hapū representatives have the role to co-design the plans at a drafting level. Māori economic authorities must have a specific role and provision in the design of the plan to represent the needs of Māori landowners, particularly in the development of Māori land and in the engagement process

d. opposition to a more permissive direction of consents. Any current and future consents need to enable freshwater rights and interests for iwi and hapū and legislate co-decision making for all notified consents. Māori landowners to be protected to ensure their voice has a specific status in consents.

137. Feedback on specific aspects of system design included:

a. transition and monitoring have an integral role alongside the consent process for Māori and need to be considered carefully

b. the system needs to provide a cost-effective method for achieving recourse that does not involve judicial review (specifically to enable affected party decisions to be challenged)

c. consider setting principles to direct processes rather than providing for prescription. Allow Māori to act more flexibly in process that will be to the benefit of councils to defend provisions

d. assurances that Māori involvement in the plan development process need to be realised

e. desire to be involved in further policy development detail on both the plan development process and consenting

f. ensure current arrangements between local authorities and iwi/hapū for managing involvement in consenting are not 'wound back'

g. the level of participation in consents is contingent on the scale at which limits, and targets are set

h. there needs to be flexibility in plan development and consenting for Māori to adopt various roles such as submitters or technical specialists

i. consideration of the best way to lift the standards of cultural impact assessments and provide clarity on the requirements of cultural impact assessments for all system users

j. Integrated Partnership Process (IPP) needs to give expression to Māori via tikanga about what is dealt with at different levels of the system, and how processes will be resourced to avoid inequity for Māori participation

k. remove consents for significant breaches and consider water conservation orders and heritage protection for iwi and hapū.

Paper 2: Consequential amendments

Purpose

1. This paper seeks agreement from the Ministerial Oversight Group (MOG) to delegate the ability to approve consequential amendments stemming from existing and future MOG decisions to the Minister for the Environment, subject to consultation with the Minister of the agency responsible for administering the affected legislation and Ministers of other affected agencies.

Background

2. Table 1 (pages 36 to 39) lists 199 pieces of legislation (both primary and secondary) that have been identified as currently cross referring to provisions in the Resource Management Act 1991 (RMA), or utilising mechanisms from the RMA. This list does not include iwi participation legislation (including Treaty settlements and Takutai Moana legislation as defined in the RMA), which are being dealt with separately.

3. In addition to this list of legislation, there is also one Bill (the Crown Pastoral Land Reform Bill 2020, currently before Parliament) that has been identified as currently cross referring to provisions in, or utilising mechanisms from, the RMA. This does not include iwi participation Bills (including Treaty settlements and Takutai Moana legislation as defined in the RMA), which are being dealt with separately.

4. Most of the policy decisions made by the MOG to date about the Natural and Built Environments Act (NBA) will have ramifications for the associated legislation referred to in the appendices, and the Crown Pastoral Land Reform Bill 2020. The same will be true of future MOG decisions about the NBA.

5. This will sometimes require consequential amendments to the associated legislation (or Bill) to ensure that it effectively interfaces with the changed legislative landscape that will result from these decisions:

    a. at the simpler end of the spectrum, these consequential amendments may merely require replacing a general reference to the RMA with a reference to the NBA;

    b. other times it will mean replacing a reference to a specific provision in the RMA with a reference to the equivalent provision in the NBA;

    c. where the differences between the NBA and the RMA are more significant, it could mean rewriting part of the associated legislation (or Bill);

    d. with respect to the Crown Pastoral Land Reform Bill 2020, if the Bill is still before Parliament, consequential amendments would be made to the Bill. If the Bill has been enacted and come into force, these changes would be made to the resulting legislation.

6. The MOG's policy decisions may also necessitate amendments to regulations, orders and other secondary legislation made under the current RMA. While these will eventually be repealed and replaced with secondary legislation made under the NBA, the NBA may need to continue them (with necessary consequential amendments) for an interim period.

7. In some cases, these consequential amendments can be made in a legally neutral manner so that the legal effect of the associated legislation (or Bill) is not changed. In these cases there is arguably no need to seek policy approval to make the consequential amendments (because nothing is substantively changing). The Ministry for the Environment will work with the Parliamentary Counsel Office to make these changes.

8. In other cases, it will not be possible to make the consequential amendments in a legally neutral manner and it will be necessary to obtain policy approval from MOG. This paper

recommends that MOG delegate to the Minister for the Environment the ability to approve these consequential amendments.

9. Additionally, there will be times when the associated legislation (or Bill) refers to terminology in the RMA that is not changing, but the mechanisms in the NBA that utilise that terminology are changing. Therefore, the legal effect of the provisions in the associated legislation (or Bill) is different even if the words themselves remain the same. In such cases, if the words are to be left the same, then policy approval is also needed from MOG. This paper recommends that MOG delegate the power to make these approvals to the Minister for the Environment as well.

10. This delegation would be subject to the condition that the Minister for the Environment consult with the Minister of the agency responsible for administering the affected legislation (or Bill), and Ministers of other affected agencies. For local Acts with no responsible Minister (such as the Wellington Town Belt Act 2016 and Waitakere Ranges Heritage Area Act 2008), the Minister for the Environment would consult the relevant local authority or other entity.

11. This delegation would also be subject to the requirement for MOG to go back to Cabinet to seek policy approval for all of its policy decisions (including delegated decisions).

Table 1: Associated legislation that may require amendment as a consequence of MOG decisions about the content of the Natural and Built Environments Act, excluding iwi participation legislation (which includes Treaty settlements and Takutai Moana legislation as defined in the RMA)

	Legislation
1.	Airport Authorities Act 1966
2.	Animal Products (Regulated Control Scheme—Bivalve Molluscan Shellfish) Regulations 2006
3.	Aquaculture Reform (Repeals and Transitional Provisions) Act 2004
4.	Auckland Airport (Vesting) Order 1998
5.	Auckland City Council (St Heliers Bay Reserve) Act 1995
6.	Auckland Improvement Trust Act 1971
7.	Biosecurity Act 1993
8.	Building (Accreditation of Building Consent Authorities) Regulations 2006
9.	Building (Forms) Regulations 2004
10.	Building Act 2004
11.	Building Regulations 1992
12.	Burial and Cremation Act 1964
13.	Cadastral Survey Rules 2021
14.	Canterbury Property Boundaries and Related Matters Act 2016
15.	Chatham Islands Council Act 1995
16.	Children's Act 2014
17.	Christ Church Cathedral Reinstatement Act 2017
18.	Christ Church Cathedral Reinstatement Order 2020
19.	Christchurch City Council (Robert McDougall Gallery) Land Act 2003
20.	Christchurch District Drainage Act 1951
21.	Christchurch District Drainage Amendment Act 1969 (deemed to be part of the Christchurch District Drainage Act 1951)
22.	Civil Defence Emergency Management Act 2002
23.	Clevedon Agricultural and Pastoral Association Empowering Act 1994
24.	Climate Change Response Act 2002
25.	Climate Change Response (Emissions Trading Reform) Amendment Act 2020
26.	Conservation Act 1987
27.	Contempt of Court Act 2019
28.	Contract and Commercial Law Act 2017
29.	Corrections Act 2004
30.	Costs in Criminal Cases Act 1967
31.	COVID-19 Recovery (Fast-track Consenting) Act 2020
32.	COVID-19 Recovery (Fast-track Consenting) Referred Projects Order 2020
33.	Criminal Procedure Act 2011
34.	Crown Forest Assets Act 1989
35.	Crown Minerals (Minerals Other than Petroleum) Regulations 2007
36.	Crown Minerals (Royalties for Minerals Other than Petroleum) Regulations 2013
37.	Crown Minerals (Royalties for Petroleum) Regulations 2013
38.	Crown Minerals Act 1991
39.	Crown Organisations (Criminal Liability) Act 2002
40.	Crown Pastoral Land Act 1998
41.	Crown Research Institutes Act 1992
42.	Department of Justice (Restructuring) Act 1995
43.	District Court Act 2016
44.	Earthquake Commission Act 1993
45.	Education (Early Childhood Services) Regulations 2008
46.	Education and Training Act 2020
47.	Electricity Act 1992
48.	Electricity Amendment Act 2001

49.	Electricity (Hazards from Trees) Regulations 2003
50.	Electricity Industry Act 2010
51.	Electronic Courts and Tribunals Act 2016
52.	Energy Efficiency and Conservation Act 2000
53.	Environment Act 1986
54.	Environmental Protection Authority Act 2011
55.	Environmental Reporting Act 2015
56.	Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
57.	Farm Debt Mediation Act 2019
58.	Fencing Act 1978
59.	Financial Markets Conduct (Communal Facilities in Real Property Developments) Designation Notice 2016
60.	Fire and Emergency New Zealand Act 2017
61.	Fisheries (Aquaculture Compensation Methodology) Regulations 2012
62.	Fisheries (Commercial Fishing) Regulations 2001
63.	Fisheries (Cost Recovery) Rules 2001
64.	Fisheries Act 1983
65.	Fisheries Act 1996
66.	Food Act 2014
67.	Forestry Rights Registration Act 1983
68.	Forests Act 1949
69.	Freshwater Fish Farming Regulations 1983
70.	Freshwater Fisheries Regulations 1983
71.	Gas Act 1992
72.	Goods and Services Tax Act 1985
73.	Gore District Council (Otama Rural Water Supply) Act 2019
74.	Government Roading Powers Act 1989
75.	Greater Christchurch Regeneration Act 2016
76.	Hawke's Bay Endowment Land Empowering Act 2002
77.	Hazardous Substances and New Organisms Act 1996
78.	Health Act 1956
79.	Health and Safety at Work Act 2015
80.	Health and Safety at Work (Asbestos) Regulations 2016
81.	Health and Safety at Work (Hazardous Substances) Regulations 2017
82.	Health Sector (Transfers) Act 1993
83.	Heritage New Zealand Pouhere Taonga Act 2014
84.	Housing Accords and Special Housing Areas Act 2013
85.	Housing Act 1955
86.	Housing Assets Transfer Act 1993
87.	Hurunui/Kaikōura Earthquakes Recovery Act 2016
88.	Income Tax Act 2007
89.	Infrastructure Funding and Financing Act 2020
90.	Inquiries Act 2013
91.	Irrigation Schemes Act 2018
92.	Joint Family Homes Act 1964
93.	KiwiRail Holdings Limited Vesting Order 2012
94.	Lake Wanaka Preservation Act 1973
95.	Land Act 1948
96.	Land Drainage Act 1908
97.	Land Transfer Regulations 2018
98.	Land Transport Management Act 2003
99.	Land Valuation Tribunals Rules 1977
100.	Lawyers and Conveyancers Act (Conveyancers: Registration and Practice) Regulations 2008
101.	Lawyers and Conveyancers Act 2006
102.	Legal Services Act 2011

