Resource Management Law Association of New Zealand Inc.
Te Kahui Ture Taiao

THE RESOURCE LEGISLATION AMENDMENT BILL

TO: **The Local Government and Environment Select Committee**

Submission on behalf of the

Resource Management Law Association of New Zealand Inc.

INTRODUCTION

1 This Submission is made by the Resource Management Law Association of New Zealand Inc (**RMLA**).

2 The RMLA is concerned to promote within New Zealand:

a an understanding of Resource Management Law and its interpretation in a multi-disciplinary framework;

b excellence in resource management policy and practice; and

c resource management processes which are legally sound, effective and efficient and which produce high quality environmental outcomes.

3 The RMLA has a mixed membership. Members include lawyers, planners, judges, environmental consultants, environmental engineers, local authority officers and councillors, central government policy analysts, industry representatives and others. Currently the Association has some 1,100 plus members. Within such an organisation there are inevitably a divergent range of interests in views of members.

4 While the membership has been consulted in preparing this submission, it is not possible for the RMLA to form a single universally accepted view on the proposed reforms. A

number of members may be providing their own individual feedback and those may represent different approaches to the views expressed here.

5 For these reasons, this submission does not seek to advance any particular policy position in relation to the proposed reforms, but rather is kept at a reasonably high level and is made with a view to ensure that the reforms:

a are consistent with the general framework of existing laws and policies of relevance, and the Resource Management Act 1991 (**RMA** or **Act**);

b are practicable and workable; and

c will assist in promoting best practice.

6 This submission is also made with a view to ensuring that the policy changes intended by the Bill are effected in a manner which produces efficient, effective and sustainable outcomes and in a way that avoids unforeseen consequences. To that end, in reviewing the various proposals contained in the Bill and preparing this submission, the RMLA has generally considered:

a whether the proposed change will achieve the stated (or apparent) policy objective (and whether that objective could be achieved in a different way);

b whether the proposed change will have any unintended consequences; and

c the extent to which the proposed change will have implications for users of the Act in terms of:

i certainty (or uncertainty);

ii time and cost;

iii natural justice and due process;

iv appropriate participation;

v consistency and workability; and

vi 'transaction costs' associated with legislative change.

7 In relation to the last factor above, there will be a potentially significant “transaction cost” associated with any amendment. Every substantive amendment to the RMA has raised issues as to transitional provisions, the need to reinterpret provisions, and the relationship between amended or newly inserted provisions in one part of the Act and sections in other parts of the Act that have not been so amended (and that have been drafted at different times under different policy imperatives). Planning documents may need to be amended in light of the new provisions. In addition, there will inevitably be a degree of uncertainty in relation to any new or amended RMA provisions, until such

time as practitioners and the Courts can settle on their interpretation. While these factors are not reasons in themselves to avoid amendment, they should be borne in mind when considering how amendments are made.

8 The objective of the Bill, as stated in the Explanatory Note, is to create a resource management system that achieves the sustainable management of natural and physical resources in an efficient and sustainable way, by seeking to achieve:

a better alignment and integration across the resource management system;

b proportional and adaptive resource management processes; and

c robust and durable resource management decisions.

9 The RMLA is concerned that the Bill may not, in a number of respects (and without amendment), achieve these outcomes. In particular:

a While the increased emphasis on national direction should achieve better alignment and integration across the resource management system, many of proposed changes are not proportional, and may not result in robust and durable resource management decisions.

b For example, many of the processes remove or further diminish public participation and rights of appeal. It has not been demonstrated that the loss of these important checks and balances is outweighed by (or is proportional to) the benefits of the new processes in terms of robust and durable resource management decisions.

c In terms of durability, the RMLA has significant concerns in respect of the extent to which the Minister (and Government) of any particular day can now change planning provisions and processes. In particular, the Minister has wide discretion: in determining the scope and final form of the national planning template, in exercising the proposed new regulation making powers, and in determining both the procedure to be followed for the streamlined planning process and the final wording of the proposal.

10 Specific comments on these matters are made later in this submission. In most cases, it is considered that the same broad policy objectives and benefits to users of the legislation can still be achieved with refinements to the Bill to address the concerns summarised above.

Structure of submission

11 This submission addresses aspects of the Bill under the following topic headings:

a Natural Hazards

b Maori Participation

c Changes to Plan Making

d Changes to Consenting

e Court Powers

f Process Alignment (Reserves Act and Conservation Act)

g Public Works Act

h EEZ Act

i National Direction (NES, NPS, and regulations)

(I) NATURAL HAZARDS

New subsection 6(h) and related amendments

Specific matter

12 The last bullet point on page 2 of the Explanatory Note to the Bill refers to better managing the significant risks from natural hazards in New Zealand by including "natural hazards" as a new matter of national importance. Clause 5 of the Bill then proposes inclusion of the words "the management of significant risks from natural hazards" as a new subsection 6(h) in the Act. The Bill includes related amendments to the following sections of the Act:

a Section 65 – see Clause 41.

b Section 106 – see Clause 133.

c Section 220 – see Clause 141.

13 The broad definition of "natural hazard" in the principal Act is not proposed to be amended and nor are the provisions in sections 30 and 31 regarding the functions of regional councils and territorial authorities with respect to natural hazards. Those functions include, for example, regional councils controlling the use of land for the purpose of avoiding or mitigating natural hazards – see section 30(1)(c)(iv) of the Act. In that regard, the Regulatory Impact Statement on the Bill prepared by the Ministry for the Environment contains some useful explanations of the reasons for the amendments, including the following at pages 23 and 58:

111. Adding this new matter to the principles of the Act will provide greater emphasis to the consideration of risks from natural hazards across all resource management decisions. This supports sections 30 and 31 of the RMA, which prescribes natural hazards management as a function of both regional councils and territorial authorities. This change also supports changes to section 106 regarding consideration of the risks from all natural hazards in subdivision consents (P 3.8).

351. Currently, when considering applications for subdivision consents under section 106 (which specifies circumstances under which consents can be refused or conditions placed) decision-makers can consider a limited list of natural hazards but not all natural hazards that may affect the potential subdivision.

352. In addition, section 106 is worded in such a way that a risk management approach does not have to be taken. In particular, some court decisions have excluded low-likelihood and high-consequence hazards from being considered.

Submission

14 The RMLA supports the proposal to strengthen and broaden (in relation to subdivision consents) the consideration of natural hazards under the Act.

15 However, the RMLA is concerned that the wording in new section 106(1A)(b) and (c) is confusing insofar as it uses words from section 106(1)(a) and (b) that are to be deleted (i.e., "land" and "structures") that relate to only some of the matters that are covered by the definition of natural hazards (i.e., "human life", "property", and "other aspects of the environment"). The amendments proposed by the Bill are as follows (amendments shown in ~~strike through~~ and underlining):

> ***106 Consent authority may refuse subdivision consent in certain circumstances***
>
> *(1) A consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that—*
> *~~(a) the land in respect of which a consent is sought, or any structure on the land, is or is likely to be subject to material damage by erosion, falling debris, subsidence, slippage, or inundation from any source; or~~*
> *~~(b) any subsequent use that is likely to be made of the land is likely to accelerate, worsen, or result in material damage to the land, other~~ ~~land, or structure by erosion, falling debris, subsidence, slippage, or inundation from any source; or~~*
> *(a) there is a significant risk from natural hazards; or*
> *~~(c)~~(b) sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision.*
>
> *(1A) For the purpose of subsection (1)(a), an assessment of the risk from natural hazards requires a combined assessment of—*
> *(a) the likelihood of natural hazards occurring (whether individually or in combination); and*
> *(b) the material damage to land in respect of which the consent is sought, other land, or structures that would result from natural hazards; and*
> *(c) any likely subsequent use of the land in respect of which the consent is sought that would accelerate, worsen, or result in material damage of the kind referred to in paragraph (b).*

16 The definition of "natural hazard" is as follows:

> ***natural hazard** means any atmospheric or earth or water related occurrence (including earthquake, tsunami, erosion, volcanic and geothermal activity, landslip, subsidence, sedimentation, wind, drought, fire, or flooding) the action of **which adversely affects or may adversely affect human life, property, or other aspects of the environment***

(Emphasis added)

17 The RMLA is concerned that the new section 106(1A)(b) and (c) would limit the assessment to material damage to land and structures, but the definition of natural hazards includes actual and potential adverse effects on human life, property, or other aspects of the environment. The definition of natural hazards is therefore much broader and should be reflected in the amendments to section 106(1A)(b) and (c), rather than using the defunct wording in section 106(1)(a) and (b).

Relief sought

18 Amend section 106 as follows (in this section additional deletions shown as ~~struck through~~ and further additions shown as underlined; where text has been added by the Bill but is proposed to be deleted, this is shown as both ~~underlined and struck through~~):

106 Consent authority may refuse subdivision consent in certain circumstances

(1) A consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that—

~~(a) the land in respect of which a consent is sought, or any structure onthe land, is or is likely to be subject to material damage by erosion, falling debris, subsidence, slippage, or inundation from any source; or~~

~~(b) any subsequent use that is likely to be made of the land is likely to accelerate, worsen, or result in material damage to the land, other land, or structure by erosion, falling debris, subsidence, slippage, or inundation from any source; or~~

(a) there is a significant risk from natural hazards; or

~~(c)~~(b) sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision.

(1A) For the purpose of subsection (1)(a), an assessment of the risk from natural hazards requires a combined assessment of—

(a) the likelihood of natural hazards occurring (whether individually or in combination); and

~~(b) the material damage to land in respect of which the consent is sought, other land, or structures that would result from natural hazards; and~~

~~(c) any likely subsequent use of the land in respect of which the consent is sought that would accelerate, worsen, or result in material damage of the kind referred to in paragraph (b).~~

(b) any effects of those natural hazards; and

(c) any likely subsequent use of the land that would or may alter:

(i) the likelihood of those natural hazards occurring; or

(ii) the effects of those natural hazards.

19 The amendments focus the assessment on what it should focus on: the likelihood of natural hazards occurring and the effects of those natural hazards on human life, property, or other aspects of the environment as per the definition of natural hazards in the Act. Such effects include adverse effects, positive effects, and effects of low

probability but high potential impact as per the definition of effect in section 3(f) of the Act. In addition, the amendments are consistent with the requirement in section 104(1)(a) to have regard to actual and potential effects when considering resource consent applications.

20 The new (c) would ensure that consideration is given to how likely subsequent uses of the subdivided land would or may alter the likelihood of natural hazards or the effects of those natural hazards, either positively or negatively. For example, if a person applied to subdivide erosion prone land for residential housing, but also proposed to undertake extensive planting to reduce or eliminate the risk of erosion, that is a positive effect that would reduce the natural hazard and should, therefore, be taken into account along with any negative effects that would or could increase erosion. The consideration under sub-clause (c) should not be limited to potential negative effects.

Consequential relief sought

21 Section 220 of the Act should be consequentially amended so that it is consistent with the relief sought above. The amendments proposed in the Bill are as follows (amendments shown in ~~strike through~~ and underlining):

220 Condition of subdivision consents

(1) Without limiting section 108 or any provision in this Part, the conditions on which a subdivision consent may be granted may include any 1 or more of the following:

…

(c) a condition that any allotment be subject to a requirement as to the bulk, height, location, foundations, or height of floor levels of any structure on the allotments:

(d) a condition that provision be made to the satisfaction of the territorial authority for the protection of the land or any part thereof, or of any land not forming part of the subdivision, against ~~erosion, subsidence, slippage, or inundation~~ natural hazards from any source (being, in the case of land not forming part of the subdivision, ~~subsidence, slippage, erosion, or inundation~~ natural hazards arising or likely to arise as a result of the subdividing of the land the subject of the subdivision consent):

22 Section 220(1)(d) above should be deleted and replaced with the following:

(d) a condition to avoid, remedy, or mitigate any significant risk from natural hazards.

23 This wording is sought on the basis that it is consistent with section 106(a) as proposed in the Bill and the amendments to section 106(1A)(b) and (c) as sought above.

(II) MAORI PARTICIPATION

New Subpart 2 of Part 5 - Iwi participation arrangements

24 **Specific matter**: Clause 38 proposes the introduction of a new subpart to part 5 of the Act comprising sections 58K to 58P to include provisions and procedures in relation to "participation arrangements" between iwi and local authorities.

25 **Submission**: The RMLA supports clause 38 of the Bill and the proposed amendment to include subpart 2. The purpose of the provisions (as per section 58K) has support in section 8 of the Act, and is consistent with what is generally considered good practice, namely for Councils to consult with iwi on the development of policy and plans in relation to the use, development and protection of natural and physical resources.

26 **Relief sought**: Retain clause 38 of the Bill.

New Section 58L – timing of invitation to enter into a participation arrangement/Clause 108 – amendments to Schedule 1 to include new clauses 1A, 1B and 4A

27 **Specific matter**: New section 58L(1) and (2) propose that the trigger for a local authority to invite iwi authorities to enter into 1 or more iwi participation arrangements is the holding of a triennial general election under section 10 of the Local Electoral Act 2001, with such invite to be given not later than 30 working days after that event.

28 Proposed new clauses 1A, 1B and 4A in Schedule 1 clarify the relationship between iwi participation arrangements and the Schedule 1 process, and affirm the requirement in clause 3(1)(d) to consult on proposed policy statements or plans regardless of whether or not an iwi participation arrangement has been concluded between the local authority and an iwi authority. Clause 4A(1)(b) in particular requires a local authority to "have particular regard to any advice received on a draft proposed policy statement or plan" from iwi authorities.

29 **Submission**: The RMLA supports these provisions. On the assumption that the Bill is passed and receives Royal assent prior to the 2016 triennial local body elections (as per section 2 of the Bill), then the obligation to invite iwi authorities to conclude iwi participation arrangements will be triggered in an appropriate timeframe. In the event that it is not, existing clause 3(1)(d) and proposed new clause 4A of Schedule 1, will ensure consultation with, and consideration of, iwi advice on policy statements and plans (and changes to them). Clause 4A in particular codifies the legal position as expressed in *Waikato Tainui Te Kauhanganui v Hamilton City Council* (CIV2009-419-1712, Allan J, Hamilton Registry, 3 June 2010) that "[the] right to be consulted is conferred primarily in order that iwi have a prior opportunity to influence the drafting of the plan" (at paragraph [74]).

30 However, in the event that the timing of Royal assent is after the 2016 triennial local body elections, local authorities would not be obliged to make an invitation for three

years, and that may frustrate the purpose of the provisions for both local and iwi authorities. There is no power given to a local authority to make an invitation to an iwi authority at any other time except within 30 working days of the holding of the triennial local body election.

31 **Relief sought**: Amend clause 58L to require an invite to be given to iwi authorities within a specified date (say, 6 months), in the event that the provisions do not receive Royal assent prior to the 2016 triennial local body elections.

New Section 58M – contents of iwi participation arrangements

32 **Specific matter**: New section 58M sets out the requirements (form and content) of iwi participation arrangements.

33 Proposed new clauses 1A, 1B and 4A in Schedule 1 clarify the relationship between iwi participation arrangements and the Schedule 1 process. Clause 4A(1)(b) in particular requires a local authority to "have particular regard to any advice received on a draft proposed policy statement or plan" from iwi authorities.

34 **Submission**: The RMLA supports these provisions. However, to ensure consistency and integration between the Schedule 1 obligation in clause 4A(1)(b) and the contents of iwi participation arrangements, a specific content item could usefully be included to set out the parties' agreements about the ways in which the local authority will have particular regard to advice of an iwi authority on a proposed policy statement or plan on which it has been specifically consulted pursuant to clause 3(1)(d).

35 **Relief sought**: Amend clause 58M(b) to include a new content requirement as follows:

> *"how the local authority will have particular regard to advice of the iwi authority on a proposed policy statement or plan on which the iwi authority has been specifically consulted pursuant to clause 3(1)(d) of Schedule 1."*

New Subpart 2 of Part 5 - Iwi participation arrangements

36 **Specific matter**: Subpart 2 is silent on the issue of who bears the costs (time and external advice) of iwi and local authorities in concluding iwi participation arrangements and ongoing iwi authority participating in iwi participation arrangements. It is assumed that each party would bear their own costs.

37 **Submission**: The resources of iwi authorities and local authorities are most likely to be disproportionate, which may impact on the iwi authority's ability to participate meaningfully. It would be appropriate to consider whether provision should be made to address an imbalance, so that the relevant iwi authority can engage with its local authority meaningfully.

38 It is also important that iwi participation arrangements address the issue of ensuring the reasonable costs and expenses of iwi authorities participating in the iwi participation arrangements are appropriately covered by local authorities.

39 **Relief sought**: Consider amending subpart 2 to include a requirement that a local authority consider how to contribute to the reasonable costs and expenses of iwi authorities incurred in concluding an iwi participation arrangement, including where that process involves mediation (under proposed section 58N, or resource to assistance from the Minister under proposed section 58O).

