

Topic area: the resource consent process

Issue

The resource consent process under the Resource Management Act 1991 (RMA) is frequently criticised for excessive delays and costs that hinder economic growth. These concerns are often associated with major projects and urban development but are just as relevant for small and simple activities. Inconsistency in consent requirements between local authorities is also an issue which can cause considerable uncertainty for applicants.

Getting quicker decisions on resource consents has been identified as a critical issue for the RMA. There is potential to achieve this through a simplified process that reduces the complexity for local authorities and the delays and costs to applicant. This is likely to involve some refinement of the matters to be considered and the nature of public participation including appeal rights, without necessarily affecting the quality of resource consent decisions.

Objectives

The objectives of any changes to the resource consent process should be to:

- get quicker decisions without reducing quality
- reduce the costs, delays and uncertainty for applicants
- remove any unnecessary checks on local decisions
- remove any excessive requirements or considerations.

Achieving these objectives will involve some rebalancing between the rights of public participation and appeals on one hand, and efficiency, effectiveness and consistency on the other. Policy choices range from minor changes to provisions through to more substantial changes to the underlying principles and structure of the RMA. The impact on local authorities and ease of implementation of the options should be a primary consideration of any policy changes.

Options

This paper evaluates six broad options to improve the resource consent process:

[1: Strengthen local decision-making](#)

[2: Remove the notification presumption](#)

[3: Streamline the process for minor consents](#)

[4: Provide certainty on the baseline environment](#)

[5: Simplify statutory timeframes](#)

[6: Clarify further information provisions](#)

A summary table of these options to improve the resource consent process and their evaluation against the objectives is provided below. Options are assessed as:

- **not workable:** requires other means to achieve objectives
- **workable:** but has implications and/or will require modifications
- **recommended:** priority option for further research.

Option	Not workable	Workable	Recommended
Strengthen local decision-making			
• 1.1: Remove the scope for “de novo” appeals on regionally significant hearings			<input checked="" type="checkbox"/>
• 1.2: Increase the rigour of council hearings			<input checked="" type="checkbox"/>
• 1.3: Introduce new powers to deal with trade competition and vexatious parties		<input checked="" type="checkbox"/>	
• 1.4: Allow applicant to request independent hearing panel		<input checked="" type="checkbox"/>	
• 1.5: Give council discretion whether necessary to hold hearing			<input checked="" type="checkbox"/>
• 1.6: Direct referral to Environment Court	<input checked="" type="checkbox"/>		
• 1.7: Administrative costs of hearings to be shared between the participants	<input checked="" type="checkbox"/>		
• 1.8: Further requirements in commissioner training and certification		<input checked="" type="checkbox"/>	
Remove the notification presumption			
• 2.1: Remove the notification presumption	<input checked="" type="checkbox"/>		
• 2.2: Specify what consent categories require notification			<input checked="" type="checkbox"/>
• 2.3: Require applications to be notified ‘when in doubt’			<input checked="" type="checkbox"/>
• 2.4: Broaden the use of limited notification			<input checked="" type="checkbox"/>
Streamlining the process for minor consents			
• 3.1: Exclude Part II considerations from controlled/restricted discretionary activities			<input checked="" type="checkbox"/>
• 3.2: Simplify requirements for non-notified applications	<input checked="" type="checkbox"/>		
• 3.3: Define what activities all or part of section 104 and schedule 4 applies to		<input checked="" type="checkbox"/>	
• 3.4: Limiting s113 to contested, notified or complex applications			<input checked="" type="checkbox"/>
• 3.5: Allowing the applicants AEE to be adopted when complete and accurate			<input checked="" type="checkbox"/>
• 3.6: Provide guidance and templates to process simple applications			<input checked="" type="checkbox"/>
Provide more certainty on the environmental baseline			
• 4.1: Provide clarity around the what permitted baseline includes		<input checked="" type="checkbox"/>	
• 4.2: Provide a definition of the receiving (existing) environment		<input checked="" type="checkbox"/>	
Simplify statutory timeframes			
• 5.1: Set total working days limits for consent processing		<input checked="" type="checkbox"/>	
• 5.2: Limit the scope of section 37 to exceptional circumstances		<input checked="" type="checkbox"/>	
Clarify further information requirements			
• 6.1: Limit further information requests		<input checked="" type="checkbox"/>	
• 6.2: Review s92A so that inadequate applications can be declined efficiently			<input checked="" type="checkbox"/>

Background

Resource consents are one of key tools within the RMA to promote the purpose of sustainable management. Resource consents are the primary means through which local authorities check developments, activities and other proposals that are not permitted under a plan and allow consent authorities to avoid, remedy or mitigate adverse effects from those proposals on the environment.

The concept of the 'resource consent' as a permission to undertake an activity is not new. The use of resource consents¹ under the RMA was simply designed to the replace a diverse array of consents, permits and authorisations that had to be obtained under legislation that preceded the RMA with a more uniform approach and terminology. Most developed countries operate a permit system that is similar in character to resource consent, though often they are not as integrated (many have separate planning laws and permits for urban uses and others that relate to natural resource use). Most planning systems are also based around managing activities rather than the environment effects of those activities.

Concerns

Excessive costs and delays are perennial issues associated with the resource consent process under the RMA (as they are with similar consenting systems in other nations). Concerns are frequently expressed about the RMA in the New Zealand media based on anecdotal evidence and underlying perceptions and interests. Building consents required under the Building Act 2004 are often confused with resource consents by some sectors of the media, reinforcing perceptions that a resource consent is required for everything and that council planning regulations impose significant costs.

There is a growing body of quantitative evidence on the resource consent processes and associated compliance costs². This data demonstrates that resource consent costs and timeframes are highly variable; depending on the specifics of individual applications and the performance of the consent authority. New Zealand's devolved system of resource management means that speed, quality and effectiveness of the consent process is largely determined by the capacity, resources and political will of local government. Some councils perform well and process consents in a efficient manner whereas others have capacity issues³ and struggle to meet statutory timeframes. However, there is no evidence to suggest that councils are regularly making poor decisions on resource consents or imposing an unnecessarily lengthy and costly consent process.

Previous amendments to the RMA have sought to improve the efficiency of the resource consent process with varying levels of success. Some amendments, such as changes to sections 92, 93, 94 and 113, may have had the reverse impact for

¹ As defined in section 87 of the RMA the types of resource consents are land-use consent, subdivision consent, coastal permit, water permit, discharge permit.

² RMA survey of local authorities (1996-2006), Hill Young Cooper 2008 reports "*Impact of the RMA on Housing Costs*" and "*The Costs of Obtaining a Resource Consent*".

³ Capacity relates to the both amount of staff and their skills/experience in planning processes and with the RMA. There has been an on-going capacity issue with RMA practitioners and planners (that is not unique to New Zealand) that impacts on the ability of local authorities to process consents efficiently. The Ministry has a targeted programme to build capacity in local government through guidance, training and accreditation, and targeted assistance.

some applications through directly or indirectly requiring additional reports, or leading to a more complex and convoluted process. However, most amendments are generally perceived as being beneficial. This includes limited notification, compulsory accreditation for decision-makers and much clearer consultation requirements for resource consents. Despite notable improvements in some areas⁴, it is important that the RMA is remains up-to-date and responsive to emerging trends and issues.

Consent costs

The RMA survey of local authorities⁵ shows that approximately 50,000 resource consents are processed annually. Median council charges to process these consents ranges from \$440 for a non-notified land-use consent to \$10,800 for a notified coastal consent. Total council costs for processing resource consents equates to approximately \$73 million per year.

Research has demonstrated that council costs generally make up a small component of the overall costs to applicants⁶. For example, a survey of subdivision costs found that on average consent processing fees made up only 7% of the total cost to applicants (\$1,340 per lot). The majority of costs were made up of applicant preparation costs (\$4,630 per lot on average or 39%) and compliance with consent conditions (\$9,770 per lot on average or 50%). However, it is considered that many of the applicant's costs (especially compliance with consent conditions) relate to basic design and construction matters that would occur regardless of RMA requirements.

The cumulative impact of these costs has lead to widespread concerns over the impact of the RMA on housing affordability, particularly within the Auckland region⁷. Developers have stated the RMA can have a large impact on the financial viability of developments and anecdotal evidence suggests that developers will on occasions take a low risk (and less innovative) approach to reduce RMA costs⁸. Data from a larger sample of over 250 subdivisions demonstrated that the combined RMA costs amounted to approximately 2-4% of the price of a new home, depending on THE applicant costs and the location. Arguably that cost is not that significant to ensure quality development with acceptable social and environment effects. There are also plenty of examples of high quality urban design that goes through a relatively efficient RMA consenting processing. Bad financial planning and poor design are often the more important factors contributing to high RMA costs for developers.

The Ministry has also collected total applicant costs for the full range of resource consent types. Although the sample size is small, the results in the table demonstrate that consent costs can be significant in some circumstances.

	Land-use	Subdivision	Discharge	Water	Coastal
Processing time (actual days)	94	132 (to s.104)	434	182	46
Average council	\$2,758	\$1,344	\$10,929	\$2,379	\$659

⁴ For example, an independent survey of RMA practitioners found 76% thought there was improved overall performance in hearings as a result of the Making Good Decisions programme <http://www.mfe.govt.nz/publications/rma/making-good-decisions-survey-aug06/index.html>

⁵ RMA Survey of Local Authorities 2005/2006.

⁶ Hill Young Cooper (2008) *Impact of the RMA on Housing Costs*

⁷ MOTU (2007), *Housing Supply in the Auckland Region 2000-2005*

⁸ Market Economics and Harrison Grierson (2008), *The adequacy of Auckland Regions residential land supply*. Draft report, prepared for the Department of Building and Housing.

processing fee		(per lot)			
Average total RMA costs	\$24,653	\$15,744 (per lot)	\$39,623	\$8,908	\$659

The significance of these costs will depend on the nature and scale of the activity and the applicant. Some businesses simply include RMA costs as part of the “cost of business” and there are varying opinions on the reasonableness or otherwise of those costs. For example, Shell spends \$100,000-\$200,000 per annum on consultants to assist with resource consent applications (which amounts to approximately 1% of their investment expenditure)⁹. For others, RMA costs may impose a significant imposition, such as first-time applicants who want to undertake minor works on their property and have little capital to invest. Importantly from an applicant point of view is that a single project can sometimes require a range of different types of consents for a variety of activity classes and potentially from more than one local authority¹⁰. Each consent may have separate conditions on it often with specific monitoring conditions (particularly regional council consents).

The cumulative impact of these costs has been expressed as a particular concern from some businesses and sector groups¹¹. For example, the Warehouse estimates that the cost of their notified applications has increased from \$5,000 to \$50,000 since the RMA was introduced and can be over \$100,000 if a hearing or the Environment Court is involved¹². Some of these additional costs are due to the increases in size and scale of the development and therefore increases in effects.

Timeliness of process

Statutory timeframes for processing resource consents range from 20-80 working days depending on whether the application is notified (the equivalent of one to four calendar months). The last RMA survey showed that 74% of non-notified applications are processed within the statutory timeframes but only 56% of publicly notified applications met the time limits. Preliminary data from 2007/2008 suggest the amount of consents processed within time-frames has dropped further to 69%¹³.

This lack of compliance with statutory timeframes has created negative perceptions of the RMA and its effectiveness by some groups. For example, a 2007 survey of Federated Farmers found 51% found the processing time was unacceptable and 63% felt the RMA should be changed in some way¹⁴. However, other studies have found that more than half of applicants considered the timeframe to process their application to be reasonable¹⁵.

In reality compliance with statutory timeframes provides a somewhat limited measure of timeliness. It is the actual processing time that applicants are generally concerned with. Statutory timeframes exclude weekends and any time when the ‘clock was stopped’ due to further information requests. Further information requests are a source of particular concern for applicants as these are relatively common (made on 32% of applications) and may be made several times. Preliminary data from

⁹ LECG (2006), *Impacts on the Business Environment of the Resource Management Act*.

¹⁰ ¹⁰ A suite of 57 resource consents were recently granted for the Arnold River hydro-electric dam and there are 34 consents needed for the Mokihinui River hydro proposal.

¹¹ For example, the Business NZ/KPMG *Cost Compliance Survey* (2003-2008).

