

# **RESOURCE MANAGEMENT (SIMPLIFYING AND STREAMLINING) AMENDMENT BILL 2009**

## **EXECUTIVE SUMMARY**

### **Problems**

The Resource Management Act 1991 (RMA or the Act) is the principal legislation for managing New Zealand's environment and allocating rights for access to most natural resources. The RMA is a complex piece of legislation that seeks to balance social, cultural, economic and environmental matters – decisions made under the RMA often address some of the most controversial and contested issues facing New Zealand and play a crucial role in both environmental and socio-economic outcomes.

The RMA has been designed to operate on the basis that resource management decisions should be made by the authority that has the best available information, will be most affected by those decisions and therefore is best placed to promote sustainable management. Responsibility for implementing the RMA is, therefore, devolved to local authorities and the role of central government is to set policy on matters of national significance, provide support and training, and monitor the implementation of the Act. The high degree of devolution under the RMA coupled with a lack of clear central government direction has, however, exacerbated capacity issues in local government and led to variability in planning controls and the speed and quality of consent processing. In this context the RMA has been criticised for contributing to unnecessary delays and compliance costs that hinder efficient implementation, economic growth and major infrastructure development.

Problems with the RMA relate in particular to:

- the clarity and effectiveness of central government direction
- the balance between public participation and timely and efficient processes
- the effectiveness of local government plan making processes
- the efficiency and effectiveness of resource allocation mechanisms.

The government proposes to address problems with the RMA in a series of phases. This Regulatory Impact Statement is associated with the first phase of amendments aimed at streamlining, simplifying and improving RMA processes. Subsequent reforms will address key environmental issues including infrastructure, water management and urban design.

### **Overarching policy objective**

To reduce delays, costs and uncertainty associated with Resource Management Act processes, and thereby help improve environmental, social and economic outcomes.

### **High level policy options**

The options for achieving the government's objective include:

- *Improving clarity and effectiveness of central government intervention.* A clear and transparent strategy guiding the use of central government's RMA powers would improve their effectiveness but, unless supported by legislative amendment, would not be sufficient to address the range of problems with RMA implementation and decision-making.
- *Increase local government resourcing.* One way to improve RMA performance would be for central government to significantly increase its funding of local government. This will not, however, guarantee more effective implementation and will not address the question of how to appropriately balance national interests against local interests in a local decision-making forum.
- *Provide further non-statutory guidance.* Non-statutory guidance plays an important role in assisting accurate interpretation and promoting improved performance. In isolation, however, non-statutory guidance will not guarantee effective or consistent implementation as compliance is voluntary.
- *Drafting special purpose legislation.* While potentially effective, this option could counteract the principle of integrated management and would risk undermining the integrity of New Zealand's resource management framework.
- *Amending related legislation.* There are options available but they are complex and may have significant or unintended implications that can not easily be identified within the timeframe set for the first phase of reform.
- *Amending the RMA to improve, streamline and simplify processes.* There are a range of amendment options available to increase the consistency, speed and quality of planning controls and consent processes. In some instances, effective options are likely to include reduced opportunities for public participation and greater reliance on centralised rather than devolved decision-making. Amendments to the RMA could increase the effectiveness and efficiency of central government intervention and consent processing for nationally significant proposals to ensure that matters of national importance are appropriately factored into local decisions. There are also options available to improve the workability of the statute by correcting inaccuracies and omissions, and to increase the efficiency of decision-making processes and the effectiveness of compliance mechanisms.

The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 is expected to improve environmental, social and economic outcomes by reducing delays, costs and uncertainty associated with RMA processes. At the highest level, the reforms aim to achieve this objective by:

- addressing frivolous, vexatious and anti-competitive objections
- improving the decision-making process for proposals of national significance and establishing an Environmental Protection Authority
- improving plan development and change processes
- improving resource consent processes
- improving central government direction
- improving the effectiveness of compliance mechanisms
- improving decision making processes
- making minor improvements to enhance the workability of the Act.

The weight of evidence indicates that many applications are delayed substantially by wide-ranging appeal rights and uncertain timeframes, which discourages investment. The overall direction of the amendments is to temper the right to object with the

responsibility to behave constructively and reasonably; encouraging objectors to consider more deeply the merits of their case, and whether further action is justified.

The proposed amendments aim to enhance central government's ability to provide guidance on matters of national significance. Clarifying when proposals will be called-in and processed by an Environmental Protection Authority, and improving the call-in provisions is expected to increase the consistency of decisions on proposals that are of national significance and increase certainty amongst the general public, local government and the private sector in terms of RMA interpretation. The reforms also enable the contents of National Policy Statements and Environmental Standards to be incorporated quickly into district plans, which should reduce the time it takes for central government guidance to translate into council decisions.

Reforms such as removing the need for councils to request further submissions on plans aim to accelerate the planning process, and are expected to allow a more timely response to emerging threats and opportunities. Similarly, proposed changes to the notification, assessment and reporting procedures for applications with minor or well-known effects are intended to increase the efficiency of RMA processes.

Many of the proposals are enabling rather than prescriptive (e.g. allowing, rather than requiring, local authorities to allow notification of consents via the internet), which can be expected to reduce costs.

While some of the proposed amendments will reduce currently numerous opportunities for public participation, the changes represent a rebalancing and streamlining of resource management decision-making processes, rather than a fundamental reweighting of the underlying philosophy, purpose or principles of the Act.

## **Specific problems, objectives and policy options**

### **A. *Frivolous, vexatious and anti-competitive objections***

The RMA does not effectively deter some submitters and appellants from opposing applications on the basis of arguments that have little or no merit. Nor does the RMA effectively prevent anti-competitive behaviour by trade competitors. The government intends to reduce costs and delays arising from submissions and appeals that are frivolous or vexatious, or motivated by anti-competitive behaviour by:

- reinstating the power of the Environment Court to require security for costs and allowing the Courts to award more extensive costs, including indemnity and punitive costs
- preventing trade competitors from participating in proceedings unless they are directly affected by a potential adverse effect of the activity on the environment
- making it explicit that decision-makers are prohibited from having regard to trade competition or its effects in relation to resource consent applications, notices of requirement, the preparation of plans and policy statements, and notification decisions
- discouraging covert opposition of trade competitors through third parties.

Taking action to reduce opposition motivated by frivolous and vexatious concerns will improve the quality of arguments put to decision-makers and has the potential to significantly reduce costs for the Court, applicants and local government. Increasing

penalties associated with anti-competitive behaviour and introducing new tools for effectively addressing this behaviour has the potential to significantly increase New Zealand's economic productivity and efficiency. In both instances these benefits are expected to outweigh the consequences of limiting opportunities for public participation.

### ***B. Decisions on proposals of national significance***

At present, it is very likely that decisions on most significant roads, transmission infrastructure and other large scale infrastructure projects will be appealed to the Environment Court. Indirect costs associated with delays and uncertain timeframes and the direct costs of defending or mounting appeals have the potential to threaten the viability of projects that are in the national interest. The government intends to reduce the time it takes to reach decisions on significant projects while still maintaining effective public participation and promoting the sustainable management of natural and physical resources by:

- providing guidance to clarify criteria determining eligibility for call-in and enabling councils, applicants and/or requiring authorities that comply with these criteria to submit their resource consent application, notice of requirement for a designation or related private plan change directly to an EPA that will process applications in accordance with an enhanced call-in process
- limiting appeals on decisions of Boards of Inquiry and the Environment Court on matters that are called-in to the High Court and then to the Supreme Court in exceptional circumstances
- enabling parties to apply directly to the EPA for certificates of compliance associated with matters of national significance.

Improving call-in provisions, and providing guidance to clarify eligibility criteria and thresholds, is expected to significantly reduce the length of time it takes between lodging an application and receiving a decision on proposals of national significance; in some cases these savings could be measured in years. Greater consistency in decisions on proposals that are of national significance will increase certainty amongst the general public, local government and the private sector in terms of RMA interpretation and implementation. In particular, increasing certainty around processes and timeframes is expected to improve investment certainty. Limiting the number of hearings and removing the opportunity to appeal on merit does reduce the opportunities for public participation in decision-making on significant projects. The process does, however, preserve the right of the public to submit on proposals and allows the board of inquiry to respond to local issues by building flexibility into board appointments and hearings processes. On balance it is considered that the benefits of greater efficiency, clarity and consistency outweigh the effects of reducing opportunities for public participation.

### ***C. Environmental Protection Authority***

The government intends to establish a body that can provide efficient and timely administration of proposals that are called-in by:

- establishing an EPA as a statutory office within the Ministry for the Environment as a transitional arrangement, with the role of statutory officer to be exercised by the Secretary for the Environment.

The establishment of an EPA to centralise processing of proposals that are called-in will facilitate more efficient, consistent and transparent decision-making on proposals of national significance. The financial cost of establishing and operating the EPA will not outweigh these benefits.

#### ***D. Improving plan development and change processes***

Cumbersome planning processes have hampered the ability of councils to respond quickly to changing conditions or emerging environmental issues. The government intends to improve the quality of plans and facilitate timely plan development and amendment to enable rapid responses to changing conditions or emerging environmental issues, while retaining an appropriate degree of public participation and legal right to redress. The government will achieve this by:

- increasing the flexibility of processes governing plan development, the correction of minor errors and reporting on decisions
- increasing the range of available alternatives for service and notification of plan changes, and associated proceedings
- removing the non-complying class of activities
- removing the mandatory obligation to review district plans every 10-years and encouraging the development of combined district and regional plans and policy statements
- removing the requirement for local authorities to summarise submissions or call for further submissions, and requiring local authorities to consult with and have regard to the views of anyone who they consider may be affected by matters raised in submissions
- clarifying the time at which proposed plan provisions have legal effect
- limiting appeals on plans to the Environment Court on questions of law, except in cases where the appellant has gained the leave of the Court to appeal on the merit of a decision.

Significantly reduced administrative requirements in relation to plan and plan change development processes could enable councils to devote more resources to policy development and the evaluation of alternative policy options. Increasing the flexibility of consultation requirements, limiting the scope of submissions and appeals, and empowering councils to correct minor errors in plans has the potential to significantly reduce the time it takes to make plan provisions operative. This will help clarify the local planning framework which will benefit the general public, private enterprise and community groups. A more efficient plan development process is expected to promote more timely council responses to new information and emerging issues. Overall it is considered that these benefits outweigh the effects of constraining the scope of and reducing opportunities for appeal.

#### ***E. Improving resource consent processes***

Statistics gathered by the Ministry for the Environment indicate that only 74% of non-notified consents and 56% of notified consents are processed within statutory timeframes and that performance has tracked steadily downwards over the past six years. The government intends to reduce the cost and time it takes to come to a decision on resource consent applications, while maintaining an appropriate degree of public participation and legal right to redress by:

- modifying notification requirements to clarify criteria for notification

- increasing options for service and notification
- narrowing the scope of matters decision-makers are required to have regard to when considering applications for controlled and restricted discretionary activities
- simplifying the reporting requirements for minor activities and proposals that do not require public notification
- deleting existing blanket tree protection rules in urban areas and prohibiting local authorities from imposing rules of this type in the future
- amending processes relating to local authorities' requests for further information
- requiring all councils to develop a discount policy in respect of breaches of statutory timeframes.

