2 APRIL 2013




LOCAL GOVERNMENT NEW ZEALAND SUBMISSION

In the matter of the discussion document: Improving our resource management system

To the Ministry for the Environment

Submission by Local Government New Zealand

IN THE MATTER OF:

Improving our resource management system: A discussion document

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Introduction

1. *Local Government New Zealand* (LGNZ) welcomes the opportunity to submit on the Discussion document: Improving our resource management system.

2. LGNZ wishes to engage further with Minsters and officials on this submission.

3. LGNZ is a member based organisation representing all 78 local authorities in New Zealand. LGNZ's governance body is the National Council. The members of the National Council are:

    - Lawrence Yule, President, Mayor, Hastings District Council
    - John Forbes, Vice-President, Mayor, Opotiki District Council
    - John Bain, Zone 1, Deputy Chair, Northland Regional Council
    - Richard Northey, Zone 1, Councillor, Auckland Council
    - Meng Foon, Zone 2, Mayor, Gisborne District Council
    - Jono Naylor, Zone 3, Mayor, Palmerston North City Council
    - Adrienne Staples, Zone 4, Mayor, South Wairarapa District Council
    - Maureen Pugh, Zone 5, Mayor, Westland District Council
    - Tracy Hicks, Zone 6, Mayor, Gore District Council
    - Len Brown, Metro Sector, Mayor, Auckland Council
    - Dave Cull, Metro Sector, Mayor, Dunedin City Council
    - Stuart Crosby, Metro Sector, Mayor, Tauranga City Council
    - Brendan Duffy, Provincial Sector, Mayor, Horowhenua District Council
    - Stephen Woodhead, Regional Sector, Chair, Otago Regional Council
    - Fran Wilde, Regional Sector, Chair, Greater Wellington Regional Council.

4. This submission has been prepared under the direction of the National Council. Councils may choose to make individual submissions. The LGNZ submission does not derogate from these individual submissions.

5. The final submission was endorsed under delegated authority by Lawrence Yule, President, LGNZ and Hon. Fran Wilde, Chair, Regional Sector Group.

6. *Local Government New Zealand* wishes to meet with the Minister for the Environment for further discussion on the points raised in this submission and seeks structured engagement with Ministers and officials on the key matters before the Bill is introduced to Parliament.

Submission

7. The discussion document proposes significant changes to The Resource Management Act (RMA). We support the government taking an interest in the RMA as natural resource management is a cornerstone of New Zealand's economy and national identity. Given this, we need to be very certain that changes to the mechanics of how we as a nation manage our natural capital are well founded and resilient. As practitioners since its inception, local government is an important source of knowledge about how well changes will translate and whether they are likely to deliver the government's objectives.

8. We support some of the Government's objectives but in some cases the problem is unclear and therefore we are concerned that the "fix" proposed is unlikely to be effective. We have looked at the "problem statements" in the discussion document and have identified cases where the "evidence" does not support either the mooted problem or the proposed solution.

9. We commissioned New Zealand Institute of Economic Research (NZIER) to undertake an independent assessment of the discussion paper. Their assessment is attached as Appendix 1 to this submission. In relation specifically to the "problem definition", NZIER considers (page 1) that "*The intent of the discussion paper, in removing undue costs and uncertainty from resource management processes is unquestionably beneficial, but the paper's analysis and evidence base is not compelling in supporting its conclusions and proposals for improvements. Those proposals are so widespread and disparate that it is difficult to foretell what their combined effects will be, and the paper has no cost benefit analysis of implementing what it proposes*."

10. NZIER goes on to state (page 3) that "*While the paper strongly states the need for improvements, it contains little evidence of the analysis it has undergone to reach its conclusions. The justification for some of them is based more on assertion than evidence…It does not establish a clear framework for what objectives the Act is intended to achieve, the problems with its implementation, and the likelihood of its proposed solutions remedying them*.

11. *"That is a significant omission, because it is hard to assess the relative scale and significance of the different problems claimed with the Act, or the mutual compatibility of the various proposed improvements. The risk this poses is that in changing many different aspects of the Act simultaneously, it is difficult to predict what the combined impact and response will be. Also significant is that the paper makes no attempt to consider the costs and benefits of the changes it proposes, even in a qualitative sense – which is ironic, given the tightening requirements for councils to consider costs and benefits of their actions being proposed in the Resource Management Reform Bill before Parliament at the moment."*

12. We are also concerned about the timing of some of the proposals. Many councils are in the process of preparing their second generation plans - district plans are giving effect to regional policy statements, as required under the 2005 amendments, at a significant cost – borne by both the ratepayers, their communities, and stakeholders. The 2005 change was proposed to address the alignment issue between an RPS and subordinate plans. The discussion document does not reflect the significant amount of collaboration taking place across the sector in plan making or what becomes of this planning effort.

13. Another significant amendment was introduced in 2010 requiring all members of a hearings panel to be accredited – this will apply to hearings of submissions on RMA policy and plan hearings – and will apply to elected members. We argue that plan and policy decisions should be made by elected representatives of communities and that the changes to accreditation requirements will help to ensure the robustness of decisions. Any use of independent

commissioners should be a decision made by councils and not directed by Central Government. We do not support moves which are contrary to this. Some of the discussion document's proposals directly undermine local democracy. The proposals lack the necessary and proven evidential basis on which such a significant degradation in local representation ought to be based.

14. While we can support the government's objective of fewer resource management plans we have very real concerns about the concept of the "single resource management plan" as conceived in the discussion document. We do not think it is workable as conceptualised and the practical implementation will require significant resource by councils. *Local Government New Zealand* argues that proper incentives should be provided to councils to undertake joint planning and the "single resource management plan" as a technical exercise should not proceed. The technical exercise will not overcome problems of overlapping jurisdictions between regional and district rules. The respective jurisdictional domains will remain separate and this will not be overcome by simply introducing a "template document". If this is one of the drivers for the single resource management plan and a template then there are other ways of addressing it.

15. While we can support the objective of frontloading plans and providing for greater certainty – this does come with a cost – to the community and to ratepayers. It also assumes a great deal of knowledge is available about the effects of particular activities.

16. We have noted the particular areas which need a great deal more thought before they are translated into legislation. We expect to be involved in this process as the changes will directly affect our members' ability to discharge their functions under the legislation.

Proposal 1: Greater national consistency and guidance

17. *Local Government New Zealand* supports the objective of greater national consistency and guidance and we note that as a sector we have made submissions on this matter and we have also sought central guidance on specific matters. As the regulator, the local government sector needs to have a structured role in helping set the agenda of what national guidance is promulgated.

Change the principles contained in sections 6 and 7 of the RMA

18. The proposal is that sections 6 and 7 are combined into a single section of Principles that decision-makers are required to "recognise and provide for" and a new section 7 sets out Principles to guide decision-makers. A new concept of "overall broad judgement" is introduced: "*In making the overall broad judgment to achieve the purpose of this Act, all persons exercising functions and powers under it in relation to managing the use, development and protection of natural and physical resources shall recognise and provide for the following..."*

19. We do not have any significant issue with the proposed introductory wording of section 6 but would suggest retaining the words "matters of national importance" to signal that the overall approach has not changed. We also suggest that that it would be more efficient/simpler to delete the words "*managing the use, development and protection of.....*" and replace with *"...sustainably managing....."*

20. We can support the concept of "overall broad judgement" as this essentially confirms the practice across the sector and simply reflects existing case law. Although the addition is not strictly necessary it would signal that the existing case law approach is to be retained.

21. We point out, however, that while the Section 6 matters are those really important matters that should be in the mix (where relevant) when making the overall broad judgment, the "overall broad judgment" is still made at section 5. The "overall broad judgement" in achieving the purpose of the Act is not made at section 6. Section 6 matters are to edify the purpose statement in section 5 but section 5 still contains the critical matters that walk a decision maker through the broad judgement. We understand that water, air, and the needs of future generations do not appear in 6 because they hold a critical position in 5.

22. The government's rationale for the proposed changes is that positive effects (or net benefits) of economic and social activities are underweighted.

23. We have considered the implications of the proposed changes and the implications of the wording for a council's functions with respect to plan and policy-making and resource consenting. We have not concentrated on the change in philosophy underpinning the proposed changes but we have considered how the changes align with the direction set in the recently released package of freshwater changes.

Combining existing sections 6 and 7

24. It is proposed that the current sections 6 and 7 be combined into a single section that lists the matters that decision-makers would be required to "recognise and provide for". It is suggested that a single list in section 6 would remove the current hierarchy between sections 6 and 7 and support more balanced decision-making. The new section 7 would (with some exceptions) set out some best practice principles rather than provide guidance as to matters which decision makers should have particular regard to.

25. The collapsing of "matters of national importance" and "other matters" into one section is generally supported. This would remove the hierarchy between the sections and thereby simplify the current approach.

26. We do however note that there are some attendant disadvantages with this approach which should be considered. These are as follows:

- Currently the overall balancing approach does put different weight on section 6 and 7 and 104 matters. There is a significant difference between recognising and providing for a matter and merely having "particular regard" to it;
- There is also a meaningful difference between merely having regard to a matter under section 104 and having particular regard to it under section 7;
- Section 7 matters on their own are seldom if ever sufficient to defeat a proposal, but are often influential in terms of conditions;
- The courts and decision makers understand the different weightings involved and a significant body of case law exists around the current two tier approach;
- There is some merit of having some matters relegated to the second tier; and
- Having different weighting for different matters does in practice provide more guidance to decision makers than the proposed approach.

27. In summary, LGNZ supports the suggestion of a single set of guiding principles.

Proposed Changes to Section 6

28. We now address each of the proposed amendments to section 6.

29. *(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development;*

30. This provision is proposed for retention unchanged. We support the retention of the references to preservation and protection. Case law is clear that this provision does not require preservation at all costs and we consider that the New Zealand Coastal Policy Statement (NZCPS) now provides sufficient guidance as to the application of this provision.

31. *(b) the protection of specified outstanding natural features and landscapes from inappropriate subdivision, use and development;*

    We assume the intention is that consent authorities and the Environment Court could no longer find that landscapes, natural features vegetation or habitats are significant unless they have been specified in an operative district or regional plan, a regional policy statement or a national environmental standard.

32. LGNZ supported the TAG recommendations that in order to be considered "outstanding" a landscape must be of at least regional significance and identified in an operative regional policy statement. The current proposal is unclear as to whether landscapes and features which are significant only at a district level are to be included. Similarly it is unclear where and how the "specification" would be required.

33. A significant drafting issue has been identified with the approach taken in the discussion document. Currently, the principle means of recognising and providing for these matters is through plans and the secondary means is via consent and designation decisions. However, the provision as proposed only requires provision for these matters if they have already been specified. This is circular. The net result as currently worded, is that it would only be landscapes and features currently specified in a plan which would be caught by the provision.

34. There would be no requirement for local authorities which have not completed their identification process to continue to do so. That is because those features etc are not yet specified and accordingly, would not be governed by the requirement to recognise and provide for. That approach is not supported.

35. We assume however that this is an unintended consequence and is one that could be addressed by making it clear that provision of protection through the consent and designation processes must only be in relation to features etc specified in a relevant plan. This could perhaps be achieved by taking the reference to specification out of section 6 and transferring it to section 104.

