Submission on: *Fast-track Approvals Bill*

To: Environment Committee

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Submitter details

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In a nutshell

There is widespread frustration with the time it takes to get major projects underway. The Government has expressed a determination to 'get stuff done' and 'do things differently'. Faced with the scale of our national infrastructure deficit and the looming pressures that climate change will place on the inadequate stock we already have, there is no question about the need to improve the cost and speed of consenting.

Many features of the current Bill can find a precedent in previous legislative forays. A table attached to this submission summarises some of the similarities and differences (see Annex 1). What is new is their application in settings where the need for speed in the face of an emergency is absent, and the almost unlimited range of projects that can qualify for special treatment.

If the Bill were confined to infrastructure, it could, with amendment, be useful. Infrastructure such as roading, transmission and energy generation, provides long run public benefits. While the specifics of sites will differ, the built assets and their attendant risks are well understood. It should be possible in many cases to expedite them. The Infrastructure Commission has done a lot of work on this – the Committee should hear from it.

But the addition of 'development projects' introduces the possibility of many one-off, private developments that involve significant environmental harm being accorded the same treatment. Unlike much infrastructure, the risks and trade-offs will not be well understood, and the benefits are largely private in nature. The problem analysis used to justify the Bill does not support the range of projects that would be eligible.

Getting stuff done and doing things differently should not mean discarding the need for high quality information and a clear understanding of the costs as well as the benefits of proposed activities. The Bill does nothing to improve the parlous state of environmental information that afflicts resource management processes and imposes so much cost. On

the contrary, its solution appears to be to limit the opportunities for environmental scrutiny.

As Parliamentary Commissioner for the Environment, I am charged with providing Parliament with advice on the system of agencies and processes established by the Government to manage the allocation, use, and preservation of natural and physical resources. The Committee will be aware that I was less than convinced that the last big, attempted reform that led to the Natural and Built Environments Act 2023 would do things differently in an environmentally responsible way. Neither will this Bill.

I suggest, at the end of my submission, two crucial elements of any reform that must be progressed if we are to do things differently and do them better. They cannot be done overnight. But the problems we face with consenting did not arise overnight. They need serious sustained attention so that we can build a stable legislative basis for dealing with public resources and private externalities.

That is for the future. In the meantime, the Committee must address this Bill.

I consider that it poses significant risks to the environment for the following reasons:

- The environment does not appear in the purpose clause (unlike its predecessor the COVID-19 Recovery (Fast-track Consenting) Act 2020) so environmental impacts will carry less weight than claimed developmental benefits;
- The Minister for the Environment is excluded from being either a decision maker or being consulted as part of the processes;[1]
- The time needed to verify and test the accuracy and completeness of environmental information is limited and there is no requirement to record gaps in information or uncertainty alongside the claimed benefits of projects;
- Ministers subject to political lobbying are empowered to allocate public resources with potentially harmful environmental and health consequences;
- Currently prohibited activities and projects that have already been declined on environmental grounds are potentially eligible for fast-tracking;
- Excluding those who wish to raise environmental concerns that are wider than those of immediate landowners means that most environmental questions will not be asked.

The Bill lacks many of the environmental safeguards its predecessor legislation contained. Even the much-maligned National Development Act 1979 had more environmental checks and balances.

[1] I note that the Bill contains a single requirement to consult with the Minister for the Environment, in relation to marine consents under the EEZ Act, see Schedule 9, clause 5.

The Bill will achieve sub-optimal outcomes through poor decision making, poor allocation of resources, a lack of legislative durability, and increased litigation risk. These arise because:

- The Bill inevitably creates extensive possibilities for judicial review of the Ministers' decisions.
- Truncating the provision of information and constraining the ability to test the robustness of that information will lead to Ministers making decisions based on inadequate information and without full knowledge of the facts.
- By all but excluding public participation and handing final decision-making authority to Ministers, the Act will politicise the decision-making process.
- Projects risk being approved with unidentified or undisclosed impacts that impose costs on both society and the environment and end up undermining public confidence.
- Fast-tracking many projects without prioritisation risks stoking inflationary pressures as they compete for the same labour, services and inputs.
- Ministers are cast in the role of picking winners and creating losers through their power to open the gates to fast-tracking and then take final decisions.

If the Bill is to proceed, the following changes should be made:

1. Remove the role of Ministers as final decision-makers.
2. Limit eligible projects to those that provide significant public benefits.
3. Elevate environmental considerations, including into the purpose clause, and restore the role of the Minister for the Environment.
4. Exclude previously declined or prohibited activities from the fast-track process.
5. Lengthen the proposed timelines for the consenting process.
6. If they remain decision makers, require Ministers to explain any deviation from a panel's recommendations.
7. Require decision makers to make an explicit statement about the level of uncertainty that applies to any information relevant to environmental risk, and to undertake rigorous cost/benefit analysis of all referred projects.
8. Expand the range of parties who are entitled to have their views listened to by the panels.

The Parliamentary Commissioner for the Environment

The Parliamentary Commissioner for the Environment was established under the Environment Act 1986. As an independent Officer of Parliament, the Commissioner's role is to review the environmental management system. He has broad powers to investigate environmental concerns and make recommendations to improve environmental outcomes. The Commissioner is wholly independent of the government of the day. The current Parliamentary Commissioner for the Environment is Simon Upton.

Introduction

There can be no disagreement with the case for consenting processes that minimise unnecessary cost and delay. Large, complex projects can test routine processes, if only because they raise issues that regulators aren't familiar with. The case for treating them differently is not a new one. Previous fast-track consenting regimes have abbreviated resource management processes, and emergency legislation has often reduced compliance requirements. Legislative authority for these measures has generally spelt out a clear policy justification, processes that are limited to what is necessary to achieve the statutory purpose, all the while making reference to the need for good environmental outcomes. The Bill departs from all those protections.

What problems does the Bill seek to address and how does it address them?

The supplementary analysis report produced to support the introduction of the Fast-track Approvals Bill identifies two problems:

- A consenting process for major projects that is slow, costly and complex, particularly where approvals are required under several statutes.
- An approval process that places insufficient value on the positive economic and social benefits of such developments.

While the problems are linked, they are distinct. The first involves matters of process, the second goes to the heart of the trade-offs that are made when dealing with public resources and private interests. I discuss each in turn.