103.	Local Authorities (Members' Interests) Act 1968
104.	Local Electoral Act 2001
105.	Local Government (Auckland Council) Act 2009
106.	Local Government (Auckland Transitional Provisions) Act 2010
107.	Local Government (Financial Reporting and Prudence) Regulations 2014
108.	Local Government (Rating) Act 2002
109.	Local Government Act 1974
110.	Local Government Act 2002
111.	Local Government Amendment Act (No 2) 1999
112.	Local Government Amendment Act (No 3) 1991
113.	Local Government Members (2021/22) Determination 2021
114.	Local Government Official Information and Meetings Act 1987
115.	Local Legislation Act 1968
116.	Local Legislation Act 1974
117.	Maori Land Court Fees Regulations 2013
118.	Maori Land Court Rules 2011
119.	Marine Reserve (Long Island—Kokomohua) Order 1993
120.	Marine Reserve (Motu Manawa-Pollen Island) Order 2008
121.	Marine Reserve (Taputeranga) Order 2008
122.	Marine Reserve (Whangarei Harbour) Order 2008
123.	Maritime Transport Act 1994
124.	Maritime (Charges) Regulations 2014
125.	Maritime (Offences) Regulations 1998
126.	Marine Protection (Offences) Regulations 1998
127.	Maritime Security Act 2004
128.	Submarine Cables and Pipelines Protection Act 1996
129.	Mauao Historic Reserve Vesting Act 2008
130.	National Civil Defence Emergency Management Plan Order 2015
131.	National Parks Act 1980
132.	National War Memorial Park (Pukeahu) Empowering Act 2012
133.	National Water Conservation (Rakaia River) Order 1988
134.	National Water Conservation (Te Waihora/Lakes Ellesmere) Order 1990
135.	New Plymouth District Council (Waitara Lands) Act 2018
136.	New Zealand Game Bird Habitat Stamp Regulations 1993
137.	New Zealand Railways Corporation Act 1981
138.	New Zealand Railways Corporation Restructuring Act 1990
139.	Northland Regional Council and Far North District Council Vesting and Empowering Act 1992
140.	Ombudsmen Act 1975
141.	Overseas Investment Act 2005
142.	Overseas Investment Amendment Act 2021
143.	Overseas Investment Regulations 2005
144.	Point England Development Enabling Act 2017
145.	Property Law Act 2007
146.	Prostitution Reform Act 2003
147.	Public Safety (Public Protection Orders) Act 2014
148.	Public Works Act 1981
149.	Racing Industry Act 2020
150.	Radio New Zealand (Assets) Order 1992
151.	Railways Act 2005
152.	Rating Valuations Act 1998
153.	Reserves Act 1977
154.	Residential Tenancies (Healthy Homes Standards) Regulations 2019
155.	Residential Tenancies (Smoke Alarms and Insulation) Regulations 2016
156.	Riccarton Racecourse Development Enabling Act 2016
157.	River Boards Act 1908

158.	Rodney County Council (Gulf Harbour) Vesting and Empowering Act 1977
159.	Rules for Cadastral Survey 2010
160.	Sale and Supply of Alcohol Act 2012
161.	Search and Surveillance Act 2012
162.	Secondary Legislation Act 2021
163.	Selwyn Plantation Board Empowering Act 1992
164.	Sentencing Act 2002
165.	Sharemilking Agreements Act 1937
166.	Sharemilking Agreements Order 2011
167.	Soil Conservation and Rivers Control Act 1941
168.	South Taranaki District Council (Cold Creek Rural Water Supply Act) 2013
169.	State-Owned Enterprises Act 1986
170.	Sugar Loaf Islands Marine Protected Area Act 1991
171.	Summary Proceedings Amendment Regulations 2006
172.	Summit Road (Canterbury) Protection Act 2001
173.	Tasman District Council (Waimea Water Augmentation Scheme) Act 2018
174.	Taumata Arowai - the Water Services Regulator Act 2020
175.	Tax Administration Act 1994
176.	Telecommunications Act 2001
177.	Unit Titles Act 2010
178.	Unit Titles Amendment Act 1979
179.	Unit Titles Regulations 2011
180.	Waitakere Ranges Heritage Area Act 2008
181.	Waste Minimisation Act 2008
182.	Water Conservation (Buller River) Order 2001
183.	Water Conservation (Kawarau) Order 1997
184.	Water Conservation (Mataura River) Order 1997
185.	Water Conservation (Mohaka River) Order 2004
186.	Water Conservation (Motueka River) Order 2004
187.	Water Conservation (Oreti River) Order 2008
188.	Water Conservation (Rangitata River) Order 2006
189.	Water Conservation (Rangitikei River) Order 1993
190.	Water Services Act 2021
191.	Weathertight Homes Resolution Services Act 2006
192.	Wellington Regional Council (Water Board Functions) Act 2005
193.	Wellington Town Belt Act 2016
194.	Whakatane Paper Mills, Limited, Water-supply Empowering Act 1936
195.	Whitebait Fishing (West Coast) Regulations 1994
196.	Whitebait Fishing Regulations 2021
197.	Local Government (Tamaki Makaurau Reorganisation) Council-controlled Organisations Vesting Order 2010
198.	Sanitary Plumbing (Permission for Householders) Notice 1992
199.	Wellington Airport (Vesting) Order 1992

Paper 3: Protection Mechanisms in the Natural and Built Environments Act

This paper is supplemented by Appendix 2, supporting item 1: Treaty impacts analysis (pages 74 to 77); Appendix 2, supporting item 2: Summary of existing water conservation order Treaty requirements to note (page78); and Appendix 2, supporting item 3: References to WCOs in existing Settlement Acts (page 79).

Purpose

1. This paper seeks agreement to address protection-related provisions in the Resource Management Act 1991 (RMA) relating to Heritage Orders, Water Conservation Orders (WCOs), and the general prohibition on tree protections.

Problem Definition

2. The resource management system currently includes a range of provisions to ensure the protection of significant values. Resource management reform will deliver a more outcomes-based system, that needs to retain some level of protection for such values. This paper reviews previous protections under the RMA and recommends how these can be provided for.

Protection mechanisms under the current system

3. This paper uses the general term "significant places" to refer to places in the environment that have one or more significant values relating to the natural environment, natural heritage and cultural heritage.

4. Under the RMA, protection of some significant places follows from the matters listed in section 6 and 7. For some of these matters, central government provides further policy direction through national policy statements, national environmental standards, and the national planning standards[24]. Local government protects significant places through regional and district plans.

5. The National Policy Statement for Freshwater Management 2020 (NPS-FM) requires that freshwater is managed in a way that 'gives effect' to Te Mana o te Wai, that degraded water bodies are improved and other waterbodies maintained or improved using bottom lines, and that there is annual monitoring and reporting on freshwater quality.

6. The Regional Policy Statement identifies region-wide issues and sets policies for identification of significant places. Regional and District plans must give effect to it.

7. Regional plans set policies for water quality and allocation (including for significant water bodies), and manage water takes and discharges to water with rules to be implemented through resource consents.

8. Regional coastal plans set policies for the identification and protection of significant places in the coastal environment.

9. District plans provide policies for the identification and protection of significant places within the district and manage the effects of land-use and development through rules to be implemented through resource consents. Identification usually takes the form of a schedule or an overlay to which protection rules apply but can also take the form of general rules.[25]

10. The RMA limits the extent to which rules can be applied through district plans for trimming and removal of trees[26] on urban allotments. The limitation means that the only method for

[24] For example, the NZ Coastal Policy Statement provides policies for the identification and protection of historic heritage in the coastal environment.

[25] Section 76 4(d) A rule may – be specific or general in its application

[26] Section 76(4A)-(4A)

protecting trees in district plans is to specifically identify notable trees for protection in a schedule, either individually or as part of a definable group.

11. In addition to this general framework for protection, the RMA includes two mechanisms for the protection of significant places outside of the usual policy framework for protection: Heritage Orders and Water Conservation Orders.

Options considered

12. This section summarises the policy choices, considers Treaty implications and identifies the preferred option for each of the three protection mechanisms.

13. Each of these mechanisms has a different origin and a specific role under the RMA. The options to address them in the new system are not uniform but follow the same general theme.

- Option One: Do not carry the protection mechanism into the new system
- Option Two: Carry the protection mechanism into the Natural and Built Environments Act (NBA) as a discrete management tool
- Option Three: Better integrate the protection mechanism in a way that helps it fulfil the broader purpose of NBA.

Water Conservation Orders

14. In the RMA, Water Conservation Orders (WCOs) are a national level instrument to protect water bodies that have nationally outstanding amenity or intrinsic values. They are government regulations, gazetted by an Order in Council. They contain restrictions and prohibitions to protect outstanding values and ensure a council cannot grant water or discharge permits contrary to the provisions of the WCO. WCO restrictions can include maximum or minimum flows or levels, maximum allocation for abstraction, or maximum contaminant loads, and range of temperature in the water body. There are fifteen WCOs protecting outstanding characteristics of thirteen rivers and two lakes and two active applications.

15. As noted in the Panel's report, the WCO mechanism was developed as a counterbalance to the "Think Big" hydroelectric power projects of the 1970s, to prevent wild and scenic waterways from being dammed. The WCO provisions were introduced into the former Water and Soil Conservation Act 1967 in 1981, were carried over into the RMA in 1991, and have remained largely unchanged since then.

16. A regional council cannot grant water permits or discharge permits that are contrary to the restrictions, prohibitions, or any other provision of the Order. However, a WCO cannot affect or restrict any resource consent granted or any lawful use established before the Order is made.

17. Anyone can apply to the Minister for the Environment for a WCO. If accepted, the application is assessed by a special tribunal, whose recommendations may be appealed to the Environment Court by submitters. The Environment Court must send a report to the Minister recommending the special tribunal's report be rejected or accepted, with or without modifications. The decision can be appealed to the High Court and Court of Appeal on points of law. Applications are often opposed by parties with an interest in the future use and development of a water body because of the level of protection a WCO can provide.

