EDS Position Paper on RMA Reforms

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(1) IMPROVING RESOURCE MANAGEMENT PLANNING

Proposal: National Planning Template

The Minister for the Environment will develop content through a process that allows for public participation. The Minister of Conservation will develop any content relating to the coastal marine area. This will need to be developed within two years of the enactment of the legislation. The template will be progressively implemented by councils within five years.

EDS Position: Support in part

EDS supports the concept of a national planning template as this will improve consistency and result in efficiency improvements. The template should focus on structure and layout of plans to ensure a consistency of approach across the country. Any policy "templating" should be done via the relevant national instruments (NPS and NES) However, EDS suggests that the template needs to be developed through a more robust process than that suggested and, in particular, via a process that involves a wide range of stakeholders and practitioners. EDS suggests that the process used to develop NPSs would be appropriate or alternatively a short collaborative process akin to the Land and Water Forum.

Proposal: A single RM Plan per district (or other agreed area)

Councils will be required to compile all content from their relevant regional policy statement and regional and district plans into a single planning document using the template. This is to occur within three years of the legislation being enacted.

EDS Position: Support

EDS supports improving the ease of access to planning documents, although it needs to be remembered this proposal will not result in any improvements to the content of planning documents.

Proposal: Three planning tracks: Schedule 1, Freshwater Collaborative, Joint Council Planning Process

The schedule 1 process will be retained. A new collaborative process (consistent with the LWF recommendations) will be an option for freshwater planning.

The joint council planning process will be available for any plan content that is not directly related to freshwater. Under this process, councils will be required to consult with their community earlier. It will involve a rigorous hearing process by an independent panel, which will make recommendations to the relevant council. The council will then accept or reject these recommendations, with associated appeal rights limited to points of law if the council accepts the panel's recommendations.

EDS Position: Oppose in part

Retaining the Schedule 1 process and introducing a new collabortative process for freshwater is supported.

EDS supports the need to improve coherency between regional and district planning documents.

However, the proposal for Joint Council Planning is essentially a roll-out of the Auckland Unitary Plan process and EDS has concerns about extending this process nationwide before the 'Auckland trial' is progressed.

EDS also considers that a 'one stop hearing' will not result in the cost and time saving projected by Government as what were informal and accessible first instance hearings will become formal and legalistic. The 'increased consultation' requirement may improve the quality of the proposed plan, but unlike collaboration will not result in the consensus and buy-in that reduces conflict. There is no 'front end gain' to balance out the 'back end loss' in public participation rights in this process.

We consider that the Environment Court plays a useful role as an independent judicial body in testing policy against the legal requirements and should be retained.

If this proposal is advanced, EDS considers that a joint planning process needs to occur at a region-level. A hybrid situation, for example, if in Northland an integrated plan was prepared for the Far North and separate regional and district plans remained in Whangarei and Kaipara, would be very confusing. In addition, safeguards need to be put in place to ensure no party "takes over the reins". Regional and district councils have very different skills and it is essential the people with the relevant experience are making recommendations and decisions.

Proposal: Council planning agreement

Councils will be required to publish an agreement within 6 month of enactment of the legislation which sets out the high-level framework for how councils will produce the single resource management plan per district. It will provide certainty to the community on which planning tracks they intend to use over the next three years.

EDS Position: Oppose in part

While EDS sees the benefits in this document requiring the production of another document seems to be the antithesis of what the reforms are intended to achieve.

Proposal: Faster resolution of Environment Court hearings

Pre-hearing mediation will be mandatory unless a Judge directs otherwise. All parties participating in mediation must have the authority to resolve the matters under dispute.

EDS Position: Support

EDS is disappointed that proposals to increase the Environment Court's existing powers to enforce agreed timeframes and make law changes to deliver the full potential benefits of electronic case management have not been progressed. The reasons for this are not stated. Electronic case management offers clear benefits and should be resourced.

Proposal: Maori participation

The reforms will specify requirements for councils to involve iwi in planning early in the process. Councils will be required to invite iwi to enter into an arrangement on how they will work together through the planning process.

EDS Position: Support

Proposal: Addition to the functions of Councils

A new function in ss 30 and 31 will require councils to plan for long-term land supply and ensure there is adequate land supply to provide for at least 10 years of projected growth in demand in their areas.