1. Slow, costly and complex approval procedures

The Bill's solution to this problem is threefold:

- It enables consents required under multiple statutes to be dealt with together within a single process;
- It shortens the timelines within which the consenting process must be concluded;
- It dispenses with the need for a hearing or the notification of any affected parties other than adjacent landowners.

Discussion

- It is sensible to have a 'one-stop-shop' integrated process for those projects that require consents or permissions under multiple statutes.

- The concerns about cost and delay used to support the shortening of consenting timelines are based on analysis provided by the Infrastructure Commission. The Commission's headline statistic is that "current consenting processes cost infrastructure projects $1.29 billion every year, and the time taken to get a resource consent for key projects has nearly doubled within a recent five-year period".

  While the total cost makes for a good headline, the Infrastructure Commission's research found that typically about 5.5% (4.8%-6.1%) of a project's total budget is spent on seeking consent. The proportion of the consenting cost was highest (probably unreasonably so) for small projects <$1m (14%-16%) and 8% for medium sized projects (between $1m-$10m). For large projects (>$10m) this proportion drops significantly to between 0.5% and 2.1%. This is in line with international comparisons presented in the Infrastructure Commission's research and appears not unreasonable given the impacts that some of those larger, more complex, projects are likely to have.

  As the Bill applies to infrastructure and development projects with significant regional or national benefits, most will be in the large or complex category where consenting costs, while significant in absolute terms, are likely to be reasonable given the scale of what is at stake. That is not to say that cost savings on consenting can't be found – they should – but the problem seems to be overstated if it is being used to justify shortcuts in understanding the environmental impact of proposals associated with projects that are, by definition, likely to be complex.

  It is concerning that the problem analysis relied on to support the Bill related specifically to infrastructure but that the Bill has been extended to 'development projects'. No comparable analysis to that provided by the Infrastructure Commission has been supplied for this vastly expanded category of activities. Under the Bill an almost unlimited range of projects could qualify for fast-tracking, yet they are not all created equal.

  Many infrastructure projects, while complex, are likely to have known or easily understood environmental impacts. That makes them lower risk for fast-tracking (especially when their public benefits are taken into account). Private projects that extract or use natural resources (such as extractive industries, aquaculture etc) are riskier because they are more likely to be one-off projects with environmental impacts that are less well known and potentially complex and significant.

- There is nothing new about concerns over cost and delay. The history of the RMA has been punctuated by attempts to streamline its processes. The most notable changes were a result of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 which led to the establishment of the Environmental Protection

Authority (EPA).[2] The previous Government's decision to replace the Resource Management Act 1991 (RMA) with a new Natural and Built Environment Act 2023 (NBEA) attempted further streamlining with the introduction of a permanent fast-track regime.

There have, in addition, been a series of emergency enactments that have reduced or removed consenting requirements – the Epidemic Preparedness Act 2006, the Canterbury Earthquake Response Act 2010, the Hurunui/Kaikoura Earthquake Recovery Act 2016 and the COVID-19 (Fast-track Consenting) Act 2020.[3] The last of these statutes became the template for the permanent fast-track process that was incorporated into the NBEA with somewhat relaxed timelines.

The Bill in effect applies many of the process truncations that were originally justified by times of emergency. These include much abbreviated periods for scrutiny and review by expert panels, very limited rights to be heard by parties other than the applicant and limited appeal rights. While each of these features has a precedent, what is new is their application in settings where the need for speed in the face of an emergency is absent.

2. Giving priority to positive economic and social benefits over any environmental concerns

The objective of the Bill, stated in the Supplementary Analysis, is "to provide an increase in favourable decisions for major projects that have regionally or nationally significant benefits". The solutions to the problem proposed by the Bill are:

- To place Ministers at the entry to the process and its conclusion and extend their decision-making powers well beyond projects that deliver largely public benefits. The final decision to approve a project lies in the hands of the Ministers of Infrastructure, Transport and Regional Development (joined by other Ministers in respect of projects requiring approvals under the Wildlife Act and the Crown Minerals Act).
- To exclude the Minister for the Environment from taking any part in assessing eligibility or making decisions on recommendations.
- To omit any reference to the environment in its purpose clause and ensure that this purpose carries greater weight than those governing other statutes such as the RMA (Schedule 3, clause 1(2), see also Schedule 4, clause 32). The Bill seeks to erect a sliding scale of significance which privileges projects deemed to be of significant national or regional benefit. None of the previous fast-track Acts did this – they

[2] These amendments included the creation of the Environmental Protection Agency, streamlining the process for projects of national significance, increased choice of pathways for resource consent, improved efficiency for plan development and change process, enhanced preparation and effect of national environmental standards and national policy statements, and increased effectiveness of compliance and enforcement measures.
[3] Annex 1 summarises some of the similarities and differences between those Acts and this Bill.

ensured that the purposes of the Acts they sped up remained a primary consideration.

- To allow activities and projects that have previously been determined to have significant negative environment impacts and that have been declined or are prohibited by law, to be eligible for approval under the fast-track regime.

Discussion

- All previous fast-track regimes, with one exception, have left the final decision in the hands of the body hearing the application (an expert panel, a board of inquiry, the Environment Court). This is the best approach as it insulates decision making from political processes and provides public confidence that public assets and the environment in which they sit are being well managed.

  The single exception is the National Development Act 1979, which provided for the Governor-General by order-in-council to declare a work to be one of national importance, following a hearing and recommendation from the Planning Tribunal.

  The National Development Act contained a number of provisions that provided some balance to set against final decision-making authority resting with the Executive branch of Government:

  - an unabridged entitlement to be heard by any body or person affected by the work (not just adjacent to it) and any body or person "representing some relevant aspect of the public interest";
  - no change to the matters that would be weighed should the project have been processed in the normal way;
  - a requirement to table any order-in-council in the House within 14 days; and
  - a requirement for the Minister to table, at the same time, a written statement explaining the reasons for any differences between the detail of the order-in-council and the recommendation of the Planning Tribunal.

  The current Bill provides none of these safeguards. Clause 25(4) does preclude Ministers from deviating from the Panel's recommendations "unless they have undertaken analysis of the recommendations and any conditions included in accordance with the relevant assessment criteria". But there is no precision around the type of analysis that might be undertaken and no requirement to spell out the reasoning that such analysis might support.