40 Insert a new clause 58M(b)(vi) as follows:

> *The extent to which the local authority will meet the reasonable costs and expenses of iwi authorities participating in the iwi participation arrangement.*

(III) CHANGES TO PLAN MAKING

Purpose of amendments to plan making processes

41 **Specific matter:** The stated aim of the proposed amendments to plan making processes in the Act is to enable a more efficient, flexible, and proportionate plan change process. The Bill also introduces two new 'planning tracks' for councils (in addition to Schedule 1 amendments) namely; the streamlined planning process (**SPP**) and the collaborative planning process (**CPP**).

42 The Regulatory Impact Statement (**RIS**) records that the current (Schedule 1) process, which is used for all proposed plans, plan reviews, and plan changes, is not necessarily proportionate to the size or significance of the planning process, and is not responsive enough to quickly address changing situations, or minor or site specific issues.

43 The RIS also states concerns over the process of plan making being 'slow' and that the weighting to be given to an (operative/proposed) RPS in the context of unitary planning instruments is uncertain.

44 **Submission:** The RMLA acknowledges the desirability to achieve 'planning agility' and to introduce proportionate plan making processes with respect to planning issues at hand. The amendments proposed to Schedule 1 and to introduce the CPP in order to achieve these outcomes are generally supported, subject to amendments and comments suggested below. The SPP (which is considered through the RIS as being the main amendment to address these issues) is however not supported by the RMLA in its current form. Specific comments and suggested amendments to the SPP are further outlined below.

45 The RMLA supports the intent of the reforms to combine and integrate planning documents, and to provide additional optional paths to plan preparation. However, it is submitted that the incentives or criteria through which access to the alternative processes are proposed to be made available need further consideration, in terms of whether they are practicable or desirable based on a further detailed cost/benefit analysis of the reforms.

46 The RMLA opposes any option or alternative process that dispenses with (or narrows) rights of appeal to the Environment Court, and recommends these aspects of the reforms be abandoned.

Amendments to Schedule 1 planning process: extension of time

47 **Specific matter:** *Clause 152* inserts *new clause 10A* in Schedule 1 to require a local authority to apply to the Minister for an extension of time for notifying a proposed policy statement or plan. This clause applies instead of the more generally applicable (current) section 37 of the Act.

48 **Submission:** The RMLA considers this amendment to be a sensible change in principle, as it is considered to be minor and primarily for clarification purposes. It is noted that local authorities currently have the power to extend the timeframe imposed under Schedule 1 for completing a plan making processes within two years of notification (by way of the process under section 37 of the Act). It is understood that section 37 of the Act is currently rarely used by local authorities in the context of extending Schedule 1 (including clause 10) timeframes. It is also acknowledged that the RIS states that 23% of plans take longer than two years between public notification and the making of a decision. These two occurrences therefore suggest that local authorities in some instances may be breaching Schedule 1 of the Act.

49 However the RMLA has some concerns in relation to the potential unintended consequences of this amendment. The insertion of the ability for extension of time into Schedule 1 makes it more explicit that local authorities have an option to extend the two year timeframe. Whilst the intent of the amendment is for the process to deter local authorities from breaching Schedule 1, and to provide notice to those involved in the process that a delay may occur, it may have the consequence of providing local authorities with an 'easy out', and mean that they are less likely to try to comply with the two year timeframe if there is an explicit process for allowing an extension. This would clearly not achieve the policy objective of shortening the plan making process.

50 It is suggested that consideration should be given to such unintended consequences, and that these should be consulted on with local authorities.

51 Furthermore, RMLA has concerns over some of the language of new clause 10A, and the lack of specific timeframes provided for decision making.

52 Clause 10A(1) provides that an application for extension can be made where the local authority is 'likely to be unable, to meet…' [the timeframe imposed]. It is unclear in what situations a local authority will be sure that it is unlikely to be able to meet the two year timeframe. This wording may give local authorities too much "freedom", which does not otherwise exist in section 37, as well as increased uncertainty for stakeholders involved in the plan making process. This wording is suggested to be deleted or amended as outlined in the relief sought below.

53 There is no timeframe associated with when a local authority may make such a request or determine that it will make such a request prior to the expiry of the two year completion timeframe. This is a concern for the certainty of those involved in the planning process, as a local authority could in theory apply immediately before the date of expiry; thereby undermining the purpose of the amendment (on the assumption that the requirement imposed by 10A(3)(a) could be achieved without direct consultation). Furthermore there is no timeframe for decision making explicit in clause 10A(4), (5) and (6); this could result in the delay of Ministerial decision making and local authority notice of such decisions, which would further delay the plan making process.

54 There is also no maximum timeframe imposed which can be requested by a local authority, or which could be granted by a Minister. This is inconsistent with section 37

and could potentially lead to circumstances of further unnecessary delay. It is submitted that the potential for extension should be fettered by a legislated maximum timeframe, or otherwise by a qualification of 'reasonableness' to such an extension.

55 **Relief sought:** The RMLA seeks that:

a Consideration be given to the potential unintended consequence of increased occurrences of plan making exceeding the two year timeframe imposed by Schedule 1, and consultation occur with local authorities on this matter with a view to introducing regulatory guidance.

b Consideration be given to the imposition of legislative timeframes for: when a local authority can make a request under clause 10A(1); when a Minister must make a decision under clause 10A(4); when a Minister must serve that decision under clause 10A(5); and when the local authority must give public notice of that extension under clause 10A(6).

c The duration of extension required under clause 10A(2) be limited by a maximum amount (upon further consultation with local authorities and with regard to the current double time extension allowed for in section 37).

d It be clarified the Minister has discretion as to how long an extension may be granted for under clause 10A(4) in light of the maximum extension allowed, and that any such extension of time must be subject to further specified criteria, such as reasonableness.

Schedule 1: limited notification of plan change

56 **Specific matter:** *Clause 5* of Schedule 1 of the Act is amended to provide that a local authority may either give limited notification or public notification of a plan change. *New clause 5A* is inserted to provide for the new ability of limited notification of a plan change.

57 The amendments to clause 6, new clause 6A, clauses 7, 8, and 8A and also clause 25 are all consequential amendments in relation to the limited notification mechanism.

58 **Submission:** Whilst it is acknowledged that there are specific limitations on the use of such limited notification, including importantly that it can only apply to a plan change (as opposed to a whole plan review or proposal), it is not clear that this amendment will justifiably achieve the policy intent of shorter plan making processes.

59 In resource management processes, community and stakeholder participation is a fundamental tenet, and public participation in decision making on planning instruments is central to the premise of the Act.

60 The nature of planning instruments under the RMA is that they are the product of collective and informed decision making, which have long-term (over ten years in many

instances) impacts on the rights of individuals. The legitimacy of those instruments is derived from the comprehensive process which they endure to be produced. The requirement for local authorities to legitimately publicly notify plan changes (and case law on what that requires) has been extensively developed over a long period. The notion that a local authority could effectively identify all persons 'directly affected by a proposed pan change' and then bind all future persons to decisions made under the product of that process is of concern.

61 Any such decision-making which involved only those considered to be directly affected at a particular point in time will not take into account the future impacts of those instruments on potentially affected landowners, stakeholders and community down the line. Allowing the potential assent of only a select group of people to effectively bind unknown future groups to a planning regime is undesirable.

62 Moreover, this amendment is likely to cause an increase in judicial review proceedings challenging notification decisions for local authorities, which would undermine the purpose of the amendment. It would be difficult for local authorities to conclusively determine what persons are directly affected by a plan change, other than perhaps in the case of minor amendments to zoning boundaries; generally, the nature of a planning instrument is that it has potentially wide ranging effects across a district or region, even where a change may be isolated to a small geographic location or with respect to a single resource for example.

63 In the alternative, if the proposed amendments are to proceed, the RMLA:

a Supports the restriction (as proposed) that a local authority only have this option if it is able to identify all directly affected persons.

b Seeks that what is meant by "directly affected" is defined in an inclusive manner (so as to capture all those stakeholders who have a particular interest in the plan change).

64 **Relief sought**: That amendments to clause 5 and new clause 5A of Schedule 1, introducing an option for limited notification of plan changes, be removed in full. That the consequential amendments to clauses 6, 7, 8, 8A, and 25 of Schedule 1 are also removed.

65 In the alternative, if the amendments proceed in substantially the same form, then the RMLA seeks that an additional subclause (11) be added, to define the term "directly affected" in a way that captures all affected persons. Suggested wording is as follows:

> (11) For the purposes of this section, a local authority must identify a person as being directly affected by a proposed change if:
>
> (a) the person is the owner or occupier of land to which the proposed change directly relates; or

(b) the person is the owner of infrastructure that serves or passes through, over or under the land to which the proposed change directly relates; or

(c) the person is affected by an effect of the proposed change that is minor or more than minor (but not less than minor); or

(d) the person is the owner of an operation that has or is associated with an **effects area** over land to which the proposed change directly relates.

66 This wording is necessary to clarify that a person is not only "affected" if their land will be directly subject to the change in rules or activity status (for example) proposed in the plan change. It recognises, firstly, that the owners of infrastructure serving or passing under/over that land will also be affected (consistent with the wording the proposed amendments in respect of notification of resource consents). Secondly, it adopts the "effects threshold" from the resource consent notification tests in determining where other people in the vicinity of the land affected will be affected by activities that are enabled by a plan change.

67 Finally, it introduces the concept of an "effects area", which would be defined in section 2 as:

an odour or noise buffer, noise control boundary, or other effects overlay identified in an operative or proposed district plan.

68 This wording is necessary to ensure that any reverse sensitivity effects associated with a plan change (for example, enabling housing intensification) can be considered and submitted on by the person responsible for the operation which stands to be affected. Such effects boundaries are usually only put into plans where the effects of an activity cannot be internalised, and almost always relate to regionally significant land uses.

Weighting of proposed RPS

69 **Specific matter**: *Clause 51* of the Bill amends section 80 of the Act to clarify the weighting to be afforded to proposed and operative regional policy statements in the context of preparing a combined planning instrument.

70 This amendment is supported in general by the RMLA as it seeks to clarify what is already an accepted occurrence in the preparation of planning instruments under section 80. In the context of 'standard' district planning instruments, it is accepted that an operative RPS has more weight (in that it must be given effect to) and a proposed RPS has lesser weight (in that it must be had regard to). It is agreed that this weighting does not make sense when an authority is preparing a combined planning instrument, such as a unitary plan.

71 That example was recently at issue in the hearings on the proposed Auckland Unitary Plan, whereby it would be an anomaly for the Council to have given effect to the Operative Auckland RPS, which at the time of review was over ten years old and itself was being replaced by the incoming unitary plan. The RMLA is aware that in that instance the Council determined it had the ability, by inference within section 80 of the Act, to apply a reversed weighting of the operative and proposed RPS instruments.

72 **Relief sought:** That the proposed amendment be accepted.

Introduction of the collaborative planning process

73 **Specific matter**: *Clause 52* inserts two new subparts (including *new subpart 4* comprising *new section 80A*) which give an overview of the collaborative planning process, the details of which are contained in *new Part 4* of Schedule 1.

74 *New Part 4* of Schedule 1 of the RMA, comprising *new clauses 36 to 73*, sets out the procedural matters applying to the local authority's use of the CPP for a change to a policy statement or plan, including matters as follows:

a the considerations relevant to the choice of this process, including that the local authority must be satisfied that use of the process is not inconsistent with its obligations under any relevant iwi participation legislation or arrangement (*new clause 37*):

b the notification requirements *(new clause 38):*

c the establishment of a collaborative group, appointments to be made, the group's terms of reference, and publicity requirements *(new clauses 39 to 42):*

d the reporting requirements for a collaborative group *(new clauses 43 and 44):*

e obligations of the local authority responsible for establishing the collaborative group, including the preparation of a proposal (new clauses *45 to 50, 54, and 56):*

f obligations of the collaborative group in relation to the role of a review panel (new clause 52):

g the establishment and role of a review panel, and its functions and powers and procedural matters *(new clauses 51, 53, and 63 to 73):*

h provisions relating to the preparation or change of a regional coastal plan *(new clause 55):*

i provision for a local authority, if it has begun preparing, changing, or reviewing a policy statement or plan before the provisions authorising the use of a collaborative planning process come into force, to use a collaborative process

in accordance with the arrangement set out in *clause 14 of new Schedule 12* (as amended by clause 110) *(see new clause 57):*

j rights of appeal under the collaborative planning process *(new clauses 58 to 61 and* Schedule *2).*

75 **Submission:** In August 2012, the RMLA submitted to the then Minister for the Environment, Hon Amy Adams, (and published) a "Position Statement" of its National Committee (an unprecedented step), stating in relation to the (then) current debate about whether full rights of appeal to the Environment Court on RMA planning documents should be retained that:

> *Rather than dispensing with any one or more phases of the current plan preparation process all together, the Ministry for the Environment should harness the range of constructive proposals for better public engagement at the outset of the plan review procedures (thereby reducing the need or likelihood of submitters exercising an appeal right), alongside the suggestions for continued improvement in the case management plan appeals, and as recently recounted by Acting Principal Environment Judge Newhook.*
>
> *Adopting that approach, along with further incentives to promote a genuine commitment to collaborative processes suggested in this document, we consider that the imperatives of plan agility can be realised without raising the strong concerns held by many members about a potential reduction in the quality of planning outcomes arising through a removed or limited right or scope of appeal to the Environment Court.*

76 The Position Paper further stated, regarding proposals for partial appeal rights (as proposed under the reforms), that:

> *The fact is that no alternative mechanism involving either a fully removed (High Court appeal only) or restricted right of appeal has been proposed that does not create its own perverse outcomes and incentives including:*
>
> *(a) For Councils to adopt the consensus outcome, rather than as recommended by a hearing panel, simply to avoid appeals (LAWF 2 proposal, refer second Russell McVeagh paper);*
>
> *(b) Use of independent hearing panels to give necessary rigour to first instance hearing and decision, while a key pretext for reform is that local body politicians should be making the value judgement/policy decisions involved in RMA planning;*
>
> *(c) Use of independent hearing panels, with suitably qualified members, together with full rights of cross examination (essential if there is only one hearing) will act as a deterrent for lay submitters to become involved in the process;*

(d) Difficulties in determining on what basis leave to appeal should be granted (for example, where a matter of national significance is at stake, as also proposed in the LAWF 2 paper) or inevitably placing pressure on what is meant by an 'error of law';

(e) Inevitability of increased litigation over issues of leave to appeal within whatever scope is retained.

We do not consider these options effectively resolve the issues they create; let alone seek to address.

77 The RMLA in its submission on the Resource Management Amendment Bill 2013 reiterated the above statements in its consideration of the then proposed collaborative planning process. The proposed CPP under the current 2015 Bill has changed in scope considerably from that proposed in 2013 as the CPP can now apply to all planning processes, rather than just for freshwater planning as earlier proposed. Clause 52 of the Bill, inserting new subpart 4 states that the CPP may be used to 'prepare a proposed policy statement or plan, or a change to a policy statement or plan…. Or a change to a combined regional and district document under section 80'. On that basis, the concerns of the RMLA in relation to loss of appeal rights and the process of Environment Court appeals raised in its 2013 submission are of even greater concern now.

78 Overall, the RMLA considers that a greater emphasis on collaboration should not come at the expense of merit-based Environment Court appeals, nor need it do so. The process does not justify a limited access to justice for those involved in a planning process.

79 The limitation in *new clause 59(1)* (inserted in new part 4 of Schedule 1 by clause 108) only allows for rehearing appeals to the Environment Court where the final decision of the local authority is 'inconsistent with the decisions and recommendations of the review panel' (save for exceptions listed, such as compliance with parts of the Act and other legislation). The RMLA considers this amendment may result in a very limited appeal window, depending on the interpretation of 'inconsistent'.

80 Further to this, clause 92 amends section 276, which sets out matters relating to evidence in the Environment Court, to make it subject to new section 277A (as inserted by clause 93). Clause 93 inserts new section 277A, which modifies the powers of the Environment Court in relation to evidence heard on appeal by way of rehearing.

81 The RMLA is concerned that such a hearing will be run on a 'rehearing' basis rather than a 'de novo' hearing, as is currently the case in Schedule 1 planning appeals under the Act. The RIS states that:

"the de novo appeal rights in Schedule 1 processes do not incentivise early, good faith engagement in a planning process (with the exception of Canterbury where special legislation limits appeal rights); and

> *"the removal of de novo appeal rights is necessary to emphasise the importance placed on the consensus of the collaborative group and to incentivise the community to participate meaningfully thereby ensuring the full range of values is represented".*

82 The RIS also suggests more broadly that the ability of the Environment Court to replace decisions of council do not encourage full engagement of stakeholders in the first-instance decision (leading to greater conflict at the appeal level), and that the Environment Court tends to take a legalistic approach which does not take full account of the local context.