Clearer and more efficient notification, assessment and reporting requirements will substantially reduce administrative burdens and facilitate more effective work allocation within local authorities. This is expected to reduce the time it takes to process resource consents. Amendments to the provisions governing requests for further information are likely to promote more timely and certain consent acquisition timeframes. It is considered that the benefits of clearer and more efficient processes will outweigh the potential costs associated with a possible reduction in opportunities for public participation.

#### ***F. Improving central government direction***

There is no overall strategy for the use of national RMA instruments, and the instruments themselves can be cumbersome, inflexible and difficult to implement. This has created a lack of certainty for all parties involved about when and how central government will intervene in RMA processes and has reduced the effectiveness of national RMA instruments. The government intends to increase the efficiency and effectiveness with which national RMA instruments are developed and implemented by:

- broadening the scope of matters the Minister of Conservation and the Minister for the Environment are able to call-in
- providing the relevant Minister with explicit powers to cancel, postpone, and restart a national policy statement process before it has been gazetted, and powers to make minor amendments to national environmental standards in an efficient and timely manner
- truncating the process of amending plans and policy statements in response to national policy statements and national environmental standards, and limiting the scope of appeals on changes
- clarifying the responsibilities of local authorities in relation to national environmental standards and the effect of these standards.

More flexible and efficient provisions governing the development and implementation of national environmental standards and national policy statements will facilitate the articulation of effective environmental bottom lines and policy expectations. Increasing the effectiveness of central government direction and easing local government implementation is expected to foster greater certainty and reduce the costs of implementing and complying with the RMA across all sectors. These benefits will outweigh the associated reduction in local discretion over interpretation and implementation of the Act.

### ***G. Improving the effectiveness of compliance mechanisms***

The resourcing of RMA monitoring and enforcement throughout New Zealand is variable and in some areas councils lack either (or both) the ability to effectively detect non-compliance or to take enforcement action. The government intends to ensure that the RMA enforcement regime acts as an effective deterrent to non-compliance by:

- increasing the flexibility and scope of enforcement powers and responsibilities
- raising the maximum fine for committing an offence
- giving the Environment Court powers to direct a review of a resource consent where it is connected to an offence that has been committed
- remove the provisions of the Act that protect the Crown from enforcement action.

The proposed extensions to the powers of local authorities and the Courts are expected to reduce costs associated with enforcement and the remediation of environmental damage, and to ensure that the Courts are able to more effectively recover unpaid fines.

### ***H. Improving decision making processes***

There is concern amongst applicants around the objectivity, skills and knowledge of elected decision makers. Ongoing concern has also been expressed by a variety of parties in regard to the role of the Minister of Conservation in regard to coastal activities. Applicants, submitters and decisions makers are often faced with duplication of process, cost and time resulting from applications having to go through a council hearing and then be re-heard again in the Environment Court, even though it was known from the start that the application was of such a nature that appeals were inevitable. Low Environment Court filing fees do little to discourage the lodgement of poorly conceived appeals, and do not indicate to appellants the seriousness of the consequences and expense all parties will incur if the appeal proceeds further. The government intends to increase the efficiency of decision-making processes under the RMA by:

- allowing applicants for and submitters on resource consents and notices of requirement to require at least one independent commissioner on a decision panel,, provided that the party making the request bears any additional costs
- enabling applicants for resource consents and notices of requirement to request that their application be directly referred to the Environment Court for a decision, provided that the permission of the local authority that would otherwise have made the decision has been obtained
- clarifying that local authorities can delegate the power to make decisions on plan changes to staff or any other person
- increasing the filing fee for lodging appeals with the Environment Court to \$500 (inclusive of GST)
- removing the Minister of Conservation's final decision-making role in relation to restricted coastal activities and matters called-in by the Minister
- requiring hearings to be formally closed no later than 10 working days after the last party has completed presentations
- requiring decisions on applications for designations to be made by the relevant local authority.

Increasing filing fees, tightening hearing processes and providing greater flexibility as to who can make decisions will increase the rigour of decisions and decision-making processes under the RMA. Better quality submissions and appeals, and more robust decisions are expected to result; increasing the general level of confidence in the RMA decision-making process. In particular, the proposals will also lead to faster, more transparent, decision making on consent applications for activities in the coastal marine area. Improving the independence of decision-making on notices of requirement will increase confidence in the process. The increased filing fees are unlikely to act as a substantial barrier to legitimate public participation in RMA processes. The proposal to provide for direct referral of applications to the Environment Court could discourage public participation and may be open to abuse by local authorities seeking to avoid costly and controversial decisions. It does, however, have the potential to lead to significant time and overall cost savings. On balance the savings to applicants for resource consents and plan changes and savings to local authorities and the Environment Court will outweigh the potential effects on public participation.

### ***1. Other matters to improve workability***

Some of the timeframes for local authority obligations and public participation can create unnecessary procedural delays or compliance difficulties. There are also a number of minor and technical errors in the RMA that reduce its workability. The government intends to remove and replace redundant technical provisions with enforceable ones, and make minor procedural changes to avoid unnecessary delays and improve processes.

Improving the consistency, efficiency and enforceability of the statutory provisions is expected to facilitate more equitable and effective implementation of the RMA. Reducing the influence of those who seek to join as parties to other appeals will complement efforts to address misuse of the RMA for anti-competitive purposes.

## **Implementation and review**

Legislative amendments will be complemented by guidance and communications material to assist local authorities in understanding how the amendments will impact on them, their processes, and how they are expected to respond.

After the bill is enacted in late-2009 the Ministry for the Environment will commence monitoring the effect and implementation of the Act, investigate performance and take actions to remedy poor implementation in accordance with the functions and powers of the Minister for the Environment currently set out the RMA.

## **Consultation**

The government's timeframe for implementing the first phase of RMA reform has ruled out comprehensive public consultation – best endeavors were, however, made to ensure public and professional input into the policy development process.

In late-2008 the government's cross-departmental natural resources network considered the Ministry for the Environment's most recent monitoring data and agreed on a set of core problems with the RMA. From November 2008 to January 2009 the Ministry for the Environment convened a working group comprised of

officials from all government departments and conducted a series of workshops to identify potential solutions to address these problems.

On 1 December 2008, the Minister for the Environment sent a letter to all local authorities inviting comment on potential options for addressing problems with the RMA and any further suggestions. The Minister's request was complemented by postings on the Ministry for the Environment website inviting comments and suggestions.

On 16 December 2008 the Minister for the Environment announced the appointment of a Technical Advisory Group (TAG) to support the Government's programme of reform of the RMA. Between December 2008 and January 2009 the TAG, supported by Ministry for the Environment officials, held six full-day meetings to consider potential options for addressing problems with the RMA. All responses to the Minister's request were analysed and suggested amendments evaluated by the officials working group and TAG.

## **ADEQUACY STATEMENT**

The Regulatory Impact Analysis Team (RIAT) has reviewed this Regulatory Impact Statement (RIS) and considers it to contain the required information and accurately reflect the analysis undertaken.

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

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

## **STATUS QUO AND PROBLEM**

The Resource Management Act 1991 (RMA or the Act) is the principal legislation for managing New Zealand's environment and allocating rights for access to most natural resources. The RMA is a complex piece of legislation that seeks to balance social, cultural, economic and environmental matters – decisions made under the RMA often address some of the most controversial and contested issues facing New Zealand and play a crucial role in both environmental and socio-economic outcomes.

The RMA has been designed to operate on the basis that resource management decisions should be made by the authority that has the best available information, will be most affected by those decisions and therefore is best placed to promote sustainable management. Responsibility for implementing the RMA is, therefore, devolved to local authorities and the role of central government is to set policy on matters of national significance, provide support and training, and monitor the implementation of the Act. The high degree of devolution under the RMA coupled with a lack of clear central government direction has, however, exacerbated capacity issues in local government and led to variability in planning controls and the speed and quality of consent processing. In this context the RMA has been criticised for contributing to unnecessary delays and compliance costs that hinder efficient implementation, economic growth and major infrastructure development.

Problems with the RMA relate in particular to the:

- clarity and effectiveness of central government direction
- balance between public participation and timely and efficient processes
- effectiveness of local government plan making processes
- efficiency and effectiveness of resource allocation mechanisms.

While all are important, some problems are more complex than others and require further data collection analysis and consultation before appropriate solutions can be formulated. The government, therefore, proposes to address problems with the RMA in a series of phases. This Regulatory Impact Statement is associated with the first phase of reform aimed at streamlining, simplifying and improving RMA processes.

Subsequent reform will address key environmental issues including infrastructure, water management, urban design and the role and functions of the Environmental Protection Authority (EPA).

The content of this initial reform package has been designed with the intended nature of subsequent reforms in mind and will not, with the exception of the transitional provisions governing the creation of the EPA, require further amendment.

The overarching policy objective and high-level policy options set out below are followed by sections discussing specific problems, targeted objectives and options for achieving them in a manner that promotes achievement of the overarching policy objective.

## **OVERARCHING POLICY OBJECTIVE**

To reduce delays, costs and uncertainty associated with Resource Management Act processes, and thereby help improve environmental, social and economic outcomes.

## **HIGH LEVEL POLICY OPTIONS**

### ***Improve clarity and effectiveness of central government intervention***

A clear and transparent strategy guiding the use of central government's RMA powers would improve their effectiveness. Greater transparency would also increase certainty for local government, applicants and the wider community. More clear, proactive and certain central government guidance would improve performance but, unless supported by legislative amendment, would not be sufficient to address the range of problems with RMA implementation and decision-making.

### ***Increase local government resourcing***

Given the influence of local government in New Zealand's resource management processes, one way to improve RMA performance would be for central government to significantly increase local government resourcing – particularly in the areas of resource consent processing, monitoring and enforcement. Although worthy of consideration, increased resourcing of local government will not necessarily guarantee more effective implementation and will not address the question of how to appropriately balance national interests against local interests in a local decision-making forum.

### ***Provide further non-statutory guidance***

Non-statutory guidance plays an important role in assisting accurate interpretation and promoting improved performance. In isolation, however, non-statutory guidance will not guarantee effective or consistent implementation as compliance is voluntary.

### ***Draft special purpose legislation***

The government could choose to introduce specific legislation to address specific problems with the RMA. While potentially effective, this option could counteract the principle of integrated management and would risk undermining the integrity of New Zealand's resource management framework.

### ***Amend related legislation***

There are options available to improve synergy and reduce duplication across statutes but these are complex and may have significant or unintended implications that can not easily be identified within the timeframe set for the first phase of reform.

### ***Amend the RMA to improve, streamline and simplify processes***

There are a range of amendment options available to increase the consistency, speed and quality of planning controls and consent processes. In some instances, effective options are likely to include reduced opportunities for public participation and greater reliance on centralised rather than devolved decision-making. Amendments to the RMA could increase the effectiveness and efficiency of central government intervention and consent processing for nationally significant proposals to ensure that matters of national importance are appropriately factored into local decisions. There are also options available to improve the workability of the statute by correcting inaccuracies and omissions, and to increase the efficiency of decision-making processes and the effectiveness of compliance mechanisms. Directly amending the RMA is considered the most effective means for achieving the government's objective in a timely and certain manner.