- Perhaps more concerningly, the Bill could green light projects that that have previously been declined on environmental grounds or are currently prohibited activities due to environmental concerns. This demonstrates a clear determination to secure approvals, on the basis of their claimed benefits, without regard for their costs. If a panel is asked to examine a proposal that would, but for this Bill have been

prohibited, it is hard to see how any level of environmental harm could persuade it to recommend against the project. If something which is normally prohibited has been a priori acceptable in advance, the panel would be hard pressed to rebut that.

- Finally, the Bill creates three categories of project eligibility (listed, listed referred, and referred). While referred projects will have had to satisfy eligibility criteria (set out in clause 17), there is no such requirement for projects to be listed in schedules that have not yet been presented to the Committee. This means that the first projects that reach expert panels will have been subject to no objective criteria that justify their preferential treatment. While this might be justifiable in the event of an emergency, that is not the case here.
- Notwithstanding the reasons advanced for the legislation (timeliness and cost coupled with the need to give more emphasis to social and economic outcomes), it is hard not to conclude that the legislation seems premised on the fact that it's the natural environment that is getting in the way.

The risks of this legislation

The design of the Bill runs four broad risks:

- Environmental impacts being poorly understood and potentially ignored.
- Poor allocation of resources with attendant economic and environmental consequences.
- A lack of legislative durability in the absence of a broad consensus on resource management issues and the voice of the community in allocating public resources.
- Litigation risks.

I deal with each class of risks in turn.

1. Environmental impacts being poorly understood and ignored

Nothing in the Bill will make information more easily available or lower the cost of gathering it. But the Bill's processes and timelines are likely to mean that whatever information is available will only be subjected to passing scrutiny and any significant gaps are unlikely to be filled. While the responsible agency assesses a referral application to ensure that it describes an eligible activity and that necessary information has been provided by applicants, the only assessment of the substantive content of that information is conducted by an expert panel within very constrained timeframes.

As a result, with only the most limited opportunities for challenge, and with limited time for the panel to absorb content and seek technical advice, the information submitted by applicants may not be properly tested or verified. The incentive that applicants would ordinarily have to ensure that the information they provide is rigorous and able to stand up to challenge will be reduced.

This risk is amplified because the Bill contemplates fast-tracking projects with potentially significant negative environmental impacts. Whereas the COVID-19 (Fast-track Consenting) Act focused primarily on public infrastructure and housing which tend to have better understood environmental risks, the Bill embraces a potentially unlimited range of 'development' projects. These would be better dealt with using the existing call-in process.

Where comprehensive information is submitted with an application, limited time available to the panel for proper consideration can, perversely, lead to very detailed conditions. For example, anticipating the acquisition of two new ships, and their increased size, the Waitohi Picton ferry precinct redevelopment was submitted under the COVID-19 fast-track framework. The project was highly complex involving coastal reclamation, harbour-dredging, the construction of new terminal buildings, new docks and a sea wall, and changes to roading and rail networks. The sheer complexity of the project and the tight statutory timeframes put the expert consenting panel under severe pressure. To deal with the complexity, the resource consent that was granted by the panel was subject to comprehensive conditions.[4]

The COVID fast-track timelines have been largely replicated in this Bill but will apply to a far wider range of projects. The Committee should consider inviting panel members to share their experience and indicate whether they think these timeframes are prudent if the aim is high quality decision making for large and complex developments.

Finally, I am concerned that projects that have previously been declined, or activities currently prohibited by law, should be eligible for fast-track consideration. In respect of the former, this amounts to a retrospective judgment that decisions carefully arrived at were wrong. In respect of the latter, it amounts to allowing Ministers to selectively lift prohibitions. The better course would be to amend the legal scope of prohibitions which Ministers regard as excessively risk averse. That process of amendment is something that should properly take place after public consultation.

2. Poor allocation of resources with attendant economic and environmental consequences

At its core, the consenting system is about allocating the right to use resources where property rights either don't exist or are in conflict. The absence of private property rights indicates public or common pool ownership in which those who allocate rights do so on behalf of the community at large. Any decision in this realm will involve trade-offs, winners and losers. This is what makes it such a contentious arena, particularly where the claimed benefits are largely private.

The Bill places responsibility for those trade-offs in the hands of Ministers on the advice of advisory panels. Placing resource allocation designed to deliver private benefits entirely in the hands of Ministers is fraught with risks. Businesses will inevitably conclude that instead of investing in making themselves more productive to gain access to resources, they

[4] Ultimately, the project was not pursued, as the acquisition of the new ships was cancelled.

would be better off investing in lobbying. Where public resources are at stake, the asymmetry of access to political decision makers and panels becomes particularly problematic.

Given its focus on projects of national or regional significance, the Bill is likely to grant privileged access to consenting to what might be termed 'the big end of town'. Those promoting smaller developments would miss out despite facing higher costs as a proportion of their total budget.[5]

Leaving the vexed issue of public ownership aside, expediting access to resources is not in itself a problem providing we can demonstrate that resources are allocated to their highest value use. Where resources are privately owned and valued, that is what markets normally do. The absence of private ownership means that we need some test to ensure that businesses are incentivised to invest in improving productivity.

The question is how consideration of allocative efficiency can be added to the proposed process. At the very least, any decision should aim to maintain or improve the overall level of capital at society's disposal or, more simply, the benefits of a project to society as a whole should outweigh the costs.

Sometimes the highest value allocation of resources will be to exploitative uses, sometimes it will be to the environment itself. In the case of already degraded environments, the value of remaining natural capital tends to be higher. For example, the relatively few remaining wetlands in New Zealand tend to generate more benefit to society (e.g. nutrient filtration, trapping sediment, providing habitat for fisheries) than the surrounding farmland. A loss of this kind of natural capital may generate financial benefits in the short term but reduces the capital stock available to provide benefits to the wider population over time.

Even if we put aside environmental impacts, resource limitations and trade-offs always exist. If the Fast-track Approvals Bill were to remove the barrier of consenting, projects would still need to attract labour, services and inputs to proceed. In the current economic context, it is unlikely that these resources are sitting idle. They would need to be attracted to these projects, crowding out other business activity and fuelling cost inflation.[6] In an inflationary environment it is unlikely that fast-tracking will create additional economic activity over the counterfactual.

