TE KŌKIRINGA TAUMATA
NEW ZEALAND PLANNING INSTITUTE

SUBMISSION ON FAST-TRACK APPROVALS BILL

19 APRIL 2024

Submission of Te Kōkiringa Taumata | New Zealand Planning Institute
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Planning is essential to achieving a better New Zealand

Te Kōkiringa Taumata | New Zealand Planning Institute (NZPI) is the voice of planning in New Zealand. It is the professional organisation representing this country's planners, resource managers, urban designers, and environmental practitioners.

Planners have a critical role in shaping New Zealand's future by helping to develop solutions to key issues, such as population growth, infrastructure needs, pressure on natural resources and environments, demographic change, and transport.

INTRODUCTION

1. Te Kokiringa Taumata | New Zealand Planning Institute (NZPI) welcomes the opportunity to provide feedback on the Fast-track Approvals Bill (the Bill). This is a significance piece of legislation for the resource management system in New Zealand, and we are the organisation that represents the professionals who implement that system.

2. NZPI has approximately 3300 members who come from diverse backgrounds and work for a variety of organisations and clients, such as councils, central government, developers, environmental groups, infrastructure providers, and consultancy firms. Although this is a diverse membership, there is a consistent view among us on how to make improvements and do things better. As professionals working within the system, our views and opinions are focused on how we can plan for a better New Zealand for our society as a whole, considering all points of view. This is the strength of our submission.

3. We have applied an implementation perspective to our review of the Bill. Our submission is informed by the experience of our members in the current and past fast-track systems. We have held discussion groups with members to seek feedback on the Bill and generate ideas for improvements and alternative means of achieving the outcomes sought.

4. NZPI expresses support for the submissions of **Papa Pounamu** and **PlanTechNZ**, two Special Interest Groups of NZPI. We acknowledge the mahi behind these submissions and commend the thought, reasoning and initiative expressed in them. We recommend that the Environment Committee adopt the recommendations in these two submissions.

5. We also express support for two other submissions. The submission of **EQC Toka Tū Ake** includes very important and sensible recommendations relating to risk from natural hazards and climate change, and we recommend the Environment Committee adopt those recommendations. We also support the very comprehensive submission of **LGNZ/Taituarā**. Our submission highlights the particular points in that submission that we agree with.

6. **We would like to speak to our submission**.

OVERVIEW OF SUBMISSION

7. NZPI supports the concept of a fast-track process as part of the resource management system. We are supportive of the one-stop-shop approach of the Bill. However, speed of process often comes at the expense of democratic decision-making, so it is important to get the balance right between timeliness and fair process. As currently drafted, we consider that this balance in the Bill is not quite right, and our submission suggests a number of improvements.

8. In particular, NZPI seeks improvements to:
   a. The justification for projects being eligible for the fast-track process. The process should be reserved for a sub-set of projects whose ends justify the means of a less democratic process. As drafted, the Bill extends eligibility too widely and the 'ends' that projects need to achieve is not clear enough, including in the purpose of the Bill.

   b. The checks and balances on decision-making. Ministerial decision-making can be a powerful tool to achieve change, but it needs to be carefully applied to avoid unintended consequences and uphold the principles of natural justice and fair process. NZPI recommends changes to checks and balances in three key ways:

      i. A forward-looking requirement to adhere to Te Tiriti o Waitangi obligations when making decisions under the Bill, not just to Treaty Settlements, which are limited to addressing past wrongs.

      ii. Greater emphasis on environmental considerations and the consideration of local community goals and aspirations as set out in RMA plans.

      iii. Changes to ensure sufficient guidance for Ministerial decision-making, to reduce the risk of conflicts of interest for Ministers, and to require more weight to be given to expert advice.

9. We also recommend a number of changes to improve the implementation and workability of the Bill. Our members have been involved in fast-track processes on behalf of applicants, councils, and as members of expert panels. We have a significant amount of on-the-ground experience to be able to offer practical improvements to the Bill.

10. Our review of the Bill has identified a number of drafting issues. We identify these and recommend solutions in **Appendix 1** of this submission.

PROBLEM DEFINITION

11. NZPI is concerned that there is not a clearly defined problem that the Bill is trying to resolve, and no critical analysis of the different options available to address the problem. The lack of a Regulatory Impact Statement makes it very difficult to assess the justification for the Bill and understand its costs and benefits. For example, as we explain later in this submission, there is no evidence that a Treaty principles clause in the COVID-19 fast-track legislation has caused issues for the timely approval of projects, yet there is no Treaty clause included in this Bill. The lack of evidence to support the proposals in the Bill is undemocratic.

12. The Bill's focus on prioritising economic development over environmental protections is concerning given the economic benefits environmental protect provides. For example, tourism is New Zealand's second largest export earner at $37.7 billion and generating $1 billion in GST (Tourism NZ March 2023[1]). Further strategic thought and direction is needed, and we highlight this later in this submission when we discuss the purpose of the Bill.

[1] Industry insights | Corporate (tourismnewzealand.com)

13. NZPI recommends that the Bill is made temporary, in place only until a permanent system to replace the Resource Management Act 1991 (RMA) is enacted. This submission raises a number of fundamental issues with the policy behind the Bill, and we recommended time is taken as part of the longer-term reform of the RMA to address these policy issues and introduce enduring and robust legislation. We support the recommendation in the LGNZ/Taituarā submission of a sunset clause of 3 years, or if not, that a requirement for annual independent monitoring and review of the performance of the legislation is included in the Bill. We anticipate the Bill will need ongoing review and amendment to improve it, and monitoring of system performance is essential.

14. Recommendation 1:
    a. That a sunset clause of 3 years is included in the Bill, so that it ceases to have effect in 3 years, or when comprehensive reform of the RMA has been enacted (which ever is sooner).
    b. If recommendation (a) above is not accepted, that the Bill is amended to implement recommendation 5 of the LGNZ/Taituarā submission to include monitoring and review clauses.

15. NZPI does support the one-stop-shop approach to the Bill and agrees that this will address the problems of delay, expense and inconsistency caused by having to make multiple applications to different decision-making authorities. However, this approach also creates issues associated with complexity of applications, which we address throughout this submission.
16. We consider that is one additional type of approval that should be added to the Bill, being bylaw approvals under the Local Government Act. Bylaw approvals are often required for infrastructure projects, and including them in the Bill would add efficiencies.

17. Recommendation 2: That bylaw approvals under the Local Government Act are added to the Bill.

PURPOSE OF THE BILL

18. NZPI has two key concerns with the purpose of the Bill as drafted in clause 3:
    - The lack of an outcome or purpose to the benefits that are to be facilitated.
    - Lack of balance between benefits and the environmental, social and cultural costs of those benefits.

19. These concerns are discussed below and amendments are recommended at the end of this section.

20. The purpose of the Bill needs to be clear and easily understood in order for the fast-track process to work smoothly. Key to this is a clear outcome for what is to be achieved by the process. This is currently missing from clause 3 of the Bill.

21. The purpose is focused on the delivery of projects with significant regional or national benefits. This gives an indication of scale, but it does not give any indication of what the benefits should be for or what the purpose of the benefits should be. It is not clear what outcome the benefits should contribute to. Clarifying this in the purpose will greatly assist implementation of the Bill. For example, adding *benefits 'for the wellbeing of all New Zealanders'*, or *benefits 'for the economic prosperity of New Zealand'* provide direction for the overall outcome sought by the Bill.

22. We agree with the LGNZ/Taituarā submission point that benefits should be long term and in the public interest (recommendation 1 of that submission). We note that our recommended wording above incorporates a focus on public interest benefits, by referring to 'New Zealand'. That is, the benefits need to be for 'New Zealand Inc'.

23. NZPI is concerned that consideration of the costs of achieving benefits is not factored into the purpose of the Bill, particularly environmental and social costs. As the Bill is currently drafted there is a risk of poor environmental outcomes. We do not consider that benefits should be facilitated at any cost. That would be an irresponsible approach. A balancing exercise is required in order to determine if the benefits justify or outweigh the costs. An important role for the legislation is to set out the weighting to be given to particular priorities in that balancing exercise. But the requirement for the balancing first needs to be in the purpose of the bill.

24. A balancing requirement can be included by adding a qualifier to the purpose of facilitating projects with significant benefits, such as 'while'. This construction keeps the primary purpose as it is and allows other considerations to be identified. We recommend that sustainable management is used as the qualifier, in a similar way as in the purpose of the COVID-19 Recovery (Fast-track Consenting) Act 2020 "*while continuing to promote the sustainable management of natural and physical resources*". Sustainable management is a concept that is well understood by practitioners and the legal system in New Zealand. It provides for the consideration of costs and benefits across the range of wellbeings (social, cultural, economic and environment). There is no evidence that it has been an issue for the approval of projects under the COVID-19 fast-track legislation. We note that there have been 136 applications for projects under the COVID-19 or Natural and Built Environment Act fast-track process, of which only 6 have been declined[2].

