National-led Government Reform of the Resource Management Act

Overview of Phase One

'Resource Management (Simplify and Streamline) Amendment Bill 2009'

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Hon Dr Nick Smith
Minister for the Environment

New Zealand Government

Background and Process

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

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

However, over the 17 years since the Act became law there has been growing criticism of its ability to effectively manage complex environmental issues and complaints about slow and costly plan preparation and consenting processes.

Major reform is overdue

The Government promised to introduce legislation into the House to amend the RMA within 100 days of the formation of the new government. Streamlining and simplifying the Resource Management Act is an important part of the Government's programme, which includes assisting in an economic recovery.

Steps to reform

Last December the Government announced the appointment of the RMA Technical Advisory Group (TAG) to support the Government's programme of reform of the Resource Management Act. The group was formed, and its terms of reference agreed, as part of the National - ACT confidence and supply agreement.

The TAG is chaired by barrister Alan Dormer and includes environmental consultant Guy Salmon, Rodney Mayor Penny Webster, lawyer Paul Majurey, Tasman District Council Environment and Planning Manager Dennis Bush-King, barrister Michael Holm, planning consultant Michael Foster, and businessman and former Deputy Prime Minister Rt Hon Wyatt Creech.

The TAG, officials and Ministers have met intensively since mid-December and have recommended a significant package of amendments which are being finalised into a Bill to go before Parliament mid-February. Major aspects of the Bill are explained in brief here. The policies and proposals in the Bill are set out in this paper. The Bill will undergo the scrutiny of a full Select Committee process and people will have an opportunity to comment on the Bill.

The Bill is likely to be back before the House for its final stages in late August.

1. Removing frivolous, vexatious and anti-competitive objections

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

The costs and delays to applicants from anti-competitive behaviour can range from thousands of dollars and weeks, through to millions of dollars and years. Administration costs for councils and Courts can also be substantial. Some of the highest costs are incurred in the so-called "supermarket wars", where proponents and opponents have spent millions of dollars fighting each other and delays of years have resulted.

The ability for almost any person to object or appeal under the RMA is currently sometimes being exploited by trade competitors with the effect that the economy is less efficient and productive and with few benefits, if any, to the environment or society.

The reforms propose therefore that the ability of trade competitors to oppose a rival company's consent application or private plan change be removed if the opposition is motivated by trade competition.

The outcomes of the reforms in this area are to:

- Discourage submitters and appellants, who are only seeking to delay proceedings, from bringing cases with little or no merit, and;
- Reducing the attractiveness for trade competitors to use the RMA as a weapon to delay or thwart projects, through providing a disincentive to such behaviour.

Consistent with pre-election policy announcements, the proposals reinstate the powers of the Environment Court to award security for costs. Having to provide security for costs will act as a disincentive against making appeals of dubious merit (particularly those likely to be judged frivolous or vexatious).

Furthermore, the filing fee for the lodgement of appeals to the Environment Court will be raised from $55 to $500. The Environment Court's appeal filing fee of $55 has not been changed since it was set more than twenty years ago in 1988 and is lower than for other courts.

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

Such a regime would apply where the Courts not only feel it is appropriate to compensate a party whose position is adversely affected by a trade competition appeal, but consider it necessary to punish the party that brought (or continued) such

an appeal. The punitive regime is critical to the package of limiting the trade competition abuse of the RMA.

2. Streamlining processes for projects of national significance

The Government considers that significant projects can be subject to unreasonable delays and inconsistent consideration of national level benefits. The intention of the reforms is to make greater use of the existing board of inquiry process, but to also improve the capacity for local authorities and communities to have confidence and involvement in that process.

The reform proposals are based on the existing ministerial intervention provisions of the RMA that enable the Minister to determine that a matter is of national significance and refer it to a board of inquiry or the Environment Court for a decision.

