

February 2023

Natural and Built Environment Bill and Spatial Planning Bill

Submission by the Auckland District Law Society Environment and Resource Management Law Committee

1. Introduction

- 1.1 The Auckland District Law Society Incorporated (**ADLS**) is an independent, voluntary organisation with 4739 members working in legal sectors across New Zealand. As at the time of writing, ADLS operates 19 law committees specialising in different practice areas and each committee compliment ranges from 7 to 28 members.
- 1.2 The submission presented is made on behalf of the Environment and Resource Management Law Committee (**ERM Committee**). The ERM Committee consists of lawyers, policy advisors and academics within the legal community, who specialise in various fields of environmental law.
- 1.3 One of the functions of the ERM Committee is to contribute to the improvement and reform of environment and resource management law in New Zealand. Hence the ERM Committee makes this submission on the Natural and Built Environment Bill (**NBE Bill**) and Spatial Planning Bill (**SP Bill**), together "**the Bills**".
- 1.4 The members of the ERM Committee represent clients and stakeholders with a wide range of interests and views. Accordingly, this submission focusses on workability issues identified in the Bills rather than supporting or opposing matters of policy direction articulated in the Bills.
- 1.5 The ERM Committee wishes to thank the Environment Select Committee (**Select Committee**) for the opportunity to make this submission on the Bills. The ERM Committee also wishes to express its gratitude to the Select Committee for the extension it granted, in recognition of the complexity of the Bills and the compressed timeframe for submissions.

2. Executive Summary

- 2.1 The Bills are the product of significant work over many years to bring about reform to an integral part of New Zealand's legal system. Like it or not, the Resource Management Act 1991 (RMA) affects the lives of all New Zealanders, and its replacement has great expectations to live up to.
- 2.2 The reform programme has come a long way since Cabinet's decision in 2019 to undertake a comprehensive review of the resource management system. That decision led to the "Randerson Report" New Directions for Resource Management in New Zealand in 2020, followed by an "exposure draft" of the NBE Bill in 2021 and ultimately the Bills at the end of 2022.
- 2.3 Despite that significant work over many years, the Bills are, with respect, undeveloped and unrefined. The ERM Committee says this, not to disparage the many people that have worked tirelessly to produce the Bills in an abrupt timeframe, but rather to emphasise the importance of taking the time to ensure the new system delivers all that was promised in terms of system efficiency, simplicity and workability.
- 2.4 The key themes that echo throughout this submission that the ERM Committee wishes to draw to the attention of the Select Committee are:
 - a. The NBE Bill is lengthy and complex. This submission identifies several improvements that could be made to the workability and clarity of the NBE Bill. With the NBE Bill weighing in at 833 pages and the SP Bill at 59 pages, it is difficult to see how the Bills achieve the objective of simplifying New Zealand's environmental management regime.
 - b. As introduced, the NBE Bill represents a missed opportunity to structure and organise the legislation in a clear and user-friendly way. In some cases, the NBE Bill places related provisions hundreds of pages apart. Simple restructuring or reorganisation could make the 833 pages of the NBE Bill seem much less daunting.
 - c. In reforming the resource management system, the NBE Bill removes or replaces many principles and concepts that have developed through case law under the RMA. Such changes are not justified in all cases and the replacement of settled concepts may result in a loss in the clarity and workability from the overall management regime. Change should not be made simply for change's sake.
- 2.5 The ERM Committee urges the Select Committee to consider recommending that the necessary time is taken to develop and refine the Bills. The resource management system and the New Zealanders it affects will not be served by rushing the Bills through before Parliament rises, only to have to clarify the system – either through the Courts or subsequent legislative amendment.
- 2.6 The remaining parts of this submission address the detail of the Bills, under the following key topics:
 - a. Purpose and Principles of the Bills.

- b. Plan Making.
- c. Consents.
- d. Designations, Highly Vulnerable Biodiversity Areas and Places of National Significance.
- e. Enforcement and Compliance.

3. Purpose and Principles

Recognising the policy-driven nature of the purpose and principles of the Bills, the ERM Committee has few comments on this particular section:

Clauses 3, 4 and 5 – Purpose, Te Tiriti o Waitangi and System Outcomes

- 3.1 Clauses 3, 4 and 5 are critical to the successful implementation of the Bills. They underpin policy formulation, planning and decision-making, as well as the exercise of roles and functions of central and local government and other agencies.
- 3.2 Those clauses are a significant departure from Part 2 of the RMA and introduce a number of new concepts:
 - a. Clause 3 introduces dual purposes for the NBE Bill, which have the potential to be in tension (i.e. enabling use and development may conflict with recognising and upholding te Oranga o te Taiao). How such conflict is to be resolved is unclear and will likely promote time-consuming and costly litigation.
 - b. Clause 4 increases the weight required to be given to the principles of te Tiriti o Waitangi. The consequences of this change are likely to be wide-ranging and require litigation to resolve.
 - c. Clause 5 introduces potentially conflicting outcomes, without hierarchy nor mechanism for resolving tension. The NBE Bill contemplates that the NPF will resolve tensions between system outcomes. The ERM Committee questions whether it is desirable to leave such high-level legislative policy decisions to Secondary Legislation.

The ERM Committee strongly urges the Select Committee to closely scrutinise clauses 3, 4 and 5.

Clause 6 – Decision-making principles

- 3.3 The relationship of cl 6(3) with cl 4 should be clarified. Clause 4 states that the principles of Te Tiriti must be "given effect to". Clause 6(3) states that various te ao Māori concepts must be "recognised and provided for" (i.e. a different threshold compared with cl 4). It is currently unclear how those provisions work together and whether cl 6(3) weakens cl 4.
- 3.4 Additionally, there are two drafting errors in cl 6(3). The first drafting error would mean there are very broad obligations at all times on all persons exercising powers under the NBE Bill,

which is not the intention of the provision. The second is to use the defined term of the 'environment' instead of te taiao. The ERM Committee recommends the following changes:

All persons when exercising powers and performing functions and duties under this Act must recognise and provide for the responsibility and mana of each iwi and hapū to protect and sustain the health and well-being of ~~te taiao~~ the environment in accordance with the kawa, tikanga (including kaitiakitanga), and mātauranga in their area of interest.

- 3.5 Clauses 804 and 805 are also important decision-making principles and should be elevated to cl 6. Further, cl 805 as currently drafted does not link with the broader legislation and therefore the following change is required:

805 Best information

(1) A requirement under this Act to use or provide the best information available at the time is a requirement to use, if practicable, complete and scientifically robust information.

Clause 7 - Interpretation

- 3.6 Amenity values has been deliberately excluded from the definition of environment. The ERM Committee understands the policy reason for this. However, one consequence of this is the loss of good environmental design including urban design. There will no longer be a clear basis for rules in plans to regulate minimum design standards, and the inclusion of desirable buildings and spaces to achieve an integrated level of amenity for the residents, especially in higher density developments. Further, the basis for requiring information in an assessment of environmental effects on a resource consent application under cl 7 of Schedule 10, in respect of aesthetic values appears to be undermined and no longer relevant in decision-making. The same applies in respect of cl 112(2)(iii), which states the purpose of environmental contributions is to incentivise "good environmental design and practice". It is not clear whether removal of these considerations has been fully considered in preparing the NBE Bill.
- 3.7 The definition of development infrastructure could also include the role of other types of transport infrastructure, for example ferries, which are relevant transport infrastructure servicing development areas.

General comment

- 3.8 The Bills do not maximise the use of existing provisions, terms and language. A significant amount of case law has been established over the last 30 years under the RMA, and a great deal of this established law will be lost under the NBE Bill. This extends to, for example, the purpose of the RMA, the permitted baseline and existing environment concepts, notification, new concepts such as the polluter pays principle and the precautionary approach, and terms expressed in te reo Māori. In some cases new terms are unnecessary or could be changed to better incorporate existing (and settled) legal concepts. This would reduce uncertainty in the application of the Bills. Te reo Māori terms may have different meanings throughout New Zealand as they may be applied differently across iwi and hapū. The Select Committee should be aware that significant litigation will likely be required to establish the meaning of key new terms in the Bills.