18. WCOs have a stand-alone purpose in Part 9 of the RMA that emphasises protection and conservation. They are not subject to Part 2 of the RMA. This means when considering WCO applications, those making recommendations and decisions do not consider whether the RMA purpose of sustainable management of natural and physical resources is being achieved, and do not consider the matters in ss 6-8 RMA. Instead, the decision-making framework for WCOs requires achieving the stand-alone purpose in s.199, taking into consideration the matters set out in s.207.

Panel recommendations

19. The Panel recommended that WCOs are carried into a new system with improvements. These improvements included a greater role for iwi, a more streamlined process for development, better integration with planning documents, and more monitoring.[27]

Options

20. The options for protecting new nationally significant water bodies in the NBA are set out in the table below.

Options	Benefits	Disadvantages
Option 1 – Do not include a process to create new WCOs in the NBA	Improves system simplicity	Removes the highest level of protection for newly identified nationally significant water bodies Removes the opportunity for any person to apply to protect a water body Removes opportunity for interim protection
Option 2 – Include a process for new WCOs as a standalone mechanism (with some amendments)	Provides the highest level of protection for nationally significant water bodies Provides an opportunity for any person to apply to protect a water body Provides opportunity for interim protection	Less system simplicity WCOs not subject to NBA purpose and principles New WCOs subject to narrow test that does not reflect National Planning Framework (NPF) approach to freshwater management New WCOs subject to decision-making process that does not reflect NBA approach (including Treaty partnerships)
Option 3 - Protect nationally significant water bodies through NPF	Provides a process to ensure a high level of protection for nationally significant water bodies Increases system simplicity Aligns with national direction for freshwater Provides for Māori and public participation through preparation of NPF and NBA plans consistent with national direction Increased opportunities for Māori decision-making New protection mechanism is subject to NBA purpose and principles Does not allow for applications to be made for WCOs by any person in the way that is currently possible now.	May provide a lower level of protection for newly identified nationally significant water bodies to meet the purpose of the NBA rather than meet a standalone purpose. Will not allow for applications to be made for new WCOs by any person as is currently possible now. Some possibility that significant water bodies may not be protected in perpetuity.

[27] Report of the Resource Management Review Panel (2020), pages 309-318 and 320.

21. Existing WCOs will be carried over to the new system as a legacy protection mechanism. This includes WCOs that are referenced in existing Treaty settlement legislation, ensuring that Treaty obligations continue to be upheld.

22. The existing WCOs can be integrated into NBA Plans through the plan development process. This provides an opportunity for review and potentially enables any WCOs that are no longer required to be withdrawn through the NBA Plan process (while still providing for appropriate management of the values of the water body through other plan provisions).

Treaty Impact Analysis Summary – Water Conservation Orders

23. There are two aspects of WCOs that may impact Treaty considerations:

    - the protections provided by existing WCOs
    - the protection of newly identified water bodies of significance to Māori.

24. With respect to existing WCOs, there are four references to WCOs in existing Settlement legislation including two that include decision-making powers[28]. Provision for continuation of these arrangements will be made to ensure Treaty principles are upheld.

25. Within the new system, there will be opportunity for Māori to directly seek protection of the historical, spiritual, or cultural characteristics of a water body, including the characteristics of water bodies considered to be of outstanding significance in accordance with tikanga Māori.

26. Given the requirement for the NPF to also provide national direction on natural environment limits, nationally significant features, outstanding natural features and landscapes, and significant habitats of indigenous fauna, there is an opportunity to continue to protect such nationally significant water bodies through the NPF process. Moreover, the NPS Freshwater Management 2020 requires the protection of significant values of outstanding water bodies, and a decision has been made that policy intent will be incorporated into the NPF.

27. A full summary of the analysis of the Treaty impacts of the recommendations of this paper are contained in Appendix 2, supporting item 1 (pages 74 to 77).

Summary of analysis and preferred option

Preferred option – Primarily protect nationally significant water bodies through the NPF but enable new WCOs in exceptional circumstances

28. Officials recommend the most effective and efficient policy response for the protection of newly identified nationally significant water bodies is to use the NPF as the primary mechanism, but to enable applications (by any person) for new WCOs in exceptional circumstances.

29. The role of the NPF includes providing direction on matters of national significance, with mandatory topics including natural environment limits, freshwater quality, nationally significant features, outstanding natural features and landscapes, and significant habitats of indigenous fauna. Under the current system, WCOs cover similar matters and are a national level tool.

30. The reform provides an opportunity to bring all new national level tools into a single NPF framework, reducing system complexity and allowing better integration with other planning documents. Therefore, although the standalone purpose would be removed, the mechanism to ensure protection of the values of newly identified nationally significant water bodies would be achieved within the 'umbrella' of the NPF.

31. The removal of the general ability of Māori and the general public to apply for a new WCO (other than in exceptional circumstances) would in part be mitigated by increased access

[28] Refer to Appendix 2, supporting items 2 and 3 (pages 78 and 79, respectively)

through the NPF development process and particularly through subsequent regional plans and plan changes. Furthermore, increased Māori involvement in governance and decision-making is anticipated across the reformed RM system.

32. Provisions within the NPF will thus ensure protection for newly identified nationally significant water bodies, including by directing NBA Plan development and decision-making.

33. Furthermore, the NBA could enable new WCOs for protection of nationally significant water bodies in exceptional circumstances. This approach would have the benefit of retaining a very high level of protection that sits outside the NBA purpose and principles and which provides a process that is available to any person by application, including as an interim protection.

34. However, as noted above, this approach would increase system complexity and require an approach that sits outside the NBA in terms of the purpose and principles, the integrated NPF (including any reconciliation of trade-offs) and agreed governance and decision-making principles.

35. For these reasons, this stronger protection mechanism should only be available for water bodies that meet criteria for national significance, where it can be demonstrated that the NPF cannot provide the level of protection required, and in circumstances where only specified values of the water body may be the subject of the WCO (eg, outstanding significance in accordance with tikanga Māori). Further work will include what rights people have to take action in circumstances where they consider sufficient protection has not been provided through the NPF.

36. The tests outlined immediately above have not yet been the subject of detailed policy analysis. If Ministers decide to include this mechanism, officials recommend that Ministers agree that further work is undertaken to develop these tests and to consider in detail the implications for Treaty partners, key stakeholders and the community.

Existing WCOs

37. Carrying over existing WCOs provides certainty for holders of these WCOs. While it does add a level of complexity to the system, there are benefits in ensuring that existing WCO holders' rights are upheld, particularly where there is reference to those WCOs in Treaty settlement legislation.

38. There should however also be provision for the revocation of existing WCOs, in line with the equivalent process in the RMA.

Heritage Orders

39. Under the RMA, Local Authorities have a range of ways to protect heritage, including heritage related policies and rules, overlays, special character zones, schedules of protected places and more. However, some of these approaches have led to unintended consequences. In particular the use of special character or heritage zones across large areas has, in places, significantly impacted on an areas potential for growth and development.

40. Heritage Orders are a specific mechanism in the RMA for protecting a broad range of significant places by a Heritage Protection Authority (HPA). It can cover:

- any place of special interest, character, intrinsic or amenity value or visual appeal, or of special significance to tangata whenua for spiritual, cultural, or historical reasons.
- such area of land (if any) surrounding that place as is reasonably necessary for the purpose of ensuring the protection and reasonable enjoyment of that place.[29]

[29] RMA Section 189(1)

41. Once a notice is issued, a Heritage Order offers immediate legal protection outside of the normal planning process and prevents activities that would partly or wholly nullify the heritage order, without the written consent of the Heritage Protection Authority. A process to confirm the heritage order occurs, after which the relevant council records the heritage order in their district plan[30].

42. Heritage Protection Authorities are identified in the RMA as Ministers, Heritage New Zealand Pouhere Taonga, and Local Authorities. There is a process whereby bodies corporate (including iwi) can be approved as a Heritage Protection Authority, but these parties are unable to make any heritage order on private land.

43. Heritage New Zealand Pouhere Taonga used Heritage orders in the 1980s under the Historic Places Act 1980 to protect a number of iconic buildings in the city centres of Wellington and Auckland. Moving the mechanism into the RMA enabled a broader range of parties to use it. However, heritage orders have been rarely used over the past 30 years, though some Heritage Protection Authorities point out that its potential for use often serves as leverage for negotiations over protection.

Panel Recommendations

44. The Panel traversed the issues that were preventing more widespread use of heritage orders, concluding that the mechanism is too complex to use and exposed a Heritage Protection Authority to disproportionately high financial and reputational risks. The Panel stated that *'consideration could be given to the use of heritage orders to provide interim protection'* with a less complex process and a focus on resolving issues that threaten a heritage place. They thought introducing a more time-bound, solutions focus to the mechanism could reduce the risks for HPAs and encourage their use in appropriate situations.[31]

Options

45. The options for processing heritage orders in the NBA are below:

Options	Benefits	Disadvantages
Option 1 – Do not carry the heritage order process into the NBA	System simplicity	No tool to protect significant places that are not identified in NBA plans
Option 2 – Carry the heritage order process into the NBA largely as-is	Retain a strong tool that acts as a last resort for significant unprotected places Easy to carry-over and reform in the future	Current provisions are overly complex and costly, so they are rarely used Current provisions are not considered to be Tiriti-compliant
Option 3 – Carry heritage orders into the NBA, but transform and integrate it with the purpose of the NBA	Retains and improves upon a tool that can protect significant unprotected places Opportunity to improve the tool for Māori Opportunity to advance the purpose of the Act through this tool	More complex than Option 1

46. The 23 existing heritage orders in effect under the RMA would need to be transitioned into the new system, but more work will be needed to determine an appropriate process.

[30] The process, described in sections 189-191, closely resembles the process for confirming designations and can be appealed to the Environment Court.
[31] Panel Report discussion at pages 302-309, recommendations at page 319-320

Treaty Impact Analysis Summary – Heritage Orders

47. This mechanism is the closest the RMA has to a tool that could affirm rangatiratanga over wāhi tapu. However, Māori have found it costly and difficult to use, and some of the groups who are closest to taonga (hapū and marae) are prevented from using it without body corporate status. There has been difficulty applying it to the range of taonga that Māori would want to protect with it (eg, on private land and water bodies). The provisions for issuing heritage orders under the RMA do not give effect to the principles of te Tiriti but transitioning them into a new system would be an opportunity to improve them.

48. Currently, heritage orders are mentioned in two Deeds of Settlement (Raukawa and Te Arawa River Iwi Deeds of Settlement). Within them the Crown committed to support and assist Raukawa and Te Arawa to carry out other functions, including to be approved as a Heritage Protection Authority. Discussion with these iwi will be needed to understand what this commitment means to them and how best to provide for it in the new system. The root of this commitment is to enable these iwi to protect their significant places, so an appropriate transition is in the context of the entire system for protecting places under the NBA, not just heritage orders.

