Report to Technical Advisory Group

Ministry for the Environment RMA Review Team

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Summary of proposed amendments:

The following represents an initial attempt to separate amendment options into two reform phases based on information currently available.

RMA Review Phase One

Streamlining consent processes

1. Reintroduce security for costs.
2. Allow the Environment Court to refer a consent back to the council if the Court has determined that there is sufficient information for the consent to continue to be processed.
3. Remove the Minister of Conservation's final decision making powers over Restricted Coastal Activities (see also recommendation 6 in the plan making process as an alternative).
4. Allow councils discretion to determine whether a hearing is necessary based on the content of submissions and outcome of any pre-hearing meetings.
5. Remove the need to refer to all Part II matters when making decisions on consents for Controlled and Restricted Discretionary Activities (note that this recommendation would need to be amended if Controlled Activities were to be removed as a category as suggested as an option under the Plan Making Process).
6. Allow resource consent and plan change applicants to make binding requests for their applications to be heard by an independent commissioner or panel (as opposed to elected representatives).
7. Allow the applicant's Assessment of Environmental Effects to be "adopted" by the consent authority to avoid the consent authority having to repeat material that it is in agreement with in subsequent reports.

Streamlining plan making processes

1. Extend the period under which consultation is conducted under other enactments may be used for RMA plan purposes from 12 months to 36 months.
2. Remove the requirement for local authorities to summarise and notify a summary of submissions. However new clauses should provide that councils may, without formality, seek comment and views from those they consider will be directly affected by matters raised in submissions.
3. Remove further submissions from plan preparation, variation and plan change processes.
4. Allow local authority initiated plan changes to be called in.
5. Remove the ability to appeal against, and seek the withdrawal of, entire plans.
6. Remove Restricted Coastal Activities as a separate class of resource consent and provide transitional provisions that make them Discretionary Activities until such time as plans are amended. Plans will be required to be amended within 2 years. This may require consequential changes to the provisions relating to the NZCPS.

Improving and strengthening central government direction

1. Increase the weight decision makers are required to give to Crown submissions and national environmental standards (NES).

2. Enhance call-in provisions to streamline and improve processes.
3. Lift the statutory cap on Environment Court judges
4. Allow councils to make their plans consistent with national policy statement (NPS) objectives and policies, and to develop rules to give effect to NPS without having to undergo the full public consultation process.
5. Allow councils to modify their plans to be consistent with NES through a truncated plan change process.
6. Introduce linkages between NES and other section of the RMA (eg. Part 3).
7. Allow for minor amendments to NES where changes are within the original policy intent.
8. Amend provisions so that there is more flexibility in the way NES relate to other planning instruments.
9. Enable councils to issue Certificates of Compliance specifically for NES.
10. Make it explicit that local authorities are responsible for monitoring and enforcing compliance with NES.
11. Provide the Minister for the Environment with powers to withdraw a proposed NPS or NES at any time prior to it coming into effect.
12. Develop a strategy and complementary review and monitoring programme to guide government intervention in RMA processes.

Improving the interface between the RMA and other legislation

1. Consolidate all contributions into LGA (single regime in LGA policies).
2. Clarify relationship between LTCCP outcomes and RMA objectives.
3. Initiate wider review of charging principles.
4. Introduce statutory timeframe for decision making on concessions.
5. Provide for integrated consent and concession process, where applications are lodged simultaneously.

Complementary Measures

1. Enable enforcement action to be taken against Crown Organisations (as defined in the Crown Organisations (Criminal Liability) Act 2002).
2. Raise the maximum level of penalties for RMA offences.
3. Raise the penalties for infringement notices.
4. Make contravention of a resource consent a specific offence.
5. Enable local authorities to charge non-consent holders for monitoring and enforcement work undertaken to ensure compliance.

RMA Review Phase Two

The follow matters have been identified as possible work areas for the second phase of the RMA review alongside new water management, resource allocation and urban programmes. The options listed have not, in every case, been subjected to more than preliminary discussions and should be regarded as options at this stage only.

Priority consent process

1. Establish a central processing authority to receive and process applications for priority projects.

Consent processes

1. Set parameters around the use of s.37 (ability of councils to extend or waive compliance with timeframes) to limit its use to justifiable circumstances only.
2. Strengthen s.88(3) (the ability to return incomplete resource consent applications to applicants) and amend and clarify s.92 (further information requests) to reduce reliance on, and use of, further information requests to rectify deficient applications or delay determination of resource consent applications.
3. Limiting appeals in the Environment Court (could include removing hearings being heard de novo or limiting some appeals to points of law and process only).

Plan making processes

1. Regulations to standardise the structure, format and expression of plans and plan provisions.
2. Regulations to introduce a set of 'national definitions' to be used across NPSs, NESs and RMA plans.
3. Provide the Minister for the Environment with powers to produce Resource Management Orders (a form of Minister initiated plan change to deal with issues of national, regional or local significance that local authorities are struggling to resolve).
4. Simply s.32 evaluation requirements to reduce the repetitiveness of the process and focus on necessity and consequences of implementation (which may include financial consequences).

Improving the interface between the RMA and other legislation

1. Improve the relationship and interface between the Hazardous Substances and New Organisms Act and the RMA.

Introduction:

Purpose

The RMA is frequently criticised both for unnecessary delays and compliance costs that hinder economic growth and major infrastructure development. On the other hand, given the negative trend in several key environmental indicators,[1] the RMA is also frequently criticised for failing to protect the environment. The recently elected National-led government campaigned on reforming the Resource Management Act 1991 (RMA) to address these issues. The Government's intention is to implement the necessary changes to the RMA and related legislation as expeditiously as possible, and plans to introduce a Bill to the House including a first phase of amendments focussed on streamlining and simplifying processes within 100 days of taking office.

This report provides the Minister's Technical Advisory Group (TAG) with options to address issues with the RMA and related legislation. Many of the issues identified by the government are complex and have been the subject of previous amendments. In some instances – particularly where issues cross legislative boundaries – a strong evidential basis for intervention is lacking and Ministry for the Environment officials have provided options for consideration based on anecdotal information. In some cases anecdotal evidence will be satisfactory to satisfy Treasury's Regulatory Impact Analysis requirements, in others further research will be required to allow legislative amendments to proceed.

There are real practical issues with particular provisions of the RMA and with its implementation generally. Officials consider that these issues arise because:

- *Devolved RMA decision-making has exacerbated capacity issues in local government, and led to variability in planning controls and the speed and quality of consent processing.*

  Resource management decision-making is complex, 'resource-intensive' and can demand a high level of capability. It can also be difficult in some cases, both practically and politically, for councils to factor national benefits, priorities and strategies into planning and decision-making when the costs of decisions fall locally.

- *Ad hoc government participation in RMA processes increases uncertainty for businesses, local government and communities.*

  Central government has recently started to make more use of the RMA instruments that offer greater national direction and guidance (including those instruments added in 2005). There is, however, no overall strategy for the use of these powers, which creates a lack of certainty for all parties about when and how the Government will intervene.

- *Cumbersome planning processes make it harder for councils to respond quickly to changing circumstances or new evidence.*

[1] Evidence collected by the Ministry for the Environment on the state of the New Zealand environment suggests that the most significant issues relate to the effects of freshwater consumption and land use intensification in some regions, water quality degradation in many catchments, and greenhouse gas emissions. The trends indicate that, if we do not change current paths, we risk hitting environmental limits or effects that are irreversible or very costly to remedy.

Good RMA implementation relies on high quality statutory plans. Broad rights of public participation and provision for multiple appeals on consents and plans can cause considerable delays in RMA decision-making. Quicker final decisions are needed on both statutory plans and resource consents, especially for major infrastructure projects (although the interface with other legislation can also be a factor in delays). This suggests a need for reassessment of the balance between public participation and appeal rights on the one hand, and efficiency, effectiveness and responsiveness on the other.

- *Effective and efficient resource allocation is not occurring and new or expanding high-value uses are not being provided for under current RMA practice.*

  Problems are most keenly felt where resources are at or approaching full allocation. In some areas fresh water, coastal space and air-sheds are affected. The current first-in first-served system of allocation evolved from case law at a time when there was less resource competition and no explicit Government direction. The 2005 RMA amendments enabled councils to develop alternative forms of resource allocation, but there has been little trialling or implementation of these and it is still too early to determine their effectiveness.

Collectively these issues result in:

- Increased processing times and costs – both in relation to plan making and obtaining resource consents.
- Increased uncertainty – for local government, applicants and the community.
- Sub-optimal environmental, social and economic outcomes.

General policy options

- *Ensure efficient handling of projects of national significance*

  The RMA call-in provisions were amended in 2005 to broaden the range of proposals of national significance that could be called-in to include designations and private plan changes. Another important change was that the determination of called-in proposals passed from the Minister to boards of inquiry. Further refinement of the Ministerial intervention powers could increase the efficiency of consent processing for nationally significant proposals and ensure that matters of national significance are appropriately factored into local decisions.

  Ministry for the Environment officials are currently working with officials form other departments, including Treasury and the Ministry for Economic Development, to identify potential options and thresholds for consenting of priority projects. A supplementary report will be provided to the TAG.

- *Further streamline plan making and consent application processes*

  There are a range of 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. In general terms, policy choices will be required to balance local political accountability and multiple opportunities for public participation, against speed, efficiency and consistency of outcome –

although the preferred balance might be different for plans and consents. Any streamlining of plan making and consent processes will need to take into account any proposed measures to improve the participation of Māori in resource management (either through policy or Treaty settlements), especially given the concerns of many iwi about council performance in these areas.