83 The first of these points relates to the idea that participants in plan change processes deliberately "keep their powder dry" in the knowledge that they can always appeal the decision. In the experience of RMLA members, that concern is generally not borne out by how these processes occur in practice. While sometimes additional evidence may be produced at the appeal stage to fill any perceived gaps (or evidence may be "sharpened up" for the more formal Environment Court process) it is not usually the case that parties deliberately keep their true concerns hidden or key evidence under wraps until the appeal stage as part of their litigation strategy. Instead, parties aim to achieve what progress they can through the first round of hearings, but value the ability to appeal (generally, now, on discrete matters) to the Environment Court if necessary in relation to any unresolved issues. Once there, many if not most plan change appeals are resolved by way of consent order following mediation between the parties. Council level processes are also becoming more sophisticated, with an increasing emphasis on expert conferencing where there are technical matters in dispute. This further decreases the ability for parties to "game" the process and keep their powder dry for the appeal stage.

84 As such, we consider that the concerns around inefficiencies and poor behaviour through council-level planning processes have been overstated.

85 In addition, it is not clear in what form a 'rehearing' will be run. In the discussion document for the Resource Management Amendment Bill 2013, a rehearing could be run by the Environment Court rehearing evidence *'where appropriate'*. In response to that comment, the RMLA pointed out that the traditional approach for an appeal by way of rehearing is to conduct the appeal on the basis of the record of the decision making body below (*Hall v Chief Executive of Land Information New Zealand* CIV-2005-404-007222).

86 The proposed section 277A (which provides for the rehearing process) is addressed under the Court Processes heading below.

87 The limitation for appeals on points of law in new clause 60 of Schedule 1 is supported in principle on the basis that the Environment Court, being the specialist Court in resource management planning, is best placed to hear points of law appeals on planning instruments developed under the collaborative process in the first instance. The Environment Court is well used to considering legal questions, and has the benefit of

greater familiarity with interpreting and applying planning instruments than the High Court.

88 **Relief sought:** The RMLA seeks the following:

a The CPP is generally supported, subject to the above comments and below relief sought;

b Any option or alternative process that dispenses with (or narrows) rights of appeal to the Environment Court be abandoned;

c To engage with the Ministry to promote best practice in collaboration prior to plan notification, so that the incentive or perceived need to appeal is reduced; and

d For the procedures to include additional details around how the members of the collaborative group are identified and appointed (for example, should there be a requirement for a local authority to seek expressions of interest, and a specified process for resolving any disputes as to membership).

Early use of collaborative process

89 **Specific matter:** Clause 14 of *new part 2* of schedule 12 (as amended by clause 110 of the Bill) purports to establish what is essentially a transitional process for 'early use' of the collaborative process. The RMLA acknowledges that this arrangement is likely to have come about due to the delay in amendments to the Act since 2013, and so as not to prejudice those authorities who in good faith had begun to undertake a collaborative type planning process.

90 **Submission:** The general framework of requiring a local authority to apply to the Minister for 'acceptance' into the CPP upon meeting established criteria is accepted by the RMLA in principle. However, there are some potentially fundamental issues with those criteria listed in clause 14(3).

91 In particular, for those criteria which refer to meeting a standard "in the opinion of the Minister" the RMLA considers that such reference should be removed (it is possible that this text was included in error). Requiring a report to be written by the local authority which states how certain factors will be met 'in the opinion of the Minister' will not achieve sound public planning outcomes. These criteria could be (unintentionally) interpreted as being narrowly focussed on appeasing the Minister, rather than providing a comprehensive picture that the process undertaken at that stage is sufficiently similar to the CPP set out in the legislation. The Minister as ultimate decision maker will obviously have the final say, and as such, reference to his or her 'opinion' is superfluous (particularly given the requirement in clause (4) is for the Minister to "be satisfied").

92 The RMLA is concerned that local authorities which have genuinely endeavoured to undertake a collaborative process will have lost that work as a result of having its

application declined by the Minister under clause 14(4)(a) of new Part 2, Schedule 12. As such, it is suggested that an additional criterion is added as a 'catch all' provision allowing the Minister wider discretion to accept an application where the process is 'sufficiently collaborative' in some ways, although it may not directly fit within the legislative process as summarised in the clause 14 criteria.

93 It is further submitted that such a catch-all criterion should fetter the Minister's discretion, with reference to important public policy outcomes. For example, other factors relevant could be listed in the legislation such as the public perception of collaboration and involvement to date.

94 Further to this, the RMLA is concerned with clause 14(5)(a) of new Part 2, Schedule 12 in particular as this provides for narrow options for consent authorities and the Minister for reasonable decision making. It should be provided in this subclause that there is an option for the Minister to provisionally accept an application, or to refer the application back to the authority to make amendments to its process before re-application.

95 The RMLA considers that this will provide the Minister with a broader suite of options (rather than just accept or must then reject) in instances where the local authority may have, for example, only marginally or trivially not met the stated criteria in the preceding sub clause.

96 **Relief sought:** The RMLA seeks the following for *clause 14 of new part 2, schedule 12 (inserted by clause 110):*

a That the above comments are taken into consideration.

b That the following amendments are made to clause 14:

"(3) The criteria are as follows:

(a) whether there has been a clear intention to set up a collaborative group and appoint its members:

(b) whether the composition of the collaborative group reflects the requirements set out in clause 40 of Schedule 1:

(c) whether, ~~in the opinion of the Minister,~~ the commitment of the local authority to the consensus of the collaborative group is consistent with the requirement of clause 45(2)(a) of Schedule 1:

(d) whether, ~~in the opinion of the Minister~~, the terms of reference for the collaborative group are consistent with the terms of reference required by clause 41 of Schedule 1."

Addition of streamlined planning process (SPP)

97 **Specific matter**: *Clause 52* inserts two new subparts (including *new subpart 5* of Part 5 comprising *new sections 80B and 80C*) which set the purpose and scope of the SPP. Any application by a local authority to enter into a SPP must first be made under *new* subpart *5* before a local authority proceeds with the SPP; the details of which are then set out in *new part 5* of Schedule 1 (inserted by section 108).

98 New Part 5 of Schedule 1 of the RMA, comprising new clauses 74 to 93, makes provision for a SPP. A local authority intending to prepare, change, or vary a policy statement or plan may apply to the responsible Minister to enter the SPP (see new section 80C of the RMA). This Part of Schedule 1 of the RMA would set out:

a the application requirements, how an application is to be dealt with, the responsible Minister's power to direct that a SPP is followed, and the Minister's decision on the proposed planning instrument once the SPP has been followed (new clauses 74 to 80, 84 to 88, and 90 Schedule 1);

b the rights and obligations of the local authority that applies for, and enters into, a SPP (new clauses 81 to 83, 89, and 91 Schedule 1);

c the operative date of the planning instrument that is approved under this Part (new clause 92 Schedule 1); and

d the fact that there are no appeal rights in respect of the SPP, but judicial review rights are preserved, as is the right of appeal in respect of actions taken under a planning instrument approved under this Part (new clause 93 Schedule 1).

99 **Submission:** The RMLA is opposed to the addition of the SPP in the Bill in its current form. The SPP is considered to undermine the premise of devolved decision making for local authorities (which is central to the resource management planning framework), and to provide unjustified and significant power to central government in plan making due to the relatively unconstrained discretion given to the Minister, and absence of process requirements to enable effective participation.

100 The SPP is understood to be a 'remodel' of what was proposed in the 2013 Bill as a 'truncated planning process'. The fundamental change in what is now proposed is that the mechanics of the actual plan making process are removed from the legislation and are proposed to be made in a bespoke manner by the responsible Minister(s) (Environment or Environment and Conservation) through a disallowable instrument (not a legislative instrument).

101 The nature of the SPP being only a 'skeleton framework' set out in the Act, with the majority of the process left to be determined through Ministerial decision making at a later stage, means there is considerable uncertainty for the public as well as local authorities undertaking the process. Moreover the RMLA considers the SPP to include Henry VIII provisions as the 'direction' given by the responsible Minister in new clause

77 of Schedule 1 (inserted by clause 108) provides for a process which essentially overrides the alternative planning tracks set out in the legislation (being the status quo Schedule 1 planning process, and the new proposed CPP).

102 The RMLA acknowledges that the broad decision making power of the Minister in this instance is somewhat fettered by the criteria listed in new clause 77 Schedule 1. However, these limitations still do not provide certainty and transparency to the amount of delegated decision making power which this new process will afford to the executive, particularly in light of the potential implications such decisions will have on public rights.

103 A decision made within the Minister's 'direction' will not just have an impact on the rights of a local authority or those who are directly involved in that following planning process, but will have important consequential implications for all those who are impacted by the resulting planning instrument made under that SPP. This is potentially a very large number of individuals within a district or region as the case may be.

104 **Relief sought:** The RMLA seeks that:

a That the Streamlined planning process be removed in its entirety;

or in the alternative:

b That the RMLA work with MfE to consider options to amend the process to provide for a 'streamlined' process which does not unduly compromise the resource management planning framework premise of public participation; and

c That the more specific comments on the SPP listed below are carefully taken into consideration.

Entry criteria for SPP

105 **Specific issue:** *New Subpart 5 (inserted by clause 52 of the Bill)* provides for what are essentially 'entry criteria' for admission into the process of the SPP. The criteria listed at new section 80C(2) are however very broad and are not considered able to achieve the purpose of providing a streamlined process which is 'proportionate to the planning issue at hand'. The criteria listed include matters such as 'the requirement to meet a significant community need', and 'the expeditious preparation of a planning instrument is required…" (Criterion in new section 80(2)(c) and (f)) respectively). These criteria in particular are so broad that the RMLA envisages that most plan making processes could qualify for entry into the SPP by the local authority.

106 **Relief sought:** If the SPP is retained in the Bill, the RMLA seeks the following;

a That the 'entry criterion' listed in *new section 80C (inserted by clause 52)* be substantially limited, in particular that the criterion be removed as follows:

"80C(2) However, a local authority may apply for a direction only if the local authority is satisfied that the application satisfies at least 1 of the following criteria:

(a) the proposed planning instrument will implement a national direction:

~~(b) as a matter of public policy, the preparation or change of a planning instrument is urgent:~~

~~(c) the proposed planning instrument is required to meet a significant community need:~~

~~(d) an operative planning instrument raises an issue that has resulted in unintended consequences:~~

(e) the proposed planning instrument will combine several policy statements or plans to develop a combined document prepared under section 80:

~~(f) the expeditious preparation of a planning instrument is required in any circumstance comparable to, or relevant to, those set out in paragraphs (a) to (e).~~"

Decision making under SPP

107 **Specific issue:** *New clauses 74 to 80, 84 to 88, and 90 are inserted into Schedule 1, new part 5, (by section 108)* to set out the application requirements, the power of Minister's directions, and the Minister's decision-making ability on the proposed planning instrument once the streamlined planning process has been followed by a local authority.

108 **Submission:** As stated above, the entire SPP is of concern to the RMLA, in particular however clauses 77-80 of Schedule 1, being the mechanics of a direction set by the Minister and what that must contain. Clause 77 Schedule 1 sets out the 'skeleton' of the planning process which must be included in a direction set by the Minister.

109 Those provisions in new clause 77(a) to (e) Schedule 1 provide a considerably limited process to that which exists in Schedule 1 currently for plan making. It is foreseeable that the consequence of this clause could result in a very minimal process which does not reflect the planning issues at hand (or is not proportionate) and which will be somewhat binding on the local authority. There is no set process after the issuance of a direction for the local authority to rebut what process is served upon it (once amendments have been sought/made under clause 80). The RMLA is also concerned with this omission on the basis that new clause 82 Schedule 1 binds the authority into following the direction.

110 As stated above, the nature of the instrument being a disallowable instrument (prescribed in new clause 79 Schedule 1) is strongly opposed. The RMLA considers that at the very least, should the SPP be implemented through the Bill, that the 'direction' from the Minister should be legislative as it has demonstrable and long term effects on personal rights. As a minimum, such an instrument should be a regulation, made under delegated authority and subject to adequate scrutiny of the House.

111 As stated above, the entire SPP is of concern to the RMLA, in addition, new clauses 80-84 Schedule 1 (inserted by section 108) being the Minster's decision making process on planning instruments, is of grave concern. These clauses give the responsible Minister **c**onsiderable decision making powers, which essentially put the Minister in the position of the Environment Court. In determining whether to approve a planning instrument under new clause 84, the Minister would have to make an overall assessment of the instrument's consistency with the Resource Management Act; a determination which has been the subject of a long history of litigation and judicial decision making in the realm of the Environment Court.

112 Such a decision is not apocopate for a centrally elected official to make as this undermines the premise of local decision making under the Act.

113 Moreover it is of concern that the Minister has powers in new clause 84 to direct specific recommendations or changes to a planning instrument once it has gone through an entire planning process. The local authority "must adopt" any such "recommendations" made by the Minister (subclause 87(4). The ability to "recommend" changes at this stage in the process will essentially bind the hand of a local authority into implementing that change. If a local authority were for example to attempt to reject such an amendment and resubmit the instrument to the Minister it is foreseeable that the Minister would decline approval under new clause 84(b) Schedule 1.

114 The factors limiting the Minister's decision of declination or acceptance listed at new clause 84(2)-(4) are broad. If the Minister is to retain ultimate discretion on the final form of a SPP produced plan, the criteria for the exercise of the discretion should be set out in detail.

115 **Relief sought:** If the SPP is retained in the Bill, the RMLA seeks the following;

a That the above concerns be taken into account if the Minister is to remain as a final decision maker on a planning instrument.

b That the above be taken into account in the process for setting a direction, and what must be included in such a direction.

116 **Specific issue:** *New clause 93 of the First Schedule (inserted by clause 108 of the Bill)* establishes that there are no appeal rights in respect of the streamlined planning process, but judicial review rights are preserved.

117 **Submission:** The RMLA is concerned with the removal or limitation of any appeal rights in the public planning process, in particular where that process is not subject to adequate public participation.

118 **Relief sought:** If the SPP is retained in the Bill, the RMLA seeks that full appeal rights (contained currently in Schedule 1 part 1 of the Act) are retained in the SPP, and that those rights must be set out in the legislation rather than able to be altered or prescribed through a Ministerial direction under clause 77 of the SPP.

(IV) CHANGES TO CONSENTING

Fast-track applications

119 **Specific matter**: Under new s 87AAC (inserted by clause 121 of the Bill) all controlled activities (other than subdivisions) will also be processed as "fast-track" applications. In addition, a new regulation making power (new s 360F) will enable the Minister to prescribe:

a particular activities or classes of activities as fast-track; or

b prescribe methods or criteria a consent authority must use to identify fast-track activities; and

c the information that an application must include (rather than the information required by Schedule 4).

120 For "fast-track" applications:

a Less information may be required to be submitted with the application;

b A decision on the application is to be made within 10 working days after the application is made (rather than the usual 20);[1] but

c The fast track status ceases to apply if the application is notified or a hearing is held. At that stage, the information normally required under Schedule 4 can be sought by way of a section 92 request.

121 **Submission**: The RMLA considers that faster processing times for "straight-forward" resource consent applications are likely to be welcomed by some applicants. However, it may be that for other applications a 10-working-day difference is not of material value because of the range of other factors that affect the delivery of a project.

122 A broader question raised by the proposed reforms is whether all local authorities (including those authorities with fewer resources available) will have the capacity to process applications under a reduced timeframe. While the 2013 Discussion Document indicated that the processing requirements on Councils would be reduced commensurately with the shorter timeframes, that has not been carried through into the Bill and the required quality of decision making will be the same regardless of the shorter timeframe.

123 For these reasons, if the new fast-track mechanism is to proceed as proposed, then it will be necessary to ensure that it only applies to "the most straight-forward" applications. In particular, consideration needs to be given to whether controlled activities are universally suitable to be processed in this manner (consultation with local authorities would be appropriate), as clearly councils could not have had this procedural

[1] Section 115(4A).

consequence in mind when assigning controlled activity status to an activity. Accordingly, consideration should also be given to whether a transitional measure allowing councils to review their controlled activities would assist, and/or whether Councils should be given the ability to specify that a given controlled activity will not be subject to the fast-track application process. In the absence of this ability Councils may in the future be reluctant to provide for an activity as controlled if they are concerned about the likely processing timeframes.

124 **Relief sought**: That consideration be given to:

a Whether all local authorities have the requisite resource capacity to process applications within the 10 working day timeframe, and if not, what assistance could be provided or changes made to the proposed fast-track mechanism in order to make this more manageable.

b Whether it is appropriate to include all controlled activities as automatically subject to the "fast-track" application process, or whether a transitional period and/or the ability to "opt out" for controlled activities would be appropriate.

Boundary activities

125 **Specific matter**: New sections 87AAB and 87BA (inserted by clauses 121 and 122 of the Bill) provide that "boundary activities", being activities that require resource consent only by virtue of a district rule that relates to the distance between a structure and the boundary of an allotment (or the dimensions of the structure in relation to that distance), will not require consent if written approval is provided by all neighbours with an affected boundary. Instead, the application is issued with a notice from the council confirming that the application is permitted.

126 **Submission**: The RMLA considers this to be in principle a sensible change; given that the purpose of 'boundary rules' is generally to safeguard the interests of neighbours (being both owners and occupiers), if those neighbours give written approval then there is no need for the rule to apply.