49. A full summary of the analysis of the Treaty impacts of the recommendations of this paper are contained in appendix 2, supporting item 1 (pages 74 to 77).

Summary of analysis and preferred option

50. Officials recommend that Option Three is advanced in the new system. There continues to be a gap in the overall system of protection that means significant places are at risk where they are not included in NBA plans. Furthermore, sometimes their inclusion in plans does not adequately encompass the range of significant values they possess, leaving gaps in protection. This is particularly relevant to Māori heritage, which is under-identified and under-protected. Without heritage orders, there would be no way to intervene to protect significant places when they slip through the cracks.

51. Within Option Three, officials investigated whether interim protection could be achieved through direction in the NPF but do not recommend it. The NPF could include direction for councils to apply a precautionary approach to the protection of significant places, particularly where there is not enough information to fully understand their value and there is a risk of irreversible loss. This may still be a valuable additional tool to consider. However, it would remove the role of the Heritage Protection Authority to intervene on behalf of a particular place that is at risk. That would mean it could not be used by hapū/iwi/Māori groups to protect their significant places, and that Heritage New Zealand Pouhere Taonga and relevant Ministers could not likewise intervene.

52. The Panel's consideration of heritage orders align most clearly with Option Three. They recognised that the process for issuing a heritage order was overly complex and exposed the Heritage Protection Authority to high costs and financial risks. This is due largely to the process mirroring the designations process, which is more often used to secure land for eventual purchase for infrastructure purposes.

53. One aspect of the Panel's report was that consideration could be given to the use of heritage orders to provide interim protection. Officials consider that heritage orders could be recast as an interim tool, but think further work with Heritage Protection Authorities is needed to clarify how this would affect their potential use. An interim focus could reposition the tool as an intervention that triggers a planning process to resolve immediate issues and/or confirm long-term protection of the place.

54. Resolution of the order could involve inclusion in a relevant protection schedule or overlay in the NBA plan, or it could involve a third-party covenant on the land that maintains a long-term connection to the Heritage Protection Authority.

55. Another risk for significant places is "demolition by neglect", created by the ineffectiveness of the current system to require positive action to maintain the integrity of a significant place or modify existing uses that are degrading it. Further work will be done to understand

whether this risk could be addressed by this tool, or whether it would be more effective to clarify how councils should use compliance monitoring, enforcement powers, and a range of incentives to protect places.

56. Lastly, the name "heritage order" suggests a limitation on the use of this tool that does not exist. The applicability of heritage orders to a broad range of significant places irrespective of whether any kind of heritage criteria applies suggests a broader name would better demonstrate the function of the order. "Protection order" is appropriate as a broader term and could then be more readily linked to protection-oriented outcomes in the NBA.

57. Further work is needed on some aspects of the policy framework, including a simplified protection order process and identification of protection authorities, further including whether there is still an open avenue for a body corporate to be approved as a Heritage Protection Authority. These need to be worked through in detail with iwi/Māori and Heritage Protection Authorities named in the RMA.

Urban tree protections in District Plans

58. Tree protection in district plans was open to councils' discretion prior to 2009. However, after this, restrictions to tree protection were introduced to the RMA to remove general protection from district plans. This was further clarified in the 2013 changes to the RMA. The intent of these latter changes was to prohibit 'general' tree protection rules in district plans for urban land, particularly private land. One of the triggers for the changes to the tree protection rules in the RMA was an estimate that up to 50% of Auckland City Council's resource consents (in 2007/2008) were related to trees.

59. The 2013 RMA provisions mean that district plan rules can only prohibit or restrict the felling, trimming, damaging, or removal of trees on private urban land if the district plan describes the trees being protected and identifies their location with respect to the street address and/or legal description of the land they are on.[32]

60. This restriction meant that there could no longer be rules in district plans which protect urban trees with general categorical rules (eg, trees over a certain trunk circumference or specific species) as they were not legal or enforceable.

61. The 2013 RMA changes may have also led some councils to be conservative in their approach to protecting trees in environments that do not meet the narrow definition of urban allotment in s76(4D), with some district plans not utilising alternative mechanisms, except through Significant Natural Areas for indigenous biodiversity or Reserve and Conservation Management Plans.

62. The current process to identify trees in a notable tree schedule is inefficient and ineffective in achieving a balance with competing outcomes such as housing development. The process to keep the schedules up to date is arduous and costly, with many schedules being out of date and unresponsive to local tree protection concerns. For example, it is estimated only 1% of trees in Auckland are protected through this mechanism. A study of tree loss in the Waitematā local board area from 2006-2016 resulted in a total loss of 61.23 hectares of tree canopy loss, mostly on private land.

63. The cost of an application to trim or remove a notable tree is also often disproportionate to the cost of doing the work, though some councils tend to waive or reduce the consent fees.

64. Protection of trees contributes to a range of NBA outcomes including ecological integrity protection of landscapes, indigenous vegetation and biodiversity, climate change, greenhouse gases, and well-functioning urban environments. The current approach prevents councils from using tree protection to complement these interrelated outcomes. As part of this, clarification is needed around the scope of protection for vegetation more generally as opposed to individual trees or groves of individual trees.

[32] RMA Section 76 4A-4D.

65. The current RMA urban tree protection restrictions, which are reliant on a notable tree schedule, limits the extent to which district plans can apply rules to meet biodiversity outcomes (s31) and obligations in the Proposed National Policy Statement for Indigenous Biodiversity.

66. Councils are also tasked with enabling urban growth and development and to ensure housing supply meets the needs of their growing communities. This can, at times, put considerable pressure on tree protection aspirations. It is important therefore that the revised NBA system can advance a workable solution that recognises the importance of urban trees and vegetation to create successful urban environments, whilst contributing to climate change adaptation, local biodiversity and quality urban design.

67. Given the contribution trees can make to multiple NBA outcomes and the need to balance urban development, it is legitimate for councils to have a mandated option in NBA plans for protecting urban trees, but it needs to work alongside their other urban growth challenges

Panel Recommendations

68. The Panel did not address urban tree protection in their report; however, these provisions were specifically referenced within the scope of RM Reform.

69. A resource management reform Cabinet paper[33] addressed the need for tree protection noting that:

> 'Territorial authorities need to be able to protect mature trees and other ecologically significant trees, especially indigenous vegetation, to better meet their functions under section 31 of the RMA. It is also important that these protections do not create unnecessary compliance costs for routine pruning or removal of smaller trees. I am therefore proposing to review the current provisions in section 76(4A) to (4D) as part of the Stage 2 review.'

70. The corresponding Cabinet Minute [CAB-18-MIN-0485.01] noted that:

> 'The Minister for the Environment intends to consider RMA changes relating to urban tree protection and climate change (both mitigation and adaptation) as part of a subsequent more comprehensive review of the resource management system'

Options

71. Options for addressing urban tree protection in the NBA are below:

Options	Benefits	Disadvantages
Option 1 – No specific reference to tree protection in the new framework	Joint Committees and the planning process can determine the level and mechanism of tree protection, if any. Councils choose how to meet their obligations to NBA outcomes.	No certainty of the consequences, including how NBA outcomes are balanced.
Option 2 – Transition the current restricted urban tree protection provisions into NBA	Certainty and familiarity of the mechanism used. Urban development generally not impeded by local tree protection	Current provisions are inefficient and ineffective. Provisions are unresponsive to urban development pressures. Council's ability to meet its obligations to other outcomes restricted.

[33] Cabinet Paper – Proposed Resource Management Amendment Bill, October 2018.

		Community concerns about urban tree loss likely
Option 3 – Provide protection for urban trees through the new framework. Note that further work is being undertaken to determine in more detail what this would look like – NBA, NPF or both.	Clarifies a range of current and potential future tensions around competing NBA outcomes. Clarifies interrelated NBA outcomes and how they can complement each other eg, National Policy Statement for Indigenous Biodiversity. Guides protection mechanisms to support an efficient and effective approach. Clarifies the scope - urban and non-urban, individual trees and vegetation Opportunity to improve the tool for mana whenua	Currently it is uncertain what the tree provisions will be in the new framework until work being undertaken is completed.

Treaty Impact Analysis Summary – Urban Tree Protection

72. Further analysis will be undertaken on Treaty impacts alongside the work being undertaken to better understand the challenges of tree protection and development of options to address them.

Summary of analysis and preferred option

73.

74.

75.

76.

77.

- [redacted]

78. Option Three is the preferred option and is in line with previous Cabinet decisions to review the current provisions.

Engagement on policy options

Agencies

79. MfE officials met with agencies on 15 September. There was general agreement with the overall recommendations. Some concern was expressed that the detailed decisions to come should ensure the revised protection tools are used judiciously and do not hinder the shift to a more enabling environment for development, and that more work would be needed to articulate policies for good stewardship of significant places separate from controls on development.

Local government

80. The Minister for Culture and Heritage asked local government about heritage orders as part of the Strengthening Heritage Protection project. In general councils commented that the existing heritage order process is cumbersome and ineffective. They noted that guidance on the use of heritage orders should be provided and that perhaps a central fund to cover the administrative costs of the process would support their use.

81. A slide pack summarising the above discussion was sent to local government representatives for consideration on 29 September 2021.

Iwi/Māori groups

82. Heritage Orders and Water Conservation Orders were a topic of discussion with [redacted] Initial views of heritage orders were critical, noting that they did not seem like an effective tool for wāhi tapu. Technicians noted that inclusion in plans was important; if sites are not recorded, they cannot be protected.

83. Other criticisms were the difficulties iwi/hapū had with becoming a Heritage Protection Authority and the risk that they would have to compensate landowners for using the tool. They mentioned that the rāhui issued by Te Kawerau a Maki for the Waitakere Ranges was ultimately successful in driving positive action, but the lack of statutory weight delayed action until a groundswell of support pressured the council to act. They expressed an interest in participating in work to create something new and useful.