4. Consenting and Notification

Resource consenting and proposals of national significance

The ERM Committee makes the following comments on the changes to the consenting and notifications regime proposed under the NBE Bill:

Subpart 1 – Preliminary provisions

- 4.1 The types of resource consents at cl 152 are supported and should be adopted in their current form. These consents and permits are well understood by practitioners.
- 4.2 How the activities will be categorised is supported in part. Fewer categories assist with making the system easier to follow. While the NBE Bill anticipates that there will be a greater number of permitted activities, it is not clear how local authorities will be encouraged (or required) to have a greater proportion of permitted activities in NBE plans.
- 4.3 There is a risk with having discretionary activities linked with compulsory 'public notification' (cl 204). This has the potential for Planning Committees to drive many activities into this category, as the outcomes or effects may not be known at the time the NBE Plan is drafted. If the majority of the activities are discretionary, full public notification will result in costly processes for applicants.
- 4.4 The intention of the NBE Bill is that if an activity is to be permitted, how that activity achieves the outcomes of the proposed legislation must be known. This will only work if the National Planning Framework (NPF) and Plans are drafted well and are transparent. There is a significant reliance on the NPF and Plans for the new activity statuses to work. It would be contrary to the stated aims of the NBE Bill for more activities to require notified consent applications due to it being unclear whether the activity will achieve the outcomes.

Subpart 3 – Application for resource consent

- 4.5 Clause 174(1) addresses when an application is deemed incomplete, but it is not the only clause to address the concept. There should be a link to cl 173(5)(b), which also addresses when an application is considered incomplete.
- 4.6 Clause 182 allows for the withdrawal of an application but does not specify the form withdrawal should take. For administrative efficiency, the clause should require withdrawal to be in writing.
- 4.7 When a consent authority requires the commissioning of a report, the NBE Bill requires that the report is made available at the office of the consent authority (cl 183(4)) and made available to submitters (cl 183(5)). However, there is no obligation to provide the report to the applicant. A new clause or additional wording should be added to cl 183(4) to clarify that the report must be provided to the applicant. Greater clarity could also be provided about who pays for the report if the consent authority commissions a report.

Subpart 4 – Notification of applications for resource consent

- 4.8 The intent behind the change to the notification provisions is to reduce the number of consents proceeding through limited or public notification, and to have decision-making about notification occur at a strategic level policy or planning level, rather than on individual consents. The intent to streamline consenting and support consistent decision-making is desirable. However, the ERM Committee does not consider the provisions achieve their objective.
- 4.9 First, the provisions themselves regularly change between providing direction to plan drafters and consent decision-makers. This makes the provisions difficult to apply (counteracting efficiency gains) and is likely to lead to unnecessary litigation about their interpretation and application. (For example, cl 199 is about consenting, cl 200 is about planning, cls 201 and 202 are about both, cl 203 and 204 are about consenting, cl 205-207 are about planning and finally cl 208 is about consenting.)
- 4.10 Secondly, providing for affected persons to be determined through the plan-making stage could lead to overly complex and unwieldy plans. It will also result in a loss of flexibility inherent in an effects-based notification assessment. It may also lead to longer planning processes due to the need to determine presumptive notification status for the multitude of activities provided for in plans.
- 4.11 Clause 198 refers to "a" purpose of notification. The use of the indefinite article suggests that there could be other purpose(s) of notification not identified in the clause. Consideration ought to be given to whether the intent is to leave cl 198 open to other purposes or whether the wording should be replaced with a definite article i.e. 'the'.
- 4.12 As signalled above, cls 199 to 208 cross between resource consenting and plan making processes and are difficult to follow. It may be that some clauses are better suited to different sections of the NBE Bill. The focus of sub-part 4 is on the notification of resource consents. We step through the clauses as follows:
- a. Clause 199 is about resource consenting and notification and how the consent authority must comply with the NPF.
 - b. Clause 200 appears to be more about plan drafting. It provides that NPF or plans can set notification requirements (it is not linked to notification of resource consent) – this clause would be better suited in the NPF clauses or plan drafting clauses as it has no link to resource consenting. This clause could be deleted as cl 199 states that the consent authority has to comply with the NPF or plan.
 - c. Clauses 201 and 202 are about affected parties. Clause 201(2)(b) states that the decision maker "must consider whether information from the person is necessary to understand the extent and nature of effects or contributions towards outcomes". Neighbours who are considered affected do generally have a good understanding of the land and outcomes. An example of this is knowledge of stormwater and flooding, the history of

the land, past activities on the site, etc. Clause 201 potentially significantly broadens the category of notifiable people.

- d. Clauses 203 and 204 are about consenting and the ERM Committee agrees that a controlled activity should be presumed not to be publicly notified. As noted above, if the NPF and plans are not clear there is a risk that most activities will fall into the discretionary category and are likely to be publicly notified. Clauses 203 to 204 can also link to cl 199(3)(b).
- e. Clauses 205-207 are about planning and have no link to resource consenting. The 'decision maker' here is the regional planning committee or the Minister in the NPF. It seems impracticable to have the decision maker (being a regional planning committee in a plan; or the Minister in the national planning framework) deciding if there should be limited notification of an activity. As these clauses only relates to the NPF or NBE Plans, they should be shifted from this part of the NBE Bill as they do not link to resource consenting notification.
- f. The change of the definition of "decision maker" for cls 206-207 from 201-202 is confusing.
- g. Clause 208 then addresses consenting again.
- h. The new timeframe for submissions of at least 20 working days at cl 211 is supported. However, a timeframe should be provided for when the applicant is to be served (especially when the applicant needs to decide if it will seek mediation). That is, cl 210(3)(b) should refer to service on the applicant within 5 working days after the submission has been served on the consent authority.

Subpart 5 – Hearings and decisions

- 4.13 Clause 214(5) states that the outcome of mediation must be reported to the consent authority, but does not go any further to say that the consent authority must make the report available to the applicant and any submitters. If the applicant and submitters are not included in this provision, there is a risk that a party will not be made aware of the outcome (and miss appeal dates).
- 4.14 Clause 215 gives the consent authority the right to decide if a hearing should take place, regardless of whether the applicant or a submitter wishes to be heard. This precludes submitters from the natural justice of the current system. Generally, any applicant will seek for the consent authority not to hold a hearing, to save money and time. If a submitter objects to an application, a hearing should take place to ensure there is access to natural justice. Being heard through a hearing helps to resolve differences. This is very important for applicants/submitters who are neighbours. There is also the risk that if the submitter is not heard, an appeal is more likely, particularly if the local authority does not have a good understanding of the issues that the submitter raised on paper only.
- 4.15 Clause 216(3) should be reworded to state that at least 20 working days' notice is given for a hearing. 10 working days is not enough time to prepare any evidence or ensure availability of experts. In practice, 10 working days is never used.

- 4.16 Clause 217 should extend further to say that only commissioners can hold and make decisions in hearings. This ensures that people with the right skills are making decisions. This section is also slightly unclear in that it applies to the decision rather than a hearing per se. It might be better to amend the heading to "Decision by the commissioner".
- 4.17 Clause 220(2) states that a hearing must be heard within the time prescribed by regulations under this Act (if any). This could be linked to cl 187(2), which outlines the timeframes.
- 4.18 Clause 223 is one of the key clauses for resource consent decision-making. While it maintains many concepts from its predecessor (s104 of the RMA), it introduces many new concepts. Specific comments include:
- a. The new requirement in cl 233(2)(e) to consider "the likely state of the future environment as specified in a plan, a regional spatial strategy, or the national planning framework" creates uncertainty. Is the consent authority to have regard to whether the proposal contributes to achieving that future state? Or is the "likely state of the future environment" intended to benchmark against which the scale of the effects of the proposal are assessed. This criterion warrants clarification.
 - b. A matter that must be disregarded under cl 233(8)(c) is "any effect on scenic views from private properties". Is this clause intended to prevent individuals from opposing applications based on the effects on views from their private properties, or could it have wider application to prevent the protection of connections of people to place, provided for in plans? For example, Chapter D14 of the Auckland Unitary Plan protects Volcanic Viewshafts using a Height Sensitive Areas Overlay "to appropriately protect significant views of Auckland's volcanic cones through the use of viewshafts and height sensitive areas".
 - c. A matter that must be disregarded under cl 233(8)(c) is any adverse effect arising from the use of land by people on low incomes, people with special housing needs, or people whose disabilities mean they need support or supervision in their housing. Is this clause intended to include reverse sensitivity effects? If so, it could lead to adverse outcomes whereby development is enabled in areas otherwise inappropriate for that development - for example, residential development within an airport noise zone.
 - d. Clause 233(10) attempts to codify case law developed under the RMA on when recourse may be had to Part 2. However, when read alongside cls 223(2)(c) and (d) (both of which require consideration of the NPF), it is unclear how the restriction in cl 233(10)(a) is intended to apply. Further, the test for whether an NBE Plan or the NPF "adequately deals with a matter" is new and is uncertain.
- 4.19 Clause 238(3) has an error. Reference should be to "consent authority" instead of "committee".
- 4.20 In cl 241 we support a provision containing requirements for decisions, which promotes consistent and good decisions. It might assist to add to cl 241(3)(a) that a decision may also refer to any evidence/submissions/other material received by the decision-maker.
- 4.21 Decisions on resource consents should also be made public, and any decisions from hearings should be made available on a website (as is the case for a tribunal). This will help ensure

consistent administration of NBE Plans and help all of those involved in the system understand how other consent authorities are approaching similar issues. Currently, it is difficult to find out what is being granted or declined by consent authorities, the basis for the decision, or the reasons for decisions. This will also assist in having better resources for experts and enable better decision-making for Commissioners.