¹² LECG (2006), *Impacts on the Business Environment of the Resource Management Act*.

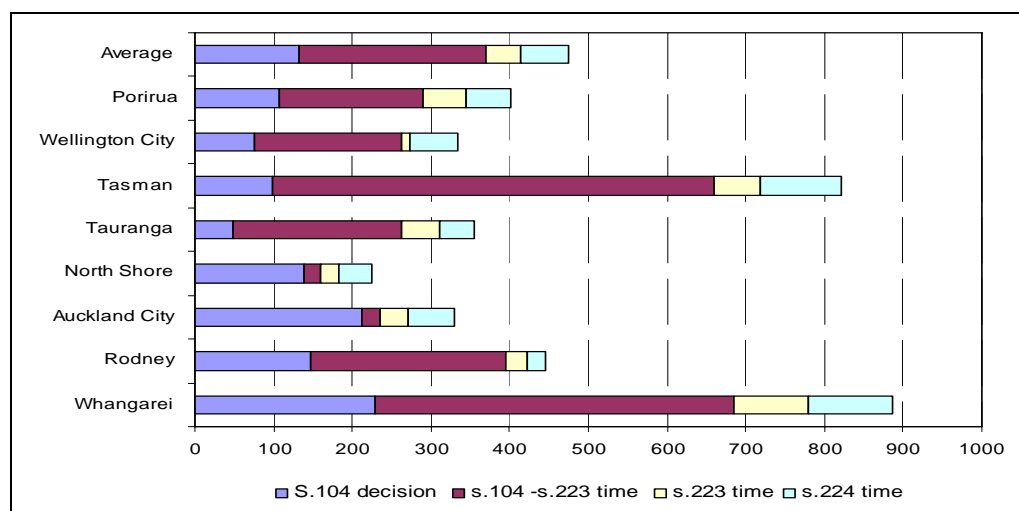
¹³ Note these figures are preliminary and have yet to be confirmed with councils.

¹⁴ Research NZ (2007), *The Resource Management Act and Farmers*.

¹⁵ LECG (2007), *The Cost of RMA Implementation: Report on Pilot Study*.

2007/2008 suggest the use of further information requests have increased to 40% of applications. There is also the ability to extend timeframes through the use of section 37. Local authorities are increasingly extending consent processing timeframes and 2007/2008 figures indicate it is now being used on 28% of applications.

The best set of data on actual processing timeframes comes from a survey of over 250 subdivisions in 2008. This survey demonstrated that actual timeframes were considerably longer than statutory timeframes with the average processing time from lodgement to decision was 132 calendar days (and over 200 days in some councils). In addition to the initial consent processing time, the time taken to obtain the section 223 and 224 approvals (which confirm completion of the subdivision consent condition requirements) generally adds another couple of months to the total timeframes. The average processing times from each council from lodgement through to section 224 certificate is shown in the graph below.



It is important to note from the graph that the section 104-223 timeframe is where the applicant undertakes works to meet conditions of consent and obtain survey plan approval. The period usually involves the applicant clearing the site, making provisions for access and connection to utilities, and carrying out earthworks to get the land stable and in accordance with approved plans. Therefore this period (which makes up 11 out of the 18 months a subdivision took on average) largely out of the control of council and more relates to how quick applicants undertake work to meeting their obligations to get the land safe and suitable for housing.

Holding Costs

Anecdotal evidence suggests that resource consent processing timeframes can be a significant issue for developers, particularly in metropolitan areas such as Auckland¹⁶. The primary concern associated with these delays relates to holding costs that applicants incur waiting to get their consent approved. This is particularly an issue for large urban developments where significant capital is borrowed and some commentators have estimated holding costs of up to \$600,000

¹⁶ MOTU (2007), 'Housing Supply in the Auckland Region 2000-2005', Market Economics and Harrison Grierson (2008), "The adequacy of Auckland Regions residential land supply".

Despite finding widespread criticism in the media, actual evidence of RMA holding costs is rare. Although consent delays and associated costs are clearly an issue for some developments, Ministry research suggests that majority of applicants do not consider they incur holding costs while waiting for RMA approvals. Where applicants did consider they incurred holding costs, they could rarely quantify or verify them¹⁷.

To provide some quantitative estimates of holding costs for residential development, the Ministry calculated 'theoretical holding costs'. These calculations are based on land value, current interest rates, actual processing times and the assumption that 90% of land value was borrowed. These holding cost calculations are much more modest than commonly reported in the media as shown in the table below.

Location	Auckland	North Shore	Wellington	Porirua	Average
Processing time (actual days)	213	138	75	108	132
Total holding costs (per lot)	\$6,800	\$4,600	\$4,100	\$2,500	\$3,100

The reasons for delays in consent processing not straight forward however. Often these are related more to the quality of the application and the capacity issues within councils rather the RMA itself. For example, a review of 11 poor performing councils following the 2005/2006 RMA survey found the following reasons for delay:

- accepting poor quality applications
- delays in gaining information from other parties (within council)
- inadequate tracking
- poor information and communications technology
- complex planning reports and conditions for minor applications
- shortage of consent officers
- level of priority put on meeting statutory timeframes
- low level of delegated authority to council officers
- increasing number of complex applications
- difficulties administering the district / regional plan.

Many of these factors clearly relate to council capacity and their individual processes (implementation) rather than the RMA itself.

Summary of issues

Collectively there appears to be some cost and time issues with the resource consent process. This suggests efficiency gains can be made by streamlining the consent process and decision making in some areas. Any changes should aim to make improvements across the full range of consents under the RMA rather than simply focusing on major or high profile developments. This means making the process for all applications clearer, the process for small applications simpler and the process for complex applications more robust. It also involves some changes to the current broad rights of appeal on consents. To be effective these measures will need to be supported by initiatives to improve implementation and build capacity in local authorities¹⁸.

¹⁷ LECG (2007), *The Cost of RMA Implementation: Report on Pilot Study*, Hill Young Cooper (2008), *The Impact of the RMA on Housing Costs*.

¹⁸ This could build on initiatives underway at the Ministry, including the Quality Planning, Making Good Decisions, targeted assistance, and possibly be expanded to include more specific guidance on efficient consent processing and specialised training in certain areas (e.g. cross examination).

Discussion of options

Options

This paper evaluates six broad options to improve the resource consent process:

- [1: Strengthen local decision-making](#)
- [2: Remove the notification presumption](#)
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- [4: Providing certainty on the baseline environment](#)
- [4: Simplify statutory timeframes](#)
- [5: Clarify further information provisions](#)

Each of these options may involve a number of changes ranging from minor changes to provisions through to more substantial changes to the underlying principles of the RMA. Most options involve a rebalancing of the rights of public participation and appeals, or a rationalisation of the requirements of resource consent decision-making. These are the trade-offs that are required to be made to improve the efficiency, costs and consistency of the process.

As there is a degree of overlap between the options and many are complementary, any changes to the resource consent process should be considered as part of a larger package of policy options. It is also important to take into account options recommended in other papers, especially options such as a reduction in consent categories and Environment Court fine and fees¹⁹.

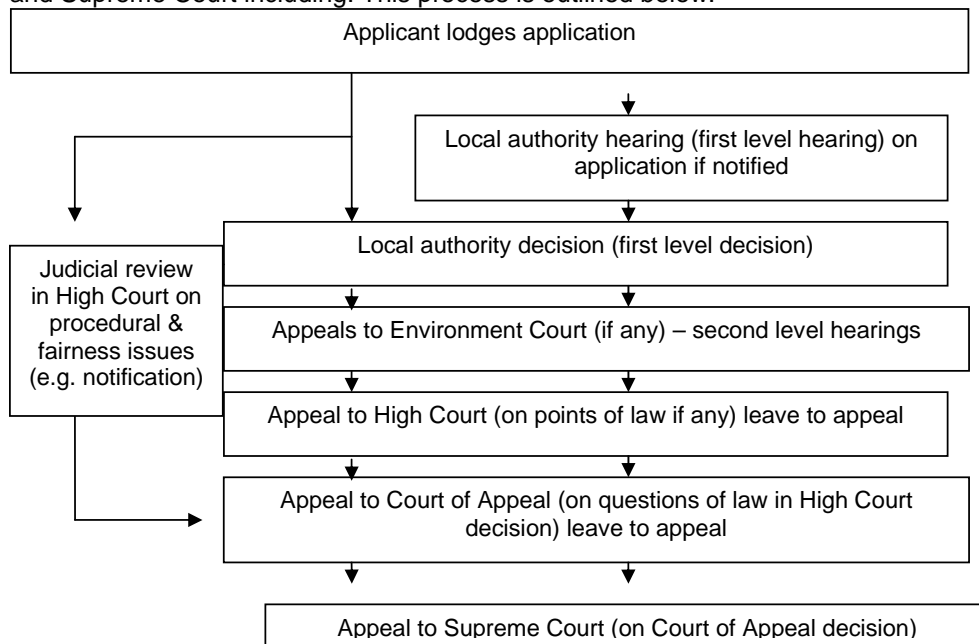
¹⁹ There are complementary papers currently being developed on: the first schedule; Environment Court fines and fees; priority consenting; National Policy Statements and National Environment Standards; RMA and other legislation; RMA compliance and enforcement.

1: Strengthen local decision-making

Issue

Concerns around local decision-making on resource consents have largely focused on the inconsistency of requirements between local authorities and the quality of decisions. The former is largely related to the variability in local authority plans, while the latter issue is more related to the skills and experience of those making the decisions. This latter issue has been addressed, at least in part, through the introduction of requirements for local decision makers be trained and accredited to sit on hearing panels (hearings are held for approximately 4% of resource consent decisions). However complaints over the time and costs of decision making persist, especially in regard to major projects and the 1% of resource consent decisions that are appealed to the Environment Court. These largely form the basis of a number of the commonly cited 'war stories' around the RMA.

These concerns relate to a fundamental issue for the resource consent process which is the balance of decision-making powers between local authorities and the Environment Court. The RMA was set up with numerous checks on local decisions that provide broad appeal rights to the Environment Court (in addition to rights of objection to the original decision making authority). Currently, the Environment Court has the ability to hear all matters that were considered in the first level decision afresh (i.e. "de novo" appeals). Under the de novo system, the Court has the same discretion as a council on a decision that is appealed and so it may hear the application again in its entirety and confirm, amend or cancel the original council decision²⁰. There are also further rights of appeal to the High Court, Court of Appeal and Supreme Court including. This process is outlined below.



²⁰ Note that the Environment Court does not always conduct a de novo hearing, because the circumstances may not warrant it so the issues on appeal can be more restricted than the first instance hearing. The Court has the power to restrict the issues, read the evidence in advance and take it as read, and may require cross-examination only rather than conduct a "de novo" hearing.

These checks in the consent process enable local decisions to be made on local issues, while upholding the principles of natural justice through providing an avenue of appeal for those who considered their views had not been properly considered, or the reasoning of the local decision makers flawed.

However, for large applications the de novo appeal rights to the Environment Court can create a situation where they go through an extensive council hearing that follows a robust process to produce a sound decision, only to repeat the experience in an Environment Court hearing on appeal. This repetition leads to increased costs and delays for applicants and some submitters (who may have appealed) as the matters are essentially heard twice and experts and submitters may be required to re-present evidence. It can also result in a waste of council energy and resources into the first-level decision.

In more recent times it has become increasingly common for the Environment Court to adopt the practice of taking evidence as read prior to the commencement of the Court hearing, enabling the hearing to focus on cross-examination and matters in contention. This has had some success in reducing the costs and time spent in appeal hearings. However, there are still considerable delays and costs accrued simply by having to go through an Environment court hearing to get a final decision.

Another concern with the current de novo system is the undermining of the first level decision making process by participants who hold back serious input and investment until the matters are heard before the Environment Court in their entirety. Some practitioners see this as a regular occurrence and a particular issue for the resource consent process²¹. An example of opposing submitters 'holding back' at the first level hearing is the Overseas Passenger Terminal redevelopment on the Wellington Waterfront. The applicant invested \$750,000 in the process up to a first level decision. The council decision to grant the consent following a lengthy hearing was appealed by a submitter who provided no expert evidence at the council hearing. The appellant has arranged ?number? of experts to provide evidence at the Environment Court hearing. This would suggest that the de novo model often provides little incentive for third parties to invest in the first level decisions, particularly for large or controversial applications when an appeal is likely to follow.