EDS Position: Oppose in part

This proposal probably stems from the issues facing Auckland and Christchurch and fails to recognise that in many areas of New Zealand resident populations are decreasing. Any requirement relating to land supply needs to be nationally applicable, now and into the future, and therefore needs to be applicable to areas where there is projected to be decreases in demand, as well as areas where there is increasing demand. EDS therefore proposes that this be amended to refer to 'changes in demand'.

It is essential that local authorities determine how to provide land supply according to the wishes of their communities. This requirement must allow demand to be met by a variety of mechanisms. We are concerned to ensure that this requirement is not used to justify environmentally and economically unsustainable urban sprawl. EDS therefore proposes that this be amended to refer to 'housing supply' which is the actual outcome sought.

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(2) NATIONAL CONSISTENCY AND GUIDANCE

Proposal: Changes to the principles in sections 6 and 7 of the RMA

Current Part 2 RMA	**Proposed Part 2 RMA**
Section 6	*Section 6*
In achieving the purpose of this Act, all [decision makers] shall recognise and provide for the following matters of national importance:	In making the overall broad judgment to achieve the purpose of this Act, all [decision makers] shall recognise and provide for the following matters of national importance:
The preservation of the natural character of the coastal environment…	No change
The protection of outstanding natural features and landscapes…	The protection of specified outstanding natural features and landscapes…
The protection of areas of significant indigenous [biodiversity]	No change
The maintenance and enhancement of public access…	No change
The relationship of Maori … with their ancestral lands, water sites, waahi tapu, and other taonga	No change
The protection of historic heritage…	The importance and value of historic heritage…
The protection of protected customary rights	No change
Section 7	
In achieving the purpose of this Act, all [decision makers] shall have particular regard to:	Delete distinction between matters of national importance and other matters.
Kaitiakitanga	No change
The ethic of stewardship	Deleted
The efficient use and development of natural and physical resources	The efficient use and development of natural and physical resources, and the benefits derived from their use and development
The efficiency of the end use of energy	Efficiency energy use
The benefits to be derived from the use and development of renewable energy generation	The benefits of renewable energy
The maintenance and enhancement of amenity values	Deleted
Intrinsic values of ecosystems	Effective functioning of ecosystems
The maintenance and enhancement of the quality of the environment	Deleted
Any finite characteristics of natural and physical resources	Deleted
The protection of the habitat of trout and salmon	The maintenance of aquatic habitats, including significant habitats of trout and salmon
The effects of climate change	No change
	New: The effective functioning of the built environment including the availability of land to support changes in population and urban development demand.
	New: The management of significant risks from natural hazards.
	New: The efficient provision of infrastructure.
	Section 7
	In order to achieve the purpose of this Act [all decision makers] must endeavour:
	To use timely, efficient and cost effective

	resource management processes.
	In preparing policy statements and plans: To include only those matters relevant to the purpose of this Act, To use concise and plain language.
	To promote collaboration between or among local authorities of their common resource management issues.
	To ensure that restrictions are not imposed under this Act on the use of private land except to the extent that any restriction is reasonably required to achieve the purpose of this Act.

EDS Position: Oppose

Removing the hierarchy

One of the stated objectives of the proposals is to improve national direction. However the proposals will exacerbate the uncertainty and subjectivity that is inherent in an 'overall broad judgment approach'. Better national direction would be achieved by specifying a clearer 'line in the sand' as to when a matter of national importance should prevent a proposal from proceeding. This type of approach would be consistent with the Government's direction of travel in the freshwater context, where the need for clear bottom lines has been recognised.

The proposed changes are not consistent with the courts' current approach. The courts clearly utilise the statutory hierarchy when interpreting and applying section 5. The overall broad judgment approach has not nullified the statutory hierarchy and the proposed changes will represent a significant departure from what currently occurs.

For that reason, the proposals will considerably weaken the status of section 6 matters relating to the environment as they will be 'downgraded' by introducing new matters relating to development which are proposed to be 'upgraded'. At a superficial level the same obligation to 'recognise and provide for' them will apply but the reality is that the proposed list incorporates matters of a fundamentally different nature which would often lead to conflict thus making it more difficult to 'provide for' the listed matters. This will lead to uncertainty, unclear jurisprudence and *ad hoc* decision-making.