- *Improve clarity and effectiveness of central government intervention*

  The RMA was amended in 2005 to enhance the choice of the Government's intervention options. Central government has recently shown an increasing willingness to participate in resource management processes via the use of call-in. It has also started to promulgate National Policy Statements and further National Environmental Standards. These actions indicate that these amendments are beginning to take effect.

  Early experience with the call-in process appears to have been positive, but nevertheless some have criticised the central government's participation in the RMA for being *ad hoc* and for increasing rather than reducing uncertainty. The government could choose to adopt a more strategic, transparent and outcomes-driven approach to central government involvement in RMA processes (including direct Crown involvement via submissions and appeals). A clear and transparent strategy guiding the use of its intervention powers should provide government with greater confidence to use the available tools and improve their effectiveness. Greater transparency to central government's involvement in RMA processes should also increase certainty for local government, applicants and the wider community.

- *Improve interaction with other legislation*

  Legislation other than the RMA can influence how projects progress. Process alignment to avoid duplication and uncertainty is desirable. Amendments to both the RMA and other legislation are necessary to improve synergy, reduce duplication and increase certainty.

- *Amend the purpose and principles of the RMA*

  Previous amendments to the purpose and principles of the RMA have tended to emphasise environmental protection and Māori rights and interests. While there is much evidence to support changes to RMA processes, the Ministry for the Environment has little evidence to suggest the need for significant amendments to the purpose and principles of the RMA.

  The government could, however, consider inserting additional matters deemed to be nationally significant, such as infrastructure development, into the principles of the RMA and amending section 8 to clarify obligations with respect to the Treaty of Waitangi. Such actions would require political judgements to balance the necessity and potential benefit of the change against the potentially significant social, environmental and economic implications (all plans would, for instance, need to be changed and applicants would face an uncertain regulatory environment until case law settled).

- *Enhance resource allocation*

  Options to help promote more sustainable and efficient resource allocation include:

- Further facilitating the establishment of clear environmental bottom lines, assessment methodologies and thresholds.
- Further simplifying the transfer of resource consents and reallocation of rights to available resources.
- Providing additional direction and support to councils to facilitate the effective use of economic instruments for resource allocation.
- Providing tools to enable councils to address the ‘gold rush’ mentality that tends to follow proposals to amend allocation regimes. This could involve allowing councils to refuse to receive applications in specific circumstances until an appropriate allocation framework has been finalised.

The Government has, however, made it clear that further work will be undertaken on freshwater policy and it is through this process that allocation options will be identified and assessed. For this reason, allocation options are not addressed in this report.

1: Improving and Streamlining Consent Processes

Issue: Slow and Costly Consent Processes

Slow and complex consent application and processing requirements add time and cost to projects. Some local authorities have a shortage of experienced decision makers to sit on resource consent hearings.

Background Context:

- The 2005/06 survey of consent authorities shows that approximately 50,000 resource consents are processed annually. Median council charges for processing these consents range from $440 (non-notified land-use consent) to $10,800 (notified coastal permit). Total council costs for processing resource consents equates to approximately $73 million per year.
- 2008 research demonstrated that council costs generally make up a small component of the overall costs to applicants. For example a survey of subdivision costs found that on average consent processing fees made up 7% of the total costs to applicants ($1,340 per lot).
- The 2005/06 RMA survey showed that 74% of non-notified applications, and 56% of publicly notified applications are processed within statutory timeframes. Preliminary data from the 2007/08 RMA survey suggests that this has dropped further.
- 2008 research on subdivisions shows that actual calendar timeframes for consent processing are considerably longer than statutory timeframes (which excludes when the clock is 'stopped' such as when awaiting further information), with an average calendar processing time of 132 days.
- The 2005/06 RMA survey showed further information is requested on 31% of applications and timeframes are extended on 28% of applications. Preliminary data for the 2007/08 survey indicates the use of both sections 92 and 37 is increasing.
- 1,200 decision makers have been accredited by the *Making Good Decisions* accreditation course. However, in some locations there remains a lack of experienced decision-makers to sit on hearing panels. Councillors sitting on hearings, while providing local knowledge, are not specialists in RMA planning, and yet are expected to be effective in the quasi-judicial arena of resource consent hearings.

Policy Options:

1. Limit criteria to narrow and clarify the scope of when councils are able to use section 37 to extend consent processing timeframes.
2. Clarify that poor council performance against statutory timeframes can trigger a Ministerial Review of processes and functions.
3. Remove the Minister of Conservation's decision making role in respect of restricted coastal activities (see also recommendation 1 in the Plan Complexity part of section 3 as an alternative).

4. Provide councils with discretion whether necessary to hold a resource consent hearing.
5. Direct referral of any consent to the Environment Court at the request of the applicant.
6. Administrative costs of hearings to be shared between the participants (applicants and submitters).
7. Exclude Part II considerations from controlled/restricted discretionary activities.
8. Simplifying the requirements for non-notified resource consent applications.
9. Allowing the applicant's AEE to be adopted in the council officer's report when complete and accurate.
10. Allow applicants to choose whether they want their application to be heard by council elected representatives or by an independent panel.

Commentary:

Limiting the scope and ability of councils to use section 92 would provide more certainty for applicants and reduce delays. Changes made in 2005 enable applicants to refuse to provide information and have the application considered on the merits of the information provided (albeit risking refusal of consent). Any further changes need to ensure there is no resultant reduction in the quality of decisions. Change is needed to the section 92 provisions introduced in 2005 to streamline and clarify objections and appeals processes.

Reducing the ability of councils and applicants to use section 37 to extend statutory timeframes may reduce delays. Many councils use of section 37 is due to capacity and resourcing issues - reducing the ability of councils to extend timeframes will not solve this issue.

The interaction and functioning of sections 37, 88 and 92 is a wider issue that needs to be considered comprehensively. Some councils consider that the present section 88(3) threshold for receiving an application is set too low, which can lead to successive requests for further information via section 92 and waivers of time limits under section 37. Many applicants are frustrated by iterative section 92 requests and resultant uncertainty around timelines – a single comprehensive process with firm timelines may be required. It may be more appropriate to set a higher threshold for receiving applications and blend the section 88(3) and section 92 processes. Such an approach could have implications for notification decisions and could require significant changes to the RMA, hence it should be deferred to the second phase of reforms.

Ministerial review of poor performing councils can currently be undertaken (section 24A); however, to date there has been limited use of this. Clarifying that poor performance against timeframes can trigger such a review and any subsequent recommendations from the Minister are binding will strengthen Minister's powers. In combination with a greater use of these powers, this will incentivise compliance with timeframes.

Removal of the current decision-making role of the Minister of Conservation for restricted coastal activities will reduce the time it takes for these consents to be processed. It is probably still appropriate for the Minister of Conservation to retain the option of having an appointee on a hearing panel, given the Minister's other legislative responsibilities in relation to the coastal marine area.

Providing councils with some discretion over the necessity to hold a resource consent hearing will reduce costs and delays associated with the requirement to hold a hearing. Currently a hearing is necessary if any submitter indicates they want to be heard or if the applicant

requests a hearing. Additional criteria for holding a hearing could include the council determining that a hearing is necessary to consider and/or clarify issues. When council decides a hearing is not necessary, all parties would retain their appeal rights on the substantive decision on the application. This may result in an increase in appeals if potential council hearing participants do not get the opportunity to be heard. This risk may be mitigated by greater the use of pre-hearing meetings to (a) refine issues in contention, and (b) provide an avenue for affected parties to speak to their concerns and have them reported to the decision makers.

Direct referral of any consent to the Environment Court is one way of avoiding duplication associated with two hearing processes, particularly for large or controversial projects - which are very likely to be appealed. This option was put forward in the 1999 Resource Management Bill; however, it was discarded by the select committee due to concerns about the loss of local decision-making, community participation and other concerns.

If this was developed as an option, in order to ensure that Environment Court time is not wasted dealing with minor issues, suitable applications need to be directly referred, it is therefore appropriate to identify a set of criteria for when direct referral is an option. Adequately resourcing of the Environment Court is a critical success factor for such an option which will increase court workload. Lack of resourcing of the Environment Court would exacerbate delays in having cases heard.

Cost sharing of the administrative cost of hearings between the participants (applicants and submitters) by way of either a bond or deposit is likely to ensure that parties make wise use of hearing time. While this may be some deterrent to frivolous submitters, it may also impact on the ability of directly affected parties to engage in the process. However this may be able to be overcome by the ability for directly affected participants to receive a refund at the end of the process. The administration of this option would likely be quite onerous for each council.

Clarifying that Part II does not need to be considered when making a decision on controlled and restricted discretionary activities will reduce the reporting requirements for activities with minor effects. This is one of a trio of options to ensure that activities with only minor effects are not unnecessarily tied up in bureaucracy. Part II considerations are a factor in determining what activities are controlled or restricted discretionary (i.e. limited effects) during plan development and should not need to be considered again on each individual application. This option will result in the inability to grant consents for restricted discretionary activities on the basis of Part II.

Simplifying the section 104 and section 113 requirements (matters to be considered and decision reporting requirements respectively) for non-notified resource consent applications is the second option. Non-notified applications have by definition already been determined to have only minor effects and so should only have limited matters to consider. However, in reality there are large and complex applications considered on a non-notified basis and applying such a simplification to all non-notified consent could reduce the quality of decisions made. However this option could be more suitable to apply to controlled and restricted discretionary activities similar to the option above.

Alternatively an activity specific approach could be adopted, with a schedule to the RMA identifying which activities (e.g. tree trimming, moorings) reduced section 104 and 113 requirements apply to. This type of approach has been successfully adopted in the recent Building Act amendments.