- 4.22 The use of a regional alternative dispute resolution (**ADR**) process is supported and will assist in moving matters forward without the expense of a hearing for limited notified consents. 5 working days' notice to decide if the matter should use voluntary ADR (cl 248(a)) is extremely tight for an applicant to decide if this is the best process when submissions were only received 5 working days prior and may not have been served on the applicant, nor yet properly understood. As noted above, cl 210(3)(b) currently does not have a set timeframe on when submissions are to be served on the applicant. It is currently drafted to say "as soon as reasonably practicable". As noted above, a 5 working day timeframe should be imposed and then linked to the timeframe that a decision on whether to use ADR is needed to be given. A decision on ADR could be 10 working days after the service of submissions.
- 4.23 It is not yet clear who can be an accredited adjudicator. Can this be a commissioner or will it be someone who is a member of the Arbitrators' and Mediators' Institute of NZ or similar? It is recommended that provision be added for regulations to address minimum requirements for this role.
- 4.24 An extended timeframe from 10 working days to 15 or 20 working days is needed when deciding to appeal the decision from the ADR process (cl 252). More time is required, given that instructions from clients will be needed and a lawyer may not be involved in a matter until a court application is required.
- 4.25 The timeframe for serving parties with a notice of an appeal should be back to 5 working days (currently 15 working days at cl 254(2)). 15 working days is lengthy for a party not to know of its involvement.

Subpart 6 – Nature of consents, review, and transfer

- 4.26 While cl 266 outlines the duration of a resource consent, that duration changes with particular types of consent, and a link to cl 275 clarifying the relationship between the two sections could be useful. Another option would be to shift cl 275 (and cl 276) to sit immediately after 266.
- 4.27 The difference between a Certificate of Compliance (cl 295) and a Permitted Activity Notice (cl 302 "**PAN**") is not clear. Will an applicant need to apply for both if there is a permitted activity and the NPF or Plan says that a PAN must be applied for? Is a PAN needed if a Certificate of Compliance has been issued, or will the Plan identify activities that are 'permitted' or 'permitted with a notice', the latter requiring a PAN? The lapsing timeframe for a Certificate of Compliance and PAN is drafted as 3 years, however, this timeframe seems short (for example, an applicant gets its Certificate of Compliance and sells the property with a lengthy

settlement date). The current timeframe of 5 years would be more appropriate and assist with the workload of the local authority.

5. Plan making and the Spatial Planning Bill

THE NPF

- 5.1 The role of targets in the NPF is unclear. In particular, giving the Minister responsibility under cl 50 to set minimum level targets if he or she is concerned the limit is not set appropriately second-guesses the limit-making process. In addition, it is not clear how targets translate into NBE plans. For example, it is unclear what types of rules councils should put in place to achieve targets. It is also unclear whether compliance with targets is mandatory (and if so, whether having both limits and targets is necessary).
- 5.2 The NPF must include an “effects management framework” under cls 61-67. The framework applies to adverse effects on significant biodiversity areas and specified cultural heritage (cl 62). When applied, cl 63 provides for offsetting for adverse effects, and enhancement to make up for adverse effects in accordance with schedules 3, 4, or 5 as applicable. The ERM Committee recommends that Schedules 3, 4 and 5 be omitted from the Bill and reintroduced as part of the NPF. As part of the NPF, the content of these schedules would be subject of expert evidence and robust interrogation before a Board of Inquiry, which is more appropriate than including them within the NBE Bill.
- 5.3 The intention of the provisions in cls 64-67 to provide for possible exemptions, limits and grants are desirable, but add a layer of Ministerial regulation that in the past has been adequately managed by regional and district councils. The ERM Committee considers the powers to make exemptions sit with regional planning committees (**RPCs**) and consequential changes should be made to the NBE Bill.

PLAN-MAKING

- 5.4 Clauses 9-13 of Schedule 7 cover engagement agreements with Māori. RPCs may benefit from further guidance relating to dispute resolution and remuneration matters. Engagement agreements could be supported by the following existing clauses within the NBE Bill:
- a. Schedule 8, cl 37, relating to funding disputes between local authorities could be amended to cover iwi and hapū funding disputes.
 - b. Schedule 8, cls 8, and 11 covers facilitation to support iwi and hapū composition process, which could be used to resolve disputes in forming engagement agreements.
 - c. Schedule 8, cl 38, statement of intent regarding funding, and cl 41(1)(f) regulations for funding Māori participation, could also be applicable.

- d. Clause 818, which requires a schedule of the reasonable costs to be agreed between the local authority, iwi and hapū in respect of collaboration generally.

5.5 The ERM Committee supports the new plan change processes (standard, proportionate and urgent) subject to the matters below:

- a. The ERM Committee considers that the first stage of consultation on the draft NBE Plan should be of the full draft plan and not just the "major policy issues" to allow for the potential early resolution of all issues. In the event the first stage of consultation remains related to "major policy issues", then the ERM Committee considers further clarity is needed in cl 14 of Schedule 7 as to what exactly that phrase includes.
- b. The ERM Committee considers that the obligation in cls 21, 34(3)(c) and 36(2)(c) (to include all evidence that the submitter intends to submit in support of the primary, further or enduring submission at the same time) is a departure from current practice and is unreasonable within the time frames available, and could impose an unaffordable cost on many lay submitters. This is an unnecessary use of public resources and forecloses on the potential to resolve issues early in the planning process. The requirement to provide evidence accompanying submissions is inconsistent with cls 85, 87 and 115 of Schedule 7, which suggest there is some discretion as to when evidence must be provided. It is also inconsistent with the process for resource consent applications, which do not require all of the evidence to be submitted in support to be provided with the application. It is recommended that cls 21, 34(3)(c) and 36(2)(c) of Schedule 7 be deleted or in the alternative reworded as follows:
 - i. *include ~~all the evidence~~ a description of the type of evidence that the submitter intends to submit in support of the submission.*
- c. Clause 35 provides two different timeframes for the provision of secondary submissions (in cl 35(1)(d) and cl 35(3), being 10 or 20 working days). This error should be corrected (or the difference otherwise clarified) by amending cl 35(1)(d) to provide for the (existing) 20 working day timeframe.
- d. Both the proportionate and urgent planning processes should allow for secondary submissions. Secondary submissions allow submitters to respond to matters raised by other submitters. This allows for the full identification of issues prior to hearing. It also determines the scope of the hearing. The ERM Committee therefore suggests that cls 44(2)(d), 48(2)(d) and 50(4) are deleted together with consequential amendments to Schedule 7 and the remainder of the NBE Bill.
- e. In practice, the effect of "targeted notification" for the proportionate planning process (cl 45 of Schedule 7) is no different from limited notification and this concept should be removed.
- f. Schedule 7, cl 49 requires an RPC to appoint commissioners to consider submissions and report if no hearing is to be held. Clause 55 deals with the appointment of commissioners to hear submissions and make recommendations on any proportionate or urgent plan changes if a hearing is to be held and includes the requirement to have at least one commissioner with an understanding of tikanga Māori and the perspectives of local iwi / hapū. It is unclear if this is a deliberate difference, but if not the Select Committee should consider whether amendments for consistency are required.