Improving the allocation of resources might well improve the productivity of economic activity, but the Bill does nothing to make that likely. The opposite could occur if Ministers,

[5] Moore, D., et al (2021*) The cost of consenting infrastructure projects in New Zealand: A report for The New Zealand Infrastructure Commission / Te Waihanga*, Sapere https://srgexpert.com/wp-content/uploads/2023/07/The-cost-of-consenting-infrastructure-projects-in-New-Zealand-July-2021.pdf

[6] The Infrastructure Commission's November 2023 Briefing to the Incoming Minister notes that this is already a concern in some infrastructure sectors, some of which are the result of previous fast tracking regimes.

in deciding which projects to fast-track, are not required to compare and contrast the other options for the economic use of those resources.

There is no getting away from the fact that public resources and mechanisms to access them involves a degree of centralised resource allocation by governments. It is for that reason that transparency is essential for efficient resource allocation. I note that this is a conclusion also reached by the New Zealand Initiative.

A transparent prioritisation method needs to be inserted into the decision-making process. One way forward would be to include a thorough cost benefit analysis for each project (again this has been recommended by the New Zealand Initiative). I would recommend the following methodology:

- Benefits should be based on modelling using Computable General Equilibrium (CGE) models. Measures like increased "jobs", "tax revenue" or "profits" generated are not relevant as labour and capital will usually be coming from elsewhere. Only the additional value added should be included for projects with purely private benefits.
- Benefits should include spillovers where they increase the productive capacity of the economy in the long term. This is likely to apply to infrastructure investments, but even then, not all infrastructure projects are created equal – some will provide a better return to society than others.
- Include in the costs an estimate of the value of any natural capital lost or damaged (for example capitalising ecosystem services generated by the natural capital). Where there are no estimates of impacts to natural or cultural capital to include, the impact should be clearly noted for decision makers to consider.
- Use sensitivity analysis to highlight key uncertainties and use a low discount rate (for example 2%) to reflect the fact that there will be on-going costs of environmental damage from, for example, extractive industries on future generations long after any short run benefits have been reaped. A failure to do this means privileging a quick boost to current consumption over the long-run wealth of the community.

Using this methodology, I would expect projects that exploit public resources for private benefit, such as extractive industries, to deliver a positive result only in rare cases where their negative impacts are offset by exceptionally valuable outputs. In such cases, their negative impacts can be outweighed by benefits such as royalties and higher paying jobs, or by making investments in environmental remediation or offsetting on another site. High value minerals such as lithium are more likely to be able to command the premium required to make such investments than relatively low value minerals like coal.

3. Lack of legislative durability

Any regime that deals with the allocation of public resources relies on decision makers being able to demonstrate that they have presided over a fair process, based on good

information that has taken account of the wider public on whose behalf they are acting. By all but excluding public participation and handing final decision-making authority to Ministers, the Act cannot help but politicise the decision-making process.

Public scrutiny assists with ensuring applicants are honest, diligent and accurate in the information they provide. It ensures more robust outcomes and community buy-in. The Bill risks projects being approved with unidentified or undisclosed impacts that impose costs to both society and the environment and end up undermining public confidence.

The National Development Act (despite its significant protections) was thrown out because of a lack of public confidence in political decision making. The Resource Management Act that followed remained on the statute book for thirty years not because it was perfect – 23 substantive amendments testify to its serial shortcomings – but because at a fundamental level it represented a consensus on the role of government (at its different levels). Elected officials were empowered to make the trade-offs that were reflected in environmental and planning rules and limits. Arms-length decision making under those rules was left to dedicated bodies and, on appeal, the courts.

The NBEA tried to effect some sweeping changes which would have significantly improved some of the RMA's protracted and lack-lustre processes. Those changes are well overdue. But the fundamental political 'settlement' of the RMA was preserved. A failure to secure broad support for those changes and the introduction of this process now throws that consensus up in the air.

The NDA, too, failed to attract a broad constituency. This Bill risks the same fate down the track. It also raises the risk that if it's good enough for one political coalition to impose its decisions without constraints, it will be good enough for another coalition to impose its agenda by similar means. If institutional certainty and transparency of process have value for both investors and the communities in which they invest, this Bill is not the best way to achieve it.

4. Litigation risks

Confining appeal rights by prescribing those who have standing to points of law, and limiting the role of the senior courts, is clearly designed to reduce the risk of litigation and associated delays. However, the creation of a new and novel legislative regime for existing statutory approvals may lead to litigation nonetheless, which will undoubtedly leverage the novelty of the Bill's processes.

A right to justice is codified by section 27 of the NZ Bill of Rights Act 1990. This, in itself, may provide a basis for novel argument in any proceedings. The principles of natural justice, particularly the right to be heard, may be engaged by litigants who are impacted by the decisions of Ministers but have been excluded from the approval process.

The Bill provides extensive possibilities for judicial review of the Ministers' decisions. Truncating the provision of information and constraining the ability to test the robustness

of that information, make it likely that Ministers will make decisions based on inadequate information and without full knowledge of the facts. Without refining the criteria for referral, improving the transparency of decision making, broadening the scope of consultation, and providing timeframes or mechanisms that ensure information is properly tested and considered, the Bill stands little chance of avoiding delays due to litigation.

Given the speed of the approval process, and the likely pace at which development would commence once approved, the courts would be asked to hear proceedings with similar expediency. The delay caused by judicial review proceedings is one risk. A successful review would be something else again. What started as a fast-track would likely become a slow track, defeating the purpose of the reform. Ministers' decisions risk being declared unlawful, or remitted for reconsideration, with both remedies undermining the overall aim to increase the speed of approvals. Further, fast-track may find itself at a dead stop if the courts find that the statutory provisions are inconsistent, or are interpreted in a manner that is inconsistent with the policy intent, and the Government is forced to pursue legislative amendment in response.

Changes to the Bill that would address some of these risks

As Parliamentary Commissioner for the Environment, my principal concern is to see that in dealing with large, complex projects, matters of environmental concern and the concerns of people and nearby communities will be fairly weighed in the balance. Annex 2 provides a detailed list of amendments that could address some of these concerns. This section addresses nine key changes that would reduce the risks outlined above.