A related option for streamlining processes for minor consents involves specifying the applicant's AEE, when complete and accurate, can be adopted by the council. This reduces

the need for lengthy reporting, particularly where the council is in agreement with the applicants AEE.

Greater use of independent commissioners on resource consent hearings is likely to increase the robustness of decisions made, particularly for particularly complex or technical applications. Allowing applicants to choose whether they want their application to be heard by council elected representatives or an independent panel may aid in reducing the risk of poor decision-making on major projects.

Preferred Option(s):

1. Allow the Court to refer a consent back to the council if the Court has determined that there is sufficient information for the consent to continue to be processes.

2. Remove the Minister of Conservation's final decision making powers over Restricted Coastal Activities (see also recommendation 6 in the plan complexity section as an alternative).

3. Remove the need to refer to all Part II matters when making decisions on consents for Controlled and Restricted Discretionary Activities (note that this recommendation would need to be amended if Controlled Activities were to be removed as a category as suggested as an option under the Plan Complexity part of section 3).

4. Allow resource consent and plan change applicants to make binding requests for their applications to be heard by an independent commissioner or panel (as opposed to elected representatives).

5. Allow the applicant's Assessment of Environmental Effects to be "adopted" by the consent authority to avoid the consent authority having to repeat material that it is in agreement with in subsequent reports.

Expected Outcomes:

1. Clearer, faster procedures around challenges to council decisions to decline applications on the basis on insufficient information being supplied in response to requests for further information.

2. Less complex consenting processes for restricted coastal activities with shorter timeframes.

3. Lower costs to applicants preparing applications for controlled and restricted discretionary resource consent applications, and faster and less costly processing of such applications.

4. Higher levels of applicant confidence in the robustness and impartiality of decision makers sitting on resource consent hearings.

Issue: Trade Competition and Frivolous and Vexatious Objections.

Significant cost and delays can be experienced by resource consent and private plan change applicants in defending their applications against objections and appeals from trade competitors or frivolous and vexatious parties.

Background Context:

- Cases such as *Westfield (New Zealand) Ltd v North Shore CC* [2005] 2 NZLR 597 (SC) illustrate the use the RMA process to delay commercial projects, 'dressing up' their trade competition concerns as RMA matters, such as district plan integrity.
- Existing provisions in the RMA designed to reduce influence of objections and appeals motivated by trade competition, or frivolous or vexatious reasons are not effective in addressing these issues at the council hearing level.
- The powers in section 41C (introduced in 2005) to strike out frivolous or vexatious submissions being used at council hearings have been used rarely (if at all). The rights of appeal against strike out do not make this an attractive option.
- Two of the five RMA cases heard in the Supreme Court are, in effect, trade competition related.

Policy Options:

1. Reintroduce security for costs for appeals.
2. Increase appeal lodgement fees.
3. Introduce appeal hearing fees (per half day basis).
4. Cost recovery for hearings (charging participants for time, documentation fees, and resources).
5. Introduce ability to award indemnity from costs.
6. Limit the definition of 'environment' to natural and physical resources.
7. Either: (a) Strengthen the wording in s.104(3) to also exclude "negative economic impacts due solely to the approval of an application on individuals, businesses, or communities"; Or (b) Strengthen the wording in s.104(3) to also exclude "negative economic impacts due solely to the approval of an application on competing businesses, when considering an application".
8. Use of Commerce Act 1986 powers.
9. Limiting consideration of effects on persons, when a consent is notified to people "directly affected". A consequential amendment could then provide a definition of what 'directly affected' meant (which could exclude financial effects).
10. Raising the threshold of effects as to when people are considered adversely affected above *de minimus.*

Commentary:

Trade competition pre-dates the RMA as an issue and has proven difficult to address. A range of these options put forward here are in effect ‘economic disincentives’ which may reduce frivolous and vexatious objections at the appeal stage. In some cases, however, it is acknowledged that the effect may be marginal given the scale of benefits that trade competitors can leverage through RMA processes. No legislative change is needed to effect options 2, 3 and 4. It can be very difficult to clearly identify when frivolous or vexatious reasons are motivating appellants, particularly when such people may also have valid resource management concerns. Economic disincentives are not likely to dissuade well-resourced trade competitors, but will have negative effects on participation by individuals and the community.

The ability to award indemnity from costs safeguards the opportunity for directly affected parties to be involved in the process without costs being awarded against them.

While limiting the definition of the environment would limit the ability for trade competitors to argue economic and social adverse effects, this change would also remove the ability to take economic benefits into account. Consideration of economic impacts is also an important consideration when making decisions with ‘reverse sensitivity implications’ (see for example the comments of the Environment Court in *Land Equity Group v Napier CC* [2008] W028/2008).

Strengthening s.104 (the main decision making section for resource consents) may assist in ruling out consideration of loss of profit or employment losses from the arrival of a competitor on existing businesses. It will not however overcome the use of environmental effect arguments used by trade competitors to oppose other businesses. There is also a risk that strengthening the wording of section 104 along the lines suggested may hinder local authorities in managing urban environments.

The purpose of the Commerce Act 1986 is to promote competition in markets, but linking Commerce Act provisions to the RMA will not resolve the trade competition problem in resource management decision-making. The Commerce Act prohibits collusion, price fixing, the abuse of market power, and the purchase of a business's shares or assets if that purchase will lead to a substantial lessening of competition in the market. Given that any citizen has the right to make an objection under the RMA, such objections (even if motivated by trade competition reasons) cannot be considered an example of collusion or abuse of market power, and therefore cannot be prohibited under the Commerce Act.

Limiting notification to those ‘directly affected’ and then placing restrictions on what directly affected means effectively creates a form of standing. Based on experiences with the former Town and Country Planning Act 1977 this may simply result in additional court cases centred around who is directly affected. An further unintended consequence may again be to limit the ability to manage effects of reverse sensitivity where the only effects are limitations on business operations.

The consequences of raising threshold for determining affected parties above *de minimis* have yet to be fully considered. Additionally an appropriate replacement threshold would need to be put in its place. Such an approach may rule out objections and appeals from competitors who are, at best, affected only in a *de minimis* way.

Preferred Option(s):

1. Reinstate security for costs.

2. Give Environment Court the ability to award indemnity for costs.

Expected Outcomes:

1. Fewer appeals from less well resourced objectors with trade competition, frivolous, or vexatious motives.

2: Improving and Streamlining Plan Making Processes

Issue: Slow and costly plan preparation processes

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

Background Context:

- The first generation of plans prepared under the RMA took, on average, nine years to prepare with many costing millions of dollars. Even now, four councils have district plans that are not fully operative; some 17 years after the RMA came into force. Resolution of appeals (over five years on average) was the greatest contributor in terms of time, while costs were spread relatively evenly between plan consultation and preparation, the statutory submissions and hearing process, and appeals.

- Despite the views of the High Court in *Westmark Investments v Auckland City Council* [1995] HC72/95 vague appeals to entire plans are still being lodged. These can take years to resolve while potentially lessening the effectiveness of plan provisions and adding cost and uncertainty to other parties.

- The costs and time associated with plan changes vary greatly. Some plan change may only take a year, while other more than six years. Surveys of plan changes in 2008 found costs ranging between $19,000 and $800,000. Key determinants of time and cost are: the scale and complexity of the change; the number of submissions and further submissions made to it; and the number of appeals.

- A 2008 study of plan changes found that further submission process added up to five months to plan change processes, but generally had little effect on the decision of the consent authority. In most cases further submissions were being lodged by those who has already made a submission. Historically, the further submission process has also been used by some companies to challenge trade competitors.

Policy Options:

1. Enable council initiated plan changes to be called-in.

2. Clarify that appellants cannot appeal entire plans or seek their withdrawal.

3. Remove the further submission process from plan changes only.

4. Remove the mandatory requirement for there to be a summary of submissions, and remove the further submissions processes from the plan preparation and change process. New clauses would be included to signal, and enable, councils to seek comments of those who may be affected by submissions.

5. Extend the timeframe under which consultation carried out to fulfil legislative requirements under other legislation can be used in the development of RMA plans from 12 to 36 months.

6. Replace the requirement for there to be a decision on each individual submission with a requirement for a decision report that provides decisions and reasons group according to subject matter.

7. Introduce new Ministerial powers to impose a moratorium on private plan change requests in the lead up to notifying a proposed plan, if requested by a council

Commentary:

These options are will have an incremental and complementary effect.

While only a small percentage of appeals challenge entire plans, the impact on others of such appeals can be great (in terms of holding up provisions that may be of benefit to the environment and community). It was also noted in *Westmark* that the Court has not ability to delete entire plans in any event.

The removal of further submissions brings the RMA plan and plan change process in line with many other planning processes in New Zealand and overseas while reducing timeframes, costs and the opportunities through which trade competitors can challenge each other. The ability of local authorities to seek comments of those who may be affected by submissions (and who may have otherwise lodged a further submission) would install a mechanism similar to that which existed under the former Town and Country Planning Act 1977.

Case law (see *Queenstown Lakes DC v Macaram Grand Lakes* [2002] C156/02 for example) has implied that decisions need to be made on each individual submission. In same cases this has been interpreted by councils as meaning decisions on individual submission points (of which there may be thousands). To write and send out decisions in this manner has proven to be costly in terms of time and resources. A decision report that deals with decisions by topic rather than by individual submission may present a less costly option, encourage decisions to be made in a way that considers the environment in an integrated manner, and enables readers to see decisions in the context of others related to the same matter.