25. Adding this qualifier is consistent with one of the Government's stated objectives for RMA reform, of safeguarding the environment. It is also consistent with the hierarchy of considerations set out in the Bill, which puts the purpose of the RMA after the purpose of the Fast-track Bill. Including it will ease integration of the fast-track process with the existing resource management system.

26. From a Te Ao Māori perspective, kaitiakitanga principles are not aligned with the purpose of the Bill as drafted. In addition, the Te Ao Māori concept that if we look after the environment, the environment will look after us, is not reflect in the Bill as drafted. The Crown's Treaty

[2] Fast-track projects | EPA

obligation to protect taonga is also currently missing from the Bill's purpose, and the Bill as drafted presents a real risk that this obligation will not be fulfilled in the case of fast-track approvals. The addition of a sustainable management qualifier to the purpose in clause 3 of the Bill will help to address these issues.

27. We also note a drafting issue with clause 3. As currently drafted, the purpose clause creates circular reasoning throughout the Bill. The purpose of the Bill is to "*provide a fast-track decision-making process …*". It does not make sense to assess how individual projects achieve this purpose. We understand the intention is to assess projects against their ability to deliver significant regional or national benefits. The drafting of the purpose clause therefore needs to be reversed. For example: *the purpose of this Act is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits in a timely manner*.

28. Recommendation 3: That clause 3 of the Bill is amended so that:
    a. The outcome that projects with significant benefits are to contribute to is included in clause 3, such as *benefits 'for the wellbeing of all New Zealanders'*, or *benefits 'for the economic prosperity of New Zealand'*.
    b. That a sustainable management qualifier is added to clause 3, along the lines of '… *while continuing to promote the sustainable management of natural and physical resources'*.
    c. The drafting of clause 3 is reversed, so that the facilitation of the delivery of projects with significant benefits comes before the other aspects of the purpose.

29. Combining these recommendations, an amended clause 3 could read as follows: *The purpose of this Act is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits for the economic prosperity of New Zealand in a timely manner, while continuing to promote the sustainable management of natural and physical resources*.

TE TIRITI O WAITANGI

30. NZPI is concerned that there is no requirement in the Bill for persons exercising functions under it to do so in accordance with Te Tiriti o Waitangi principles and obligations. The Treaty principles of partnership, participation, and protection are fundamental to resource management in New Zealand, and they need to be upheld in the Bill. A clause should be included in the Bill that is equivalent to section 8 of the RMA, but that requires people to give effect to the principles of Te Tiriti o Waitangi rather than just take them into account. We note that the COVID-19 fast-track legislation includes such a clause, and there has been no evidence that this has caused issues for processes under that Act[3]. We also note that the submission of LGNZ/Taituarā supports inclusion of a Treaty clause (recommendation 90 of that submission).

[3] See comment above that there have been 136 applications for projects under the COVID-19 or Natural and Built Environment Act fast-track process, of which only 6 have been declined.

31. NZPI supports the requirement in clause 6 of the Bill in relation to existing Treaty settlements and customary rights. However, this is not enough. Treaty settlements only address past wrongs, and there is a need to ensure actions going forward are Treaty compliant. Otherwise, the Government will risk contemporary Treaty Claims.

32. We also raise an issue that the Bill changes the context for existing Treaty settlements, and there does not appear to be a framework in the Bill for addressing this. Our expectation is that settlements with provisions for resource management matters will need to be reconsidered in light of the Bill.

33. Including a Treaty clause in the Bill will also provide some support for unsettled iwi. We are concerned that participation in the system for unsettled iwi is not as clear as for settled iwi.

34. We note that Ministerial decision-making does not provide for partnership with Māori in decision-making. This point is part of the reasoning for our recommendation later in this submission that panels should be the decision-makers on substantive applications. Panels allow for a degree of joint decision-making with Māori, which helps to give effect to the Treaty principle of partnership.

35. Related to the above point, we consider there should be greater safeguards for land under consideration for return to Māori as part of Treaty settlements. We consider that the Minister for Treaty Settlements should be one of the Ministers invited to provide written comment on referral applications (clause 19) and on substantive applications (clause 20 of Schedule 4). This will support the requirement in clause 13 that any recognised negotiation mandates for, or current negotiations for, Treaty settlements that relate to the project area are reported on. We note that the Minister for Treaty of Waitangi Negotiations is listed in clause 20 of Schedule 4 already. We recommend this identification is replicated in clause 19 of the Bill.

36. Later in this submission we discuss the timeframes in the Bill for participation in the process. In the context of Te Tiriti o Waitangi, we note that participation for Māori in the process should be genuine, meaning it needs to be well resourced and adequate time provided for it. The timeframes in the Bill as drafted are too tight to allow for genuine participation. Our recommendations to address this are set out later in this submission.

37. Recommendation 4: That the Bill is amended to:
    a. Include a clause that requires all persons exercising functions and powers under it to give effects to the principles of Te Tiriti o Waitangi.
    b. Amend clause 19 so that there is a specific requirement to invite written comment from the Minister for Treaty of Waitangi Negotiations on referral applications that replicates the requirement for this Minister to be invited to provide written comment on substantive applications in clause 20 of Schedule 4.

ELEGIBILITY CRITERIA

38. The Bill proposes a process that shortcuts or bypasses established planning and decision-making principles, such as expert-led and evidence-based decision-making, Te Tiriti-based decision-making, democratic decision-making, that decision-making should occur as close the those affected as possible, and aspects of fair process. It is much more than just a fast process. There needs to be a strong justification for projects to be eligible for such a process. Eligibility should be a high threshold, and should be the exception rather than the rule. As currently drafted, eligibility is far too wide.

Significant regional or national benefits

39. An impact of having no clear outcome that the Bill is trying to achieve, as discussed above, is that it is very difficult to understand what projects may be eligible and what constitutes significant regional or national benefits. Clause 17(3) of the Bill provides some guidance on this. However, it is largely a list of project types, rather than a list of criteria, and the list is very broad. A wide range and a large number of projects could be eligible.

40. This approach has several negative consequences:
    - It reduces transparency and creates uncertainty in the system.
    - It risks overloading the system and slowing it down, contrary to the intent of creating a fast process.
    - It has the potential to place a large demand on the workloads of Ministers.
    - It raises the expectations of potential applicants, which may not be realised, resulting in delays to projects and frustration[4].
    - It undermines the 'business as usual' system, particularly strategic planning, land use planning and local government funding processes.
    - It raises the potential for conflicting demands on resources, where more than one project is vying to use the same resources, and risks ad hoc decision-making with little consideration of cumulative impacts.
    - It invites argument and legal challenge.

41. There is a lack of direction in clause 17 on what types of benefits (e.g. economic, environmental, social, cultural etc) should be facilitated, who the benefits should accrue to (public or private benefits), when the benefits should be realised, if they should be short-term or long-term benefits, and whether the benefits should stay in New Zealand or go offshore. There are no requirements about how benefits should be assessed, demonstrated, or measured. The legislation needs to address all of these matters so that there is a clear and strong justification for projects having access to the fast-track system, and to overcome the negative consequences identified in the above paragraph.

42. Rather than focusing on 'significant regional or national benefits' as an eligibility criterion, which is a vague and undefined term, NZPI considers it would be more helpful to focus on

[4] We note that there appears to have been some confusion already: Minister questions mining company's fast-track 'invite' claim | RNZ News

'significant contributions to regional or national priorities'. Focusing on priorities is a more transparent and certain approach, if priorities are required to be identified (discussed further below). The priorities should link to the purpose of the Bill and the outcome the bill is trying to achieve. In line with our comments above about including an outcome in the purpose of the Bill, our amended drafting (see below) links priorities to outcomes – priories *for improved economic prosperity and social, cultural and environmental wellbeing*. Being outcomes focused means that projects that meet priorities for achieving the outcome can be considered, and there is no need to create a list of types of projects in the legislation. This allows for flexibility and innovation. The 'significant' qualifier should be retained, although we recommend further requirements in relation to it (discussed further below). Our recommended wording for a replacement eligibility criterion is set out below.

43. Recommendation 5: That clause 17(2)(d) of the Bill is replaced with the following: *whether the project would have positive effects that make a significant contribution to the achievement of regional or national priorities for improved economic prosperity and social, cultural and environmental wellbeing*.