## **SPECIFIC PROBLEMS, OBJECTIVES AND POLICY OPTIONS**

### **A. Frivolous, vexatious and anti-competitive objections**

#### ***Problem***

Frivolous and vexatious objections and anti-competitive use of RMA provisions can result in significant costs to applicants, consent authorities and Courts. A notable case is that brought by the Omokoroa Ratepayers Association against the Western Bay of Plenty District Council in 2002 that opposed proposals for development. Costs of around \$180,000 were awarded against the Association, reflecting the Court's view that its case lacked merit, but these were never paid after the Association dissolved itself.

Objections and appeals involving anti-competitive behaviour are not uncommon. A 1997 study commissioned by the Ministry of Commerce revealed that 32% of business applications attracted submissions from parties they considered trade competitors. In a further 25% of the cases it was suspected that trade competitors had been involved. Research carried out in 2008 suggests that 8% of judicial review proceedings in the High Court relating to decisions made under the RMA may have been motivated by trade competition and it is likely that a similar pattern to that found by the Ministry of Commerce in 1997 applies today.

Depending on the scale of the businesses affected and the degree to which their opponents are prepared to fight the applications through various Court stages, the costs and delays to applicants from anti-competitive behaviour can range from thousands of dollars and many weeks delay, through to millions of dollars and years of delay. For example, one commercial retailer has still to complete works and commence operation despite the first consents for these activities having been granted in 2001. This delay is attributable to objections, judicial reviews and appeals by its competitor. The costs of defending its application and lost profits from seven

years of delay are estimated by this commercial retailer to be in the tens of millions of dollars. Administration costs for councils and Courts can also be very substantial.

Dealing with trade competition under the Act has proved particularly difficult. Previous attempts to address this issue have been largely ineffective because of the ability of trade competitors to disguise their commercial motives behind almost any aspect of relevant planning principles, potential effects and other methods available to them (including disguising their interests by having third parties front hearings on their behalf.)

### ***Key problem summary***

- The Act does not deter some submitters and appellants from opposing applications with cases that have little or no merit. This has the potential to impose significant unjustified delays and costs on applicants.
- The open standing provisions of the Act allow unrestricted participation of trade competitors to resource consent application proceedings and the potential to thwart and delay applications at many stages.
- Cost awards under current provisions, even when these have been substantial, have not been enough to deter commercial decisions by trade competitors to enter resource consent application proceedings to thwart or delay proposals.

### ***Specific objective***

To reduce costs and delays arising from submissions and appeals that are frivolous or vexatious, or motivated by anti-competitive behaviour.

### ***Alternatives***

- Reinstate a requirement in RMA for all potential submitters to demonstrate they are directly affected or represent some relevant aspect of the public interest before being able to participate in procedures. This would undermine one of the key principles of the Resource Management Act and result in wasteful arguments over whether submitters/appellants have standing rather than debating the merits of a case.
- Provide an opportunity for applicants to seek that a trade competitor's case be struck out before the case is heard or after evidence has been heard. The method could remove, near the beginning of the public process, those competitors that cause substantial delays and costs to be incurred. The full rights of trade competitors would, however, be reduced. This could act as a precedent for other parties to be excluded through challenge. The method would no doubt lead to judicial review challenges of any decision to exclude parties from the process and could therefore defeat the purpose of reducing delays.
- Amend the definition of the environment to exclude social and economic matters that "affect or are affected by" ecosystems, natural and physical resources and amenities. This would make it more difficult (but not impossible) for trade competitors to mount arguments that proposals should be turned down because of the economic and social impacts on, for example, shopping centres or suburbs or communities. This could reduce the delays and costs that are borne by some applicants. There could be significant unforeseen consequences from changing the definition due to uncertainty about what "the environment" means, which will affect not just the RMA but also the seven other acts that rely on the same definition.

### ***Preferred option***

- *Reinstate powers of the Environment Court to require security for costs.* This proposal will help to ensure that applicants are able to recover a greater proportion of the costs of defending proposals against appeals lodged by those with anti-competitive, frivolous or vexatious motives. It will also close the gap between the financial gain or advantage to be made from lodging an appeal and the costs that may be awarded against the appellant (thereby reducing the 'net benefit' to the appellant). This will reduce the attractiveness of lodging submissions or appeals with limited merit and will act as a significant and effective disincentive to frivolous and vexatious opponents. There is a risk, however, that a move to reinstate security of costs will act to prevent the participation of some with legitimate cases but little money, and will not present an effective barrier to well funded opposition from trade competitors with much to gain from delaying an opponent's proposal.
- *Make it explicit that decision-makers are prohibited from having regard to trade competition or its effects in relation to resource consent applications, notices of requirement for designations, and the preparation of plans and policy statements.* This is necessary because of recent attempts to argue that while trade competition itself must be disregarded its effects are still a relevant matter for consideration. Although this argument was rejected by the High Court there is the potential for it to be raised in other cases.
- *Make it explicit that decision-makers are prohibited from having regard to trade competition or its effects in relation to notification decisions.* This could potentially reduce costs and delays by removing the potential, at an early stage in the process, for trade competitors to submit. There is a small risk, however, that local authorities could be over-zealous in their application of this provision with the effect that some legitimate submitters could be prevented from making their case.
- *Limit standing so that parties are only able to participate in resource consent application proceedings or notices of requirement for designations of trade competitors, or lodge a submission on a proposed policy statement or plan change relating to the activities of a trade competitor, if they are able to demonstrate that they are directly affected by a potential adverse effect of the activity on the environment.* This would diminish the principle of 'open standing' upon which the Resource Management Act is based and would prevent companies from lodging submissions in support of rivals to avoid case law being set that may have a bearing on activities elsewhere. On the other hand, limiting the participation of trade competitors has the potential to significantly reduce compliance costs and delays for some applicants – New Zealand's productivity and efficiency are likely to be enhanced by the increased competition that might result.
- *Prevent trade competitors from being represented at proceedings of the Environment Court as third parties.* Removing the potential for trade competitors to enter proceedings under the aegis of representing an interest "greater than the public generally" would close one loophole that might be available to cause delay. Under the Town and Country Planning Act trade competitors exploited a provision whereby they could gain status if they could demonstrate they were affected greater than the public generally. Trade competitors would still be able to be represented if they were directly affected by an adverse effect on the physical environment. The limitations on their rights would be more than balanced by the potential reduction in costs and delays.
- *Discourage covert opposition of trade competitors through third parties by requiring third parties to disclose their interests and imposing sanctions for non-disclosure.* The proposed amendment would make it much more difficult for trade

competitors to prosecute their cases by channelling resources through third parties. There is, however, a risk that the resources of applicants and resource consent authorities will be diverted into detecting and challenging surrogates for trade competitors. Lengthy and costly judicial review proceedings may result.

- *Allow the Courts to award full costs in cases where the Courts find that participants have been substantially motivated by trade competition.* The financial benefits of delaying business opponents' developments can often significantly exceed costs awarded, even when these costs have been substantial. In many cases, the possibility of having full costs awarded against them will increase the risk that potential penalties will outweigh the commercial gains of delaying an opponent's business proposals.
- *Allow the Courts to award punitive damages in cases where the Courts find that participants have been substantially motivated by trade competition.* Changes to the Act have been recommended to limit the standing of trade competitors in proceedings. These will go some way to preventing the delays and costs that arise from the exploitation of the Act for commercial gain. However, there is still the risk that some trade competitors may find ways around the exclusions and judge it worthwhile to prolong proceedings, even if they anticipate that they might lose the case. Costs awards will address trade competition only if they are of sufficient magnitude to signal stern warnings to prospective trade competitors. In order to complement the other measures and to develop an effective deterrent to anti-competitive behaviour, it is necessary to increase the chance that substantial (punitive) cost awards may be made in situations where commercial motives are deemed to be the most significant reasons for opposition.

### ***Net benefits***

Taking action to reduce opposition motivated by frivolous and vexatious concerns will improve the quality of arguments put to decision-makers and has the potential to significantly reduce costs for the Court, applicants and local government. Increasing penalties associated with anti-competitive behaviour and introducing new tools for effectively addressing this behaviour has the potential to significantly increase New Zealand's economic productivity and efficiency. In both instances these benefits are expected to outweigh the consequences of limiting opportunities for public participation.

## **B. Decisions on proposals of national significance**

### ***Problem***

At present, it is very likely that decisions on most significant roads, transmission infrastructure and other large scale infrastructure projects will be appealed to the Environment Court – either by project opponents or the applicant themselves (against a decision to decline the application or against consent conditions that threaten the financial viability of the project). Indirect costs associated with delays and uncertain timeframes and the direct costs of defending or mounting appeals can be significant. In some instances the costs and/or delays can be out of proportion with the scale of expected environmental effects and have the potential to threaten the viability of projects that are in the national interest. These problems are exemplified by the following cases:

- Meridian Energy Ltd's \$1.5 billion Project Hayes wind farm proposal is located 70km from Dunedin and involves 176 turbines producing 630MW. Applications

were lodged with Central Otago District Council in July 2006 and with Otago Regional Council in October 2006. Consents were granted in October 2007 after two requests for further information. Consents were appealed to the Environment Court in November 2007. The Environment Court held hearings on the proposal in May and August 2008. During these proceedings consent was granted to Trustpower to construct the Mahinerangi windfarm, which involves 100 turbines and is located south of the proposed site for Project Hayes in Clutha District. During the period between applying for consent for Project Hayes the surrounding environment has changed and the Environment Court had adjourned hearings on the application until 2009 to allow parties to present further evidence on the cumulative effects of the two windfarm projects.

- Contact Energy took six years to gain consent for the existing Wairakei and Poihipi geothermal plants and increase output by 20MW. Contact Energy lodged application for consents in 2001. Consents were granted in 2004. The council decision was subsequently appealed and it took another 3 years before final approval from the Environment Court in 2007 as it became entangled in a review of Environment Waikato's geothermal plan provisions. It is useful to compare this with Contact's 220 MW Te Mihi geothermal plant that, having been called-in by the Minister for the Environment, took 8 months from lodgment through to final decision.

### ***Specific problem summary***

- Iterative requests for further information from local authorities, slow processes for appointing commissioners to hearing panels and difficulties securing hearings time; coupled with a lack of repercussions for councils failing to meet statutory timeframes and no council accountability for delays.
- Unnecessary duplication of council and Environment Court hearing processes.
- Existing provisions allow the Minister for the Environment to directly intervene in projects considered to be nationally significant. The criteria for eligibility are broad and applicants and local authorities are unclear whether particular proposals qualify and, if the Minister considers a proposal meets the criteria, when and how the Minister will choose to intervene.

### ***Specific objective***

To reduce the time it takes to reach decisions on proposals of national significance while still maintaining effective public participation and promoting the sustainable management of natural and physical resources.

### ***Alternatives***

- Broaden designation provisions so they apply to a broader range of development proposals. Designations have the potential to work well with improved call-in provisions to facilitate effective and efficient processing of priority projects – particularly for projects that require extensive or linear use of land. This would, however, have the potential to transfer significant powers to proponents of projects that are pursuing private benefit rather than public good – contrary to the original intent of the designation process. Complex issues will arise if consequent amendments are required to the compulsory land acquisition and compensation provisions of the Public Works Act.
- Adjust or eliminate the weightings of various criteria within the purpose and principles of the RMA when considering resource consent processes for nationally significant proposals. This would provide greater certainty for these

proposals as to the outcome of resource management processes by simplifying decision-making for consent authorities. However changes to the purpose and principles of the RMA could result in unpredictable outcomes and a lengthy period of uncertainty as councils and the Courts interpret the amended framework. This option would likely undermine the equality of the RMA in the minds of the general public by providing an 'easier ride' for proposals with potentially significant effects.