- 5.6 Clause 24(1)(a) as drafted requires preparation of the evaluation report "in accordance with subclause (2)". It should instead refer to cl 25 of Schedule 7.
- 5.7 Clause 25 of Schedule 7, replaces s 32 of the RMA. Section 32 was the key provision in evaluating proposed planning provisions. The ERM Committee has the following submission points on cl 25:
- a. Clause 25 anticipates that regulations may be produced to set out the form for evaluation reports (subclause (4)). If the above clarification as to content is not provided through the legislation itself, then the ERM Committee encourages the early adoption of regulations, so that RPCs are not required to individually interpret the requirements and potential content.
 - b. References to cost-benefit analysis and effectiveness and efficiency are no longer matters that are required to be assessed when evaluating proposed planning provisions. The benefit of these provisions is to ensure that regulatory responses were proportionate to the activities they controlled. The Select Committee may wish to consider whether those references should be re-incorporated into cl 25 of Schedule 7.
 - c. Clause 25 also requires the evaluation report to include an examination of any alternative options to the proposal for achieving the purpose of the Act. This is a notable difference from the RMA, which provides for the identification of any other "reasonably practicable" options. The ERM Committee considers that the addition of "reasonably practicable" is important in this context, as under the current wording RPCs will be required to assess all other options, no matter how feasible they may be in practice. This could place a significant burden on RPCs, for limited benefit (in terms of being required to assess options that are not reasonably practicable). This appears contrary to the later requirement that the evaluation report be expressed "succinctly and plainly".
 - d. The ERM Committee has been unable to identify a requirement in the NBE Bill for the RPC to summarise all advice received from iwi and hapū, and any response to the advice, as is required by the RMA. While the enhanced involvement by iwi and hapū in the RPC process may render this less necessary, the ERM Committee considers that some assessment of this advice would be helpful in the evaluation report under cl 25, to ensure that all relevant information is contained in one place, and to reduce duplication across documents.
 - e. The ERM Committee proposes the following amendments in respect of cl 25 of Schedule 7:

25 Contents of evaluation report on proposal for plan or plan change

(1) An evaluation report must include:

(a) a consideration of the extent to which the proposal presents the most appropriate way of achieving the purpose of the Act; and

(b) an examination of any reasonably practicable alternative options to the proposal for achieving the purpose of the Act;

(c) the reasons for selecting the preferred option; ~~and~~

(d) a consideration of the efficiency, costs and benefits of intervening through a regulatory approach;

~~(d)~~(e) any consideration of the extent to which the efficient implementation of the proposal can be monitored.

...

(5) An evaluation report must summarise all advice received from iwi / hapū and any response to that advice.

- 5.8 Provisions relating to appeal rights should be grouped together to improve clarity. Currently, cl 67 of Schedule 7 provides for general appeal rights to the Environment Court for persons who made submissions where the RPC uses the proportionate or the urgent process to determine a proposed plan change, while subpart 6 provides a right of appeal where RPC rejects an IHP recommendation (cl 132), and a right of appeal to the Environment Court if the RPC accepts an IHP recommendation beyond scope (cl 133).
- 5.9 Clause 103 of the NBE Bill provides a cross reference to matters in cl 644 for which the regional council is responsible, and to cl 646 for which the territorial authority is responsible. To clarify matters, a cross reference to cl 645 could be added, which refers to functions of territorial authorities and unitary authorities, and the statement of community outcomes.
- 5.10 In the NBE Bill, cl 104 is duplicated in cl 109, and should be deleted.
- 5.11 Clause 106 provides for iwi or hapū to make a statement on te Oranga o te Taiao to the relevant regional planning committee. However, the link between this and the remainder of the NBE Bill is missing. Te Oranga o te Taiao is only mentioned in cl 5. It is unclear how these statements will be considered.
- 5.12 Clause 648 covers jurisdiction over certain listed islands outside regional boundaries. The Minister of Conservation has the responsibility of a local authority over the islands. Clause 648 needs to be better co-ordinated with s 22 of the Local Government Act 2002 (LGA), which provides for the Minister of Local Government to be the territorial authority for any part of New Zealand not forming part of a territorial authority. Section 22 does not apply to the main islands listed in cl 648. Clause 648 should be stated to prevail over LGA s 22.
- 5.13 The NBE Bill also provides procedural principles in cl 804. This clause contains substantial differences from the similar clause under the RMA (s 18A). Section 18A was a break-through aimed at reducing the growing complexity and bulk of policy statements and plans. This section, in addition to the same requirement in cl 804(a), required every person exercising powers and functions to take all practical steps to "ensure that policy statements and plans... include only those matters relevant to the purpose of this Act; and are worded in a way that is clear and concise". The ERM Committee considers that cl 804 should reinstate the principle in RMA s 18A(b) of aiming for documents that are clear and concise, and limited to matters within the purpose of the Act.

- 5.14 From experience gained through the Auckland Unitary Plan process, the ERM Committee considers that unless the processes are considerably simplified through the Select Committee process then the Select Committee may wish to consider whether there is a need for the legislation to include a requirement that those preparing plans and plan changes provide for a "friend of the submitter". The "friend of the submitter" would be an independent advisor to assist submitters who are otherwise unrepresented (at no cost), assisting to explain the process, advising lay submitters how best to express their views. In a quasi-judicial hearing process, this support is necessary to enable full public participation.

REGIONAL PLANNING COMMITTEES

- 5.15 The Committee makes the following comments on provisions in relation to Regional Planning Committees (RPC/s) including Schedule 8 of the NBE Bill:
- a. It is recognised that the RPC will require its own staff (as provided for under cl 33 of Sch 8), in to perform and fulfil its broad range of functions and duties. However, the ERM Committee questions whether those staff being employees of the host local authority may potentially give rise to conflicts of interest, on the basis that the host local authority can also participate in the planning process. It may also lead to staff shortages if local authorities are actively submitting on those planning processes. This is not adequately provided for within the provisions of the legislation as currently drafted. The Select Committee may wish to consider providing RPCs with sufficient budget and powers to appoint its own independent staff, separate to the staff of constituent local authorities.
 - b. The ERM Committee encourages the early adoption of regulations (as provided for in cl 41 of Schedule 8) where this may be desirable, particularly to provide more guidance to RPCs as to the required procedure at the outset of their constitution, and to encourage national consistency in approach where possible.

SPATIAL PLANNING

- 5.16 Currently RPCs are allowed to determine their own consultation processes in relation to regional spatial strategies (**RSSs**). Due to the importance of RSSs under both Bills, the Committee considers that clearer requirements are needed to ensure that RSSs are fully consulted on (similar to the standard or proportionate NBE planning process), including an opportunity for further submissions. Hearings on RSSs should be mandatory.
- 5.17 Clause 25(3) is repeated verbatim under the NBE Bill in several key places, namely cl 108(c) matters to be disregarded in preparing the NPF; schedule 6, cl 19 (board of inquiry recommending NPF to disregard effects on scenic views, and visibility of commercial signage; cl 223(8)(c)(d) matters to be disregarded in determining a resource consent application). These provisions could have significant unintended consequences for example undermining protection of outstanding natural landscapes, or causing safety issues through the location of signage along state highways.
- 5.18 The reference to case law in legislation is unusual: the *NZ Maori Council* case is referred to in cl 65 of the SP Bill. It is not clear what cl 65 implies or states. Clause 65 should be redrafted to state clearly the legal position taken by the present Government or be omitted if remaining

unsettled. Presently cl 65(1) recognises obligations in an obscure manner but cl 65(2) then appears to negate that recognition. Compare NBE Bill, cls 810 and 814 which duplicate cl 65.

6. Designations, places of national importance, highly valuable biodiversity areas

DESIGNATIONS

Waiving the requirement for secondary CIP

- 6.1 Clause 504 addresses when primary and secondary construction and implementation plans (CIPs) are to be lodged for a notice of requirement and the content of those CIPs. Clause 504(4) provides an exception to the requirement to lodge a secondary CIP prior to construction of a project. Clause 504(4)(c) empowers the planning committee to waive the requirement for a secondary CIP, but does not provide guidance on when that power should be used, nor a pathway for affected persons to object to or appeal that decision. Under the NBE Bill's proposed designation provisions, secondary CIPs serve an important role – primary CIPs may only contain high-level information about the activities proposed and associated effects: secondary CIPs provide the detail of projects, including height, shape and bulk and the location on site.
- 6.2 The ERM Committee recommends that cl 504(4)(c) be reconsidered and amended to provide criteria for when a planning committee may waive the requirement for a secondary CIP.