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

The key features are:

- Applicants will have the ability to make applications directly to the Environmental Protection Authority (EPA). Eligibility for projects that can be directly applied to the EPA are to be determined by the existing 'national significance' criteria already in the RMA, with the addition of one new criterion to recognize the operational infrastructure needs of a nationwide network utility operator. This criterion is specifically intended to cover projects that may not individually be considered to be of national importance, but which will play a significant role improving or maintaining the functioning and integrity of nationally significant networks (such as those relating to roads, railways, pipelines and electricity transmission).
- If the EPA decides that an application meets the criteria the proposal will be referred to a board of inquiry to consider. In the event that the EPA decides that an application does not meet the criteria the Minister will have the powers to refer the application back to the relevant local authority to be processed under normal processes.
- The Boards of Inquiry will be chaired by a current, former or retired Environment Judge. The board appointment process will include a requirement for there to be nominations for the board from the local authorities within which the application occurs, and a requirement to appoint people to the board with local knowledge.
- A final decision on the application must be made within 9 months of the date of notification. The Minister shall have the power to extend this timeframe if he or she is satisfied by a report from the Board of Inquiry that there is necessary justification for doing so.

3. Creating an Environmental Protection Authority

As a transitional measure, this package of reforms proposes to establish the Environmental Protection Authority (EPA) as a statutory office. Pre-election policy announcements also signalled an intention to create an EPA to achieve national environmental goals. One of the functions for a new EPA is to centralise some regulatory roles which are best exercised on a nationwide basis.

The roles, functions and powers of the EPA will, for the time being, be exercised by the Secretary for the Environment.

The Secretary will be able to delegate these functions to his or her employees within the Ministry for the Environment, to allow the administrative work to be carried out by a dedicated unit.

The creation of the EPA as an independent statutory office gives the necessary degree of separation from the Ministry for the Environment's core business.

4. Improving plan development and plan change processes

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

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

The package of measures to improve plan development and change processes will include:

- Removing the ability for appellants to make general challenges or ones that seek the withdrawal of entire proposed policy statements and plans.
- Modifying the requirement for local authorities to summarise submissions and call for further submissions on proposed policy statements and plans.
- Removing the non-complying activity category of activities. There will be a three-year transitional period together with a deeming provision so that these activities become classified as full discretionary activities after a transitional period of 36 months.
- Simplifying the process so that local authority decisions on submissions do not need to be made in respect of each individual submission but are to be made according to issues raised.
- Enabling the regional council and all territorial authorities of a region to combine to produce a single RMA planning document. Provisions regarding the ability of local

authorities to produce combined plans already exist in the RMA, but are unclear in respect of combining the regional policy statement into such a document.

- Making it so that rules in proposed plans shall have no legal effect until such time as decisions made on submissions have been notified, except where such rules are required to protect a natural resource, historic heritage or apply to an aquaculture management area. A local authority may apply to the Environment Court to have particular rules take effect earlier if they do not meet the above criteria.
- Limiting appeals on proposed policy statements and plans to questions of law, except in cases where the appellant has sought the leave of the Environment Court.
- Removing the requirement for territorial authorities to review their plans every 10 years. It's more cost effective for territorial authorities to change their plans as and when required.

5. Improving resource consent processes

Complex consent applications and extensive processing requirements add time and cost to projects. More than 50,000 resource consents are processed by local authorities each year. Statutory timeframes for the processing of resource consents range from 20 working days (effectively a calendar month) to 85 working days (four months) depending on whether a consent is notified. While official statistics indicate that 74% of non-notified consents and 56% of notified consents are processed on time, this leaves many consents not processed within time limits.

The package of measures to improve resource consent processes will include:

- Removing the current presumption in favour of notification of resource consent applications (most applications are not notified now) and amending the criteria for when public notification is required on projects with more than minor effects on the wider environment.
- Simplifying the reporting requirements for council decisions and removing the need for material to be repeated or restated in subsequent hearing reports or decision reports. This will help local authorities to process resource consents more efficiently through reducing the administrative burden of repetitive and unnecessarily complicated assessment and reporting requirements.
- Inserting provisions into the RMA that remove the ability for blanket tree protection rules to be imposed in urban areas. These rules generate more than 4000 resource consent applications annually.
- Limit the ability for local authorities to 'stop the processing clock' during requests for further information from applicants. The proposal is to limit it to the first request only and that from that time the applicant either supplies the information, or refuses to supply it. There is no further ability for the local authority to stop the clock in conjunction with further requests for information.
- Require all councils to develop a discount policy in respect of late consent processing, within 12 months of enactment. Councils must have a complaints

process and, where the local authority is at fault, the applicant will receive a discount on the application processing fees and charges.