44. The Bill should clarify that regional or national priorities are those set by central or local government or iwi authorities. The Bill should also require regional and national priorities to be clearly set out. This will provide transparency and certainty for the system. For national priorities, this could be done in the Bill itself, by reference to existing documents such as Government Policy Statements and National Policy Statements, by new secondary legislation, or through new documents such as a national spatial strategy (discussed further below). For regional priorities, existing documents such as Regional Policy Statements, Long Term Plans, spatial plans, economic development strategies, future development strategies, or new documents could be used. Similarly, there are existing iwi strategic and planning documents that could be used to identify priorities.

45. A common factor to the central and local government documents listed above is that they are all created via established legislation that requires public input and democratic decision-making, and they may have also been tested through the courts. Iwi planning documents are developed in accordance with relevant tikanga and are accepted as representing the collective view. Projects that contribute to the achievement of the priorities set in these documents will have a degree of social licence and the truncated fast-track approval process can be more easily justified.

46. Relying on central or local government or iwi priorities helps provide certainty for some of the questions identified above, such as who the benefits accrue to, when they should be realised, whether they are short or long-term, and if they stay in New Zealand or go offshore. These are considerations that would inform central government, local government and iwi decision-making. It also has the advantage of providing a degree of coordination and strategic direction for the case-by-case eligibility assessment. Consideration of how the various projects work together (or don't), is important to ensure durable long-term outcomes.

47. NZPI considers that a national spatial strategy would significantly assist with eligibility assessments and provide a high degree of certainty to the system. A national spatial strategy

would bring together strategic decision-making on national and inter-regional issues such as transport infrastructure (including major state highways, rail, ports and airports), energy infrastructure (including hydro, geothermal, wind and solar generation, storage, and transmission), and telecommunications infrastructure and data centres, climate change and natural hazards, nationally important natural areas, significant natural landscapes.

48. A national spatial strategy is a potentially powerful tool to ensure consistency across the country and address competition for space between nationally important uses, for example between biodiversity and transport or between productive land and renewable energy generation. As well as addressing competition, it would also address complementary and beneficial relationships, for example infrastructure adaptation to climate change. It could also assist with consistent assumptions on population growth cognisant of immigration policy, and the development of consistent scenarios for long term housing and transport outcomes based on Government Policy Statements. For the fast-track process, a national spatial strategy would simplify referral and substantive decision-making processes.

49. We note our agreement with LGNZ/Taituarā on this point. We support recommendation 97 of the LGNZ/Taituarā submission that calls for Integrated National Direction and a National Spatial Strategy that identifies critical constraints and opportunities to guide decision-making on nationally important and regionally significant projects.

50. Recommendation 6: That clause 17 of the Bill is amended to:
    a. Clarify that regional or national priorities are those set by central or local government or iwi authorities.
    b. Require regional and national priorities to be clearly set out in specified existing or new documents.
    c. Require the development of a national spatial strategy.

51. The Bill should require projects to demonstrate a significant contribution to regional or national priorities. Clear requirements on this will assist with implementation of the Bill, provide certainty to applicants, and provide a framework for Ministerial decision-making. At a minimum, this should include identifying where the benefits lie or who they accrue to, the duration of the benefits (short-term or long-term), and the scale of the benefits.

52. Criteria and methodologies for demonstrating significant contributions should be included. These could be different for the different types of priorities. For example, there may be a list of economic indicators required to demonstrate contribution towards economic prosperity (such as through a renewable energy plant/farm), and separate requirements for assessing contribution towards social wellbeing (such as through a housing development). These more detailed requirements could be set in secondary legislation rather than the Bill itself.

53. Recommendation 7: That clause 17 of the Bill is amended to:
    a. Require applications to demonstrate a project's significant contribution to regional or national priorities and set the requirements for this, including identifying where the benefits lie or who they accrue to, the duration of the benefits (short-term or long-term), and the scale of the benefits.

b. Set the criteria and methodologies for demonstrating significant contributions in secondary legislation.

Costs

54. It is essential that clause 17 include a requirement to consider whether the costs of a project outweigh the benefits. This aligns with our recommendation above that sustainable management is added into the purpose of the Bill. It also aligns with the suggestion of LGNZ/Taituarā that projects provide net benefits (see paragraph 102 of that submission). At referral stage this needs to be a high-level assessment, but it is important that projects that clearly have costs that outweigh the benefits are not referred. We do consider it is appropriate to refer projects where it is not clear whether the benefits outweigh the costs, as a key task for the panel is to determine this based on consideration of all the evidence.

55. Identification of costs should include economic, social, cultural and environmental costs, and should consider the long-term, such as consequences for communities after projects are compeleted. As we recommend for the benefits, applications need to identify who bears the cost, the duration of the costs, and the scale of the costs. Criteria and methodologies for assessing costs could be included in secondary legislation, alongside the criteria and methodologies for assessing benefits.

56. Identifying costs is important for two other reasons: to understand who might be affected by or have an interest in the application, and to understand the types of conditions that might be required on an approval.

57. Recommendation 8: Amend the Bill to:
    a. Add the follow criterion to clause 17(2): *whether the costs of the project outweigh the benefits*.
    b. Include a requirement that Ministers cannot refer a project for which the costs outweigh the benefits.
    c. Require applications to identify costs, including who will bear the costs, the duration of the costs, and the scale of the costs.
    d. Set the criteria and methodologies for assessing costs in secondary legislation.

Viability of projects

58. It is important that projects referred into the fast-track process are viable and ready to go. In particular, it is important that funding and supporting services are engaged for the project. The two-year lapse date means that projects have to be ready to go, so all aspects of a project need to be agreed and arranged. For example, the implications of a housing development being approved without arrangements and funding in place for infrastructure and services to support it are significant, particularly for local councils.

59. It is inefficient to open the fast-track process to projects that are not viable and ready to go. It is a significant process to go through, and it would be a waste of resources if the approvals granted lapsed without being implanted. There could also be a significant burden and pressure placed on local councils, for example, to agree to provide infrastructure for projects

within the short window between approval and lapse date. Approval over a short period of time is not likely to be possible, give the timing of council financial planning processes such as Long Term Plans.

60. To address these issues, we recommend an eligibility criterion is included that requires consideration of the viability of a project.

61. Recommendation 9: That clause 17 of the Bill is amended to include an eligibility criterion that requires consideration of the viability of a project, including agreement and funding for supporting infrastructure.

Natural hazard and climate change risk

62. It is important that fast-track approvals do not increase the risks to our communities from natural hazards and climate change. For example, significant housing developments should not be allowed in high-risk flood areas, power substations should not be built in coastal inundation areas, and the location of large scale exotic forestry that creates wildfire risk neds to be carefully considered. Risk from natural hazards and climate change needs to be given priority over other considerations, to ensure we achieve good outcomes through the fast-track process. This requires an eligibility criterion related to risks from natural hazards and climate change, so that applications that would result in unacceptable risk are not referred. We note support for this in recommendation 58 of the LGNZ/Taituarā submission.

63. Recommendation 10: That clause 17 of the Bill is amended to include an eligibility criterion that requires consideration of the level of risk that would result from the project and any measures to manage that risk.

64. Recommendation 11: That sub-clause (3) of clause 17 is deleted. This sub-clause is redundant if the changes in recommendations 4 to 8 above are made.

Prohibited activities

65. NZPI is very concerned that the Bill allows applications to be made that include prohibited activities under the RMA, and that applications previously declined by the Courts can be reconsidered under the Bill. We note shared concern over prohibited activities with LGNZ/Taituarā. Prohibited activities are very clear statements of community intentions. There is a very high bar to include prohibited activities in RMA plans, particularly due to the operation of section 85 of the RMA. To allow applications for them, with no specified need to justify applying for them, is to blatantly disregard clearly expressed community intentions and considered decision-making. It fundamentally undermines the democratic planning system. Retaining this ability in the Bill will significantly undermine the social licence for the fast-track process.

66. Our recommendation is to delete clause 17(5) and corresponding clause 21(2)(f), so that there is no ability to apply for prohibited activities. If this is not accepted, we recommend a requirement for ‘exceptional circumstances’ is included, so that applications can only be

made for prohibited activities in exceptional circumstances. This is a term used in the RMA (for example in section 107 relation to discharge permits) and would set a very high bar for allowing an application.

67. We point out that many prohibited activity rules result in positive effects. For example, wetlands can assist with flood management, so rules that prohibit the draining of wetlands have a positive impact on flood management.