127 One potential concern is that some rules which would qualify as 'boundary rules' (as this is proposed to be defined) may have been intended to protect or benefit persons other than immediate neighbours. One example of this might be where 'boundary rules' are intended to protect the interests (eg views, or light) of persons located further away. Accordingly, the RMLA recommends that Councils be given a transitional period within which to review their plans and make any necessary amendments (eg by enacting viewshafts or other mechanisms which would not be caught by the 'boundary rule' definition) before this proposed change comes into effect.

128 A useful workability amendment that could be made would be to clarify the status of the notice issued by a council under s 87BA - in particular, whether this is equivalent to a certificate of compliance issued under 139 in terms of the rights to conveyed to the applicant. If it were intended that the same status apply, this could be achieved

relatively simply through a cross-reference in s 87BA to s 139, or by an amendment to s 139 itself.

129 **Relief sought**: The RMLA seeks that:

a Consideration be given to a transitional period before the boundary activities provisions take effect to allow councils to review their plans.

b The legal rights conveyed by a notice issued under s 87BA are clarified (for example with reference to the certificate of compliance provisions).

"Deemed-permitted" activities

130 **Specific matter**: New section 87BB (inserted by clause 122 of the Bill) allows a consent authority, in its discretion, to notify a person (either before or after an application for consent is made) that an activity is a permitted activity, if:

a the activity would be permitted but for a "marginal or temporary non-compliance" with the relevant standards;

b any adverse environmental effects of the activity are "no different in character, intensity, or scale " than they would be in the absence of the non-compliance; and

c any adverse effects of the activity on a person are less than minor.

131 **Submission**: While this amendment will offer benefits to applicants in some circumstances (in particular, uncontroversial and minor breaches), there will be other cases in which applicants may prefer to go through the additional process of securing resource consent in the usual way rather than receive notice that the activity is "permitted" in a manner that could be subject to challenge. For example, what comprises a "marginal or temporary" non-compliance will be relatively subjective and will potentially present a judicial review risk for applicants.

132 In addition, it is not clear whether the phrase "effects of the activity" subsection (1)(c) in referring to effects on persons being less than minor should be interpreted as directing an assessment of the "effects of the *non-compliance*" (given the focus of subsection (1)(b) is clearly on the effects of the non-compliance rather than the effects of the activity as a whole). Notably, there is no reference in the section to a "permitted baseline" type analysis (compare sections 95D(b), 95E(2)(a), and 104(2), which mean that the focus of an effects assessment in the notification and substantive decision contexts is generally on the effects of any *non-compliance* with permitted activity standards, rather than the effects of the activity as a whole). It would be useful to clarify this (either way) to reduce uncertainty and the likelihood of challenge/ litigation.

133 The drafting currently enables a consent authority to give notice at its own initiative and at its discretion. The RMLA recommends that an applicant be given the ability to request

that an application be processed in the usual way and a notice not issued by the local authority, if that is the applicant's preferred process (which may be the case if the applicant was concerned about a possible challenge if the "deemed permitted" approach was used).

134 In addition, as above in relation to boundary activities, it is necessary to clarify the status of the notice (ie whether it is equivalent to a certificate of compliance issued under section 139, or if not, which of the other sections of the Act (eg as referred to in s 139(9)-(12)) apply to the notice. This is needed to provide certainty as to the notice holder's rights if (for example) a district or regional plan is changed after a notice is issued.

135 **Relief sought**: The RMLA seeks that:

a Applicants be given the ability to opt out of the deemed permitted notice process (eg if they do not wish to run the risk of challenge).

b The status of the section 87BB notice is clarified (with reference to a certificate of compliance).

c Subsection 87BB(1)(c) is clarified in terms of whether the focus should be on the effects of the non compliance or on the effects of the activity as a whole (if it is the latter, then it is much less likely that an activity will qualify as eligible for a notice under this section).

Notification - public notification and limited notification precluded

136 **Specific matter**: Amendments to sections 95A (clause 125 of the Bill) provide that public notification will be precluded where the application is for one or more of the following, but no other, activities:

a a controlled activity;

b a restricted discretionary or discretionary application for a boundary activity, a subdivision, or a residential activity; or

c an activity prescribed in regulations under new s 360G.

137 In addition, under amendments to section 95B (clause 125 of the Bill) limited notification is precluded if the application is only for a controlled activity other than a subdivision, and/or an activity prescribed in regulations.

138 **Submission**: The focus of these proposed changes appears to be on enabling smaller developments (particularly residential activities and subdivisions) to be approved with fewer obstacles (ie reduced opposition or hearing processes). This is proposed to be achieved by further limiting public participation in resource consent decision making.

139 The RMLA considers that the notification of applications is important both to allow affected persons to understand and have input on resource management decisions

which affect their interests, but also to assist decision makers consider all relevant issues in determining whether to grant a resource consent, and to impose conditions. In light of this, the RMLA queries whether notification processes are still causing undue delays, or whether the amendments made in 2009 have addressed most concerns. It is understood that in most districts only a very small proportion of applications are notified. Experience suggests that resource consent processing has generally improved, and any remaining problems are more likely to be attributable to Council resourcing issues than to the statutory tests.

140 As with a number of the changes proposed in regard to the notification of applications (addressed below), the RMLA is concerned that the result of these amendments will be reduced access to justice for those affected by proposed developments, and also a risk that the quality of decision making will be reduced if decision makers do not benefit from the input of submitters.

141 In addition, and as noted in relation to other proposed amendments, there is a potential for unintended consequences to occur where the new mechanisms are linked to rules or activity status in ways that could not have been anticipated when those provisions were drafted. In his case, for example:

a Some councils have historically used non-complying status more than others, which will now affect the extent to which applications within those districts are notified.

b Equally, councils may have provided for certain activities as controlled but still anticipated that submitters might usefully have input into the conditions imposed to managed adverse environmental effects.

142 Further, these and other changes which are linked to activity status may provide the wrong incentives to councils in setting activity status (ie if they wish to retain some control over consent processes), which could end up making development more difficult rather than easier (which is presumably the intention of the reforms). For example, there might be fewer activities being classified as controlled and more as non-complying as a result of these and related changes.

143 Finally, given the special treatment given to subdivision activities, there is a particular risk of reverse sensitivity effects arising as a result of the inability to submit on such applications. The RMLA considers that any special provision for residential activities and subdivision (ie in terms of lesser notification requirements and restrictions on appeals) should only apply where the proposed activity is to occur in a residential zone. That approach is already taken in the Bill in relation to residential activity (given how this is defined in new subsection 95A(6)), and also with respect to appeal rights in new subsection 120(1A), which provides that residential activity is only exempt from appeal where (among other things) it is "on land that, under a district plan, is intended to be used solely or principally for residential purposes"). This ensures that, even if there is limited scope for public participation at the resource consent stage for such activities (which the RMLA would still have concerns with), this will only be the case where the

activity is proposed to be located in an area which a district plan (through a public process) has identified as generally appropriate for residential activity. The RMLA considers the same approach should be applied to the related amendments that limit or restrict participation in relation to applications for subdivision consent.

144 **Relief sought:** The RMLA seeks:

a That the need for the proposed changes be reconsidered in light of their implications for public participation, and whether they are necessary in order to facilitate residential development, given the other measures available.

Or in the alternative, if the amendments proceed:

b That Councils be given a transitional period in which to review and amend their plans to respond to any unintended consequences associated with the activity status attributed to different activities.

c That the restrictions on public notification for subdivision are subject to the same qualifier as is proposed to apply to residential activity, ie that it be "on land that, under a district plan, is intended to be used solely or principally for residential purposes".

Notification - eligibility criteria for affected persons

145 **Specific matter**: New section 95DA (clause 128) provides that, except for "regional consents" (ie activities that can only be granted by a regional council) and most non-complying activities, new "eligibility criteria" restrict who can potentially be limited notified of an application. It is proposed that following persons would be eligible to be considered affected:

a for a boundary activity, the owner or occupier of an allotment with an affected boundary;

b for an activity (other than a non-complying activity) on land that is subject to a designation, the requiring authority responsible for the designation;

c for a subdivision (unless the subdivision is non-complying), the owner of infrastructure associated with providing services to the land, the medical officer of health, the Fire Service, and the relevant Civil Defence Emergency Management Group; and

d for any other kind of activity (not being a non-complying activity), the owner or occupier of an allotment that is "adjacent" to (ie adjoining or across a road, right of way, or watercourse from) the application site, as well as the owner of any infrastructure assets that pass through, over, or under the application site.

146 Additional eligibility criteria for prescribed activities (which override the criteria above) can be specified in regulations under new s 360G.

147 Any person who is "eligible" must still meet the effects threshold in section 95E in order to be considered an affected person and served with limited notification of the application.

148 **Submission**: The RMLA is concerned that these proposed changes will also significantly reduce the ability of affected persons to have input into resource management decisions that affect their interests (by definition, limited notification currently only occurs when a person is directly affected). Under the proposed changes it would not matter how severely a person stood to be affected by a proposal - if they did not meet the limited eligibility criteria above then they could not be limited notified. It is difficult to see the policy rationale for such a situation.

149 The RMLA considers that, in general, the new more clearly defined threshold for limited notification introduced in 2009 (ie that an effect must be "minor", whereas previously anything more than a de minimis effect would trigger notification) is working well. As such, any benefit of the proposed change in terms of fewer people having to be considered as potentially affected will be outweighed by the extent to which people are materially affected but unable to be notified.

150 However, if there is evidence that an excessive number of applications are being limited notified in circumstances where there is no material effect on the person notified and/or little benefit for the decision maker in determining the application, then the RMLA recommends that instead of imposing eligibility criteria consideration is instead given to:

a Reviewing the effects threshold for limited notification (ie if there is evidence that the "minor or more than minor (but not less than minor)" threshold is set too low); and/or

b Providing greater guidance or training to consent authorities to improve the quality of notification decisions.

151 However, if eligibility criteria are to be imposed, then the RMLA is concerned that some of these are unduly narrow. It is important to understand that some of the criteria are not cumulative. For example, a subdivision application that is not non-complying can only be limited notified to the persons specified; there is no ability for an adjacent landowner (or person responsible for infrastructure on adjacent land) to be notified. Once a subdivision has been authorised, subsequent development on the land may be able to proceed without further resource consent being required, or further ability for affected persons (eg those adjacent to the site) to participate.

152 Secondly, the rationale for limiting eligibility for most other categories of application to adjacent owners or occupiers has not been made clear. Clearly some effects (eg noise) will be felt further away at more distant locations. Further, the RMLA is concerned that

in developing this proposal adequate consideration has not been given to so-called "reverse sensitivity" effects. Reverse sensitivity is a well-recognised concept that is relevant in the consideration of the actual or potential effects of a proposed activity. It has been variously defined, but essentially refers to the vulnerability of an established activity to objection from new, sensitive, land uses located nearby. As a result, the established use may be required to restrict its operations or mitigate its effects so as to not adversely affect the new activity.

153 The RMLA is concerned that, under the proposed eligibility criteria, existing operators such as industry or infrastructure providers will not be eligible to be limited notified in respect of activities which will have adverse reverse sensitivity effects on their operations. A partial solution to this (at least in some cases) would be to add eligibility criteria in relation to an "effects area" (to be defined as a "an odour or noise buffer, noise control boundary or other effects overlay identified in an operative or proposed district plan."). This could be achieved by including a definition of "effects area" in section 2, and adding to the "persons eligible to be considered affected" column (for each activity): "The owner of an operation which has or is associated with an effects area". This change would ensure that operators of significant infrastructure or facilities would at least be eligible to be considered affected (and would still need to meet the section 95E effects threshold in order to be notified).

154 Consistent with the discussion above, the RMLA considers that any restrictive eligibility criteria for subdivision should only apply where the subdivision is proposed to occur on land that "under a district plan, is intended to be used solely or principally for residential purposes". This would ensure that the suitability of the land for subdivision and/or residential development would at least have been considered through a public plan change process.

155 Finally, given that notices of requirement have interim effect (under section 178 RMA), the RMLA considers it would be appropriate for requiring authorities to also be eligible in respect of land that is subject to a notice of requirement as well as land that is subject to a designation (as currently proposed).

156 **Relief sought**: The RMLA recommends that this proposed change be rejected.

157 However, if this change is to proceed then the RMLA recommends that the eligibility criteria are carefully reviewed in order to address the concerns set out above, and that:

a The restrictive eligibility criteria for subdivisions only apply "on land that, under a district plan, is intended to be used solely or principally for residential purposes".

b "The owner of an operation which has or is associated with an effects area" be added to each of the columns (and the definition of "effects area" proposed above be added to section 2)

Notification - disregarding effects "taken into account" in objectives and policies

158 **Specific matter**: Proposed new subsections 95D(ca) and 95E(2)(c) provide that, in assessing whether the effects of the application will be "more than minor" or "minor or more than minor", a consent authority will have a discretion to "disregard an adverse effect of the activity if the adverse effect, considered in the context of the relevant plan or proposed plan, is already taken into account by the objectives and policies of that plan". This is in addition to the existing requirement to disregard effects over which control/discretion is not reserved/restricted, and the existing discretion to disregard effects of permitted activities.

159 **Submission**: This change appears to have its genesis in the 2013 Discussion Document, which proposed that an application be considered against the objectives and policies of the plan to determine whether notification needed to be considered at all. The current proposal is more moderate, as it only affords a *discretion* to disregard effects.

160 However, it is still not clear that any benefits from this proposed amendment will outweigh the potential for greater complexity and risk of challenge in notification decision making. In particular, the RMLA considers that it may not be appropriate to provide for an objectives and policies assessment at the notification stage, given that the focus of the notification enquiry should be principally on effects of the activity, and given the subjective nature of an objectives and policies assessment (there would be a real risk of judicial review in some cases).

161 Further, councils already have the ability to restrict their discretion or control (or preclude notification altogether) at the planning stage through rules as to activity status - and in a manner that is much more certain than shoe-horning an evaluation of objectives and policies into notification decisions.

162 Beyond that, it is not clear what "taken into account" means in this context. One interpretation, for example, would be that if a plan has objectives and policies about the need to carefully manage traffic effects, then traffic effects have already been "taken into account" so do not need to be considered at the notification stage. It is unlikely that this was intended. Other examples will be more nuanced, but there is likely to a degree of uncertainty and a risk of challenge in practice.

163 However, if it were considered important to allow particular classes of effects to be disregarded at the notification stage, while still being relevant to the exercise of the consent authority's discretion or control (currently restricting discretion or control is an "all or nothing approach" - as it limits both the matters for notification and for the substantive consideration and conditions), then a more straightforward and certain way of achieving this decoupling would be to allow councils to separately specify in plans:

a the matters over which control or discretion is reserved (in the case of controlled or restricted discretionary activities); and

b the categories of effect that are relevant for notification (for any class of activity).

164 This would allow councils to more clearly express at the planning stage how they intended applications to be considered, and would not increase the complexity of the notification decision to be made by consent authorities. The RMLA does not consider that this as an amendment that is necessarily required, but considers it would be preferable to the proposed discretion to disregard effects that have been "taken into account" in objectives and policies.

165 **Relief sought**: The RMLA recommends that the proposed change be rejected.

166 In the alternative, if there is evidence of benefits to be achieved through decoupling matters that are relevant for notification from those that are relevant for the ultimate decision and the imposition of conditions, then this be approached in the manner set out above.

167 That could be achieved by amendments to section 77D to number the existing wording as subsection (1), and further provide:

> (2) A local authority may make a rule specifying, for a particular activity, which environmental effects are relevant to be considered under section 95D or 95E.
>
> (3) The environmental effects specified in a rule made under subsection (2) may be different to the matters over which discretion is restricted or control is reserved, in the case of a restricted discretionary or controlled activity.

168 The proposed subsections 95D(ca) and 95E(2)(c) could then be replaced with:

> must, if the activity is described in a rule made under section **77D(2)**, only have regard to the effects specified as being relevant for consideration in that rule, and disregard any other effects of the activity; and

169 The RMLA considers that this approach, of having proposed rules of this kind proposed by a local authority and considered by the community through a plan change process, would also be preferable to having the "relevant effects" identified by a consent authority on a case by case basis, as discussed below.

Notification - requirement to specify relevant effects in notification decision

170 **Specific matter**: Proposed new subsections 95A(7) and 95B(9) provide that, if an activity is notified or limited notified because it exceeds the relevant "effects thresholds", then the consent authority must specify in the notice the adverse effects that it considers to be "relevant" under section 95D or 95E (respectively).

171 This in turn would affect the matters that can be raised in submissions, and therefore in an appeal (under the proposed new section 41D and subsection 120(1A)).

172 **Submission**: The RMLA opposes this change.

173 Firstly, it is not clear what is meant by "relevant", ie whether this means the particular effect in question would itself have to be above the effects threshold to trigger either public or limited notification (ie "more than minor" or "minor", respectively). That creates substantial uncertainty, particularly in cases of public notification (where only one effect might be more than minor so as to trigger public notification, but other effects on individuals could be at least "minor" so should be able to be commented on through submissions).

