

# The Environmental Protection Authority Bill

Submission to the Local Government and Environment  
Select Committee

January 2011



Parliamentary Commissioner  
for the **Environment**  
Te Kaitiaki Taiao a Te Whare Pāremata

# Contents

	List of Recommendations	3
1	Accountability and evolution of the EPA	4
2	The EPA should appoint Boards of Inquiry for Call Ins	6
3	The EPA should develop and monitor National Environmental Standards	7
4	The EPA should administer the Waste Minimisation Act	8
	Appendix	10

## List of Recommendations

I recommend that:

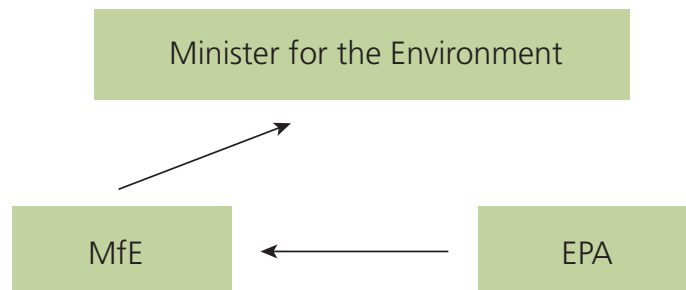
1. The Environmental Protection Authority appoints the members of Boards of Inquiry convened to determine proposals of national significance.
2. The Local Government and Environment Select Committee recommend to the Minister for the Environment that he delegate functions and powers to the Environmental Protection Authority to enable it to:
  - a) develop National Environmental Standards; and
  - b) monitor, evaluate and report on the compliance of local authorities with National Environmental Standards.
3. The Waste Minimisation Act 2008 be included as an environmental Act under clause 4 of the Environmental Protection Authority Bill.
4. The Waste Minimisation Act 2008 is administered by the Environmental Protection Authority.
5. The Local Government and Environment Select Committee recommend to the Minister for the Environment that the Waste Minimisation Act 2008 be amended so that the Waste Advisory Board becomes a committee of the Environmental Protection Authority.

## 1. Accountability and evolution of the EPA

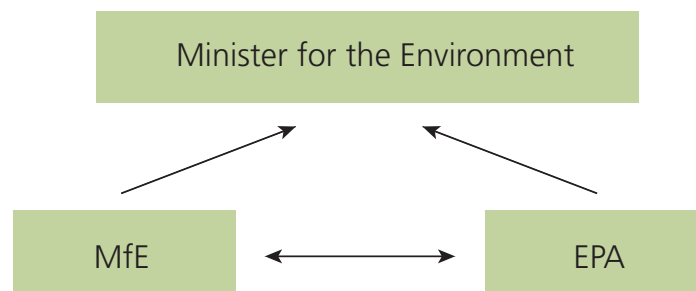
I support the creation of the Environmental Protection Authority (EPA). A technically skilled environmental agency focused on implementation at central government level is long overdue. I am especially pleased that the EPA is being established as a Crown entity since a measure of independence is appropriate for a regulatory body. However, I do have a major concern. This cannot be fully addressed now by amending the Bill, but should be kept in the forefront as the EPA evolves.

My concern is that despite the EPA being established as a Crown entity, its Board will have virtually no decision-making powers beyond those of the current Environmental Risk Management Authority (ERMA). Such an approach would make more sense if the EPA were to remain as a statutory unit within the Ministry for the Environment (MfE). However, the EPA is to be separate from MfE, and the risk is that without a significant role for the Board, the new agency will function as an advisory arm of MfE, rather than as an independent entity.

The relationships between a Minister, a Ministry, and a Crown entity should be rather different from this. The EPA is to be held accountable to the Minister for the Environment through its Board. While there will need to be a great deal of interaction with MfE, it must be made clear that the Board as the accountable body should have the power to control the exercise of its functions.



A mechanism for evolution of the EPA is contained in clause 15 of the Bill. This clause states that the Minister may delegate functions and powers to the EPA. It is important that such delegation builds the following relationship model.