36. We also note that if the intention is to limit outstanding natural features and landscapes (ONFLs) to those which are nationally or regionally outstanding, a question arises as to the treatment/status of landscapes which are not identified in a regional planning document but which are significant at a district level. We presume they could still be recognised in district plans and addressed as appropriate under s 104 (without the added weighting of national importance) but the intent is unclear.

37. We note there will be significant costs, particularly to regional councils, associated with those recommendations requiring identification and specification (mapping). There is no mention as to how these costs should be met. In an environment where central government consistently

complains about rates and fees levied by local government, this casual approach to the generation of further costs is undesirable and further evidences the concerns recently, expressed by the Productivity Commission. Central government ought to be carefully considering the points that have been made by the Productivity Commission; instead it seems to be continuing on the same track.

38. However we do agree there is a need for certainty in plans and this is a particular area where national guidance is required – both regarding criteria and methodology. The sector has sought this before and we made a case, supported by evidence, for national guidance.

39. We also note the following points:

- There would need to be a substantial transition period because most councils have not completed a comprehensive assessment of ONFLs;
- This is a very contentious issue in relation to private land and achieving such specificity will take time;
- The exercise would require significant scientific/expert resources to complete comprehensive surveys and assessments;
- By way of example we do not yet have a comprehensive list of outstanding water bodies notwithstanding various attempts to provide such an inventory; and
- In our view the more urgent decision is whether ONFLs should be limited to nationally and regionally outstanding areas and consequently, where ultimate specification should occur.

40. *(c) the protection of specified areas of significant indigenous vegetation and significant habitats of indigenous fauna*

41. In our view the proposed new references to "specified areas" are problematic and undesirable in relation to significant indigenous vegetation and habitats.

42. Again, we assume that the intention is that consent authorities and the Environment Court could no longer find that significant indigenous vegetation or habitats are significant unless that has been specified in an operative district or regional plan.

43. As with 6(b) there is a fundamental drafting issue which would need to be addressed. The current proposal is circular and illogical.

44. Assuming that the intention is as outlined above we nevertheless consider that this approach is problematic for the following reasons:

- This issue requires a different approach to proposed 6(b) as landscapes are large scale and capable of being mapped more readily. Conversely, rare species and habitats can be very small scale and therefore impractical to map;
- There would need to be a transition period to enable those councils which have not completed a comprehensive assessment of areas of significant indigenous vegetation or habitat;
- If specification is required in plans, it is inevitable that some features will not be indentified which should be identified;
- So far as vegetation and habitats are concerned the matter of specification is even more complex. The exercise requires significant scientific/expert resources to complete comprehensive surveys and assessments, (much more so than for ONFLs);
- Instead an alternative approach has been developed (and sanctioned by the Courts) where areas of "potential significance" are identified in plans and the plans then provide criteria for the consent authority to determine significance or not, within the consent/designation process;

- In some cases plans adopt a two tier approach where accepted areas are identified but potential areas are left be identified if required, triggered by receipt of an application. An area is usually mapped as significant natural area (SNA) or potentially significant natural area (PSNA) to trigger the ecological assessment at consent stage. The two-tier approach has merit from a cost-effectiveness point of view but it relies on areas being neither SNA or PSNA to narrow the field and target resources. A mapping exercise is possible using the two tier approach;
- Most district plans now contain clear criteria for identifying areas of significance and these are generally consistent between plans.
- At least in relation to significant vegetation and significant habitats of indigenous fauna, it will be impossible to provide comprehensive mapping. By way of example, in the course of assessing say an irrigation or hydro scheme proposal the applicant may discover that the proposed scheme affects a hitherto unknown habitat of some rare species. It is appropriate that the consent authority be required to recognise and provide for the protection of such;
- We consider that decision-makers already have sufficient tools to be able to address this issue on a case by case basis where areas of significance have not already been specified;
- Whilst we agree that local authorities should be encouraged to continue with mapping where practical, we are strongly of the view that this two tier approach to mapping should be encouraged.

45. We support some certainty being given through plan provisions but we need to work to find an approach that achieves this while being realistic about the associated costs. The two tier approach should be explored.

46. It would be a huge and hugely contentious exercise for every local authority to have to now proceed to provide a map of all areas of significance within (presumably) quite a short time frame. Time would also need to be allowed for introducing such maps into plans and making them operative. Inevitably such maps would not be comprehensive.

47. If there is to be any policy change in this area, we consider that it would be better focussed on a national policy statement to ensure consistent criteria for identifying areas of significance. Local Government New Zealand is prepared to assist Government in establishing criteria.

48. *(d) the <u>value</u> of public access to and along, the coastal marine area, wetlands, lakes and rivers;*

We support the change of wording from *"maintenance"* to *value*. Although this weakens the provision, we think that the requirement to recognise and provide for such values provides sufficient direction without implying that maintenance of existing access should be the goal. There may be projects where maintenance is impractical but can be compensated for by improved access elsewhere or mitigated by controlled access.

49. *(e) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, taonga species and other taonga including kaitiakitanga;*

We support the inclusion of kaitiakitanga within this provision rather than within section 7. However we do query whether kaitiakitanga is properly described as a taonga rather than an aspect of the relationship.

50. *(f) the protection of protected customary rights;*

We support the change in wording from recognised customary activities to protected customary rights.

(g) the <u>benefits</u> of the efficient use and development of natural and physical resources;

We oppose the proposed new reference to benefits. The words provide a different logic and meaning to the intent of the TAG report. The current requirement to have regard to efficient use and development is well understood and has been the subject of case law including most recently the Meridian Project Hayes High Court decision.

51. As a matter of logic and economics it does not make any sense to provide for the benefits of efficiency but not provide for the *costs* of inefficiency. We do however consider that the requirement to recognise and provide for efficient use and development is fundamental to sustainable management.

52. *(h) the importance and value of historic heritage*

We support the proposed rewording.

53. *(j) the benefits of efficient energy use and renewable energy generation;*

We have two minor issues with the rewording. We suggest that the word efficient should precede "renewable'. The current proposal implies that all renewable energy generation is beneficial, when clearly there are environmental impacts associated with such proposals. In our view renewable electricity generation proposals should only proceed if their effects on the environment can be properly mitigated and they make economic sense. The latter point is not an RMA matter but it does impact on the costs to consumers of electricity.

54. The other issue is that energy can't be generated – it is converted – it is the electricity that is generated. The provision should be reworded so the reference to renewable <u>energy</u> generation is corrected to renewable <u>electricity</u> generation.

55. *(k) the effective functioning of the built environment including the availability of land for urban expansion, use and development;*

We have no issue with the inclusion of this new matter. However it is unclear how this matter would in practice be provided for. We do not accept that this provision is an adequate replacement for the sections proposed to be deleted referring to amenity values and the quality of the environment, and without those other factors having equal weighting there is a risk of land becoming available without adequate provisions for infrastructure, transport, recreation etc.

56. *(l) the risk and impacts of natural hazards;*

We support the inclusion of this matter and note the sector has sought this for some time. We encourage submissions to be carefully considered to ensure appropriate wording of this provision e.g. what are the implications of "impacts" versus "effects" and what are the implications of using the terms "risk" and "impacts" in this provision?

57. *(n) areas of significant aquatic habitats, including trout and salmon;*

We support the elevation of this matter from section 7 to section 6 but we question whether the intention is that these areas are mapped in order to provide certainty in plans. This was clearly the intention of the TAG. The discussion document does not include the term "specify" in this provision which is different to provisions (b) and (c). The inclusion of criteria or a definition to provide decision-makers with more guidance will be necessary. As worded, it is implied that all aquatic habitats will need to be surveyed within the region to identify which ones are "significant" and then plans changed to reflect this. If the habitats are required to be mapped this will have significant resourcing implications.

58. If this change proceeds we consider there should be a corresponding addition to section 6 requiring recognition and provision for the "*Values of aquatic ecosystems*". The reason for this is

that the current proposal requires no particular regard to be had, or provision to be made, for the values of aquatic habitats which are not deemed to be significant. The only other requirement is to maintain life supporting capacity of aquatic habitats and ecosystems (section 5) and to avoid, remedy or mitigate adverse effects.

59. In addition, we consider that the reference to trout and salmon should be supplemented with a reference to native fish. There is no ecological logic in including these introduced species and excluding native fish.

60. We are of the view that the current proposal on its own, would significantly downgrade the existing approach to protection of aquatic values which are not deemed to be significant. It will also lead to a debate as to what is significant or not. In our view unless the additional clause suggested above is added, the proposal will be inconsistent with the National Policy Statement on Freshwater Management and the suggested changes in relation to freshwater management.

Proposed deletions from section 7

61. The discussion document suggests that the following matters be deleted because they are already effectively encompassed in section 5 of the Act.

7(aa) the ethic of stewardship

7(c) the maintenance and enhancement of amenity values

7(d) intrinsic values of ecosystems

7(f) maintenance and enhancement of the quality of the environment

7(g) any finite characteristics of natural and physical resources.

62. We agree that 7(aa) does not provide useful guidance.

63. We agree that 7(d) is already incorporated in section 5. We also consider that the focus should be on the values of ecosystems rather than their *"intrinsic"* values. The latter tends to imply an emotive value to ecosystems which we consider to be unhelpful given the wider goals of the proposed reforms. There is a danger that the reference to intrinsic values could be used to argue for the status quo rather than for sustainable management. By way of example it could be argued that sustainable harvesting of indigenous forest or sustainable aquaculture necessarily interferes with the intrinsic values of ecosystems. Although in practice we consider that it is highly unlikely that decision makers would be swayed by such arguments, we are of the view that this provision is unnecessary.

64. We agree that 7(g) adds little and is in any event part of sustainable management (the reasonably foreseeable needs of future generations).

65. We do not support the proposed deletion of both 7(c) and 7(f). Although section 5 requires adverse effects on the environment to be avoided, remedied or mitigated, there is little guidance as to how much mitigation is required where avoidance or remediation is not possible. These existing provisions provide some additional guidance.

66. Given that these are not matters which necessarily have to be provided for, we consider the existing provision provide an appropriate balance.

67. So far as amenity values are concerned we see these as essential components of both the urban and rural environment. People expect the amenity values of their neighbourhoods to be at least maintained.

68. This is an important provision in terms of noise and visual amenity amongst others. These provisions have not been applied by the Courts in an overly restrictive manner but do provide useful guidance to decision makers. In our view these two matters also provide some balance to the more development oriented provisions suggested for section 6 without overriding them. There are also instances where these provisions usefully weigh in favour of well-designed developments, recognising that not all change is negative.

69. By way of example, provision for infrastructure, energy projects, urban expansion etc should all be guided by requirement to also have particular regard to (so far as is possible) maintaining and enhancing rural or urban amenity values and the quality of the environment.

70. Most New Zealanders put a high value on the quality of the environment which they live and recreate in. A bare requirement to mitigate adverse effects on amenity values and the quality of the environment is somewhat meaningless. Mitigate to what extent?