The ability to impose a moratorium on plan change in the period in the lead up to a plan being notified was suggested by local authorities as a means of ensuring resources were not diverted at this crucial time. However a similar effect has been achieved by some local authorities though non-statutory means (agreements, or working the plan change into plan change provisions prior to notification). A moratorium would also effectively extend the overall period in which a request for a private plan change can be rejected prior to its notification beyond two years (clause 25(4)(e)).

Preferred Options:

1. Enable council initiated plan changes to be called-in.

2. Clarify that an appeal can not be made that challenges a plan in general terms or seek the deletion or withdrawal of an entire plan.

3. Remove the mandatory requirement for a summary of submissions and further submissions processes from the plan preparation and plan change process. New clauses would be including signalling that councils may seek informal comments of those who may be directly affected by matters raised submissions prior to the hearing.

4. Extend the timeframe under which consultation carried to fulfil legislative requirements under other legislation can be used in the development of RMA plans from 12 to 36 months.

5. Replace the requirement for there to be a decision on each individual submission with a requirement for a decision report that provides decisions and reasons group according to subject matter.

Expected Outcomes:

1. Less time and cost associated with resolving appeals.

2. Less and time and cost for councils taking a proposed plans and plan changes through submission, hearing and decision making stages (potentially measured in months and $10,000s).

3. Greater use of consultation carried out under other enactments to inform the preparation of RMA plans. This is expected to reduce the duplication of consultation over some issues (with inherent cost and time savings), and reduce consultation fatigue and confusion amongst those consulted.

4. Improved effectiveness and responsiveness of plans to address environmental issues.

Issue: Plan complexity and inconsistency

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

Background Context:

- In comparison with some overseas jurisdictions New Zealand plans demonstrate a high degree of variability and complexity. In part this is due to the devolved nature of decision making under the RMA, the comparative lack of central government intervention, and the complexity of a statute that sees plans catering for seven classes of activity (if permitted and prohibited activity classes are included). By comparison there are three activity classes in Victoria (Australia), six in New South Wales, and three in the United Kingdom.

- The Restricted Coastal Activity class is limited in its geographic application, and makes up less than 0.1% of all resource consent applications. Controlled activities make up 19% of all resource consents, but are generally for minor matters (tree trimming for example) that could equally be permitted subject to carefully considered permitted activity standards and terms. Most overseas jurisdictions do not have an equivalent of the controlled activity category.

- Across 85 local authorities there are more than 2,000 types of zone, many of which differ only in matters of detail. Similarly each of more than 130 RMA plans has adopted its own particular structure, format, style and expression. Standards applicable to some ubiquitous activities with identical effects are inconsistent from one plan to the next. Such diversity has caused difficulties for Ministry for the Environment officials drafting NESs and has been the source of frustration amongst network utility operators such as Transpower and Telecom who work with the provisions of many plans. In a study of 8 district plans there were 448 different definitions for 123 relatively common terms.

Policy Options:

1. Remove Restricted Coastal Activities as a separate consent class and provide transitional arrangements for them to be considered as Discretionary Activities until the NZCPS and plans are able to be amended [note also the alternative option of removing the Minister of Conservation decision powers under the consent topic area].

2. Remove the Controlled Activity class as separate activity class and provide transitional arrangement for them to be considered as Restricted Discretionary Activities until such time as they can be re-written in plans as Permitted Activities (or where this is not possible, formally included as Restricted Discretionary Activities – possible subject to reduced Schedule 4 requirements).

3. Remove Non-Complying Activities as a separate activity class (transitional arrangement would make them Discretionary Activities until such time as plans were amended).

4. Amend Section 32 of the RMA to require a more rigorous economic cost/benefit analysis.

Commentary:

The Resource Management Amendment Act 2005 amended sections 67 and 75 so that the only mandatory provisions that need to be included in plans are objectives, policies and rules. To date this has had limited effect by virtue of many plans only entering the review stage now.

If local authorities take up the opportunity to reduce the content of their plans they will be less bulky though the provisions that remain may not necessarily be less complex or less inconsistent with those of other local authorities. The main tools to achieve consistency at present are NPS' and NES'. Additional tools that could be incorporated into the RMA (standard plan structures, formats and the like) require further consideration and consultation to a degree that is unlikely to be able to be accommodated within the 100 day timeframe (and therefore have been listed in Annex A for consideration as part of the second phase of amendments).

Removing the Restricted Coastal Activity category will have a limited effect on reducing plan size and impact mainly on regional coastal plans. It does however represent and incremental and relatively easily achievable step in reducing the overall number of consent classes contained in plans that some applicants find confusing.

Removing Controlled Activities are likely to have a greater impact on reducing plan complexity than Restricted Coastal Activities. In some cases Controlled Activities can re-worked as Permitted Activities in a plan (such as when consent conditions are almost always the same), with the matters of control becoming the basis for permitted activity standards. In other cases, the similarity with Restricted Discretionary Activities means the remainder can be transferred into that class with little difficulty. While Restricted Discretionary Activities can in theory be declined, most are not (and it unlikely that, given the scale of them they would be). As such it is considered than an increased business uncertainty arising will be more perceived than real.

Preferred Option(s):

1. Remove Restricted Coastal Activities as a separate consent category and provide transitional arrangements for them to be considered as Discretionary Activities until plans are able to be amended.

2. Remove the Controlled Activity class as a consent category with transitional arrangement for Controlled Activities to be considered as Restricted Discretionary activities until such time as they can be allocated a replacement activity category in amendment plans.

Expected Outcomes:

1. Shorter, less complex plans.

2. More activities having Permitted Activity status, though subject to additional standards, terms and conditions.

3. A slight increase in the use of the Restricted Discretionary consent category for former Controlled Activities local authorities have not been able to transfer to the Permitted Activity category.

4. Easier drafting and implementation of NPS and NES.

3: Improving and Strengthening Central Government Direction

Issue: Unclear Central government intervention

Broad criteria and a significant degree of ministerial discretion mean that it is unclear when central government will intervene in a matter, provide direction, or address performance issues arising out of the implementation of the Act. This creates uncertainty for applicants, local government and the general public. Ad hoc or reactive use of intervention powers reduces the effectiveness of central government direction – the provisions themselves also require fine-tuning to promote effective and efficient use.

Background Context:

Central government guidance and direction has the potential to simplify the framework within consent authorities make decisions by: setting clear environmental thresholds and targets, clarifying the relationship between potentially competing national strategies and matters of national importance in particular situations and maintaining expected standards of performance. Government has yet to lever maximum benefit out of its existing powers of intervention. In some cases this is because the mechanisms themselves require improvement. In making this point we note that:

- The Environment Court in *Upland Protection Society V Clutha District Council and Otago Regional Council* [C 85/2008] paragraphs 32-33 concluded that submissions by the Minister for the Crown attract "… no particular weight or priority".
- Apart from the recent WEL Networks Te Uku application and Meridian's White Hill, every application for a wind farm in New Zealand has been appealed to the Environment Court. Similarly, other large-scale and infrastructure projects with the potential to result in significant adverse environmental effects are extremely likely to be appealed to the Environment Court either by the applicant or objectors.
- A primary reason for calling-in a proposal is to reduce the time it takes to come to a decision – there are currently no overall decision-making timeframes around Board of Inquiry processes to guarantee a timely outcome.
- Boards of Inquiry are currently appointed on a case by case basis with approval required via a paper to the APH and approval from State Services Commission to increase fees. This can take several weeks with approval turn-around times.
- Fees for Boards of Inquiry are capped at rates significantly lower than what experienced practitioners are able to command in the marketplace. This has recently led potential (high-quality) appointees to rule themselves out of contention.
- A significant amount of new NES regulation and NPS policy is expected for gazettal within the next 18-months. Most of this new regulation and policy will have to be given effect to immediately or within five years. Councils will face substantial costs to implement these new regulations and policies (estimated to be as high as $250 million plus). A significant proportion of these costs derive from plan change processes (consultation, hearings, appeals etc) necessary to give effect to NPS and to bring plan provisions in-line with NES. There is, therefore, a need to coordinate NPS and NES release times to promote synergy and efficiency.

- There is currently a lack of consistency between the National Environmental Standard provisions and other sections of the Act. This has lead to uncertainties about what standards can or can not achieve.
- Some provisions relating to NES limit the usefulness of the instrument. There is some scope for writing more flexibility into NES provisions.
- Roles and responsibilities for standards are not clearly defined in current provisions. This leads to uncertainty over what roles different authorities play once standards are in effect.
- Steps have been taken to add additional judicial and administrative resources to enable the Court to meet future demand arising out of potential increased use of call-in provisions and the second generation of plan reviews. Nevertheless, the delay between appeal lodgement and hearing commencement can be significant and there were 89 cases outstanding as at June 2008. The potential for delays in securing hearing time can be high (the Swanson Structure Plan, Project West Wind and Project Hayes provide examples).

Policy Options:

1. Increase the weight decision-makers must give to Crown submissions and regulations.

2. Make more frequent use of call-in powers subject to an overall intervention strategy.

3. Streamline and improve call-in provisions.

4. Lift the statutory cap on Environment Court judges (so that numbers can be adjusted more quickly to enable chairing of Boards of Inquiry).

5. Allow councils to make their plans consistent with NPS objectives and policies, and develop rules to give effect to NPS without having to undergo the full public consultation process.

6. Allow councils to modify their plans to be consistent with NES through a truncated plan change process.

7. Improve linkages between NES's and other sections of the RMA by inserting references to NES throughout the Act (e.g. Part 3).

8. Improve NES by: increasing flexibility, clarifying responsibilities, streamlining the process for making minor technical amendments and enabling the Minister for the Environment with powers to withdraw a proposed NPS or NES at any time prior to it coming into effect.