Comment [w1]: Get figures from Mark McGuinness

- Hearing length
- Money spent
- Experts etc.

These issues are not new and have been a key consideration in previous reviews of the RMA. The 2005 amendments to the RMA aimed to strengthen local decisions by introducing:

- compulsory accreditation of hearing commissioners
- new powers to direct evidence exchange and presentation, to provide further information at a hearing, and to strike out submissions that are frivolous, vexatious, have no relevance or would be an abuse of the hearing process to allow
- formal requirements to document reasons and findings of fact in first level decisions (section 113)
- new ability for Court to accept evidence presented at the council hearing
- new requirement for Court to "have regard to" the first level decision.

Although these powers have generally been useful in first level hearings there is little evidence to suggest that the Court giving more weight to first level decisions. Some practitioners suggest that generally no material weight is given to the first level

²¹ John Hassan (2008): '*The Environment Court: looking afresh at its role and status.*'

decision, and that evidence presented at the first level is often represented at the appeal stage²². There are examples of cases that have only scarcely mentioned the original decision by way of background, while others have largely dismissed the original decision as having little relevance to the matters under appeal. There are also recent examples where an application has gone through a quality first level decision only to be immediately overturned on appeal. This includes the Waterfront Investments Ltd application to operate a Hilton Hotel on the Wellington waterfront, and the Wellington Marine Education Trust's application for a marine education centre on Wellington's South Coast. The Court choosing not to give any or little weight to the first level decision undermines the purpose of the first-level decision making process.

However, there is growing evidence that the quality of local decision making under the RMA has improved, particularly for more complex applications that go through full council hearing²³. There is also an increasing pool of capable decision makers that now have considerable experience under the RMA and have obtained accreditation through the Making Good Decision programme²⁴. These improvements have been demonstrated in recent decisions where the Court commented positively on the **robustness of the council decision**.

Comment [w2]: Will refer Motorimu and Mahinerangi cases

This would suggest that it is timely to re-evaluate the role of the Environment Court in resource consent appeals with an aim to reduce duplication of council and Court hearings. However any move to limit the scope of appeals on resource consents will also need to ensure a high level of quality and integrity in first level decisions. Accordingly, some of the options presented below need to be considered as a package to be successful.

Options include:

- 1.1: limit the scope of “de novo” hearings at the Environment Court
- 1.2: increase the rigour of council hearings
- 1.3: new powers to deal with trade competition and vexatious submitters
- 1.4: allow applicants to request an accredited independent hearing panels
- 1.5: give local authorities the discretion on whether to hold a hearing
- 1.6: provide for the direct referral to the Environment Court on complex cases
- 1.7: require the administrative cost of hearings to be shared between participants
- 1.8: introduce further requirements in hearing commissioner training

1.1: Limiting the scope of “de novo” hearings at the Environment Court

There are a number of options to limit the scope of de novo hearings at the Environment Court. One option is to dispense with appeal rights on the merits of first level decisions and allow appeals on points of law only. However, this option demands high quality and legally sound first level decisions. This cannot be guaranteed without changes to requirements of first level hearing panels and their powers. Even if these were enhanced through, by example, giving the council powers to cross-examine, it is very unlikely that the council's questioning of evidence would be as robust as Environment Court hearing. This could be a particular issue

²² John Hassan (2008): *'The Environment Court: looking afresh at its role and status'*

²³ Boulder Planning (2006) *"Survey of Practitioners – Making Good Decisions"*.

²⁴ List of accredited decision-makers: <http://www.mfe.govt.nz/rma/practitioners/good-decisions/certified-independents.php> up to 1200 in total.

where hearing panels comprise of local elected representatives or inexperienced commissioners.

A more feasible option may be to split up the first level hearing and the subsequent appeal rights based on the significance²⁵ of the application. An example of how this could work is shown below:

	Local Hearings	Regionally Significant Projects
Panel	Accredited decision-makers	Appointed panel of independent commissioners (possibly by Minister with support from councils)
Chair	Accredited decision-maker	Environment Commissioner (or former or retired Environment Judge)
Hearing powers	As currently exists	Cross examination, pre-circulation of evidence
Appeal rights	To Environment Court on points of merit, contention or uncertainty only	Points of law to High Court

However for this option to be practical there would need to be clear guidance about whether a matter was best heard locally or through a regionally significant hearing. If criteria was developed in the RMA there would need to be a distinction clear whether the matter is regionally significant, a priority project, or nationally significant in accordance with the criteria for call-in under section 141B(2). It is likely there would be overlap on some proposals as the number of regionally or nationally significant projects in New Zealand is quite limited²⁶.

Another important aspect to consider is who makes the request and the final decision to go for a regionally significant hearing. One option would be for the applicant to apply, with the final decision to proceed made by the regional council or the consent authorities the application relates to (or all of the councils in the region). Whatever option was taken there would still need to criteria developed to assist the consenting authorities make their decisions. Ideally criteria could make links to targets in key national and regional strategies (e.g. energy strategy, regional growth strategies)²⁷.

The regionally significant hearing model resembles a version of the call-in process that currently exists under the RMA at a smaller scale and with no or little involvement from the Minister. The call-in process has its own issues around how to determine proposals that meet the call-in criteria and the availability of suitable commissioners and Environment Judges (this is the topic of a separate paper). These issues will be relevant to the regional significant process and any changes would need to be complementary (in terms of criteria and the composition of the panel required).

²⁵ Note “significance” could also be replaced by “priority” depending on how these projects were to be given weight in the RMA. There is a separate paper considering how the RMA may be changed to provide a better process for priority projects.

²⁶ To avoid overlap one option would be to extend the call-in processes to include in the criteria in section 141B (2) ‘is or is likely to be significant on a regional scale.’ However, this may lead to a flood of applications which may not be able to be resourced quickly, leading to further delays

²⁷ Also note there is work underway to develop a national strategy for central government involvement in the RMA.

This option may still retain the ability for the Environment Court to conduct de novo hearings in special circumstances. For example, where important new information has become available or when the council decision was clearly inadequate. Where the first level decision was considered inadequate (by the applicant or a submitter) there could be scope to appeal to the Environment Court on those grounds and request a de novo hearing. The Environment Court would need to be guided by a prescribed list of factors such as:

- has the decision-maker correctly applied relevant RMA principles and documents?
- has the decision-maker committed any error of law in terms of the "*Wednesbury principles*"?
- was the evidence presented sufficiently tested?

Comment [h3]: Will include a quick summary as a footnote of what these are.

If, the Environment Court considered the first level decision to be inadequate; the Court could be given the choice of cancelling the decision and referring it back to the first level decision-maker, with directions. The other option would be to rehear the whole application through a de novo hearing.

As this option would lead to hearings about whether there was new evidence or the decision was inadequate, there is potential that this could lead to an inefficient use of the Court's resources. There are estimates that this could occupy at least 150 additional hearing days. It could be argued on those grounds that it may be more efficient for the Court just to get on with a de novo hearing or not, as circumstances dictate. On the other hand, there would be a reduction in Court time by minimising the number of applications that go to the Court and on what grounds.

Comment [w4]: Check with Ann where this figure came from

Pros	Cons/risks
<ul style="list-style-type: none"> • Consistent with making local authority hearings more robust (MGD etc) • Encourage full public participation in the first hearing (and save Court hearing for more technical points of law) • Potential to significantly reduce Environment Court workload (but also potential to increase if many decisions are challenged on procedural matters which may increase hearing time) • Reduced costs for applicants as matters are not reheard in their entirety • May improve the accessibility for participation in the process (rather than be required to go to the formal Court environment on appeal) • Time savings as some projects only being heard once. 	<ul style="list-style-type: none"> • Need to ensure first level hearing robust and legally sound. This may include more stringent requirements for panel composition and harder requirements for accreditation (which may be impractical given some already struggle with the course requirements). • How to define the “regionally significant” track and who may apply for and approved this status may be controversial. Criteria will likely need to be developed nationally to guide councils • Potential to increase the overall costs to applicants if the council decision considered to be inadequate (though review of process then judgement) • Possibly make first level hearing too complex and inaccessible for the lay submitter and applicants, and more expensive and time consuming for councils • Potential to increase Environment Court workload through two hearings (for process and then judgement). • Restricting appeals to point of law only may be problematic when proposal evolving or modified through first level hearing and the Court may need to seek new evidence more frequently • May see a transfer effect with appeals that would have been on merits of the decision simply become appeals on process matters lodged in order to overturn a decision (in some cases this may simply see the Court refer the matter back to the local authority for what will in effect be a third hearing) • Could potentially add further complexity for councils and others at a time when the 2005 amendments (are just starting to bed in and have effect. • May require a wider review of the role of the Environment Court (should it be a specialist Court making value judgement? Should its status be elevated to that of the High Court?)

1.2: Enhance rigour of first level (local authority) hearing

The 2005 amendments provided a range of new hearing powers to local decision-makers. The Making Good Decisions programme has been effective to encourage better use of these powers and these are being used well by some decision-makers. However, there is little evidence to suggest they are being used as widely and effectively as they could. It appears there is potential to further increase the rigour of the first level hearing through a combination of additional powers and more specialised training and accreditation. It is considered that further training is required to ensure decision-makers know how to effectively use new and existing powers to run a robust hearing (refer to option 1.7).

The additional powers that could be given to panel members in first level hearings include rights for cross examination and requirements for applicants and submitters to exchange all their evidence prior to hearings and summarise their points of contention (.i.e. the so-called inquisitorial approach). These enhanced powers may be limited to more complex or regionally significant projects but maintain the current, less formal, hearing process for projects with less effects/implications, such as for limited notified application. Through training it would be expected that panels could effectively get experts to summarise their points of contention while ensuring the lay submitter could still feel comfortable to outline their issues/concerns.

Pros	Cons/risks
<ul style="list-style-type: none"> • Consistent with making local authority hearings more robust (MGD etc.) • Encourage full participation and presentation of evidence at the first level hearing • Help to ensure evidence produced at the first level had been sufficiently tested • Could lead to a more efficient hearing process focusing on areas of contention • Limit the need for an de novo hearing at the Environment Court 	<ul style="list-style-type: none"> • Would need to be supported by additional training and practice notes to ensure powers used appropriately. Decision-makers would need to undertake specialised training and certification in the new powers (even those already accredited). • May make first level hearing intimidating for the lay submitter • May result in some hearings become more technical and dominated by expert witnesses • May add to the length, complexity and cost of the hearing (although this could reduce the scope of matters to be considered at Environment Court)

1.3 New powers to deal with trade competition and vexatious submitters

There are frequently concerns raised about trade competition and vexatious or frivolous submitters causing unnecessary delays and costs in the consent process, both at the council level and the Environment Court. Submitters may be considered “vexatious” if they are there to annoy or embarrass another party, or are not likely to lead to a practical result. “Frivolous” generally implies some degree of superficiality or lack of purpose. Trade competitors essentially fall within this definition as their motive is abuse the consent process to get a competitive advantage and annoy the competition. However well advised trade competitors are likely to couch their objections in a way to avoid the characteristics of “vexatious” or “frivolous” submissions. Therefore effective tools to deal with these types of submitters may need to be specific to that type and the underlying motive.

This paper focuses on options to vexatious submitters at the first level decision. Dealing with trade competition and submitters at the Environment Court level (including security of costs) is the topic of separate papers²⁸.

Vexatious submitters

Local authorities were given new powers in 2005 to strike out submissions (in whole or part) if they are considered to be frivolous, vexatious or would otherwise be an abuse of the hearing process. However, these powers under section 41C(7) are

²⁸ Refer to ‘RMA Amendment Ideas: A Preliminary Analysis of Announced Policy Options’, ‘Environment Court Fees and Costs’, and ‘Anti-competitive behaviour and the RMA, November 2008.

rarely (if at all) used by hearing panels. This is because it generally very difficult to use these powers as:

- trade competitors and vexatious submitters can quite easily be disguised as having legitimate concerns about environment effects, and may be careful not to expose their underlying motive
- it is hard to prove vexatious motives, or that a submission is frivolous (indeed there is a lack of clarity on what is “frivolous” or “vexatious”)
- the easy objection rights for any submission struck out which may simply provide an easy avenue to stall the hearing process (as it currently stands appeals can go all the way to the Supreme Court).