1. **Remove the role of Ministers as final decision makers**.

Making Ministers the gatekeepers to the process provides a powerful signal that fast-tracked projects are important ones. Leaving the panel that examines the evidence to make the final decision provides confidence that the decision will be made, transparently, on its merits. It incentivises the panel to do a professional job (its decision has ultimate consequences) and removes the possibility of political lobbying behind closed doors.

2. Limit eligible projects to those that provide significant *public* benefits.

The Bill targets projects that are likely to be both complex in terms of the claims they make on resources and the frictions they raise with the communities in which they are embedded. Such projects will frequently be 'one-offs' which raise questions that may not have previously been raised and for which template-like solutions aren't readily available. Their complexity means that an understanding of their impacts – both on the environment and their surrounding communities – is likely to require the gathering of more information than routine developments. The public nature of their benefits makes them legitimate candidates for bespoke consenting procedures that can examine the spill-over public benefits and weigh them against the costs of equally public impacts. Infrastructure falls into this category.

By contrast, private developments which hope to use public resources depend for their success on private commercial returns. As noted above, these projects incentivise intense political lobbying for preferment. Politicians who are elected to be the guardians of public resources, end up allocating those resources on the basis of private advocacy motivated by private benefit. In the short term, this creates a risk of inefficient allocation of resources. In the longer term, it could incentivise any business with aspirations to grow to invest in lobbying rather than improving its productivity.

3. Elevate environmental considerations

The Bill's purpose should be amended to make it clear that the environment continues to be an important consideration. The addition of words such as "while securing sustainable environmental outcomes" would make it clear that the quality of the environment is an important boundary condition for any development. This addition is neither novel, nor should it be controversial, as it is similar to what featured in the purpose clause of the COVID-19 (Fast-track Consenting) Act.

A clear role for the Minister for the Environment should be reinstated. This could be done in one of two ways. Either the Minister could be included as one of the joint Ministers, or the Bill could require the Minister for the Environment to be consulted by the joint Ministers prior to a decision to refer or approve a project, and in respect of any conditions that are to be applied in an approval. Every project will have environmental impacts. If it is good enough to enlist three Ministers to appraise and promote the benefits of fast-tracked projects, it seems not unreasonable to involve the portfolio minister responsible for overseeing the planning, environmental and resource management process.

4. Expand the list of ineligible projects and activities

Projects or activities that have already been declined consent or are prohibited by law, regulation or regulatory plan have already been shown to have significant negative environmental effects including human health and should not be eligible for the fast-track process. If the applicants think they have modified their proposals to further mitigate negative effects, those claims need to be thoroughly tested. That would not be possible under this Bill and they should be subject to the same processes that assessed them the first time.

It is hard to see any justification for allowing activities that are currently prohibited to be approved. If prohibited activities are considered acceptable by the Government, changing an activity's categorisation should be sought through the relevant process which rendered them prohibited in the first place, rather than circumventing them.

5. Lengthen the proposed timelines for the consenting process.

A less-pressured decision-making timetable will make for better quality decisions. The timelines enacted in the short-lived Natural and Built Environment Act fast-track mechanism might be a sensible starting point for consideration. The Committee might also consider what has been possible within the timeframes available for proposals of

national significance.[7] That pathway was used to great success for the Waterview tunnel in Auckland. Of considerable regional benefit, the tunnel was a large and complex project which raised significant ecological considerations, engineering issues, and impacts on the local community. If projects like the Waterview tunnel are what Ministers anticipate progressing through the fast-track process of the Bill, the Committee should seek the advice of expert panel and board of inquiry members to ensure that any timeframes are informed by the experience of those who have had to operate within them.

6. If they remain decision makers, require Ministers to explain any deviation from the panel's recommendations

If Ministers are to remain as decision makers, transparency in public decision-making, demands that Ministers should be required to specify their reasons for deviating from any of the panel's recommendations. Where directions are made to the panel by Ministers, remitting an application back to them for reconsideration, the reasons for those directions must be specified by the Ministers. The final decision of the Ministers, the reasons for it, and all information relating to the application must be made publicly available.

7. Require decision makers to make an explicit statement about the level of uncertainty that applies to any information relevant to environmental risks and cost/benefit analysis

Due to the curtailed nature of the fast-track process there will not be sufficient time to analyse either the positive or negative impacts of proposals properly. Where applicants, and any experts contacted by the panel, are making claims about environmental impacts, they should be required to declare what is well understood about the risks, what is uncertain, and the plausible range, likelihood and magnitude of those impacts. They should also indicate any impacts that are impossible to estimate on current evidence. A transparent process (such as cost benefit analysis) should be used to ensure that resources are efficiently allocated. This should include environmental impacts and a sensitivity analysis to highlight uncertainty.

8. Expand the range of parties who are entitled to have their views listened to by the panels.

There are two issues here: the number of people whose voices should be heard and the way in which they should be heard. I have not given detailed consideration to this question. The list of persons who must be invited to comment in Clause 20 of Schedule 4, for approvals under the RMA, is made up almost entirely of people with statutory interests or public office holders (but – bizarrely – not including the Minister for the Environment). The only exceptions to this insider list are anyone on whose land the project is to be undertaken and the occupiers of land that is 'adjacent'. This is far too narrow and would effectively shut out local, grass roots community groups who will have to live with the consequences of decisions taken by Ministers who live, in all likelihood, far away.

[7] See Part 6AA of the RMA.

If the concern to limit participation is in part driven by fear of litigation, then some work needs to be done on how to provide access without igniting a legal bonfire. I appreciate that hearings can burn money and this should be avoided. But in any case, there are many people with legitimate interests who cannot afford expensive legal processes under fast-track processes or otherwise. This is a Bill that liberates 'the big end of town' who are vastly better resourced to deal with any process. It is in the interests of project proponents that people affected by their developments (who may not always be beneficiaries of those developments) are seen to have been listened to. It goes to the heart of both social and political licence.

Who might the expanded list of 'people' include? A good starting point could be those who can make further submissions as part of the process for proposals of national significance under the RMA, specified generally in section 149F(3). The more specific list of expert organisations who could comment on listed and referred projects in the COVID-19 (Fast-track Consenting) Act 2020, at Schedule 6, clause 17(6)(k)-(u) could provide an alternative starting point to address this issue.