9. Develop a strategy to guide government intervention in RMA processes. Complement with a strategic monitoring and review programme to gather high-quality information to guide central government decisions on RMA issues and to identify when and what form of intervention is appropriate.

Commentary:

There is no evidence to suggest that a protracted application process – where an Environment Court hearing (and other hearings) follows an initial council hearing - more successfully

promotes the purpose of the RMA. Put simply, a longer process does not necessarily deliver a better outcome. On the other hand the increase in costs for applicants, councils and the community arising from protracted, iterative decision-making processes can be significant. More frequent use of call-in powers and a one-step (Board of Inquiry or direct referral to the Environment Court) hearings process has the potential to significantly reduce the time and cost of progressing applications through to decision – for everyone involved. Recent experience with call-in has indicated several areas where procedural changes could shave weeks off the process at the front-end and ensure that high-quality decision-makers remain available for participation in Boards of Inquiry.

Under current call-in provisions, a Board of Inquiry is required to issue a draft report and decision and calls for comments from parties. The intention of the amendment (as noted in the department report of the time) was to enable comments on minor errors to be picked up at this stage. This sub-section was not intended to allow challenges to the fundamental reasoning of the decision, but has not been drafted to rule this out. The potential for jurisdiction complications to arise from this sub-section has drawn comment from one current call-in Judge; how should a Board of Inquiry appropriately address comments on draft decisions that seek to challenge or contradict the fundamental reasoning of the decision? Section 148(4) of the RMA should be amended to limit that changes that can be suggested.

There is a need to limit the liability of members of Board's of Inquiry – it is possible to do this by using clause 5 of Schedule One of the Waitaki Act.

One of the benefits of a council run process is that there is an assessment of the application in the form of an officer's report. Such a report would help to ensure that the inquiry process was robust and would undoubtedly assist the Board of Inquiry members and submitters in a call-in process. It would not, however, be appropriate for the affected council(s) to produce the report nor for it to contain recommendations. The call-in provisions should be changed to enable the Board (or its servicing body) to commission an independent planning report assessing the matter in light of the local councils' plans and/or technical reviews of the information provided.

Call-in provisions should be amended to clarify that any requests for information that the councils have made but that have not been supplied at the time the matter has been called-in are still valid and that the information needs to be provided to the Minister. The Minister will then pass this information to the Board of Inquiry or the Environment Court.

The definition of a 'matter' in the call-in provisions could include a council proposed plan. This may need then to be accompanied by a requirement for councils not to progress any applications received in the meantime until the Board has made decision on the plan.

Pay rates for Boards of Inquiry also need to be addressed. Currently Boards of Inquiry fall under the Fess Framework and are judged to be a Group Two – Higher Level Body. These rates are significantly lower than those that experienced resource management decision-makers are able to command in private practice and even as independent hearings commissioners for councils. This makes it difficult to recruit candidates and accordingly the level of remuneration for these Boards needs to be reassessed. Boards of Inquiry should either be reclassified under the Fees Framework to a Group Four Level One Body or Cabinet approval should be sought for a fees scale outside of the Framework. Discussion with the State Services Commission indicates that this probably does not require amendment and can be dealt with through a paper to APH.

Appointment of Boards of Inquiry must be made on a case by case basis with each Board required to go through Cabinet's APH process. This process takes time and there are a limited number of possible candidates. It may be more cost effective to looking a pre

approved pool of candidates that the Minister can then use to constitute particular Boards, without needing to go to APH each time. Alternatively applications that have been called in could be referred to a standing decision body – such as the ERMA Board.

Recent experience with the development and implementation of NES and NPS has indicated areas where amendments are required to reduce the cost and increase the speed of local authorities' giving effect to national direction. A strengthening of linkages between these instruments and other provisions in the RMA will provide consistency and clarify what role local authorities have in terms of national policy tools.

There is significant potential for the Government to clarify potentially competing national imperatives through Crown submissions on particular applications. However, there is a lack of incentive to exercise these costly and resource-intensive powers without a clear Government objectives and strategic guidance, and when the Court affords central government direction no particular weight.

There is also the potential for Government to lever maximum benefit out of its powers of intervention and to foster clarity and effective implementation of the RMA by developing a strategy to establish when government will intervene in RMA processes. This will need to be complemented with an enhanced monitoring and review programme in order to extract high quality and relevant data on RMA implementation in a timely manner.

Preferred Option(s):

1. Increase the weight decision makers are required to give to Crown submissions and standards.

2. Streamline and improve call-in provisions.

3. Lift the statutory cap on Environment Court judges.

4. Allow councils to make their plans consistent with NPS objectives and policies, and develop rules to give effect to NPS without having to undergo the full public consultation process.

5. Allow councils to modify their plans to be consistent with NES through a truncated plan change process.

6. Introduce linkages between NES and other section of the Act eg. Part 3.

7. Allow for minor amendments for NES where changes are within the original policy intent.

8. Amend provisions so that there is more flexibility in the way standards relate to other planning instruments.

9. Enable councils to issue Certificates of Compliance specifically for NES.

10. Make it explicit that local authorities are responsible for monitoring and enforcing compliance of NES.

11. Provide the Minister for the Environment with powers to withdraw a proposed NPS or NES at any time prior to it coming into effect.

12. Develop a strategy and complementary review and monitoring programme to guide government intervention in RMA processes.

Expected Outcomes:

In most instances it is difficult to quantify the cost and time benefits associated with Government direction. In general terms, however, it is considered that the benefits have the potential to be significant because:

1. More effective Crown submissions will enable Government to provide direction to consent authorities in cases where different national imperatives could be in conflict. This will ensure appropriate weight and regard is given to matters of national importance. This could also reduce the complexity surrounding consideration of matters of national interest, which has the potential to reduce the time it takes to come to a decision.

2. Clarifying responsibilities and streamlining the development and implementation of NES and NPS will foster greater certainty for councils, applicants and the community, and will increase the consistency of environmental management regimes across New Zealand.

3. Reducing the time it takes to appoint members to Boards of Inquiry will save up to four-weeks in the call-in process.

4. Developing a strategy to guide government intervention in RMA processes and improving data-gathering will facilitate accurate and timely use of central government's powers and will increase certainty among applicants, councils and the community as to how and when Government will intervene. This will increase the effectiveness of central government's powers of intervention and improve implementation of the RMA.

4: Improving the Interface between the RMA and Other Legislation

Issue: Overlaps and Duplication of Effort

Overlaps in environmental considerations, processes, or powers between the RMA and requirements of other legislation can result in inefficient, duplicative, work for applicants, asset owners and local authorities. This can add unnecessary time and cost to some projects and adds to the regulatory burden faces by private individuals and organisations.

Background Context:

Despite the RMA replacing more than 50 statutes when it was first introduced, there remain areas of overlap, including duplication of some powers and processes, between the RMA and other legislation. This includes:

Other legislation	Area of overlap
Local Government Act 2002	Long Term Council Community Plans required under the LGA have consultation, outcomes and reporting requirements that are currently not easily able to be aligned with RMA policy/plans. Either development contributions (LGA) or financial contributions (RMA) can be required by local authorities for specific purposes associated with funding infrastructure and mitigating effects of developments. Administrative charging ability of local authorities.
Building Act 2004	Building consents and resource consents may be needed for the same project. S.37 of the Building Act effectively puts building consents on hold (in whole or part) if work associated with the consent also require a resource consent.
Historic Places Act 1993	Items on the Historical Places Trust Register are often included in RMA plan schedules associated with plan provisions that protect them. This is their primary form of protection. Projects may require both resource consents (RMA) and archaeological approvals (HPA) if works destroy or modify an archaeological site.
Forests Act 1949 and Forests Amendment Act 1993	Before any activity is initiated on land subject to a registered Sustainable Forestry Management Plan, any resource consent required by the relevant Regional or District Council must be obtained. This can create a dual approvals process that in some (but not all) cases covers the same subject matter.

Conservation Act 1987	Concessions are required for occupation and/or use of conservation land in addition to resource consents.
Commerce Act 1986	Material on the Commerce Act is covered under 'Trade Competition' in Part 2 of this report.

Improvements to the interface of the RMA with other legislation should aim to:

- to improve the efficiency of the RMA and integration with other legislation
- identify process rationalisations at the margins of RMA jurisdiction, particularly where overlaps have been identified with processes under other legislation
- remove or reduce duplication between processes under the RMA and separate legislation, including aligning processes where possible

An associated objective is to ensure any such changes can be made without compromising the quality of decisions made.

These policy choices will involve some rebalancing of gains in efficiency and consistency on one hand, with ensuring the purpose of differing legislation is still achieved. Policy choices range from minor changes to provisions through to more substantial changes to the RMA, other legislation and the purpose and structure of various organisations. Ease of implementation and the impact on consent authorities should be a primary consideration of any policy choices.

It is noted that many of the suggested options will require consultation with stakeholders and other government departments to ensure that the most workable options are progressed with. It is also noted that many options require amendments to pieces of legislation that do not fall under the Environment portfolio.

Policy Options: Overlap with Local Government Act (LGA)

Clarify relationship between community outcomes and RMA objectives

1. Transfer RMA monitoring and reporting functions (section 35) to the LGA

2. Clarify/rationalise LGA reporting requirements

3. Combine RPS into LTCCP

4. Development contributions to be deemed plan provisions

5. Amend RMA to reflect section 200 of LGA

6. Consolidate financial contributions and development contributions into LGA

7. Repeal section 36 of the RMA and use LGA cost recovery provisions

8. Initiate a wider review of charging principles

Commentary: Overlap with Local Government Act

The Local Government Act has provisions relating to planning, monitoring and reporting as does the RMA. Simplifying these requirements and enabling them to be easily aligned could result in savings of time and resources.