71. Examples of where these matters have come in to play include:

- The visual impact, intrusion and noise effects of proposed wind farms;
- Protection of public and private visual amenity within the urban environment;
- Minimising effects on remote and scenic areas from aquaculture;
- Considering the impact of the taking or damming of water on recreational amenity provided by rivers (a matter not covered by the references to habitat values);
- Sunlight and view protection rules/standards;
- Noise standards;
- Privacy of yards; and
- Building and wind farm set back provisions to address issues of dominance, visual impact and noise at adjoining properties.

72. For these reasons, we oppose the removal of both provisions.

73. As far as we are aware, there are few if any examples where these existing provisions have given rise to disproportionate results.

74. These provisions underpin many rules in plans which are intended to minimise adverse effects on amenity values and the quality of people's living environments, so far as that is practicable.

75. Notwithstanding all of the above we do accept that there is a case for making the direction clearer and more flexible. This could be achieved by the addition of the words:

So far as is reasonably practical maintaining and enhancing the quality of the environment
Or
So far as is reasonably practical minimising adverse effects on the quality of the environment

The suggested new section 7

76. We do not consider the suggested new section 7 to be necessary or particularly useful and oppose its inclusion.

77. With respect, this suggested new section unhelpfully mixes two concepts.

78. The proposed subsections 1, 2 and 4 are effectively good practice guidance which we support and we do not have any particular problem with them being stated somewhere other than section 7.

79. Proposed subsection 3 requires decision makers to *have regard to* environmental compensation which is in a form which does not qualify as mitigation. In practice this is unnecessary since the

Courts have already determined that they can and should have regard to such compensation. To the extent that it is considered necessary to reinforce that approach, we consider that this matter would be better located in section 104 of the Act which sets out other matters which consent authorities should have regard to when making consent decisions.

80. We agree that if this matter remains it should not be elevated to section 7.

81. The proposed subsection 5 uses the new phrase "achieve" which adds confusion. What is the difference between *recognising and providing* for and *achieving*? Is the latter intended to have a greater status as could be argued?

82. The explicit reference to the balancing of public and private interests in the use of land is unnecessary and in any event is incomplete – private interests in public resource use also occurs. In our view, this is a matter best left to practice. We consider that this provision if left would give rise to unnecessary litigation.

83. We suggest that if this matter remains (which we oppose) it would be better located within section 32 as a matter to be weighed when developing policy statement and plan provisions.

84. We also suggest that this matter does not provide useful guidance to decision makers. What is "*an appropriate balance"?* In essence this proposal simply reflects a matter which is already inherent in section 5 and in our view is unnecessary. Alternatively this matter could be regarded as in effect changing the definition of sustainable management which we consider to be undesirable.

85. In our view adding this matter runs contrary to the intention of increasing the clarity of guidance to decision makers and is unnecessary.

86. In summary we consider the proposed new section to be unnecessary and unclear.

LGNZ position:

a. Reconsider the changes to sections 6 and 7 to reflect the points made in this submission above.

3.1.2 Improving the way central government responds to issues of national importance and promote greater national direction and consistency when needed

87. Guidelines with criteria are proposed to clarify when and how each national tool or combination of tools would be used.

88. The local government sector has asked for criteria before: Rationalising National Intervention under the RMA and we support the proposal to have clear criteria.

89. We accept that for matters deemed nationally important the Government wishes to retain an intervention power but how this is to be exercised is critical. If changes are to be made to local planning instruments there must be consultation with the local authority about whether Schedule 1 is used or not. Again, this raises fundamental issues concerning local democracy. Limiting the ability of communities to exercise their rights should not be lightly removed and *Local Government New Zealand* will oppose this forcefully unless there is a clearly demonstrated and evidenced problem. The discussion document fails to meet this standard.

90. Local government should have a role in determining the issues of national importance. While the practice is that there is engagement with local government on the specifics of a regulation, we do not have a formal role in initiating the development of an NPS or NES. We have examples where we have sought central guidance on specific matters (e.g. an NPS on landscape) and made a case that this is a priority for the sector, only to be advised that it is "too hard". We argued that as a section 6 matter, and one creating significant costs for the local government sector and other stakeholders, some clarity and certainty was warranted on this particular matter – in the form of national guidance.

LGNZ position:

a. Support the proposal for guidelines and criteria to clarify when and how each national tool or combination of tools would be used; and

b. Seek a structured role for the local government sector to be involved in developing the guidelines and criteria.

3.1.3 Clarifying and extending central government powers to direct plan changes

91. This proposal includes a stepped process for Central Government to direct plan changes with criteria in the RMA regarding the circumstances where this would be used. We note that the Ministerial powers to direct preparation or change of plans exists under section 25A but they have never been invoked. Sometimes councils will want to work with Central Government to make use of this new power but we note that the provision proposed extends beyond the Minister's powers under s25A. We would expect clear criteria as to what is in the national interest and that the agenda (3.1.4) should address emerging issues ahead of time. Local government is faced with pressure to constrain rates and set priorities through Long Term Plans – so it is essential to know ahead of time about any plan changes which might be directed which may affect local priorities and resources.

92. There are some significant matters of detail, however, that are not included in the discussion document. For example: at what stage in a local authority plan change process would the Minister be able to exercise power to directly amend a plan; what process would the Minister follow to amend a plan; and how will process costs be recovered? This general lack of attention to implementation detail was identified by the Productivity Commission as a significant problem in central government policy formulation generally.

LGNZ position:

a. Support for clear criteria as to what is in the "national interest";

b. The agenda (3.1.4) should address emerging issues ahead of time; and

c. There are significant process issues that need to be addressed.

3.1.4 Make NPSs and NESs more efficient and effective

93. The proposal is to amend the RMA to improve the flexibility of NPSs and NESs by providing for a combined NPS and NES process, to clarify that NPSs and NESs can be targeted to a specific region or locality and to further streamline the process for NPSs and NESs. A non-statutory agenda is also proposed to indicate which matters the government would consider for NPSs or NESs.

94. Many matters are aligned with Gerard Willis' paper Rationalising National Intervention under the RMA and with our previous submissions.

95. *Local Government New Zealand* supports a combined NPS/NES tool and we have submitted on this matter in the past. We seek that if an NPS or NES is to be targeted then it should be to a specific issue rather than to a region or locality. Further, the issue should already be on the agenda and not included as an ad hoc response to a matter or a response to a persistent lobby. This will give certainty regarding a lead time and assist local authorities forward plan.

96. The proposal to streamline the process is supported and we also encourage greater use of section 55 of the RMA. This overrides the need to use the Schedule 1 process to give effect to an NPS by directly inserting provisions into plans. NPSs and NESs need to fully deal with implementation issues and costs and "road test" a regulation before it is finalised, even if this is done informally with a handful of councils. This would have been particularly useful with the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011.

97. As stated above, we support the non-statutory agenda and clear criteria and the local government sector needs to have a clear and structured role in setting the agenda for NPS/NES promulgation.

98. We encourage a review of the current NPSs to determine whether they have added value and central guidance beyond the section 6 or 7 principle or "other matter".

LGNZ position:

a. Support a combined NPS/NES tool;

b. If an NPS/NES is to be targeted it should be to an issue rather than to a region/locality;

c. An issue should be on the "agenda" in order to be promulgated as an NPS/NES; and

d. Explore greater use of section 55 provisions.

Proposal 2: Fewer resource management plans

99. *Local Government New Zealand* supports the objective of fewer resource management plans and we have made this clear to the Minister. We now need to establish how we get to that position in a way that makes the best use of councils' limited resource for plan making. As a purely technical exercise the "joint plan" outlined in 3.2.1 within a template structure will be a very costly exercise for councils and, we argue, will not be money well spent.

100. We also support the objective of some standardisation of definitions and terms across the sector but the detail needs to be fully considered and not unduly rushed.

101. If one of the problems this reform is trying to address is the duplication of functions between regional and district plans then it is suggested that another area of reform which could be explored is to clarify responsibilities – specifically s30 and s31 (RMA) functions. Currently, the alignment issues between the roles of regional councils and of territorial authorities are covered in a number of areas such as in section 62 (Contents of Regional Policy Statements). The technical template plan proposed here will not address this matter.

3.2.1 Fewer resource management plans

The single plan – technical vs fully integrated

102. This proposal requires all districts to have a single plan in place within five years (per district or a broader area if agreed by the councils). Timing can be varied depending on plan review cycles. The single plan is to be consistent with a new national planning template (although we note that in consultation meeting officials would not commit to providing a template any earlier than in five years time, which would create considerable logistical difficulties and potentially a policy vacuum.

103. As stated above, we support the objective of fewer resource management plans and we support a move towards integrated planning and some standardising of terms and conditions and structure.

104. However, the ideal model is likely to be a fully integrated plan (i.e. more than the technical exercise proposed by this discussion document) which considers how the regional and district plan provisions sit together and whether a function should be regional or territorial. We do not think local government should have to fully meet these costs and the technical "single plan" proposed in 3.2.1 will not achieve this degree of integration.

105. We also note that the changes to section 6 and 7 will require plan changes to give effect to these changes. The timing of those plan changes needs to be aligned to any requirement regarding the "single plan" to reduce the amount of plan change/plan review.

106. We would like greater incentives to be offered to encourage a fully integrated plan. The incentives proposed (3.2.3) are unlikely to be sufficient to encourage this.

107. We also find that the timing of this proposal is problematic: many councils (regional and territorial) are involved in their second generation plan reviews to give effect to the regional policy statement, and to meet the review requirements under the RMA.

108. Plan development of the 2nd generation plans is a great deal more collaborative across a region. There needs to be a clear exemption pathway to cover situations where, for example, a 2nd generation RPS has been promulgated (or is operative) and subordinate documents have given effect to it or are in the process of doing so.

109. We are unclear exactly what the driver is for the technical single plan. We note that the proportion of consents requiring consent under both regional and district provisions is minimal so the technical single plan is unlikely to provide significant benefits in this area. It will not address any issues of duplication between regional and district provisions.

110. Given the significance of this particular reform it is important to fully understand the rationale for it and the real problem it is trying to address.

111. The language in the discussion document is not tight and while we understand that the regional policy statement is to be included in the single plan – if it is a "rule book" then does the RPS need to be included? It is unclear how the RPS provisions will be "protected" across a region.

Where some districts within a region embark on the technical single plan while others undertake an integrated plan across districts within the same region it is unclear whether/how the RPS provisions will remain intact across the region. We are concerned that the differential roles of the RPS / RP and DP have not been appreciated in the discussion. Infrastructure is not covered by this discussion document and the alignment/connectivity provided across a region via an RPS between land use and infrastructure may be lost.

112. There is no recognition of the differing role of the RPS, regional plan rules and district plan rules. Regional rules have different presumptions when compared with district rules and they apply from the point of notification but most district rules need to wait to go through the decision making process.

113. The template document and the standard definitions have been mooted before and they have been opposed because of the cost involved to the sector. The technical "single plan", conforming to a template, will not be a simple process and we consider there will be significant costs associated. If the template proceeds it should not be hurried – the concept has only been discussed at a very high level in the discussion document and there are many questions that need to be addressed. The discussion document does not appear to appreciate that any requirement to adopt standard definitions will require use of the Schedule 1 process to incorporate these new definitions and terms and as changes to rules will be required, based on these definitions – unless there is proposed to relook at the use of the Schedule 1 process in plan-making.