68. We also note a potential legal issue that we recommend the Environment Committee seek advice on. Clause 10(1) of the Bill states that the Bill applies if a resource consent, notice of requirement, or certificate of compliance is required under the RMA, and sub-section (5) of clause 10 states that approvals under the Bill have effect as if they were granted, issued, or entered into in accordance with the legislation that establishes or provides for it. We point out that there is no legislation that establishes or provides for an approval for a prohibited activity, and it is not possible to obtain a resource consent for a prohibited activity. This issue would need to be resolved if the ability to apply for approval for prohibited activities was to be included in the Act.

69. We recommend that activities for which applications have previously been declined by the Court are not able to use the fast-track process. Allowing this to occur shows a blatant disregard for the judicial system and all the time and resources put into the appeal process. We recommend that these activities are added to the ineligible projects list in clause 18 of the Bill.

70. If the above recommendation is not accepted, we recommend that the findings of the Court in the relevant case are specified in the Bill as a material consideration when these applications are considered for referral and when substantive decisions are made. The findings of the Court are likely to include comment on the nature and scale of effects on the environment, comment about how the project sits within the RMA policy framework, and other relevant matters. These are matters that are considered by the Joint Ministers on referral (see clause 21), and by the expert panel when making recommendations on the substantive application (see clause 32 of Schedule 4).

71. We note that clause 14 of the Bill, which sets out the information requirements for referral applications, includes a requirement for information about previous applications and any decisions in relation to them. This suggests that this information should be used in decision-making, but there is no actual requirement that it should be. Clause 14 should be amended to clarify that ‘any decisions made on them’ includes those made by the courts.

72. Recommendation 12:
    a. That the Bill is amended to delete clause 17(5) and corresponding clause 21(2)(f).
    b. That if (a) above is not accepted, a requirement is included in clause 17 for there to be exceptional circumstances in order for an application for a prohibited activity to be considered for referral.
    c. That the Environment Committee seek legal advice on the ability of the Bill as drafted to provide an approval for a prohibited activity.

d. That clause 18 of the Bill is amended so that projects for which applications have previously been declined by the Court are added to the list of ineligible projects.
e. That if (d) above is not accepted, a requirement is added to the Bill for Joint Ministers and expert panels to have particular regard to the findings of any Court relating to pervious version of the application when making recommendations and decisions under the Bill (e.g. clause 21 of the Bill and clause 32 of Schedule 4).
f. Consequential to (e) above, that clause 14 is amended to clarify that 'any decisions made on them' includes those made by the courts.

MINISTERIAL DECISION-MAKING

43. NZPI considers that Ministerial decision-making on individual projects should be undertaken with caution. The role of Ministers is primarily one of governance, policy making, and apportioning government funds. Stepping into a regulatory decision-making role should be done infrequently and with the proper protections in place against conflicts of interest.

44. Our preference for the role of Ministers in the system is to set clear national priorities and strategic policy direction on New Zealand's significant resource management issues, provide sufficient resourcing and support to the system, and then let the appropriate experts undertake assessments and decision-making.

45. In the long-term, there will be more consistency and certainty if decision-making is non-political and expert led. Expert led decision-making is more likely to result in robust and enduring outcomes, and it reduces the risk of judicial reviews.

46. NZPI sees a number of issues with the Ministerial decision-making provided for in the Bill as drafted:
    a. The same Ministers that refer projects into the system also decide on those projects. This raises significant opportunity for conflicts of interest.
    b. There is a lack of direction in the Bill for how Ministers should make decisions, both at the referral and substantive steps. This results in a high degree of Ministerial discretion. A high degree of discretion creates uncertainty for all users of the system. It also raises issues of transparency and fair process and increases the risk of judicial reviews.
    c. Ministerial decision-making does not allow for making decisions in partnership with Māori.
    d. The ability for Ministers to deviate from an expert panel recommendation is extensive. This undermines the role of the panel by making it appear token and ineffectual. It also changes the basis for decision-making from evidence-based to being politically based. This creates opportunities for lobbing of Ministers and undermines the credibility of the fast-track process.

47. NZPI has developed a number of options to overcome the issues identified above. These are discussed in the following paragraphs.

48. Expert panels should be the decision-makers on substantive applications. We agree with recommendation 47 in the LGNZ/Taituarā submission in this regard. This is the situation for

the current fast-track process, and there is no indication that it has caused any issues, and no evidence that Ministerial decision-making would result in better outcomes. We note that past experience suggests that Ministerial decision-making is not appropriate[5]. This option of the expert panel making decisions ensures evidence-based decision-making and puts weight on expert opinion rather than political motivations. In addition, it allows for a degree of partnership with Māori in decision-making, if appropriate Māori representatives are included on the panel.

49. Those making the substantive decisions should not be those who make the referral decisions. We suggest that the joint ministers could make referral decisions, and the expert panels make the substantive decision. This would remove the potential conflict of evidence for Ministers and ensure decisions on the substantive decisions were evidence-based and expert-led.

50. We consider that two additional Ministers should be added to the Joint Ministers: the Minister for the Environment and the Minister for Māori Development. We note agreement with LGNZ/Taituarā on inclusion of the Minister for the Environment (recommendation 48 in that submission). This will help spread the concentration of Ministerial powers across different interests, providing a more balanced consideration and reducing the potential for lobbing to be effective. It also assists with our submission points on greater consideration of the environment and of Māori interests.

51. To assist with the potential for conflicts of interest, we consider that there needs to be a cross-reference to the Cabinet Manual. In particular, Ministers should be required to declare conflicts of interest in relation to specific projects, this should be recorded in all the records of decision-making for that project, and Ministers should be excluded from decision-making in relation to a project where there is a real or perceived conflict of interest.

52. If Ministerial decision-making is retained for substantive decisions, we recommend a number of changes to address the issues identified above. We recommend that a decision by Joint Ministers to deviate from the recommendations of an expert panel should trigger a right of appeal to the Environment Court for all those involved in the process. This is the same appeal right mechanism that applied to recommendations made by Independent Hearings Panels for the Auckland Unitary and Christchurch District Plans. We consider this will encourage careful consideration by the Joint Ministers before deviating from an expert panel recommendation, and it will provide an appropriate check and balance on political-based decision-making over evidence-based decision-making. We note support for this recommendation in the LGNZ/Taituarā submission, at least for local government to have this appeal right (recommendation 53 of that submission).

[5] See Carter delegates decision on Whangamata marina | Beehive.govt.nz; and Boyd, Jordan --- "The Whangamata Marina decision and ministerial decision-making under the RMA" [2007] NZJlEnvLaw 11; (2007) 11 NZJEL 297 (nzlii.org)

53. There should be a requirement in clause 25 of the Bill for the Joint Ministers to specify reasons for deviating from expert panel recommendations. This will improve transparency and better facilitate any court processes that might follow.

54. There should be no ability for the Joint Ministers to refer recommendations back to the expert panel with directions, and no ability for the Joint Ministers to commission additional advice or seek further comments from affected parties. These abilities undermine the role of the expert panel and make decision-making political rather than evidence-based. A hearing held by an expert panel, with all the relevant parties and all the relevant experts, is the appropriate forum for debating the issues and considering competing expert views. Additional expert views and additional affected party comments should not be sought by the Ministers after the panel has undertaken its consideration and made its recommendation.

55. In addition, Ministers should not have the ability to delete, add or modify conditions recommended by an expert panel. Conditions work together as a whole, and removing one or more can impact the way the other conditions will operate. The panel will have paid particular attention to the development of conditions, and the Minister should not be able to override this.

56. Recommendation 13: That the Bill is amended so that:
    a. Joint Ministers make referral decisions, but not substantive decisions.
    b. Expert panels are the decision-makers on substantive approvals, rather than the Joint Ministers.
    c. The Minister for the Environment and the Minister for Māori Development are added to the Joint Ministers (change to the definition in clause 4 Interpretation).
    d. A link is included to the Cabinet Manual, and in particular, Ministers are required to declare conflicts of interest and that these are recorded in records of decision-making for the relevant project, and Ministers are excluded from decision-making in relation to a project where there is a real or perceived conflict of interest.
    e. If Ministerial decision-making on substantive decisions is retained, a decision by Joint Ministers to deviate from the recommendations of an except panel should trigger a right of appeal to the Environment Court for all those involved in the process.
    f. If Ministerial decision-making on substantive decisions is retained, there is a requirement in clause 25 of the Bill for the Joint Ministers to specify reasons for deviating from an expert panel recommendation.
    g. If Ministerial decision-making on substantive decisions is retained, sub-clauses (5) and (6)(b) and (6)(c) of clause 25 are deleted, and an amendment is made to specify that the Joint Ministers are not able to add, delete or amend conditions recommended by an expert panel.