There is overlap of process and reporting requirements for Long Term Council Community Plans (LTCCP) under the LGA and policy statements and plans under the RMA, particularly regional policy statements (RPS). There is a lack of legislative clarity about how the documents under the RMA and LGA relate to each other.

Additional overlapping areas are the ability to take development contributions at the time of development and in administrative charging. Under the RMA a council can require financial contributions to be paid to the local authority for specific purposes associated with the mitigation, offsetting or remedying environment effects and also as a way of funding infrastructure to service new growth.

Development contributions can be levied under the LGA to fund new infrastructure associated with growth; although section 200 of the LGA states that a local authority cannot impose a development contribution if it has imposed a financial contribution for the same purpose.

With development contributions now favoured by local authorities, it is likely financial contributions will be progressively phased out by Councils, only retaining the use of them for matters outside the scope of development contributions.

Administrative charges are another area of duplication in the LGA and RMA. Section 150 of the LGA enables local authorities to set fees to recover the reasonable costs of specific council activities and section 36 of the RMA authorises councils to impose administrative charges for recovering reasonable costs for specified matters. The test of ‘reasonableness’ applies to both cost recovery provisions.

The powers of cost recovery under the LGA are much broader than the RMA. This is illustrated by the trend towards councils increasingly using section 150 of the LGA to recover costs they are unable to under the RMA (such as monitoring of permitted activities and inspections responding to validated complaints). Further, section 12 of the LGA contains general powers that can be used to charge for services other than those specified in section 150. Charges under section 12 are not tied to the test of ‘reasonableness’. There are no appeal rights for charges issued under the LGA charging provisions.

Given the broad cost recovery provisions under the LGA is may no longer be necessary for the RMA to have it own administrative charging powers. Greater use the cost recovery provisions under the LGA has wider user pays implications than just relating to resource management, although this is a significant aspect, therefore a wider review of charging principles may be necessary.

There is a complex relationship between the LGA and RMA and potential solutions need to be carefully examined. Such solutions need to start with ensuring there is a clear and direct relationship between community outcomes and RMA plan/policy objectives.

Preferred Options: Overlap with Local Government Act

While several options have been identified as being suitable for further consideration, some of these may require amendments to legislation other than the RMA. Further consultation and discussion of options is required with Department of Internal Affairs officials.

1. Consolidate all contributions into LGA (single regime in LGA policies)

2. Clarify relationship between LTCCP outcomes and RMA objectives

3. Initiate wider review of charging principles

Expected Outcomes: Overlap with Local Government Act

1. Greater clarity of relationship between LGA and RMA documents

2. Greater alignment of processes and requirements under the LGA and RMA

Policy Options: Overlap with Building Act

1. Institute a combined building and resource consent process for minor projects.

Commentary: Overlap with Building Act

The Building Act and RMA have different purposes. The former is concerned with the performance and habitability of buildings, while the latter is concerned with environmental effects (that may be associated with the building or site works). Not every building that requires building consent requires a resource consent, and many building activities are listed as being permitted activities in RMA plans.

Work undertaken as part of the Quality Regulation Review of 2006 found that the main issue regarding consents under the Building Act and RMA was a lack of understanding amongst applicants that two consents may be needed for the same project, and that obtaining a building consent did not mean the RMA was being complied with. A contributing factor to the lack of understanding was poor communication (council staff not alerting applicants and no publication being available that covered processes) and a relatively high proportion of applicants not checking with councils before lodging a building consent (either through speaking with council officers or PIM applications).

The option of combining resource consent and building consents into a single process has been included here as a potential option only. There already exists the ability to process building consents and resource concurrently however this is not done is many cases because:

- Applicants are not always aware of the need for a resource consent in addition to the building consent (particularly if they have not contacted the council previously)
- It can be difficult to establish if a resource consent is required if the building plans are subject to change (by the applicant changing their minds in regard to design or to

meet other requirements – e.g. altered dimensions to avoid encroaching on an easement the applicant had not considered).

- There may be issues that are required to be addressed (such as checking geotechnical issues on hazard prone land) before it is appropriate to consider whether the building meets the requirements of the Building Code).
- Poor communication within councils between staff dealing with building act applications and staff dealing with RMA consent applications.

Preferred Option(s): Overlap with Building Act

No preferred option has been identified at this time. Further consultation and discussion of options are required with Department of Building and Housing officials.

Working with councils to promote better communication with applicants may improve some of the issues around the cross over between the building and resource consent processes.

Expected Outcomes: Overlap with Building Act

1. The option of combining building and resource consent for minor projects into a single consent or process has not been worked through or widely consulted on at this point. Work carried out at the time of the Quality Regulation Review of 2006 suggests that there may not be large gains to be made in this area however. Larger gains are considered to be derived from finding ways to shorted consent timeframes.

Policy Options: Overlap with Historic Places Act

1. Archaeological authorities replaced by RMA consenting process administered by local authorities.

2. Streamline processes so that archaeological authorities area automatically processed by councils in consultation with Historic Places Trust concurrently with RMA consent applications.

3. Align timeframes between archaeological authorities and resource consent processes.

Commentary: Overlap with Historic Places Act

The transfer of archaeological authorities into the RMA and of functions from the Historic Places Trust to councils was last considered in the in the 1998 Historic Places Act review and subsequently, the Resource Management Amendment Bill 1999. Clauses relating to the proposed change of status and role for the Historic Places Trust were had been deleted by the Resource Management Amendment Act 2003 can into force, but historic heritage still became a matter of national importance under section 6.

A main consideration in regard to the transfer of archaeological authorities into the RMA to become another matter for which a resource consent must be obtained is the resourcing and expertise that local authorities will require to perform the role. Few councils have staff trained or specialising in archaeology, heritage conservation, or other related fields. It is

probable that many would have to contract in such expertise. This could add delays and cost to the resource consent process that may at least partially defeat the purpose of bringing archaeological authorities into the resource consent process in the first place. Similarly the option of councils processing consents, but in consultation with the Historic Places Trust may not necessarily result in a time advantage (though it may simplify matters for resource consent applicants, and overcome some of the skill shortages that councils would face).

Aligning archaeological authorities with RMA consent processes is only likely to present genuine time savings where the presence of archaeological sites is known before work commences. This is only likely if; (1) there are existing, accurate site records or; (2) archaeological surveys are made a standard part of all assessments of effects for resource consent applications. The latter circumstances have obvious cost and time implications for all consent applicants that may nullify the advantage of concurrent processing, or may uncover nothing of significance (in which case there is no advantage to the applicant at all).

It is noted that the Historic Places Act 1993 is also scheduled to be reviewed over the next year. The issues to be explored as part of that review are likely to be wide ranging. Ideally RMA and HPA review processes should work together to produce a cohesive and workable package that meets the intent of both reviews. The contrasting timeframes for the 100 day review of the RMA and HPA review may create difficulties in this regard, particularly since consultation over possible changes and evaluation of alternatives has been very light to date.

Preferred Option(s): Overlap with Historic Places Act

No preferred option has been identified at this time as consultation has to still to take place with relevant parties.

Expected Outcomes: Overlap with Historic Places Act

No outcomes are listed here as no preferred option has been identified. Further work and consultation is required with, in particular, the Ministry of Culture and Heritage and Department of Conservation, to identify workable solutions.

Policy Options: Overlap with Forests Act

NB: The following options merely constitute ideas generated by officials. They have not been analysed in depth or consulted on at the time this paper was prepared.

1. Require local authorities to provide for forestry operations managed under sustainable forest management approvals as permitted activities in plans.

2. Make resource consents for forestry managed under a sustainable forestry management approval non-notified.

3. Institute a joint approval process (RMA / Forests Act Permit that serves the purposes of both).

Commentary: Overlap with Forests Act

Advice from MAF officials is that there has been some duplication of effort in the past when forest owners have had to gain approvals under both the Forests Act and the RMA (such as for ‘land clearance’ for example). However the main problems currently being encountered is not so much the resource consent process itself but appeals by third parties to the Environment Court. Such appeals have held up harvesting in areas such as Gisborne and Southland for months (if not years).

In 2002 the Primary Production Committee report on Indigenous Forestry had recommended a ‘one-stop shop’ approach to sustainable forestry management approvals, but this has been found to be difficult to implement under existing legislative arrangements (and as such has not progressed).

MAF is currently working on non-legislative approaches to reduce the compliance burden. This has revolved around working with selected local authorities selected councils to process applications for harvesting native trees with the least amount of double up and to recognise the approval processes and resources that MAF has in sustainable programmes to help guide Councils on issuing approvals. However, as a resource consent is still required under a number of council plans, objections and appeals still arise.

Preferred Option(s): Overlap with Forests Act

Further work is still required around options to address the overlap between the Acts. Consultation with MAF has only extended as far as initial sharing of ideas at this time. The specific merits, pros and cons of options have not been debated robustly.

Expected Outcomes: Overlap with Forests Act

No outcomes are listed here as there is no preferred option available at this time. Further interdepartmental work and consultation is required before mutually acceptable, workable, solutions can be presented.

Policy Options: Overlap with Conservation Act

Further research and consideration, as well as consultation with a range of other departments and stakeholders is required to identify a comprehensive list of workable options.

This list below forms some preliminary options identified by officials for discussion:

1. Exempt activities which hold a current concession from land use consent requirements (s9(1)).

2. Limit Conservation Act regime to exercising an ownership interest and narrow scope of issues considered in concession process.