9. Specify the Bill's duration

The Bill currently has no expiry specified, and it is unclear from its purpose if it is intended to be temporary. Given that a major reform of resource management law has been signalled, a sunset clause would provide some confidence that the vexed issue of special consenting tracks will be reviewed comprehensively in the context of that wider reform of which it must form a coherent part.

Improving the quality of major project consenting and environmental risk management

As currently framed, the Bill is – for the reasons outlined - unlikely to provide a durable, long-term basis for project consenting. A more long-sighted approach that would deliver benefits to both large and small development proposals alike would be to invest heavily in two pieces of underlying 'soft' infrastructure:

- Fixing the environmental information infrastructure
- Applying that information at the level of spatial plans

In my role as Parliamentary Commissioner for the Environment I have conducted extensive reviews of the fitness for purpose of environmental data collection, the use to which it is put and the research priorities needed to support it. Despite repeated briefings to Ministers, nothing has been done to improve the situation. I am aware that the Infrastructure Commission has reached similar conclusions. They have recommended the creation of a digital information ecosystem that brings together in one place all existing information on the natural and built environment held by different agencies. This would allow for informed decision making, streamlined infrastructure planning and financing and an efficient planning and consenting framework.

The provision of high-quality information to support environmentally related decision making is a key economic priority. Complaints are continually echoed about 'the obstruction economy'. But it is, in many cases, the lack of high-quality information that is a key obstruction to economically efficient and environmentally sustainable investment. It will never be possible to know everything. But far too often, project promoters are having to purchase data that already exists and has been paid for by taxpayers or pay for its collection from scratch where it doesn't exist. This has created an industry for private consultants.

The collection and assembly of core environmental data should be a public good. Developers and regulators should have access to extensive, spatially explicit data layers that enable fundamental geology, minerals and aggregate, soil, hydrology, climate and biodiversity to be stitched together with land uses and physical infrastructure in a way that confines the need for debate and case-specific expenditure. Again, this will never be eliminated – we will never know everything – but the need for it could be greatly reduced.

As underlying data is joined up, it should be possible to generate spatial plans that provide a wealth of information about areas where developments can proceed with the fewest problems. Before New Zealand invests large additional sums in physical infrastructure it should develop a nationwide plan to provide open access to integrated biophysical datasets.

As part of such a venture, core data-gathering, monitoring and surveillance responsibilities should be assembled under the umbrella of the EPA. It is remarkable that an agency created, in part, to improve the handling of complex projects has never been charged with piecing together the data and technical skillsets that are needed to underpin all environmental management in New Zealand.

An examination of the future role of the EPA inevitably encroaches on the issue of the organisation of local government in New Zealand. This too is an issue that has been parked in the too-hard basket by successive governments (the creation of a unified council in Auckland being a significant exception).

I shall be pursuing the issues outlined above in the context of the Government's announced intention to undertake far-reaching resource management law reform over the course of this parliamentary term.

Rt Hon Simon Upton
Parliamentary Commissioner for the Environment
Te Kaitiaki Taiao a Te Whare Pāremata

Annex 1: Fast-track Bill: Comparative Legislative History

	NDA	RMA (call-in/direct)	COVID-19 Act	NBE Act	FT Bill
Approvals	Any authorisation, permission, a licence, a permit, a right, and any other approval of any type whatsoever capable of being granted under any statutory provision.	RMA	RMA	NBE Act	RMA, Wildlife Act, Conservation Act, Reserves Act, Freshwater Fisheries Regulations, Heritage NZ Pouhere Taonga Act, EEZ Act, Fisheries Act, Crown Minerals Act, Public Works Act.
Purpose	An Act to provide for the prompt consideration of proposed works of national importance by the direct referral of the proposals to the planning Tribunal for an inquiry and report and by providing for such works as to receive the necessary consents.	The purpose of this Act is to promote the sustainable management of natural and physical resources. ***sustainable management*** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-	The purpose of this Act is to urgently promote employment to support New Zealand's recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment across New Zealand, while continuing to promote the sustainable management of natural and physical resources.	The purpose of this Act is to uphold te Oranga o te Taiao. The purpose must be achieved in a way that— (a) protects the health of the natural environment; and (b) subject to paragraph (a), enables the use and development of the environment in a way that promotes the well-being of both present and future generations.	The purpose of this Act is to provide a fast-track decision-making process that facilitates the delivery of infrastructure and development projects with significant regional or national benefits.

	NDA	RMA (call-in/direct)	COVID-19 Act	NBE Act	FT Bill
		being and for their health and safety while— (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.			
Timeframe	~30 weeks (150 working days)	60 working days + 9 months for Board of Inquiry, or duration of Environment Court process.	50 working days (+ 25 day extension)	120 working days	50 working days (+25 day extension)
Consultation	Submissions can be made to the Commissioner for the Environment, by any person, on the applicant's environmental impact	Any person may make a submission to the EPA for a matter which the Minister has made a direction to refer to a	Comment invited, pre-referral decision, from relevant local authorities and Ministers.	Comment invited, pre-referral decision, from relevant local authorities and Ministers, and any person as required by	Applicants must consult with specified groups before lodging referral application. Heritage NZ and the Minister

	NDA	RMA (call-in/direct)	COVID-19 Act	NBE Act	FT Bill
	report. The Planning Tribunal's inquiry is held in public, those with a right to be heard: - the applicant, -Minister of Works and Development -Relevant local authorities -Any body or person affected by the proposed work -Any body or person representing some relevant aspect of the public interest -Every statutory authority normally responsible for granting the consents.	board of inquiry, the Environment Court, or the local authority. If the board of inquiry holds a hearing, any person who made a submission may be heard. If referred to the court, the applicant must provide the notice of motion and supporting affidavit to the local authority and every person who made a submission. To participate as a party, much give notice to the Court and to other parties.	Once referred, panel must invite comments from: - relevant local and iwi authorities, and Treaty settlement entities - relevant customary marine title group and protected customary rights group - owners and occupiers the land and of adjacent land - responsible Ministers for listed portfolios - listed expert organisations	regulations. Once referred, panel must invite submissions from: - relevant persons or groups, subject to regulations - persons or groups specified by the Minister The panel may invite submissions from any other person or group: - they consider represents a relevant aspect of the public interest - to whom they consider the activity is relevant	responsible must be consulted on any archaeological authority. Ministers' must invite comment on referral applications from relevant local authorities, portfolio Ministers, and specified groups. <u>Approval specific</u> RMA applications: Panel invites comment from relevant local and iwi authorities, specified groups, owners/occupiers of adjacent land, specified portfolio Ministers. For referred projects, also Heritage NZ and NZ Infrastructure Commission. Fast-track concession: In preparing the referral