There is no obvious option to improving the mechanisms available to deal with frivolous or vexatious participants. Removing the right to object any submission struck out may help to improve the powers in section 41C(7). This could be replaced with a right of appeal to the Environment Court, which may discourage appeals as the submitter may be intimidated by the Environment Court (with powers to award costs). This option would be less effective for more experienced submitters and trade competitors who could effectively stall the process further at the Environment Court by expressing some form of legitimate concern.

Given these issues, it is unsurprising that local authorities find it easier to accept vexatious or frivolous objections, conduct the hearing (if required), then discount it during consideration of whether to accept or decline the consent. This would suggest that rather than striking out vexatious submissions (which opens up the hearing to challenge) there may be more merit making hearing more robust and efficient hearing. This can be achieved through excluding information that is not relevant and submissions containing information that appears to offer nothing reasonable or relevant to the case (as currently available under section 41(7)(b) and focusing the hearing on the matters of dispute²⁹. To facilitate this training and guidance could be provided to decision-makers on how to effectively use these powers to run an efficient hearing.

So the option to deal with vexatious submitter at the first level hearing include:

- amending section 41C so that there is no objection to submissions that are struck out (possibly with a right of appeal to the Court)
- provide specialised training on how to run an efficient hearing (through excluding irrelevant information at the outset)

Also note that giving the council the discretion to hold a hearing (option 1.5) could help deal with vexatious or frivolous submissions for smaller applications.

Pros	Cons/risks
<ul style="list-style-type: none"> • Removing the right of objection may encourage greater use of powers to strike out submissions (although if a right of appeal to the Court was retained this could create further delay while waiting to be heard at Court) • Training would help run a more efficient hearing and disregard irrelevant submissions 	<ul style="list-style-type: none"> • Powers that already exist are rarely used to the practical difficulties associated with their use • Difficult to distinguish vexatious submitters from those with genuine concerns

1.4: Allow applicant to request independent panel

²⁹ Refer section 41C(1), 41C (6)of the RMA

This option would allow applicants to choose between a panel comprising of local authority elected representatives and an independent panel of commissioners when it is confirmed that a hearing is necessary to determine an application (refer to option 1.4). It may also involve the applicant requesting that their application proceed as a “regionally significant project” (see process 1.1 above) but the final decision on whether to proceed down this path would be that of the regional council or all the councils in the region.

If an applicant requested an independent panel, there would be more limited rights of appeal. Additionally all costs associated with the independent hearing panel would be borne by the applicant (including when expert panel members are required to be brought in from other localities).

Pros	Cons/risks
<ul style="list-style-type: none"> • More certainty for applicants on how their application will proceed • Reduced perceptions of conflict of interest issues though keeping decision-makers independent from elected representatives • Supports call to separate out the executive plan making role of councils from their quasi-judicial role • May create greater certainty in process and limit the need for de novo appeal rights 	<ul style="list-style-type: none"> • This may be problematic for areas with a limited pool of accredited decision-makers (although could call on expertise from other locations) • Unlikely to be supported by elected representatives particularly TA's • Further training may be required to ensure independent panels are making robust decisions • If supported by applicants, may lead to a flood of applications to be considered by independent panels of through the 'regionally significant' track • Most councils already refer complex decisions/where there is a potential conflict of interest to a panel of independent commissioners, or a combination of commissioners and councillors (although these decisions are still being overturned in the Courts).

1.5: Give the council the discretion on whether to hold a hearing

This option would involve the council having greater powers to decide whether a hearing is necessary. At present a hearing is required if any submitter indicates they want to be heard. Additional criteria for holding a hearing could be set to include the council determining that a hearing is necessary to consider and/or clarify issues.

Both criteria would have to apply to require a hearing. This would reduce the number of hearing needed where sufficient information has been provided by the applicant, and submitters have limited basis for opposition,

Pros	Cons/risks
<ul style="list-style-type: none"> • Reduce number of first level hearings where limited or very minor matters are in contention or where submitters are opposing 'in principle'. • Reduce delays and costs of processing less complex notified or limited notified applications, where that delay is due to difficulties in finding suitable hearing days for a hearing panel. • Allow consent authorities to avoid going through hearing when submission are clearly not going to 	<ul style="list-style-type: none"> • Could be seen to be contrary to the principles of public participation and the submitters 'right to be heard' • May not be supported by local body elected representatives • May exclude submitters with a poor knowledge of the process ensuring their issues or concerns are adequately heard

1.6: Direct referral to the Environment Court for complex cases

This option would involve complex applications by-passing the council decision and have the resource consent application directly heard by Environment Court³⁰. This could involve two options:

1. The applicant obtaining the agreement of the consent authority to refer the matter directly to the Court
2. The applicant could apply to the Court directly and the Court would make a decision based on certain grounds or criteria (that would need to be developed to guide the Court).

The direct referral to the Environment Court has the immediate effect to applicants of being able to save the time and expense of local authority hearings. This would be an attractive option for some applicants for larger or more controversial proposals. However, the majority of submitters on the 1999 Resource Management Bill opposed the idea with the main concern being around the loss of local decision-making and community participation. The select committee discarded the proposal based on a these and additional concerns³¹.

³⁰ Note this option was recommended in 1998 report "*Report of the Minister for the Environment's Reference Group*" and the Resource Management Amendment Bill of 1999.

³¹ These included: the time and cost savings being negated unless the Environment Court accepted every application for appeal; there being benefit is council hearing first to narrow down issues; the cost to third parties.

Pros	Cons/risks
<ul style="list-style-type: none"> • Would save the repetition for larger applications that are complex and controversial that will inevitably be heard by Environment Court of being heard twice (reducing overall time and costs to applicants) • Environment Court experienced in dealing with people with little legal experience • Would be useful option for those councils with limited resources and expertise to hear complex applications • May help to discourage frivolous and vexatious submitters • Local input could still be provided through preparing report, making submissions etc. 	<ul style="list-style-type: none"> • Against the principles of public participation that underpins the RMA • Environment Court an intimidating setting for the lay submitter due to the formality, costs and evidential requirements • Not consistent with current initiatives to improve the robustness of first level decision-making (MGD etc) • Could increase costs for applications that may have been settled through local authority hearing • Criteria would need to be developed to help the Court determine what applications should be directly referred • Could significantly increase the workload of the Court so this would need to be matched with additional resourcing (otherwise would lose any time savings) and priority of these applications by the Court which would impact on other Environment Court cases (e.g. plan appeals)

1.7 Allow hearing costs to be shared between participants

This option would involve submitters or participants in the council hearing to be required to pay for their involvement. The majority of the costs would remain with the applicant but some form of deposit or bond may help to encourage all participants to put their best case forward at the first level hearing. The bond option would enable some form of refund or compensation for participants who demonstrate that they are adversely affected by a proposal or are found to be acting in the public good. On the other hand, those found to be frivolous or vexatious or raising irrelevant matters could be ordered to pay additional costs in addition to their deposit/bond. All costs would be determined after the hearing concludes and decision released to ensure there is no delay in the process.

Pros	Cons/risks
<ul style="list-style-type: none"> • May encourage all participants to put their case forward in the first level decision • Would encourage third parties to think about their involvement more and encourage more considered involvement • May discourage frivolous or vexatious submitters • Would help to ensure that submitters have the correct cost signals concerning the costs to the council (applicant and ratepayers also) of making a submission 	<ul style="list-style-type: none"> • It may create a barrier to participation which conflicts with the underlying principles of the RMA to encourage public participation in local decisions (but this could be mitigated by a power to waive charges) • The potential awarding of costs is a huge new responsibility for panel members (and arguable should be left to the Court) • It is very difficult to separate out "vexatious" submissions. The panel would likely be reluctant to award costs on this basis. • Unclear as to what size the bond or deposit size should be, while that, plus the discretionary nature of refunds could create fruitful grounds for objections and appeals (if such rights are afforded, if not, natural justice issues may arise) • Strict limits and guidelines would be required on how deposits should be charged/refunded and when additional costs should be sought

1.8 Further accreditation requirements for decision-makers

This option would be required to complement any move to limit appeal rights further and change the composition of hearings panels. This would involve building on the Making Good Decisions programme to have more advanced courses (e.g. for panel members on "regionally significant projects") and specialised training (e.g. plan and policy making, dealing with vexatious matters and cross-examination).

This option could be complemented by the ability of the Minister to cancel accreditation for poor performing decision-makers (as desired or if a request shows this to be desirable). This would be an added incentive for decision-makers to take their duties seriously to ensure processes and decisions were robust.

Pros	Cons/risks
<ul style="list-style-type: none"> • Would complement any move to limit appeal rights by ensuring local decision-makers are well qualified in RMA hearing processes • Improve the robustness of first level hearings and improve quality of decision making • Builds capacity and skills in RMA decision making to provide a more efficient and robust regime 	<ul style="list-style-type: none"> • Requires a significant amount of resources to develop the material, run the courses and grade the participants, and has on-going resourcing requirements. • Many decision-makers have already gone through courses and may resent the requirements to get re-certified and/or attend further courses, see it as an imposition in terms of the additional time and money required • May increase the incidence of judicial reviews as a substitute for lost appeal rights.

Direction for further work / Recommendation:

Option	Not workable requires other means to achieve outcome	Possibly workable but has negative implications and/or will require modifications	Recommended priority option for further search
• 1.0: Do nothing			
• 1.1: Limit the ability for and scope of “de novo” appeals (introduce two categories of first-level hearings)			<input checked="" type="checkbox"/>
• 1.2: Increase the rigour of council hearings			<input checked="" type="checkbox"/>
• 1.3: Allow applicant to request independent hearing panel		<input checked="" type="checkbox"/>	
• 1.4: Give council the discretion whether to hold hearing			<input checked="" type="checkbox"/>
• 1.5: Direct referral to Environment Court	<input checked="" type="checkbox"/>		
• 1.6: Administrative costs of hearings to be shared	<input checked="" type="checkbox"/>		
• 1.7: Further requirements in commissioner training and certification		<input checked="" type="checkbox"/>	

2: Remove the notification presumption

Issue

Section 93 and section 94 of the RMA require local authorities to notify a resource consent application unless they are satisfied that the effects will be no more than minor and approval of affected parties is obtained; the application pertains to a 'controlled activity'; or the relevant plan specifically states notification is not required. This presumption in favour of notification mirrors that which existed in sections 66, 72 and 74 of the Town and Country Planning Act 1977, and is less stringent than the notification requirement in section 24 of the Water And Soil Conservation Act 1967 (both of which are immediate predecessors to the RMA). Notification is the gateway to third party involvement and subsequent appeal rights (i.e. standing) so the wording of section 93 and 94 has a profound impact on the resource consent process.

Although only 5% of applications are notified, there is often a heavy emphasis on notification decisions and the determination of affected persons³². Case law has determined that local authorities must be satisfied that they have enough information to determine the effects will not be more than minor and the Courts will carefully scrutinise that decision if challenged³³. As a consequence, the onus of proof to establish the effects are no more than minor sits largely with the council officer.

The wording of section 93/94 and case law interpretation often places local authorities in a difficult position with respect of notification decisions. Non-notification is generally highly desired by applicants to reduce their costs and avoid the risk of appeal from submitters. Anecdotal evidence suggests that applicants are going to increasing lengths to provide additional information and seek written approvals to convince local authorities that their application should not be notified³⁴.

As the burden of proof rests with council officers in their notification decision reports, often they are requiring higher levels of information from applicants to produce a detailed 93/94 decision and reduce their risks of judicial review. This often creates significant inefficiencies in the form of requests for further information which leads to increased costs and processing times.

For example – refer to [WCC example](#)

The occurrence of judicial reviews of notification is relatively low, with approximately four per year proceeding through to a substantive decision. However indications are that many more judicial reviews are filed and settled through other means and that the costs of judicial review are disproportionately high³⁵. The 'supermarket wars' on the North Shore provide an obvious example of this. These high profile cases have resulted in notification decisions often being contentious for local authorities due to onus of proof, the pressure from applicants and the fear of judicial review.