174 Even if this issue is clarified, this proposed change (read together with the related amendments at sections 41D and 120(1A)) is a significant departure from the current position, and will result in uncertainty for applicants and potential submitters alike as to what effects can be raised through submissions. Again, if it were necessary to restrict the matters that can be raised in submission (and the RMLA is not aware of any evidence that it is) then the better approach would be for the local authority to specify this through rules in the plan (following a community plan change process) rather than have it decided by a consent authority on a case by case (and potentially ad hoc) basis.

175 Finally, if the amendments proceed as proposed and councils are not provided with a transitional period within which to review their plans and make any necessary amendments to respond to the new requirements, then the amendments risk materially undermining the intention or understanding of councils (and also the public and other stakeholders) in developing those plans. This is because:

a Some rules may trigger the need for resource consent (eg as a discretionary activity) according to a given metric (such as gross floor area or parking spaces) with the intention that a wider range of effects (eg noise, amenity, visual effects) will be able to be considered in the consent process itself. There is a risk that such effects might not be specified as "relevant" by the consent authority, and as such could not be submitted on.

b More broadly, the effective restriction of submissions to certain kinds of effects (where the effect is the reason the application was notified) is inconsistent with the principle that any effect can appropriately be considered (and submitted on) for discretionary activities, and also the fact that in choosing (unrestricted) discretionary activity status in its plan the relevant council must have intended that all effects could be the subject of submissions.

176 As such, if this change is to proceed, then it is essential that councils be afforded an opportunity to amend their plans to avoid any unintended consequences.

177 **Relief sought**: That these amendments be rejected. If there is a need to specify which effects are relevant for submissions, then this is better done at the rule making stage

with appropriate community consultation (see suggested amendments to section 77D above) than at the notification stage.

178 In the alternative, if this amendment is pursued, then the RMLA seeks that:

a The provisions be amended to clarify what is meant by "relevant" effects (and to clarify that effects that are not more than minor can still be "relevant" where an application is publicly notified).

b A transitional period be provided to allow councils to review their plans and make any necessary amendments, before they take effect.

Requirement to strike out submissions

179 **Specific matter**: It is proposed that under new section 41D (clause 120 of the Bill) a consent authority would be required to strike out a submission on a resource consent if one or more specified circumstances applies, unless the consent authority considers that doing so would materially compromise its ability to fulfil its obligations under Part 2 of the RMA. The specified circumstances are where the consent authority is satisfied that the submission:

a "does not have a sufficient factual basis";

b "is not supported by any evidence";

c is supported only by evidence which purports to be independent expert evidence but which is prepared by a person who lacks the requisite independence or expertise; or

d "is unrelated to the activity's actual or likely adverse effects, if those effects were the reason for notifying the application or review" (this appears to be a reference to the new requirement to identify the "relevant" effects in a notification decision).

180 Submissions could be struck out before, during, or after a hearing.

181 **Submission:** The RMLA anticipates that the intended benefits of these changes are to speed up hearing processes and/or to avoid or narrow Environment Court appeals (given the related change to appeal rights).

182 While there is a residual discretion or ability to allow a submission to stand despite coming within one of the specified circumstances, the RMLA considers this could be broadened to allow wider considerations to be taken into account.

183 As noted above, the RMLA has a number of concerns with submissions effectively being restricted to the kinds of effects that were specified as "relevant" by the consent authority, and in limiting the matters that can be effectively addressed through submissions. These include that:

a It creates a misalignment or disjunct between the matters that can be within the scope of submissions, and the matters that the consent authority has to consider in determining the application for consent (and imposing conditions). That is, the matters for discretion or control may be wider than what affected persons can submit on.

b In addition, given the wording of subsection 41D(2)(iv) is confined to "adverse effects", on the face of the section a submitter would not be able to call into question the applicant's assertions about positive effects, or to raise concerns about consistency with relevant objectives and policies, if the consent authority had specified "relevant effects" as the reason for notification. Assuming that this result were not intended, the drafting could be improved by rewording subsection 41D(2)(iv) as follows (to ensure that only the part of a submission alleging other kinds of effects would be struck out):

> "it relates to an adverse effect that is unrelated to an activity's actual or likely adverse effects, if those effects were the reason for notifying the application or review"

c As such, the consent authority would have to consider some matters or effects solely on the basis of the views put forward by the applicant (or the consent authority's own assessment of the issues). Such issues will still need to be addressed by the applicant but will be considered by the decision maker in a less informed way.

d It puts the applicant and submitters in uneven positions, as submitters could only engage on limited issues whereas the applicant would be able to engage on a broader range of issues.

e Submitters will not be able to address cumulative effects, or wider effects, that may have been just shy of the relevant effects threshold but which would sensibly be considered as part of a holistic assessment of the effects of an application.

184 **Relief sought**: The RMLA recommends that subsection 2(a)(b)(iv) be deleted, and that discretion at subsection (2)(c) be widened (for example by replacing the phrase "not materially compromise" with "not detract from").

185 In the alternative, and/or if subsection 2(a)(b)(iv) is retained, that it be reworded as set out above, in order to clarify that (for example) parts of a submission that related to positive effects or consistency with objectives and policies would not have to be struck out as a consequence of the consent authority having specified particular adverse effects as "relevant" in its notification decision.

Requirement to consider offsetting conditions

186 **Specific matter**: A proposed new subsection 104(1)(ab) (clause 62 of the Bill) would require a consent authority to have regard to:

> any measure proposed by the applicant for the purpose of ensuring positive effects on the environment to offset any adverse effects on the environment that will or may result from allowing the activity

187 **Submission**: The RMLA supports this addition, which confirms (perhaps for the avoidance of doubt) that consent authorities must consider volunteered offsetting conditions as part of their evaluation of a resource consent. There has been some uncertainty as to the appropriate context to consider such conditions following case law finding that offsetting or positive effects do not constitute mitigation (so could only be considered as either a positive effect under section 104(1)(a) or an "other matter" under section 104(1)(c), if the consent authority considered it relevant).

188 However, as drafted there is some uncertainty as to what measures would qualify. For example, it could be argued that the consent authority would only be required to have regard to such a measure if it would "completely offset" all adverse effects of a proposal (ie so that a "no net loss" outcome is achieved). If that was not intended, then to avoid uncertainty and litigation on this issue the RMLA considers it would be appropriate to amend the new subsection so that it reads:

> any measure proposed by the applicant for the purpose of ~~ensuring~~ creating positive effects on the environment to offset ~~any~~ the adverse effects on the environment that will or may result from allowing the activity

189 Finally, as noted above, it is generally accepted that offsetting conditions volunteered by applicants can be (and are) taken into account in the section 104 assessment as positive effects. The more difficult hurdle, where offsetting conditions cannot currently be taken into account, is in section 104D(1)(a) (ie the "effects limb" of the gateway tests for non-complying activities). This is because that subsection refers simply to the "adverse effects" of the activity, and offsetting conditions (because they are not "mitigation") are not considered to reduce the adverse effects (instead they "offset" those effects).

190 Accordingly, a change that could be considered, if it were intended to make offsetting conditions relevant at the section 104D stage, would be to amend subsection 104D(1) as follows:

> (1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—
>
> (a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies, and after allowing for any

effect to which section 104(1)(ab) applies) will be minor or less than minor.

191 **Relief sought**: The RMLA considers that the minor amendment set out above should be make to clarify the intention of new subsection 104(1)(ab), and that the subsection 104D(1)(a) be amended as above (if it is intended that offsetting conditions be able to be taken into account at the section 104D stage of the consent authority's assessment).

Limitations on the scope of resource consent conditions

192 **Specific matter**: New section 108AA (clause 64) provides that, except where the applicant agrees otherwise, a condition must be "directly connected" to either an adverse effect of the activity on the environment, or an applicable district or regional rule (being a rule that is the reason, or one of the reasons, why consent is required).

193 **Submission**: The RMLA is not aware of any major concerns with the way conditions are currently imposed, which appears to be broadly consistent with this proposed new section. However, it may be that the section nonetheless provides a useful clarification.

194 As such, the RMLA supports this new section, provided it allows conditions to be included in a resource consent in terms of:

a Voluntary conditions agreed to by an applicant (such that the accepted *Augier* principles apply).

b Any or all effects of the activity (ie not just those effects which were specified in the notification decision as "relevant" or expressly referred to in the rule that triggered the need to obtain consent).

195 As a minor workability improvement it would be useful to clarify the that section 108AA is "subject to" section 87A, which limits the matters that conditions can cover for controlled and restricted discretionary activities.

196 Finally, the RMLA observes that the Bill does not amend the range of potential conditions that can be imposed on subdivision consents under section 220 of the RMA. Any limits imposed on section 108 of the RMA should also address the flow-on implications for section 220.

197 **Relief sought**: The RMLA recommends that this amendment be adopted, subject to the comments set out above.

(V) COURT POWERS

Delegation of powers to Environment Commissioner

198 **Specific matter:** Clause 95 of the Bill would insert new s280 (1AA) enabling an Environment Judge to delegate the powers conferred by s279(1) to (4) of RMA to an Environment Commissioner in the context of a s120 (resource consent) appeal. Clause 89 makes a consequential amendment to section 265 of the Act.

199 As it stands under the RMA, the s279 (1) to (4) powers are conferred on an Environment Judge, sitting alone, during the course of any given proceedings.

200 The explanatory note to clause 95 states the intention that such powers may only be delegated to an Environment Commissioner *after* a conference under s267 of RMA.

201 **Submission:** While the ability to delegate section 279 powers to an Environment Commissioner is supported, if the intention of the new provision is that such delegation may only be made after a judicial conference, the wording of new s280(1AA)(a) limitation could be more express. This could be achieved by a simple grammatical amendment, for example, the insertion of a "," after the words "Environment Judge" and before "after a conference".

202 Ideally, a new subsection (c) would be added in place of that clause, as follows:

> An Environment Judge may only confer powers under section 279(1) to (4) on an Environment Commissioner after a conference held under section 267 in relation to that matter.

203 Beyond this, the RMLA is uncertain as to the benefit of providing for such a power of delegation, but only after a conference has been held under section 267. Presumably, application of the s279 powers would be a matter addressed (or potentially addressed) at any such conference, and the Environment Judge would then be in a position to exercise those powers (to the extent appropriate) with the benefit of input from the relevant parties.

204 It is unclear why an Environment Judge would wish to delegate such a power to an Environment Commissioner after the conference in such circumstances, and where the Environment Commissioner would not have heard from the relevant parties regarding the potential exercise of the power in question. This in turn raises potential natural justice issues, unless the Environment Commissioner was present at the conference.

205 The RMLA is also uncertain as to why the power of delegation would be confined to section 120 appeals. A similar point is made in relation to proposed clause 94 whereby an Environment Judge (sitting alone) would be authorised to exercise any other powers conferred by the Principal Environment Judge in relation to a particular matter, under new section 279 (5).

206 The proposed consequential amendment to s265 (through clause 89) is obviously necessary alongside proposed new section 280(1AA), and is supported by the RMLA.

207 Relief sought: If the delegation power is to be restricted in the manner proposed, amend s280 (1AA) by deleting the words "after a conference held under s267 in relation to that matter" and adding a new s280(1AA) (c) as set out above.

208 In addition, consider restricting such delegation to a Commissioner present at the prerequisite conference, or deleting this restriction altogether.

Requirement to consider judicial teleconference

209 **Specific matter**: Clause 90 amends s267 of RMA to impose a mandatory requirement for an Environment Judge to consider whether to convene a judicial conference (i.e. as presided over by a member of the Court) as soon as practicable after the lodging of any proceedings.

210 Section 267 would also be amended to ensure that any person representing another person at such a conference has authority to make decisions in respect of any matters that may arise.

211 **Submission**: The mandatory requirement to consider a case management conference is supported in principle, and such consideration is likely to be a step taken by the presiding Environment Judge at present in any event. In civil proceedings, a case management conference at which any procedural steps not agreed between the parties would be addressed is the default position.

212 In many instances, such a conference may not be necessary but the RMLA considers that provision to require consideration of the potential benefits of such a conference would potentially promote efficient case management. This is particularly in cases where there are many parties, and/or where the parties may not be as forthcoming as desirable in initiating case management themselves.

213 The provision requiring that any representative have capacity to make decisions is sensible and supported.

214 **Relief sought**: Retain proposed amendments to s267.

Mandatory ADR processes

215 **Specific matter:** Clause 91 would amend s268 of the RMA in two material respects:

a Deleting the requirement for the consent of the parties before an alternative dispute resolution process is initiated (either by the Court of its own motion or upon request); and

b Making participation in ADR mandatory, without leave of the Court (new section 268A).

216 As with the proposed amendment to s267, any person representing another person at ADR would need to have authority to make decisions on matters that may arise.

217 **Submission**: A core principle of ADR processes (including mediation as falls within the definition of "ADR process" under proposed new s268(4)) is that they are generally voluntary processes which all relevant parties must elect, on a consensus basis, to participate in.

218 The RMLA appreciates that this is a basic principle underpinning ADR theory.

219 The RMLA nevertheless understands (and supports) the imperative sitting behind this proposed amendment; namely that of empowering the Court to more actively progress the timely resolution of appeal proceedings short of a formal hearing, including in the face of one or more parties that may be reluctant to engage.

220 For these reasons, however, the RMLA supports the proposed provision whereby under new s268A, leave may be obtained for a party not to participate in the ADR process. Proposed new s268A(5) states that the Environment Court may grant leave "if it considers that it is not appropriate for the party to participate in the ADR process." While this introduces the potential for challenges in respect of such decisions, that has to be balanced against the drivers towards encouraging meaningful participation in ADR processes.

221 The RMLA considers that, to ensure the additional interlocutory process surrounding such leave applications is able to be efficiently determined, the new section would benefit from specifying the principal criteria through which such a decision (about whether it is appropriate for a party to participate) might be made, including:

a Whether the party has good reason for not attending, including genuine unavailability.

b Whether the issues that the particular party (proposing to be absent) has raised in pleadings (notice of appeal, section 274 notice, etc.) would otherwise be addressed at the mediation despite that party's absence, where those issues are considered important to resolution or determination of the proceedings.

c Whether it is appropriate to proceed with the mediation in the absence of that party, particularly where the party is a key party, or raising a central issue. For example, it would not be appropriate for a mediation to proceed in the absence of the applicant for the resource consent that is subject to appeal.

d Whether there might be a "power imbalance" regarding the representation of relevant issues arising within the context of the proceedings, in the absence of that party.

222 **Relief sought:** Retain new proposed s268 and s268A but amend s268A(5) to insert criteria by which a decision would be made as to whether or not leave should be granted (for a party to be excused from participation in the ADR).

Appeals by way of rehearing for collaborative planning process

223 **Specific matter:** Clause 93 would insert new section 277A, addressing the powers of the Environment Court in relation to evidence heard on appeal by way of rehearing (as invoked by proposed new clause 59 of the First Schedule, where a collaborative planning process is pursued).

224 Clause 92 would insert new subsection (4) directing that s276 is subject to proposed new s277A.

225 **Submission:** The RMLA is concerned that this provision could become a "battle ground", in its own right, for interlocutory proceedings concerning the potential rehearing of statements of evidence, and production of fresh evidence, which would ultimately hinder (rather than promote) the efficient case management currently being achieved by the Court.

226 The RMLA has previously submitted against any alternative to the current "de novo" hearing power of the Environment Court for this type of reason (for example, refer paragraphs 88 to 93 of the RMLA's submission on the February 2013 Discussion Document (*Improving our Resource Management System*).

227 However, if this amendment is to proceed, the following submissions are made (essentially in the alternative).

a The basic position at common law is that any appeal by way of rehearing proceeds on the basis of the record from the first instance decision maker, and bearing in mind that it was that decision maker which had the benefit of seeing and hearing the witnesses (*Hall v Chief Executive of Land Information New Zealand* [2014] NZAR 749).

b By contrast, proposed new s277A provides the Environment Court with full discretion to rehear all or any part of the evidence received by the local authority or panel (whose decision is subject of the appeal).

c It also provides that the Environment Court must rehear the evidence of any witness where there is reason to believe that the record of that person is or may be incomplete (in a material way).

d Furthermore, provision is made for any party to introduce 'new evidence' with the leave of the Environment Court.

e Under proposed new s277A(5) such leave may be granted only if the Court considers that the proposed new evidence was "not able to be produced at the hearing conducted by the local authority or panel."

228 Overall, the proposed new section represents a substantial departure from:

a the current practice involving a “de novo” hearing before the Environment Court; and

b the common law position as to what comprises a “rehearing”.

229 It effectively enables the Environment Court full discretion to rehear evidence, without setting the criteria by which any such decision would be made (other than in the case where the record of evidence is or may be incomplete).

230 If this aspect of the proposed Bill is to proceed, the RMLA respectfully suggests that tightly framed criteria should be applied for rehearing of any evidence, and/or through which leave to produce fresh evidence might be considered and granted.

231 Otherwise, any potential benefit from this aspect of the reform (in terms of reduced cost, time frames and improved efficiency of plan making processes) may be eroded, through proceedings being expanded from “rehearing” to in effect hearing de novo in any event, following applications made to the Court to exercise its discretionary powers under the new section.