Notification

- 6.3 Clause 507 provides the process for determining if notices of requirement or CIPs are publicly or limited notified for submissions. Clause 507 relies heavily on the notification provisions for resource consents in the NBE Bill. As addressed elsewhere in this submission, the ERM Committee considers that those notification provisions are not fit for purpose for resource consents. That concern is compounded when those provisions are jury-rigged to apply to notices of requirement and CIPs:
- a. Clause 507(1) provides that if an activity has a notification status under the NPF or NBE Plan for a region, that notification status applies to the notice of requirement and associated primary CIP. Projects that are subject to notices of requirement are often large-scale, complex and would be subject to multiple resource consent requirements, if such projects were applied for as individual activities. Under this approach, applying the notification status of the component activities is likely to lead to all notices of requirement and primary CIPs being publicly notified.
 - b. Clause 507(2) provides that in all other cases, the provisions in the NBE Bill for determining whether a resource consent is to be publicly notified, limited notified or non-notified apply. The provisions for determining notification status for resource consents are unclear and not readily applicable to notices of requirement and CIPs. Clauses 199 and 200 contemplate that the NPF or NBE Plans will set notification status, or provide considerations for decision-makers to determine notification status in accordance with the NPF or NBE Plan. However, those provisions are focused on

activities that require resource consent – when making the NPF or NBE Plans, decision-makers may not have in mind the notification implications for notices of requirement and CIPs.

- c. Clause 507(4) provides that notices of requirement for route protection (i.e. that are not accompanied by a primary or secondary CIP) do not require consideration of the effects of construction or implementation. This suggests that it is intended that notices of requirement for route protection are unlikely to be publicly or limited notified.

- 6.4 Given the approach in the NBE Bill to require most notification decisions to be made during the development of the NPF and NBE Plans, the ERM Committee considers that applying the resource consenting notification provisions to notices of requirement and CIPs is likely to result in uncertainty and litigation to resolve when notices of requirement and CIPs should be notified.
- 6.5 The ERM Committee recommends that the notification provisions for notices of requirement and CIPs be revisited and a bespoke regime developed. In that process, the Select Committee may wish to consider whether the notification provisions for projects of national significance are better suited to designations to limit the number of different processes in the NBE Bill.

Changes through a secondary CIP

- 6.6 Clause 508 addresses secondary CIPs, including the circumstances where a secondary CIP addresses issues beyond those contained in a primary CIP (i.e. where a secondary CIP broadens the primary CIP). Clause 508(1)(b) provides that if a secondary CIP broadens the project, the planning committee can either notify that CIP, or request changes. If changes are requested, but not made by the requiring authority, the planning committee has a right of appeal to the Environment Court. Changing a project through a secondary CIP has the potential to impact on affected persons. Notifying such a secondary CIP addresses potential natural justice concerns, but the process of requesting changes / planning committee appeal does not.
- 6.7 The ERM Committee recommends that if the process of requesting changes in cl 508(1)(b)(ii) is retained, the consequence of the requiring authority declining to make changes should be notification, rather than a planning committee appeal right.

Discretion not to hold a hearing

- 6.8 Clause 509 addresses information, submissions and hearing issues. It provides that a planning committee need not hold a hearing on a notice of requirement or CIP if it considers it has sufficient information, even if the applicant or a submitter requests a hearing. Clause 509(6) further suggests that if a hearing is held, the planning committee may hear from some submitters, but not others.
- 6.9 The ERM Committee has concerns with the proposed curtailment of the right for applicants or submitters to be heard in relation to notices of requirement or CIPs. Any perceived

timesaving or efficiency gain in the system, does not justify the limitation on applicant's' and submitters' rights to natural justice.

- 6.10 Other than commenting on the potential cost saving, neither the Interim Regulatory Impact Assessment nor Supplementary Analysis Report have assessed the impact of curtailing the right to be heard. Notices of requirement generally support complex and contentious projects, with a wide range of impacts on the environment and people. Hearings are an important tool for expressing competing views and for testing evidence. The ERM Committee considers that decision-making on notices of requirement and CIPs would be poorer if hearings are not held, even if the RPC considers it has sufficient information.
- 6.11 There are other mechanisms available to streamline hearing processes, including directing mediation or expert conferencing, and requiring pre-circulation of legal submissions and expert evidence. The ERM Committee considers that mandatory consideration of such measures would result in better outcomes than curtailing the right to be heard.
- 6.12 The ERM Committee recommends that cl 509 is amended to reflect the approach in s 100 of the RMA: that a hearing need not be held unless either:
- a. the planning committee considers that a hearing is necessary; or
 - b. the applicant or a submitter has requested to be heard and has not subsequently advised that he/she/they does not wish to be heard.
- 6.13 If streamlining of hearings is desirable, amendments to the NBE Bill could be made that require RPCs to consider making directions for mediation, expert conferencing and pre-circulation of legal submissions and expert evidence (rather than enabling, but not requiring these processes).

Clarification and workability

- 6.14 Clause 512 provides the considerations that RPCs can and must have regard to when considering notices of requirement and submissions received. Clause 512(2)(c) and (d) provide mandatory considerations that must be given particular regard and refer to "infrastructure". While most notices of requirement will relate to infrastructure, they can also be lodged for "public work" (cl 503(1)(a)) and "an activity, a project or a work" (cl 503(2)(b)). Clause 512 does not appear to intend that the considerations in cls 512(2)(c) and (d) apply only to infrastructure.
- 6.15 The ERM Committee recommends that the language of cl 512 (and the designation provisions in totality) be reviewed to ensure that consistent language is used to avoid uncertainty in relation to relevant considerations.
- 6.16 Clause 517 addresses circumstances where multiple designations apply to the same piece of land. Curiously, cl 517(3) provides that cl 517 is subject to cls 17(1) and 18-22. The effect of a designation is that cl 17(1) (restrictions relating to land) does not apply to a public work,

project or work undertaken by a requiring authority under a designation. Clause 517(3) therefore directly conflicts with cl 516(1)(a).

- 6.17 The ERM Committee recommends that cl 517(3) is either deleted entirely, or amended to remove reference to cl 17(1).

PLACES OF NATIONAL IMPORTANCE

More than trivial adverse effect

- 6.18 Clause 559(1) provides that (subject to exceptions) an activity is not allowed if it would have a *more than trivial adverse effect* on the attributes that make an area a place of national importance. The term "trivial" is not defined in the NBE Bill so it is unclear what level of adverse effects is not allowed. As the term "minor" is not used, it may be that the intention is to refer to something smaller like "de minimis" adverse effects.
- 6.19 It is important that the meaning of "trivial" is clarified in the NBE Bill, as otherwise it will cause interpretation difficulties at the planning and consenting stages. The ERM Committee therefore recommends that the NBE Bill is amended to clarify what is intended by the term "trivial" in cl 559. However, it notes that as the word "trivial" is used in other parts of the NBE Bill – including in the definition of adverse effect – any drafting changes must be made with these other provisions in mind to avoid unintended consequences for other parts of the NBE Bill.

Assessing areas of significant biodiversity

- 6.20 Clause 559(3) requires areas of significant biodiversity to be identified at the resource consenting stage. This clause is located in Part 8 – *Matters relevant to natural and built environment plans* – and could be overlooked at the time a resource consent is being processed. To improve workability of the NBE Bill, the ERM Committee recommends that this requirement is included in Part 5 – *Resource consenting and proposals of national significance* – along with the other provisions relating to the resource consenting process.

Protection of significant biodiversity areas

- 6.21 Clause 561 sets out the circumstances in which the protection requirements in cl 559(1) apply to a significant biodiversity area.
- 6.22 Clause 561(1)(c) provides that cl 559(1) applies to a significant biodiversity area if *the place meets the criteria, even though the place was not assessed when the plan was made*. The ERM Committee is concerned about the uncertainty that this requirement introduces into decision making by requiring *unidentified* areas to be protected.
- 6.23 As areas cannot be protected until they are identified, the ERM Committee considers that cl 561 should be amended to clarify how this requirement will be implemented. For example, it could be amended to specify that cl 559(1) applies if the place is identified during the resource consenting process, which is already required by cl 559(3).