³²EMS (2008), 'RMA Technical Amendments and Conceptual Ideas'.

³³ *Westfield (New Zealand) Limited v North Shore City Council* [2005] NZRMA 337

³⁴ Richmond Planning (2008), 'A think piece on options to improve the resource consent process', EMS (2008), 'RMA Technical Amendments and Conceptual Ideas'.

³⁵Brown & Pemberton Planning Group (2008) 'Results of Research into Higher Court Resource Management Act Cases', & Simpson Grierson (2008). 'Options to refine and simplify the resource consent process'.

Comment [MoE5]:

Richard
Equally there is also evidence that suggests that some councils are going to great lengths to justify notification decisions, particularly non-notified – e.g. Wgtn CC taking more than a month and bringing on consultants just to determine whether or not the J'ville mall consent should be notified.

Natasha
Refer to WCC example where the judicial review was not in the councils favour – has made them very risk averse – as Richard's eg below shows...
Get stats on rates were error was found

There is evidence to suggest the present notification provisions that provide full discretion to local authorities are resulting in too much pressure and contention on notification decisions. It is not an issue of too many applications being notified. On the contrary many would argue that too many applications are not notified, which is a particularly issue for common resources such as water, air and the coastal environment. The issue is more that local authorities are often placing too much weight on notification (under the pressure from applicants and fear of judicial review) rather than focusing on the merits of the application. Refining the discretion to local authorities in respect of notification decisions may result in more focus on the merits of the application and greater certainty for applicants.

Options include:

- 2.1: Remove the notification presumption
- 2.2: Specify what consent categories require notification
- 2.4: Require applicants to be notified “when in doubt”
- 2.4: Broaden use of limited notification.

2.1 Remove the notification presumption

This option would involve amending section 93 and 94 to remove the presumption that applications should be notified unless the consent authority is satisfied that the adverse effects of the activity on the environment will be minor. This could be amended to state that applications should be notified when the effects are considered to be significant (full notification), or when the effects are not significant but there are clearly affected parties (limited notification to affected parties only).

Pros	Cons/risks
<ul style="list-style-type: none"> • Reflects reality of what happens now (i.e. low rates of notification) • May reduce effort and analysis over non-notification. However, a judgment call is still required to be made which could result in little benefit in terms of time and costs. 	<ul style="list-style-type: none"> • Likely to place more onus (and costs) on council to prove effects are significant (or more than minor) • Will create period of uncertainty as to what significant may mean in practice (in contrast the case law on current notification provisions is well developed) • Changing threshold will result in even fewer applications being notified and reduce opportunity for communities to have their say in proposal affecting them (notification already significantly less under the RMA than previous legislation) • There would need to be criteria developed to assist in determining “significant” effects to assist with implementation. • Detailed 93/94 assessments often feed into the assessment of an application to save costs and time there. • Places greater emphasis on consultation and hearings associated with plan preparation as this may be the only opportunity inside a 10 year timeframe for parties to have a say on a large portion of activities that affect them.

Specify what consent categories require notification

This option would involve using consent categories³⁶ to provide more certainty on what applications will be notified. For example, amendments could be made to state all restricted discretionary activities would not be notified. To retain some discretion, local authorities could require written approvals from affected persons as part of the application (as a matter to which they reserve their discretion otherwise the activity would not be a restricted discretionary). Alternatively section 94C (special circumstances for public notification) could be expanded to explicitly include restricted discretionary activities. Restricted discretionary activities make up 25% of the consents processed so this option could provide greater certainty a large number of applications

To provide more certainty on what applications would be notified, the RMA could be amended to require all non-complying activities to be publically notified. Although only 7%³⁷ of consents are non-complying this would provide more certainty on those applications and reduce the number of contentious notification decisions. This option could also be complemented by expansion of the existing ability to alter the default notification/non-notification requirement if special circumstances exist through changes to 94C. There is robust case law already about what constitutes special circumstances.

Pros	Cons/risks
<ul style="list-style-type: none"> • Will provide more certainty to applicants on when applications will be notified • Will reduce the onus on councils and the onus on applicants on deciding when to notify some applications • May reduce number of applications for non-complying activities (which are unanticipated by the plan) • May encourage councils to change consent categories to notify certain applications (and to not notify others to provide greater certainty within the region/district) • Makes use of existing consent categories and provisions rather changing the fundamental nature of section 93/94 (which would result in a period of uncertainty as new case law developed) 	<ul style="list-style-type: none"> • Will require councils to redraft activity classification in plans to take into account the new restrictions around notification • May create unnecessary costs for non-complying activities that have minor effects but are still required to go through the formal notification process (although the ability to determine 'special circumstances' would reduce this risk) • Would require a reclassification of the activity in section 77 and other amendments • May create an opportunity for vexatious parties to oppose non-complying activities (even when are not considered to be adversely affected) • A blunt and rigid approach that may not cope well with subtleties of site, proposed activities, and receiving environment characteristics (but this could be alleviated through changes to 94C)

2.3 **Require applications to be notified “when in doubt”**

Another option is to amend 93/94 to clarify that “when in doubt” about significance of effects, the application should be notified. This amendment could apply to the existing “no more than minor” test and would help to ensure the onus of proof does not always fall on local authorities to demonstrate effects are no more than minor.

³⁶ Note a reduction in consent categories could have a dramatic effect on this option.

³⁷ RMA survey of local authorities 2005/2006.

Pros	Cons/risks
<ul style="list-style-type: none"> • The “when in doubt” provides a clear incentive to notify when there is any doubt about effects being minor or not. • Could be effective to reduce the onus on council (and subsequent information requirements) to prove effects are either no more than minor • Will reduce delays and efforts in determining whether or not notification is necessary. 	<ul style="list-style-type: none"> • May result in councils not putting in enough effort into identifying effects and affected parties • Already reflected in current case law to a certain extent in regard to notification (e.g. <i>Kawhia Harbour Protection Soc. v Otorohanga DC</i> 2006) • Applicants could still put pressure on councils through further information requests that are no more than minor.

2.4 Broaden use of limited notification

Currently full public notification is required when any effects on the environment (which includes effects on people) are more than minor. This results in full public notification being required when effects (albeit significant effects) are limited to a very local scale (such as shading from a new development). There seems little justification for full public notification when effects are limited to a local scale. This can create situations where submissions are being made from localities that appear to have relationship with the application site, and where those making submissions do not appear to be adversely affected.

Public notification is generally more costly for applicants and local authorities. This is demonstrated through the differences in council processing fees in the RMA survey between limited and full notification, particularly for land-based activities.

Median council processing charge per consent type	Limited notification	Full notification
Discharge	\$3,370	\$4,764
Coastal	\$8,487	\$10,801
Water	\$4,363	\$5,417
Subdivision	\$3,002	\$6,801
Land-use	\$2,598	\$5,641

There may be potential to make further use of limited notification introduced in 2003 as this has generally be well received and is increasing in use³⁸. This option would entail amending section 93 to enable limited notification (of affected parties only) in situations where effects on some affected people may be more than minor, but effects on the wider environment will be minor or insignificant. Local authorities could also develop standard spatial measure for certain types of applications (i.e. 50m from subdivision site) to remove ambiguity further and provide greater certainty for applicants. This spatial approach is thought to work relatively well in Sydney³⁹.

³⁸ Refer to the RMA surveys of local authorities and report on the use of limited notification: <http://www.mfe.govt.nz/publications/rma/use-limited-notification-jan05/index.html>

³⁹ Refer to discussion of the City of Sydney’s Development Control Plan in EMS(2008), ‘RMA Technical Amendments & Conceptual Ideas’.

Pros	Cons/risks
<ul style="list-style-type: none"> • Ensures only those affected by the activity are involved in the consent process • Further clarifies notification requirements • Would be particularly useful for land based activities that have localised effects that are more than minor 	<ul style="list-style-type: none"> • May complicate notification decisions further

Direction for further work / Recommendation:

Option	Not workable requires other means to achieve outcome	Possibly workable but has negative implications/will require modifications	Recommended priority option for further research
• 2.0: Do nothing			
• 2.1: Remove the notification presumption	<input checked="" type="checkbox"/>		
• 2.2: Specify what consent categories require notification			<input checked="" type="checkbox"/>
• 2.3: Require applications to be notified 'when in doubt'			<input checked="" type="checkbox"/>
• 2.4: Broaden use of limited notification			<input checked="" type="checkbox"/>

3: Streamlining the process for minor consents

Issue

The scale and effects of the activities that require consent under the RMA varies significantly. Currently all applications, regardless of scale and effects, have to provide the information required by plans and the Fourth Schedule of the RMA (Assessment of Effects on the Environment). Applications are then considered in accordance with section 104, which requires consent authorities to have regard to the actual and potential effects from the proposal, all relevant RMA provision (including Part II), and any other relevant matter. Decisions on applications, regardless of the scale of issues and effects, must then be set out in writing in accordance with section 113.

These requirements for decision-making on resource consents are appropriate for large or complex projects where there may be significant effects and areas of contention. However, these requirements can be onerous for smaller, low risk applications, such as side-yard infringements, new dwellings, bore permits and tree removal, which make up the majority of consent volumes that local authorities process. The RMA survey demonstrates that approximately 80% of applications are non-notified land-use and subdivisions consents. It would appear logical to in categorise and streamline the process for these minor applications in some way to reduce the time and costs.

Currently the RMA provides no guidance as to how different activities should be treated other than stating the AEE *"should correspond to the scale and significance of the activity"*. Likewise, plans are variable in the guidance they provide for application requirements. There appears to be a wide interpretation of these provisions and many inconsistencies in the requirements for applications of similar scale and effects. Data indicates that while there is some correlation between the complexity of the application and the level of assessment, there is also wide variation⁴⁰.

There also appears to be a lot of repetition between the application and AEE provided and subsequent council officer and decision reports, which is a particular issue for smaller applications. For example, the 2007 review⁴¹ of 11 poor performing councils found that overly complex planning reports and conditions for minor applications was a major reason for delays in consent processing. Consent officer reports and conditions for minor applications were found to be long and complex often including multiple recitals of what the application is for, which plan provisions are relevant and why others do not apply. Reporting writing for minor resource consent reports was found to take several hours, which was often over a third of the time the consent officer spends processing the entire application.

There is also evidence that council reports often provide a detailed assessment of effects even when a comprehensive AEE is included in the application⁴². This is useful to highlight areas of dispute but where there are no areas of contention the result is simply a duplication of efforts, which creates additional costs and delays.

⁴⁰ Harrison Grierson (2008). 'Review of Statutory RMA Provisions for Consent Processing'.

⁴¹ MFE (2007), 'Review of council consent processing performance' (Round one and two).

⁴² Richmond Planning (2008), 'A think-piece on options to improve the resource consent process'.

The cumulative impact of these requirements can create a lot of repetition between applicant and councils officers and produce unnecessarily complex reports for simple applications. This can divert council resources away from the important issues and applications and impact on their ability of councils to process consents in a timely manner. This issue is driven by the practices of local authorities and their tendency to be risk adverse when processing applications. A change in this underlying practice is required to improve the time and costs for minor applications and this could be facilitated through changes to the RMA.

There is also uncertainty around the matters to be considered for restricted discretionary activities. In *Auckland City Council v John Woolley Trust and S J Christmas*⁴³ the Court determined that restricted discretionary activities are subject to Part II of the RMA but only when granting the consent (that is such applications cannot be declined for reason of inconsistency with the purpose or principles of the RMA). This has created uncertainty for council officers on the relevant matters to be considered when making decisions on restricted discretionary activities. The *Woolley Trust* interpretation has essentially made the assessment of restricted discretionary activities more complex and time-consuming than originally thought, as Part II matters that support the granting of the consent now must be considered. It appears illogical and impractical to have a different set of criteria to consider when granting a consent to that when declining.

This evidence suggests that there is a need to rationalise the requirements and matters that must be considered for certain resource consents (i.e. those with relatively minor effects). There is also potential to provide greater certainty in relation to restricted discretionary activities. Note that permitted baseline and definition of the receiving environment is discussed in [option 4](#).