232 It is noted in that regard that (albeit in a different context) the common law tests for production of fresh evidence are well established, including as set out by the Privy Council in *Lundy v R* [2013] UKPC 28 ([2014] 2 NZLR 273).

233 In particular, the Privy Council stated:

> “In the Board’s view, Dr McGinn’s evidence should be admitted. The process by which admission of new evidence should be determined was stated in *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273, at para 120:
>
> > “... the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.”

234 Proposed new s277A(5) omits an aspect of the common law "fresh" evidence test (i.e. evidence that could not have been obtained for the trial *with reasonable diligence*). Proposed new s277A(5) ought to adopt such a "reasonable diligence" threshold.

235 Beyond that, the degree of cogency of the evidence in question (its strength and potential impact on the issues at stake) ought to be evaluated and provided for within the criteria set through s277A for the admission of new evidence.

236 Finally, given the nature of the proposed collaborative planning process, the test should allow new evidence to be produced in circumstances where the plan provisions adopted by the review panel and/or the local authority differ materially from the provisions as notified (given that any evidence would have been prepared in respect of the notified proposal and could not have considered provisions that did not yet exist).

237 Relief sought: If proposed new s277A (alongside clause 59 of the first schedule) is to proceed, clearly specify those criteria upon which the Environment Court would exercise its discretion to rehear evidence and/or admit new evidence, and include a reasonable diligence and cogency test within new section 277A(5).

Additional powers for Environment Judge sitting alone

238 **Specific matter:** Clause 94 would insert new s279(5) into the Act providing the principal Environment Judge to confer additional powers (beyond those established through s279(1) to (4)) upon an Environment Judge sitting alone in the context of a s120 appeal.

239 **Submission:** Subject to the comment made above about confinement of this provision to s120 appeals, the proposal is supported as sensible in order to promote the effective and efficient case management of RMA proceedings.

240 **Relief sought:** Retain proposed new s279(5) but potentially expand it to all proceedings heard by the Environment Court.

Applications to be in prescribed form

241 **Specific matter:** Clause 96 would amend s281A to require applications for waiver of fees to be in the prescribed form, and addressed through reference to any prescribed criteria (alongside the existing s281A(2) tests).

242 **Submission:** The RMLA is unclear what prescribed criteria would add to the existing grounds upon which a waiver (reduction or postponement) of the payment of any fee would be granted, and whereby the existing grounds are themselves reasonably clear and certain.

243 It is also unclear through what means such criteria would be prescribed (regulation, Environment Court practice note or otherwise?).

244 The proposed new requirement (new s281A(2)) that any such application be made in the prescribed form is supported.

245 **Relief sought:** Proceed with proposed new s281A(2), but retain existing s281A(2) (renumbered as subsection 3).

Environment Court on appeal to have regard to hearing reports etc

246 **Specific matter:** Clause 97 would amend existing s290A of RMA to require that in addition to having regard to the decision subject of the appeal, (in the case of a s120 resource consent appeal), the Court also have regard to consent authority hearing reports and prehearing meeting outcomes.

247 **Submission:** The RMLA questions the benefit of the Environment Court considering a hearing report prepared in the context of a resource consent application to the first instance consent authority. Such reports (including supporting technical reports) can run to several hundred pages. A consent application may well have evolved (and potentially significantly) between the first instance decision and the hearing on appeal.

248 The RMLA considers that a mandatory requirement to consider a hearing report (section 42A) would impact on the Court's efficiency by requiring review of voluminous material for little potential benefit. It must also be remembered that a section 42A report is prepared for a different purpose. It will generally contain a specific recommendation to the first instance consent authority as to whether consent should be granted or refused. Such a recommendation is not appropriate in the section 120 appeal context, as it would usurp the judicial function the Court, to determine this as the "ultimate issue".

249 Similarly, the RMLA questions as to whether there would be any real benefit (or it would otherwise be appropriate) for the Environment Court to consider the outcomes of any prehearing meeting or alternative dispute resolution process at the first instance stage.

250 The Environment Court might be given discretion to have regard to this type of material, but to the extent still relevant, it would almost certainly be addressed in evidence called by the local authority before the Court.

251 **Relief sought:** If proposed new s290A is to proceed, provide that the Environment Court has a discretion whether to consider any of the matters referred to in proposed new s290A(b), rather than making such consideration mandatory.

National planning templates

252 **Specific matter:** Clauses 98 and 99 make consequential amendments to sections 293 and 310 to reference the provisions of national planning templates.

253 **Submission**: These consequential amendments are supported as necessary in light of the requirements of (for example) s67(3) of RMA relative to national planning templates, as proposed to be provided for under new s58B to s58J.

254 **Relief sought:** Retain the proposed amendments to s293 and s301.

255 **Specific matter:** Clause 135 of the Bill will amend section 120 of the principal Act to remove the right to appeal to the Environment Court in certain circumstances, namely:

a "Boundary activities";

b In relation to subdivision, unless that subdivision needs to be assessed as a non-complying activity; or

c In respect of a single dwelling house on a single allotment where the building of a single dwelling unit is a controlled, restricted, discretionary or "full" discretionary activity.

Restrictions on appeals from resource consent decisions

256 **Specific issue**: Clause 135 of the Bill will amend section 120 of the principal Act to remove the right to appeal to the Environment Court in certain circumstances, namely:

a Boundary activities;

b In relation to subdivision, unless that subdivision needs to be assessed as a non-complying activity; or

c In respect of a single dwelling house on a residential property (ie "on land that, under a district plan, is intended to be used solely or principally for residential purposes") where the building of a single dwelling unit is a controlled, restricted, discretionary or "full" discretionary activity.

257 **Submission:** With reference to the RIS, the RMLA understands that the rationale behind these proposed changes derives from a concern over delays created by the ability to appeal the subdivision or development of residentially zoned land, even though the land is zoned for the purpose.

258 In particular, section 3.4 of the RIS states:

> 276 The current regime also provides appeal rights to the Environment Court for submitters on any notified or limited consent application. This means a development with particular effects, for example a residential subdivision in a residential zone, or the construction of houses within residentially subdivided land, can be appealed even if those effects have been anticipated and accepted at the planning stage. Appeals from neighbours or the wider public (whether threatened or real) have considerable power to reduce housing supply delay developments, or prevent developments occurring at all.

277 *A problem therefore exists that decisions made at the plan making stage are subject to potential re-litigation through the consent process. Such re-litigation of residential development is hindering the timely provision of housing and giving third parties too much power to effectively change zoning decisions which have already been agreed through the plan making process.* In turn, this provides a strong disincentive to plans being well developed in the first place, and leads to existing plans being undermined.

(Emphasis added)

259 The RMLA considers that there is a basic issue with the "problem definition" in this respect. If the purpose of this aspect of the reform is to address any broader concern regarding housing supply or affordability, i.e. to speed up the ability to deliver residential housing, the proposed amendments to section 120 will not be effective in addressing that concern.

260 Instead, the proposed amendments to s120 would effectively remove Environment Court jurisdiction and further erode "access to justice" for land owners, developers, relevant stakeholders (adjacent landowners, Iwi groups, environmental NGOs) around matters that can go to the heart of sustainable management decision making under RMA.

261 Research of the *Westlaw* case database reveals that, since November 2011, there have only been 15 decisions of the Environment Court dealing with what are defined as "boundary activities" under the Bill, subdivision in an urban context, or in relation to the establishment of a single dwelling house on a residential property.

262 The RMLA's experience is that Environment Court decisions dealing with any form of subdivision or residential development are almost exclusively focused on settings in which the land is *not* zoned for the purpose (residential); and in which there may be significant landscape, amenity or biodiversity issues at stake (being matters of national importance under s6 of the Act).

263 The effect of the amendments therefore would not be any demonstrable saving in time (or otherwise within the resource management system), but the displacement of Environment Court jurisdiction to consider whether land zoned for rural or other purposes in areas of significant landscape or biodiversity value should be subdivided or developed for residential purposes. This is particularly the case with the proposed ousting of jurisdiction over subdivision, and noting that residential development (single dwelling or otherwise) on land zoned for other purposes would not appear to be covered under proposed new section 120(1A(b).

264 For that reason, and given the RIS refers to the example of "a residential subdivision in a residential zone", the RMLA considers that if the amendments are to proceed then the immunity for subdivision should be on the same basis as that for residential development, ie that it only apply to residentially zoned land.

265 In addition, and as discussed in the Changes to Consenting part of this submission, the RMLA is concerned about the proposals to limit the scope of submissions at the notification stage (by the requirement for the consent authority to specify "relevant effects"), and the related proposal in section 41D that submissions (or parts of submissions) be struck out if they do not relate to a "relevant effect". Those changes are opposed, as is subsection (1A)(c), for the same reasons.

266 However, if subsection (1A)(c) is to be retained, then the RMLA seeks that the phrase "provision or matter" is clarified, as the meaning of this is unclear (the reference to a "provision" would make more sense in the context of a plan change). Wording such as "resource consent condition, environmental effect, or other matter" would be preferable. In addition, if subsection (1A)(c) is to be retained then it is necessary to clarify that a submitter can appeal in respect of an aspect of the decision (eg to impose a certain kind of condition) that was not part of the notified proposal in respect of which submissions were made. In such cases it would not have been possible for the submitter to have raised the matter in advance of the decision being issued, and so they should not be precluded from raising it at the appeal stage.

267 Finally, if the amendment is to proceed, the RMLA questions the need to include the term “and” between each of ss 120(1A) (a) and (b) on the basis that the two subparagraphs relate to separate and distinct activities and do not need to be read conjunctively.

268 **Relief sought:** Delete Clause 135(1) in its entirety, or proposed new section 120 (1A)(a)(ii) and (c) in particular.

269 If the amendment is to proceed, then:

a Delete the term “and” where it appears between subsections (a) and (b) of proposed section 120(1A).

b Amend subsection (1A)(a)(ii) so that it reads:

> a subdivision <u>of land that, under a district plan, is intended to be used solely or principally for residential purposes</u>, unless the subdivision is a non-complying activity

c Amend subsection (c) and add a new section (1B), as follows:

> <u>(c)</u> a person described in subsection (1)(b) may appeal under this section only in respect of a ~~provision~~ <u>resource consent condition, environmental effect, or other</u> matter raised in the person’s submission (excluding any part of the submission that is struck out under **section 41D**).

(1B) To avoid doubt, section (1A)(c) does not prevent a person described in subsection (1)(b) from appealing in respect of a part of the decision of a consent authority on an application for resource consent if the resource consent condition, environmental effect, or other matter to which the appeal relates could not reasonably have been raised in the person's submission.

(VI) PROCESS ALIGNMENT (RESERVES ACT AND CONSERVATION ACT)

270 **Purpose of amendments:** Measures are proposed to reduce overlaps and duplications between various statutes within the resource management system. While not all overlaps or duplications are undesirable, in some cases changes to the legislation have been proposed to improve alignment and to provide greater efficiencies where a particular activity triggers more than 1 piece of resource management legislation. These include:

a An optional joint process of public notification, hearings, and decisions for proposals that involve publicly notified plan changes or resource consents under the RMA and recreation reserve exchanges under the Reserves Act. This process could be particularly beneficial to facilitate urban redevelopment projects.

b Alignment of the notified concessions process under the Conservation Act with notified resource consents under the RMA. These changes to the Conservation Act are promoted as bringing concessions processes and time frames in line with resource consent processes.

Reserves Act and RMA processes

271 **Specific Issue:** Clause 162 provides that Part 2 of the Bill amends the Reserves Act 1977 (the 1977 Act).

a Clause 163 inserts new sections 14A and 14B into the 1977 Act. New section 14A replaces the existing section 15(1) and (2), which are repealed by clause 164. New 14A sets out the process empowering the Minister to authorise an exchange of reserve land. New section 14B introduces an alternative process for the exchange of recreation reserve land. This new section allows an administering body to authorise an exchange of recreation reserve land where the land is vested in the administering body, the proposed exchange is part of an application for resource consent or a request for a district or regional plan change, and the administering body is the resource consent authority or local authority.

b Clause 164 amends section 15 to make consequential amendments as a result of the insertion of new sections 14A and 14B.

c Clause 165 makes consequential amendments to the Resource Management Act 1991 as a result of the insertion of new section 14B into the 1977 Act.

272 **Submission:** Clause 163 is understood by the RMLA to largely be a modernisation of the Reserves Act reserve exchange process. Whilst that undertaking is in principle supported, the RMLA has concerns over unintended consequences that might occur through such a change.

273 The reserve exchange process undertaken by the Minister has been a long standing process undertaken under the Reserves Act; there is a risk that such changes in one part of the Reserves Act process may have flow on consequential effects in other parts of the Act which have not been realised. This is particularly of concern where modernised language is used in some parts of the legislation but not others.

274 **Relief sought:** The RMLA seeks that these proposed amendments are carefully reviewed in light of the concerns raised above.

275 **Specific Issue:** New section 14A (3) requires that before the administering body for a reserves requests the Minister authorise an exchange, either the administering body pass a resolution, or "a change must have been made to a district plan under the Resource Management Act 1991 to enable the exchange to be made".

276 **Submission:** It is unclear how a district plan can "enable" an exchange to be made, as exchange of land is not an activity that would normally be addressed in a plan. There is no criteria included by which the Minister can assess whether the exchange is "enabled" by a district plan.

277 **Relief sought:** Amend section 14A so as it is clear what is required in a district plan to enable an exchange.

278 **Specific Issue:** New section 14B (inserted by clause 163) allows an administering body to authorise an exchange of recreation reserve. This is a novel approach to reserve exchange which has always rested with the final decision maker, being the Minister of Conservation.

279 **Submission:** Clause 164 inserts new section 114(8) into the RMA which provides that an exchange can only occur once the resource consent or plan change is beyond appeal. This is supported. The council must provide advice on its "*likely decision*" (new section 114(8) (a)(iii)) regarding the exchange prior to the RMA process being beyond appeal, and prior to the exchange taking place. This phrase "likely decision" is novel in the RMA, although it has occurred in other pieces of legislation in New Zealand. It is unclear for what purpose the advice on the "likely decision" must be provided. No decision appears contingent on it. Provision of advice as to the "likely decision" could be used to fetter the Council's ultimate decision, and give grounds for unnecessary litigation.

280 The RMLA considers that the policy intent of this reform, as outlined in the RIS, to reduce:

> *"…prolonged decision-making processes, unnecessary costs to developers and local authorities, and duplication of evidence heard. Having two separate processes for issues that are part of the same proposal also leads to ineffective and inefficient community engagement and consultation"*

may be achieved, and therefore supports the general framework.

281 Each decision (under the Reserves Act and under the RMA) will still have to be made in accordance with the purpose of each piece of legislation which is appropriate, and which currently happens if the council is also the administering body of the reserve.

282 **Relief sought:** The RMLA seeks that reference to the provision of the "likely decision" of an exchange of recreation reserve land in section 114 (8) of the RMA be deleted.

Conservation Act and RMA processes

283 **Specific Issue:** *Clause 176* provides that *Part 4* of the Bill amends the Conservation Act 1987 (the 1987 Act). Clause 177 makes provision for new Schedule 1AA of the Conservation Act 1987 (as inserted by clause 182), which sets out transitional, savings, and related provisions.

a Clause 178 replaces section 17S with 6 new sections.

b New section 17S re-enacts existing section 17S(1) and (2), which prescribes the requirements for an application for a concession (a lease, licence, permit, or easement) in respect of a conservation area.

c New section 17SA allows the Minister to return an incomplete application for a concession within 10 working days of receiving it.

d New section 17SB re-enacts existing section 17T(2), which requires the Minister to decline an application for a concession if the Minister considers that the application is inconsistent with the 1987 Act, a conservation management strategy, or a conservation management plan.

e New section 17SC replaces existing section 17T(4) and (5), which requires the Minister to notify his or her intention to grant certain concessions. The new section 17SC requires the Minister to notify applications for concessions (rather than the intention to grant those concessions).

f New section 17SD re-enacts existing section 17S(3) and allows the Minister to seek more information from an applicant to help the Minister to make a decision on the application.

g New section 17SE re-enacts existing section 17S(4) and (5) and allows the Minister to commission a report or seek advice in relation to an application.

h Clause 179 amends section 17T by inserting a new section 17T(2), which re-enacts existing section 17S(6), and by repealing sections 17T(3) to (7).

i Clause 180 amends section 17U to make a consequential amendment as a result of other amendments in this Part and to re-enact the existing section 17T(3) as new section 17U(8).

j Clause 181 amends section 49 of the 1987 Act to provide that applications that are publicly notified under new section 17SC are to be notified for at least 20 working days.

k Clause 182 inserts the new Schedule 1AA set out in Schedule 7 of the Bill. New Schedule 1AA sets out transitional provisions that relate to amendments made by this Bill.

284 **Submission:** Currently the Conservation Act does not include many timeframes in relation to the processing and decision making relating to an application for a concession. The proposed amendments change this slightly by including timeframes for determining if an application is complete (10 days), clarifying how an application can be declined for being inconsistent with the Act, and decreasing the time frame for public submissions (from 40 to 20 days).