TIMEFRAMES

Overall timeframes

57. The Bill is called ‘fast-track’, but it is unclear how fast the process will actually be. There have been reports of a 6 month time period for decisions, but there is no 6-month timeframe in the Bill. There is no set timeframe for the referral process or for the substantive process, and

there is no overall timeframe from lodgement of referral application to a decision on approval. It is therefore very difficult to assess if the process will be faster than business as usual or not, and this creates uncertainty.

58. We note that with an uncertain timeframe, the Bill is effectively a 'facilitate development' bill, rather than a fast-track bill, and the naming of the bill is perhaps somewhat misleading. However, the amendments we suggest will help to ensure the process is actually fast.

59. The biggest risks to a fast process are the Ministerial decision-making stages, on referral and on the substantive application. There are no time limits on these stages. The experience of NZPI members under the current fast-track process is that it takes longer to get a decision on referral and to set up a panel than it does for the panel process itself. This issue with the current system has not been addressed in the Bill. It is ineffective to place time limits on the panel process when the main problem is the time it takes to get to that point. For streamlined planning processes (a parallel fast-track process for plan changes under the RMA), our experience has also been one of delays getting the Minister's final approval.

60. Our view is that the Bill will result in an overall longer time period for decision-making than under the current fast-track process. There are two reasons for this. First, the Bill adds another step to the process – the requirement for the Joint Ministers to make a decision on the application after they have received the expert panel recommendations. There is no time limit in the Bill for this decision. So, our expectation is that applications under the new process to take as long as under the current process, plus an unspecified additional amount of time for the Ministerial decision-making step.

61. Second, the Bill provides a one-stop-shop for approvals, which means that applications are going to be more complex than they have been to-date. More complex applications take more time at each step of the process as there is more information to deal with. This requires more resourcing (capability and capacity), and there is no indication that more resourcing will be provided to support the new process.

62. We discuss resourcing in more detail later in this submission. In terms of timeframes, we consider it is essential that time limits are put on the referral and substantive decision-making stages of the process (Ministerial decision-making). We note support for this in recommendation oe8 of the LGNZ/Taituarā submission. Without this, we do not think it a possible to call the process 'fast-track'.

63. Recommendation 14: That the Bill is amended so there is a time limit on Ministerial decision-making on referral decisions and on the substantive approvals. We recommend:
    a. 40 working days for the referral decision, from the time the Joint Ministers receive written comments from invited parties.
    b. 10 working days for the substantive decision, from the time the Joint Ministers receive the expert panel's recommendation report.

Participation timeframes

64. The timeframes for participation in the fast-track process are very tight. They do not allow for meaningful engagement in the process. Meaningful engagement is important to reduce the risk of judicial review and appeals, to create social licence for the process and the approvals it provides, to provide the opportunity for those who are familiar with the location of the proposed project to provide that local knowledge and expertise that may otherwise be overlooked, and to ensure the principles of fair process and natural justice are satisfied.

65. Meaningful engagement is also important to achieve the Government's intention for RMA reform, that the system is based on the enjoyment of property rights. If those with property rights are not given a meaningful opportunity to comment on how they are affected by a project, then the system will not be based on an enjoyment of property rights.

66. The timeframes in the Bill generally provide either 5 or 10 working days for comments by those invited to participate. This is not enough time to seek expert advice. This applies to Ministers seeking advice from officials, councils seeking advice from their officers, Māori agencies seeking input from experts, hapū and whanau, and affected parties seeking independent expert advice. If there is no hearing held by the panel, those invited comments are the only opportunity for parties to make their case. This is compared to the business as usual process where there are two chances, one when preparing a submission, and one when providing evidence at a hearing (noting that new points cannot be raised at the hearing, but original points can be elaborated on). In addition, applications under the fast-track process will be for significant projects that are complex and cover a wide range of approvals under different legislation, so they will take longer to consider and understand than applications just under the RMA. When there are limited appeal rights, as proposed by the Bill, it is important to provide sufficient time to participate in the first instance process, to provide for fair process and natural justice. We consider at least 20 working days should be provided for comments, and we support the recommendation of LGNZ/Tairuarā that 30 working days would be preferable (recommendation 7 of that submission).

67. Recommendation 15: That the Bill is amended so that there are at least 20 working days, and preferably 30 working days, to respond to an invitation to provide comments in each case where it is currently 10, and at least 10 working days for each case where it is currently 5.

Panel timeframes

68. Based on the experience of our members who sit on expert panels for fast-track applications, we consider that 25 working days is too short for preparing an expert panel report (see clause 39 of Schedule 4). Adequate time is needed to properly understand applications that are complex and cover approvals under more than more than one piece of legislation, particularly where the panel members may not be familiar with all the types of approvals required. The process needs to produce robust and well evidenced recommendations in order to manage the risk of judicial review and to provide social licence and legitimacy to the projects that are approved. It takes time to make robust recommendations.

69. The experience of our members is that hearings are a very efficient way to test evidence and develop conditions. More can be achieved more quickly with all parties in the room than doing the same 'on the papers'. Our expectation is that expert panels will want to use hearings more often than not. However, it is not possible to hold a hearing and produce a recommendation report within a 25 working day timeframe. We think an unintended consequence of this short timeframe is hearings not being held when it would be more efficient and effective to hold one. Allowing more time for reporting when there is a hearing would address this issue.

70. Considering the above point, we consider that the default time period for panels to produce recommendation reports should be 40 working days, from the date comments close. We note that the LGNZ/Taituarā submission also suggests 40 workings days (recommendation 82 of that submission). The ability to double this timeframe should be retained, and the holding of a hearing should be identified as a reason for doubling the timeframes.

71. Recommendation 16: That clause 39 of Schedule 4 of the Bill is amended so that:
    a. There are 40 working days for a panel to produce a report from the date comments close.
    b. There is an ability to double the 40 working day timeframe.
    c. Holding a hearing is specified as a reason for doubling the timefame.

Timeframes summary

72. Overall, our recommendations above (and below under the heading 'quality applications') would result in a referral process that takes 70 to 80[6] working days (14 to 16 weeks, or 3 to 4 months), and a substantive decision-making process that takes a maximum of 130 to 140 working days (26 to 28 weeks, or 6 to 7 months). We consider this is 'fast', and we consider it strikes the right balance between where the time is spent – more time for Ministerial decision-making on the referral decisions, and more time for panel consideration on the substantive application.

RESOURCING

73. The timeframes discussed above will only be met if there is sufficient resourcing provided for the system. This means funding, training, and capacity building across the system.

74. The Ministries dealing with referral applications, and the Environmental Protection Authority (EPA) supporting panels, need to be adequately resourced (capability and capacity) to ensure the process can run fast and produce quality decisions. This aspect of the process is not adequately resourced currently, and this is causing problems with the current system, such as applications being provided to panels with insufficient information. This is an issue that results in inefficiencies in the system and will defeat the purpose of providing a fast process.

75. Resourcing of panels is another significant issue with the current system. Currently, applicants can wait longer for a panel to be set up than they do for the panel to go through its

[6] Depending on whether 20 or 30 workings days are provided for invited comments.

process. This is obviously not a fast process. In addition, the experience of panel members can be limited. It is not uncommon for a member of a fast-track panel to have no previous experience on decision-making/recommending panels, which brings with it significant concern over the robustness of the decision.

76. There are a number of possible solutions to these issues. Ministries servicing the process, and the EPA, need enough staff with appropriate qualifications and experience to advise Ministers and assist the panels. This requires senior practitioners with a practical understanding of processing complex development applications across the range of approvals that can be sought under the fast-track process.

77. A stronger role for councils in the process would assist with resourcing the fast-track process and help with the quality of the decision-making. We note that there is no equivalent of a s42A report to the expert panel, as there would be under the RMA, meaning that the panel does not get the benefit of the expertise and recommendations of the council officers in the fast-track process. In the absence of this requirement, the Bill should be more specific about what and when councils should contribute to the system. Councils are particularly well-placed to assess a proposal against the relevant planning documents, and to develop conditions of consent. Councils also have skills is assessing applications for completeness. The longer timeframes for providing comments that we recommend above will help, and the cost recovery provided for in the Bill will also help. We also consider the recommendations of LGNZ/Taituarā in relation to the role of TAs in the development of conditions will help, and NZPI supports those recommendations (recommendations 83, 84, 85 and 88 of that submission).

78. Having more than one panel convener would assist with the establishment of panels, provided there are panel members available. The Bill should be amended so that having more than one panel convener is possible.