Reference to the overall broad judgment approach

As set out above, the proposals will change the effect of Part 2 considerably. New case law will have to be developed over time, leading to uncertainty, litigation, costs and delays. The approach that develops from this new case law may differ considerably to the current approach which this amendment intends to codify.

Furthermore, adding this phrase to section 6 is inconsistent with the way in which the overall broad judgment approach is applied. The overall broad judgment is made when the decision-maker is applying section 5, not section 6. The Government asserted that these reforms would not amend section 5, however this proposal amends section 5 by stealth.

Restriction to 'specified' ONFLs

A considerable risk would arise from the proposed change to section 6(b), because there is no proposal to make anybody responsible for identifying ONFLs. Past experience shows that local authorities are often reluctant to take on that responsibility given the costs involved, and even if they do, the outcomes can be less than robust. Even if responsibility is placed on councils to specify ONFLs, whether this proposal will come at the cost of the natural environment will depend on how well resourced the planning process is, the quality of decision-making and whether sufficient time is provided for the exercise to be completed by way of a transitional provision. We favour deleting "specified" and the consequential defintions.

The ethic of stewardship

The proposed deletion of 'the ethic of stewardship' would limit the scope of 'guardianship' type considerations to kaitiakitanga. The principle was previously inserted by way of an amendment to the Act in order to make it clear that the concept was not limited to Maori. EDS considers that the removal of this principle is not warranted and will create judicial confusion.

Benefits of the use and development of natural and physical resources

Much like the proposed amendments to section 32 'opportunities for economic growth that are anticipated to cease to be available' (which was changed during select committee to 'opportunities for economic growth that are anticipated to be provided or reduced'), this refers to one side of the coin without the counterbalancing side – to benefits but not costs. EDS considers that a principle relating to 'the efficient use and development of natural and physical resources' is sufficient.

Amenity values

The rules of statutory interpretation require that any deletions should be treated as necessitating a change of approach. Therefore the courts are likely to determine that any matters deleted from Part 2 should be given less weight in the future. Although this matter is inherent in section 5 itself, the same is true of all matters that have been retained or added. It is clear that the purpose of sections 6, 7 and 8 is to highlight matters that must not be overlooked and are deserving of 'special treatment'. Deleting matters from Part 2 will inevitably impact on the way they are dealt with.

"Amenity values" are the characteristics that influence and enhance people's appreciation of a particular area and are derived from the pleasantness, aesthetic coherence and cultural and recreational attributes of an area. The concept is essential to the 'quality of life' and 'sense of place' which is so important in respect of the places that New Zealanders live, work and recreate in. This principle is important with respect to recreational values in the rural environment (such as fishing and kayaking) and is particularly relevant in intensifying urban areas, such as Auckland, where it is very important that amenity is maintained. As Auckland, and some other urban centres, intensify and expand, the provision of adequate green space such as local reserves will become increasingly important. Amenity values are a critical value for New Zealanders in 2012 and in the future, and we are strongly opposed to the removal of express reference to them.

Aquatic habitats

The proposal would replace the current requirement to 'protect' the habitat of trout and salmon with a requirement only to 'maintain' aquatic habitats including only 'significant' habitats of trout and salmon. This is a major dilution of the existing measure.

The failure to refer to enhancement is inconsistent with the provisions of the National Policy Statement for Freshwater Management 2011 and the wider direction of the fresh water reforms. This is surprising given the high level of consensus that has been achieved in this context.

The meaning of the word 'significant' has proven to be highly contentious in the past and will result in added costs and uncertainty for those seeking to ensure that the habitats of trout and salmon are not degraded.

New principle – built environment

We recognise the value of quality urban design and the EDS TAG Report recommended that a principle be inserted into section 7 requiring decision-makers to have particular regard to "the maintenance and enhancement of a quality urban and built environment" and that greater guidance as to outcomes for urban and built environments should be pursued through a National Policy Statement, National Environmental Standard or best practice guidelines.

We appreciate that changes have been made to ensure this principle does not assume that growth is occurring throughout New Zealand. However we remain apprehensive that this principle could be interpreted to favour particular outcomes for urban growth, such as urban sprawl. Urban sprawl is associated with significant negative environmental, social and economic outcomes in cities around the world and is becoming increasingly so in a carbon-constrained world. It is the antithesis of high quality urban form and sustainable management.