3. Provide for integrated consent and concession process with joint decision-making, where applications are lodged simultaneously.

4. Introduce statutory timeframes for processing of concessions.

5. Remove concession requirement.

Commentary: Overlap with Conservation Act

The interface between the Conservation Act and the RMA could be better coordinated, particularly relating to concessions and the resource consent requirements. The concession process is not dissimilar to the resource consent process under the RMA: it can involve public notification, submissions and a hearing; and concessions may be granted (with conditions) or refused.

However, the purposes of each process are quite different. The RMA consent process is to manage adverse effects on the environment; whereas, the concession process is to ensure the activity does not compromise conservation objectives, rights of public access and enjoyment, and public safety.

While there are no statutory timeframes for processing concessions, indicative timeframes[2] vary from 5 working days to up to 12 months.

The lack of integration between concession and resource consent requirements leads to two issues, which are most problematic (in terms of costs and delays) for significant projects:

- duplication of process (separate hearing processes may be held for both - opponents get two goes)
- concession conditions can replicate or be more onerous than resource consent conditions

There are around 3600 current concessions, and around 1100 were lodged in the year ending June 2008.

While there is room for improvement in the integration of these processes, any changes need to be very carefully considered. In particular it is important to recognise the differing goals of the two processes. Ideally improvements to the integration of the two processes could also improve the concession process. Any reduction in the ability of the DoC to manage activities on land it owns is likely to be controversial. Changes may also have implications for other lands managed under the Reserves Act 1977 (including lands vested by local authorities for a range of purposes), due to the alignment of the Reserves Act with requirements of the Conservation Act including the concession process.

Due to the differing objectives of the two Acts and subsequently of the requirements under each it would be difficult to reconcile the two processes together. It is unlikely that satisfactory policy solutions could be found with all the appropriate trade-offs considered and made in the current short timeframe. There is a similar problem when considering the matters that should be taken into account when granting a concession. These issues can be dealt with in phase two of the RMA review.

[2] From the Department of conservation website (http://www.doc.govt.nz/about-doc/concessions-and-permits/concessions/applying-for-a-concession/)

However, there are changes that can be made in phase one that would lead to significant approvals. Firstly, introducing concession processing timeframes into the Conservation Act would give certainty to applicants as to when their applications will be dealt with. The current uncertainty around timelines can add significant costs to the applicant.

Secondly, there could be substantial gains from providing for both processes to occur in tandem, potentially including joint hearings (but separate decisions). This would mean that similar requirements would occur at the same time. It would also allow decision-making criteria to be kept separate while addressing the process issue of duplication.

Several of the options would involve significant trade-offs in competing priorities and significant alteration to the Conservation Act. Phase one amendment timeframes simply do not allow enough time to appropriately consider the options and impacts.

Preferred Options: Overlap with Conservation Act

While several options have been identified as being suitable for further consideration, some of these require amendments to legislation other than the RMA. Further consultation and discussion of options is required with other departments and stakeholders.

1. Introduce statutory timeframe for decision making on concessions.

2. Provide for integrated consent and concession process, where applications are lodged simultaneously.

Expected Outcomes: Overlap with Conservation Act

No outcomes are listed here as there is no preferred option available at this time. Further interdepartmental work and consultation is required before mutually acceptable, workable, solutions can be presented.

Issue: Compensation

Property and business owners and other affected parties expect there to be fair, reasonable and timely, compensation for restrictions placed on their land through regulation, designations for public works or infrastructure.

Background Context:

There are three areas in the RMA that touch on the question of compensation payable for taking interests in land. These are:

- section 85 which in effect recognises the principle that private property owners' rights are not absolute;
- sections 185 and 198 which allows a property owner whose land is subject to a designation, requirement or heritage protection order to apply to the Environment Court for an order under the Public Works Act obliging the requiring authority to acquire or lease all or part of the land; and
- section 186 (and the designation provisions) which enables a network utility operator[3] to apply to the Minister of Lands to have land required for a project acquired or taken under the Public Works Act.

The Public Works Act (administered by Land Information New Zealand), rather than the RMA, provides a regime on compensation for land acquired for public works. The acquisition powers in the Public Works Act are to enable public works to be provided where and when necessary to overcome potential for landholder hold out.

The Public Works Act requires, in the first instance, that the requiring authority and landowner undertake prior negotiations with the intent that the land required is acquired by agreement. However, if land cannot be acquired by agreement, then the compulsory acquisition processes are commenced. The landowner has a right to appeal a notice of intention to take land to the Environment Court and beyond.

There can be a substantial delay between the land being required for public works and compensation being paid to the landowner.

The Public Works Act was investigated for reform by LINZ in 2000-2002. The reform process was halted, and it is believed that this is because Maori held a view that Maori land should not be compulsorily acquired under any circumstances. However, sections 40-41 (offer back provisions) have caused considerable litigation over the years, and reform of these sections in particular is known to be supported by the judiciary.

Policy Options:

1. Provisions that guarantee land or property owners 'above rate' compensation to expedite the sale of land and recognise the 'public good' element of the project that is to be undertaken.

2. Widen and increase the payment of solatium.

[3] Which includes all requiring authorities

3. Provide that land which is not directly required for public works or infrastructure can be subdivided from that which is (despite plan rules that may otherwise restrict this), so that it can be made legally available for sale by the owner and made available for other uses.

4. Require land acquisition / payment of compensation at the time a designation is confirmed.

Commentary:

Matters to do with interface between the Public Works Act and RMA are closely entwined with the RMA provisions on requiring authority and designations. Granting of Requiring Authority status under the RMA provides access to Public Works Act acquisition powers.

Current compensation provisions are intended to put the owner in a financial position as close as possible to what he or she would have been in if the acquisition has not taken place. Compensation can include legal costs and removal and other expenses.

A 'solatium' payment of $2000 is a sum paid over an above purchase price and other payments. Essentially it is some recompense for loss and disruption when land acquired contains a dwelling used as a private residence.

The land value is generally taken to be the amount the land might be sold for, if sold on the open market in a 'willing seller, willing buyer' situation. Anecdotally, it appears that the threat of compulsory acquisition is more useful than the actual powers themselves, due to the protracted compulsory acquisition process.

Given the complexity of the compensation regime and previous attempts to reform the Public Works Act, reform should not be attempted during the 100 day period. The matter should be discussed further with LINZ and options that arose from the 2001-2002 period of reform, particularly the offer back provisions, should be considered. There has not been time to date to investigate these options in detail, nor what is successful in overseas jurisdictions.

There are other options that could be considered including further amendments to the designation provisions under the RMA in order to streamline the process, and possible alignment of appeal processes under the RMA and Public Works Act.

The Central Plains Irrigation Scheme has highlighted some of the complex issues surrounding the current acquisition and compensation processes. In this example Central Plains Water Trust (a requiring authority) has given a notice of requirement on farmland prior to resource consents being granted. The landowner of the affected land is prevented from doing anything in relation to the land that would hinder the public work, including subdividing or changing the character of the land use, without the consent of the requiring authority. There is no indication as yet of when the landowner will be compensated for this loss.

Preferred Option(s):

The issues are complex and further work is still required to investigate and discuss options to address the issue of compensation, in particular there has not been time for any discussion with Land Information New Zealand, who is responsible for administering the Public Works Act. Consultation with them is essential given this responsibility and the prior review commenced.

Expected Outcomes:

No outcomes are listed here as there is no preferred option available at this time. Further interdepartmental work and consultation is required before mutually acceptable, workable solutions can be presented.

5: Complementary Measures

Issue: Ineffective Compliance Incentives

Process restrictions on the use of RMA enforcement powers, low penalties for non-compliance, and the exemption of Crown agencies from enforcement action provide limited incentive to comply with the RMA, RMA plans or resource consent conditions.

Background Context:

- The maximum fine level of $200,000 has remained unaltered since the RMA came into force 17 years ago. Applying the average CPI over the same period suggest the equivalent sum would now be $288,000. The court can also impose a maximum fine of $10,000 per day for each day an offence continues.
- In New South Wales the maximum fines are $5 million for a corporation, $1 million for an individual. In Canada the Environmental Penalties Act 2000 increased the maximum fine for a corporation's first conviction of a major environmental violation from C$1 million to $6 million per day. Fines for an individual's first conviction of a major violation increased from C$100,000 to $4 million per day.
- Current RMA infringement notice penalties were set in 1999 and range from $300 to $1,000 compared with the Building Act 2004's $250-$2,000.
- More than 90% of prosecutions under the RMA are successful.

Policy Options:

1. Enable enforcement action to be taken against Crown agencies.
2. Raise the maximum level of penalties for RMA offences (fines and terms of imprisonment).
3. Raise the level of infringement notices.
4. Bring infringement notice penalties into line with other legislation such as the Building Act.
5. Make contravention of resource consent conditions a specific offence.
6. Widen the scope of the Court to review, amend or cancel consents.
7. Remove the right to have a trial by jury in RMA prosecutions.

Commentary:

Section 4(5) of the RMA provides that while the RMA binds the Crown, the Crown is exempt from enforcement action. The Crown Organisations (Criminal Liability) Act 2002, brought into force provides a mechanism (along side the repeal of RMA section 4(5)) whereby the Crown agencies (including government departments) can have enforcement action taken

against them. The 2002 Act was brought in as result of the Cave Creek tragedy to specifically provide an incentive to avoid “systemic failures”.

Options 2-6 above are mainly alterations to existing powers and are designed to provide for stronger penalties (to update them having not been changes for 17 years, and bring them more into line with other offences under other legislation and penalties in similar overseas jurisdictions).