- Insert an additional matter (or matters) into the principles of the RMA requiring decision-makers to have particular regard to “the benefits to be derived from economic development and the timely development of infrastructure projects” or similar. This would elevate the weight given in balancing decisions to these matters and have an immediate effect on decision-making but could be undermined by the potential for varying interpretation by councils and the Environment Court, and the potential for councils to engage in social and economic planning. The direct and indirect costs of such a change could be significant due to the number of plan changes that would be required and the uncertainty as case-law evolved.

### ***Preferred option***

- *Provide guidance to clarify non-statutory criteria determining eligibility for call-in and enable councils, applicants and/or requiring authorities that comply with these criteria to submit their resource consent application, notice of requirement for a designation, or private plan change directly to an Environmental Protection Authority (EPA). The EPA will process applications in accordance with improved and streamlined call-in provisions.* The government will establish the Statutory Office of the EPA via the RMA as a transitional step. The Secretary for the Environment will hold the office and exercise the powers, functions and duties of the EPA. The Ministry for the Environment will perform the functions of the EPA as they relate to the processing of applications called-in by the Minister until such time as the Authority is formally established by legislation. Establishing and administering the EPA will require additional financing. A significant proportion of the ongoing costs of operation will be recoverable from project proponents, with overall costs being substantially outweighed by the benefits of a more efficient, timely, consistent and transparent consent process for significant proposals.

Elaborate on the existing factors the relevant Minister is required to consider when deciding whether a proposal is, or is part of, a matter of national significance by providing guidance to clarify what proposals, and in what instances, applications should be submitted directly to the EPA. The guidance will explain the specific criteria and/or thresholds that the EPA will use when making recommendations to the Minister for the Environment and Minister of Conservation (in relation to proposals wholly in the coastal marine area) on whether proposals should be called-in. Clearer eligibility criteria and decision-making rationale will avoid confusion and uncertainty, and will reduce the potential for costly and time consuming legal arguments. The development of clear criteria will require engagement and consultation, which will ensure that the criteria are accurate and transparent. Establishing non-statutory criteria will provide government with a greater degree of flexibility to respond to changing issues and information. This adaptability has both strengths and weaknesses; but on balance the provision of clear but adaptable criteria will outweigh any perceived political subjectivity.

If, after considering the recommendation of the EPA, the relevant Minister decides that a project should proceed down the call-in path, the EPA will publicly notify the proposal on behalf of the Minister. This will trigger the beginning of a 9-

month timeframe within which a final decision must be notified. An explicit processing timeline will facilitate timely and efficient processing which will, in turn, reduce project costs, promote investment certainty and facilitate more rapid responses to evolving economic, social and environmental issues. The 9-month timeline may, however, be difficult to comply with in instances where the proposals are particularly large or complex and could risk expeditious decision-making. This risk will be mitigated by the high quality of the decision-making boards (Chaired by a current or retired Environment Court judge) and ability of the board to seek the leave of the Minister for the Environment to extend the timeline.

Appeals on decisions made by a board of inquiry or by the Environment Court if it is considering a matter that has been called-in will be limited to appeals to the High Court on questions of law. Further appeals will be limited to the Supreme Court in exceptional circumstances only. The Supreme Court will either decide to hear the appeal or direct it to the Court of Appeal for determination as a matter of priority. In either case the Supreme Court or Court of Appeal will be the final decision-maker. Boards will be chaired by a current, former or retired Environment Court Judge and comprise members who are nationally recognised experts in specialist fields. The process and decisions of these boards will have the rigour of a specialist court. Limiting appeals on these decisions will avoid repeated consideration of the merits of a proposal and thereby reduce potential delays due to successive legal challenges, while still providing a 'legal safety valve' should participants feel that the decision fails to accurately interpret or apply the RMA.

Any additional or supplementary resource consents associated with a significant project but not applied for in the substantive application to the EPA shall be eligible for referral to the EPA. The relevant Minister, having considered the advice of the EPA, will either: decide whether the application may be processed as a change to the original conditions of consent on a non-notified basis and refer it to a board for decision; or notify the application and refer it to a board for decision in accordance with the call-in provisions; or refer the application to the relevant local authorities for processing. This will ensure that minor resource consent requirements that were either unforeseen, or for which applicants failed to lodge consent applications in error do not unnecessarily delay significant projects.

- *Require the relevant Minister to call for nominations for appointments to the board of inquiry from the relevant local authorities and also require the Minister to appoint a person or persons to the board with an appropriate degree of local knowledge.* This will help assuage concerns that the call-in process reduces local input into decision-making on significant proposals and will also ensure that due consideration is given to local matters.
- *Lift the current cap on Environment Court Judges from eight to 10.* This will ensure that there is capacity to deal with the additional functions and work load expected to arise out of the proposed amendments. Lifting the cap will also enhance the ability of the Environment Court to hear cases faster; reducing delays for those resource consent applications, notices or requirement, plans and plan changes that are appealed to the Court. Raising the number of Environment Court judges will have budgetary implications. Simply raising the cap does not, however, automatically mean that the full complement of ten judges will be appointed. It does, on the other hand, provide the Court with the flexibility to boost resources at a future date to meet demand without having to seek an urgent legislative amendment.
- *Add the new criterion – “Relates to a network utility operation that extends, or is proposed to extend, to more than one region in New Zealand” – to the factors the*

*relevant Minister may have regard to when considering whether to call-in a resource consent, plan change, or notice of requirement.* This criterion will require the Minister to consider calling-in projects that may not individually be considered to be of national importance, but because of their association with a wider network will play a significant role in improving or maintaining the functioning and integrity of nationally significant infrastructure (such as those relating to roads, railways, pipelines, telecommunications or radio-communications, or electricity transmission).

- *Clarify that a board of inquiry for matters that are called-in can request or commission an independent report on the matters that have been called in and require that this be pre circulated to parties.* An independent assessment of the application available to all parties at the hearing will be of benefit to all submitters and will assist the Board in understanding the local planning context and the issues arising from the application. The cost of producing such a report is estimated to be approximately \$20,000 - \$40,000 depending on the scale of the application(s). This would be recovered from the applicant under the call in process. An applicant would be charged these costs through a normal council process the matter not been called in and this would have been budgeted for.
- *State that any comments on a draft decision on a matter that is called-in must be of minor and technical nature and that there is no opportunity to challenge the key findings or rationale.* This would make clear to all parties what the nature of comments being sought and reduce the risk that the board has to spend time dealing with arguments it has already heard and has already made decisions on.
- *Provide protection for Board members against legal action for actions or omissions.* Such a provision will reduce any risk of action being taken against the Board on the grounds of negligence or any other reason. Other decision-makers under the RMA a provided with this protection and, although such action is unlikely, it is important for board of inquiry members to have an equivalent degree of legal protection.
- *Clarify that the Minister for the Environment can call-in a private plan change application (a) after the application has been lodged with the local authority but before that authority has made a decision as to whether to accept, adopt, or decline the application; or (b) after the a decision has been made by the local authority with whom is was lodged to accept, adopt or decline it prior to the hearing.* This will remove uncertainty that presently exists as to when in the private plan change process the relevant Minister is able to exercise the power to call-in an application.
- *Enable parties to apply directly to the EPA for certificates of compliance for matters that have been called-in.* Confirmation that resource consents are not required for particular activities that form part of a proposal of national significance can only be obtained from local authorities. Allowing parties to lodge requests for certificates of compliance directly to the EPA will streamline what can be a cumbersome and time consuming process, particularly in instances where proposals cross multiple local authority boundaries.

### **Net benefits**

Improving call-in and related provisions, and developing an accompanying government policy statement to clarify eligibility criteria and thresholds, is expected to significantly reduce the length of time it takes between lodging an application and receiving a decision; in some cases these savings could be measured in years. Greater consistency in decisions on proposals that are of national significance will increase certainty amongst the general public, local government and the private

sector in terms of RMA interpretation. In particular, increasing certainty around processes and timeframes is expected to improve investment certainty. Limiting the number of hearings and removing the opportunity to appeal on merit does reduce the opportunities for public participation in decision-making on significant projects. The process does, however, preserve the right of the public to submit on proposals and allows the board of inquiry to respond to local issues by building flexibility into board appointments and hearings processes. On balance it is considered that the benefits of greater efficiency, clarity and consistency outweigh the effects of reducing opportunities for public participation.

## **C. Environmental Protection Authority**

### ***Problem***

The issues behind improving call-in processes also apply to the creation of an EPA: the need to avoid delays in consent processes for significant projects; the desire for more national consistency in decisions, and the need to address concerns that national priorities are not always appropriately recognised under a devolved decision-making framework.

### ***Key problem summary***

The high level of devolution in New Zealand's environmental management systems and an absence of centralised processes and standards in some areas raise the costs of implementing the RMA and increase the financial risk associated with developing significant infrastructure and public works in New Zealand.

### ***Specific objective***

To establish a national body that can provide efficient and timely administration of projects that are called-in.

### ***Alternatives***

- Locate the administration of the call-in process within the Environmental Risk Management Authority (ERMA), and change its name to the EPA to reflect its broadened role. There would be practical difficulties in incorporating new functions into ERMA purely through an amendment to the RMA, as ERMA has been established for a different purpose and has a governance structure operating under different legislation.
- Amend the Environment Act 1986 to facilitate the establishment of the EPA. While this might be a preferred option in the future, it has not been possible to analyse the potential implications of amending other statutes within the timeframes for the first phase of RMA reform.

### ***Preferred options***

- *Establish an EPA as a statutory office within the Ministry for the Environment, with the role of statutory officer to be exercised by the Secretary for the Environment. The Secretary will be able to delegate these functions, to allow the administrative work to be carried out by a dedicated unit within the Ministry for the Environment. Greater centralisation of those regulatory roles which are best exercised on a nationwide basis would address some of the issues created by*

extensive devolution of environmental management in New Zealand. The creation of the EPA as a statutory office creates the necessary degree of separation from Ministry for the Environment's core business. This will give the EPA a separate identity that can be easily recognised and accessed by stakeholders. It also allows the EPA, in its establishment stages, to call upon the Ministry's existing RMA expertise and experience in managing call-in processes and supporting Boards of Inquiry. The EPA's roles, functions and powers will be clearly set out in the RMA and will include:

- determining whether a proposed project meets the eligibility criteria for call-in
- making recommendations to the relevant Minister regarding his or her powers of intervention, including call-in
- managing the application and notification process for projects that are called-in
- preparing or commissioning a report or reports for boards of inquiry on the information supplied by the applicant
- providing secretariat services to boards of inquiry
- making recommendations to the relevant Minister about the process for determining any additional applications that are related to proposals of national significance.

Many of the costs incurred by the EPA in administering the call-in process will be able to be recovered from applicants. The construction of a stand-alone unit will require at least one manager and in the order of three full time equivalent employees, administrative support and the establishment of new systems and processes. It is estimated that the initial establishment cost will be approximately one million dollars.

### ***Net benefits***

The establishment of an EPA to centralise processing of proposals of national significance will facilitate achievement of the benefits identified above in relation to modifying the call-in process. The initial financial cost of establishing and operating the EPA will not outweigh these benefits.