- Insert provisions requiring resource consent hearings to be formally closed no later than 10 working days following completion of the last party's presentation at the hearing. This will reduce the delays commonly faced by all parties in getting a decision on a resource consent application.

At present there is little incentive for local authorities to process resource consents in a timely fashion. In most cases the only sanction against tardy processing practices appears to be adverse publicity. This package of measures, including the requirement to develop a discount policy, will improve the incentives and mean that local authorities will be more focussed on processing consents in a more timely way.

6. Streamlining decision making

Applicants, submitters and decisions makers are often faced with duplication of process, costs and time delays resulting from applications having to go through a council hearing and then be re-heard again in the Environment Court, even though such an appeal was almost inevitable.

Local authority officers make around 87% of decisions on whether to grant or decline resource consent applications (generally non-notified). Independent commissioners make around 1% of decisions on resource consent applications and the rest are made by elected representatives. Although only 12% of decisions on resource consents are made by elected representatives there is still concern among applicants about the objectivity, skills and knowledge of elected decision makers.

The package of measures proposed to address these issues includes:

- Providing the ability for resource consent applicants or submitters to choose whether they have a notified application considered by elected representatives of the local authority or by one or more independent commissioners selected by the local authority from the pool of persons accredited under the "Making Good Decisions" programme. The costs being borne by the requestor.
- Providing the ability for applicants for resource consents and notices of requirement to request that their application be determined in the Environment Court without the need to first go through local authority consenting processes, provided that the local authority has first agreed. This direct referral process is complementary to the 'proposals of national significance' process, providing an alternative streamlined process path for those applications that may not fit the criteria of being nationally significant.
- Removing the Minister of Conservation's powers in respect to decision making on restricted coastal activities. The Minister of Conservation has a number of other responsibilities in relation to the coastal marine area, including the approval of the New Zealand Coastal Policy Statement and approval of Regional Coastal Plans, and has the ability to nominate a representative onto hearing panels for restricted coastal activities. Removing the decision making power for restricted coastal activities still leaves the Minister with sufficient oversight of activities in the coastal marine area through his or her other powers. The proposal would mean that the

current recommendation of the hearing panel to the Minister would become the decision.

- Amending the RMA so that decisions on notices of requirement are made by the relevant territorial authority instead of a Requiring Authority, as is currently the case. This will bring the decision making process for designations into line with other processes in the RMA, improve the timeliness of decision making (by removing a step in the process), and adding to confidence in the independence and rigour of the decision making process.

7. Improving workability and compliance

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

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

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

Other than fines or imprisonment, another means of providing a deterrent would be review of existing consents. However, no such explicit ability for the Court to impose such penalties is currently provided by the RMA.

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

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

The measures proposed to improve the effectiveness of compliance mechanisms include:

- Raising the maximum fine for committing an offence under the RMA from $200,000 to $600,000 for corporate offenders and to $300,000 for private individuals
- Providing the Court with the power to require a review of a resource consent held by an offender.
- Amend the RMA to enable enforcement action (enforcement orders, abatement notices, excessive noise directions or prosecutions) to be taken against the Crown by local authorities similar to the Crown liability under section 6 of the Building Act.

8. Improving national instruments

National Policy Statements (NPS) and National Environmental Standards (NES) are tools under the RMA which the Government can use to provide direction on specific national, regional or local issues. Central government guidance and direction can simplify the framework within which consent authorities make decisions by setting clear environmental thresholds and targets, and clarifying relationships between potentially competing national strategies and matters of national importance.

Councils potentially face significant costs in implementing new national environmental standards and national policy statements, mostly due to the plan change processes (consultation, hearings, appeals, etc) necessary to give effect to national policy statements and to refer to national environmental standards.

The improvements proposed in this reform package include:

- Providing the Minister for the Environment (and Minister of Conservation in respect of the New Zealand Coastal Policy Statement) with powers to cancel, postpone and restart a national policy statement development process that has already commenced at any time before it is gazetted.
- Enable national policy statements to direct that a local authority must change the objectives and policies of policy statements and plans without the need for further local planning processes. This is because of the robust public process followed when developing a NPS.
- Establish that appeals on changes to plans and regional policy statements that are implementing objectives and policies of a national policy statement shall be limited to points of law only.
- Clarify that consent authorities must have regard to the relevant provisions of a national environmental standard when making decisions on resource consents and the effect of a NES on existing resource consent applications, and that consent authorities be given an explicit ability to issue certificates of compliance where activities comply with the provisions of a NES.