The importance of this future delegation of functions and powers by Ministers of the Environment cannot be underestimated. The new EPA will be largely focused on the implementation of the Hazardous Substances and New Organisms Act (HSNO) with relatively few staff working on the much more comprehensive Resource Management Act (RMA). Without new functions and powers, the EPA will be unable to play a significant role in the country's most significant environmental management regime – the RMA. And while the EPA Board will decide whether or not to approve the importation of a new household cleaner, it as yet will have no influence over a major issue such as freshwater management.

## 2. The EPA should appoint Boards of Inquiry for Call Ins

Applications for resource consents, plan changes, or designations, which are determined to be nationally significant, can be “called in” by the Minister for the Environment. The Minister refers such applications to the Environment Court or to a Board of Inquiry. If the latter, the Minister appoints the members of the Board of Inquiry.

The management of the call-in process is the only function performed by the EPA in its current embryonic form. Beyond administering the call-in process, the EPA has a role to play in advising the Minister – whether an application should be called in, and if so, whether it should be referred to the Environment Court or a Board of Inquiry.

However, while the EPA is responsible for managing call-ins, it has virtually no control over the process. The statutory time limits can only be extended by the Minister. The costs appear to be higher than the costs of comparable local authority RMA processes.

Giving the EPA the power to make some of the decisions during the call-in process would better align the Board’s power with its accountability.

Which of the decisions (if any) currently made by the Minister should be transferred to the EPA is a matter that requires careful consideration. However, giving the EPA the power to appoint the members of Boards of Inquiry would be a good first step. Such a change would create a more independent and efficient decision-making process.

*I recommend that:*

- 1. The Environmental Protection Authority appoints the members of Boards of Inquiry convened to determine proposals of national significance.**

The required amendment to the RMA is in the Appendix.

### 3. The EPA should develop and monitor National Environmental Standards

National Policy Statements (NPSs) and National Environmental Standards (NESs) are two RMA tools available to the Minister to address issues at the national level.

The purpose of an NPS is to set environmental policy on matters of national significance. Local authorities must include or give effect to the objectives and policies in NPSs. In contrast, NESs are technical and regulatory in nature. Their purpose is to prescribe national standards or rules that may prohibit or allow an activity. NES standards and rules have immediate effect and override local authority plans.

An example is the NES for Electricity Transmission which sets out a national framework of permissions and consent requirements for activities on existing electricity transmission lines. Activities include the operation, maintenance, and upgrading of existing lines.

The policy nature of NPSs mean that it is appropriate that they continue to be developed by the Ministry for the Environment. But responsibility for the development of NESs should fall to the EPA as the technical and regulatory agency.

However, with regard to NESs, the Explanatory Note in the Bill states that the EPA will only “provide advice and information on the development and implementation of national environmental standards developed under the RMA”.

As the technical and regulatory agency the EPA should be responsible for developing NESs and recommending them to the Minister. Further the EPA should monitor, evaluate and report on the compliance of local authorities with NESs.

Under clause 15 of the Bill, the Minister can delegate these functions and any necessary powers to the EPA.

*I recommend that:*

**2. The Local Government and Environment Select Committee recommend to the Minister for the Environment, that he delegate functions and powers to the Environmental Protection Authority to enable it to:**

- a) develop National Environmental Standards, and**
- b) monitor, evaluate and report on the compliance of local authorities with National Environmental Standards.**

#### **4. The EPA should administer the Waste Minimisation Act**

The process of evolution by delegation in clause 15 of the Bill is a pragmatic approach to the challenge of building a fully-fledged EPA. Under clause 15, the Minister can delegate functions and powers under “environmental Acts”.

Clause 4 of the Bill defines “environmental Acts” as the Climate Change Response Act 2002, the Hazardous Substances and New Organisms Act 1996, and the Resource Management Act 1991.

An obvious omission is the Waste Minimisation Act 2008. The focus of this Act is technical and operational and there is a good fit with the Authority’s functions under the Hazardous Substances and New Organisms Act 1996.