## **D. Improving plan development and plan change processes**

### ***Problem***

Experience with the first generation of plans produced under the RMA has shown the process to be expensive and time consuming. On average the time from initial consultation to the resolution of appeals was more than eight years, at an average cost of nearly two million dollars. Research conducted in 2004 and updated in 2008 found that:

- an important contributor to cost and time were appeals to the Environment Court (averaging more than three years and \$600,000). In some cases non-specific appeals to entire plans were made that delayed plans becoming operative for years (creating uncertainty and compliance costs for resource consent applicants)
- consultation and plan drafting was the other main contributor (2.5 years and \$670,000 on average)

- at present the plan preparation process involves two rounds of submissions. The second round of submissions (the further submission process) and associated administrative requirements added, on average, more than six months and tens of thousands of dollars to the process. Analysis of local authority decisions and interviews with local authority staff found that further submissions, overall, added comparatively little toward improving plan quality
- Environment Court decisions on plan appeals, while addressing the concern of the appellant, can inadvertently but materially affect the policy direction, structure and flow of the plan. This can mean that the Environment Court rather than elected council representatives determines local policy.

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

The plan change process is similar to that of plan preparation. In the period 2006-2008 approximately 200 plan changes were notified per year and available data indicates that:

- on average plan changes took 18 months to proceed from drafting to becoming operative, but some large plan changes were still not operative after six years
- total costs of plan changes showed varied with scale, complexity and the level of opposition encountered. Costs ranged from around \$19,000 to more than \$800,000
- as with plan preparation, the greatest proportion of costs was associated with preparing the plan change and resolving appeals
- a large majority (80–95%) of further submissions appeared to have no bearing on the final decisions made in respect of the plan changes studied. Additionally, the majority of further submissions were made by those who had already made submissions.

### ***Key problem summary***

Effective RMA implementation relies on high quality plans being in place in a timely manner. Cumbersome planning processes have hampered the ability of councils to respond quickly to changing conditions or emerging environmental issues. Broad rights of public participation and multiple appeal opportunities for consents and plans can cause considerable delays in RMA decision-making.

### ***Specific objective***

To improve the quality of planning documents and facilitate timely development and amendment that enables rapid responses to changing conditions or emerging environmental issues, while retaining an appropriate degree of public participation and legal right to redress.

### ***Alternatives***

- Amend the Schedule 1 process governing plan development to be more consistent with that set out in the Local Government Act 2002 (LGA). The LGA simplifies the process under which plans are produced by removing provision for further submissions; removing the requirement for councils to produce a report on alternatives considered and limiting appeal rights to the effect that only the

process can be challenged. Such a process could considerably reduce the time and cost associated with plan preparation and appeal processes. There would, however, be significant natural justice issues. Removing the right to appeal could mean that there would be no means of challenging provisions that impact on property rights. Also, changing appeal rights in this way might result in a substantial increase in the number of requests for judicial review and impose aggregate costs on individuals that outweigh the benefits to councils and communities.

- Delete the requirement for councils to produce a report considering the costs, benefits and alternative options to those proposed in the plan. This could substantially reduce the costs to councils and potentially reduce the time taken to notify plans and plan changes. This requirement is designed to impose a rigour on local authorities but some reports produced currently are superficial and provide inadequate analyses of alternatives. Without a formal requirement to produce a report, however, there may be no check on councils' imposing excessive regulation or introducing provisions with unintended consequences. Requiring a report allows communities and potentially affected parties to determine the adequacy of council reasoning.

### ***Preferred options***

- *Remove the ability of objectors to submit/appeal seeking withdrawal of entire proposed plans or policy statements.* This measure could potentially save many years and hundreds of thousands of dollars for local authorities and the Courts. It would increase the obligation on submitters and appellants to particularise their objections and concerns. This option would, however, also remove the ability for submitters on private plan changes to seek the withdrawal of the whole change. That gives promoters of private plan changes greater rights than applicants for resource consents and potentially disadvantages some submitters who may be significantly affected if a proposed plan change goes ahead. Another disadvantage is that the option would remove the opportunity to have a whole plan struck out through appeal when the approach taken by the local authority is extremely flawed – for example when it is contrary to the principles of the RMA. Early in the life of the Act there were examples of plans that were considered by government officials to fit into that category. This risk is mitigated, however, by the residual powers of the Minister for the Environment to direct the preparation of a plan, change or variation and new powers to call-in council initiated plan changes.
- *Enable internet and e-mail alternatives for service and notification of plan changes, variations and associated proceedings.* This option is likely to speed up the process and therefore reduce costs and delays. It is possible that some potential submitters may not have access to internet and therefore could be disadvantaged, although this will be mitigated by continuing to allow notification by mail and print media.
- *Allow plan changes initiated by the local authority to be subject to the full range of Ministerial intervention powers.* This option is intended to bring plan changes into line with other matters on which the Minister can seek to intervene for reasons of national significance. Delays might be reduced through Ministerial intervention because processes could be circumscribed – for example, through the Minister calling in the plan change. A disadvantage is that a council would lose control over decision making on an aspect of its plan with potential consequential impacts on the degree of integration in the plan.
- *Extend the period that consultation conducted under other enactments can be used for RMA plan purposes from 12 to 36 months.* This could reduce the costs

of consultation for local authorities. In many cases the issues brought up under other enactments will be relevant to the development of a plan under the RMA. A risk is that there is a greater chance of circumstances changing over a three year period so some relevant considerations may be overlooked.

- *Remove the requirement for local authorities to summarise submissions or call for further submissions and require local authorities to consult with and have regard to the views of anyone who they consider may be affected by matters raised in submissions.* This option is likely to significantly reduce the time taken to produce a plan and the costs for local authorities. Summarising submissions is currently undertaken to enable members of the public and potentially affected parties to determine whether they will seek to make further submissions on a plan. However, this step, together with the ability to lodge further submissions, can add many months to the process with only limited benefits in the overall development of the plan. Provided provision is made for a council to be able to consult with any party they consider may be affected by a submission, the full range of arguments should be able to be brought to the attention of the council and the interests of third parties should not be too adversely affected by this option.
- *Clarify notification requirements in relation to decisions on submissions on plans.* This technical amendment will remove confusion caused by the current lack of clarity arising from inconsistent use of terminology.
- *Remove the need for local authorities to provide decisions and reasons on every submission point from every submitter by grouping decisions according to plan provision or topic where there is no corresponding provision.* This will remove considerable repetition in responding to submissions and will reduce the time needed by councils to move on to the more substantive issue of appeals. It should also make reports on reasoning more coherent. There could be some disadvantage to individual submitters whose reasons for opposition or support may be subtly different to the general thrust of other similar submissions but this downside is outweighed by the cost savings to local authorities.
- *Delete the non-complying class of activities from the RMA within three years of the Amendment coming into force and require local authorities to consider them as discretionary activities until plans are amended to reflect the deletion.* Although deleting the non-complying activity class will not reduce the total number of consents required it will simplify the application and decision-making process for some activities not currently provided for by local authorities. Local authorities often class activities as non-complying in circumstances where natural resources are, or are close to, sustainable limits of allocation and removing this activity class will reduce the number of tools available to control resource allocation. In this regard it is noted that the government intends to address resource allocation in subsequent RMA reforms. On the other hand, applications that will have a more than minor adverse effect on the environment or that are contrary to the objectives and policies of a particular plan are likely to fail under the standard decision-making tests and the presence of an additional hurdle provided by non-complying activity status is unnecessary. Although finely balanced, the benefit of removing an unnecessary additional hurdle is, in the long run, expected to outweigh the immediate costs due to necessary plan amendments.
- *Make it explicit that all local authorities in a region may produce combined district and regional plans and policy statements.* This option would cement into law what already is increasingly occurring in practice. The Wairarapa councils already have a combined district plan and Northland councils are considering a similar move. There are potentially high cost savings from this option to ratepayers. Other advantages are that a combined plan provides for more integrated decision making and consistency of approach across boundaries. Downsides are that local

communities lose a degree of control over policies that affect their communities. Also, there is a potential for blurring of regulatory and policy functions when regional policy statements are combined with regional plans.

- *Remove mandatory obligation to review District Plans every 10-years; leave the review period to the discretion of councils and “rolling reviews”.* This option could reduce costs for local authorities by potentially extending the time between plan reviews. Giving councils discretion as to when they undertake a review enables them to judge the appropriateness of current provisions. There is a risk, however, of councils extending the period for review well beyond the date when their provisions are relevant, with the effect that some consent applicants are disadvantaged and appropriate development is thwarted. Some local authorities under the previous Town and Country Planning Act chose never to review their plans with the effect that their plans became comprehensively out of date.
- *Clarify that a proposed plan shall have no legal effect until the date of notification of the council’s decisions on submissions – excluding rules required to protect a natural resource or historic heritage protection provisions, or to provide for a proposed aquaculture management area. Provide local authorities with the ability to seek leave from the Environment Court to have other provisions not captured by the above exclusions come into effect immediately.* This option would reduce delays caused by legal arguments over the appropriate weight that should be given to the provisions of a proposed plan and increase certainty for applicants and appellants regarding the planning provisions against which proposals are to be considered. The proposal is also likely to encourage local authorities to expedite their plan development process. Providing local authorities with the ability to seek the leave of the Environment Court for particular policies and rules to take effect prior to decisions on submissions will enable local authorities to prevent unscrupulous parties from lodging multiple consent applications aimed at beating the introduction of a proposed rule. This will retain the flexibility of councils to deal with resource allocation issues via plan changes. A disadvantage of this approach is that it will prevent some proposed provisions from having any effect until all appeals are settled, despite the fact that they may improve outcomes or more clearly reflect the aspirations and expectations of a particular community. Although finely balanced, the benefit of greater certainty will outweigh the effects of limiting the effect of proposed plan provisions.
- *Limit appeals on plans to the Environment Court on questions of law, except in cases where the appellant has gained the leave of the Environment Court to allow questions of merit to be considered on the basis that the proposed policy statement or plan would (a) have a significant impact on existing property rights; (b) fail to give effect to matters provided in Part II of the Act, or (c) are of unclear in meaning or effect.* This could reduce plan processes for some plans by several years and therefore significantly reduce costs and delays. It would be consistent with the philosophy that local authorities, rather than Courts, should be responsible for deciding the policy framework for their communities. The option may, also, reduce the workload on the Environment Court and therefore free up time for consideration of appeals on resource consent applications. On the other hand, the option could limit appeal rights for those who are genuinely affected by decisions and make the plan development process more expensive and time-consuming as local authorities try to demonstrate a high level of compliance with all required functions and duties. This will have a potentially significant effect on public participation, but the expected time savings and the benefit of underscoring that local authorities should be the primary policy-making body will, on balance, outweigh these effects.

### ***Net benefits***

Significantly reduced administrative requirements in relation to plan and plan change development processes could enable councils to devote more resources to policy development and the evaluation of alternative policy options. Increasing the flexibility of consultation requirements, limiting the scope of submissions and appeals, and empowering councils to correct minor errors in plans has the potential to significantly reduce the time it takes to make plan provisions operative. This will help clarify the local planning framework which will benefit the general public, private enterprise and community groups. A more efficient plan development process is expected to promote more timely council responses to new information and emerging issues. Overall it is considered that these benefits outweigh the effects of constraining the scope of and reducing opportunities for appeal.

