



# **Capital Leadership**

**- in the national interest?**

## **RMA REFORM UPDATE**

Chair: Duncan Laing

Presenters: Sylvia Allan

Rosemary Dixon

Dennis Bush-King

# Sylvia Allan

## Outline

- Overall Impression
- Provision for large projects
- Cost Issues
- Issues for groups/organisations



# Overall Impression

- Incomprehensible to the ordinary person
- Heaps of “fine print”
- Much undoubtedly beneficial
- Some provisions may never be needed
- Much trying to close legal (rather than practical) loopholes



# Provisions for Large Projects

- Now at least 5 options
  - Business as usual
  - Direct referral to Environment Court
  - Call-in by Minister
  - Call-in on request
  - EPA process
- Quite profound implications for proponent of project, but also for affected people and bona fide interest groups
- Risks and costs around “one go” - significant for all

# Provisions for Large Projects (Cont'd)

## Advantages

- Possible benefits of non-business as usual options
- Speed (possibly)
- Reduced role of Council

# Provisions for Large Projects (Cont'd)

## Disadvantages

- Information (issues not refined; must cover everything)
- Inevitably unfriendly process for submitters
- Little ability to mediate/negotiate
- Cost risks
- Reduced role of Council

# Cost Issues

- Security for costs
  - when likely to be used?
  - who will be most affected?
- Court/Crown costs
- BOI costs
- Council policy issues
- Discounts if timeframes not met
- Charging submitters
- Objections and appeals on costs

# Issues for Groups/Organisations

- Resourcing – legal and evidential
- Costs/difficulty of basic participation
- Status
- Risks substantially increased
- Role of Attorney General
- Where best to target effort?



# Rosemary Dixon

## Outline

- Proposals of national significance
- Call-in
- Environmental Protection Authority
- Direct referral
- National Instruments
- Trade competition



# Proposals of National Significance

- Call-in provisions completely rewritten – Part 6AA
- Creation of Environmental Protection Authority (Part 4A)
  - statutory office within MFE, Secretary of Environment is CEO
- Applications may be lodged directly with the EPA
  - receives and processes applications (incl notification)
  - makes a recommendation to the Minister
  - provides support to Boards of Inquiry (if application directed to BOI)



# Proposals of National Significance

(Cont'd)

- supplies information to Court (if application directed to Court)
- Applications fast tracked include reviews of consents, plan changes and NORs
- Applications can also be lodged with the councils in the normal way and called-in by the Minister
- Factors of national significance Minister considers slightly expanded – discretion



# Issues with EPA/call-in

## **Role of Councils**

- Prepare report
- Suggest Board members
- What else?

## **Timelines**

- 20 working days from lodgement to provide a recommendation to the Minister (includes assessing completeness)
- 20 working days for submissions



# Issues with EPA/call-in (cont'd)

- 9 months from notification to final decision (BOI not Court) = effectively 7 months
- Extension only if “special circumstances” apply

## Others

- Call in at Minister’s own initiative
- Whole of Government submission on matter referred to BOI or Court

# Call-in is not a silver bullet

- One step process – no first instance hearing process for testing the project and understanding the opposition – direct to the blowtorch
- The fact that the project has been called-in as a “matter of national significance” is largely irrelevant – procedural significance – BOI applies the RMA plus inquisitorial process
- Timeframes were tight and just got tighter



# Call-in is not a silver bullet (Cont'd)

- Lay submitters can't manage the timeframes – don't consult, don't prepare evidence, don't instruct counsel, don't meet deadlines – rebounds on the applicant



# The Applicant





# How to Make it Work

## Pre Application

- Applicant, EPA and Councils work together to ensure application lodged is complete – technical reports received and peer reviewed, EPA's reports commissioned
- Avoid s92s
- Processing largely pre application

# How to Make it Work (Cont'd)

- EPA currently in discussion around formalising the Council's role – *“involving them directly in support role for the BOI and in assessing applications”*

## **Submission Period**

- Appoint “submitters’ friend”

## **Hearing**

- Continuous hearing?
- Simultaneous evidence exchange?
- Evidence taken as read, limited presentation time?