There is however a problem in simply adding the Waste Minimisation Act 2008 to the list of “environmental Acts”. This Act has been written to be administered by MfE and some functions, duties and powers are held by the Secretary – the Chief Executive of MfE. The Minister cannot delegate functions, duties and powers that are held by the Secretary.

One solution to this is to insert a clause into the Bill that allows the Secretary to delegate his or her functions under the Waste Minimisation Act to the EPA. Indeed clause 51 allows certain chief executives to delegate any of their functions, duties and powers to the EPA under the Climate Change Response Act. But this mechanism is one that should only be viewed as a temporary fix and it is preferable for it not to be used at all. It is poor governance for the chief executive of a Ministry to direct or delegate functions to the board of a Crown entity.

There is some justification for a temporary fix in the case of the Climate Change Response Act because the Emissions Trading Scheme is so new, but the delegations should be converted into legal amendments in due course. However, this does not apply to the Waste Minimisation Act since it is so obvious that it should be administered by the EPA.

A further issue is Part 7 of the Waste Minimisation Act which deals with the Waste Advisory Board set up to give advice to the Minister. If the Waste Minimisation Act is to be administered by the EPA, it would be both sensible and efficient for the Waste Advisory Board to become a committee of the EPA Board.



I make three recommendations regarding the Waste Minimisation Act.

The following recommendation is in three parts.

The first deals with the role of the Minister in the Waste Minimisation Act. The Minister may wish to delegate some of his functions and powers under this Act to the EPA, so it should be added to the list of “environmental Acts” in clause 4.

The second deals with the transfer of functions, duties and powers from the Secretary of the Environment to the EPA.

The third deals with the Waste Advisory Board.

*I recommend that:*

**3. The Waste Minimisation Act 2008 be included as an environmental Act under clause 4 of the Environmental Protection Authority Bill.**

The required amendment to the Bill is in the Appendix.

*I recommend that:*

**4. The Waste Minimisation Act 2008 is administered by the Environmental Protection Authority.**

The required amendments to the Waste Minimisation Act is in the Appendix.

*I recommend that:*

**5. The Local Government and Environment Select Committee recommend to the Minister for the Environment that the Waste Minimisation Act 2008 be amended so that the Waste Advisory Board becomes a committee of the Environmental Protection Authority.**

# Appendix

## Amendments to give effect to Recommendations 1,3 and 4

### Recommendation 1

Amendments to section 149J of the Resource Management Act 1991.

S149J: Minister to appoint board of inquiry **[Appointments to Boards of Inquiry]**

- (1) This section applies if the Minister makes a direction under section 142(2)(a) or 147(1)(a) to refer a matter to a board of inquiry for decision.
- (2) As soon as practicable after making the direction, the Minister **[Environmental Protection Authority]** must appoint a board of inquiry to decide the matter.
- (3) The Minister **[Environmental Protection Authority]** must appoint—
  - (a) no fewer than 3, but no more than 5, members; and
  - (b) 1 member as the chairperson, who must be a current, former, or retired Environment Judge or a retired High Court Judge.
- (4) A member of a board of inquiry is not liable for anything the member does, or omits to do, in good faith in performing or exercising the functions, duties, and powers of the board.

### Recommendation 3

Amendment to Clause 4 of the Environmental Protection Authority Bill:

environmental Act means—

- (a) the Climate Change Response Act 2002;
- (b) the Hazardous Substances and New Organisms Act 1996;
- (c) the Resource Management Act 1991

**[(d) the Waste Minimisation Act 2008]**

### Recommendation 4

Amendments to the Waste Minimisation Act 2008.

S 5(1) (b)

~~Secretary means the Secretary for the Environment appointed in accordance with section 29 of the Environment Act 1986~~

**[Environmental Protection Authority means ...]**

Secretary **[Environmental Protection Authority]** in ss20, 21, 22, 23, 24, 26, 29, 30, 31, 33, 37, 40, 41, 67, 76, 84, 85, 86, 87, 88, 90.