## **E. Improving resource consent processes**

### ***Problem***

Research conducted by the Ministry for the Environment in 2008 into RMA compliance costs found significant concern amongst applicants at the time and cost it takes to obtain a resource consent. Generally those consents that are notified and subject to public submissions and hearing processes are significantly more time consuming and expensive than non-notified consents. Statutory timeframes for the processing of resource consents range from 20 working days to 80 working days depending on whether a resource consent is notified. At present, only 74% of non-notified consents and 56% of notified consents are processed within statutory timeframes; performance has steadily tracked downwards over the past six years. The Ministry for the Environment reviewed resource consent processing performance in 2008 and concluded that the following matters contributed to lengthy timeframes:

- complicated RMA process and reporting requirements
- local authority reliance on 'paper-based' systems and communication
- poor quality resource consent applications
- shortages of skilled consent processing staff
- consent staff being required to deal with 'extraneous issues'.

The Ministry for the Environment provides guidance to help improve the quality of resource consent applications but some applicants continue to use council officer responses to initial applications (rather than formal pre-application meetings) to identify areas of concern and, therefore, where they should concentrate their resources. There is a nationwide shortage of skilled and experienced consent processing staff and council officers tend to move fluidly into private practice after having gained one or two years experience in councils. Local authorities hold a wide range of obligations in addition to those conferred by the RMA, which can spread available resources thinly.

### ***Key problem summary***

- Slow and complex consent application and processing requirements add time and cost to projects.

### **Specific objective**

To reduce the cost and time associated with resource consent processes, while maintaining an appropriate degree of public participation and legal right to redress.

### **Alternatives**

- Increase the rigour of the first level (council) hearing by allowing cross-examination. This could promote a more robust hearing process with greater interrogation of issues and effects and may reduce the need for appeals to the Environment Court. However this would increase the formality of the first level hearing and may introduce a barrier to public participation. Extensive training would be needed for hearing panel chairs and members on cross-examination principles and practice, and this would add significant costs to the process. It would also impose costs on submitters who would feel a need to have legal representation.

### **Preferred option**

- *Remove the current presumption that resource consents need to be notified and amend the criteria for notification so that (a) activities with minor effects on the environment shall not be publicly notified or shall only be notified to those affected parties who have not given written approval (b) activities with more than minor effects on the environment will be notified (c) local authorities will have the power to override the notification requirements of the Act and sepecify notification or non-notification for particular activities in special circumstances. Support by removing provisions that would have enabled the Environment Court to review decisions made in regard to the notification of resource consents. This will simplify the notification process and reduce costs and delays. While plans will need to be updated to reflect this change, this can occur at the next plan review. This proposal will also reduce the likelihood of local authorities adopting an unnecessarily precautionary approach to notifying applications. There is a risk that higher rates of non-notification will mean a consequent reduction in public participation and negative environmental outcomes if there is less scrutiny of the effects of applications. This risk is mitigated, however, by the fact that (a) decisions on notification will still be subject to judicial review (b) the decisions of local authorities will be subject to the scrutiny of community groups and the Minister for the Environment (c) proposals will still need to be notified if they are likely to have effects on the environment that are more than minor or if special circumstances exist.*
- *Enable internet and e-mail alternatives for service and notification of applications and associated procedures including exchanging submission and appeal notices and evidence, and serving notified resource consents on affected parties. This would provide for faster service of documents, reduce paperwork and the overall burden and duplication of administration. Paper copies may still be required for security purposes and not all parties have access to computers. The proposal will enable proceedings can get underway quicker and lessen the administrative burden on the Court.*
- *Enable local authorities to adopt the applicants' assessment of environmental effects (AEE) in reports. This will help to reduce councils' time and costs in reporting on applications. There is a small risk in the proposal to allow the adoption of the applicant's AEE that omissions or inaccurate information may be overlooked and/or get carried into council assessments*

- *Simplify the reporting requirements for minor and non-notified projects.* This would simplify and speed up the decision making process for non notified applications (94% of all resource consent applications) and reduce duplication and processing costs.
- *Delete existing blanket tree protection rules in urban areas and prohibit local authorities from imposing rules of this type in the future.* This proposal will prevent the need for approximately 4,000 resource consent applications per annum across New Zealand. The proposal will require Local authorities to identify and schedule specific trees that are worthy of protection and may result in a minor reduction in urban amenity. Other options exist to effectively prevent councils from adopting blanket protection rules (such as the use of Ministerial plan change directive powers or the use of national environmental standards) but these options will incur additional delay and costs.
- *Amend processes relating to local authorities' requests for further information to: remove the ability for local authorities to 'stop the processing clock' while awaiting responses to requests for information (subsequent to an initial request); enable the applicant to simply agree or decline to supply information that is requested; and allow local authorities to decline applications if an initial request for information has not been responded to within 12 months.* This proposal emphasises the importance of lodging one comprehensive request for further information and discourages local authorities from making serial requests for information. This will help to prevent local authorities from misusing existing powers to delay processing times for complex applications but will preserve the ability of council officers to seek information necessary to enable accurate and efficient consideration and decision-making. The proposal will clarify the responsibilities and powers of local authorities and applications in relation to requests for further information and enable applicants to proceed with an application even if council officers consider further information is required. There is a risk that this change will prompt local authorities to use powers available elsewhere in the RMA to delay processing and that further changes will be required to effectively streamline and improve RMA processes.
- *Limit consideration of the purpose and principles of the RMA when making decisions on consents for Controlled and Restricted Discretionary activities to those matters over which a local authority has expressly reserved control or discretion in its plan.* This reflects the fact that local authorities consider the purpose and principles of the Act when electing to limit discretion and specify matters for control in particular instances. This proposal will increase certainty for councils, applicants and decision-makers over the range of relevant matters and the scope of consideration necessary in relation to applications for restricted discretionary activities. This will reduce council reporting requirements and increase processing efficiency for applications with minor or well-known effects. Applicants will also face a more certain and less complex application process. The proposal risks making it more difficult for local authorities and the Environment Court to consider the cumulative effects of minor activities. It may also rule out consideration of the positive effects of particular applications – plans may need to be amended to allow consideration of positive effects.
- *Require all councils to develop a discount policy in respect of late consent processing, within 12 months of enactment.* This proposal will provide a fiscal incentive to promote efficient processing in accordance with statutory timeframes. Effective implementation is crucial if legislative amendment is to achieve its objective. This proposal risks manipulation by applicants who may lodge barely adequate applications and delay responses to questions in order to foster non-compliance with timeframes and, therefore, discounted processing fees. Local authorities are likely to change their behaviours to ensure compliance and may,

for instance, turn away more applications on the basis of insufficient information. They may also choose to require pre-application meetings, increase staff numbers, or increase charge out rates and make greater use of consultants. This may increase costs to applicants. The one-year transitional period will allow local authorities time to develop necessary new complaints processes to establish whether councils were at fault in instances of non-compliance with timeframes. This process may require additional resourcing.

### ***Net benefits***

Clearer and more efficient notification, assessment and reporting requirements will substantially reduce administrative burdens and facilitate more effective work allocation within local authorities. This is expected to reduce the time it takes to process resource consents. Amendments to the provisions governing requests for further information are likely to promote more timely and certain consent acquisition timeframes. It is considered that the benefits of clearer and more efficient processes will outweigh the potential costs associated with a possible reduction in opportunities for public participation.

## **F. Improving central government direction**

### ***Problem***

It can prove difficult, both practically and politically, for local authorities to factor national benefits, priorities and strategies into planning and decision-making in instances where the immediate costs of decisions fall locally. Central government has recently started to make more use of available RMA instruments to offer greater national direction and guidance (including those added in 2005).

Central government guidance and direction has the potential to simplify the framework within which consent authorities make decisions by setting clear environmental thresholds and targets via national environmental standards, and clarifying relationships between potentially competing national strategies and matters of national importance via national policy statements. There is, however, no overall strategy for the use of these instruments, which has created a lack of certainty for all parties involved about when and how central government will intervene in RMA processes. Similarly, many of these instruments are either new or infrequently used by central government and recent practical experience has highlighted several areas where drafting peculiarities have rendered the instruments cumbersome, inflexible and difficult to implement.

A number of regulations and national policy statements are expected to come into force over the next 18 months. Local authorities will be required to implement these regulations and policies either immediately or, in some cases, incrementally over a short timeframe. To do so, councils will face significant costs, which in some cases could cumulatively amount to tens or hundreds of millions of dollars across the country. A significant proportion of these costs derive from consequent plan change processes required to give effect to central government direction.

### **Key problem summary**

- Existing provisions governing the development and implementation of national policy statements can be unclear, inflexible, time consuming and potentially economically inefficient.

### **Specific objective**

To increase the efficiency and effectiveness with which national RMA instruments are developed and implemented.

### **Alternatives**

- Retain existing provisions but use them more proactively and transparently in line with an explicit government strategy. Experience has highlighted a number of problems with existing instruments and areas where amendments would significantly improve functioning and implementation.

### **Preferred option**

- *Provide the relevant Minister with explicit powers to cancel, postpone, and restart a national policy statement process that has already commenced at any time before it has been gazetted.* Allowing the relevant Minister to withdraw, delay or restart the development of a national policy statement— were there is a reason to do so – provides the Minister with the same powers as local authorities in relation to proposed plans variations/changes and provides the Minister with the ability to respond to changing issues and evidence.
- *Clearly provide for councils to insert objectives and policies from a national policy statement into their plans and policy statements without going through the full schedule 1 process, and limit appeals to plan changes that are required by a national policy statement to questions of law only.* National policy statements already go through a public process of inquiry and policy statements and plans are required to give effect to a national policy statement. As such, appeals on the merits of plan changes that comply with national policy statements would achieve relatively little benefit in comparison to the costs involved. Limiting appeal rights in this way will reduce delays and the costs to councils of complying with their responsibility of giving effect to national policy statements. This will increase the speed of local policy development to assist decision-makers in giving effect to national direction and reduce risks associated with re-litigating the outcomes of national inquiries into national policy statements. Applicants and submitters will still have opportunities to test rules for development proposals on questions of law, but limiting appeal rights does reduce another avenue for public participation.
- *Require that consent authorities have regard to the relevant provisions of national environmental standards when making decisions on resource consents.* This would remove legal ambiguity and improve consistency in the Act plus improve clarity, speed and certainty of process.
- *Explicitly clarify the effect of national environmental standards and other regulations made under the RMA in relation to duties and restrictions under the Act, and improve linkages between sections of the Act by including specific reference to regulations where appropriate.* This would increase clarity and certainty for RMA practitioners and reduce legal costs required to clarify the present situation.
- *Provide consent authorities with an explicit power to issue certificates of compliance where activities comply with the provisions of a national*

*environmental standard.* This would increase certainty for local authorities, industry and the public and reduce cost and time delays associated with legal interpretation. For example, the cost to the telecommunications industry of councils not issuing a certificate of compliance is estimated as being \$1.54 million over the next three years. This includes transferring risks onto a third party (lawyers) or seeking a declaration from the courts, costing approximately \$40-50,000 per application. There are also costs for local authorities who are forced to issue compliance letters outside of the legislative framework and cannot recover costs from the applicant. This option may result in greater workload for local authorities.