# Direct Referral

- Applies to notified resource consent applications and reviews of consents and designations
- Request to council within 5 working days of close of submissions (no right to be heard)
- Council decides whether to agree to direct referral or not within 15 working days
- Applicant can object (s357) and decision is remade. No appeal right.

# Direct Referral (Cont'd)

- Transferred to Court via a “notice of motion”
- Council supplies all information to the Court including a report (similar to a s42A report, incl proposed conditions)
- Council can become a party and has residual functions after decision
- Council can recover costs under section 36

# Issues with Direct Referral

## Would you choose this option?

- No right of appeal
- Non-submitters can join as parties if they qualify under s274, so 2 tiers of parties
- May not save time – about 3 months for the various procedural steps and then no guarantee as to which track the Court will choose – could be the “standard track”

# Issues with Direct Referral (Cont'd)

- Mediation difficult without first instance hearing/decision and may not be available
- Role of council loose – report – then witness if also party?
- Costs (s285) fall on the applicant – presumption that Crown costs will be paid by applicant and that a s274 party incl submitters will not have costs awarded against
- **In what circumstances is an applicant likely to use direct referral?**

# National Instruments – what concerns have not been met?

## NPS

- Minister has power to withdraw, suspend inquiry, or provide further information
- NPS can direct the insertion of objectives and policies into a plan without formality (not rules)
- Appeals on plan changes implementing NPS on points of law only (s290AA)

## NES

- COCs for NES
- Councils have an enforcement role
- Councils must remove plan provisions that conflict with NES without further formality

# Trade Competition

- Intent is to make it harder and less attractive for trade competitors to use the RMA to delay or thwart projects of rivals
- **Submissions**
- If you are a trade competitor:
  - You must be directly affected by an effect of the activity to which the application relates



# Trade Competition (Cont'd)

- The effect must be an adverse effect on the environment
- The submission may not be on trade competition

## Appeals

- If you are a trade competitor:
  - Your purpose may not be to protect yourself from trade competition
  - Your purpose may not be to deter the applicant or prevent the applicant from engaging in trade competition

# Will it work?

- What is a trade competitor?
- Open to abuse - sanctions
  - Declaration that Part 11A breached leads to indemnity costs
  - Declaration can be used in the High Court to seek damages (s308G-H)
  - Sanctions apply to surrogates

# Dennis Bush-King

## Outline

- Context
- Plan Making
- Roles & Responsibilities
- Consent Processing
- Enforcement
- Odd Ball



# Context

- If not the RMA then what?
- Amendment maintains basic structure of the Act, but there are some deliberate adjustments

# Plan Making

- Did Parliament drop the ball?
- Combined plans – *de facto* amalgamation or opportunity for better and more integrated management?
- Legal effect of rules – delayed effect subject to 3 exceptions - there will be operational challenges, but no affect on objectives and policies.
- Rolling Reviews – obligation to keep plans relevant and current
- Further submissions – still there, but new test may be a challenge

# Plan Making (Cont'd)

- Plan hearing decisions – grouping of matters will reduce administrative burden but how will people know what changes have been agreed to?



# Roles and Responsibilities

- Is the EPA to be seen as a threat to local government or an opportunity?
- A tendency towards greater direction from the centre
- New responsibilities for the Environment Court

# Consent Processing

- Notification – “will have or is likely to have adverse effects that are more than minor – is this different from “unless satisfied the adverse effects will be minor”?
- Must notify if no response to s 92 requests or deadline not met
- Affected persons – adverse effects must be minor or no more than minor (but not less than minor) see s95A
- Further information – statutory clock stops only twice (once after submissions close)
- Hearing Commissioners – has accreditation failed?
- Charging policy – the devil will be in the detail