114. The template is going to be extremely difficult to develop and the requirement to develop the single plan needs to set a realistic timeframe based on the template being prescribed in regulation, not from the legislation change. Likewise, if standardisation of terms is a key feature of the template and the single plan, the timeframe needs to be based on when these are prescribed in regulation.

115. It will be necessary to provide for an exemption process to take into account the timing of a council's plan review cycle. Many councils are in the middle of plan reviews or have just finished this.

116. We assume that new service delivery models will be expected – a single plan will require planners within councils to be across both regional and district provisions and applicants are likely to expect joint consenting. It is unclear from the discussion document what is proposed/required here. Again, this shows a lack of implementation analysis.

117. There are some TAs that are in more than one water catchment (and covered by more than one RPS) e.g. Taupo is in four regions and Rotorua is in two. It is also unclear where coastal plans fit into this one plan model - TA boundaries do not extend into the CMA and a TA cannot therefore have a plan over an area it does not have any jurisdiction over?

Simplified plans

118. Most, if not all councils preparing RMA plans have failed to take up the opportunity provided by the 2005 RMA amendment to limit content to objectives, policies and rules. The opportunity for reduced content "trim plans" would satisfy one of the objectives of this reform and would also reduce submissions and therefore appeals by stripping out those methods that are unable to be implemented by the RMA. Proactive methods that require budget provision such as the provision of information, education campaigns, incentives for action and even monitoring, can only be implemented through the Local Government Act 2002 (LGA) subject to inclusion in

Annual and Long Term Plans and subsequent community approval and do not need to be included in RMA plans.

LGNZ position:

Support the objective of fewer resource management plans, but:

a. Do not support the technical exercise of a single resource management plan;

b. Provide for a clear exemption pathway;

c. Provide greater incentives for fully integrated plans than proposed in 3.2.3;

d. Involve local government fully in developing the template;

e. Involve local government fully in developing standard definitions;

f. Any requirement regarding timing for a single plan needs to start at the time the template is provided for in regulation;

g. Any requirement regarding timing for a single plan needs to start at the time standard definitions are prescribed in regulation;

h. Any requirement to give effect to the changes to section 6 and 7 needs to be aligned with requirements regarding the single plan;

i. Allow automatic changes to plans when a national definition takes precedence (i.e. cl 16 or 20A amendment);

j. The legislation needs to be clear about when the Schedule 1 process needs to be invoked. For example, when provisions to be "dropped in" to the template and when amendments are needed as a result of a change to a definition;

k. The timing needs to be realistic and take into account that parts of the process are outside of a council's control. The 5 years referred to in the discussion document is optimistic;

l. Consider whether the provisions of a regional policy statement need to be part of the single plan if the focus is on "rules";

m. Unitary plans should not have to conform to a template until such a time as they are reviewed;

n. Clarify what decision-making processes are envisaged under a single plan. Will regional councils issue regional consents and district councils district consents or is a joint consent envisaged?;

o. Clarify where enforcement responsibility falls; and

p. Consider how when new standard definitions are added, how this will align with the plan making processes.

3.2.2 An obligation to plan positively for future needs including land supply

119. A range of legislative and non-legislative changes is proposed to encourage a more positive future focused approach to planning. These include changes to s 30 and 31 (functions) to

confirm that 'managing for positive effects' is one of council's core functions; and a requirement that councils ensure there is adequate land supply for at least 10 years of projected growth residential land. The 'future focused' approach is to be reflected in the proposed 'single plan' approach.

120. RMA provisions create an envelope of acceptable effects identified through zones and activity class thresholds through which resource use (economic activity) within the region can thrive. RMA plans are enabling. All proactive methods to achieve resource management objectives are provided for under the Local Government Act. Many councils have developed strategic plans under the Local Government Act and the implementation plans under the RMA. The most recent example of this is Auckland – the Spatial Plan which will be implemented by a number of plans including the Combined (Unitary) Plan.

121. We have previously submitted that the interaction of the LGA, the LTMA and the RMA need to be aligned. The lack of legislative linkages between the statutes needs to be addressed to enable more effective planning. This could provide substantially more benefit in terms of consistency and positive planning than the current proposals. Governments of all political stripes have consistently failed to address this issue. The discussion document continues this trend.

122. We also note that the legal effect of plan rules at notification should be reconsidered as this could help with "positive planning" – enabling provisions under the RMA do not currently do not have legal effect at the time of notification. Only those plan rules dealing with resource use (e.g. water) have legal effect at the time of notification. The current situation would not seem to align with Central Government's objectives.

123. With regard to land supply, we commissioned some work[1] which shows that all respondents to the survey indicated that residential land is available in their respective territorial authority area – and in many cases, steps have been taken by a number of TAs to ensure sufficient residential land is available for the next 20 – 30 years.

124. We do question what Central Government wants of councils regarding "positive planning". It is unclear what Government considers is not taking place that should be taking place. There is an implication that local authorities act as a "handbrake" to development and economic activity in their area and we do not accept this. Frankly, all councils want and encourage vibrant businesses and strong infrastructure to support growing their economies. Such activities need to be environmentally sustainable, but the concepts are not mutually exclusive. Pigeon-holing councils as being anti-development is patently incorrect. This particular section of the discussion document is very vague and lacks any credible evidential basis. Rhetoric of this kind only lends itself to poor and uncertain law, as was the case with last year's amendments to the Local Government Act 2002.

125. Section 31 does not currently distinguish between adverse/positive effects with the exception of the specific categories of adverse effects identified in ss31(1)(b)(i)-(iii).

LGNZ position:

a. Clarify what is meant by "positive planning;"

[1] Analysis of residential land availability by Territorial Authority, Resource and Environmental Management Consultants, 22 February 2013

b. Consider the legal effect of rules and whether enabling provisions should have effect at the time of notification (i.e. a return to the situation pre-2009 amendments); and

c. Consider the statutory linkages between of the RMA, LTMA and LGA.

3.2.3 Enable preparation of single resource management plans via a joint process with narrowed appeals to the Environment Court

126. This aspect of the reform package allows district and regional councils to choose to group together and jointly prepare a single integrated joint plan for each district or larger area. It requires a plan partnership agreement between respective councils, pre-notification engagement and collaboration, an independent hearings panel and narrowed appeals to the Environment Court.

127. Aspects of the discussion above under 3.2.1 are relevant here.

128. We support aspects of this proposal and the objective of encouraging a fully integrated joint plan. We consider the incentive offered, on its own (collaborative process and limited role of the Environment Court) is unlikely to be sufficient to encourage councils to initiate this process but may depend on the timing of their review process. Given the costs involved we seek consideration of a fund councils can apply to for costs associated with a joint plan making process.

129. We have sought, in the past, a reconsideration of the role of the Environment Court in the RMA plan and policy making process and we support the proposal to "frontload" the process and reduce the role for the Environment Court. However, plan and policy making is fundamentally the role of elected representatives and the council needs to maintain control of the appointment of an independent hearings panel. There are already many instances where independent commissioners are appointed by councils for RMA plan hearings, often when the subject matter is very technical. Where there is a joint process as proposed by this option, it may be appropriate that an independent Chair is appointed. Councils, however, need to retain control of this appointment process. This should not be prescribed. Again, principles of local democracy apply.

130. We are concerned that the detail of this proposal is not aligned with the collaborative process proposed under the "Freshwater reform 2013 and beyond". Specifically, the incentive offered for the collaboration on water plans is a council-appointed panel comprising a majority of non-council appointed commissioners. This differs to the fully independent hearings panel for the joint RMA plan prepared under a collaborative process.

131. We do not understand the need for any difference between the two processes and consider it will cause confusion. We go further and argue that an independent hearings panel is already a voluntary option and should remain so. Councils should, as a matter of principle, retain control of the appointment process of hearings panels.

132. We also point out that it may not be a straightforward process to determine, for the purposes of a single resource management plan via a joint process, which elements of a plan are fresh-water related and which are not; and therefore which process is to be applied. The submission of Waikato Regional council clearly considers this matter and describes recent practical experience of this.

133. It is likely that any councils considering preparing a joint plan would do so at least partly to effect the changes required by the freshwater reform. Thus, the catchment scale assumes greater significance and it becomes even more important to align the two processes under the reforms. It will be important that any template is able to operate at different scales.

134. We assume that changes to the hearings process would be required and that cross examination would be needed. Recent changes to the RMA mean that all members of a panel considering RMA plan and policy matters will need to be accredited. These changes have not had time to take effect but they will support consistency and increase the capability of hearings panels.

135. A requirement to have an independent hearings panel will significantly increase the cost of hearings. Costs are not recoverable for processes initiated under Schedule 1. We do not support this requirement. Elected members should remain the default and independent commissioners used when a council decides to do so. Once an independent hearings panel is appointed the council loses control of the plan decisions and elected members are no longer making the policy decisions of the council. We seek retaining a panel with a majority of elected members. This, in itself, may act as a disincentive for councils to use, or opt into, this alternative process.

LGNZ position:

a. Greater incentives should be provided for councils to undertake a single plan using a joint process;

b. The collaborative processes for RMA plans should be aligned with the process for freshwater plans; and

c. Independent hearings panel or the appointment of one or more independent commissioners should remain a voluntary option, at the discretion of the councils involved in the joint process.

3.2.4 Empowering faster resolution of Environment Court proceedings

136. This proposal includes increasing the Environment Court's existing power to enforce agreed timeframes (e.g. time period for exchanging evidence); strengthens provisions to require parties to undertake alternative dispute resolution and make any law changes required to deliver the full potential benefits of electronic case management.

137. *Local Government New Zealand* supports these changes and we question whether other factors could be addressed to improve timeliness e.g. specifying a maximum timeframe for the release of a decision post-hearing.

LGNZ position:

a. Support these proposals; and

b. Consider other mechanisms e.g. a maximum timeframe for the release of hearing decisions.

Proposal 3: More efficient and effective consenting

3.3.1 A new 10-working-day time limit for straight-forward, non-notified consents

138. This element proposes: a 10 working – day processing timeframe for consents that meet criteria specified in regulations; a new processing system to reduce the burden on consent authorities; processing at a fixed cost is possible.

139. We note that many councils process, on average, applications for resource consent well below 20 days and we urge you to gather statistics that show the average processing time and then to consider how much of a problem this is in practice. We are advised that most "simple" applications are processed well within this timeframe already.

140. There will be capacity implications for some councils, not necessarily the smaller ones. If a council is not currently processing applications for resource consenting within 10 days then there will be a capacity issue in providing the resource to ensure these timeframes can be met. We question the notion that an additional 10 days will make such a difference to an applicant. In practice we are advised that very few proposals are on such a tight time frame for consent that 10 vs 20 days is significant, and where timing is critical council staff will generally work with the applicant to process the application as quickly as possible. An applicant has the ability to ensure their application is in good shape, meets the s 88 test and factor in the consent timeframes.

141. We also question the principle that some applications should be able to go ahead in the queue (over the standard 20 day).