- *Provide the Minister for the Environment with the power to make minor amendments and corrections to any national environmental standard that is already in force.* The monetary and time cost of undertaking even a minor change to national environmental standard is significant and has estimated costs in excess of \$100,000 per minor change, with the fixed costs of a consultative exercise on a national environmental standard in the order of \$25,000 - \$50,000. This option would reduce costs and improve the speed with which minor amendments can be made. One risk is a negative public perception of central government making minor changes without public consultation (although any amendments would be subject to checks and balances such as regulation review processes). It may also be unclear what constitutes a 'minor' amendment.
- *Clarify that councils can remove redundant provisions from plans and make reference to a national environmental standard following the promulgation of a national environmental standard without going through the full schedule 1 process.* This would reduce costs and time for local authorities associated with plan changes. The time and expense of a council initiated plan change is significant with the average cost being between \$80-100,000 per plan change. This option would also increase the readiness of local authorities to update their plans, thus raising public awareness of new regulations and reducing the need for interpretation of redundant policy. A risk is a negative public perception of local authorities making minor changes without public consultation.
- *Clarify when a national environmental standard prevails over a resource consent and clarify that local authorities are responsible for the compliance and enforcement of national environmental standards.* This would increase the likelihood that expected outcomes of standards are achieved. This option will clarify responsibilities but will increase administration and processing costs for local authorities. There is a risk that local authorities will, initially, lack the expertise and resources to administer a standard.

### **Net benefits**

More flexible and efficient provisions governing the development and implementation of national environmental standards and national policy statements will facilitate the articulation of effective environmental bottom lines and policy expectations. Increasing the effectiveness of central government direction and easing local government implementation is expected to foster greater certainty and reduce the costs of implementing and complying with the RMA across all sectors. These benefits will outweigh the associated reduction in local discretion over interpretation and implementation of the Act.

## **G. Improving the effectiveness of compliance mechanisms**

### ***Problem***

The resourcing of RMA monitoring and enforcement throughout New Zealand is variable and in some areas councils lack either (or both) the ability to effectively detect non-compliance or to take enforcement action. The ability of local authorities to recover costs or ensure the repeat offenders are appropriately penalised is limited under the RMA. This can act to undermine the economic viability of effective monitoring and enforcement action. As an example maximum fines for prosecutions under the RMA were set at \$200,000 in 1991 and have not been changed since. If brought up to date in line with increases in the consumers' price index over the same period, the maximum fine for prosecution would be closer to \$300,000. Comparisons with other resource management regimes suggest that penalties for prosecution under the RMA are relatively light. They also do not differentiate between offences committed by corporate entities and private individuals. In New South Wales and Canada the maximum fines are set in millions of dollars and differentiate between companies and individuals:

- New South Wales - for a company the maximum fine is \$AUD 5 million for a corporation and \$AUD 1 million for an individual.
- Canada - \$CAD 6 million for a company and \$CAD 4 million for an individual (upon first major violation).

In the period between 2001 and 2008 there have been 431 RMA prosecutions. Because the ceiling on fines in New Zealand is relatively low, fines imposed by the Courts averaged less than \$8,000 in the same period. Anecdotal evidence from enforcement officers suggests that in such cases the adverse publicity (and the possibly that income may be lost and a result) tends have more of a deterrent effect than the fine. While the power exists under the RMA for the Court to require, in addition to a penalty, an offender to pay an amount not exceeding three times the value of the commercial gain made from committing the offence this power has been rarely used.

The ability of enforcement officers and local authorities to carry out their duties in ensuring compliance is currently hampered by minor technical matters and an inability to recover a substantial proportion of their costs. In regard to the former, enforcement officers have had problems positively identifying offenders as they do not have the power to require the offender to provide their date of birth, this is also an issue in regard to recovery of fines. In regard to the latter, the cost of taking enforcement action often far outweighs the costs able to be recovered. This means that less well resourced local authorities sometimes shy away from enforcement action because they do not have the budget for it, or have concerns that the inability to recover the costs of such action will mean other projects or actions have to be deferred.

### ***Key problem summary***

- Practical barriers can hinder effective enforcement and create unnecessary costs for councils.
- Difficult to confirm identify with only name and address.
- Current penalties are an insufficient deterrent.

### **Specific objective**

To ensure that the RMA enforcement regime acts as an effective deterrent to non-compliance.

### **Alternatives**

- Raise the penalties associated with infringement notices. Infringement notices are only applicable to minor or small-scale offending under the RMA. The level of penalty for serious offences that create irreversible damage would remain unaffected by any changes in infringement penalties and would do little to redress the erosion in the deterrent effect of current maximum penalties.
- Extend the timeframes for filing of prosecutions. Many local authorities find it difficult to file prosecutions within existing timeframes. This is considered to largely be a practice and resourcing issue within local authorities and increasing the timeframe could lead to misalignment between the RMA and other legal processes in overlapping legislation.
- Remove the need for a constable to be present when exercising search warrants. This could raise safety issues for enforcement officers who do not have the same training and powers as police. There are also other concerns around transparency in regard to ensuring chain of custody and possible counter legal action.

### **Preferred option**

- *Enable an enforcement officer to direct a person suspected of committing an offence to supply date of birth.* This will improve the ability to confirm identity of suspected offenders. Reluctance to provide information may result in increase in infringements fines for failing to provide date of birth.
- *Extend the definition of 'reasonable costs' to enable the costs awarded by the Courts to encompass the costs of taking court action.* Lessening the economic burden of local authorities undertaking enforcement action against offenders under the RMA (by enabling them to recoup legal costs, and the costs of engaging expert witnesses) will remove a barrier to effective enforcement of compliance with consent conditions.
- *Raise the maximum fine for committing an offence from \$200,000 to \$600,000 for corporate offenders and \$300,000 for offenders who are private individuals.* This updates RMA penalties to take account of inflation, indicates the seriousness of offences, will improve the deterrent effect of penalties and reflects the potential for commercial profits due to non-compliance. Courts are likely to impose greater fines in line with new offences but it may reduce incentives to prosecute individuals due to the introduction of greater fines for corporate offenders.
- *Give the Environment Court powers to direct a review of a resource consent where it is connected to an offence that has been committed.* This provides a process for the Court to reduce potential for repeat offences and enables the Court to prompt a modification of consent conditions as punitive action. This proposal may increase compliance costs and may reduce opportunities for affected parties or the public to participate in the review/modifications of consent conditions. In circumstances of non-compliance, however, this cost is considered acceptable.
- *Remove the provisions of the Act that protect the Crown from enforcement action.* This will ensure that the provisions of the RMA apply consistently and

equitably to all parties but could potentially result in significant additional compliance costs for government departments with operational arms.

- *Enable notices of hearings and the exchange of written evidence in enforcement proceedings be able to be served by email where this is practicable and parties agree.* This will improve the timeliness and reduce the costs of paperwork involved in enforcement processes, whilst also promoting consistency with other administrative processes.
- *Extend the general duty to avoid, remedy or mitigate adverse effects to cover existing buildings.* This corrects a previous omission and recognises that existing building works are activities and it is appropriate for the general duty to avoid, remedy or mitigate adverse effects to apply. There is a small risk that it may be used by vexatious parties to antagonise otherwise complying parties (no greater than present).

### **Net benefits**

The proposed extensions to the powers of local authorities and the Courts are expected to reduce costs associated with the remediation of environmental damage, reduce costs to law-abiding ratepayers (as local authorities will be able to recover a higher proportion of the costs of enforcement action) and ensure that the Courts are able to recover unpaid fines from the correct parties. In particular, providing the Courts with a wider range of powers to impose non-financial penalties will allow more scope to ensure future compliance and redress damage caused by non-compliance that is not able to be effectively remedied through financial penalties.

## **H. Improving decision making processes**

### **Problem**

With a few notable exceptions, decisions on whether to notify resource consent applications are made by local authority officers. Local authority officers also make around 87% of decisions on whether to grant or decline resource consent applications. Independent commissioner make around 1% of decisions on resource consent applications and the rest are made by elected representatives. Though only 12% of decisions on resource consents are made by elected representatives there is still concern amongst applicants around the objectivity, skills and knowledge of elected decision makers.

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

The Environment Court appeal filing fee of \$55 was set in 1988, being a modest increase to the fees set in 1978 regulations, and has remained unchanged since. By comparison the New South Wales Land and Environment Court has standard filing fees of \$AUD 718 and filing fees for corporations of \$AUD 1,436. Comment has been made by RMA practitioners and lawyers that low Environment Court filing fees do little to discourage the lodgement of poorly conceived appeals, and do not indicate to

appellants the seriousness of the consequences and expenses all parties will incur if the appeal proceeds further.

### ***Key problem summary***

- RMA decisions made by local authorities can be of variable quality.
- The Minister of Conservation's decision-making role in relation to restricted coastal activity applications adds little to decision making quality and introduces duplication.
- Environment Court fees are outdated and recover a small proportion of the court's budget compared with other similar courts.

### **Specific objective**

To increase the efficiency and workability of decision-making processes under the RMA.

### ***Alternatives***

- Require compulsory use of independent commissioners for decisions. The number of independent commissioners available, particularly in rural authorities, may be insufficient to meet the additional workload that would result under this option. Many of those who are qualified to act in this capacity also act as consultants to applicants and local authorities raising the potential for conflicts of interest. Commissioners brought in from surrounding areas to meet the expected shortfall may lack the requisite knowledge of local issues and planning documents. This option may also increase hearing costs for applicants as commissioners may charge at full consultancy rates (local elected representatives payments are paid allowances fixed under local government legislation).
- Require Ministerial sign off on contentious consents and plan decisions. Requiring all contentious consents and plan decisions to go through a Ministerial approval step may slow decision making and would be less transparent and certain to applicants and submitters (decisions may be made without further input or involvement unless an additional hearing is held, which would slow down the decision making process further). This option offers little advantage over current appeal provisions in the Environment Court.

### ***Preferred option***

- *Introduce the ability for applicants for and submitters on resource consents and notices of requirement to require there to be at least one independent commissioner on a decision panel, provided that the party making the request bears any additional costs.* This will provide reassurance to applicants and submitters that the panel hearing and making decisions on applications for resource consent and notices of requirements for designations have an appropriate degree of independence, experience and qualifications to make high-quality decisions. The party requesting independent commissioners will need to bear the additional costs of conducting a hearing above those that would have been incurred by the local authority had it appointed elected representatives to the hearings panel. Where the same number of commissioners is used as members of a council hearing panel, it is likely that the costs to the applicant will be higher. This is because the charge-out rates for independent commissioners are likely to be higher than council hearing committee rates.