Glossary of Key Terms and Acronyms

Acronym/Term	Detail
the Bill	Natural and Built Environments Bill
CAA	Climate Adaptation Act
CME	Compliance, monitoring and enforcement
the committee	the Environment select committee
EPA	Environmental Protection Authority
exposure draft	Exposure draft of the Natural And Built Environments Bill
FILG/TWMT	Freshwater Iwi Leaders Group/Te Wai Māori Trust
the inquiry	the select committee inquiry
IPP	Integrated Partnerships Process
JMAs	Joint Management Agreements
KWM	Kāhui Wai Māori
LDAC	Legislation Design and Advisory Committee
MWaR	Mana Whakahono a Rohe
MOG	Ministerial Oversight Group
NBA	Natural and Built Environments Act
NBA Plans/Plans	Plans prepared under the Natural and Built Environments Act
NES	National Environmental Standard
NPF	National Planning Framework
NPS-FM	National Policy Statement for Freshwater Management 2020
PSGEs	Post Settlement Government Entities
The Panel	Resource Management Review Panel
parliamentary paper	exposure draft and the explanatory material together
RSS	Regional Spatial Strategies
SPA	Strategic Planning Act
TTK or FOMA/KWM/NZMC	Te Tai Kaha, which consists of Federation of Māori Authorities/Kāhui Wai Māori/New Zealand Māori Council
WCOs	Water Conservation Orders

Appendix 1: An efficient and effective planning and consenting system

Supporting item 1: Summary of Treaty impacts analysis

Status quo

- The status quo does not give effect to the principles of te Tiriti. The RMA explicitly states that there is no duty to consult for resource consents,[34] and so the notification process (where used) serves as the consultation mechanism. Applicants do not engage with iwi/hapū or other potentially affected parties (such as infrastructure providers), resulting in iwi/hapū and other parties being submitters. As a result, Māori have limited ability to influence decisions on resource consents.
- Māori are often not given status in non-notified or limited notified consents, restricting their ability to influence the outcome or request appropriate conditions. Although the RMA requires the consent authority to consider statutory acknowledgements when determining who is an affected person, Māori are often left out of the process.
- Negotiations through treaty settlements have been used to provide a specific role for iwi, hapū, and Māori in the resource management system.

Summary of analysis

Gives effect to the principles of Te Tiriti o Waitangi

- Providing a stronger requirement to ensure iwi/hapū involvement in plan development and/or providing technical secretariat support to plans ensures opportunities for Māori to influence plan content. This will drive consents categories for activities of interest to Māori and consenting pathways.
- A role for Māori in setting limits and targets (including regional) and plan drafting ensures:
    - activity categories are appropriately applied to activities and areas of interest to Māori
    - mana whenua are identified as affected parties and consulted on activities of importance to them, including identifying limited notified parties.
- Specifying the requirement to engage in legislation is consistent with the requirement to give effect to the principles of te Tiriti. The policy intent is that plans and the NPF are clearer on who are affected parties, and who should be limited notified parties - prompting or requiring applicants to engage early and before lodging an application.
- A pre-application step for consents allows mana whenua to be engaged early before applications are lodged (not necessarily because they have been identified as affected persons)
- Opportunities to ensure that Boards of Inquiry and hearing panels have knowledge, skill and experience relating to tikanga Māori and mātauranga Māori.
- Ensuring an appropriate process for Māori land for the NBA equivalent of s85 – no compensation for effects of planning provisions (decisions will be sought from a later MOG or subgroup).

Costs and benefits for Māori

Costs

- Initially there will be significant demand on iwi/hapū expertise to feed into plan development processes, in particular gathering the evidence base for setting limits and targets.
- Iwi/hapū will be covering a number of roles during the transition phase by continuing to input into the current system, while engaging in the development of new plans.
- There may be some gaps in information as the mātauranga Māori knowledge base is built, enhanced and validated to inform plans.

Benefits

- As mātauranga Māori information is embedded into plans, there will be greater clarity for plan users on how to uphold Te Oranga o Te Taiao and who to engage with at a consenting level.
- Iwi/hapū will be involved early in the process (prior to lodgement) through clear information and affected party requirements set out in plans.
- consent processing timeframes once applications are lodged will be more efficient, due to greater clarity on information requirements and affected parties for iwi/hapū being provided up-front.
- Plans give greater clarity on how to uphold Te Oranga o Te Taiao, resulting in improved environmental outcomes for all.

Protecting and transitioning Treaty settlements

- Certain Treaty settlements identify iwi authorities as affected persons for resource consents by using statutory acknowledgement areas. Existing treaty settlements with RMA statutory acknowledgment mechanisms should

[34] Under s36A of the RMA – introduced in the 2005 amendment to the RMA

be retained. Future plans will enable the inclusion of specific requirements to engage iwi/hapū before undertaking activities (including permitted activities where affected persons approval from iwi/hapū may be required through plans).

Waitangi Tribunal Recommendations

- WAI 262 report found that the status quo resource management system largely reserved decision-making powers for the Crown. The new system needs to shift to greater participation by Māori across the planning and consenting regimes.

Māori rights and interests in freshwater and other natural taonga

- This paper seeks recommendations on a system-wide approach.
- The approach within this paper does not appear to preclude any options to address Māori freshwater rights and interests.

Limitations of this assessment

- This assessment is limited by lack of decisions on governance arrangements, which will affect the decision-making structures associated with NBA consenting regimes (particularly the 'general consenting pathway'), the NBA plan development process, and arrangements for oversight and responsibility of NBA plans long-term.
- There has been limited opportunity to engage with iwi/Māori groups on the approach for Māori participation in plan development and consenting have highlighted the importance of being involved in testing different scenarios where they have identified failures in the current system. It is too soon to form a holistic view of Māori participation in each part of the system to address any gaps as decisions are yet to be made at later MOGs.
- There has been limited opportunity to engage with internal agencies (on the approach).
-

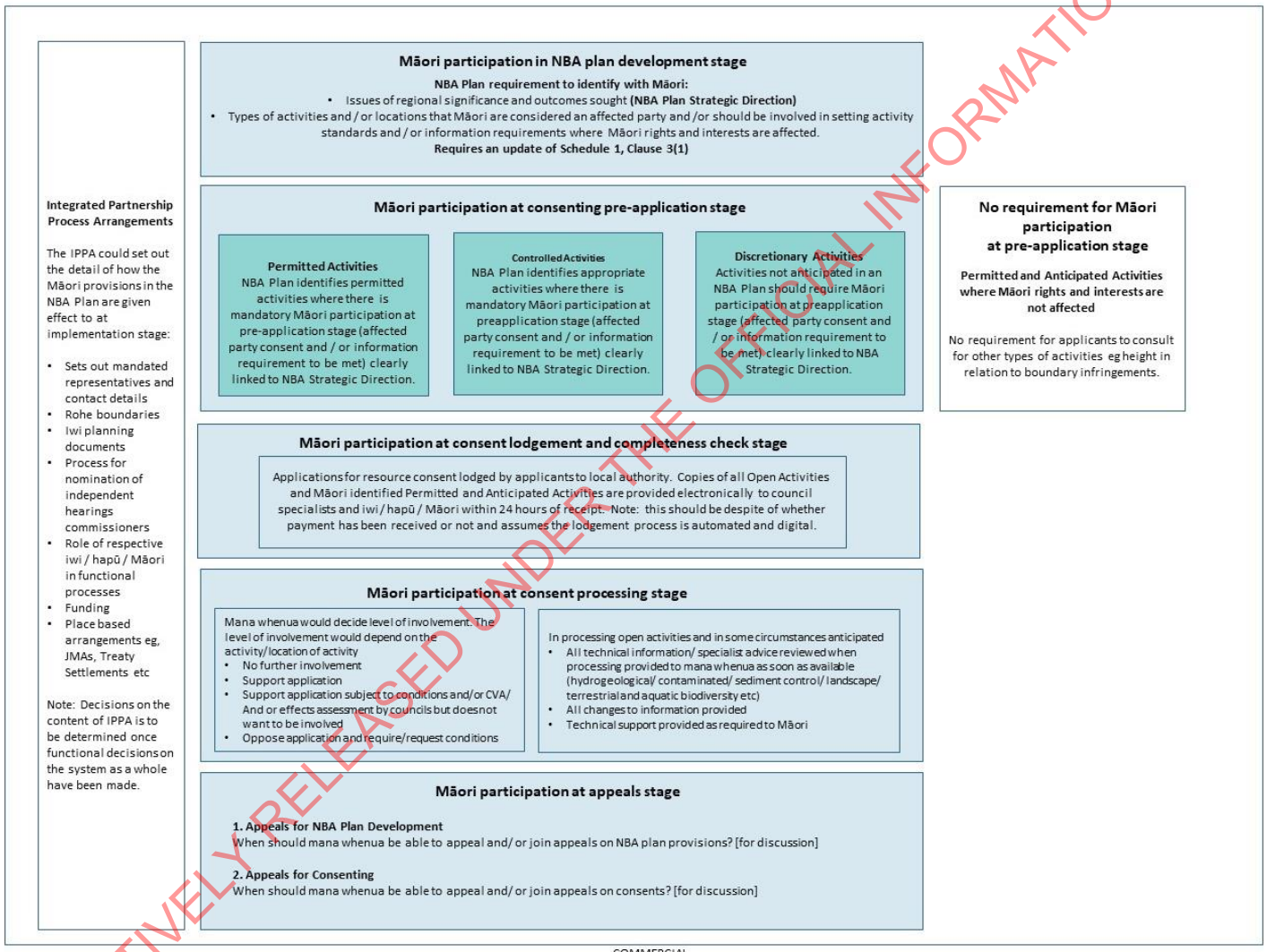
Overall assessment

The policy options for the above aspects of the consenting and planning system are intended to give effect to the principles of te Tiriti and improve the relationship of Crown and Local Government with Māori as Tiriti partners. These policy options provide Māori with more opportunity to participate in and contribute to the planning and consenting regime.