142. We also note that some councils already offer a "fast track" (five days) for a higher application fee.

143. Because of the need for the legislation to be clear and unambiguous we are uncertain how you would codify a 10 day timeframe. To proceed, the criteria need to be absolutely tight. Even if restricted to controlled activities that have the consent of all affected parties there could be unintended consequences. For instance, controlled activity subdivision typically requires feedback and conditions regarding servicing (vehicle access, roading, drainage engineer, water, stormwater) and sometimes a traffic engineer. A 10 day turn-around is generally not feasible. They may also be dependent on amalgamation condition approval from Land Information New Zealand, which has a 10 working day target from when LINZ receives the request for approval. If these applications are included in the package then the material will need to be provided prior to an application being lodged and the time spent providing this to the applicant needs to be cost recoverable. We also note that it is likely to be to an applicant's advantage to lodge the application as there is a structure for providing the advice. If it is done prior to the application being lodged the applicant will have to manage this and it is unclear how this could practically be achieved and how any conflicts would be resolved. We do not consider subdivision applications would be suitable candidates for the new 10 day timeframe.

144. If this proposal does proceed then to give it the best chance of providing tangible benefits to consent applicants, it should be accompanied by measures to enable faster processing time. For example, only having to record and report on total processing days and simplified requirements in terms of the content of notification decisions and substantive consent decisions. Reducing some of these process aspects will mean quicker, cheaper resource consents.

145. There are various matters that need greater thought, in conjunction with local government. For instance what is a non-notified application? Is it one that is prescribed as such in a plan (i.e. express approval) or does it include an application that passes the tests in section 95 for notification/non-notification?

146. Councils need to be involved in progressing the scope of this element of the reform package. Drafting certainty is essential with respect to: very precise identification of eligible activities/applications in order to avoid legal challenges; the timeframe for rejecting an application (s88(3)); application of s 91, further information requests (s 92), commissioning of reports, notification decisions and the substantive decision-making test.

LGNZ position:

a. Work with local government to further refine this element of the reform package.

3.3.2 A new process to allow for an approved "exemption" for technical or minor rule breaches

147. This proposal gives councils the discretion to classify an activity as "deemed permitted" where very minor or technical breaches are the only triggers for consent requirement.

148. It is proposed that factors relevant to the exercise of discretion are: the rule breach is very minor; neighbours are unaffected or affected to a minor degree; the environment is affected to a minor degree (or less); plan objectives and policies are not compromised by granting an exemption; no other consent permissions are required; and there is no need for any technical conditions to control effects.

149. We support the principle behind the proposed approach but the local government sector wants to be involved in assessing alternatives that might deliver the same benefits. Some ideas worth exploring are:

- Confirming/providing the ability for a plan to provide for, as a permitted activity, a breach with written approval provided (see below);
- A simple "authorisation" of a "deemed permitted" activity; and
- An alternative to an application for a certificate of compliance.

150. A number of councils already include rules in their district plans which essentially provide for this. Typically, the permitted activity rule provides for a breach of a yard requirement if the written approval of the adjoining neighbour is provided. This is done when an application is made for a building consent.

151. Other plans allow for encroachments of the maximum permitted height for masts, chimneys etc and others allow intrusions into sunlight access planes (also known as recession planes or daylight standards) if the written approval of affected parties is provided.

152. It is important to get the scope right – and if there is an element of assessment involved - e.g. to determine whether effects are *de minimis* or minor or whether there are affected parties then cost recovery of officers' time needs to be provided for. If there are a number of criteria proposed then a recorded assessment and a site visit are likely to be needed to determine whether the criteria are all met. If an assessment is required against criteria then a one day turnaround will not be practicable to administer.

153. Another option that could be explored is the potential for "registration" of an activity that could otherwise be permitted but that a council needs to know about and potentially charge for especially for resource monitoring/management purposes - eg bores, gravel extraction etc, small water takes.

154. We note that the changes to s 88 and the 4th Schedule in the 2012 Bill run contrary to the streamlined process that Central Government is seeking – the 2012 Bill requires a Rolls Royce process for every application, even when it is not warranted.

LGNZ position:

a. Work with local government to further refine this element of the reform package; and

b. Retain this as a matter of discretion for local authorities.

3.3.3 Specifying that some applications should be processed on a non-notified basis

155. The proposal is that Regulations will direct non-notification as a nationwide standard for specified activities which would have nationwide effect.

156. It is unclear what the issue is here - 94% of applications for RC are already non-notified and some of these would be subject to non-notification provisions. This proposal has the potential to create conflict with other plan provisions that have similar effects and that would not be subject to non-notification provisions.

157. If this proposal is to be advanced we support it if it is in the context of an NES for an activity i.e. as part of the NES it states that a particular provision is non-notified and there shall be no affected party approvals required. This would ensure that national non-notification requirements were 'in context' with the broader planning provisions relating to that activity. It could also be a good fit with the amendments to NPS and NES provisions proposed in Section 3.1.4 of the Discussion Document.

158. Otherwise, *Local Government New Zealand* does not support this proposal as we consider decisions about notification provisions needs to be made by the local community and as currently happens. Many plan provisions already contain specific express approval (i.e. non-notified and no written approvals required).

LGNZ position:

a. Do not support.

3.3.4 Limiting the scope of conditions that can be put on consents

159. This element proposes strengthening the RMA provisions that set the types of consent conditions that can be placed on different classes of consents, specifically: a condition must directly relate to the provision that has been breached; the adverse environmental effects of the proposal and content is volunteered/agreed to by the applicant.

160. We are concerned this proposal has not been clearly thought through and overstates the case for change. Our legal advice is that the description of the existing RMA provisions and associated case law is inaccurate and this is surprising. Accordingly, we find there is a serious question as to whether the perceived problem actually exists. Even if there are situations where conditions are determined to be too onerous there may be other means by which these situations can be addressed.

161. The suggested focus on plan breaches or adverse effects overlooks the other aspects of decision-making on consent applications that can justify the imposition of conditions i.e. Part 2, objectives and policies etc. The relationship between activity classification and consent conditions needs to be thought through and is not mentioned in the discussion document. Not all activities are amenable to a clear quantifiable-breach/related effects analysis – the assumption that all rules operate like bulk and location controls is not accurate.

162. Discussions with councils indicate that it is common practice to seek agreement on conditions prior to issuing, a decision and objections to conditions under s357 are rare.

163. It is important to consider that it is often the conditions that enable the grant of a resource consent and/or that effects can be mitigated to effects that are minor so no parties are considered to be affected. Increased rigidity may mean that many applications that are currently approved on the basis that conditions appropriately mitigate adverse effects, may need to be declined or more parties considered to be adversely affected.

164. We also note that some of the driver for this may not be related to conditions imposed by a consent authority, but are covenants imposed by a developer on a certificate of title. Councils do not have control over these. Examples we are aware of include matters such as specifying that a clothesline cannot be located in a front yard and that particular materials be used in the construction of a dwelling.

LGNZ position:

a. Do not support.

3.3.5 Limiting the scope of participation in consent submissions and in appeals

165. Amendments are proposed to the consenting process to limit the scope of submissions and third party appeals to only the reasons the application was notified and the effects related to those reasons. Where a neighbour does not give written approval, prior to making a decision, councils could invite comment on the proposal by a particular date and limit comment to only those aspects of the development that would affect the neighbour leaving other maters out of scope.

166. We can understand the intent behind these suggestions but we do ask what the scale is of the actual problem. The consequences (as described below) are unlikely to justify the sort of intervention proposed.

167. We are concerned that even more robust notification decisions will be required by consent authorities as these will determine participation and scope by a party in the resource consent process. A decision would have to be tight to avoid challenge - notification decisions are already very time-consuming.

168. There will be implications for plan drafting e.g. plan rules that use a single trigger to classify an activity as fully discretionary may need to be rethought. The full range of issues generally arising in the context of a discretionary activity classification will not be the subject of submission – although the council's notification and substantive decision-making will not be limited in this way.

169. We are concerned with the workability of this proposal and consider it has not been well thought through, particularly in relation to the various activity classifications. It may be more workable for controlled and discretionary (restricted) activities but not for those activities that are fully discretionary and non-complying.

170. We do not think the scale of the "problem" justifies this solution. Only 6% of applications are notified, including limited notified – this needs to be considered. Recent amendments have dealt with vexatious or trade competition and the provisions are sufficient to deal with these submissions.

171. Submissions can be a useful process for identifying issues that the officer or advisor may not be aware of, such as how the local roading network actually works in practice. The proposed provisions would force councils to specify effects and inadvertently exclude people from the process. The potential for litigation and challenge will increase.

LGNZ position:

a. Do not support.

3.3.6 Changing appeals from *de novo* to merit by way of re-hearing

172. Appeals on consent hearings would be a rehearing rather than *de novo and* Tribunal style resolution is proposed for minor matters. This is identified as future work

173. *Local Government New Zealand* supports a more timely resolution of appeals.

174. There will be implications for the council process associated with the proposal for a rehearing rather than *de novo*. Evidence given at the council hearing – including the council's evidence will form the basis of evidence on appeal. The robustness and quality of that evidence will consequently be of heightened importance. However we support this in principle and wish to work on the details. We also wish to work with central government on the details of the second part of this proposal i.e. the Tribunal style resolution proposed for minor matters. This is identified as future work. We are interested in the details and how this will work alongside the proposal that an appeal on a consent hearing is a rehearing rather than *de novo*.

LGNZ position:

a. Support this proposal subject to better understanding of the scale of the impact on council decision-making at first instance; and

b. Work with local government on the details of both proposals.

3.3.7 Improving the transparency of consent processing fees

175. It is proposed that: councils will be required to set their own fixed charges for certain types of resource consents – based on, for example, the type of activity, zone, level of non-compliance, activity status and a guarantee full and final processing costs. Councils would retain the ability to fix charges in accordance with the Act. Where fixed charges are not required, councils would be required to estimate the additional charge to the applicant (incl 3rd party charges passed on) in advance. It will be mandatory to provide an estimate.

176. We are interested in establishing how much of a problem this is now. Note the Productivity Commission's only recommendation is that: *Regulations should be reviewed to remove specific fee amounts and make those fees at the discretion of local authorities, subject to the requirements of section 101(3) of the Local Government Act 2002*.

177. The discussion document does not accurately cover this matter. Section 36 of the RMA provides for councils to "fix" a charge – it does not require "fixed charges". The accuracy of estimates that must be made before processing of consents is questionable and therefore of little practical value and will further divert staff time away from processing resource consents. When it is important, an applicant requests an estimate and the time spent preparing it.

178. Less well prepared applications take longer to process and a set or standard charge would result in them being subsidised at the cost of the well prepared applications. Likewise, some "simple" applications become less than straightforward and it is not always possible to identify these when they are lodged. The Act already provides for an applicant to request a fee estimate – we do not support this being mandatory. The status quo works well. In addition, would a council be able to recover their time to provide a fee estimate? We consider they should be able to, as is currently the case.

179. An alternative approach is to work towards some consistency across the sector but it should not be required. Some councils will have higher overheads which would work against this but we consider that a useful starting point is to gather this information across the sector. This exercise should be driven from the sector.

LGNZ position:

a. Do not support the proposed approach. Councils need to be able to recover costs and subsidising by ratepayers or other applicants of poor quality applications is not appropriate. Fee estimates do not need to be made mandatory.

3.3.8 Memorandum accounts for resource consent activities

180. Memorandum accounts are a way of disclosing the accumulated balance of revenue and expenses incurred in the provision of certain outputs or services. It is proposed that councils will be required to publish memorandum accounts specifically for their consenting activities.