# Enforcement

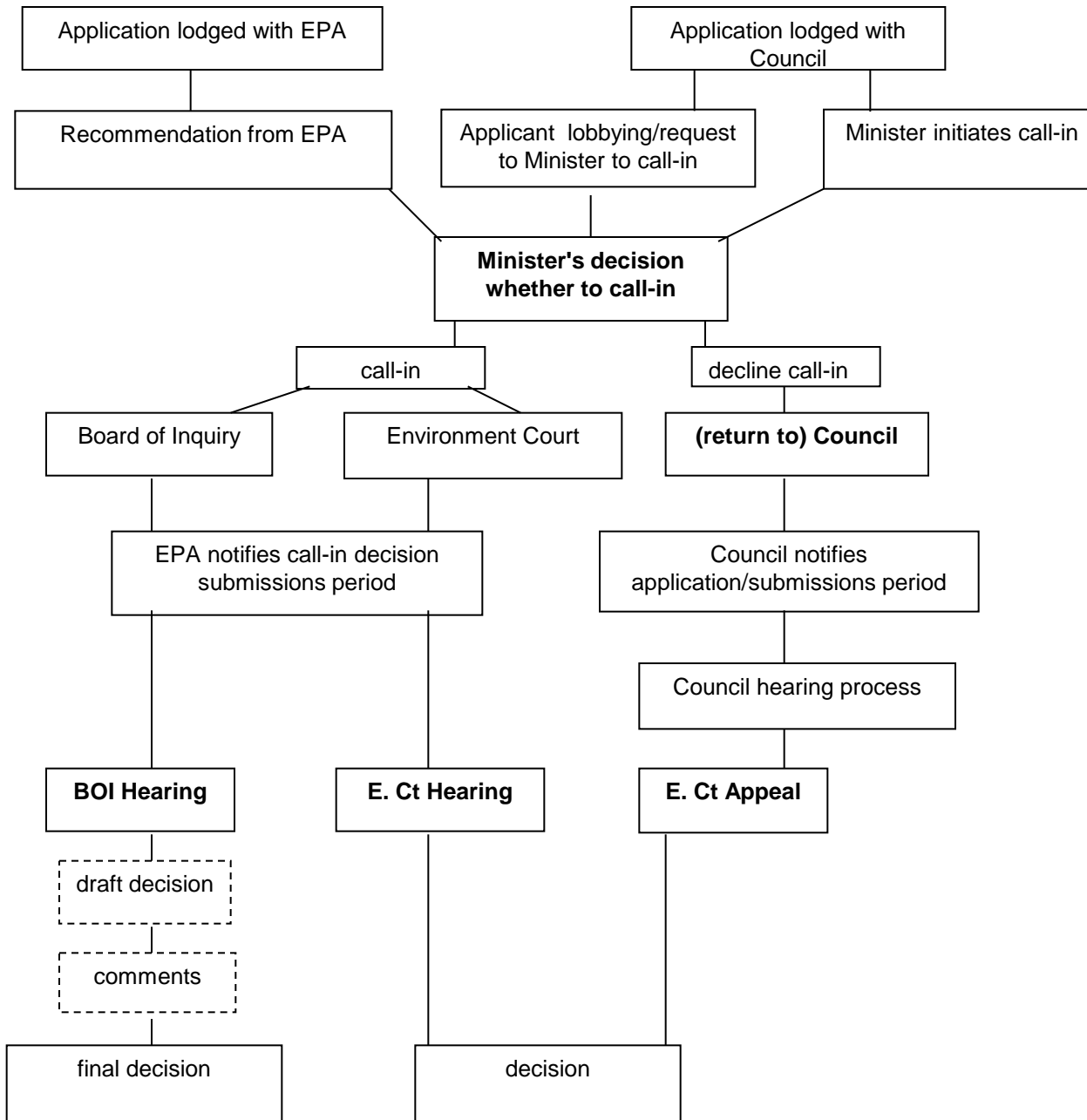
- Crown bound a little bit more
- Penalties increased – will this see a change in LA enforcement practice?
- Review of consent on successful prosecution of s339(5)