Appendix 1: An efficient and effective planning and consenting system

Supporting item 2: Māori participation in the NBA (focussing on NBA Plans and consenting)

COMMERCIAL



COMMERCIAL

Appendix 1: An efficient and effective planning and consenting system

Supporting item 3: Panel's recommendations on RMA activity categories and proposed categories in the NBA

RMA categories	*Panel's recommendations/rationale*	Proposed NBA categories	*Intent*
Permitted (no consents, and hard to cost recover and monitor)	Fit for purpose as they signal what is acceptable and anticipated, and are sometimes encouraged to achieve the outcomes, and provide certainty for what a property owner can do. They consider permitted activities to be hard to monitor, as no resource consents are required	Permitted	**Activities which contribute to outcomes** • Positive and adverse effects (including cumulative) relevant to outcomes are known. • Effects can be managed through standards and criteria (eg affected persons approvals or management plan by qualified professional) • Activities that are encouraged
Controlled (must grant)	Fit for purpose as they are for activities that are acceptable and anticipated in the locality. Although consents must be granted, councils can impose conditions which they reserve control and cost recover/monitoring consents.		
Restricted Discretionary	Fit for purpose as they are for activities that are generally appropriate, but council wants to retain ability to refuse if the scale of the activity cannot be avoid, remedied, or mitigated. There is certainty over the matters, as councils restricts their matters of discretion	Controlled (limited discretion to decline)	**Activities potentially contribute to outcomes** • Activities that are acceptable and anticipated, and generally appropriate • Positive and adverse effects (including cumulative) relevant to outcomes are anticipated, but not fully understood. • Tailored management and assessment of effects is required to ensure outcomes are met.
Discretionary	Fit for purpose, and no restrictions on how local authority could consider and impose by way of conditions	Discretionary	**Activities may not achieve outcomes** • Activities not understood well enough to determine whether appropriate. • Activities that are potentially discouraged • Effects of activities on outcomes and limits require further consideration. • Catch-all for unanticipated activities unknown during plan development.
Non-Complying	Remove. Should be for activities not anticipated in the plan and signal activity is discouraged to a greater degree than a discretionary activity without prohibiting it. However, in practice, this is not too different from Discretionary Activity		
Prohibited	Consent applications cannot be made for these activities, because it is never considered appropriate to give consent. This provides a clear boundary and greater clarity on what is not acceptable.	Prohibited	**Activities do not meet outcomes** • Activities understood to breach limits or degrade outcomes.

Shifts in the NBA which will provide an opportunity to further reduce categories and clarify intent:

- The NPF/RSS are clearer in directing what is permitted, prohibited and anticipated in the future system – this will provide a stronger certainty and efficiency
- Expanded scope of permitted activity and ability to cost recover for permitted activities (including need to register permitted activities) reduce the frequency of consents being triggered for these purposes

With our recommendation to move towards clearer and more directive plans we envisage that the prohibited activity category will be used more often in a future system.

Only two categories that will trigger resource consents will reduce complexity (eg controlled category triggers resource consent sthat must be granted can be confusing)

Appendix 1: An efficient and effective planning and consenting system

Supporting item 4: Options Assessments – Māori Participation in planning and consenting

Activity Categories

Options *These options are assessed against status quo, and making the assumptions that the options will be supported by stronger guidance in the legislation for each category*	Criteria			Analysis Compared to why option 2 is better
	Efficiency *consistent, reduce cost, faster process, reduce complexity*	*Effective* *giving effect to the principles of the Treaty,, retaining local democratic input, enable development within environmental limits, and shift culture*	*Certainty* *For users and plan-makers*	
Option 1: Panel's approach – five categories . Permitted a. Controlled (must grant) b. Restricted Discretionary c. Discretionary d. Prohibited	✓	✓	✓✓	**Pro:** More certain as councils are already familiar with these categories including terminology. One of the consenting categories (Controlled) provides certainty that the consent must be granted **Con:** There are three categories that trigger resource consents, particularly the controlled activity which is a must-grant. This could result in additional complexity and inefficiency/consistency in categorising of activities, and potentially confusion the need for a consent when it is a must-grant. Most importantly, plan makers have drafted complex standards in plans, given their lack of ability to decline consents. Some controlled activity consents still require high level of assessment and delays, and/or for plan-monitoring/cost recovery purposes. There are also higher risks that plan-makers could roll over the existing planning provisions into the new NBA system instead of effectively evaluate the appropriateness of each activity in the categories
Option 2: **Four categories:** • Permitted (expanded) • Controlled • Discretionary • Prohibited	✓✓✓	✓✓✓	✓	**Pro:** the new categories are more effective to meet the reform objectives, particularly that plan-makers will need to carefully evaluate how they want to enable or restrict activities instead of rolling over the provisions. The reduced number of consents will be reliant on the activities that are prohibited and prohibited. The expanded scope of permitted activities will provide the additional certainty, and higher certainty on what are prohibited. There will also be ability to register permitted activities and cost recovery for plan monitoring. For these reasons, there is an opportunity to reduce categories that require consents into two, to signal what is anticipated and what requires broader level of assessment.

				There will only be two categories that will trigger resource consents, and therefore improves consistency, reduces complexity and better signalling to users of the system. More importantly, it will drive plan-makers to reduce the number of consents triggered that do not require merits assessment. **Con**: there will be a slight reduction in certainty perceived by users as there will be no more controlled activity category which means consents must be granted if they meet the controlled conditions/standards in plans. Mitigation: plan-makers could draft more effective criteria or standards in the controlled category where they will clearly restricted matters of control/discretion. This will provide certainties for users as there are limited grounds to decline.
Overall	The key outcome that is sought is that the categories are effective and will be able to reduce complexity, and the number of consents that do not require merits assessment will be reduced. We consider Option Two will better achieve this outcome, particularly that NPF and plans will be clearer in what is allowed and what is not, and this will improve certainty in the consenting process. The expanded scope of permitted activities and ability to cost recover and register permitted activities will reduce some of the reasons why controlled category needs to be retained.			

Notification

Options ***Note that these are assessed against status quo, and making the assumptions that the options will be supported by stronger guidance in the legislation for each category***	Criteria			Analysis **Compared to why option 2 is better**
	Efficiency *consistent, reduce cost, faster process, reduce complexity*	*Effective* *giving effect to the principles of the Treaty, retaining local democratic input, enable development within environmental limits, and shift culture*	*Certainty* *For users and plan-makers*	
Option 1: full notification for all consents	✓	✓✓	✓✓✓	**Pro**: high level of certainty for users about notification and councils will not require to spend time making notification decisions. There will be some consistency in notification decisions and reducing complexity. It is generally efficient as plan makers and users understand all consents be notified and able to help with overall process, especially if it is a contentious process instead of negotiating outcomes with neighbours or parties to non-notify consents. **Con**: this may result in additional delay for developers or applicants, depending on whether a hearing is required and rights to object/appeal. These decisions will be made in future MOG. There could be perceived concerns that the decisions could be influenced by neighbour concerns.

				Note: the efficiency will be impacted whether a hearing is required and/or rights to object/appeal are provided for. These decisions are made in the future MOG.
Option 2: retain three classes of notification, requiring NPF and NPF to set notification statuses and/or identified limited notified parties	✓✓✓	✓✓✓	✓✓	**Pro**: Ability to tailor notification statuses for matters of varying scale and significance. NPF will be able to preclude notification for matters of national significance if this is warranted and this will drive consistency for certain activities or approach to meet certain outcomes. There will still be a level of certainty where plans or NPF must specify notification statuses, unless this is not possible (and they will need to set policies to guide consenting authorities). This will ensure notification is proportionate to scale and significance, and able to enable Māori or certain parties with genuine interests to participate (set through planning processes). **Con:** There could be some level of uncertainty as plans could set different notification statuses, and ability to delegate.
Overall	Officials consider Option B is more suitable as it will ensure meaningful participation for people who have a genuine interest to be involved, and a higher level of certainty for when and who to notify.			

Māori participation in consenting

Options ***These options are assessed against status quo, and making the assumptions that the options will be supported by stronger guidance in the legislation for each category***	**Criteria**			**Analysis** **Compared to why option 3 is better**
	Efficiency *consistent, reduce cost, faster process, reduce complexity*	*Effective* *giving effect to Treaty principles, retaining local democratic input, enable development within environmental limits, and shift culture*	*Certainty* *For users and plan-makers*	
Option 1: Status quo – • participation is not legislated • is determined by individual local authorities or	✓	✓	✓	**Pro:** Flexibility for districts and regions to develop own approaches to Māori involvement in consenting. Bespoke arrangements that meet the needs of Iwi and hapū can be developed through Treaty legislation or through optional Mana Whakahono ā Rohe arrangements. **Con:** No minimum legislated baseline of Māori involvement. Variable practice across districts and regions and within regions, where some Iwi/hapū have a high degree of involvement and others have none. Practice has changed over time and the level of sophistication in resource management treaty settlement redress has increased. Treaty settlements lack flexibility to change as practice changes and improves over time. This approach is ad hoc and does not provide any certainty.

• Mandated through treaty settlement legislation or • Participation is provided through optional Mana Whakahono ā Rohe				Does not provide clarity on the unique role for Māori in NBA functions and processes as both a technical expert and submitter. Does not provide detail around how Māori should participate in NBA functions and processes during the transition to the new system. Does not provide enough detail around how Māori participate in consenting in situations where they have not had capacity to participate in plan development for example, setting limits and targets at a national, regional or local scale or where there are gaps in information to inform plan development. Mana Whakahono ā Rohe arrangements are optional and can take some time for parties to reach agreement. They are non-binding.
Option 2 - Panel recommendations: • Planning committee representation and • treaty clause and • Te Mana o te Taiao (Te Oranga o Te Taiao in NBA exposure draft) • Integrated Partnerships Process (IPP) to agree how Māori participate in the different functions and processes in the system.	✓✓	✓	✓	**Pro:** Provides some clarity on Māori/Iwi/hapū representation on planning committees but leaves how plans give effect to the principles of te Tiriti and Te Oranga o Te Taiao to be addressed at plan development stage. Integrated partnerships process provides a flexible approach to document the role of Māori in different functions and processes. **Con**: Does not provide a specifically mandated role in consenting and therefore does not provide certainty that there is a role for Māori. Does not provide clarity on the unique role for Māori in NBA functions and processes as both a technical expert and submitter in order to give effect to the principles of te Tiriti and uphold Te Oranga o Te Taiao. Does not provide direction around requirements for Māori participation in NBA functions and processes during the transition to the new system in order to give effect to the principles of te Tiriti and uphold Te Oranga o Te Taiao. Does not provide direction on how Māori participate in consenting in situations where they have not had capacity to participate in plan development for example, setting limits and targets at a national, regional or local scale or where there are gaps in information in order to give effect to the principles of te Tiriti and uphold Te Oranga o Te Taiao.
Option 3 (Preferred) – • Panel recommendations + • Māori participation in NBA functions and processes to be set out in legislation as per MOG#11 and #12 decisions • **Māori can be identified as an 'affected person', have a role as a**	✓✓✓	✓✓✓	✓✓	**Pro:** A specific legislated and mandated role in planning and consenting removes ambiguity about a role for Māori in consenting. It allows regions and districts to develop plan provisions that specify involvement in activities and consents that reflect the needs of the relevant iwi/hapū. The role for Māori in consenting would need to be specified in a plan which provides certainty to applicants, Māori and local authorities about when and who should be consulted and on what activities. This approach enables plans to respond to the needs of the iwi/hapū of the region and is a practical expression of the Treaty clause. Gives effect to Te Oranga o Te Taiao and the principles of the Treaty by: • providing clarity on the unique role for Māori in NBA functions and processes as both a technical expert and submitter • providing direction around requirements for Māori participation in NBA functions and processes during the transition to the new system

technical expert and be a submitter (on plans and consents)				• providing direction on how Māori participate in consenting in situations where they have not had capacity to participate in plan development for example, setting limits and targets at a national, regional or local scale or where there are gaps in information **Con:** Could be seen as a 'minimum' to be achieved (rather than a starting point from which to build a relationship) and result in good practice and relationships that have already developed between Iwi/hapū for the processing of consents to be 'scaled' back.
Overall	The key outcome is that the option is effective, provides certainty and is Treaty compliant. Officials consider option three will better achieve these outcomes. Plans will have the ability to be clearer about when engagement should be undertaken with mana whenua and the information that is required to accompany applications.			