79. The pay offered to panel members is currently a barrier to some practitioners taking on the role. Feedback from our members is that payment is well below market rates and is often not sufficient to make the role worthwhile, particularly for experienced consultants who are part of large firms. If payment was increased, there would be a larger pool of panel members available. We note that clause 8 of Schedule 3 refers to a 'fees framework' for payment of panel members, and this is the document that will need to address this issue.

80. Despite the above suggestion, we are concerned that there are just not enough appropriately qualified and experienced professionals in New Zealand to support the fast-track system. There are likely to be opportunity costs to business as usual if a large number of projects are referred, as the same pool of panel members will need to be available for standard RMA and other processes, as well as the new fast-track system. The referred projects are not likely to get the fast process that has been advertised when there are not enough people to do the work.

81. Quality decision-making requires appropriately qualified and experienced professionals to sit on panels. All panel members, including elected members, should have appropriate

qualifications and experience. We consider that, as a minimum, the Bill should specify that all panel members should have Making Good Decisions certification, and panel chairs should have the chair certification. We also recommend that the word 'experience' is added into clause 7 of Schedule 3, so that the panel convener is required to consider the experience of the panel members, and not just their knowledge, skills and expertise.

82. Recommendation 17: That the Bill is amended so that:
    a. The Bill is more specific about what and when councils should contribute to the system, for example, specifically identifying a role for councils to assess a proposal against the relevant planning documents and a specific role for developing conditions of consent.
    b. Recommendations 72, 73, 74 and 77 of the LGNZ/Taituarā submission in relation to the role of councils in developing conditions of consent are accepted.
    c. It is possible to have more than one panel convener (see clause 2 of Schedule 3).
    d. As a minimum, the Bill specifies that all panel members have Making Good Decisions certification, with panel chairs having the chair certification.
    e. The word 'experience' is added into clause 7 of Schedule 3, so that the panel convener is required to consider the experience of the panel members, and not just their knowledge, skills and expertise ('experience' is in the title of the clause but not the clause itself).

83. Recommendation 18: That the Environment Committee recommends that:
    a. The 'fees framework' referred to in clause 8 of Schedule 3 includes payment for panel members at a level that is sufficient to encourage more experienced planning consultants to become panel members.
    b. Ministries servicing the fast-track process, and the Environmental Protection Agency, prioritise having enough staff with appropriate qualifications and experience to advise Ministers and assist the panels, sufficient to match the expected demand for the fast-track process.
    c. Ministry for the Environment works with NZPI and other providers to develop training and capacity building, to increase the availability of panel members.

OTHER MATTERS RELATED TO REFERRAL

Schedule 2 projects

84. NZPI is concerned over the process for including projects in Schedule 2. Currently, an advisory group is considering applications for projects to be included in Schedule 2 based on the criteria in the Bill as drafted. However, submission are open on the criteria, and the Environment Committee will consider recommendations to change them, such as those made in this submission. It would make a mockery of the parliamentary process if the eligibility criteria changes as a result of Environment Committee recommendations, but projects are included in Schedule 2 as a result of assessment under the original criteria. This issue needs to be addressed.

85. We recommend that Schedule 2 of the Bill is deleted. Rather, there should be strong and clear eligibility criteria, as we recommend in this submission, that all projects are subject to. There

should be transparency of process for projects that are referred into the fast-track system, and the principles of fair process and natural justice should be applied to how those projects are referred. Social licence for the projects approved via the Bill depends on this. Projects referred via Schedule 2 will lack social licence, and they will only gain small time benefits, particularly if our recommendations for timeframes and resourcing set out in this submission are implemented.

86. We are not the only ones to raise this issue. It is a point made in the submission of LGNZ/Taituarā, and we support the arguments and recommendations made in that submission on this point. If our recommendation to delete Schedule 2 is not accepted, we recommend that the solutions proposed by LGNZ/Taituarā are implemented. In particular, we agree with the solutions proposed by LGNZ/Taituarā to overcome the lack of a democratic decision-making process for referral of Schedule 2 projects, and to ensure that projects listed in Schedule 2 are progressed promptly. These include:
    - Public notification of projects in Schedule 2
    - A list of eligibility criteria in the Bill that Schedule 2 projects need to meet (or clarification that the criteria in clause 17 apply to Schedule 2 projects)
    - A requirement for environmental, natural hazard, and climate change criteria to be equal to, rather than subordinate to, meeting the purpose of the Bill
    - A requirement to produce evidence that shows how each project meets the eligibility criteria.
    - A requirement for Schedule 2 projects to be re-assessed against the amendments the Environment Committee recommends to the eligibility criteria.
    - Include a time limit for projects listed in Schedule 2 to commence the expert panel step of the process (for Category A) or referral consideration (for Category B).

87. Recommendation 19:
    a. That Schedule 2 of the Bill is deleted.
    b. If (a) above is not accepted, that the Bill is amended to implement recommendations 56 to 63 of the LGNZ/Taituarā submission.

Plan changes

88. An unintended consequence of the fast-track process is that resource consents are sought when plan changes would be more appropriate. Plan changes allow for more strategic and holistic consideration of developments and have a different set of information requirements and assessment criteria than resource consents. In particular, plan changes allow for integrated consideration of community needs, locational constraints, and infrastructure provision. A plan change for a large scale housing project allows for a much more integrated assessment than a resource consent process. We note support for this point in the LGNZ/Taituarā submission (see paragraph 114 of that submission).

89. Without a holistic and integrated approach, ad hoc outcomes result that cause issues for achieving holistic and integrated planning in the future. For example, urban residential development in the middle of a rural zone, with the underlying zoning remaining rural, creating an anomaly that does not fit within the policy framework of the district plan.

90. Clause 21 of the Bill deals with decisions to decline an application for referral. Sub-clause (2)(b) states that Ministers may decline an application if it is more appropriate to deal with the application under another Act. We recommend that the ability to decline a resource consent application because it should be considered under the RMA as a plan change should be specified alongside this sub-clause, to provide clarity.

91. NZPI considers it is not appropriate to extend the scope of the Bill to include plan changes within the fast-track process. There is already a streamlined planning process under the RMA that provides a fast-track equivalent for plan changes. The Bill as drafted is not set up for plan changes. Key plan change considerations related to strategic planning and integration, and public engagement requirements, are much better provided for under existing plan change processes.

92. Recommendation 20: That the Bill is amended so it is clear that an application for a resource consent can be decline if it would more appropriately be dealt with as a plan change. For example, by adding text along these lines to the end of clause 21(2)(b): *it is more appropriate to deal with the application under another Act, including when a resource consent would be more appropriately assessed as a plan change.*

Information requirements and referral decision-making

93. The Bill specifies the information required to be submitted with a referral application. It is important that this list provides the information needed for robust decision-making on referral applications, and that there is a requirement to consider the information when making decisions. Referral decisions are a very important part of the overall process, as once an application is referred there is an expectation it will be granted.

94. We have noted some inconsistencies between what is required to be submitted (clause 14, information requirements and clause 16, consultation requirements), and the referral decision-making clauses (clauses 17, 18, 21 and 22). These are discussed in the following paragraphs.

95. A requirement should be added to clause 22 to consider the information the applicant provides on consultation under clause 16. Clause 22 does contain a requirement to consider any consultation required to be undertaken with relevant Māori groups, but clause 16 also requires consultation with relevant local authorities, and this is missing from clause 22.

96. Clause 14 includes a list of information an applicant is required to provide on persons it considers are likely to be affected by the project. However, there is no corresponding requirement to consider this information in the referral process. We recommend that this information is considered when Joint Ministers are deciding who to invite comments from under clause 19 of the Bill. Clause 19 allows the Joint Ministers to copy the referral application to and invite written comments from any other person not already on the list of parties in clause 19. A requirement for the Joint Ministers to consider the list of affected parties included in the application will assist with this process, provide a reason for including

the information in the first place, and help provide fair process for those affected by the proposal.

97. All the matters listed in clause 21(2), which are reasons that the Joint Ministers may decline an application for referral, need to be addressed in the application and therefore identified in clause 14 information requirements. Some of the matters in clause 21(2) are listed in clause 14, such as a record of compliance history and a description of adverse effects. However, other matters are not specifically listed, such as the activity status of the proposal (noting that being a prohibited activity is a reason to decline), and an assessment of the appropriateness of dealing with the application under another Act. Clause 14 should be amended so it requires information on all the matters specified in clause 21. If this is not done, there is a significant potential for requests for further information to be made, which will slow down the process.