285 The amendments also simplify the notification requirements, removing what had become a procedurally and substantively awkward position for both applicants and potential submitters, whereby only recommendations to grant certain concessions could be publicly notified for submissions.

286 To the extent that the amendments provide more certainty for applicants and the public in terms of timeframes and the ability to take part in concession processes, the RMLA supports the changes. It is however still apparent that if a proposal requires a resource consents and concessions, two completely separate processes must still be undertaken, and there is nothing to compel an actual alignment of those two processes in reality.

287 It is noted that the processes for the regulatory documents under the Conservation Act that are relevant to concession applications, namely Conservation Management Strategies and Plans, have not been amended so that they are more "aligned" with RMA plan making processes.

288 **Relief sought:** Approve the changes proposed, and continue to review the Conservation Act for additional reform measures to improve the processes for the Conservation Management Plans and Strategies, and better alignment with Resource Management Act processes.

(VII) PUBLIC WORKS ACT

Introduction

289 The amendments to the Public Works Act 1981 (**PWA**) are intended to make the land acquisition process fairer and more efficient by:[2]

a Incentivising landowners to enter into voluntary agreements with the Crown more readily by improving compensation;

b Enabling the Minister for Land Information to delegate an administrative function to the Land Information New Zealand Chief Executive; and

c Aligning the objections process for land acquisition cases under the PWA with that which operates under the RMA.

290 A recent survey of local government employees and members of the Local Authority Property Association identified a number of aspects of the PWA that are in need of reform.[3] The key findings were that:

a The PWA does effectively enable infrastructure development.

b Compensation, offer back and compulsory acquisition aspects are most in need of reform.

c Compulsory land acquisition needs to be made more efficient and timely.

d Inconsistent approaches to valuation should be addressed.

e Incentives for settling promptly would improve acquisition and compensation.

f The offer back obligation should be limited.

g Compulsory acquisition of Māori land should not be restricted.

291 The proposed reforms do address some of those issues. However, many of the issues are not addressed by the proposed reforms. In particular, we do not consider that the proposed reforms achieve the Government's stated intention of aligning the objections process for land acquisition under the PWA with that which operates under the RMA.

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2 Land Information New Zealand "Cabinet Economic Growth and Infrastructure Committee – 2013 Resource Management Reports – Public Works Act 1981 amendments".

3 Simpson Grierson and the Local Authority Property Association Inc "How effectively does it work? Report on a survey of the Public Works Act 1981". The survey was carried out in September 2015.

Delegation of the Minister's powers

292 **Specific matter**: Clause 168 would amend section 4C(2) of the PWA to allow the Minister for Land Information to delegate the power to issue a notice of desire to acquire land for essential works.

293 **Submission**: The RMLA supports the proposed amendment. Enabling the power to issue a notice of desire to be delegated will reduce the length of the acquisition process, which will be beneficial for both requiring authorities and affected land owners. It is an appropriate power for the Minister to delegate, and is consistent with the Government's intention to make the land acquisition process more efficient.

294 **Relief sought**: Retain clause 168.

Aligning the objection process with the RMA

295 **Specific matter**: Clause 169 would amend section 24 of the PWA to allow the Environment Court to accept evidence presented at a related local authority or Environment Court hearing, and to direct how evidence is to be given to the court.

296 **Submission**: The RMLA supports the intent of the proposed amendment as it is consistent with the Government's intention to make the land acquisition process more efficient and to better align the RMA and PWA processes. However, we consider that this amendment is unlikely to make the compulsory land acquisition more efficient to an appreciable extent.

297 The primary reason for this view is that the legal tests under section 24(7) of the PWA for objections are different from the legal tests that apply to the RMA notice of requirement process under section 171 of the RMA. These differences include:

a The notice of requirement test contains additional matters not included in section 24(7) of the PWA (e.g. to have particular regard to relevant provisions of relevant planning documents (section 171(1)(a) RMA)); and

b The PWA objection test contains matters that are not included in the notice of requirement test (e.g. deciding whether, in the Court's opinion, it would be **fair, sound**, and reasonably necessary for achieving the objectives of the Minister … for the land of the objector to be taken (**additional PWA matters in bold**)).

298 Given the differences between the legal tests, a party's evidence will necessarily address the statutory tests relevant to the specific proceeding. While in practical terms, some evidence will overlap as between the notice of requirement hearing and the PWA objection hearing, evidence will need to also address the additional or different matters. Therefore, it may not be quite so simple in practice for the Court to accept evidence provided in related RMA proceedings. The evidence for the PWA objection process would likely need to be revised and/or updated from that given in the RMA hearing to

address the matters in section 24(7) and update any evidence if required due to the passage of time. The Court would need to give that evidence fresh consideration.

299 **Relief sought**: Further amendments are necessary to achieve the policy intent of aligning the objections process for land acquisition cases under the PWA with that which operates under the RMA. Possible options for achieving that policy intent include:

a Inserting a provision into the PWA that requires the Environment Court to have regard to any relevant notice of requirement decision (similar to section 290A of the RMA); and/or

b Amending the PWA to facilitate concurrent notice of requirement and objection processes. That could be achieved by providing for the Environment Court to hear RMA and PWA matters at the same time. Such a concurrent process would need to be optional however, as it is not always practical for requiring authorities to progress the notice of requirement and land acquisition processes simultaneously (e.g. due to the absence of funding for land acquisition at the time a notice of requirement is progressed); and/or

c Better aligning the legal tests in section 24(7) of the PWA with the tests in section 171 of the RMA.

Definition of "owner"

300 **Specific matter**: Clause 170 would amend section 59 to clarify that a residential tenant is not an "owner", for the purposes of the compensation provisions. This amendment is carried through in clause 173 (section 75).

301 **Submission**: The proposed amendment is supported, as it clarifies the application of the compensation provisions to "owners".

302 **Relief sought**: Retain clause 170.

Solatium compensation

303 **Specific matter**: Clauses 171 and 172 would amend section 72 and insert new sections 72A to 72E to provide a new regime for solatium compensation. The new regime applies to land which contains the owner(s) principal dwelling (principal dwelling acquisition) and any other land (land-only acquisition). For principal dwelling acquisition, compensation of up to $50,000 would be available, with $10,000 of that amount providing an incentive for prompt settlement. For land-only acquisition, compensation of up to $25,000 would be available.

304 **Submission**: The RMLA generally supports the proposed amendments, as they will help to achieve the Government's objective of making the acquisition process more efficient by incentivising landowners to enter into voluntary agreements.

305 In particular, the mechanism for adjusting compensation amounts is supported (section 72E). One of the issues with solatium compensation to date has been the lack of any increase in the $2,000 figure, set in 1981. The amendment of section 72E will make it simpler to ensure that compensation amounts are relevant and appropriate to the market of the day.

306 There are some minor issues with the provisions:

a The definition of "negotiation start date" in section 72A(2) includes "(a) the date on which the notifying authority notifies the owner of land that it intends to acquire the land under section 17". Section 17 does not provide for a formal notice process, and it is likely that landowners will not obtain legal advice until they receive a formal notice of desire to acquire land under section 18. Accordingly, it may be difficult to determine what constitutes 'notice' under clause (a). Therefore, it is proposed that in circumstances where a section 18 notice is served, that the "negotiation start date" should run from the date of the section 18 notice. The wording "…intends to acquire…" in clause (a) also suggests that the section 17 process is compulsory, rather than by agreement.

b The proposed incentive for prompt settlement only applies to principal dwelling acquisition. The RMLA considers that an amount should also be available to incentivise land-only acquisitions.

c An acquisition is considered to be a land-only acquisition where an owner has used a dwelling on the land as his or her principal place of residence for less than a "substantial part" of the period between the notification date and the vacant possession date (s72C(1)(c)(ii)). The term "substantial part" is uncertain and should be replaced with a clearer test.

307 **Relief sought**: Retain section s72 – 72E, subject to the following changes:

a Amend the definition of "negotiation start date" in section 72A(2) to read as follows (inserted text shown in underline, deleted text shown in ~~strikethrough~~):

> In this section, **negotiation start date** means ~~the earlier of the following~~:
>
> (a) the date on which the notifying authority notifies the owner of land in writing that it ~~intends~~wishes to acquire the land by agreement under section 17:
>
> (b) Despite clause (a), where ~~the date on which~~ the notifying authority serves notice in relation to land in accordance with section 18(1)(a), the date of that notice.

b Add a new sub-section into section 72C that provides for a proportion of the solatium to incentivise prompt settlement for land-only acquisitions (akin to proposed section 72A(1)(b)).

c Amend section 72C(1)(c)(ii) to replace “less than a substantial part” with “less than half”.

Transitional provisions

308 **Specific matter**: Schedule 6 would insert Schedule 1AA to provide transitional provisions for the amendments.

309 **Submission**: The transitional provisions are supported, as they provide for the early adoption of the PWA amendments, except where it would be impractical due to hearing or settlement processes that are already underway.

310 **Relief sought**: Clauses 3(1) and (2) contain typographical errors. Amend the cross-references to subclause (2) and subclause (1) in clauses 3(1) and 3(2) respectively to refer to subclause (3).

(VIII) EEZ ACT

Purpose of the amendments to the EEZ Act

311 **Specific matter**: The stated aim of the proposed changes to the EEZ Act is to make the current regime work more effectively and ensure that it meets the statutory purpose of the EEZ Act in section 10.

312 **Submission**: The RMLA observes that the purpose of the proposed amendments to the EEZ Act is not to make major substantive reforms to the existing regime. The RMLA agrees with the intention to more closely align the EEZ Act with more traditional RMA concepts. This will promote greater certainty for applicants for marine consent and help to ensure consistency in decision-making under the Act.

313 The RMLA notes, however, that more substantive reforms to the EEZ Act may need to be considered at a later date to address a number of issues that have arisen during the processing of marine consent applications for seabed mining activities. It is not unusual for issues to arise in the application of new legislative regimes governing the use and management of natural resources. There is at present an absence of guidance from the superior Courts as to the interpretation of certain key sections of the EEZ Act, meaning that there is currently a level of uncertainty facing all participants in marine consent applications under the current regime. The RMLA observes that the Government may therefore need to promote further substantive amendments at a later date to provide greater certainty moving forward to all participants under the EEZ Act regime.

Introduction of EEZ Policy Statements

314 **Specific matter**: Clause 188 of the Bill introduces (among other amendments) a new subpart 2 to Part 3A of the EEZ Act enabling the Minister for the Environment to issue EEZ Policy Statements. EEZ Policy Statements are intended to provide central Government guidance for decision-making on marine consent applications in a similar way that National Policy Statements may currently guide decision-making under the RMA. The key features of the EEZ Policy Statement mechanism are as follows:

a The stated purpose of an EEZ Policy Statement is to "state objectives and policies to support decision-making on applications for marine consents. A Policy Statement can apply to all or part of the EEZ and Continental Shelf. A marine consent authority must have regard to EEZ Policy Statements in making its decision on an application for marine consent.

b The Minister, when determining whether to prepare an EEZ policy statement, *may* have regard to actual or potential effects, New Zealand's international obligations, and the purpose and principles of the EEZ Act. The same matters *must* be considered again, along with any submissions made, in determining whether to issue a Policy Statement.

c A proposed Policy Statement must be notified to the public, iwi authorities, regional councils, and any existing interests affected. The Minister must also establish a process that allows these groups adequate time for comment.

d The Minister may review, change or revoke an EEZ Policy Statement at any time, using the same process for the development of EEZ Policy Statement set out in the Bill. The Minister can only amend an EEZ Policy Statement without regard to the statutory development process if the amendment is of minor effect or corrects a minor error.

315 **Submission:** The RMLA observes that the EEZ Policy Statement mechanism gives the ability to provide greater national direction and guidance to decision-makers. This is an important addition to the regime, given that decision-makers under this new Act have arguably struggled with its requirements in relation to adaptive management, scientific uncertainty and baseline monitoring in particular (ie the "information principles"). The RMLA considers that these areas usefully could be the focus of the first EEZ Policy Statements, in order to clarify expectations (of decision-makers, applicants and submitters alike) in terms of what is required before marine consent can be granted.

316 The Bill currently requires that a marine consent authority "have regard" to an EEZ Policy Statement in making its decision on an application for marine consent. The RMLA observes that the marine consent authority is not required to give any greater weight to EEZ Policy Statements in making its decision than the other matters to which it must have regard to under section 60(3) of the EEZ Act, including any submissions made on an application and any evidence presented. However, the "have regard" requirement is consistent with the weighting of an NPS in considering a resource consent application under the RMA.

317 The RMLA is also concerned at the wide discretion afforded to the Minister to establish the process for development of EEZ Policy Statements. The RMLA observes that there is ability for interested parties to provide comments to the Minister in developing EEZ Policy Statements; however, this alone does not guarantee there would effective participation by affected parties. In particular, there is no requirement for a hearing to the held on any comments made to the Minister on a proposed EEZ Policy Statement, nor any rights of appeal against the Minister's ultimate decision.

318 Consistent with its submissions on previous law reform proposals and in its submissions above on the proposed amendments to the RMA, the RMLA is concerned to ensure that appropriate procedural safeguards are put in place for the development of EEZ Policy Statements. In particular, hearings on submissions made on proposed EZZ Policy Statements should be required so that submissions and any evidence presented can be tested, so that the Minister is better informed when making their ultimate decision. In addition, where there are no merit appeal rights in relation to the Minister's decision on EEZ Policy Statements, then the Bill should provide for full rights of cross examination of all evidence that may be presented at any first instance hearing of submissions.

319 **Relief sought**: That clause 188 is amended to address the concerns above.

Boards of inquiry to determine notified marine consent applications

320 **Specific matter:** Clause 188 of the Bill also proposes to introduce a new section 53 to the EEZ Act, which requires the Minister to appoint boards of inquiry to determine publically notified applications for marine consent (ie section 20 activities under the Act).

321 **Submission:** The RMLA supports the use of boards of inquiry to determine notified marine consent applications. Boards of inquiry will assist in promoting the decision-maker as independent and ensuring procedural fairness. The appointment process for boards of inquiry will also allow the Minister to better ensure that the decision-makers on marine consent applications have the appropriate knowledge, skill and experience to determine applications.

322 The RMLA observes that the Minister *may*, but is not required to, appoint as chairperson of a board of inquiry a current, former or retired Environment Court judge or a retired High Court judge. The RMLA considers that the purpose of the reforms to the EEZ Act, which is to make the current regime operate more effectively, will be better achieved if the chairperson of boards of inquiry for notified marine consent applications has had previous judicial experience. This is particularly important for ensuring that cross-examination is appropriately provided for during the hearing of submissions on marine consent applications.

323 **Relief sought:** That clause 188 be amended so as to require the chairperson of boards of inquiry appointed to determine publically notified applications for marine consent be a current, former or retired Environment Court judge or a retired High Court judge.

(IX) NATIONAL DIRECTION (NES, NPS, REGULATIONS, AND NATIONAL PLANNING TEMPLATE)

National Environmental Standards (NES) and National Policy Statements (NPS)

324 **Specific matter**: Clauses 25 to 36 (inclusive) seek to change a number of matters in relation to NPS and NES generally as follows (as per the RIS):

a a combined development process for NPSs and NESs through joint consultation, development and publication;

b clarified scope for NPSs to give more specific direction about how objectives and policies should be implemented in plans;

c allowing NPSs and NESs to be developed in relation to a specific area to address a local resource management issue that has national significance;

d enabling council rules to be more lenient than a NES;

e allowing NESs to specify councils may charge to monitor activities permitted by a NES; and

f enabling NESs to specify requirements for councils.

325 **Submission**: The RMLA is concerned with a number of the changes as set out in the following paragraphs. Changes are suggested in the relief sought section.

326 **Clause 26** adds a new subsection into section 43A (contents of environmental standards) to empower a consent authority to charge for any permitted activities specified in the NES and to specify how consent authorities must perform their functions to achieve the standard. However, the clause does not specifically state that consent authorities are required to monitor permitted activities specified in the NES. While that may be implicit, for clarity it is suggested that the requirement to monitor be expressly stated in the clause.

327 Further, while the NES provides Council with the ability to charge for such monitoring, the monitoring is likely to give rise to other resource implications for some councils, such as ensuring it has sufficient trained staff to carry-out the monitoring. It may therefore be useful to provide an appropriate transitional period to enable affected councils to ensure they have adequate resources in place to undertake these activities.

328 **Clause 27** enables a rule or resource consent to be more lenient than a NES if the NES expressly permits this. This contrasts with the current situation where a rule or resource consent is not able to be more lenient than a NES. While not expressing a position on the policy change, it is noted that any such exemptions in the NES would need to be very clear as to the scope and extent of the exemption otherwise there could be unintended

consequences, for example, the intent of a NES could be rendered nugatory by a lenient resource consent or rule.