	NDA	RMA (call-in/direct)	COVID-19 Act	NBE Act	FT Bill
					report, DOC must consult with every person that is an owner or administrator of the land (if not the Crown). Archaeological authority: Application must state if consultation was undertaken and include the details of it. EEZ Act: In respect of a referral application for marine consent, Joint Ministers must also consult with the Minister for the Environment, and if relevant, the Minister of Conservation. Fisheries Act: In respect of a permit for aquaculture activities, the chief executive may consult persons specified under that Act to inform

	NDA	RMA (call-in/direct)	COVID-19 Act	NBE Act	FT Bill
					their recommendation to the panel.
Final decision-making	Governor-General	Board of Inquiry / Environment Court	Expert consenting panel	Expert consenting panel	Joint Ministers
Scrutiny	Consents granted by Order in Council, which must be laid before Parliament by the Minister. If provisions of the Order differ from the Planning Tribunal recommendation, a written statement of reasons must also be provided.	Public notice of the Minister's direction must state the reasons for making the direction, and all application information must be made publicly available. Report of a board of inquiry must give reasons for the decision the principal issues in contention, and the main findings on those issues.	Notice of the Minister's referral decision (to specified persons/groups) must state the Minister's reasons for accepting the application. Projects are referred by Order in Council, which is secondary legislation – it must be presented to the House and is disallowable. Final decision of the panel must include the reasons for its decision, the principal issues in contention, and the main findings on those issues.	Notice of the Minister's referral decision (to specified persons/groups) must state the Minister's reasons for accepting the application. Final decision of the panel must include the reasons for its decision, the principal issues in contention, and the main findings on those issues.	Notice of the Ministers' referral decision must state the reasons for accepting the application. The applicant is notified of the Minister's final decision.

Annex 2: Recommended Amendments

Clause	Discussion	Recommended Changes
3	*Purpose* The purpose provision of the Bill does not provide for environmental considerations. Environmental protection cannot be excluded in the use or development of the natural environment. This featured in the purpose of the COVID Act, despite the emergency nature of that legislation. **Development** is not defined. This significantly broadens the scope of the Bill and contributes to the extensive Ministerial discretion in the process, permitting a wide range of projects to bypass ordinary process without it necessarily being justified. **Benefit** is not specifically defined, and includes private benefit, which may include circumstances where there is no public benefit.	Provision for environmental protection, whether by reference to 'sustainable management' or otherwise, must be made in the purpose of the Act. Development – the scope of the purpose should be limited to infrastructure. If 'development' is to remain, a definition should be added for clarity of the Act's scope of application. Benefit should be confined to "public benefit", which should relate to clear evidence of public good characteristics or positive spillovers/externalities (see notes on cl 17(3)).
4	*Interpretation* **Eligible activity** is defined with reference to a meaning given to it in cl 17. Clause 17 sets out the eligibility criteria for Ministers to consider when assessing an application for referral, it does not define 'eligible activity'. However, cl 15 is the only provision that relies on this term, where the responsible agency assesses a referral application before providing it to Ministers. Cl 15(4)(b) references 'eligible activity' as being based on having regard to	Consider if a definition is required, as this is essentially already established within the clause that uses it. Alternatively, amend the definition to reference the meaning given to its use in cl 15.

Clause	Discussion	Recommended Changes
	ss 17 and 18, and the information set out in the application. A further definition of this term may not be required.	
	Eligible project is mentioned in the Bill but has no definition. It is assumed that **eligible project** means a project that is listed or listed and referred. It is unclear from its use in clause 14 how this term applies to referred projects, as it appears they can be eligible before a referral application is submitted.	Define when a project is considered to be an eligible project and may therefore be the subject of a referral application.
	Joint Ministers do not include the Minister for the Environment, despite the inclusion of other relevant portfolio Ministers under the Wildlife Act and the Crown Minerals Act. The Bill includes approvals under the Resource Management Act, and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act, which are environmental legislation administered by the Ministry for the Environment.	All approvals that are within scope of the Bill will have environmental considerations, and the Minister for the Environment should be included in the definition. At a minimum, the Minister for the Environment should come within the meaning of joint Ministers for the RMA and EEZ Acts.
	Referral order is undefined but may be assumed to be the notice required by cl 24(3). Clauses 12 and 16 of Schedule 4 refer to information requirements as specified by the referral order. It is unclear if these information requirements are included within the 'matters specified' at cl 24(3)(c). It is assumed that this drafting term was taken from the COVID Act, where referral was made by way of Order in Council and was called a referral order.	Referral order needs to be defined to ensure clarity of the requirements in subsequent clauses that refer to the order.
	Responsible agency is a singular reference but means two departments. It is unclear from the process in the Bill if applicants will be required to apply to one or both departments.	Consider if this reference needs to be referred to in the plural.

Clause	Discussion	Recommended Changes
	Further, pursuant to cl 15, it is unclear if one or both departments must decide if an application is complete.	
14	*Referral application* This clause sets out the information that an application for referral is to contain, though this is only required to be at a "general level of detail" (cl 14(2)(b)). Without visibility of the process to include lists in Schedule 2 of the Bill, is it unclear if this list of information will be similarly applied to listed projects.	The list of information in cl 14 should be the minimum required for consideration of the listed projects.
cl 14(3)(e)	*Referral application* An application for referral is only required to describe the anticipated and known adverse effects of the project on the environment. For large and complex projects this requirement may omit a volume of information that should be made available to decision makers.	The application should also include uncertainty bounds around the estimate of adverse effects in the application. It should also describe any further investigations, or data, that will be required to gain understanding of potential or actual effects of the project.
cl 14(3)(f)	*Referral application* An application for referral is only required to provide a general assessment of the project in relation to national policy statements and environmental standards. 'General assessment' provides a broad scope for how an applicant describes the project's alignment with national direction. It is a vague requirement for applicants to describe their project in relation to national environmental standards,	An applicant should be required to provide an explanation of the consistency of the project with national policy statements and describe its compliance with national environmental standards.