Question and Answers regarding Phase 1 of the RMA Amendments 2009

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1. ***What consultation has been carried out on this draft Bill?***

   - On 1 December 2008 the Minister for the Environment wrote to all local authorities seeking their comment on how the RMA could be improved.

   - On 10 December 2008 the Minister for the Environment invited members of the key sector organisations to send in comments.

   - The Minister, and the Minister of Local Government, received hundreds of letters outlining proposals for improving the function of the Act.

   - Since December 18 the Technical Advisory Group has worked intensely with the Minister and Ministry for the Environment officials. The TAG had six full-day meetings to consider options it developed, options suggested by officials, and ideas and comments received from local authorities, other organisations, businesses and the community.

     The Group has extensive, practical experience with the Act. Membership of the TAG consists of: Alan Dormer, Barrister (chairperson); Guy Salmon, Executive Director of the Ecologic Foundation; Penny Webster, Mayor of Rodney District; Michael Foster, Director of Zomac Planning; Dennis Bush-King, Environment and Planning Manager at Tasman District Council; Wyatt Creech, businessman and former Deputy Prime Minister; Paul Majurey, Partner, Russell McVeagh; Mike Holm, Barrister.

2. ***What Parliamentary support is there to pass these changes into law?***

   - National, ACT New Zealand and United Future are committed to supporting this reform. The Maori Party have indicated support for the first reading of the Bill subject to caucus approval.

3. ***Are there any variations from National's 2008 Election Policy on these reforms, and if so, why have changes been made?***

   - There were 17 specific policy commitments in National's policy of reforming the RMA – 15 are included in this reform. There have been two changes:

     a) National's policy said it would replace Section 8 in respect of the Treaty of Waitangi with a new clause setting out specific consultation requirements with iwi. The Maori Party has made strong representations opposing any change to section 8. The Technical Advisory Group has advised that case law on section 8 and the improvement in practice is such that this is no longer a significant issue.

     b) National's policy proposed narrowing the definition of "the environment". This was intended to try and prevent trade competitors abusing the RMA. The Technical Advisory Group advised that a narrower definition would have other

unintended consequences that would not improve the overall performance of the Act. Instead it has recommended other significant changes to prevent trade competitors misusing the RMA. The Government has adopted this package of amendments.

4. ***What examples would you cite supporting the case for RMA reform?***

- **Wairau Pak'nSave** – The proposal to develop a Pak'nSave supermarket on Wairau Road on the North Shore has been embroiled in litigation since the 1990s. Consents have been granted several times only to be appealed to higher courts, and although the supermarket building has been constructed, it is unable to operate due to ongoing litigation.
- **Wellington Inner-City Bypass** – In 1992 Transit and Wellington City Council approved a design in principle. Finally opened in 2007 – 15 years later.
- **Project Hayes** – Environment Court hearing underway but adjourned as further information is sought on potential cumulative effects that may have arisen since the application was lodged in mid-2006.
- **Long Bay Structure Plan** – 12-year planning process characterised by disagreement between North Shore City Council and developer ended with Environment Court issuing a decision in favour of the council-proposed Structure Plan.
- **Whangamata Marina** – Initially proposed in 1995, the Whangamata Marina proposal is still awaiting a final decision after the High Court directed the then Minister of Conservation to set his decision aside and reconsider the applications.
- **Crest Energy Marine Energy Project** – After almost four years Crest Energy is awaiting an Environment Court hearing.
- **Project West Wind in Makara** – Although the councils granted consents within six months, the Environment Court took a further 18 months to confirm their decision.
- **Alpurt B** (Albany to Puhoi Realignment) State Highway One – RMA approvals took approximately 10 years from lodgement to completion.

5. ***What is being done to strengthen the environmental protection aspect of the Act?***

- Greater central government guidance via National Environmental Standards and National Policy Statements assists local authorities to set local standards on nationally important environmental issues.