New principle – infrastructure

The need for a principle relating to infrastructure has not been established. The MFE TAG Report notes that 90% of infrastructure projects are consented under the RMA. Recent changes to the RMA have created a fast-track consenting process for major infrastructure. These measures ensure that necessary and appropriate infrastructure is able to be approved and in a timely manner.

This proposal would contribute to shifting the RMA from being a statute that enables development while managing its adverse effects, to one that actively promotes certain categories of development, favourites of the Government of the day. While section 5 recognises that the RMA has a role in *enabling* people and communities to provide for their economic, cultural and social wellbeing, at its heart the RMA is in place to ensure minimum standards of environmental management necessary for *sustainable* management. As such, section 6 should not extend to *providing for* activities which have nothing to do with environmental bottom lines.

Proposed section 7

It is unclear what 'endeavour to ensure' means. This is likely to result in significant litigation although it is preferred to any definite requirement which would exacerbate the issues raised by proposed section 7(d). Paragraphs (a) and (b) are unlikely to achieve anything as they simply replicate existing requirements. However, paragraph (a) (use timely, efficient and cost-effective RM processes) does

have the potential to discourage the uptake of collaboration processes and efforts to enhance Maori participation.

Paragraph (c) (promote collaboration between local authorities) may be useful however it may be better dealt with in Part 5 of the Act (Standards, policy statements and plans) where more specificity could be provided.

Paragraph (d) is particularly concerning as it requires restrictions on the use of private land to be 'reasonably required to achieve the purpose of the Act'. The proposed test cuts across and is incompatible with the existing section 32 requirements and has the potential to result in suboptimal planning. Instead of adopting the 'best' approach in terms of the purpose of the Act decision makers will be focusing on what is 'reasonably required'.

Cost of proposals

The changes will involve considerable costs and will increase uncertainty in the short term, as they will require the review of all regional and district council plans as well as National Policy Statements. The changes will render much existing case law obsolete, providing interpretation challenges until new case law emerges which may take a decade. Implementation costs, we calculate, are likely to be in the range of $500 million to $1 Billion. We await the RIS for confirmation of these anticipated costs.

The consequences of introducing these changes at the same time as appeal rights are narrowed does not appear to have been considered.

Proposal: Improvements to NPSs and NESs

The following changes are intended to provide direction about when and how national direction tools can be used:

a) Allow a NPS to provide direction on delivery to ensure councils understand expectations for implementation (even where not suitable to include in an NES). NOTE: this will be tested on the NPSFM in late 2013.
b) NPSs and NESs will be able to be targeted to a geographical area that has a resource management issue of national significance.
c) Development of NPSs and NESs can be combined. It is intended that NPS and NES content will be provided through the national planning template.
d) Consultation with iwi in the creation of NESs.

EDS Position: Support

The acceptable way for central government to state its policy preferences on matters of national significance is through the use of NPSs and NESs. We support these proposals and consider that the proposal to blend NPSs and NESs will provide greater flexibility.

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(3) EFFICIENT AND EFFECTIVE RESOURCE CONSENTS

Proposal: Reduction of regulatory requirement for minor and less complex projects

10-day consent process: will apply to applications for the simplest and most straight forward project types that have the least significant environmental effects:

- A controlled activity except subdivisions and directly associated applications
- An inter-boundary rule breach
- A residential activity proposed to take place on a single residential site in a residential zone
- An activity listed in regulations

Exemption process: councils will be allowed to exempt projects from the need to obtain resource consent on a case-by-case basis where a development breaches a plan rule in a technical or marginal way but the effects of the environment and people are effectively indistinguishable from those allowed without a consent.

EDS Position: Oppose

10-day consent process: EDS has some concerns regarding the impact of this proposal on quality decision-making. EDS considers that other mechanisms could encourage expeditious decision-making while ensuring councils have appropriate time to make quality decisions. EDS has concerns also about the breadth of the applications this could cover – particularly the breadth of the residential activities category.

Exemption process: Rules are intended to be definite and clear. Introducing approved exemptions creates uncertainty around the boundaries and a significant judicial review risk for local authorities exercising a discretion as to which activities qualify, particularly as this proposal fails to specifically define the 'technical or minor rule breaches'. This proposal will result in minimal benefit as such consents will be processed on a non-notified basis within the (10 or) 20-working-day time limit.