- 6.24 The ERM Committee is also concerned that the meaning of *significant new information* in cl 561 is unclear. The provisions allow the availability of significant new information that establishes that a place does/does not meet the criteria to change whether areas are subject to the protections in cl 559(1). As the phrase *significant new information* is not defined, it is unclear how this test will work and when the protections are to apply.
- 6.25 The ERM Committee therefore recommends that the NBE Bill is amended to clarify what amounts to significant new information in this context. Otherwise, there will be considerable uncertainty over when significant biodiversity areas are to be protected or not.

AREAS OF HIGHLY VULNERABLE BIODIVERSITY

How HVBAs will be identified

- 6.26 Clauses 562 to 567 provide for the identification, protection and exceptions from protection of areas of highly vulnerable biodiversity (**HVBA**). It is unclear from the NBE Bill and the SP Bill when HVBAs will be identified and where system participants can obtain that information. As currently drafted, identification of HVBAs is not required to occur as part of the development of the RSS under the SP Bill or the NPF or NBE Plans.
- 6.27 It may be that the intent is that HVBAs may be identified during the development of the NPF or NBE Plans, or at the time a resource consent or notice of requirement is being processed. If the intent is they may be developed as part of consenting or notice of requirement processes, that will create considerable uncertainty for those processes.
- 6.28 Furthermore, the consequences of identifying an area as HVBA are significant. Any activity with adverse effects on the HVBA is prohibited, unless an exemption applies or the activity is a protected customary right.
- 6.29 In light of the consequences, the ERM Committee considers that it is important that HVBAs are developed through a participatory process that allows testing of the evidence supporting the HVBA. Accordingly, HVBAs should be identified either in the NPF or in NBE Plans. HVBAs should also be clearly and accurately mapped, to provide certainty where activities may be restricted.

Role of critical habitat

- 6.30 Clause 567 empowers the Minister of Conservation to declare area to be "critical habitat". Critical habitat is defined in cls 7 and 555, including by reference to cl 567. Identified "critical habitat" is not referred to anywhere else in the NBE Bill or the SP Bill. Accordingly, identification of such areas has no "teeth".
- 6.31 The ERM Committee recommends that cl 567 and the definitions of critical habitat in cls 7 and 555 are deleted, or that the NBE Bill is otherwise amended to clarify the effect of the identification of such areas.

7. Enforcement and Compliance

General comments

- 7.1 As a general comment, the ERM Committee notes that the Part 11 Compliance and Enforcement has generally retained the same structure and enforcement hierarchy approach as under the RMA but with the addition of some new enforcement tools that have been adopted from other legislative regimes or jurisdictions.

New enforcement tools

- 7.2 The NBE Bill introduces a number of new enforcement tools. The ERM Committee takes a neutral position on whether the introduction of these tools is desirable but notes that there appears to be duplication in some of the tools' purposes and application. Where duplication of processes is discussed below this is to assist the Select Committee should it wish to attempt to streamline the tools or provide greater statutory guidance as to when the use of each tool is most appropriate.

Contaminated land management

- 7.3 Part 6, subpart 4 (cls 416-427) introduces a new contaminated land regime, which is premised on the polluter pays principle and introduces new enforcement powers in respect of contaminated land.
- 7.4 The ERM Committee is concerned that the intended scope and application of the contaminated land regime is unclear and considers that clarification is required.
- 7.5 The definition of contaminated land in cl 7 means land is contaminated when concentrations of a contaminant exceed an environmental limit or pose an unacceptable risk to human health or the environment. While it should be clear whether a contaminant exceeds an environmental limit, whether it poses an unacceptable risk to human health or to the environment is a new test and is unclear.
- 7.6 The ERM Committee considers that the Bill should include some guidance as to what this means and whether it depends on the existing or proposed land use (for example a level of contamination may be acceptable if it is to be paved and built over but would not be acceptable for a school playground). The NBE Bill could be amended to require the NPF to define what amounts to an unacceptable risk to human health or the environment.
- 7.7 Similarly under cl 422 the Minister may classify a site as "significantly contaminated land", however, there is no definition or guidance as to what would meet this test. Clause 423 refers to the Minister classifying a site as a "contaminated land site of national significance" and it is not clear if this is the same as a significantly contaminated site.
- 7.8 Clause 418 establishes a new obligation on landowners to advise if land is used for activities or industry listed in Hazardous Activities and Industries List (HAIL). HAIL activities typically require resource consent and the matters required to be notified to councils would typically

be addressed by consent conditions. Accordingly, the obligations in cl 418 may create duplication of obligations for little benefit.

- 7.9 The effect of cl 419 appears to be that a landowner is required to manage a contaminated site so that it is no longer contaminated (i.e. no longer poses an unacceptable risk to human health or the environment). However, this clause does not give any consideration to how the land was contaminated and who the polluter is (e.g. contamination from a source that has crossed site boundaries or was caused by a previous landowner). This seems at odds with the polluter pays principle and if that is the legislative intent, this should be clearly spelled out.
- 7.10 The definition of a polluter, at cl 424, in relation to contaminated land, means a person who has directly or indirectly, or through neglect or wilful inactivity, caused or allowed a discharge of a contaminant into the environment. This means that the regime could potentially capture a person who has discharged contaminants in compliance with the relevant regional plan or resource consent but the effect of those discharges has now been deemed an unacceptable risk to human health or the environment. This creates uncertainty as to what activities can be lawfully carried out and, if this is the intention, it should be more clearly spelled out.

NBE Regulator definition

- 7.11 The Committee is concerned with the large reach of 'NBE Regulators' as currently defined in cl 694. Clause 694(a) includes local authorities, RPCs and the EPA as 'NBE Regulators'. Clause 694(b) extends 'NBE Regulator' to include "any person empowered under any Act to exercise or perform any functions, powers, or duties of an NBE regulator under this Act."
- 7.12 The functions of such 'regulators' appear to be mainly with enforcement and compliance, but extend widely as they are given consequential powers that extend beyond their 'enforcement and compliance' roles. It appears that 'NBE regulators' are given all the powers of local authorities and can become involved in imposition of conditions and bond requirements, enforcement and compliance, enforceable undertakings including payment of compensation (of which 90% may be retained by the NBE regulator), financial assurances, suspension of resource consents, holding bonds and imposing other financial imposts on people, and so on. They may also recover the costs of any work done by them in exercising their functions.
- 7.13 There does not seem to be any clear criteria set out in the NBE Bill for the types of entities that can be appointed as NBE regulators, or the process of appointment, or the criteria and qualification for appointment of individuals, or the code of conduct/standards expected and accountability for their actions. It is foreseeable that there may be many appointed from private sector corporations, (possibly) NGOs and voluntary organisations, and Māori organisations including iwi authorities or groups representing hapū etc.
- 7.14 This has implications as it gives many of the very significant powers of democratically elected local authorities to non-elected entities, who may be appointed with little apparent constraint, no obvious statutory or other criteria, nor minimum qualification requirements.

- 7.15 The ERM Committee recommends that either cl 694(b) be deleted or new provisions are included to specify how NBE Regulators under cl 694(b) are appointed, what criteria apply to such appointments and minimum qualification appointments.

Scope of Enforcement orders

- 7.16 Clause 700(1) empowers the Environment Court to make an enforcement order requiring a person to cease or prohibit anything done that "*(ii) is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment*".
- 7.17 Under the RMA, the definition of environment includes "amenity values". Inclusion of amenity in the definition of "environment" has been a useful tool that empowers a regulator to consider a variety of aspects of amenity when taking enforcement action (e.g. effects on rural amenity or visual and aural privacy). For example, under the RMA, an order could be made against an occupier to clean up or remove offensive symbols, or a pile of junk or wrecked vehicles or tyres on a property where objectionable to the visual amenity of others. The effect on amenity has been an important consideration in odour discharge cases where the nature of certain odours can invoke the noxious, dangerous, offensive, or objectionable standard.
- 7.18 The ERM Committee wishes to note that the omission of amenity values could have unintended consequences in the enforcement context and make the enforcement powers less effective.