181. *Local Government New Zealand* supports this proposal as it will increase transparency of cost setting and recovery processes however question whether it is necessary, given existing reporting requirements under the Local Government Act 2002 (revenue and financing policy, funding impact statement). If this progresses appropriate wording needs to be carefully considered. Councils will need sufficient time to make the transition if they do not currently have the financial template.

LGNZ position:

a. Support this concept but question whether it is necessary given existing reporting requirements under the Local Government Act 2002 (revenue and financing policy, funding impact statement).

3.3.9 Allowing a specified Crown-established body to process some types of consent

182. This proposal would expand the call-in procedures or create new legislation to enable the Minister to designate nationally important issues, e.g. availability of land for housing, to be eligible for an alternative consenting process in specified areas or circumstances. A dedicated Board of Inquiry or other Crown body would process applications in a 3-4 month timeframe.

183. *Local Government New Zealand* does not see the need for this – councils have the capacity to determine applications in a timely way (RMA survey shows this). There are a number of alternative consent paths already for applications that are not "nationally significant" – direct referral to the Environment Court and choosing an independent hearings panel. We do not see the need for a new model. A Crown-established body for nationally significant proposals is sufficient (i.e. the EPA). Yet again, this raises fundamental issues of local democracy and should

not lightly be introduced without a clear evidential basis to support the problem. Once again, the discussion document does not provide the requisite level of evidence.

184. There are a number of matters that have not been addressed in the discussion document: what sort of activities would be suitable candidates for the proposed process; what would the role of the local authority be and would there be appeal rights; would the local authority have a role in deciding/recommending whether an application can proceed through this alternative process (as per the current direct referral process?); will applicants have discretion as to whether they use the alternative process; and will local authorities have ingoing enforcement responsibility for a decision made through the new process?

LGNZ position:

a. Do not support.

3.3.10 Providing consent authorities tools to prevent land banking

185. It is proposed that conditions are set when approving section 223 survey plans to require the construction of subdivision infrastructure within a certain timeframe after s223 certification (i.e. less than the current 3 year default period).

186. We can support this if there is proper protection for consent holders. The local government sector needs to be involved in developing this concept including what the mechanism will be for relating any such proposal to the section 223 survey plan approval or the section 224 completion certificate. It is assumed the intention is to increase flexibility around lapse times, rather than to provide a power for Council to compel a consent holder to carry out work.

LGNZ position:

a. Support this proposal in principle subject to being involved in further work to develop the concept.

3.3.11 Reducing the costs of the EPA nationally significant proposals process

187. This proposal involves: making the content of public notices more useful and relevant (summary and description); a Board of Inquiry would be required to have cost-effective processes; parties would be provided with documents electronically; the draft decision stage would be deleted or reduced in time; clarify that the EPA can provide planning advice to the Board of Inquiry if requested; and consent process can be stopped if charges not paid to date.

188. *Local Government New Zealand* supports the proposed approach. We support any rationalising of the process and encourage discussion between the EPA and councils which have been involved in BoI proceedings about how improvements can be made. We do not support the proposal to reduce the time for comment on the draft decision from 20 working days to 10 working days given the complexity and length of these.

LGNZ position:

a. Support the proposed approach but do not reduce the time from 20 down to 10 days for comments on the draft decision.

Proposal 4: Better natural hazard management

3.4.1 Learning the lessons from Canterbury

189. This proposal: adds natural hazards added as a matter in the principles of the RMA; amends section 106 to ensure all natural hazards can be appropriately considered in both subdivision and other land-use consent decisions; provides that the full risk of natural hazards – both magnitude and likelihood be taken into consideration.

190. There were two points that were included in the TAG report that have not been followed through in the proposals relating to hazards in the discussion document. We would like these to be included.

191. The first is linking the RMA and the Civil Defence and Emergency Management Act 2002 (CDEM Act). The CDEM Act requires the "reduction of risk" which would then need to be managed through RMA processes. Currently there is only a weak link between these two Acts. These changes to the RMA are an opportunity to bring effective risk management through better integration of the two relevant pieces of legislation.

192. *Local Government New Zealand* has considered the proposed changes to sections 6 and 106. We are supportive of the proposed amendments, with the proviso that the wording of section 6 is carefully considered, based on our previous discussion under Proposal 1.

193. We want to ensure the amendments address deficiencies in the RMA and include all natural hazards – the most likely natural hazard is flooding.

194. The discussion document notes that section 106 of the RMA depends on the likelihood of an event, rather than the potential impact it would have. *Local Government New Zealand* strongly agrees that greater emphasis in consent decisions should be placed on the impacts. The proposed changes do not go far enough in prioritising avoidance over mitigation.

195. The proposed changes do not appear to require decisions makers to take account of risks to the community that endure (usually in perpetuity) regardless of whether the applicant accepted the risks at the time an application was made.

196. There are inconsistencies in the term 'natural hazards' between the RMA definition, section 106, the Civil Defence and Emergency Management Act 2002 (CDEM Act) and Local Government Official Information and Meetings Act 2004. This inconsistency should be addressed.

LGNZ position:

a. Support the proposed approach but the priority should be on avoidance over mitigation;

b. Ensure that all natural hazards are captured; and

c. Work with local government to develop these provisions.

Proposal 5: Effective & meaningful iwi/Maori participation

3.5.1 Enabling more effective iwi/Maori participation in resource management planning

197. There are two elements to this proposed approach.

1. *Clarifying the role of iwi/Maori in plan-making processes:* where a council does not have an arrangement in place with local iwi it would be required to establish an arrangement that gives opportunity for iwi/Maori to directly provide comprehensive advice during the development of plans; the arrangement needs to allow iwi to provide advice on proposed policy ahead of council decisions on submissions with this advice having statutory weight under the RMA; this arrangement only applies where there is no Treaty of Waitangi settlement agreement or other arrangements that meet or exceed the specifications.

2. *Improving existing tools in the RMA:* provide consistent requirements for consultation with iwi on NESs; align with requirements for NPSs; improve the ease of use of existing tools for participation; develop criteria for Joint Management Agreements and transfers of RM responsibilities under the RMA amended to make them easier to use for iwi; improving the awareness and accessibility of iwi management plans.

198. *Local Government New Zealand* supports the proposed approach in principle but seeks involvement in developing the concept as there are outstanding questions, for example, how much weight does the advice provided during the development of plans have? How does this proposal align with the process proposed under 3.1?

199. How would it be determined/measured as to whether the nature of the arrangement is good enough?

LGNZ position:

a. Support the proposed approach; and

b. The concept needs to be further developed with local government.

Proposal 6: Working with councils to improve practice

3.6.1 Improving accountability measures

200. The proposed approach includes providing local authorities with greater clarity on what they are expected to achieve, how performance would be measured and what they are expected to achieve via an expectations system likely to specify key performance indicators: customer-centric (consenting and plan making) and environmental and economic outcomes (e.g. water quality). It may consist of: requiring performance information collected to be made publicly available; enabling Government and the community to set, in collaboration with councils, clear expectations; and enabling the Minister to specify how expectations are reported.

201. This is a very complex area and needs to be developed in collaboration with local government. We acknowledge that this is taking place on the expectations framework and that local government is involved.

202. We support the objective of the proposed approach. We note that the performance measurement of councils is too focused on the speed of consent processing rather than the environmental outcomes and we support a move towards an outcome focused performance assessment.

203. There are a number of different mechanisms and associated reporting requirements being developed currently including: RM Reform Bill regulations for state of the environment monitoring; attributes to be managed under the Freshwater reform 2013 and beyond; the expectations framework and national monitoring system; and the biennial survey. We look forward to these mechanisms being simplified to avoid duplication of monitoring and reporting.

LGNZ position:

a. Support for the proposed approach; and

b. Work with local government to develop the proposal.

Proposal 7: Other matters

204. The sector has also identified other matters which we consider warrant legislative change. We have made these known to officials in the past and it would appear to be a good opportunity now to progress these. The 2012 Bill did not include the matters listed below:

- Expressly allow applications for multiple consents to be 'bundled' and therefore treated as such for processing timeframes (eg, clock stopping, time extensions);
- Specifically provide for joint processing with regard to clock stopping etc;
- Give consent authorities the ability to require mandatory pre-lodgement meetings (at their discretion);
- Lapse all applications automatically after two years if there is no action by the applicant; and
- Shift Right of Way (ROW) approvals and Road Stopping out of the LGA into the RMA.

Changes to Specific Sections of the RMA

- Review the definitions of 'river' and the definition of 'bed' in relation to any river;
- Delete s28A(4) which exempts the Minister of Conservation from being charged for information requests;
- Review s36 to remove confusion and clarify exactly what a council can and can't do in terms of charging for resource consent processing;
- Amend s37 to provide for time extensions beyond doubling without the applicant's agreement in situations where there are competing applications for the same resource and the first application must be decided first, or add a clock stopping provision to s88E;

- Clarify s41 (protection of sensitive information) in terms interface with LGOIMA;
- Section 89A requires circulation of certain applications to Maritime New Zealand (MNZ). We suggest either a clock stopping provision in s88E or alternatively provide a specific ability to extend timeframes under s37 for such applications;
- Amend s91 to make it clear that it can be used for applications which are not to be notified or go to a hearing;
- Amend ss99(5) and 99(6) to recognise situations when a hearing is not required;
- Amend either s104(6) or s104A to make it clear that the consent authority may decline applications for controlled activities when it has inadequate information to determine the application (not whether it is in fact a controlled activity);
- Amend s104A to clarify that consents for controlled activities may be declined if they are part of a 'bundle' of consents;
- Redesign or simplify (or delete altogether) ss124A-C regarding resource allocation so that the sections are comprehensible and practicable - the current provisions are neither;
- Amend Sections168 and 168A relating to Notices of Requirement (NORs) to expressly allow partial withdrawals of requirements; and
- Amend Sections 168A, 171 and 176A to clarify the relationship between conditions and outline plans, and whether conditions on NORs can direct that certain things be addressed in outline plans.

"Improving our resource management system"

Economic commentary on Government's discussion document

NZIER report to LGNZ

2 April 2013

About NZIER

NZIER is a specialist consulting firm that uses applied economic research and analysis to provide a wide range of strategic advice to clients in the public and private sectors, throughout New Zealand and Australia, and further afield.

NZIER is also known for its long-established Quarterly Survey of Business Opinion and Quarterly Predictions.

Our aim is to be the premier centre of applied economic research in New Zealand. We pride ourselves on our reputation for independence and delivering quality analysis in the right form, and at the right time, for our clients. We ensure quality through teamwork on individual projects, critical review at internal seminars, and by peer review at various stages through a project by a senior staff member otherwise not involved in the project.

Each year NZIER devotes resources to undertake and make freely available economic research and thinking aimed at promoting a better understanding of New Zealand's important economic challenges.

NZIER was established in 1958.