- Speeding up the plan changing process will encourage councils to keep their plans up to date and therefore enable them to deal more quickly with environmental issues as they emerge.

- Maximum fines are being increased significantly from $200,000 to $600,000 for corporate offenders and from $200,000 to $300,000 for individuals. This is a tangible disincentive to those breaching consent conditions.

- Courts will have specific power to review a consent if an offender breaches their conditions. This is a major incentive to keep within the consent rules.

- Enforcement action will be able to be pursued against the Crown. This power will be given to councils as per the Building Act.

- Requiring Authorities will no longer make the final decision on notices of requirement for a designation.

6. ***Can you reassure the public they won't be cut out of the process of RMA decision making?***

   - The principle of inviting local community involvement in decision making in order to achieve good, balanced decisions remains firm. The Bill will also be open for consultation through the select committee process.

   - The issue is to strike a proper balance between a reasonable level of public participation and the need for councils to take action to protect the environment and the improvement of national infrastructure.

   - The reforms will mean better and more focused decisions locally. The larger and sometimes more controversial applications will still be publically notified. Local Government will still consult on major plan changes

7. ***Will the reforms speed up the decision making process?***

   - Yes. The quality of District Plans will be higher, the consistency of decision making better, streamlining of processes will be improved and all this will combine to achieve better and faster decisions which are less likely to be appealed.

   - Changes to the public notification procedure for consents will mean more consents can be processed on the faster 'non-notified' track.

   - Distribution of consent information by email and via websites to affected parties is a quicker and more efficient way to speed up communications.

   - Not stopping the clock when asking for more information will encourage councils to follow up faster. Councils will in turn demand higher quality applications from the outset.

8. ***Why are you setting up an Environmental Protection Authority and how does this help improve implementation of the RMA?***

   - The Bill sets up a transition to an Environmental Protection Authority (EPA) to achieve national environmental goals. The EPA will provide efficient and timely administration of proposals of national significance. It will make decisions within nine months.
   - Under the RMA it is relatively common for decisions on significant roading projects, energy projects, and other large scale infrastructure projects to be appealed to the Environment Court. This is very costly, time consuming and increases uncertainty for all. The Environmental Protection Authority board of inquiry process will avoid this situation.

- Further detailed work on the structure and functions of the EPA is to be developed as part of the Phase II RMA work programme. The Government's aim is to have this concluded by 1 July 2010.

9. *What happens next?*

- The Bill will be introduced into Parliament in February and referred to the Environment and Local Government Select Committee for public submission and hearings.
- It is expected the Bill will be enacted by September.
- This Bill is the first of two phases of reforming the resource management area. Phase II will set up the EPA and deal with reforms relating to aquaculture, fresh water, urban design and infrastructure/Public Works Act.

Nick Smith

3 FEBRUARY, 2009

Reform tackles costs, uncertainties and delays of RMA

Changes to the Resource Management Act will simplify and streamline processes without compromising environmental protections, Environment Minister Nick Smith says.

"The costs, uncertainty and delays of the current Act are adversely affecting New Zealand jobs, infrastructure, and productivity and causing economic frustrations for homeowners, small businesses and farmers. The reforms we are introducing in phase one will address these significant issues."

Key elements of the reform package are:

- Removing frivolous, vexatious and anti-competitive objections
- Streamlining processes for projects of national significance
- Creating an Environmental Protection Authority
- Improving plan development and plan change processes
- Improving resource consent processes
- Streamlining decision making
- Improving workability and compliance
- Improving national instruments

"The Government is taking an innovative approach to major projects by increasing the input from local councils into a streamlined Board of Inquiry process. This recognises that major projects have both an important local and national dimension.

"These reforms have required a delicate rebalancing between the rights of people to participate in resource consent decision making, and to appeal decisions, and the need for efficient decision making.

"The Resource Management (Simplify & Streamline) Amendment Bill, which contains more than 100 amendments, will be introduced to Parliament in February and referred to the Environment and Local Government Select Committee for public submission and hearings.

"A further phase of reform of the RMA is planned addressing specific areas of concern covering aquaculture, the structure of the Environmental Protection Authority, fresh water management, and urban design and infrastructure issues."