Abatement notices

- 7.19 The power for a local authority enforcement officer to issue an abatement notice to cease or do something to remedy an activity applies in a similar manner to "any actual or likely adverse effect on the environment". The issuing of an abatement notice is the first formal line of enforcement taken by local authority regulators and currently operates efficiently to promote compliance and community well-being.
- 7.20 For the reasons set out above in respect of enforcement orders, the Select Committee may wish to consider whether the definition of environment should be amended to reinstate the concept of "amenity values".
- 7.21 One process issue that has arisen with respect to abatement notices is whether an abatement notice should automatically lapse if it has been complied with or whether (as is currently the case) the recipient is required to apply for it to be cancelled. If an abatement notice remains on foot and it is not cancelled, and the non-compliance arises again at any time in the future then (depending on the wording of the notice) it is possible for the recipient to be prosecuted for breach of the abatement notice. This is onerous but may be deliberate to disincentivise repeated non-compliance. The Select Committee may wish to consider which is the preferred policy approach. The ERM Committee notes that having the abatement notice automatically lapse would be consistent with the approach in cl 730(2) that provides that proceedings

cannot be brought against a person who has completely discharged an enforceable undertaking.

Meaning of excessive noise

7.22 The NBE Bill largely imports the excessive noise management provisions unchanged from the RMA. The ERM Committee considers that it may be timely to consider whether these provisions are still fit for purpose especially in the context of a planning policy framework that promotes more intense urban environments. In that regard, the adequacy of the definition of "excessive noise" in cl 714 in relation to the place should be considered further.

- a. The definition applies to noise that unreasonably interferes with the peace, comfort, and convenience of any person (other than a person in or at the place from which the noise is being omitted...). There is no definition of "place", so uncertainty may arise where within one property, there are various separate living units, or within a high rise building there are separate unit titles for the units. The noise from one unit may be unreasonable in respect of the occupiers of the other units. Remedies under the Residential Tenancies Act 1986 or cross-lease / unit title provisions may take several days or weeks but relief may be required immediately. The ERM Committee suggests that a definition of "place" should apply to any separately occupied area within a property or building and this would enable reasonable remedial action in the discretion of an enforcement officer.
- b. The definition excludes noise emitted by any "(b) vehicle being driven on the road (within the meaning of s 291) of the Land Transport Act 1998. Since the RMA was enacted, vehicles have the ability to produce generate loud noise (e.g. music) that is not part of ordinary motoring. The Select Committee may wish to consider whether police require a right to stop and require the occupiers of a moving vehicle emitting excessive noise to reduce the noise to a reasonable level or cease the noise completely.

Monetary benefit orders

7.23 Clause 718 of the NBE Bill introduces a new power for the Environment Court to order a person to pay an amount not exceeding the amount that the court is satisfied, on the balance of probabilities, represents the amount of any monetary benefits acquired by the person, or accrued or accruing to the person, as a result of the commission of the offence or contravention in relation to which the order is made.

7.24 The clause is closely modelled on s 329 of the Environmental Protection Act 2017 of the Australian state of Victoria. However, the clause appears to, duplicate other provisions in the Bill

- a. To the extent that increased penalties under the Bill are intended to account for potential financial gains from offending, monetary benefit orders appear to duplicate this policy intent, while applying a lower standard of proof (i.e. balance of probabilities).
- b. The monetary benefit order appears to duplicate the more detailed provision for a pecuniary penalties order under cls 776-780 that can be for an amount up to "*3 times the value of the commercial gain resulting from the contravention.*" Under cl 780 of the Bill, while a person cannot be liable for a fine and a pecuniary penalty for the same conduct,

there is nothing in the Bill which prevents a person being liable for both a fine and a monetary benefit order, or a pecuniary penalty and a monetary benefits order. This gives rise to a risk of a form of double jeopardy as both the fine and pecuniary penalty enforcement mechanisms appear intended to take into account monetary benefit.

- c. The power may be duplicated under cls 723-730 relating to enforceable undertakings, and cls 736-750 relating to financial assurance and claims on financial assurance.
- 7.25 The ERM Committee notes cl 759 of the Bill imposes a limitation period for "offences" and "pecuniary penalties", but this limitation does not apply to monetary benefit orders because "pecuniary penalty" is defined in cl 7 of the Bill in a way that does not include monetary benefit orders. There does not appear to be a particular reason for not applying any limitation period to monetary benefit orders.
- 7.26 The Committee considers that these provisions may unduly complicate compliance options and costs in the environmental field, and could undermine the existing procedures of an enforcement order or prosecution.
- 7.27 If the Select Committee wishes to retain the monetary benefit provisions then the ERM Committee notes that the grounds for exercise appear to be wholly discretionary. It would assist if the provisions specified the circumstances where it may be appropriate to use this tool.
- 7.28 The ERM Committee also notes that in terms of determining the quantum of any monetary benefit, while the Court can consider a person's financial circumstances, it is only required to consider the NBE Regulator's estimate of the benefit but not person's estimate. Natural justice would require that the person potentially subject to the monetary benefit order should have an opportunity to place evidence as to the extent that it gained a financial benefit.

Revoke or Suspend consent

- 7.29 Clause 719 introduces a new power for an NBE Regulator to seek an order from the Environment Court to revoke or suspend a resource consent if there has been ongoing and severe non-compliance, provided the NBE regulator can demonstrate that it is in the best interests of the public and will not result in further adverse effects on the environment. The ERM Committee considers that the meaning of these tests need to be clarified:
- a. It is not clear whether it is the effect of the non-compliance that needs to be "severe", or whether it is the non-compliance with a particular condition, which may not have any environmental consequences? Further, the word "ongoing" is open to differing interpretations – would two instances of severe non-compliance constitute "ongoing" non-compliance, would it require two instances over a short period, or are the number of instances and the time period involved relevant considerations?
 - b. The notion of whether the order is "in the best interests of the public" is a new concept in an enforcement regime that is generally aimed at the management of adverse effects on the environment. The ERM Committee considers that greater guidance is required on what this means and the circumstances under which the provision is intended to apply.

- 7.30 The ERM Committee also questions the workability in relation to land use and subdivision consents which tend to be implemented and completed. It makes less sense to revoke or suspend such consents, than it does for regional consents where a person can be stopped from using, taking or diverting water or a discharging contaminants to land, water or air.
- 7.31 Given that the power is more useable in practice, consideration should be given to extending the power to impose conditions to revocation, to provide for situations such as where the revocation may result in damage to the environment if it is exercised unconditionally, or situations where it may be necessary for the Court to order certain actions in conjunction with the revocation in order to prevent damage to the environment.

Enforceable undertakings

- 7.32 Part 11, subpart 2 introduces a new enforcement tool, enforceable undertakings. There are no prescribed requirements for the content of enforceable undertakings in the NBE Bill, meaning they will have a broad application.
- 7.33 The circumstances in which an abatement notice can be issued are quite broad and the notice can contain whatever conditions the issuer thinks fit, allowing it to be tailored to fit the circumstances. Unlike an enforceable undertaking which requires a person to offer an undertaking for the contravention / alleged contravention, an abatement notice can be issued by an enforcement officer as long as they have "reasonable belief" the circumstances warranting the notice exist.
- 7.34 One benefit of the enforceable undertaking in comparison to an abatement notice is that an undertaking may include requirements to pay compensation or penalties, including paying compensation directly to the NBE Regulator. This means that the costs of environmental remediation associated with the contravention would not fall on the public or the local authority themselves. However, such an undertaking would need to be voluntarily given and cannot be required by the NBE Regulator, which raises questions as to the procurement of such enforceable undertakings in practice and their overall value as an enforcement tool.
- 7.35 Given that there is already an enforcement tool that is quite broad in its application and can be tailored to, the ERM Committee questions whether the inclusion of the enforceable undertaking provisions add any real value or whether it instead introduces another new process with additional costs for local authorities to administer.

Adverse publicity orders

- 7.36 Clause 731 introduces a new tool of adverse publicity orders. As it is currently drafted it appears to only apply to non-compliance with a resource consent. It may be that there is deliberate policy rationale in this in that a consent is an authority to undertake an activity subject to consent conditions (that are generally clear and known to consent holders) and so the breaching of these is seen as quite flagrant non-compliance. However, there are also occasions where a person will breach the Act or regulations where there is no resource consent that can be similarly blatant. The Select Committee may wish to consider whether there should be provision for adverse publicity orders in those circumstances.