Options include:

- 3.1: Exclude Part II considerations from restricted discretionary activities
- 3.2: Simplify the requirements for non-notified applications
- 3.3: Define what activities section 104 applies to
- 3.4: Define what activities schedule 4 applies to
- 3.4: Limit the reporting requirements in s113
- 3.5: Require applicant's AEE to be used when complete and accurate.
- 3.7: Provide guidance and templates to process simple applications

3.1 Exclude Part II considerations for controlled and restricted discretionary activities

This option would make it explicit that Part II should not be considered for restricted discretionary activities. The rationale for this option is the philosophy that consideration of Part II matters occurs when plans are being prepared. Consistency with Part II is therefore reflected in the standards, terms and conditions that must be met to qualify as a controlled activity or restricted discretionary activity and in the matters over which control the local authority retains some control. In regard to the restricted discretionary activities, these matters generally cover effects that are known, but are variable in scale and significance. Therefore the restricted discretionary status is useful to some ability for the council to either decline consent or set conditions on those effects when they have adverse effects on the environment.

⁴³ Refer to *Auckland City Council v John Woolley Trust and S J Christmas* [2008]

Pros	Cons/risks
<ul style="list-style-type: none"> • Provides a clearer distinction between restricted discretionary activities and (full) discretionary activities - restricted means restricted • Part II is considered when plans developed so there will be no double-dipping on considering effects again at the consent stage for minor activities • Avoids local government having to re-write parts of plans where Part II was intended to be an explicit exclusion from restricted discretionary activity • Provides more certainty for applicants on what matters will be considered for controlled and restricted discretionary activities. 	<ul style="list-style-type: none"> • It is difficult to know all potential effects from some activities in advance and some may not have been considered when plan developed • May overlook cumulative effects of minor activities and hamper councils ability to respond promptly to such effects.

3.2 *Simplify the requirements for non-notified applications*

This option involves simplifying the requirements (such as matters to be considered, application requirements, decision writing) to all non-notified applications. The rationale for this option is that non-notified applications have already been deemed to have minor effects, so there should only be limited matters to be considered and reported on. This could be achieved by having alternative requirements in sections 104 and 113 for non-notified applications. This could also be extended to excluding some matters that are currently required to be provided in Schedule 4.

However, in reality some significant applications proceed without notification, particularly at a regional level. An example of this is the resource consents required for some existing hydro dams. Therefore, any reduction in the considerations or requirements for all non-notified applications would make 93/94 determination even more important (and therefore possibly more likely to be exposed to judicial review).

Pros	Cons/risks
<ul style="list-style-type: none"> • Reduced workload for non-notified consents reducing time and costs 	<ul style="list-style-type: none"> • Some non-notified applications are still quite significant so removal (or reduction) of 104 considerations and the requirement to provide AEE could be very risky (i.e. may let large developments proceed with insufficient controls on effects) • Notification decisions would become even more important and contentious • The present notification provisions may need to be addressed concurrently to ensure notification rates increase and to avoid an increase in judicial reviews

3.3 *Define what activities all or part of section 104 considerations apply to*

This option would limit what parts of section 104 applied to certain minor activities (e.g. side yard infringements). There are several ways to achieve this - either section 104 could be more clearly limited with reference to the activity categories to such as controlled and restricted discretionary activities. The alternative is to develop a

national schedule of 'simple' activities that could be used to achieve consistency and certainty between consenting authorities.

Pros	Cons/risks
<ul style="list-style-type: none"> • Reduced considerations for straightforward or simple applications • Clearer direction about the matters to be considered for simpler applications which could reduce processing times and costs • Could be complementary to an audit approach to minor consents to process these quickly and consistently 	<ul style="list-style-type: none"> • Could also be achieved through greater use of controlled and restricted discretionary activities and targeted guidance around what such applications need to contain • Potentially still be wide variation unless a scheduling approach is used. If scheduling approach used very likely to be debates as to what is and is not eligible for a reduced s.104 consideration • Scheduling approach would be problematic for activities that have effects are site-specific, dependent receiving environment, and development characteristics.

3.4 Define what activities all or part of schedule 4 applies to

This option would involve simplifying the requirements of schedule 4 for minor activities and could work in combination with 3.3 above. Again minor activities could include controlled or restricted discretionary or it could be achieved through a national schedule. For minor activities the information currently required in Schedule 4 could be limited to:

- a) a description of the proposal
- b) identification of the persons affected by the proposal.

Applicants would be provided with a simple template to use and the local authority could then make their own assessment of environment effects.

Pros	Cons/risks
<ul style="list-style-type: none"> • Less costly and time consuming for applications for minor activities • Greater certainty and consistency in information requirements between different local authorities • Avoid duplication of efforts in terms of applicants AEE, council officer reports, and decision writing • Potential to shorten templates and reports based on reduced requirements • Could be complementary to an audit approach to minor consents to process these quickly and consistently 	<ul style="list-style-type: none"> • Greater risk to local authorities and potential liability when effects not adequately considered • Potential for more local authority staff time required (including site visits etc.) to ensure effects are considered (although applicant preparation time will be reduced)

3.5 Limiting full scope of s113 to contested, notified or complex applications

Section 113 reflects the common law requirement to give reasons for a decision and enables parties to have adequate information for the purposes of appeals. In 2005, the requirements of section 113 were strengthened to also list:

- the main findings of fact
- the principal issues of contention
- a summary of evidence heard
- the relevant plans and policy documents considered.

Arguably these requirements are important to ensure the areas of contention are properly understood, the reasons for the decision are clear, and any appeal is focused. However, for simple applications where there are no third parties involved, no areas of contention or dispute, the requirements of section 113 can seem onerous, cause unnecessary duplication and delays in processing time.

This option would involve limiting the content requirements of decision writing (under section 113) for non-notified decisions and applications where there are no areas of contention or dispute. The requirements for such applications would simply be to state the reasons for the decisions.

Another complementary option to reduce duplication for notified applications is to look at the relationship of the decision with the section 42A report (council staff report). For example, where no hearing is held or the decision is consistent with the section 42A report, the local authority decision makers could adopt the section 42A report as though it was a final decision, without having to write up and spend time on a separate decision report in those instances.

Pros	Cons/risks
<ul style="list-style-type: none"> • Make the process more efficient for applications with no areas of dispute • Avoid duplication of efforts in terms of applicants AEE, council officer reports, and writing the decisions 	<ul style="list-style-type: none"> • Will allow for less robust decisions in writing where it may be unclear to appellants why the council decided as it did • May revert the quality of poor decision-making • It may be considered a lazy option to decision writing on resource consents.

3.6 Allowing applicant's AEE to be used when considered complete and accurate

This option is already available under the RMA. For example, Auckland City Council has a "streamlined applications" process for applications prepared by approved where a standardised application format is used so that the council can base their assessment on the AEE provided⁴⁴. However for the majority of councils, this is generally not being done and officer reports often repeat the information provided in the application, particularly the AEE.

Including a specific reference in the RMA to state that an applicant's AEE should be used (when considered complete and accurate) may facilitate more use of this approach and reduce the duplication of efforts. Guidance could be provided on when to use the applicants AEE such as: when provided by approved consultants; where there are no areas of contention; and when the application prepared in accordance with council guidelines/templates. The Auckland City Council example provides a model which guidance can be based on.

⁴⁴ <http://www.aucklandcity.govt.nz/council/services/resourceconsents/streamline.asp>

Pros	Cons/risks
<ul style="list-style-type: none"> • Would avoid duplication of efforts and reduce council processing time required and therefore costs • Recognises benefits of “audit” approach to simple applications and would be complementary • Provides an incentive for applicants/consultants to produce high quality applications to reduce timeframes • Rewards high quality applications with a quicker process. 	<ul style="list-style-type: none"> • Still requires a preliminary check or audit to check for adequacy • May result in potential points of difference/contention being missed when assessing the application (especially when the council officer is inexperienced) • Would require councils to develop their own guidelines for consultants on appropriate AEE content and form (although this initial effort is likely to pay off in the long term) • Would only be suitable for some types of applications • May require council to develop list of approved consultants, training etc. (although again this initial effort is likely to pay off in the long term).

3.7 Provide guidance and templates to process simple applications

Some councils (e.g. Auckland City) already have a efficient “audit” process to fast track simple applications. The Accelerated Resource Consent Assessment Process (ARCAP) was designed to target small, low risk applications. This process basically involves dedicating less experienced staff to these applications using a vastly shortened reporting template to reduce time spent making recommendations and getting decisions⁴⁵.

This initiative shows that establishing an effective system to process simple applications does not necessarily require legislative amendment but could be facilitated through templates, training and guidance. Councils could then develop a standardised format for applications that must be submitted in accordance to proceed down the fast track or audit process.

Pros	Cons/risks
<ul style="list-style-type: none"> • Reduced timeframes for simple consents by allowing an audit approach • Does not require change to legislation • Encourages applicants to prepare applications in accordance with council guidelines • May help councils spend more time focusing on the bigger applications and more important issues 	<ul style="list-style-type: none"> • Would require resources for training and guidance • Only suitable for very minor applications where the effects are well known and predictable. • Some activities could be made permitted if plans were re-written with the appropriate standards (rather than require simple activities to get consent).

Direction for further work / Recommendation:

Option	Not workable requires other means to achieve outcome	Possibly workable but has negative implications/will require modifications	Workable priority option for further research

⁴⁵ EMS (2008), ‘RMA Technical Amendments & Conceptual Ideas’.

• 3.0: Do nothing			
• 3.1: Exclude Part II considerations from controlled and restricted discretionary activities			<input checked="" type="checkbox"/>
• 3.2: Simplify requirements for non-notified applications	<input checked="" type="checkbox"/>		
• 3.3: Define what activities all or part of section 104 applies to		<input checked="" type="checkbox"/>	
• 3.4: Define what activities all or part of Schedule 4 applies to			
• 3.5: Limiting s113 to contested, notified or complex applications			<input checked="" type="checkbox"/>
• 3.6: Allowing the applicants AEE to be adopted			<input checked="" type="checkbox"/>
• 3.7: Provide guidance and templates to process simple applications			<input checked="" type="checkbox"/>

4: Providing certainty on the baseline environment

Issue

Permitted baseline and how to define the “receiving” (or existing) environment is an area that has grown in complexity under the RMA through interpretations by the Courts. In 2003 amendments were made to the RMA aimed at provide more certainty on permitted baseline by providing consent authorities with the discretion to “disregard an adverse effect of an activity if the plan permits an activity with that effect”. This discretion to disregard the effects permitted by the plan relates to notification, determination of affected parties, and the substantive decision.

However, it is debatable whether these amendments have improved the situation and case law continues to evolve with respect of what permitted baseline includes. The baseline environment from which adverse effects should be discounted against has also grown in complexity through recent case.⁴⁶ This has complicated the resource consent process in terms of the baseline environment which the assessment of environment effects must be made for certain applications.

Some issues arising in defining the environmental baseline to which effects must be assessed against includes:

- whether the “non-fanciful” test is applicable and appropriate to assess the permitted baseline
- whether the existing environment involves a comparison with the environment *as it exists* or *as it would exist* if the land was used in manner permitted by the plan, and over what time period
- whether the existing environment includes unimplemented consents
- whether the permitted baseline includes controlled activities
- whether the permitted baseline is confined to the site that is subject to the application⁴⁷.

In addition to these issues, there is evidence that applicants are using permitted baseline in a manner unintended. Often applicants using the permitted baseline to limit the scope of what their application contains and may subsequently use it as leverage to discount effects or avoid notification. Applicants often seek written confirmation from councils of what is permitted by the plan so that it can be used as evidence to reduce the scope of assessment of environmental effects⁴⁸. These requests can be demanding on local authorities as they try to determine the scope of “non-fanciful” activities permitted by the plan. As permitted baseline is a complex concept, often it is used inaccurately in applicant’s AEE. This generally results in further information requests being required and additional time and costs to process the application.