Authorship

This report was prepared at NZIER by Peter Clough, Derek Gill and John Yeabsley, with peer review from a legal perspective by Dr Matthew Palmer

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1. Summary

Local Government New Zealand approached NZIER for an independent assessment of Government's discussion paper on "improving our resource management system" to accompany their submission. This short commentary provides an assessment with particular focus on two matters arising from the government's discussion document proposals:

- the philosophical shift in emphasis in the discussion document on the purpose of the Act, from managing externalities to balancing a mix of objectives; and
- proposed changes in the recourse of objections and submissions to the Environment Court.

Both these have particular implications for local democracy as explained below.

Synopsis of discussion paper

The premise of the paper is that the RMA and its implementation are currently too slow, costly, and impose too much uncertainty on developers and residents to make efficient decisions in use of resources. It claims that practice under the Act has been too oriented towards environmental protection, and not given enough weight to benefits of economic development. The proposed solutions canvassed in the paper are:

1. Improve national consistency with greater guidance from central government, including providing standardised templates for presenting local plans, and wrapping up the matters in RMA's section 6 and 7 into a single section with no hierarchical distinction
2. Require fewer and better integrated plans among local authorities, basically a single all-encompassing plan for each council rather than the current multiplicity [average 2.17 per council], and encourage collaborative plan making across councils
3. Increase emphasis on using planning to deliver positive outcomes and provide for such matters as future land supply for development and infrastructure
4. Improve efficiency of consenting by reducing the range of activities requiring consent and prescribing processing times proportionate to the scale of effect being managed
5. Limit the scope of participation in consent submissions and appeals, and remove the judiciary from being placed in the position of having to determine values or policy, a role more appropriately played by publicly accountable, elected representatives
6. Beef up requirements for councils to deal with natural hazards under the Act
7. Improve participation of Maori/iwi bodies and guide councils to adopt best practices in implementation and reporting against the Act's requirements (with a sub-text of enabling better comparison and benchmarking of councils' performance).

These are high level goals which it is hard to argue against. The detailed proposals are more of a mixed bag. We limit these comments to matters about which law and economics have most to say about the discussion paper, particularly points 1, 3 and 5 above.

Summary of this commentary

This commentary covers two main areas, the effect of its proposals on the purpose, approach and structure of the Act and implications for local democratic and other decision processes. The main points are summarised below.

- The intent of the discussion paper in removing undue costs and uncertainty from resource management processes is unquestionably beneficial, but the paper's analysis and evidence base is not compelling in supporting its conclusions and proposals for improvements. Those proposals are so widespread and disparate that it is difficult to foretell what their combined effect will be, and the paper has no cost benefit analysis of implementing what it proposes.
- The Act as originally designed is consistent with controlling externalities. It removed from local bodies the requirement to achieve "wise use" of land and resources in the previous Town and Country Planning Act, which had led to prescriptive and costly implementation.
  - While views may have changed since the RMA's enactment to a more pro-active role for local government in enabling growth supporting activities, the externality focus remains valid as a guiding principle for public sector actions under the Act. But this is not evident in the discussion paper.
- Section 5 of the Act expresses its purpose – sustainable management. It is that concept that involves the balancing of environmental and economic outcomes, not sections 6 and 7 as implied by the discussion paper. Proposed changes to sections 6 & 7 will change the balance but it is not obvious that they will improve the achievement of the purpose of the Act.
  - Elevating infrastructure and built environment to the same level as the current section 6 matters ignores the basic characteristic that infrastructure and built environment are a different type of collective good from the open access, common pool resources of the current section 6 matters, and they do not require the sort of intervention as required by section 6.
  - Local government's role with respect to such built infrastructure is in providing for its future expansion and avoiding undue future costs, and as such is similar to dealing with natural hazards and a single new guiding principle could cover all of these.
- Most problems identified with the RMA relate to execution rather than design, or from a lack of guidance on execution. A weakness of the RMA from the outset is that, having identified matters of national importance to be recognised and provided for, government provided no guidance on how to do that until belatedly – 15 years after the Act came into force – it started using national policy statements and national environmental standards. That omission has contributed to the delays, uncertainties and

recourse to the Environment Court that the discussion paper takes aim at, and redressing that omission would do much to remove the problems presumed by the paper.

- The prolongation of consent processing is exacerbated by the Environment Court acting as a tribunal with broad inquisitorial scope. Narrowing the focus of appeals to points of law would improve the incentives for disclosure of evidence on evidential issues to earlier in the consenting process. This is likely to reduce the cost and complexity of those applications that go on to appeal, but probably increase the cost and complexity of the initial hearing stage of all proposals. This may be the outcome of the paper's proposals to limit the participation in and scope of appeals.
- Uncertainty over the relative value of environmental and economic effects would continue to arise even with reduced recourse to the Environment Court, and it may still end up as arbiter of public policy and values. Creating a repository of knowledge on these matters in a secretariat, perhaps located in the EPA or some other body, could provide continuity and guidance for councils, regional hearing commissioners and the Court, improving the consistency and certainty for those embarking on resource management processes.

2. Commentary

2.1. The paper's problem definition, analysis and proposed solutions

While the paper strongly states the need for improvements, it contains little evidence of the analysis it has undergone to reach its conclusions. The justification for some of them is based more on assertion than evidence. The paper relies heavily on quoting previous reports and studies that support its assertions by reputable bodies such as the Productivity Commission and Motu. It does not establish a clear framework for what objectives the Act is intended to achieve, the problems with its implementation, and the likelihood of its proposed solutions remedying them.

That is a significant omission, because it is hard to assess the relative scale and significance of the different problems claimed with the Act, or the mutual compatibility of the various proposed improvements. The risk this poses is that in changing many different aspects of the Act simultaneously, it is difficult to predict what the combined impact and response will be. Also significant is that the paper makes no attempt to consider the costs and benefits of the changes it proposes, even in a qualitative sense – which is ironic, given the tightening requirements for councils to consider costs and benefits of their actions being proposed in the Resource Management Reform Bill before Parliament at the moment.

While the paper defines problems with the Act in terms of its processes being too costly, too slow, adding too much uncertainty for private sector decision-makers, and being too biased in favour of protection of environment, these problems all beg the question, compared to what alternative? Figures from the MfE's monitoring of the Act suggest that most consent applications are approved within required timeframes. That fact alone does not prove that costs and delays are not having an adverse effect on economic development but it does suggest that problems may be concentrated on a minority of applications with particular characteristics, which would be more effectively addressed through measures targeted at those characteristics, than with general reform of the Act. In short, the case for the mix of proposed changes, either singly or in combination, is not compellingly demonstrated.

The discussion paper propose changes in the Act's structure which mark a philosophical shift from the original approach of the Act.

2.1.1. The purpose and approach of the RMA

The RMA emerged from the wide-sweeping economic reforms of the 1980s with the aims of:

- Consolidating functions of diverse legislation and many special purpose bodies
- Promoting sustainable management – which is consistent with controlling economic externalities

- Providing a purpose for the two-tier local government structure created by the 1989 reforms, and its balance between empowering localised preferences and realising economies from scale
- Complementing the regulatory role with some strategic or structure planning – but as such planning has fiscal implications for local bodies the RMA supplements other legislative powers of councils, such as those under the Local Government Act (2002) and the Land Transport Management Act (2003).

The control of externalities is based on the market failure rationale for government intervention. It is still valid and provides guidance on what's covered, who does what, and how to go about sustainable management. In particular:

- Externalities are effects of activities that fall on third parties without invitation or compensation, and may be a source of real and widespread cost across the community and economy. Government intervention may be less costly and more efficient at managing these costs than alternatives such as common law remedies that are hindered by poorly defined property rights and free-riding on collective remedial actions
- Externalities occur at different scales and can best be managed by collective bodies at different scales, so they provide a rationale for the split of responsibilities between central and local government. In practice local governments acquire a range of functions and involve some compromise between being small enough to represent the preferences of communities of interest, but also large enough to achieve the capability and economies that larger scale and scope can provide. But the extent and geographic spread of externality effects still guides the distribution of powers and functions between government bodies, and is reflected in the current split of central, regional and territorial local government in New Zealand

In essence, viewed through an economic lens, the RMA potentially provides an alternative mechanism to the market for revealing the value of resources subject to market failure.

2.1.2. The structure of the Act

The RMA's stated purpose is "sustainable management of natural and physical resources" which section 5 describes (paraphrased) as managing them in a way or at a rate that enables people and communities to provide for their economic (and other) well-being while

- sustaining potential of natural and physical resources (excluding minerals) to meet reasonably foreseeable needs of future generations,
- safeguarding life-supporting capacity of air, water, soil and ecosystems,
- avoiding, remedying or mitigating adverse effects on the environment.

Section 5 embodies the balancing between economic well-being and environmental protection. It can be interpreted like an optimisation routine: enable activities that maximise welfare benefits, subject to constraints observed for sustaining potentials, life-supporting capacities and containing net adverse effects at a low level. These bullets, particularly the last, can still be informed by some comparison of marginal

benefit and marginal cost of any restraining measures, so economic trade-offs are embedded in the very purpose of the Act.

Section 6 specifies matters of national importance that must be recognised and provided for. This constitutes a reminder by Parliament to all decision-makers not to under-weight the considerations identified in section 6 – i.e. they have a degree of legal priority as relevant considerations. These section 6 matters are mostly of natural and environmental resources, and also some high level rights (access to waterways, Maori cultural and customary activities). Those natural and environmental resources are common pool resources, with non-excludable benefits subject to free-riding behaviour, and susceptible to degradation by externalities, so they fit naturally into an externality focus.

Section 7 contains other matters that decisions under the Act should have particular regard to – a lesser requirement than for section 6. These other matters are a mixed bag of principles to be observed (stewardship, efficiency of resource use and development), physical resources such as trout and salmon habitat, and, since the 2004 amendments to the Act, some infrastructure matters such as the benefits of renewable energy and energy end use efficiency.

The discussion paper, however, implicitly views the balancing of economy and environment as being in sections 6 and 7, observes section 6 as having mostly natural and environmental resources and a hierarchical priority over section 7 matters such as resource use efficiency, and views this as a problem to be solved by consolidating a range of section 6 and 7 matters into a new section 6, with no hierarchical distinction between them.

The new Section 6 is described as "principles", although this rather obscures the biophysical characteristics of many of these matters. A new section 7 proposes a list of "methods" which must be used by decision makers, but these are more accurately described as principles to be observed in undertaking functions under the Act, such as using best endeavours to ensure timeliness and using plain language in planning documents.

The comparison of the existing and proposed new sections 6 and 7 is outlined below.