- *Clarify that local authorities can delegate the power to make decisions on plan changes to staff or any other person.* This amendment reflects common practice amongst many local authorities and the position taken by the Environment Court.
- *Enable applicants for resource consents and notices of requirement to request that their application be directly referred to the Environment Court for a decision, provided that the permission of the local authority that would otherwise have made the decision has been obtained.* This option would reduce duplication of hearings for complex and/or controversial projects where the first level decision is very likely to be appealed but where the project is not of national significance. It may also help to discourage frivolous and vexatious submitters. This option could result in an increase in the workload of the Environment Court, reducing overall efficiency; although any effect is expected to be minor as these applications would likely have come before the Court eventually. Allowing applications for resource consent to be referred directly to the Environment Court may increase the public cost of participation in RMA processes and ultimately serve to discourage public participation. The proposal could encourage local authorities to pass their decision-making role to the Environment Court in instances where the cost of administration is expected to be high and the decision is expected to be controversial. This potentially conflicts with the principles of devolved decision-making and public participation that underpins the RMA, and may be inconsistent with current initiatives to improve the robustness of first-level hearings.
- *Increase the filing fee for lodging appeals with the Environment Court to \$500 (inclusive of GST).* This will enable the Environment Court to recover a greater proportion of its operational costs and bring it into line with other courts. It would also mean that participants would face the truer costs of participation in Court processes and the increased fees may help to deter frivolous or vexatious submitters. Increased filing fees may pose a barrier to wanting to participate and raising legitimate public or private interest issues. The proposed increase in filing fees appears substantial but still falls short of reflecting the true and varying costs to the Court of dealing with appeals.
- *Remove the Minister of Conservation's final decision-making role in relation to restricted coastal activities and matters that are called-in, excluding regional coastal plans.* This would remove confusion over the scope of the Minister of Conservation's power, avoid a potential source of judicial review and complaints about perceived conflicts of interest, and generally bring the Minister of Conservation's role more into line with the Minister for the Environment, who has powers to make final decisions on policy-type instruments such as national policy statements, national environmental standards and water conservation orders, but not resource consents and matters that are called-in. Retaining to Minister of Conservation's final decision-making role in relation to regional coastal plans that have been called-in ensures consistency with other sections of the Act and appropriately reflects the Crown's interests in the coastal marine area.
- *Provide protection for members of boards of Special tribunals against legal action for actions or omissions.* Such a provision will reduce any risk of action being taken against the Board on the grounds of negligence or any other reason. Other decision-makers under the RMA are provided with this protection and, although such action is unlikely, it is important for board of inquiry members to have an equivalent degree of legal protection.
- *Amend the Act so that decisions on notices of requirements are made by the relevant local authority.* This will bring the decision-making process for designations into line with other similar processes in the Act, increase the timeliness of decision-making (by removing a step in the process) and will improve confidence in the independence and rigour of decision-making. This will also provide territorial authorities (into whose plans the designation will be

inserted) with an appropriate degree of participation in the decision-making process.

- *Require hearings to be formally closed no later than 10 working days after the last party has completed presentations.* This will address an increasing trend towards adjourning rather than closing hearings, which undermines the effect of statutory timeframes on decision-making. The 10 day period will allow parties time to respond to any information requests arising out of hearings.

## **Net benefits**

Increasing filing fees, tightening hearing processes and providing greater flexibility as to who can make decisions will increase the rigour of decisions and decision-making processes under the RMA. Better quality submissions and appeals, and more robust decisions are expected to result; this will increase the general level of confidence in the RMA decision-making process. In particular, the proposal will also lead to faster, more transparent, decision making on consent applications for activities in the coastal marine area. Improving the independence of decision-making on notices of requirement will increase confidence in the process. The increased filing fees are unlikely to act as a substantial barrier to legitimate public participation in RMA processes. The proposal to provide for direct referral of applications to the Environment Court could discourage public participation and may be open to abuse by local authorities seeking to avoid costly and controversial decisions. It does, however, have the potential to lead to significant time and overall cost savings. On balance the savings to applicants for resource consents and plan changes and savings to local authorities and the Environment Court will outweigh the effect of reducing opportunities for public participation.

## **I. Other matters to improve workability**

### ***Problem***

There are a number of minor and technical errors in the RMA, some of which result from a failure to make consequential amendments when new legislation was introduced. In particular:

- some of the timeframes for local authority obligations and public participation can create unnecessary procedural delays or compliance difficulties. As an example, parties other than an appellant (objector) or respondent (council) have 30 working days (effectively six weeks) to advise the Environment Court of their intention to join an appeal – this is longer than other appeal periods in the RMA and contributes to unnecessary procedural delays
- all notices of requirement for designations are required to be publicly notified for submissions regardless of the degree of adverse effects on the environment. There is no provision for ‘limited notification’ to apply to notices of requirement for a designation as there is in the case of resource consents.

### ***Key problem summary***

Minor changes are required to improve the consistency, workability and enforceability of RMA processes.

### **Specific objective**

To remove and replace redundant technical provisions with enforceable ones, and to make minor procedural changes to avoid unnecessary delays and improve processes.

### **Alternatives**

- Maintain the status quo and rely on decision-makers and local authorities to find solutions to deal with inaccuracies in the legislation.

### **Preferred option**

- *Require local authorities to send a copy of hearing reports to hearing participants so that they receive it at least 15 working days before the hearing or, if the local authority has not exercised its power to require evidence to be provided within a set time limit, at least 5 working days before the hearing.* This corrects an omission arising out of a merger of sections in the 2005 amendment and will ensure adequate time for participants to review and consider hearings reports.
- *Exclude the time it takes for applicants to respond to requests for information or written approvals from calculations of statutory timeframes for the commencement of hearings and notification of decisions for notified or limited notified consents.* This corrects an oversight in the wording introduced by the 2005 that restricted the application of this exclusion to the circumstances where applications are not notified, or applications that are notified but where there is no hearing. Similarly exclude from calculations of statutory timeframes the time it takes for an applicant to submit other resource consents related to the same project necessary to determine the effects of the proposal. This would help ensure that a local authority is able to consider all consents together in an integrated manner and affected parties are able to understand a project in its totality without exceeding statutory timeframes.
- *Tighten the provisions governing participation of those who seek to join the appeals of others by: reducing the timeframes for notifying the Court of an intention to join proceedings, removing the ability to continue with appeals if the original appellants have withdrawn or settle, and clarifying when the 15 day working period for lodging notices commences.* This promotes consistency with the same timeframes the original appellant had to lodge their appeal and reduces the length of the period in which there is uncertainty amongst all participants as to who is participating in an appeal. This would provide for faster resolution of appeals. There is a small risk that this may provide inadequate time or opportunity for involvement of parties who were not involved in the council hearing such as those who may be representing relevant aspect of public interest and land owners were overseas or recently purchased property.
- *Prevent parties from joining an appeal only on the basis that they represent an relevant aspect of the public interest.* This would mean that parties could only join if they have already made a submission or are directly affected. Any person is able to make a submission on a plan or a resource consent and this proposal will encourage parties with either public or private concerns to participate at the outset rather than join proceedings at a late stage. The result will, however, be a reduction in opportunities for public participation.
- *Apply the same limited notification provisions that exist for resource consents to notices of requirement.* This will reduce the costs for some small to medium scale network infrastructure and infrastructure projects, and lessen the chances those

projects being the subject of objections or appeals from parties who are not directly affected.

- *Make minor and technical amendments to clarify interpretation, and correct errors and omissions arising out of previous amendments to the RMA.* Minor and technical amendments in the following areas will improve the workability and enforceability of the RMA:
  - correcting references to provisions within the RMA and other statutes that have been repealed or are incorrect
  - improving clarity and accuracy of definitions
  - removing the mandatory requirement for local authorities to provide a written reply to Environment Court on the matters raised in appeal
  - removing references to powers and functions of the Minister for the Environment in relation to the Hazard Control Commission which does not exist
  - broadening the scope of the information that must be provided by the consent authority to applicants and submitters during a hearing from “copies of the report” to “any further information requested and a copy of any report prepared”
  - removing requirement to submit copies of plans and documents to regional offices in Auckland and Christchurch
  - correcting minor wording omissions or inaccuracies.

### **Net benefits**

Improving the consistency, efficiency and enforceability of the statutory provisions is expected to facilitate more equitable and effective implementation of the RMA. Reducing the influence of those who seek to join as parties to other appeals will complement efforts to address misuse of the RMA for anti-competitive purposes.

## **IMPLEMENTATION AND REVIEW**

The majority of the proposals to address problems with the RMA will be given effect to by legislative amendment. Legislative amendments will be complemented by guidance and communications material to assist local authorities in understanding how the amendments will impact on them, their processes, and how they are expected to respond.

After the bill is enacted in late 2009 the Ministry for the Environment will commence monitoring the effect and implementation of the Act, investigate performance and take actions to remedy poor implementation in accordance with the functions and powers of the Minister for the Environment currently set out the RMA.

The Ministry for the Environment conducts bi-annual surveys of council performance, including compliance with statutory timeframes. The next monitoring period will capture the 2009-2010 period; this data becoming available in late 2010. This will enable a comprehensive review of the effect of these amendments one year to 18 months after enactment and quantitative evaluation against past trends.

An Environmental Protection Agency will be established in the second phase of reform that will hold the responsibility for administering an enhanced monitoring programme. This will improve the government’s ability to accurately evaluate local

authority and RMA implementation performance against clearly articulated expectations.

## CONSULTATION

The government's timeframe for implementing the first phase of RMA reform has ruled out comprehensive public consultation – best endeavors were, however, made to ensure public and professional input into the policy development process.

The Ministry for the Environment led a series of workshops in mid to late 2008 with officials from the natural resources inter-agency network, comprising the Ministry for the Environment, Ministry of Agriculture and Forestry, Department of Conservation, Ministry of Fisheries, Ministry of Economic Development, Land Information New Zealand, Te Puni Kōkiri, Treasury, Department of Prime Minister and Cabinet, and the State Services Commission. This work, amongst other things, established a common position across these agencies on problems with the RMA and high level options for addressing them within the context of environmental sustainability. Although this consultation primarily involved the core agencies in the natural resources inter-agency network, other agencies with overlapping interests, such as the Ministry of Justice and Ministry of Fisheries were also involved.

From November 2008 to January 2009 the Ministry for the Environment convened a working group comprised of officials from all government departments and conducted a series of workshops aimed at building on the problems and high level options agreed by the natural resources network and identifying potential solutions.

On 1 December 2008, the Minister for the Environment sent a letter to all local authorities inviting comment on potential options for addressing problems with the RMA and any further suggestions. The Minister's request was complemented by postings on the Ministry for the Environment website inviting comments and suggestions. By 20 December 2008 the Minister for the Environment and Ministry for the Environment had received 121 letters and emails (including 45 letters from local authorities) with detailed comments and suggestions from professional associations, legal practitioners, industry representatives, district and regional councils and iwi authorities. All responses were analysed and suggested amendments were evaluated by the officials working group and Minister's Technical Advisory Group.

Key messages extracted from responses to the Minister's request include:

- retain the fundamental purpose and principles of the RMA
- improve plan making processes
- ensure independent high-quality decision-making on resource consents
- simplify processes for minor applications
- establish an Environmental Protection Agency and reduce delays for infrastructure projects
- clarify and simplify the cost benefit analysis councils are required to undertake with promoting plan changes
- improve the processing of resource consent applications, particular in relation to requests for further information and decisions on notification
- prevent frivolous and vexatious objections and the abuse of RMA processes by trade competitors
- remove the Minister of Conservations "veto" over coastal consents
- Improve enforcement

- provide clearer and more effective central government direction to local authorities on matters of national importance
- reduce overlaps and improve linkages with other related legislation such as the Local Government Act 2002 and the Conservation Act 1987.

On 16 December 2008 the Minister for the Environment announced the appointment of a Technical Advisory Group (TAG) to support the Government's programme of reform of the RMA. Ministry for the Environment officials provided the TAG with background material, a report reflecting the outcome of workshops attended by the officials working group, supplementary reports to address matters arising from TAG workshops and copies of responses to the Minister's request for comment and suggestions. Between December 2008 and January 2009 the TAG, supported by Ministry for the Environment officials, held six full-day meetings to consider potential options for addressing problems with the RMA.