# Odd Ball

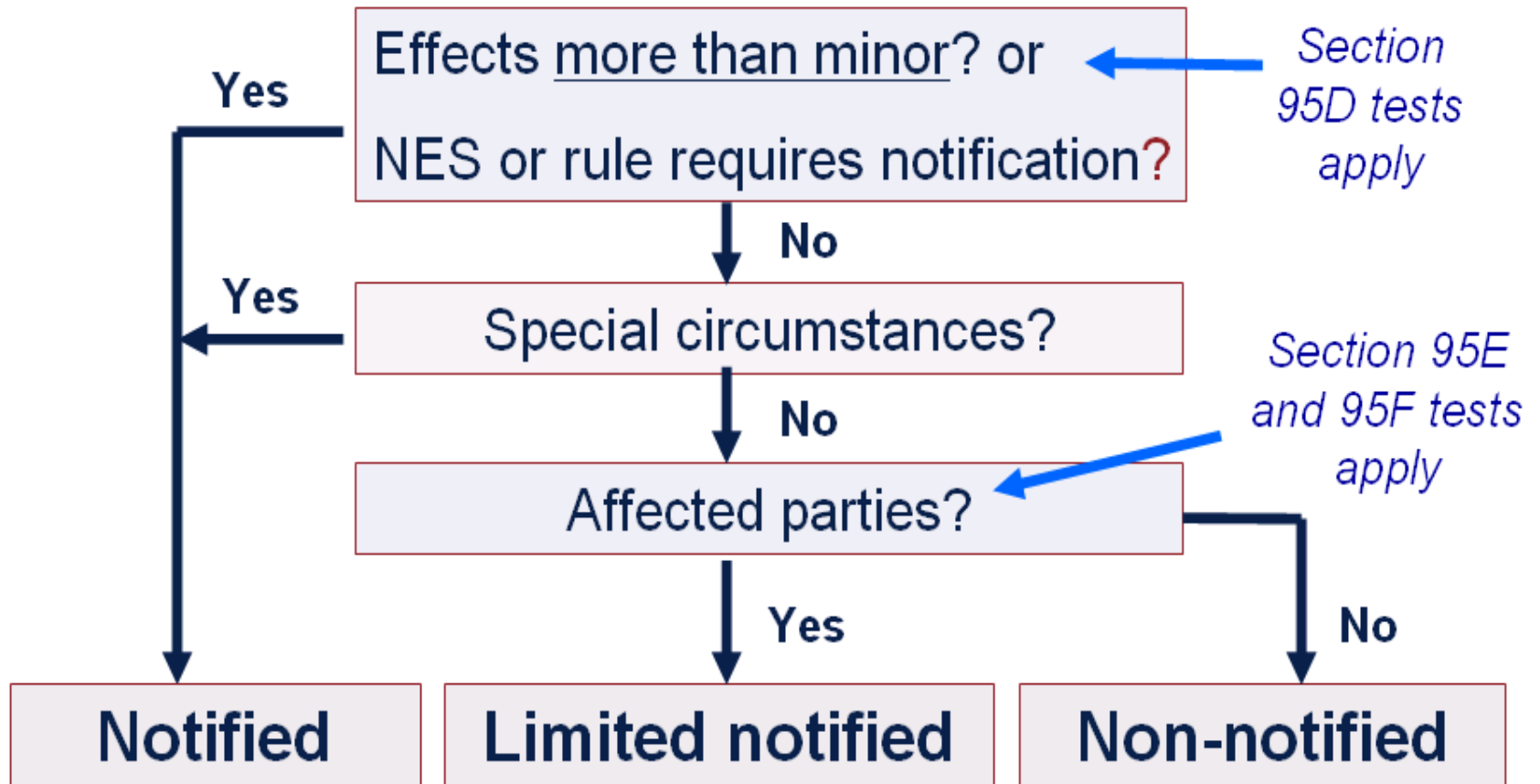
- No more replies to appeals – a saving on legal costs?



# CALL-IN PATHS



# Resource Consents - Notification





# Capital Leadership

**- in the national interest?**

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Challenges for effective  
environmental management

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1 – 3 October 2009 ■ Wellington



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