	Current Section 6		**Proposed Section 6**
	Matters of national importance - recognise and provide for		*Principles - recognise and provide for*
	protection from inappropriate subdivision of		protection from inappropriate subdivision of
a	-natural character of coasts and wetlands	a	-natural character of coasts and wetlands
b	-outstanding natural features and landscapes	b	-outstanding natural features and landscapes
f	-historic heritage	h	importance and value of historic heritage
c	protection of areas of significant indigenous vegetation and habitats of fauna	c	protection of areas of significant indigenous vegetation and habitats of fauna
d	maintenance and enhancement of public access to coasts and water bodies	d	value of public access to coasts and water bodies
e	relationship of Maori and their culture with ancestral lands and resources	e	relationship of Maori and their culture with ancestral lands and resources
g	protection of recognised customary activities	f	protection of protected customary rights
	Current Section 7	i	impacts of climate change
	Other matters - have particular regard to	k	effective functioning of the built environment
a	Kaitiakitanga	m	efficient provision of infrastructure
aa	ethic of stewardship	l	risk and impacts of natural hazards
b	efficient use and development of natural and physical resources	g	benefits of efficient use and development of natural and physical resources
ba	efficiency and end use of energy	j	benefits of efficient energy use and renewable energy generation
c	maintenance and enhancement of amenity values	n	areas of significant natural habitat, including trout and salmon
d	intrinsic values of ecosystems		**Proposed Section 7**
f	maintenance and enhancement of quality of environment		*Methods - all…must*
g	finite characteristics of natural and physical resources	1	ensure timely, efficient and cost-effective resource management processes
h	protection of habitat of trout and salmon	2	In policy statements and plans, include only matters within scope of Act, use plain language and avoid repetition
i	effects of climate change	3	have regard to voluntary environmental compensation, offsetting or similar measure
j	benefits derived from use and development of renewable energy	4	promote collaboration between local authorities on common resource management issues
		5	achieve appropriate balance between public and private interests in the use of land

While some matters are unchanged between the current and new proposed section 6, some have had minor wording changes. Adding "benefits of" to efficient use and development of resources and efficient energy use is superfluous, as efficiency implies a high ratio of benefits to costs. Providing for "the value of" public access to coasts and water bodies could be interpreted differently from providing for maintenance and enhancement of public access to coasts and water bodies. However, these drafting issues would no doubt be revisited by Parliamentary Counsel Office before any legislative amendments are introduced into the House in any case.

A more significant difference in the proposals is that the new section 6 contains a mix of the natural and physical resources that are fundamental to the definition of sustainable management, and other matters that are not. Matters such as outstanding natural features and landscapes, coasts, indigenous flora and fauna and historic heritage are public goods in the sense that they provide collective benefits to the wider community which cannot all be appropriated by those on whose land they occupy; they are subject to natural processes whose disruption could produce long term and costly to repair damage; and result from relationships that transcend individual owners' property which require guidance from a collective authority. These matters fit with the role of the RMA as an alternative mechanism to markets for revealing public preferences over collective goods.

But new matters proposed for the new section 6 do not fit that description so well: infrastructure and the built environment do not produce non-appropriable services that are hard to replace in the way that the natural environmental resources do. Elevating them to the same level of importance as the original section 6 matters indicates confusion over the purpose of the Act, and a departure from (or perhaps an unconscious loss of understanding of) the economic rationale of controlling externalities which is required for socially efficient use and development of resources. This is illustrated in the table below, which distinguishes public goods according to the rivalry and excludability of the services they provide. Whereas most infrastructure tends towards the high excludability characteristic that enables them to be provided as private or tolled goods, the natural and environmental matters in the current section 6 tend towards the low excludability characteristics of public goods, meaning that they are owned by no-one and not amenable to market trading, and are hence more in need of management by a collective authority such as that which the RMA bestows on local government.

CHARACTERISTICS OF INFRASTRUCTURE SERVICES: RIVALRY AND EXCLUDABILITY			
		Rivalry in consumption	
	Low	Medium	High
Excludability of consumption	*Public goods*		*Common pool goods*
Low	Traffic control on roads, airports/airways, harbours		Urban tertiary roads
Medium	Railway switching & signalling; National trunk roads, rural tertiary roads; urban transport signalling	Surface irrigation dams & canals; secondary roads	Water supply piped - common terminal equipment (e.g. fire hydrants)
High	Wastewater management, street sewers, treatment plant & pumping stations	Airport runways & gates; Ports and piers; Railway railbeds; Telecomms basic networks, local & long distance; Mass transit tracks & rails	Airport ground services; Power generation, transmission, distribution; Loading equipment for ports, rail & air services; terminal equipment in telecomms; piped water terminal equipment
	Toll goods		*Private goods*

Source: NZIER, adapted from Kessides 1993[1]

[1] Kessides, Christine (1993b) 'Institutional options for the Provision of Infrastructure.' World Bank Discussion Paper 212, 1993.

Infrastructure and built environment are relevant to the Act in so far as making provision in plans for their future expansion – designating corridors for new infrastructure links or providing for connections between national and local networks – may better fit with sustainable management than unfettered development across the district. That may avoid future costs for the economy in the same way as restricting certain activities in high hazard zones. However, it would be clearer for section 6 purposes to describe those matters in more generic terms, such as the avoidance of activities that create costs for the future (contrary to sustainable management) than to define built structures that are commonly privately provided and owned as if they are natural and physical resources. To do so as in the discussion document's proposals simply creates incentive for lobbying to obtain private benefit.

2.2. The role of local democratic and other decision processes in revealing value and achieving sustainable management

The discussion paper has proposals to change recourse to objections and submissions to the Environment Court. This could have implications for local representation, by changing the balance of decision making between local bodies and the Court.

2.2.1. The strengths of local self-determination

The purpose of local government can be viewed in economic terms as providing local public goods and dealing with local externalities by a collective authority most affected by them. The strengths of local self-determination have been summarised by the Productivity Commission in its discussion of subsidiarity in its review of local regulation.[2]

The Commission describes the subsidiarity principle that asserts that decision-making powers, responsibilities and tasks should be handled by the lowest, or least centralised, competent authority (level of government) capable of handling them. It has a presumption against centralisation unless there is a barrier to carrying out a function, such as access to relevant information or capability to perform the role. This allows full advantage to be taken in tailoring service levels to the particular circumstances of the communities affected by them. However, where costs and benefits spill-over into other jurisdictions regulatory functions may be better performed by a higher tier of government. Higher tiers may be able to provide services more efficiently by achieving economies of scale and scope, or where the national requirements spill-over onto local jurisdictions.

The majority of issues coming under the RMA are likely to be local or neighbourhood ones, and are handled most effectively at local government level. Major projects or issues that raise a mix of national and local issues, or where central government may have better information to bring to their resolution, may be better handled by government or at least with government guidance on how to go about resolving the issues at the local level. The two key issues in local decision making are reflection of

[2] Productivity Commission "Towards better local regulation (December 2012, 12)

local preferences (particularly where most of the cost and funding are derived from local sources), and capability to deal with issues.

2.2.2. Role of the courts and tribunals

The discussion paper argues strongly that the judiciary should not be put in the position of determining policy or the value of resources, a role that should be played by publicly accountable, elected representatives. To this end it proposes limiting the scope of public participation in consent conditions and appeals [p54], restricting the matters that are appealable solely to those that were the reason for an application being subject to public notification. It also proposes changing the appeals on consents from a *de novo* hearing to a re-hearing in which only some of the previous evidence will be re-examined.

At present notified consents may go to a hearing before locally appointed commissioners, with appeals heard by the Environment Court. Courts are traditionally institutions for resolving disputes between parties on the application of the law. But the Environment Court acts in a different role reflecting that of its predecessor, the Planning Tribunal. Tribunals are investigative bodies and the Environment Court may re-examine all the evidence in the earlier commissioners' hearing, plus new evidence that the parties may bring to the Court. Especially in relation to appeals on the formulations of plans (rather than consents) its essential function is a political one of reconciling competing values and interests in order to formulate a general "legislative" statement, rather than a judicial one of determining the law and how the law applies to a particular fact situation. In the general court structure, in moving from the High Court to Appeal Court to the Supreme Court, the issues in dispute get more narrowly defined and focused on matters of law (rather than matters of fact) with each successive step to a higher court. However, in the Environment Court the factual inquiry may be just as wide as at the earlier hearings.

Such a structure may prolong and increase the costs of hearing processes, as at the early hearings each participant has some incentive to withhold information, to try to pass the lower hurdle with as little disclosure as possible, retaining ammunition in reserve for the final appeal. In principle it may be less costly and more efficient if the inquisitorial stage were held early on, with appeals left for more focused legal dispute resolution. In practice that may lead to more costly applications and a disadvantage for those which currently do not go to appeal.

In practice judges may still be left making decisions which, implicitly or explicitly, determine competing values and interests for natural resources. If adjudicating over a consent dispute over damming a river valley for hydro-generation or leaving it in its current form, the decision one way or the other inevitably says something about the relative value of the river in its natural state or converted for electricity generation. Such decisions are difficult to make because there are no market values for all of the community benefits provided by the river, for fishing, kayaking or just as habitat for watchable wildlife. When made in a knowledge vacuum, such decisions can be widely variable with respect to apparently similar situations, reflecting the experience of the different decision-makers and their interpretation of each case. This adds to the uncertainty of outcome for applicants embarking on the process of seeking consents.

Environmental issues often give rise to problems of incommensurability which involve conflict between competing values that require political not legal decisions.

Appeal to the Environmental Court raises the risk of 'court failure' discussed in the law and economics literature. This literature suggests that generalist judges are unlikely to have the knowledge, motivation or information to effectively arbitrate disputes (see Shleifer for a longer discussion of court failure). [3]

At present the Environment Court acts as repository of specialist knowledge of the RMA, but the judges and commissioners rotate across cases and there are widely recognised differences in approaches between judges which can affect the outcomes for an application. This may also cause inconsistency in dealing with some of the specialist evidence presented by experts in different cases.

The alternative decision process of call-in to a Board of Inquiry is even more variable, as these are essentially one-off cases heard by a panel set up specifically for the case, with very little institutional history or support specific to that case to draw on.

Institutionalising the memory of the Court or other agencies (such as the EPA) in decisions on resource consents, and drawing out the implications for particular resources, is one measure that could improve the consistency, and reduce uncertainty of outcome, of cases brought before these agencies.

2.3. Suggestions for effective improvements in the system

We conclude this commentary with some constructive suggestions on improving the proposals in the document, in broad terms rather than in detail. These focus particularly on the role of guidance from central government on resolving issues raised in the document, such as the relative weight to be given to national and local concerns and to environmental and economic development concerns.

A first requirement is to fully understand the problem as without this the "fix" proposed is unlikely to be effective. The problem definition in the discussion paper and the cause and effect relationships to establish intervention logic are currently loose, giving rise to a variety of proposed solutions whose effectiveness is difficult to foretell, both individually and in combination with each other.

The structure of the RMA is not so much the problem as is its execution, so proposed changes to sections 6 and 7 are a lower priority for improvement than supporting the manner in which they are implemented. Changes to the wording and any changes to the principles (i.e. deletions and additions) need to be carefully considered.

Guidance on how to deal with national matters could be usefully improved, without dictating what local government does and detracting from its autonomy. Many of the perceived issues with the Act can be attributed to matters of national importance being interpreted at the individual local or regional level and then challenged in the court. Reducing the use of such time consuming process should improve the efficiency of the system, but the subsidiarity principle, and the scale of the externality being addressed, guide the balance between central direction and local discretion.

[3] Shleifer A. (2010) Efficient Regulation (The National Bureau of Economic Research at 1 www.nber.org/papers/w15651.pdf .

The proposals to reduce reliance on the Court in deciding matters of value and policy is generally positive to improving the certainty of RMA processes, but requires some supplementary assistance and guidance on national matters, as above.

There is a case for institutionalising the knowledge about RMA processes in a body or secretariat that can provide a comprehensive view of the workings of the Act that can assist councils, commissioners and judges alike in improving the consistency of their decisions.