Penalties

Clause 765 of the NBE Bill adjusts penalties for offences by:

- a. Reducing the maximum period of imprisonment for a natural person from 24 months under the RMA to 18 months under the NBE Bill;
- b. Increasing the maximum fine for a natural person from \$300,000 under the RMA to \$1,000,000 under the NBE Bill (an increase of 233%) and
- c. Increasing the maximum fine for a person other than a natural person from \$600,000 under the RMA to \$10,000,000 under the NBE Bill (an increase of 15,666%)

Maximum period of imprisonment decreases

7.37 The decrease in maximum period of imprisonment reduces the categorisation of offences from Category 3 to Category 2 under s 6 of the Criminal Procedure Act 2011. This removes the right to trial by jury under s 50 of the Criminal Procedure Act and s24(e) of the New Zealand Bill of Rights Act 1990. While this appears to be the intent of the reduction of maximum period of imprisonment, that intent is not expressly stated in the Ministry for the Environment materials that accompany the NBE Bill. The ERM Committee considers that the intent of this change should be clarified by the Ministry for the Environment as there is otherwise an apparent contradiction in increasing fines while reducing potential imprisonment.

Proportionality of penalty increase

7.38 The Ministry for the Environment (MfE) paper "Monitoring, enforcement, and system oversight" 9 December 2022 states that the increased fine provides a greater deterrence against non-compliance and better reflects the potential financial gains from offending. The following factors should be taken into account when considering whether the scale of increase is appropriate:

- a. Parity/comparison with maximum fines available under other statutes.
- b. How the Courts will apply this new level of fine to existing case law as to penalties under the RMA.

7.39 For instance, under s47 of the Health and Safety at Work Act 2015, recklessly exposing a person to a risk of death or serious injury or illness carries a potential penalty of a term of imprisonment not exceeding 5 years or a fine not exceeding \$600,000 for a PCBU or \$300,000 for a person who is not a PCBU; and under s 48 (a strict liability provision) failing to comply with duty that exposes an individual to risk of death or serious injury or serious illness carries a maximum fine of \$1,500,000 for a corporation. The level of potential fine under the NBE Bill could be seen as out of step with this regime, albeit that it is difficult to compare risk of human death or serious injury with environmental harm.

7.40 Another potential comparator would be the pecuniary penalty regime in cl 778 of the NBE Bill which appears to be closely modelled on s80 of the Commerce Act 1986. Both of these provisions apply a penalty of \$10,000,000 (or an amount based on calculation of monetary gain) which mirrors the \$10,000,000 maximum fine for a person other than a natural person. This suggests, consistent with the MfE paper, that the policy intent for the maximum penalty for a person other than a natural person is to address circumstances where there has been substantial commercial gain from environmental offending. If this is the case, the intent is not express in the NBE Bill which gives rise to issues as to how the increased penalty regime will be applied by the Courts in practice.

Tarif approach

7.41 Case law has developed under the RMA as to the appropriate starting point level of fine. For instance, the District Court in *Waikato RC v GA & GB Chick Ltd* (2007) 14 ELRNZ 291 established three bands as guidelines for the appropriate starting point for fines in relation to effluent discharge. In the subsequent case of *Manawatu-Wanganui RC v Wakapua Farms Ltd DC Levin CRI-2011-031-643, 21 March 2012*, the District Court took into account the increase in maximum penalties under the Resource Management (Simplifying and Streamlining) Amendment Act 2009: threefold in the case of a company in terms of the fine, and by \$100,000 in respect of individuals. The applicable starting point from the *Chick* case was accordingly increased in a proportional manner.

7.42 The ERM Committee questions whether the intent of the NBE is to increase the penalty regime from RMA case law proportionally by 233% for individuals and 15,666% for corporations, or whether the upper levels of penalties are intended to be reserved for circumstances where significant commercial gains are realised through offending.

7.43 The ERM Committee suggest that the policy intent of the increased fines and when the maximum fines would be available should be clarified in the NBE Bill to assist in certain and practical application by the Courts.

Insurance against fines unlawful

7.44 Clause 766, which renders it unlawful for insurance to pay a fine, infringement fee or pecuniary penalty derives from the Health and Safety at Work Act 2015 (HSWA), s 29.

7.45 Under the latter HSWA Act, there are clear policy reasons for preventing insurance of actions that may harm persons. The justification under the NBE Bill is less compelling. Any insurance of this type is not likely to be available to cover deliberate offending. A question could be raised whether there should be a prohibition of borrowing or crowd funding to cover the cost of a fine or penalty or prevent liquidation of a corporate body? This also raises broad policy questions about the degree to which the state should regulate individuals and business decisions on how to manage risk in their operations.

7.46 Typically, 90 percent of fines are paid to the local authority undertaking the enforcement action and are used to cover the costs of the enforcement action and remediation of the environment required as a result of the offending. The NBE proposes a significant increase in

penalties, and it seems likely that, in the absence of insurance, some offenders would be unable to pay the fines. There is a concern that this would mean that there are less funds available for remediation and that this would be inconsistent with the purposes of the NBE, particularly promoting outcomes for the benefit of the environment and the focus on the health of the environment under Te Oranga o te Taiao.

7.47 The wording in the NBE Bill and s29 of the HSWA is almost identical except that s 29 sets the maximum fines for those who seek to enter into prohibited insurance or indemnity arrangements set out in the preceding subsection. It provides that:

1. A person who contravenes subsection (2) commits an offence and is liable on conviction, –

(a) for an individual, to a fine not exceeding \$50,000:

(b) for any other person, to a fine not exceeding \$250,000.

7.48 The omission of a similar subsection in cl 766 of the NBE Bill means that it is not clear what the sanction is for breaching the requirements set out in subclause (2). While cl 766(1)(a) states insurance policies or contracts of insurance indemnifying a person from liability are of no effect, it is unclear whether the nullification is the sanction, or whether an additional sanction applies.

7.49 If the provisions making insurance for fines are retained, then the ERM Committee suggests that the Select Committee consider reinforcing restrictions contained in cl 766(2), by either:

- a. inserting a new subclause (3) into s766 with similar wording to that in section 29(3) of the HSWA; or
- b. Adding the contravention of cl 766 into the offences listed in cl 760, so as to render the offence subject to the penalties specified in cl 765.
- c. The ERM Committee notes that while there have been large increases in fines there has been no change in penalties for continuing offences and queries whether this was an oversight or deliberate policy decision.

Pecuniary penalty order

7.50 The provisions in cls 776-780 appear to create a statutory cause of action for a pecuniary penalty for a deliberate breach of obligations against a corporate body of up to \$10m and a principal or agent of max \$1m. Clause 780 states a person liable for the same conduct must not be convicted of an offence under the NBE Bill or ordered to pay a pecuniary penalty under the NBE Bill.

7.51 The provisions appear to duplicate powers of the Environment Court on an enforcement order to make an award of compensation for remedial costs (cl 700(2)) and the monetary benefit order under cl 718.

- 7.52 Pecuniary penalty orders use the civil standard of proof have the same maximum financial penalties as offences. The Select Committee may wish to consider whether it is appropriate to lower the burden of proof in the case of pecuniary penalties while retaining the strict liability approach of s 338 of the RMA, or whether this makes the bar too low given the potential penalties.
- 7.53 The ERM Committee comments that these new provisions appear to be out of place and would be more appropriate under the Biosecurity Act 1993, ss 154H-154L which is the origin of the provisions. The Maritime Transport Act 1994 has comprehensive provisions for compensation and penalties for marine pollution. The ERM Committee suggest that the Select Committee consider whether the new complex procedure is necessary in the wider context beyond the Biosecurity Act.

8. Concluding Remarks

- 8.1 Thank you for the opportunity to make submissions on the Bill.
- 8.2 The ERM Committee wishes to acknowledge the role of the previous ERM Committee Convenor, the late Dr Robert Makgill in initiating the ERM Committee's work on this submission. It also acknowledges the work of the NBE Bill Sub-committee Joanna Beresford, Mike Doesburg and Patrick Senior.
- 8.3 The ERM Committee also acknowledges the contributions to this submission by its following members: Jo Baguley, Alex Cumming, Kate Dickson, Megan Exton, Richard Gardner, David Grinlinton, Charl Hirschfield, Grant Hewison, Jemma Hollis, Elliot Maassen, Charlotte Muggerridge, Ken Palmer, and Troy Stade.
- 8.4 The ERM Committee wishes to make oral submission before the Select Committee.
- 8.5 To contact the ADLS Environment and Resource Management Law Committee for clarification on any matters raised in this submission, please contact the ERM Committee Co-Conveners: Patrick Senior (patrick.senior@russellmceveagh.com) and Mike Doesburg (mike.doesburg@wynnwilliams.co.nz).

Ngā mihi



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