Preferred Option(s):

1. Enable enforcement action to be taken against Crown Organisations (as defined in the Crown Organisations (Criminal Liability) Act 2002).

2. Raise the maximum level of penalties for RMA offences.

3. Raise the penalties for infringement notices.

4. Make contravention of a resource consent condition a specific offence.

5. Enable local authorities to charge non-consent holders for monitoring and enforcement work undertaken to ensure compliance.

Expected Outcomes:

1. Higher levels of compliance with RMA, RMA plans, and resource consent conditions.

2. A greater willingness amongst local authorities to carry out monitoring and enforcement activities to ensure compliance.

3. An improvement in water quality associated with higher levels of compliance.

Issue: Complex and costly enforcement processes

Technical process details and an inability to recover full costs of carrying out enforcement action necessary to protect the environment frustrates the ability of local authorities in the performance of their enforcement functions and duties under the RMA.

Background Context:

- Local authorities have identified a number of practical barriers to effective RMA monitoring, investigation and prosecution. These barriers can hinder the frequency of enforcement activities and create unnecessary costs for local authorities. This is a particular issue for territorial authorities with limited resources and anecdotal evidence suggest there are a low level of prosecutions taking place in proportion to the level of offending .
- Section 36 of the RMA sets out provisions for administrative charging. However, section 36 does not include a specific power to charge for monitoring or compliance inspections unless it relates to a resource consent holder. This is a particular issue for many councils as response to low level pollution takes up a significant amount of resources. As this response work is important for councils to fulfil their functions under the RMA, these response costs are generally borne by rate payer.
- There are concerns that local authorities (particularly those less resourced) are often reluctant to prosecute due to the costs of prosecution proceedings. Under section 342 of the RMA the local authority receives 90% of the fine imposed. Fines range on average between $6,500 and $12,500. In a majority of cases this does not adequately cover local authorities' costs.

Policy Options:

1. Extend the timeframe to lodge a prosecution (currently 6 month limit).

2. Expand "reasonable costs" to include the costs of prosecution in RMA enforcement cases.

3. Remove the need for a constable to be present during the exercise of a search warrant.

4. Amend section 36 to allow local authorities to charge non-consent holders for monitoring and compliance.

Commentary:

Interviews with local authority compliance and enforcement staff have suggested that it is often difficult for them to meet the six month deadline within which to take prosecution proceedings against an offender. There appear to be a variety of reasons including workload,

the time taken get evidence back from laboratory testing, the need to seek outside legal assistance to take a prosecution, and internal procedures (lack of delegation meaning that the decision to prosecute may be being made by the Chief Executive or even elected officials). However, it is suggested that none of these reasons on their own warrant a departure from the six month prosecution timeframe that could make the RMA inconsistent with other legislation. It is also noted that if resources are the key issue, an enhanced ability to recover costs of compliance and enforcement work may, at least in part, address the issue (it is noted that few councils appear to have difficulty in maintaining teams of parking officers where metered or pay and display parking is under council control).

At present enforcement officers can only exercise a search warrant to search premises if accompanied by a police constable. While there are often good reasons as to why the presence of a constable is desirable (safety of the enforcement officer for example), unavailability of police constables at crucial times can frustrate an investigation. For example it may provide the offender with the opportunity to dispose of evidence linking the offender with the offence. It is suggested that, provided the enforcement officer has been appropriately trained and has been issued with a search warrant, the requirement for a constable to be present be made optional. The Law Commission's work on reforming search and seizure powers provides a useful guide in any changes to the current requirements.

As mentioned above, a key limitation on the ability of enforcement officers to carry out their duties is resourcing. Anecdotal evidence from smaller local authorities suggest that elected representatives can be reluctant to support enforcement action due the inability to recover most or all of the costs involved. Strengthening the ability of local authorities to recover a higher proportion of their costs may assist in overcoming this barrier.

Preferred Option(s):

1. Expand "reasonable costs" to include the costs of prosecution in RMA enforcement cases.

2. Reassess the need for a constable to be present during the exercise of a search warrant.

3. Amend section 36 to allow local authorities to charge non-consent holders for monitoring and compliance.

Expected Outcomes:

1. A greater willingness amongst local authorities to pursue enforcement action, and consequently a higher level of environmental compliance leading to improved environmental quality.

2. A slight increase in the rate of successful prosecutions (it is currently around 90% already, but others may not make it to court as crucial evidence was unable to be collected).

6: Treaty of Waitangi

Issue: Principles of the Treaty of Waitangi

There is a perception that references to the Principles of the Treaty of Waitangi are vague and create uncertainty for applicants and decision makers as to whether they are being complied with (and therefore decisions safe from successful challenge).

Background Context:

Direct references to the Principles of the Treaty of Waitangi are made only in section 8 of the RMA (though several sections refer to the Treaty indirectly). However the placement in section 8 is important as this section is, in theory, an underlying consideration in the exercise of all functions, duties and decisions made under the RMA. Section 8 therefore provides the overarching framework and reference point to other sections of the RMA that recognise the rights of, and the Crown's obligations to, Maori.

Advice from the Parliamentary Commissioner for the Environment at the time the RMA was being drafted supported the inclusion of reference to the Treaty of Waitangi as it is directly concerned with, and relevant to, the management of natural and physical resources. It was also considered that the Treaty needed to be incorporated into the RMA to prevent further grievances and breaches.

References to the Principles of the Treaty in s.8 are anecdotally cited as being fruitful grounds for appeal to the Environment Court. However a relatively small number of Environment Court decisions (29) have addressed section 8 (other than in passing) in the past six years. Over the same time the Environment Court issued an average of nearly 1,300 decisions each year.

Policy Options:

The following are ideas generated by MfE officials. They have not been consulted on.

1. Remove section 8 entirely and rely on other sections and references to consultation to meet Treaty obligations.
2. Changing section 8 so that it refers to 'agreements, duties, obligations and outcomes' arising out of Treaty Settlement agreements.
3. Reverting to the 'special relationship between iwi Maori and the Crown' (an earlier, rejected, wording proposed in 1990).
4. A replacement section that encapsulates principles and practice from case law.

Commentary:

Removing section 8 entirely may provide little practical benefit to resource consent applicants or requiring authorities. The number of Environment Court cases that make reference to the principles of Treaty of Waitangi is relatively small and an alleged breach of the section 8 is rarely the primary focus of these cases. Many of the appeals that do reference section 8 or mention the Treaty of Waitangi tend to be brought in relation to:

- Environmental effects on a heritage site or site of significance to Maori
- General effects on amenity where a proposed development adjoins an area occupied or owned by Maori
- Effects on resources used by Maori (such as shell fish beds for example).

These matters are already covered by sections such as 6(e) and 7(a), and other sections of the RMA aimed at avoiding, remedying or mitigating adverse effects on the environment generally. As such a very small proportion of appeals would be averted by removing references to the Treaty.

While removing references to the Treaty of Waitangi is unlikely to have significant benefits to applicants, retention of section 8 does serve as a useful reminder for those making decisions that agreements, acknowledgements, protocols, and joint management agreements made as part of Treaty settlements should be considered and factored into decisions.

Referring to agreements, duties, obligations and outcomes of Treaty settlements may provide some clarity around what need to be considered where they have been defined via the Treaty Settlement process. However at the time of writing the Treaty settlement process is far from complete with many settlements are still to be resolved. Additionally not all aspects of Treaty settlement agreements neatly align with the purpose and principles of the RMA. There is a risk that a redrafted clause could be interpreted as requiring consideration of matters that currently lie outside the scope of the RMA. Finally there are also potential gaps in terms of what Treaty settlement agreements do not cover. Duties and obligations under the Treaty are likely to be wider that those set out in settlement agreement. Concentrating solely on duties settlements could result in further grievances.

Referring to the “special relationship between Maori and the Crown’ creates several problems:

- local authorities are not actually Treaty partners in the same way the Crown is. Local authorities derive their authority from devolved powers from the Crown. This degree of removal from the partnership relationship could cause confusion as to what actually needs to be taken into account and how that is to be applied.
- the wording is vague and without the benefit of case law that has now been built up around s.8 in its current form.

A replacement section that encapsulates the current state of case law may be a circular solution. The case around s.8 is based on what is contained in s.8 itself. There are also practical issues that need to be take into consideration including:

- Care needs to be taken when using case law that the specific circumstances of the case itself are taken into account. Some circumstances mean that determinations made in one case do not necessarily apply to others.

- Maori see the Treaty as a living document, the principles that underlie it move with the times. Replacing the Treaty with principles derived from case law risks 'fixing' compliance tests at a point of time that may, subsequently been seen as, stifling Maori development aspirations.
- Case law around the Treaty is also still evolving. Deciding which determinations should be used as the basis of future law requires careful consideration and consultation, particularly with Maori. This is well outside the scope of a 100 day amendment to the RMA.
- Given the effect of s.8 relative to other sections of the RMA, changes to the section risk adding complexity and compliance burdens greater than what may exist now. Proper consideration is needed of the implications of adopting ideas from case law to strike an appropriate balance.

A further consideration relevant to all the options outlined above is the timing of moves to remove or replace references to the Principles of the Treaty of Waitangi. At present the Crown is still settling claims arising from past Treaty breaches. Removal or replacement of the Principles, not matter how well intentioned, may be seen as sending negative signals about the Crown's future commitment to the Treaty, and the intent to honour obligations under settlement agreements already made.

Preferred Option(s):

No preferred options are listed as officials consider that ramifications of changing s.8 are potentially great and require wider consultation. In particular the consultation will be required with the Minister of Maori Affairs and Te Puni Kokiri.

Expected Outcomes:

As no preferred option has been identified, no outcomes are listed.