98. Clause 14 includes a requirement for an application to include a description of whether and how the project would be affected by climate change and natural hazards. However, there is no reference to climate change and natural hazards in decision-making clauses 21 and 22, or in the eligibility criteria in clause 17. As stated earlier in this submission, it is important that fast-track approvals do not increase the risks to our communities from natural hazards and climate change, and we recommend earlier in this submission that an eligibility criterion related to risks from natural hazards and climate change is included in clause 17. To support this, the information required in clause 14 needs to include the risk the project creates to the community, property and infrastructure, and not just how the project would be affected by climate change and natural hazards. For example, a road along the coast might be affected by climate change and natural hazards through erosion undermining the road. But putting the road in this situation also creates risk to the community and businesses that rely on the road for access and the conveyance of goods.

99. To give priority to the outcome of not increasing the risks to our communities from natural hazards and climate change, we recommend that significant risk from natural hazards or climate change should be a reason to decline a referral project, under clause 21. We recommend this is added to the list in clause 21(2).

100. Recommendation 21: That the Bill is amended so that:
    a. There is a requirement in clause 22 for the Joint Ministers to consider the consultation reported on in accordance with clause 16 of the Bill.
    b. There is a requirement in clause 19 for the Joint Ministers to consider the information in the application on persons affected when deciding who to copy the application to and invite comment from.
    c. Clause 14 is amended so it requires information on all the matters specified in clause 21 to be submitted with an application.
    d. The risk the project creates to the community, property and infrastructure is an information requirement in clause 14.
    e. That significant risk to the project, or significant risk created by the project, from natural hazards or climate change is added as a reason a referral application can be declined in clause 21.

OTHER MATTERS RELATED TO THE SUBSTANTIVE DECISION

Quality of applications

101. The experience of our members on fast-track panels is that good quality and thorough applications are needed to ensure a smooth, efficient and fast process. Poor outcomes result when further information needs to be requested, or there is insufficient information for good decision-making. We have also received feedback that incomplete applications are being referred to panels, which puts panels on the backfoot right from the beginning. This issue needs to be avoided under the new process in the Bill.

102. Clause 5 of Schedule 4 give the EPA 5 working days to assess if an application has been made legitimately and contains the necessary information. This is not enough time for this assessment to be undertaken properly. We note that the responsible agency is given 10 working days to undertake the same assessment for referral applications, and referral applications will have less detailed information than substantive applications. We recommend the EPA is given 15 working days to assess the completeness of substantive applications. We consider that this will be time well spent, with the potential to save time during the panel process.

103. We also recommend that cause 5 of Schedule 4 include a requirement for the EPA to assess the quality of the information in the application. It is one thing to confirm that a piece of required information, such as an assessment of effects report, has been supplied, but it is another thing to assess whether that assessment provides the necessary information relevant to the particular application. It is this quality check that is the most important to support an efficient and effective panel process. The 15 working days we recommend in the above paragraph should allow for this quality check. Adding this requirement to clause 5 will mean that the EPA will be able to return applications that are not of sufficient quality under clause 6 of Schedule 4, which is an important tool to encourage applicants to provide good quality applications and make sure panels do not start on the backfoot with sub-standard applications. Our recommendation above (recommendation 18(b)) about resourcing the EPA with the necessary number of appropriately qualified and experienced people to undertake this task needs to be implemented alongside this one.

104. Another mechanism that we consider would greatly assist with the quality of applications and the ability of the process to be fast is a requirement for a pre-application meeting. A meeting between the EPA and the applicant would allow detailed discussion on all the types of information that are required and the level of quality that information needs to meet. This process is helpful to applicants as it provides clarity on what is required and the ability to discuss project-specific requirements. It assists the panel to receive quality information initially and significantly reduces the need to request further information, meaning the process can run faster and smoother. We recommend a requirement for pre-application meetings in included in the Bill for substantive applications.

105. Recommendation 22: That clause 5 of Schedule 4 of the Bill is amended so that:

a. The EPA is required to assess the quality of an application. The quality should be sufficient to give the panel a comprehensive understanding of the project and the requirements of the Bill and reduce the potential for requests for further information.
b. That the time limit for the EPA to undertake the 'completeness' assessment required by clause 5 is changed to 15 working days.
c. A requirement is introduced for at least one pre-application meeting between the applicant and the EPA, prior to the application being lodged.

Hierarchy of considerations

106. Clause 32 of Schedule 4 sets a hierarchy for matters the expert panel must consider when making a recommendation on substantive applications. As we have explained earlier in this submission, we are concerned that the purpose of the Bill as drafted takes priority over the sustainable management purpose of the RMA. If our recommendation 2(b) above to include sustainable management in the purpose of the Bill, we will have no issue with the hierarchy in clause 32 of Schedule 4 putting the purpose of the Bill above the purpose of the RMA.

107. We have had some concern that the consideration of environmental effects is not explicitly included as part of the hierarchy. However, environmental effects have to be considered as part of a consideration of sustainable management and sections 5, 6 and 7 of the RMA, so we do not seek any specific amendments to clause 32 of Schedule 4 in this regard.

108. We foresee a difficulty in implementing the hierarchy in clause 32 in Schedule 4 that would be good to resolve through amendments to the drafting. The 6th or last matter in the hierarchy is "the relevant provisions of the RMA or any other legislation that direct decision-making under the RMA" and section 104 of the RMA is listed as an example (sub-clause 1(f)). This provision is likely to cause confusion, as it will result in 'double counting'. For example, section 104 of the RMA directs consideration of the same list of planning instruments as are identified as the 5th priority in the hierarchy (sub-clause 1(e)). It is unclear how a second consideration of these documents is intended to apply and what benefit that brings. If the intention is to provide a specific and different set of considerations to the RMA, which it appears to be, it may be better to delete the requirement to consider other provisions in sub-clause 1(f), as it is likely to cause confusion and therefore create a situation for litigation.

109. We note that the hierarchy of considerations is not included in other schedules to the Bill. For example, Schedule 5 and Schedule 6 include similar lists, but do not set those lists up as hierarchies. There should be consistency on this matter across the Schedules, and we recommended this is rectified.

110. Recommendation 23: That the Bill is amended so that:
a. Sub-clause 1(f) is deleted from the hierarchy of considerations in clause 32 of Schedule 4, or clarification is provided in the Bill as to how sub-clause 1(f) interacts with the other sub-clauses in the list to avoid the issue of 'double counting'.
b. That hierarch of considerations is applied consistently across the schedules of the Bill.

Affected parties

111. As discussed above for referral, clause 13 of Schedule 4 requires applications for approval to include information relating to affected persons, but there is no corresponding requirement to consider this information in the substantive decision-making process. We recommend that this information is considered when the expert panel decides who to invite written comments from under clause 20 of Schedule 4 of the Bill. This information in the application will be helpful to the panel when they make this decision, and help provide fair process for those affected by the proposal.

112. Recommendation 24: That the Bill is amended so there is a requirement in clause 20 of schedule 4 for the expert panel to consider the information in the application on persons affected when deciding who to invite written comments from.

Ministerial comments

113. Clause 20 of Schedule 4 includes a list of Ministerial portfolios who must be invited by the expert panel to comment on an application. We are concerned that the Minister for the Environment is not explicitly on the list, given the responsibilities of that Minister for environmental protection and administration of the RMA. We are also concerned that the Minister for Māori Development is not on the list, given the potential impact the fast-track process could have on Māori rights and interests. If our recommendation earlier in this submission to include these two Ministers as part of the Joint Ministers is accepted, there will be no need to add them to the list in clause 20. However, if that recommendation is not accepted, we recommend that the Minister for the Environment and the Minister for Māori Development are added to the list.

114. As currently drafted in the Bill, the Joint Ministers include the Ministers for Infrastructure, Transport, and Regional Development, and can also include the Minister of Conservation and the Minister responsible for Crown Minerals. We note that the list of Ministers in clause 20 of Schedule 4 who the expert panel must asked to comment on an application includes the Ministers for Conservation, Infrastructure, and Transport. It is not appropriate for decision-making Ministers to provide comment to the panel on applications they will be making decisions on. This rases issues of conflict of interest, bias, and unfair process. We recommend that the Ministers for Infrastructure and Transport are removed from the list, and the Minister of Conservation is only included when that Minister is not one of the Joint Ministers.