Additional Consenting Pathways

Options *Note that these are assessed against status quo*	Criteria			Analysis Compared to why option 3 is better
	Efficiency *consistent, reduce cost, faster process, reduce complexity*	*Effective* *giving effect to the principles of the Treaty, retaining local democratic input, enable development within environmental limits, and shift culture*	*Certainty* *For users and plan-makers*	
Option 1: **General consenting pathway only**	✓	✓✓	✓✓	**Pro:** • Clear process, consistent across geographical boundaries **Cons:** • A single pathway would have to cater for large complex applications. Many process steps would be irrelevant and confusing to people applying for a small consent (eg, processes catering for 'bundles' of activities are irrelevant to many applicants). • Significant risk of additional cost for all participants due to appeals against first instance decisions. Removing appeal rights is not considered appropriate, as it would be unlikely to give effect to the principles of Te Tiriti or be consistent with the LDAC guidelines.[35] While appeals on smaller applications could potentially be restricted (options will be considered at a later MOG), blanket restrictions are unlikely to be justifiable.

[35] Legislation Design and Advisory Committee Legislation Guidelines March 2018, Chapter 28.

Option 2: **General consenting pathway'** **+** **Direct referral = applicant requests that Environment Court decide the application** **+** **Proposals of national significance = Minister 'calls in' a proposal and directs it to Environment Court**	✓✓	✓✓	✓✓	**Pros**: • Provides a choice of pathways that are proportionate to the scale and type of the application. • Consistency across geographical boundaries would be achieved because consent pathways will sit in the NBA. • Users would choose the pathway that is proportionate to the scale and type of their application. While an independent body may be more costly than proceeding on the general consenting pathway, that would be outweighed by the benefit of not having two merits hearings. • Appeals from decisions of independent bodies would be limited to points of law only. • There are opportunities for increased efficiency across other areas of the new planning system. For example, a 'standing Panel' of suitably qualified members could be created, and drawn on as needed for a range of processes (eg, decision-making as proposed for the NPF). **Con:** • Multiple pathways may cause confusion or lack of clarity for those seeking a simple consent.
Option 3: **'General consenting pathway'** **+** **Request for independent body** **+** **Proposals of national significance and:** **+** **'Merits-based simplified pathway' = for proposals explicitly recognised and enabled in RSS and plans**	✓✓	✓✓✓	✓✓	**Pros:** • An additional 'merits-based simplified pathway' provides a further choice of pathways that are proportionate to the scale and type of the application. It would be based on the 'shovel-ready' pathway in the COVID-19 Recovery (Fast-track Consenting) Act 2020. Clear selection criteria would be needed. • Consistency across geographical boundaries would be achieved because processes for all pathways will sit in the NBA. • While an independent body may be more costly than proceeding on the general consenting pathway, that would be outweighed by the benefit of not having two merits hearings. • Provides greater certainty that applications are likely to be granted where the proposal has merit, and/ or the activity is explicitly recognised and enabled in RSS and plans. Ensures they are decided by an independent body with appropriate regional, national, and/ or technical expertise. Avoids relitigating policy decisions to provide for activities in RSS and NBA plans. • Increased efficiencies could be created between the 'merits-based simplified pathway' and processes for RSS. This could include a follow-on process to incorporate activities granted on this pathway into the relevant RSS, depending on their nature and scale. **Con** • Multiple pathways and decision makers may cause confusion or lack of clarity for those seeking a simple consent.
Option 4: **'General consenting pathway'** **+**	✓✓✓	✓	✓	**Pro:** • Achieving a consistent 'Panel pathway' could be achieved through having the NBA set out selection criteria, processes for convening the Panel, and the powers and functions of the Panel itself. **Cons:**

Panel of Commissioners				• Missed opportunity to design a wider range of pathways with proportionate information requirements and costs. • Inconsistencies in process and interpretation could potentially develop across geographical boundaries over time, if each region tended to call on the same Panel members and Chairs. However, this risk could be avoided through robust training and accreditation processes, and appeals on points of law from Panel decisions would provide a safeguard to ensure consistency. • Missed opportunities for additional speed through providing a wider range of proportionate pathways (Options 2 and 3).
Overall	Officials consider option 3 to provide the appropriate balance between efficiency and complexity. It allows consenting pathways to be tailored to their size, scale and complexity. It provides independence of decision making when that is required. Complexity can be managed by having clear entry and decision-making criteria.			

No compensation for effects of planning provisions on estates or interests in land

Options *Note that these are assessed against status quo*	Criteria			Analysis Compared to why option 2 is better
	Efficiency consistent, reduce cost, faster process, reduce complexity	*Effective* giving effect to the principles of the Treaty, retaining local democratic input, enable development within environmental limits, and shift culture	*Certainty* For users and plan-makers	
Option 1 - Minor drafting amendments: clarity and alignment with other NBA processes • **Modernise drafting** • **Align the process steps for challenge with the new NBA plan development process and clarify appeal rights** • **Test for rendering an interest in land incapable of reasonable use would remain high** • **No change to the current policy position whereby if a landowner does not consent to acquisition under the**	✓✓	✓	✓✓	**Pros:** • The process steps for challenge would be easier for users to understand, and greater consistency would be achieved by clarifying it in legislation (instead of the status quo where people must refer to case law to understand the process). • Will reduce the number of cases that will be brought attempting to test the meaning of the provisions or by people seeking to push the boundaries. • Clearer processes would help contribute to reduced costs overall. **Cons:** • Missed opportunity to strengthen the remedies by amending the requirement for the person with an estate or interest in the land to consent to PWA acquisition.

Public Works Act, the planning provision must be modified, deleted or replaced				• Contributes to slower planning responses and hinders the ability to plan proactively and implement policies to achieve NBA outcomes.
Option 2: Option 1 + • **Replace the requirement for landowners to consent to acquisition with a landowner electing to retain their land subject to the provision, or agreeing to acquisition under the Public Works Act** • **Ensure that proactive planning to reduce risk does not automatically provide a right to a remedy** • **Where plans do prohibit all activities on land, landowners should not be able to force an amendment or deletion of the provision by refusing to consent to acquisition of the land**	✓✓	✓✓✓	✓✓	**Pros:** • Enabling proactive planning makes the new system more responsive and contributes to achieving outcomes. Provides certainty that planning provisions can be implemented where necessary. • Greater ability to undertake proactive planning would contribute to faster achievement of the goals and outcomes in strategic planning documents. • Where the planning provision is taking a step now to reduce an increase in risk or a future risk, this approach will remove the 'timing conundrum' and provide for adaptive planning approaches over time. **Cons:** • A clear process for how planning provisions are developed for land owned by Māori is required. • Risk of greater costs to local authorities, if acquisition becomes more frequent under the PWA; however, overall costs to the system are likely to be reduced as a result of proactive planning.
Note: further decisions may be needed from a later MOG and/or subgroup depending on the outcomes of the governance workstream. There is a risk of disconnect in the new planning system if one entity is responsible for developing NBA plans, and another entity is responsible for any land acquisitions that may be undertaken using funds obtained through rates. This could lead to an unclear outcome or a dispute in the 'no compensation' context, if the Court orders the entity responsible for maintaining the NBA plan to offer to acquire land, but another entity will be responsible for funding any acquisitions.				
Overall	Option 2 balances the need for NBA planning committees to adopt planning provisions that will achieve outcomes against the rights of individuals in their land. Requiring landowner consent in such circumstances would mean the planning authority (ie, the NBA planning committee) had to amend or remove the planning provision, and be unable to implement its intended policy goals and by extension the outcomes based focus of the new system.			

Appendix 2: Protection Mechanisms in the Natural and Built Environments Act

Supporting item 1: Treaty Impacts Analysis

Status quo

The RMA contains provisions that augment the regular system for protecting significant places and bodies of water. These are heritage orders and water conservation orders.

The RMA also contains rules for district plans that limit the protection of trees on urban allotments to only those individual and groups of trees that are mapped and identified by a specific location connected to the relevant legal parcel.

Ministers need to decide whether to keep these provisions, and if so, whether to carry them over as-is or make significant changes to them.

Summary of analysis

Gives effect to the principles of Te Tiriti o Waitangi

- Water Conservation Orders: WCOs provide an opportunity for Māori to directly seek protection of the historical, spiritual, or cultural characteristics of the water body, including the characteristics of water body considered to be of outstanding significance in accordance with tikanga Māori. However, this access is not limited to Māori, therefore restrictions under WCOs may also limit exercise of other customary rights and interests. Furthermore, decision-making is not undertaken by Māori.
- Heritage Orders: do not currently give effect to the principles of te Tiriti, in that they are a tool that has significant limitations for Māori. Iwi/Māori groups that meet the criteria of a "body corporate" could apply to the Minister become a Heritage Protection Authority, but they would not be able to use the tool on private land. If they wanted to protect significant taonga on private land, they would need to lobby the Minister, Heritage NZ Pouhere Taonga, or a relevant local council to act on their behalf. Use of the tool can be costly and there is a risk of appeal to the Environment Court, where they could be asked to remove the heritage order or purchase the site. There is potential to improve the function of the tool and improve access to iwi/Māori so they could use it where they have mana whenua or mana whakahaere.
- Urban tree protections: analysis will be undertaken when further work has been completed that identifies the challenges associated with the current urban tree protection provisions and a range of options and mechanisms to address these challenges.