It is clear that the evolving permitted baseline test and the definition of what the receiving environment should include can add additional complexity and introduce additional costs and delay in the consent process. It is timely to review these

⁴⁶ *Queenstown Lakes District Council v Hawthorn Estates Limited* [2006] NZRMA 424

⁴⁷ Refer to *Queenstown Lakes District Council v Hawthorn Estates Limited* [2006] NZRMA 424 and Simpson Grierson (2008) “*Option to refine and simplify the resource consent process*”

⁴⁸ Richmond Planning (2008), “*A think-piece on options to improve the resource consent process*”.

concepts to determine whether there is a need to provide more certainty through changes to the RMA.

Permitted baseline

The current understanding of permitted baseline has evolved through a series of cases in the late 1990s that made the concept a significant issue for the RMA. Most notable of which is:

- *Bayley v Manukau City Council* [1998] NZRMA 513
- *Smith-Chilcott v Auckland City Council* [2001] NZRMA 503
- *Arrigato Investments & others v Auckland Regional Council & others* [2002] NZLR 323.

Smith- Chilcott essentially made the permitted baseline compulsory and consent authorities were required disregard effects permitted by the plan. However, cases such as *Housiaux v Kapiti Coast DC* demonstrated that circumstances can exist where application of the permitted baseline approach is not appropriate and can lead to unexpected or inappropriate consequences. In the departmental report prior to the 2003 amendments, the benefits of the mandatory versus discretionary approach to permitted baseline were considered and the report found:

Mandatory consideration of permitted baseline may be inappropriate because:

(a) The test of the permitted baseline has proved difficult to apply in 'practice'. It has been suggested that some councils may choose to do away with permitted activities in their plans to avoid having to apply the 'rule'.

(b) The permitted baseline focuses on those activities permitted by rules in the plan. This focus does not provide for consideration of all the relevant objectives, policies and rules and other provisions of the plan.

(c) The current operative plans under the Act were not drafted with the baseline test in mind. The consequences of applying those plans to a mandatory focus on permitted activities negate the importance of those plans as a whole (and the process for developing the plan) in achieving the purpose of the Act.

The proposed discretionary wording was promoted because it:

(a) Allows for the effects of permitted activities to be considered where appropriate on a case by case basis, but does not enforce that priority be given to this concept over and above consideration of all effects and the plan as a whole.

(b) Provides for increased flexibility for councils to allow them to take into account the effects of other permitted activities where they are relevant, without unnecessarily restricting their discretion or weakening the intent of their plans.

(c) Allows consideration of the effects as a whole and therefore a more informed judgment as to what effects are to count as adverse, rather than current formulaic approach established through case law. Further, it acknowledges the importance of the overall plan in achieving sustainable management.

The current discretionary approach to permitted baseline approach was therefore to provide more flexibility to local authorities and provide for those circumstances where permitted baseline may not be appropriate. However some have argued that this discretion has overcomplicated the test around permitted baseline and has led to

inconsistencies and uncertainty around the practical application of the concept⁴⁹. The discretion provided on whether or not to disregard effects permitted by the plan also creates opportunity for challenge and can lead to increased litigation on some cases.

Many practitioners view permitted baseline as useful to focus the assessment of effects to those components of the application that do not comply with the relevant plan rules⁵⁰. The rationale behind this view is that classification of permitted activities in regional and district plans (even those drafted prior to the baseline test) implies some degree of acceptability in terms of effects, which would have been considered and debated through the first schedule process. A mandatory exclusion of these permitted effects could therefore be considered appropriate and useful to streamline the consideration of adverse effects from proposals and get quicker decisions on resource consents.

So a key issue is whether the discretion provided on permitted baseline is working or whether it should revert to becoming mandatory. However if permitted baseline became mandatory, there is a need to for greater certainty on permitted baseline. As there is still considerable room for argument in what as to what can be included in the baseline. One question relates to whether the non-fanciful⁵¹ test for permitted activities that has developed is appropriate or whether greater certainty or guidance is required through the RMA. The non-fanciful test originated from the Court of Appeal in *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473 where the Court stated:

“in accordance with the purpose of the legislation anything that is permitted but fanciful does not provide a realistic indication of what is permitted and a proper point of comparison. There must be practical face-specific assessment. Of the various phases used in Barrett and elsewhere, ‘not-fanciful’ appears to set the standard appropriately”.

Although the Court was clearly trying to provide a practical test to determine what should be included in the baseline, ‘non-fanciful’ is often a complex test to apply in reality and can lead to significant litigation in some instances. The Courts have also expressed some concerns on the practicality of the term. It is also not clear whether the permitted baseline includes controlled activities⁵², existing use rights and unimplemented consents.

The receiving (or existing) environment

A clear understanding of the existing environment is required to provide a baseline to assess the environment effects of a proposal. Recent case law has established that the “receiving” environment does not just include what currently exists but an examination of future potential effects⁵³. For example, in *Wilson and Rickerbury*, the High Court concluded that the RMA requires a forward looking perspective of the environment stating:

“The Environment Court took an unduly simplified approach to the impact of adverse odour, and perhaps noise, on the Wilson land. It only looked at

⁴⁹ EMS (2008), ‘RMA Technical Amendments and Conceptual Ideas’.

⁵⁰ EMS (2008), ‘RMA Technical Amendments and Conceptual Ideas’.

⁵¹ *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473 CA267/00, CA12/0. 1

⁵² Refer to *Ohope Beach Development Society Inc v Whakatane District Council*[2002] A136/2002

⁵³ For example *Cashmere Trust v Canterbury Regional Council* C48/2004 and *Stalker v Queenstown Lakes District Council* C40/2004.

current state of the Wilson land, and ignored the effects of the proposed expansion on the potential development of that land”.

This approach taken was much broader the permitted baseline concept. This case was then followed by Hawthorn Estates Ltd v Queenstown District Council [2006] NZRMA 424, the Court of Appeal stated:

“In summary, all the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which the effects will occur”

The Court then when on to state the receiving environment from which an application is assessed against includes unimplemented resource consents:

“In our view the word “environment” embraces the future state of the environment as might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time the particular application was considered, where it appears likely that those resource consents will be implemented”.

So the Court concluded that receiving environment on which assessment of effects are based is not fixed in the state it currently exists but embraces the future state of the environment (including effects permitted by the plan and the effects of unimplemented resource consents). This is a significant conclusion that potentially signals a new direction for considering effects on the environment.

Chris Fowler in a 2007 RMLA national roadshow presentation “Defining the Environment” provides a useful summary of what is now required under both the permitted baseline and receiving environment interpretation to provide an assessment of environmental effects:

Permitted Baseline Methodology	Receiving Environment Methodology
Identify permitted baseline	Identify permitted environment
Compare with effects of proposal	Overlay the permitted environment onto the existing environment
Isolate and eliminate permitted baseline effects	Assess effects of proposal against the present and permitted future environment
Take into account only remaining effects	
Assesses the remaining effects against the receiving environment	

Clearly the Hawthorn Estates interpretation has adding another layer of complexity to the assessment of environmental effects. In practice it requires a much more in-depth consideration of future activity occurring in the receiving environment, although it is

unclear how far the receiving environment extends. Under this approach defining the receiving environment may reduce or increase effects whereas the permitted baseline is always a discounting exercise.

It appears there is potential to provide more certainty on the permitted baseline and the receiving environment to ensure the consideration of effects for resource consents does not become unnecessarily complicated.

Options include:

- 4.1: Provide greater certainty around permitted baseline
- 4.2: Provide a definition of the existing environment

4.1 Provide greater certainty around the permitted baseline

To reduce some of the uncertainty around permitted baseline, further detail could be provided in the RMA on what to include in the baseline. This could be accompanied by a change to make permitted baseline mandatory. This could help promote a less complex assessment of effects and more efficient and consistent consent process that is less open to challenge and interpretation.

The permitted baseline could be codified through the RMA as including:

Permitted activities in the relevant plans that are likely to occur near the proposed site within the foreseeable future

For the avoidance of doubt the permitted baseline excludes controlled activities and unimplemented consents.

A mandatory requirement to considering baseline would involve replacing may with shall “disregard an adverse effect of the activity on the environment if the permitted baseline includes activities with that effect” to section 104(2) and other relevant sections.

Pros	Cons/risks
<ul style="list-style-type: none"> • May provide less administration burden • May provide greater certainty to the assessment of environmental effects (reduce complexity of current case law) to reduce the complexity and reduce time and costs • Promote a more efficient and consistent approach between councils • The Court’s have expressed concerns over the “non-fanciful” test which would benefit from clarification • May reduce the grounds for litigation and challenge 	<ul style="list-style-type: none"> • Can be addressed through better consideration of effects through plans • Reduce flexibility of interpretation and application of permitted baseline

4.2: Provide a definition of the existing environment

It is likely that clarity around the permitted environment would alleviate any need to define the existing environment. However, it could still be desirable for the avoidance of doubt.

Definition of the existing environment would be ideally addressed through relevant Part IV (i.e. “the existing environment for the purposes of resource consents is”)

rather than any modification to the definition of the environment in section 2 (which could easily have other, unintended consequences).

One possibly wording is for section 104(2) to read:

When forming an opinion for the purposes of subsection (1)(a), a consent authority must disregard an adverse effect on the environment if the permitted baseline includes an activity with that effect. The adverse effects in that assessment should be made against the environment as it currently exists.

Pros	Cons/risks
<ul style="list-style-type: none"> • May provide greater certainty to the assessment of environmental effects (reduce complexity of current case law) • May simplify consideration of effects to reduce the costs and time of resource consent process • May avoid undue speculation about the development that may occur within a proposed site 	<ul style="list-style-type: none"> • Reduced flexibility of interpretation and applications • Does not promote a “forward-thinking” approach to assessing effects

Direction for further work / Recommendation:

Option	Not workable requires other means to achieve outcome	Possibly workable but has negative implications/will require modifications	Workable priority option for further research
• 4.0: Do nothing			
• 4.1: Provide greater certainty around permitted baseline		<input checked="" type="checkbox"/>	
• 4.2: Provide a definition of the existing environment		<input checked="" type="checkbox"/>	

5: Simplify statutory timeframes

Issue

The RMA has statutory timeframes that vary depending on whether the application is notified and various procedural matters. Requests for further information on resource consent applications “stop the clock” and are excluded from the statutory timeframes. Preliminary figures from the 2007/2008 RMA survey indicate that further information is requested on 42% of applications up from 32% in 2006/2006. Councils can also extend statutory timeframes through the use of section 37, and there are very few limitations on how this section may be applied. The RMA survey has shown councils are increasingly extending timeframes on consent processing. Section 37 was used on 17% of applications in 2005/2006 and preliminary figures from 2007/2008 indicate this has increased further being made on 28% of applications.

The RMA survey of local authorities captures compliance with statutory time-frames and the use of section 92 and 37. The survey provides a useful means to monitor and report consent processing statistics to encourage good performance in local authorities and promote accountability. However, the ability to “stop the clock” and extend timeframes means that compliance does not provide a accurate measure of performance or real timeframes. To demonstrate compliance with statutory timeframes councils have incentive (both the Ministry and within their organisation) to use section 92 and section 37 to distort the figures. Compliance with statutory timeframes also has little relevance to the applicant who works on actual (calendar) days and are generally more considered with the total timeframe from lodgement to decision.

Section 37 enables the council to double any statutory timeframe, or waive a failure to comply with a statutory timeframe or requirement. So for non-notified applications, this can mean extending the timeframes for releasing a decision from 20 working days to 40 working days. If applied to all timeframes for a notified application, this can mean extending the timeframe for releasing a decision from 70 working days to 140 working days. With the agreement of the applicant the council can more than double statutory timeframes. Local authorities have broad discretion on when they use section 37, provided they take into account those directly affected by the extension, the interests of the community, and the duty under section 21 of the RMA to avoid unreasonable delays.

The timeframes for notified consents are based on the procedural matters that must take place and apply to:

- the period from receipt to notification (10 working days)
- the submission period (20 working days)
- the period from close of submissions to commencing a hearing (25 working days, or 20 working days if no submissions are received)
- the period from the close of hearing to releasing a decision (15 working days)

Excluded from this is any time the clock is stopped due to section 92 (further information requests) and the duration of a hearing. Although these timeframes are useful to manage key steps in the notification process they can also create a layer of complexity and uncertainty for applicants on how long their consent will take to process.