115. Clause 39 of Schedule 4, and clause 25 of the Bill, require the expert panel to provide the draft recommendations report to the Minister of Māori Development and the Minister of Māori Crown Relations: Te Arawhiti. Those Ministers have 5 working days to provide comment on the draft. We consider this an unusual and unnecessary step for the panel to take in preparing its report. These Ministers will be asked to provide comment when the expert panel receives an application, and if our recommendation to add the Minister of Māori Development to the Joint Ministers is accepted, it will create a conflict of interest to have that Minister subsequently review the draft report. The most appropriate time in the process for Ministers, other than decision-making Ministers, to provide information to the panel, is at the beginning

of the process (in accordance with clause 20 of Schedule 4 of the Bill) so the panel has all the information in front of it at the same time. The application will have information in relation to Treaty settlements and a list of conditions, so the Ministers can consider these matters, which are specified in clause 25 of the Bill, when they review the application, and make recommendations to the panel at that point. We recommend the step to comment on the draft report is deleted from clause 39 of Schedule 4 and clause 25 of the Bill.

116. Mana Whakapono a Rohe and joint management agreements are important engagement and relationship agreements. As such, it is important that they are considered when an expert panel is considering who to invite to comment on a substantive application. We are concerned that clause 20 of Schedule 4 only provides for very narrow consideration of these documents. We recommend that an explicit requirement is included in clause 20 of Schedule 4 that both Mana Whakapono a Rohe and joint management agreements are required to be adhered to when the expert panel identifies parties to invite comments from, for both listed and referred projects.

117. We also question the value of having expert panels consider Mana Whakapono a Rohe and joint management agreements as part of their assessment of the substantive application under Clause 32 of Schedule 4. These documents are primarily engagement and process driven agreements and include matters such as decision-making. At this point in the process, the expert panel has no ability to change the engagement, process or decision-making arrangements for the substantive application. Given the restrictions set out elsewhere in the Bill, this is not the right point in the process to be considering Mana Whakapono a Rohe and joint management agreements.

118. Recommendation 25: That the Bill is amended so that:
    a. If our recommendation 12(c) above is not accepted, the Bill is amended so that the Minister for the Environment and the Minister for Māori Development are added to the list of Ministers who must be invited to provide comment in clause 20 of Schedule 4.
    b. The Ministers for Infrastructure and Transport are removed from the list of Ministers who must be asked to provide comment on an application to the expert panel in clause 20 of Schedule 4, and that a qualification is added to the same clause so that the Minister of Conservation is only asked to comment when that Minister is not one of the Joint Ministers.
    c. We recommend the step for the Minister of Māori Development and the Minister of Māori Crown Relations: Te Arawhiti to comment on the draft panel report is deleted from clause 39 of Schedule 4 and clause 25 of the Bill.
    d. an explicit requirement is included in clause 20 of Schedule 4 that both Mana Whakapono a Rohe and joint management agreements are required to be adhered to when the expert panel identifies parties to invite comments from, for both listed and referred projects.
    e. The requirement for panels to consider Mana Whakapono a Rohe and joint management agreements is removed from Clause 32 of Schedule 4. Note that our recommendation (d) above moves this requirement to a more appropriate part of the process.

Post-approval applications

119. Clause 45 of Schedule 4 of the Bill sets out that local authorities will take on the functions, powers and duties in relation to a granted application, as if they had granted the application themselves. We highlight the issues this causes for applications such as to change conditions of consent under s127 of the RMA and to vary the lapse date under s125(1A) or 184 of the RMA.

120. Fast-track applications will be for large complex projects, potentially with multiple stages. It is highly likely that conditions will be sought to be changed as construction is planned and gets underway. In addition, the complex nature of the projects and the short default lapse date of 2 years makes it likely that applications to extend lapse dates will be made. Applications to councils under the RMA for change of condition applications and to extend lapse dates will be subject to different considerations and requirements than the original application. For example, the purpose of the Fast-track Approvals Act will not be a factor in the consideration of the application. In addition, for change of condition applications, there will be a requirement for councils to consider affected parties and notification, and decisions on s127 applications will be open to appeal. It seems contrary to the intentions of the fast-track legislation to revert to a different process for these post-approval applications.

121. We note that under Schedule 5 of the Bill, concession variations or extensions are assessed under the fast-track regime for concessions, rather than by the Department of Conservation under the Conservation Act. We recommend that the same apply for post-approval applications under the RMA, that is, that these are assessed and processed under the fast-track regime as well.

122. Recommendation 26: That the Bill is amended to that an equivalent of clause 7 in Schedule 5 is included in Schedule 4.

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APPENDIX 1: DRAFTING RECOMMENDATIONS

The table below identifies drafting issues that we recommended are corrected.

Clause	Explanation of issue	Possible correction
Main Bill		
21(1)(b)	Clause 21(1)(b) states that an application for referral must be declined if the Ministers are satisfied that the project "does not meet the criteria in section 17". However, clause 17 is drafted as a list of things to consider, not as a list of criteria. This makes a nonsense of the relationship between the two clauses. For example, clause 17(2) is "the impact referring the project will have on the efficient operation of the fast-track process". It is not possible to be satisfied that this criterion will or will not be met, as the criterion does not set a level of impact that should be avoided.	The criterion listed in clause 17(2) need to be drafted as absolutes or certainties that projects need to meet, in order for the 'must decline' direction in clause 21(1) to work.
21(1)(c)	The word 'and' is used, rather than 'an'	*the project includes an ineligible activity*
Schedule 3		
1	Clause 1 of Schedule 3 should be located in the main body of the Bill, to make it more easily identifiable. It is an important clause that sets out the powers of the panel. It would work well alongside clause 25 of the Bill. The schedules on the different types of decision-making should all cross-reference to this clause.	Move clause 1 of Schedule 3 into the main body of the Bill.
1(1)	There is a cross-reference to 'section 30' in clause 1(1) of Schedule 3 which appear to be wrong. However, it is difficult to understand what the correct cross-reference should be.	Correct the cross-reference to section 30 in clause 1(1) of Schedule 3.
1(2)	The clause says "(greater or lesser)", but it should says "(greater to lesser)"	*... giving weight to them (greater to lesser) in the order listed ...*
2(5)	Sub-clause 2(5) states the panel convener appoints panels for approvals under the RMA (consents, notices of requirement, certificates of compliance). The other approvals that panels consider should also be listed in the sub-clause.	List the other approvals that a panel will consider in clause 2(5).
4(1)	This sub-clause requires the appointment of "a suitably qualified lawyer or planner with experience in relevant law". A lawyer can be expected to have experience in the law, but a planner cannot. Alternative wording is needed to describe the planner's experience, such as experience under the relevant legislation.	*... a suitably qualified lawyer or planner with experience under the relevant legislation ...*
Schedule 4		
1	Clause 1(1) of Schedule 4 refers to resource consents. We think it should also refer to notices of requirement, as information requirements for these are included in the Schedule.	Add notices of requirement to clause 1(1).

Clause	Explanation of issue	Possible correction
3(3)(c)	Sub-clause (3)(c) refers to Schedule 2 and Schedule 3, when it should refer to Schedule 2A and Schedule 2B.	Change the reference to Schedules 2 and 3 in clause 3(3)(c) to Schedules 2A and 2B.
12(1)(g)	Sub-clause (1)(g) requires assessment against "the matters set out in section 21 (whether project helps to achieve purpose of Act)". However, section 21 relates to decisions to decline a referral application. The correct section reference is probably section 17, eligibility criteria, which includes an explanation of what benefits of regional or national significance are.	Update the cross-reference in clause 12(1)(g) to section 17, and update the text in brackets.
34(2)(a)(ii)	Clause 34(2)(a)(ii) states that a panel must not have regard to any effect on a person who has given written approval to the application. We question the legitimacy of this requirement, given there is no avenue within the Bill to provide written approvals, to identify affected parties, or a test for deciding who is affected. We think it should be deleted.	Delete clause 34(2)(a)(ii), and as a consequential amendment, delete sub-clause (3).
Numerous	There are numerous references within the clauses of Schedule 4 to decisions granted by a panel. As panels only make recommendations, these references need to be updated (unless our recommendation 13(a) is accepted).	If our recommendation 13(a) is not accepted, that the references to decisions made by panels are updated.
Schedule 5		
6	Subclause (1) of clause 6 refers to deciding whether to grant a fast-track concession, but subclauses 1(g) and (2) and (3) relate to referral.	Correct the reference to referral in subclauses 1(g).
Schedules 4 to 12		
There is a significant amount of inconsistency in the structure and drafting of appendices 4 to 12. This should be made consistent across the schedules, to assist it consistent application. For example, Schedule 7 includes a clause on information requirements for applications for archaeological authorities. There is no equivalent clause for applications for conservation concessions in Schedule 5, and there should be one. We consider that Schedule 7 is a well-structured schedule and suggest that the other schedules are re-structured to match Schedule 7.		