Māori Crown relations risks and opportunities

- Water Conservation Orders. WCOs enable direct application by Māori (and any other person) to the WCO application process. Removal of the application process may be viewed as a negative outcome for Māori-Crown relations; however, there are opportunities to involve Māori in similar processes (including the NPF) which may enhance Māori -Crown relations. Furthermore, there are linkages between some Treaty settlements and WCOs – retention of these linkages will be critical to maintain Māori-Crown relations.
- Heritage Orders: This is an area where the Crown has an obligation to actively protect the interests of Māori by ensuring the regular system is effective at protecting their taonga along with their relationships to them. This is established by the purpose of the NBA and will be clarified by relevant policy direction in the NPF. The details of protection will sit in NBA plans, which iwi/Māori will have a significant role in developing. Where there are gaps in protection (such as the under-identification of sites of significance to Māori), heritage orders could fill a purpose.
- Urban tree protections: Analysis will be undertaken when further work has been completed that identifies the challenges associated with the current urban tree protection provisions and a range of options and mechanisms to address these challenges.

Costs and benefits for Māori

- Water Conservation Orders: Removal of WCOs would reduce costs to Māori in terms of the financial expense of undertaking an application for a new WCO, but also reduce the benefit of having a WCO made. Conversely, there may be increased costs to Māori of engaging in the NPF and any subsequent NBA planning processes. Some of these costs are already likely to be incurred as Māori who have an interest in freshwater are likely to wish to be involved in these processes with or without WCOs.
- Heritage Orders: An improved heritage orders framework that clarified its use by iwi/Māori in their rohe would benefit Māori by giving them access to a tool to use where their significant places lack appropriate protection. There would still be costs to use the tool and the cost of an appropriate level of due process where significant places are on private land. This would likely mean iwi/Māori groups would need to be resourced to use the tool. It may be that alternative means of protection (such as a precautionary approach) would be less costly to use where there are a large number of un-protected places.
- Urban tree protections: Analysis will be undertaken when further work has been completed that identifies the challenges associated with the current urban tree protection provisions and a range of options and mechanisms to address these challenges.

Protecting and transitioning Treaty settlements

- Water Conservation Orders: There are four existing Treaty settlements that refer to WCOs. They are Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010; Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010; Ngāti Pāhauwera Treaty Claims Settlement Act 2012; and Ngai Tāmanuhiri Claims Settlement Act 2012. Two of these settlements have arrangements regarding decision-making. The policy intent is for existing WCOs to be carried over by the NBA, and incorporated into NBA plans consistently with the contents of each order.
- Heritage Orders: Currently, heritage orders are mentioned in two Deeds of Settlement (Raukawa and Te Arawa River Iwi Deeds of Settlement). Within them the Crown committed to support and assist Raukawa and Te Arawa to carry out other functions, including to be approved as a Heritage Protection Authority. Discussion with these iwi will be needed to understand what this commitment means to them and how best to provide for it in the new system. The root of this commitment is to enable these iwi to protect their significant places, so an appropriate transition is in the context of the entire system for protecting places under the NBA, not just heritage orders.
- Urban tree protections: Analysis will be undertaken when further work has been completed that identifies the challenges associated with the current urban tree protection provisions and a range of options and mechanisms to address these challenges.

Waitangi Tribunal Recommendations

- Water Conservation Orders: Further research is required to determine if there are any recommendations that relate to WCOs.
- Heritage Orders: This mechanism drew commentary from the Tribunal shortly after the RMA was enacted. In 1992, Te Roroa report looked at the potential for Māori to use heritage orders to protect wāhi tapu. They concluded that the tool was contrary to Māori concepts in a number of ways, including that hapū and marae could not participate, that the tool required inappropriate disclosures about wāhi tapu, and that there were substantial costs with potential for perverse outcomes when applied to raupatu land. This commentary was reconfirmed in the 2006 Tauranga Moana report on post-Raupatu claims, with the added note that nothing had been done to provide for a tool that affirmed the rangatiratanga of Māori in relation to their wāhi tapu.
- Urban Trees: Treaty Impact Analysis will form part of further work being undertaken to understand the challenges and options to address them.

Māori rights and interests in freshwater and other natural taonga

- This section assesses the extent to which the advice contained in this paper:
    - May contribute to addressing Māori rights and interests in freshwater; and / or

    - May preclude options to address Māori rights and interests in freshwater.[36]
- This assessment is indicative only, given that Cabinet has yet to agree on next steps to progress the freshwater allocation and Māori freshwater rights and interests work programmes. We have yet to develop detailed policy options, or to have substantive policy discussions with [redacted] or iwi / hapū / Māori more broadly.
- Māori rights and interests in freshwater are typically grouped under four broad 'pou':
    - Water quality / Te Mana o te Wai
    - Recognition of relationships with water bodies
    - Governance and decision-making
    - Access and use for economic development.[37]
- The options being considered for Water Conservation Orders in this paper have potential implications for all four pou. As noted in the body of this paper, Option 1 (removing WCOs) is impractical as it would undo Treaty settlements which relate to WCOs unless a mutually agreeable alternative were developed. It would also remove an existing opportunity for Māori to directly seek protection of the historical, spiritual, or cultural characteristics of a water body, including the characteristics of water bodies considered to be of outstanding significance in accordance with tikanga Māori.
- Retaining WCOs as a standalone mechanism with some revisions (Option 2) could preclude options to strengthen them to better address Māori freshwater rights and interests. While the Panel proposed strengthening the role of mana whenua in the WCO application and hearing processes, Māori are also not involved in decision-making with respect to WCO applications except where this has been negotiated as part of a Treaty settlement. It can also be difficult to put forward a successful WCO application using the current tikanga Māori provision.[38] If Option 2 is progressed, these matters might need to be considered further to ensure that no options to address Māori freshwater rights and interests are precluded.
- Option 3 (protecting nationally significant water bodies through the NPF) does not appear to preclude any options to address Māori freshwater rights and interests, provided that:
    - The protections that WCOs are designed to achieve can be realised through other parts of the system
    - Existing Treaty settlement commitments for WCOs can be appropriately transitioned to other parts of the system
    - The overarching provisions of the NBA (including Māori participation mechanisms) do not preclude any options to address Māori freshwater rights and interests.
- Heritage Orders: Technically, heritage orders could be used by Māori to protect natural taonga. But the usability issues identified constrain their effectiveness. It is possible that another party could issue a heritage order over a significant place that means exercise of Māori rights and interests was subject to that party's approval, where it intersected with the place, but there are no examples to draw from. There have been issues using heritage orders to protect water bodies. Ngāti Pikiao applied to become a heritage authority for the Kaituna River but was refused by the Minister on the grounds that heritage orders could not be used for bodies of water.
- Urban Trees: Treaty Impact Analysis will form part of further work being undertaken to understand the challenges and options to address them.

[36] The accompanying paper to the NBA exposure draft states that the draft 'does not preclude any options for addressing freshwater rights and interests and their consideration as part of the ongoing discussions with iwi, hapū, and Māori' (para 25). Ministers Parker and Allan have also reassured Te Tai Kaha that the broader resource management reforms '[are] not intended to preclude any options that might be agreed as part of the freshwater rights and interests work programme' (21-M-00718).

[37] These four pou were distilled from a series of over 20 regional hui held by the Iwi Advisors Group in 2014, along with a series of case studies commissioned by MfE, to assemble a comprehensive picture of what Māori rights and interests in freshwater entailed. They subsequently formed the basis of a joint work programme agreed to by the Crown and the ILG in 2015 and were reiterated by Cabinet in July 2018 (ENV-18-MIN-0032 refers).

[38] Matthew Cunningham, Ross Webb, Perrine Gilkison and Jessica Maynard, 'Northland rural rivers: environmental management, pollution, and kaitiakitanga since 1991', report commissioned for the Waitangi Tribunal Te Paparahi o Te Raki (Wai 1040) inquiry, 2015, #A60, section 7.4.

Limitations of this assessment

- This assessment has been made by reviewing available information. New information may come to light and analysis will need to be ongoing. Engagement with iwi/Māori on these topics has been limited.

Overall assessment

- Water Conservation Orders: WCOs provide an opportunity for Māori to directly seek protection of the historical, spiritual, or cultural characteristics of the water body, including the characteristics of water body considered to be of outstanding significance in accordance with tikanga Māori. However, this access is not limited to Māori, therefore restrictions under WCOs may also limit exercise of Māori customary rights and interests. Transitioning WCOs from a standalone mechanism to the NPF has the potential to reduce the protection of water bodies of national significance to Māori; however, given the requirement for the NPF to provide national direction on natural environment limits, nationally significant features, outstanding natural features and landscapes, and significant habitats of indigenous fauna, there is an opportunity to continue to protect such nationally significant water bodies, albeit with some necessary transitional arrangements. In addition, there are four Treaty settlements that directly reference WCOs, including two that include decision-making powers. Provision for continuation of these arrangements will need to be made to ensure Treaty principles are upheld.
- Heritage Orders: This mechanism is the closest the RMA has to a tool that could affirm rangatiratanga over wāhi tapu. However, Māori have found it costly and difficult to use and some of the groups who are closest to taonga (hapū and marae) are prevented from using it without body corporate status. There has been difficulty applying it to the range of taonga Māori would want to protect with it (eg, on private land and water bodies). Heritage orders as they are under the RMA do not give effect to the principles of te Tiriti but transitioning them into a new system would be an opportunity to improve them.
- Urban Trees: Treaty Impact analysis will be undertaken when further work has been completed that identifies the challenges associated with the current urban tree protection provisions and a range of options and mechanisms to address these challenges.

Appendix 2: Protection Mechanisms in the Natural and Built Environments Act

Supporting item 2: Summary of existing Water Conservation Order Treaty requirements to note

- Ngāti Pāhauwera Treaty Claims Settlement Act 2012
    - The trustees have a right to nominate members to a special tribunal to hear and report on any application that proposes to amend, revoke, or replace the Water Conservation (Mohaka River) Order 2004 or to make any other water conservation order in respect of the Mohaka River or its tributaries
- Ngai Tāmanuhiri Claims Settlement Act 2012
    - The Local Leadership Body may provide advice to the Council on applications for water conservation orders within the LLB area

Appendix 2: Protection Mechanisms in the Natural and Built Environments Act

Supporting item 3: References to WCOs in existing Settlement Acts

ID	Act	Arrangement
WCO-01	Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010	Waikato River (Rules giving effect to Vision and Strategy prevail over WCO)
WCO-02	Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010	Waikato River (Rules giving effect to Vision and Strategy prevail over WCO)
WC0-03	Ngāti Pāhauwera Treaty Claims Settlement Act 2012	Appointments to tribunal
WCO-04	Ngai Tāmanuhiri Claims Settlement Act 2012	LLB to provide advice