329 **Clause 29** inserts a new section (45A) setting out the contents of NPSs and **clause 36** makes a similar change in relation to the NZCPS. There are two issues with this clause – the nature of some of the discretionary matters, and the ability to apply a NPS/NZCPS to a specified area.

330 In relation to the first issue, some of the discretionary matters go well beyond what is generally considered "policy" and include "directions" to local authorities on how to collect, publish, monitor and report on certain matters. This appears to be an attempt to give standing to matters that have to date been covered by (voluntary) implementation guidelines (such as those prepared by MfE for the Freshwater NPS). While understanding the rationale, such matters are not appropriate as part of policy statements and would be better dealt with as regulations or as a NES.

331 In relation to the second issue, currently NPSs and the NZCPS apply to the whole of New Zealand and there is no power to apply these documents just to a specified area. This contrasts with the current position for NESs which can be applied to a specified area (by virtue of s 360(2) – although none have to date. By their nature, NPSs and the NZCPS deal with matters of national significance, and the need for such matters to apply only to a specified area is not explained in any detail in the Bill or the RIS. No guidance is provided in the Bill as to when it may be appropriate for a NPS (or for that matter a NES) to apply only to a specified area. Relevant matters to consider in this regard could be why the issue is of national significance, why the matter requires national direction rather than being dealt with at the regional/district levels, and why a NPS/NZCPS is appropriate to address the issue as opposed to other national direction avenues (e.g. issuing of voluntary national direction guidance to the Council, and/or participation in the local government policy and plan-making process). It is noted that in the RMLA 2013 submission clarification was sought that NPSs and NESs can be targeted to a specific region or locality where the matter in question has consequences of national significance.

332 **Clause 34** inserts a new section 55A to enable a combined process for NPS and NES to be introduced. The concept of enabling a combined NPS/NES process was supported in the RMLA 2013 submission. It is noted that there is no restriction on when a combined process can be used and it is suggested that it would be sensible to restrict the use of this process to proposals which are related, as determined by the Minister.

333 **Relief sought**: The RMLA seeks that clause 26, new subsection 43A(8), be amended as follows:

26 Section 43A amended (Contents of national environmental standards)

(8) A national environmental standard may –

(a) empower a consent authority to monitor ~~charge for monitoring~~ any permitted activities specified in the standard and charge for such monitoring~~;~~ ~~and~~

(b) specify how consent authorities must perform their functions in order to achieve the standard; and

(c) specify timeframes for the commencement of monitoring."

334 That the joint development process only be available where the Minister determines the NPS and NES relate to similar areas by amending clause 34 as follows:

34 New section 55A inserted (Combined process for national policy statement and national environmental standard) 55A (Combined process for national policy statement and national environmental standard)

(1) The Minister may, where the subject matter relates to similar areas, prepare a national policy statement and a national environmental standard using a combined process by -

335 That clause 25 section 43 be amended to insert a new subsection (3A) which makes the Minister's ability to instigate the development of a new NES for a specific area subject to pre-conditions:

25 Section 43 amended (Regulations prescribing national environmental standards

(3A) Where the proposed new national environmental standard relates to a specific area, the Minister must not exercise the power in subsection (3) unless:

(a) the Minister has considered alternatives; and

(b) The Minister is satisfied that the local resource management issue to be addressed is of national significance.

336 That clause 29 new section 45A be amended to insert a new subsection 3A which makes the Minister's ability to instigate the development of a new NPS for a specific area subject to pre-conditions:

29 New section 45A inserted (Contents of national policy statements)

(3A) The Minister must not exercise the power in subsection (3)(b) or (3)(c) unless:

(a) the Minister has consulted with all regional councils and territorial authorities within the specific area as to whether the introduction of a new national policy statement is appropriate:

(b) the Minister has considered alternatives; and

(c) the Minister is satisfied that the local resource management issue to be addressed is of national significance.

337 That clause 36 section 58 be amended to insert a new subsection (3A) which would make the Minister's ability to apply a NZCPS/provisions of a NZCPS to a specific area subject to pre-conditions:

36 Section 58 amended (Contents of New Zealand coastal policy statement)

(3A) The Minister must not exercise the power in subsection (3)(b) unless:

(a) the Minister has consulted with all regional councils and territorial authorities within the specific area as to whether the introduction of a new national policy statement is appropriate:

(b) the Minister has considered alternatives; and

(c) The Minister is satisfied that the local resource management issue to be addressed is of national significance.

Regulations

338 **Specific matter**: Clause 105 seeks to insert a new provision 360D which enables the making of regulations:

a to permit a specified land use where restrictions are not reasonably required to achieve the purpose of the Act;

b to prohibit or override specified rules or types of rules, where, in the Minister's opinion, the rules would restrict land use for residential development; and

c to prohibit or override specified rules or types of rules where, in the Minister's opinion, there would be undesirable duplication or overlap with other legislation.

339 **Submission**: The RMLA is concerned that the proposed new regulation making power runs contrary to the devolved planning framework and local decision-making process that is central to the Act. The proposed power could be utilised to override rules that have been tested by public submission, council hearing and (where relevant) Environment Court process. This would have significant negative implications for local democracy and public perceptions of the legitimacy of the plan-making process. While the power to make regulations is limited to one year after the first national planning template is notified, there is potential for such regulations to have a significant impact on plan-making in the interim, particularly with respect to the Proposed Auckland Unitary Plan.

340 There are existing statutory mechanisms available to central government for amending rules. Under section 44A, following the promulgation of a national environmental standard, any duplication or conflict must be resolved through immediate change to an operative plan (without using the first schedule process). Similarly, changes to an operative plan may be brought about in response to a national policy statement (section 55(2)). These mechanisms provide a clear process for amendment that is consistent with the current RMA scheme.

341 The proposed new section is a Henry VIII clause, as it empowers the Minister to make regulations that override statutory provisions. The RMLA is generally concerned about the inclusion of such clauses as they are unprincipled and contrary to important constitutional and rule of law principles and therefore should only be used in exceptional circumstances. With respect to the Bill, the regulations would enable the Minister to effectively override local authorities' statutory power to control land use.

342 These concerns are heightened by the proposed ability of the Minister to carry out a highly subjective assessment of whether regulations are in fact required. For example, proposed subsections (3) and (8) which require assessments based on the "Minister's opinion" and refer to whether regulations are "desirable". The use of these terms is inconsistent with other substantive decision-making provisions in the Act and should be removed if clause 105 is retained in the Bill.

343 **Relief sought**: The RMLA seeks that clause 105 be removed from the Bill.

344 If the RMLA's primary submission is not accepted, the RMLA submits that the clause be amended as follows:

> **105 New sections 360D and 360E inserted**
>
> After section 360C, insert:
>
> **360D Regulations that permit or prohibit certain rules**
>
> (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations −
>
> (a) to permit a specified land use:
>
> (b) to prohibit a local authority from making specified rules or specified types of rules:
>
> (c) to specify rules or types of rules that are overridden by the regulations and must be withdrawn:
>
> (d) to prohibit or override specified rules or types of rules that meet the description in **subsection (3)(b).**

(2) Regulations made under **subsection (1)(a)** may provide for a land use to be a permitted activity, but only for the purpose of avoiding restrictions on land use that are not reasonably required to achieve the purpose of the Act.

(3) Regulations must not be made−

(a) under **subsection (1)(b) or (c)** unless~~, in the Minister's opinion,~~ the rules would restrict land use for residential development in a way that is not reasonably required to achieve the purpose of the Act:

(b) under **subsection (1)(d)** unless~~, in the Minister's opinion,~~ the rules would duplicate, overlap with, or deal with the same subject matter as is included in other legislation and that duplication, overlap, or repetition would be ~~undesirable~~ inconsistent with the purpose of the other legislation.

…

(8) The Minister must not recommend the making of regulations under this section unless the ~~Minister is of the opinion that~~ it is necessary ~~or desirable~~ to do so, after the Minister has−

(a) notified the public, relevant local authorities, and relevant iwi authorities of the proposed regulations; and

(b) established a process that−

(i) the Minister considers gives the public, the relevant local authorities, and the relevant iwi authorities adequate time and opportunity to comment on the proposed regulations; and

(ii) requires a report and recommendation to be made to the Minister on the comments received under subparagraph (I); and

(c) publicly notified the report and recommendation.

National Template

345 **Specific matter**: The Bill proposes that a National Planning Template (**NPT**) is introduced to improve the consistency of plans and policy statements. The minimum requirements for the first version of the NPT are:

a standardised formatting and structure for plans and policy statements;

b references to existing NPSs/NESs;

c (where possible) standardised definitions; and

d electronic functionality and accessibility of planning documents.

346 The relevant provisions of the Bill include:

a clause 4 which contains a definition of “national planning template”;

b clauses 9 and 10 which set out ministerial functions in relation to the NPT;

c clauses 13, 14 and 15 which insert the words “national planning template” into s 32, 32A and 32AA obligations;

d clause 37 which inserts a new heading and new sections 58B to 58J to provide for the NPT;

e clauses 39 to 47 which make technical amendments to sections 61, 62, 65 to 67and 73 to 75 to include references to the NPT;

f clause 53 which applies the dispute provisions in section 82 to the NPT;

g clause 62 which provides for a consent authority to have particular regard to the objectives and policies in the NPT;

h clause 66 which amends section 162 to require the Minister to have regard to whether a matter gives effect to a NPS or the NPT;

i clause 71 which amends section 149G to include reference to the NPT;

j clause 78 which amends section 149R to include reference to the NPT;

k clauses 82, 83 and 85 which amend sections 168A, 171 and 191 to ensure account is taken of the NPT;

l clauses 87 and 88 which amend sections 207 and 212 to refer to the NPT;

m clauses 98 and 99 which amend sections 293 and 310 to refer to the NPT; and

n clause 104 which amends section 360B to include the NPT.

o a combined development process for NPSs and NESs through joint consultation, development and publication;

p clarified scope for NPSs to give more specific direction about how objectives and policies should be implemented in plans;

q allowing NPSs and NESs to be developed in relation to a specific area to address a local resource management issue that has national significance;

r enabling council rules to be more lenient than a NES;

s allowing NESs to specify councils may charge to monitor activities permitted by a NES; and

t enabling NESs to specify requirements for councils.

347 **Submission**: The introduction of a NPT is expected to provide greater consistency in approach between councils and a reduction in plan-making costs over the longer term.

348 In the RMLA 2013 submission support was expressed for the concept of plan standardisation (template plans and standard definitions) but caution was expressed as to changes which went further than that.

349 The matters that the Bill proposes a NPT may include are extensive. They go beyond template type matters, and allow the substantive content of such plans in terms of specific objectives, policies and rules to be determined at the national rather than the local level. Given the breadth of these provisions, there is a significant risk that local aspirations will be relegated to secondary importance and that a NPT could dictate the outcome of land use consents in specific zones or for particular activities. If the NPT were to contain complete chapters for different zones which "must" be adopted, then the role of local government in RMA decision making would be reduced to drawing lines on a map (ie making decisions about where each zone applied). It is considered that the scope of the NPT is currently too broad and that it should be reduced to mirror the minimum requirements outlined above.

350 There are also a number of other areas where it is considered that further clarification or amendment is required to the NPT provisions. These are as follows:

a **Definition** - the NPT is defined in section 2 as the NPT "approved under section 58E, *as amended from time to time*". For clarity it is considered that reference to the section permitting amendments should be made.

b **Application to specific area** – the NPT or any of its provisions may apply generally or to a specific area (proposed section 58C(4)). However, no criteria are specified as to when it is appropriate for a NPT or its provisions to apply to a specified area. It is considered that a provision should be included requiring the Minister to specifically consider this issue when a NPT is prepared.

c **Preparation** – at present new section 58D(2) sets out a list of matters that the Minister *may* have regard to when preparing or amending a NPT. However,

consideration of those matters is not mandatory. It is considered that the Minister should be *required* to have regard to those matters in order to provide certainty and transparency in the NPT preparation process.

d **Reference error** – new section 58D(2)(a) refers to the matters set out in section 45(2)(a) to (h). It appears that this reference is an error and the reference should be to section *45A*(2)(a) to (h).

e **Timeframes** – councils are required to make the amendments directed by the NPT (without going through a schedule 1 process) within a year from the date the NPT is gazetted or within the timeframe set out in the NPT. Other changes required to give effect to any provision in the NPT (which fall outside the directives) must be made using a schedule 1 process within five years from the date the NPT is gazetted or within the timeframe set out in the NPT. The difference between these two types of changes could be clarified further by referring to where the NPT directs specific changes rather than just where the NPT "directs so" as at present. It is also unclear why a period of one year is required for the first lot of directed changes, when similar amendments directed by a NES are required to be made "as soon as practicable after the date on which the standard comes into force". For consistency, consideration should be given to a similar approach being taken to both. It is also unclear whether a five year period is sufficient to enable full adoption of other NPT changes. In the 2013 RMLA submission a 10 year period was suggested as this mirrored the statutory timeframe for substantive review.

f **Wording** – new sections 58H(6) and (7) could be combined into one and reworded for clarity as at present the wording is difficult to follow.

g **Review** – while the provisions enable the Minister to amend the NPT by following the same process as the preparation, there is no requirement for the NPT to be reviewed and no specific right for local or iwi authorities to request that a review be undertaken. Given the requirements to review regional and district policies and plans every 10 years, a similar requirement should be imposed on the NPT. For clarity there should also be confirmation that local and iwi authorities can request and propose changes to the NPT outside the mandatory review periods and that while the Minister is required to consider any such requests the Minister may, but is not required to commence a review or make any changes.

h **Section 207 heirarchy** - clauses 87 and 88 amend sections 207 and 212 to provide for the objectives and policies of the NPT to be given "particular regard" by decision makers in respect of applications for water conservation orders. This gives the NPT more weight that the other matters listed in section 207 and 212, which includes national policy statements, the NZCPS, regional policy statements and other matters, and instead elevates the NPT provisions to the same level as the purpose of water conservation orders. This comparative weighting appears illogical in the scheme of part 9 of the Act.

351 **Relief sought**: The following relief is sought by the RMLA.

352 The definition of NPT in clause 4 (amendment to section 2) be amended to read:

> *"means the national planning template approved under section 58E, as amended from time to time under section 58G"*

353 That clause 37 new section 58D(2) be amended to require the Minister to consider the matters in that subsection and to require consideration as to whether it is appropriate for a NPT or any of its provisions to apply to a specified area:

> *"(2) In preparing or amending the national planning template, the Minister ~~may~~ must have regard to –*
>
> *(a) the matters set out in section 45(2)(a) to (h):*
>
> *(b) whether it is desirable to have national consistency in relation to a resource management issue:*
>
> *(ba) whether it is appropriate for the national planning template to apply to specific regions or districts or other parts of New Zealand:*
>
> *(c) any other matter that is relevant to the purpose of the national planning template.*

354 That the changes required to be made without following the schedule 1 process be clarified by amending section 58H(2) as follows:

> *"A local authority must amend a document, if the national planning template directs that the document must ~~so, to~~ include the specific provisions set out in the national planning template."*

355 That consideration be given to aligning the default implementation timeframes for the NPT directive changes (i.e. those to be made without use of the Schedule 1 process) to be consistent with those applying to the NES.

356 That consideration be given to extending the timeframe for other NPT changes to 10 years to mirror the statutory timeframe for substantive reviews.

357 That the NPT be subject to review at least 10 yearly with local and iwi authorities able to request reviews outside these times by amending section 58G to insert a new subsection (6) as follows:

> *"(6) The Minister must commence a review of a provision of the NPT if the provision has not been the subject of a review, or a change by the Minister within the previous 10 years."*

358 That clause 38 new section 58C be amended to limit the scope of the NPT to template matters by:

a Amending section 58(1)(b) as follows:

"(b) any of the matters specified in section 45A(2) and (4) <u>except subsection 45A(2)(e)</u> (which applies as if the national planning template were a national policy statement):

b Deleting section 58C(1)(c), (d) and (f);

c Deleting section 58C(2).

359 That the section reference in section 58D(2)(a) be amended to: "45<u>A</u>(2)(a) to (h)".

360 That sections 58H(6) and (7) be combined into one subsection as follows:

"(6) ~~However, subsection (7) applies if~~ <u>If</u> an amendment relates to matters that are the subject of a proposed policy statement or plan that was notified under clause 5 or 48 of Schedule 1, but had not become operative before the approval of the national planning template~~.(7) If this subsection applies,~~ the local authority –

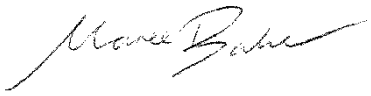
(a) is not required to amend the document within the time specified in subsection 5(b); but

(b) must make the amendments under subsection 5(a) within the time specified in the template or (in the absence of a specified time) within five years of the date on which the proposed policy statement or plan becomes operative."

361 That clauses 87 and 88 amending sections 207 and 212 be amended so that the objectives and policies of the NPT are had regard to by decision makers (not particular regard) in respect of applications for water conservation orders.

REQUEST TO BE HEARD

362 The RMLA wishes to be heard in support of this submission.



Signature of Maree Baker-Galloway on behalf of the Resource Management Law Association

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