Proposal: Published list of fixed fees for many application types and reporting on consent charges and costs

EDS Position: Support

Proposal: Reductions to the cost and complexity of the EPA process for nationally significant proposals

These include: simplifying the requirements for public notification, requiring BOI's to have regard to cost effective processes when determining their processes, improving the ability for electronic provision of information, and enabling the EPA to stop processing a proposal where there are unpaid debts.

EDS Position: Support in part

It is unclear how the requirements for public notification will be 'simplified'. The requirement to have regard to cost effective processes should not come at the cost of robust decision-making processes i.e. the alleged 'sequential error' in *King Salmon*.

Proposal: Changes to definition of 'affected party'

(a) Where minor side and rear inter-boundary rule breaches occur the only parties who can be considered affected are those who share the boundary where the rule breach occurs.

(b) Where subdivisions are anticipated by underlying plan rules or zoning the only parties who could be considered affected are the owners of affected infrastructure assets or government agencies that have an interest in public health and safety.

EDS Position: Oppose in part

EDS is opposed to proposal (b). It is unclear when a subdivision will be considered 'anticipated' by plan rules or zoning (controlled activity status?). It is unclear why the interests of some affected parties can be provided for through planning processes but not the interests of infrastructure owners or public health and safety. 'Affected parties' must already meet the narrow test set out in the RMA.

Proposal: Limiting the scope of submissions

When processing notified applications councils will be required to include both the reasons the consent is required and the effects on the environment that mean the application is being notified. The content of submissions must be limited to these matters and submissions that are irrelevant or have no evidential basis will be required to be struck out. It is intended that this will encourage upfront community engagement at the plan making stage.

EDS Position: Oppose

This proposal ignores the fact that part of the benefit of notification is that it allows issues not picked up by council officers to be raised. It is important to remember that only a very small percentage of consent applications are publicly notified. The proposal also runs contrary to notion of integrated management which underpins resource management theory and practice and is embeded in the NPSFM.

It is unclear how council will determine a submission has 'no evidential basis' as the public notification process inevitably gives rise to submissions based on hearsay and opinion but this does not mean they have no basis. It also curtails the submitters right to appear and call evidence at the Council hearing.

Proposal: Pre-hearing meetings

After the close of submissions pre-hearing meetings will be required for most notified consent applications to clarify the contested issues and provide an early opportunity for resolution. Pre-hearing meetings will need to be attended by a person with authority to make a decision. The council hearing will be limited to issues not resolved at the pre-hearing meeting. The Environment Court will need to consider attendance at a pre-hearing meeting on an appeal.

EDS Position: Support

Proposal: Applicant right to object

Following some council decisions applicants will now be able to object the decision or conditions to an independent commissioner as an alternative to proceedings to a full appeal.

EDS Position: Oppose

This proposal is inconsistent with the other proposals which limit the rights of submitters and remove rights of appeal. EDS opposes applicants being given additional rights when submitters' rights are being reduced.

It is also unclear what this will entail. Will the applicant be able to call new evidence? Will submitters have any role?

Proposal: Environment Court changes

The Court will be required to consider using a judicial conference to help parties negotiate a settlement.

The Court will be able to require parties to participate in alternative dispute resolution.

The powers of Judges and Commissioners sitting alone will be extended so they can make a wider range of orders without requiring a full hearing.

EDS Position: Support

Proposal: Incentivising a greater emphasis on plan-making

The notification test for resource consents will be changed so that, before considering environmental effects, the application must be assessed against the objectives and policies of the plan. This will provide a pathway for non-notification of proposals where that type of activity and its effects have already been planned for and anticipated by the regional or district plan.

In addition, consent applications will not be notified if they are controlled activities, or where specified in a plan rule, NES, nationally planning template or in regulations.

EDS Position: Oppose

This proposal seems to be akin to the s104D test. However, that is a gateway test that allows further consideration of the proposal. It seems that this proposal would allow non-notification if *either* test is met. Objectives and policies in a plan generally have some internal conflict and rarely will a proposal comply with all of them. If an 'overall broad judgment' is taken of the objectives and policies this will allow non-notification despite inconsistency with parts of the plan. It will also require very broad discretion to be applied to the notification test which is already subject to many judicial review proceedings.