This suggests consent processing timeframes could be simplified through introducing standardised calendar timeframes for notified and non-notified consents with limited exceptions to stop the clock or extend timeframes. This could involve section 37 being limited to exceptional circumstances. The number of further information requests would also be fixed and limited to information essential to determine the application (also refer to [option 6](#): further information). Clarifying these timeframes would provide more certainty to applicants and provide clear targets to councils.

Introducing standardised timeframes to process consents would encourage councils to do a more rigorous check of applications for completeness under section 88(3) and rejecting those which are inadequate. This may require further guidance (either through regulation or training) on what constitutes “adequate” and possibly increasing the current five working day timeframe for use of section 88(3). Councils would also need to get tougher on applicants who don’t provide the requested information in time by declining their application through a revised section 92(A) process (see [option 6](#): further information). The introduction of set timeframes could be further strengthened through clear accountability through the RMA survey and improvement measures to councils who had poor compliance with the set timeframes.

Possible exclusions from the set timeframe could include any time in excess of the 15 working day timeframe an applicant is given to respond to requests for further information. If the applicant did not provide the information within time, local authorities would need to be confident the information will be provided in agreement with the applicant, otherwise decline the application based on insufficient information. Another exception would be the time taken under section 91 to ensure all necessary applications are applied for and considered together. Often it takes a significant amount of time for an applicant to apply for any additional consents considered necessary. Considering applications together is desirable as it reduces duplication and can result in time and costs savings.

Options include:

- 4.1: Set total working day limits for consent processing
- 4.2: Limit the scope of section 37.

4.1 Set total working day limits for consent processing

This option would involve setting standardised total timeframes for consent processing in calendar days. For example, a statutory timeframe to process a non-notified consent could be one month and a notified consent could be four or five months (excluding hearing time). This option would need to be supported by clear timeframes around further information requests where an applicant would have to comply or extend the timeframes themselves, or face the application being declined.

Pros	Cons/risks
<ul style="list-style-type: none"> • Would encourage a more rigorous pre-check of applications for completeness and whether there was an “adequate” AEE. This would potentially result in more rejects of deficient applications setting higher standards • Current timeframes are difficult to accurately monitor so may help to provide more accountability (and improvement measures) • Provide more certainty to applicants on the timeframes they can expect for their consent to be processed • May encourage processing officers to look at the application timeframe as a single achievable date (rather than broken up into different stages of further information) 	<ul style="list-style-type: none"> • There may be difficulties defining the appropriate timeframes • Needs to be linked with an improved section 92A process (outlined in option 6) • Still no great incentive for councils to process within timeframes • Takes power away from planning staff to get compliance with time-frames – compliance with timeframes wouldn’t always be within their influence • May require further guidance on what constitutes an “adequate” AEE • Does not address the underlying issues of council capacity and capability that exist for some councils.

4.2 *Limit the scope of section 37*

This option would limit the circumstances when section 37 could be used. This provision could be tightened to limit its use to exceptional circumstances (or other specific criteria) and would require a clear indication from councils on why the timeframes have been extended and how the extension will impact on processing time. This option could be supported by clear guidance on what constitutes good practice when using section 37.

Pros	Cons
<ul style="list-style-type: none"> • May encourage better use of section 37 and only use it in limited or exceptional circumstances • May eventually improve overall consent processing times frames 	<ul style="list-style-type: none"> • May impact of the quality of decisions particularly when council workload exceptionally high. Although councils have the option to out source work during these periods this just becomes an additional cost for applicants • May have limited effect as some of the 17-28% of applications where s.37 is used currently are still likely to qualify for s.37 use because of their complexity or other factors that may be exceptional and/or comply with criteria established • Could see greater use made of section 92 or other ‘clock stopping’ periods to extend time periods out to those the council can meet (although this could be addressed by other options) • Does not address the underlying issues of council capacity and capability that exist for some councils.

Direction for further work / Recommendation:

Option	Not workable requires other means to achieve outcome	Workable but has negative implications/will require modifications	Recommended priority option for further research

• 4.0: Do nothing			
• 4.1: Set total working days limits for consent processing		<input checked="" type="checkbox"/>	
• 4.2: Limit the scope of section 37		<input checked="" type="checkbox"/>	

6: Clarify further information provisions

Issue

Efficient processing of resource consent can be hampered by poor quality applications and excessive further information requirements. Further information requests are generally required on certain applications to provide an accurate assessment of effects. However, they can also be a symptom of bad practice by local authorities, either through not checking adequacy up front and to delay the processing of the application. Multiple requests for further information is also a particular issue than can frustrate applicants. And further information request are quite common. Preliminary figures from the 2007/2008 RMA suggests further information requests are made on 40% of applications⁵⁴. The number of multiple requests is not known.

To provide greater certainty for applicants, there is potential to clarify the frequency and timing of further information requests. This would encourage more robust further information requests by local authorities in the first instance and reduce the overall processing time-frame. This would need to be supported by a review of section 92A to make it easier for consent authorities to decline applications with insufficient information. In particular, there is also a need to clarify the declining of an application under section 92A(3) due to insufficient information and the role of the Environment Court in this process. The current wording can result in the Environment Court making a first level decision on an application; a position the Court has expressed some discomfort about⁵⁵.

Collectively section 92, 92(A) and 92(B) provide a level of complexity that could be simplified to provide greater certainty and a smoother process for consent staff and applicants.

Options include

- 5.1: Limit ability of councils to request further information
- 5.2: Review section 92A

5.1 Limit ability of councils to request further information

This option would involve limiting the amount of times a council can request further information. This may be limited to once before the application is notified and once after it is notified (or once only for non-notified applications). However, there would need to be some flexibility in this option for the council to assess whether the information provided by the applicant has sufficiently fulfilled the original request. If inadequate, the council could commission a report to fill the information gap or decline the application if clearly inadequate (refer option 5.2). There would also need to be some flexibility to request more information if the original request provided significant new information or issues (such as a 5 day timeframe to identify and request this).

⁵⁴ Note these figures are preliminary only.

⁵⁵ Refer *PN Industrial and Residential Developments Ltd v Palmerston North City Council* [2007] W073/07 where Judge Dwyer expressed the view that declining an application under s92A(3) without having determined section 93/94 was an unsatisfactory system that required urgent remedy.

This option could also make the scope of further information requests clearer. For example, section 92(1) could state further information “that is necessary to determine the environmental effects of the application” rather than “information relating to the applications” as currently exists. This would help to exclude the ability to extend time by requesting information on minor/irrelevant matters (e.g. plans at a different scale).

Pros	Cons/risks
<ul style="list-style-type: none"> • Provide more certainty to applicant and councils (as to the scope of their powers) in order to reduce abuses • Encourage local authorities to provide a comprehensive information request at the outset • Place more onus on applicant to provide quality information and prove effects (if section 92A improved) • Improve overall processing times • May help to reduce the complexity around the provisions in section 92 	<ul style="list-style-type: none"> • May reduce the quality of information on which councils must make their decision • Possibility that more consents will be declined as local authorities can not be sure environmental effects can be adequately addressed • More resource consents notified as councils take a precautionary approach over information uncertainties.

5.2 Review section 92A

Section 92A provides applicants who receive a further information request with options as to how they may respond (including the ability refuse to supply information) and sets timeframes to respond within. A procedural lacuna has arisen from the provisions in section 92A(3) where an applicant refuses to provide information, then a local authority then goes on to consider the application without notifying it and subsequently declines. If the applicant appeals to the Environment Court, the current wording effectively requires the court to make a decision on whether or not the application should have been declined.

In *Palmerston North Residential and Industrial Investments Ltd. v Palmerston North City Council* [2007] W073/07 the court found that if it did not see fit to decline the consent, it would be tantamount to granting the consent. The Court expressed reservations about this situation as granting the consent may effectively result in a by-passing of the notification process which meant in this case (and potentially others), those that may have been affected by the exercise of the consent would be denied their rights under the principles of natural justice to have a say.

Judge Dwyer concluded in this case:

It is clear that there is a lacuna in the Act which arises when ss92 and ss92A processes are undertaken prior to notification. The Court has endeavoured to cobble together a process which ensures that those persons who might be adversely affected by the application in this case have the opportunity to consider whether or not they wish to be heard by the Court.

Clearly however this unsatisfactory situation requires urgent legislative remedy.

An indirect consequence of this case is that it effectively requires local authorities to notify resource consents when section 92 information had not been received from the applicant in case the matter goes to Court. This effectively nullifies any time saving

the applicant may have benefited from in declining to provide further information and results in additional costs through an unnecessarily convoluted process.

One option for addressing this issue with section 92A is that, if the applicant refused to provide further information, the application would be notified and heard by an independent commissioner rather than revert to the Court. However, this could be a waste of efforts when clearly deficient applications are required to be notified prior to declining. This option could potentially result in affected (or unaffected) parties making submissions based inadequate information in an application, and wasting council resources on an deficient application that was inevitably going to be declined.

A more feasible option for applicants to challenge the declining of consent based on insufficient information is through an objection under section 357, with a further right of appeal to the Court under section 358. This would allow the substantive decision on information requirements to be considered in isolation by the council in the first instance, possibly by independent commissioners to maintain some independence in the process. This would alleviate the need for the Environment Court to be involved in the majority of cases, unless any decision on objection is appealed to the Court under section 358.

Where there is an appeal, the Court would make a determination on whether the council had sufficient information to make a decision and return it to the council for the substantive decision (again ideally by an independent commissioner). The Court would simply note whether the information was sufficient when referring it back to the council, and possibly make directions on whether or not it should be notified.

There is also potential to completely remove the right of appeal to the Court and limit the right of objection to independent commissioners. This is likely to be controversial for some applicants, especially if set timeframes and limited further information request were introduced which would likely lead to an increase in the declining of consents based on insufficient information. However, it would make the process to challenge the declining of consents on these grounds much more streamlined and straightforward.

Pros	Cons/risks
<ul style="list-style-type: none"> • Improvement on the current situation where the Court felt they had to cobble together a suitable process for affected parties to be involved prior to deciding on the application • Remove the need for the Court to be involved in minor matters with objection under section 357 providing a quicker decisions • May result in more deficient applications being declined • Reduce administrative tasks and therefore costs and time, particularly if the application did not have to be notified first • Simplify the current complexity around section 92A 	<ul style="list-style-type: none"> • Potentially result in deficient application going through a long process (objection, appeal on objection, back to council for decision and possibly notification) before a determination is made. However, the occurrence of this is likely to be quite low as objections should pick up applications where a substantive decision can be made (and applicants have little incentive to go down this process).

Direction for further work / Recommendation:

Option	Not workable requires other means to achieve outcome	Possibly workable but has negative implications/will require modifications	Workable priority option for further research
• 5.0: Do nothing			
• 5.1: Limit the ability of councils to request further information		<input checked="" type="checkbox"/>	
• 5.2: Review section 92A			<input checked="" type="checkbox"/>

Conclusions

This paper looked at six broad areas of improvement for the consent process:

1. [strengthening local decision- making](#)
2. [removing the notification presumption](#)
3. [streamlining the process for minor consents](#)
4. [providing certainty around the environmental baseline](#)
5. [simplifying statutory timeframes](#)
6. [clarifying further information provisions.](#)

Within each area of improvement the following options are **recommended**:

Strengthen local decision-making

- Limit the ability for and scope of “de novo” appeals
- Increase the rigour of council hearings
- Give council the discretion whether to hold hearing

Removing the notification presumption

- Specify what consent categories require notification
- Require applications to be notified ‘when in doubt’
- Broaden the use of limited notification

Simplify the process for minor consents

- Exclude Part II considerations from controlled/restricted discretionary activities
- Limiting s113 to contested, notified or complex applications
- Allowing the applicants AEE to be adopted
- Provide guidance and templates to process simple applications

Clarify further information provisions

- Review section 92A

The following options are considered to **workable** but require further refinement:

Strengthen local decision-making

- New powers to deal with trade competition and vexatious parties
- Allow applicant to request independent hearing panel
- Further requirements in commissioner training and certification

Simplify the process for minor consents

- Define what activities all or part of section 104 and schedule 4 applies to

Provide certainty around the baseline environment

- Provide clarity around the permitted baseline
- Provide a definition of the existing environment

Simplify statutory timeframes

- Set total working days limits for consent processing
- Limit the scope of section 37