Proposal: Certainty around consent conditions

Conditions applied to a consent will need to be directly connected to the plan provisions breached, the adverse effects of the activity, or as otherwise agreed by the applicant.

EDS Position: Undecided

It is questionable how much this would practically limit the content of consent conditions without further detail. The *Newbury* test requires conditions to be for a resource management purpose, fairly and reasonably relate to the development authorise, and not be unreasonable in a *Wednesbury* sense.

Proposal: Subdivision allowed unless expressly restricted

The current status of subdivisions would be reversed so that they would be allowed unless expressly restricted by rules in plans. The notification of applications for subdivision consents would not be possible where the subdivision is anticipated in the plan.

EDS Position: Oppose

This is of considerable concern given the multitude of matters that must be considered when determining if subdivision should occur: from ecological, to amenity, to infrastructure. This has the potential to result in very poor outcomes. In addition, this was not proposed in the Discussion Document and there has been no opportunity for feedback. It is very hard to see how it might work in practice and what the problem is that is being addressed. The compliance costs will be considerable for very unclear benefits. It seems a statement of far-right political ideology rather than a sensible law change.

Proposal: Amendment to section 106 re natural hazards

Section 106 will be amended so decision-makers can decline or place conditions on subdivision consents where there is a significant risk of a natural hazard and to allow both the likelihood and magnitude of the hazard to be considered in subdivisions decisions.

EDS Position: Support

(4) COUNCIL PERFORMANCE

Proposal: Councils will be required to monitor how they are delivering their functions

Councils will be required to monitor timeliness, cost, overall user satisfaction and performance against environmental and economic indicators. Expectations will be set of councils that will help show how well councils are meeting the needs of their communities. This will be aligned with a broader performance monitoring and improvement regime being developed by the Department of Internal Affairs as part of Local Government Act reforms.

EDS Position: Support

EDS supports better monitoring of Council performance as this ensures effort is directed where improvement is required. In particular, EDS supports greater monitoring of environmental indicators. It is unclear what 'economic indicators' would need to be monitored by councils.

Proposal: Central Government intervention powers

The circumstances where central government can intervene will be:

(a) Process – where a mandated requirement for a process step has not been complied with.

(b) Plan content - where a mandated requirement for national direction has not been included in a policy statement or plan and is therefore not acted on.

(c) Where a council asks central government to intervene to develop plan content more quickly to address an urgent issue.

In terms of (b) the Minister will not be able to write plan content, if the Minister is not satisfied with the content drafted by the council an independent commissioner will draft content, and the schedule 1 process will need to be followed after drafting has occurred.

In terms of (c) the Minister could allow dispensation from some of the process steps provided adequate consultation with iwi and appropriate stakeholders has been provided for and the plan meets other statutory requirements.

EDS Position: Oppose in part

These proposals have been changed from what was originally proposed.

EDS supports (a).

EDS considers that some concerns remain with (b). First, who will appoint the independent commissioner? Second, what would happen if the outcome of the submissions and hearing process is the same outcome that led to the Minister directing a change?

EDS opposes (c) although more detail is required regarding what process steps could be skipped. It appears to be suggested that public submissions would not be required. It is unclear whether a section 32 assessment would be required.

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(5) OTHER

Proposal: Remove explicit function for councils to control hazardous substances and the ability for councils to control new organisms will be removed.

EDS Position: Oppose in part

EDS is concerned that the removal of the explicit function for councils to control hazardous substances will weaken controls. These substances are those that are most dangerous to our health and safety and to the environment and any weakening of controls should be strongly justified. The document suggests this is intended to reduce duplication but states that this will not remove councils' ability to use land use control to manage hazardous substances but will remove the perceived need for RMA controls. There is no clear evidence that RMA controls are unnecessary duplication or that they do not provide necessary protection against the risks posed by hazardous substances.

Proposals that have not be progressed:

- A Crown body to process resource consents "is no longer being progressed through the resource management reforms". Is it being progressed through other reforms?
- Proposed amendments to prevent land banking are not being progressed as many submitters considered amendments would not be effective. Given the commitment to housing affordability can effective tools to prevent land banking not be found?
- Section 106 will not be expanded to all land-use consents and designations. Given the commitment to better natural hazard management why was this not progressed?