Clause	Discussion	Recommended Changes
	which are prescribed by regulations, and are secondary legislation.	
17	*Eligibility criteria* Eligibility criteria for projects only applies to referred projects and listed referred projects. It does not apply to listed projects (Schedule 2A). Similarly, ineligibility under clause 18 will also not apply to listed projects. The process to determine the listed projects exists outside the Bill and will not be subject to Parliamentary scrutiny, but those projects will benefit from the much abbreviated fast-track process for approval. With the time available to the Advisory Group, there is no reason why the eligibility criteria for listed projects or the information requirements for applicants, should be any different from referred projects.	The terms of reference, and process that the Fast-track Advisory Group will undertake to form recommended lists for Schedules 2A and 2B should be subject to the same criteria as for projects that will otherwise be considered under the Bill, as a minimum. Similarly, the decision on what lists will be included in Schedule 2 should be based on similar criteria and information requirements as referred projects. To form recommendations on the Schedule 2A and 2B lists, it is expected that the membership of the Fast-track Advisory Group will have qualifications and experience to consider the same criteria and information as an expert panel.
17	*Eligibility criteria* The eligibility criteria for referral are extremely broad, which increases the scope for judicial review of the Ministers' decision.	The criteria could be simplified and refined, as recommended by the Infrastructure Commission, to focus on infrastructure of national or regional public benefit which: - - Contribute to well-functioning urban environments - - Improves social and economic outcomes - - Assists transition to a low carbon emissions economy - - Increases natural hazard resilience

Clause	Discussion	Recommended Changes
17(3)	*Eligibility criteria* From the purpose set out in clause 3, "significant regional or national benefit", none of these terms are specifically defined. The only guidance provided is in the eligibility criteria that Ministers must consider, which are broad and inexhaustive, including that the project will: - deliver significant economic benefits (undefined) - support primary industries, including aquaculture - support development of natural resources, including minerals and petroleum. These criteria may involve projects that also have significant national or regional disbenefits, but the criteria contain no guidance to the Ministers on how that should be resolved. Further, there is reference to 'priority project' identified by a plan or strategy and 'infrastructure priority list', though the sources of these are unclear. For certainty of the law, the public should know what these plans, strategies, and lists are with greater specificity and access. There is also reference to 'regionally or nationally significant infrastructure', though what would come within this term is undefined. None of the matters in this list are mandatory for Ministers to consider, and there is no prioritisation in the list. e.g. In	Replace this list with specified matters that constitute "public benefit". This needs to be tightly defined in order to justify the use of the powers in this Bill. In economic terms public benefit should relate to clear evidence of public good characteristics or positive spillovers/externalities. Section 14 of the NBE Act provides a useful starting point.

Clause	Discussion	Recommended Changes
	considering whether a project would have significant regional benefits, the Ministers are not required to consider whether the project is consistent with local or regional planning documents, including their spatial strategies.	
17(5)	*Eligibility criteria* Eligibility criteria includes projects that include an activity that is a prohibited activity under the RMA. Further, it doesn't specify if this includes regulations (including national environmental standards), national direction, a plan or proposed plan, made pursuant to the RMA. Classification as a prohibited activity provides legislative protection against a resource consent being granted, in circumstances where it is often designed to protect environmental and human health. Permitting projects to be eligible, despite their prohibited activities, may breach important environmental limits. The inclusion of prohibited activities resulted in a project being ineligible under the COVID recovery fast-track framework. If it was not justifiable in those circumstances, it is not justifiable under the current Bill.	Inclusion of a prohibited activity should render a project ineligible for fast-track. This means prohibited activity under the RMA, and its regulations, national direction, a plan or proposed plan. Clause 18 will require similar amendment. Clause 21(2)(f) should also be amended so that the Ministers *must* decline an application if the project includes an activity that is a prohibited activity.
18	*Ineligible projects* Projects that have previously been properly considered under the comprehensive consenting/approval regimes of their parent statutes, and declined, could be eligible for fast-track. It's hard to justify why the Bill then allows those projects to benefit from	Projects that have been previously declined either in total, or for specific activities within the scope of a project, by the ordinary

Clause	Discussion	Recommended Changes
	its truncated consideration and reduced rigour, leading to potential approval, when a more robust process had found them too environmentally damaging to be approved.	processes (by EPA/Minister/Environment Court/other) should not be eligible for fast-track.
19	*Process after receiving application* The Minister is to invite written comments on an application that is not declined, with comment due within 10 working days. Of the list who must be invited, this includes 'relevant portfolio Ministers'. It is unclear if this reference is intended to include the Minister for the Environment. The Minister for the Environment may be considered a relevant portfolio Minister for any project that will result in environmental effects, which would be every project.	For clarity, this should be expressly stated – that 'portfolio Ministers' must always include the Minister for the Environment.
21(2)(c) and (d)	*Decision to decline* The joint Ministers *may* decline a referral application if the project may have significant adverse effects on the environment, and if the applicant has poor compliance history under the relevant legislation. This discretionary decision is based on information in the application that is only required to provide a general level of detail, which includes a description of the anticipated and known adverse effects of the project on the environment (cl 14(2)(b) and (3)(e)). Further, the Ministers referral decision is only informed by a general assessment of the project in relation to national policy statements and national	Unless more robust information is provided to Ministers to inform their decision, if the project may have significant adverse effects on the environment the joint Ministers must refer the project to a board of inquiry (rather than the fast-track expert panel). The application would then be assessed and determined following the same board of inquiry process as applied to a proposal of national significance under the RMA.

Clause	Discussion	Recommended Changes
	environmental standards is required for an application (cl 14(3)(f)).	The clause should be further amended so that Ministers *must* decline a referral application if the applicant has poor compliance history under the relevant legislation.
25	*Panel reports and Ministers to decide whether to approve* The overall timeframe of the process, resulting in the Ministers decision, is 50-70 working days (for a referral application – shorter for a listed project). An expert panel may only extend their period for consideration by 25 working days for a listed project. For a referred project, the extension may be 25 working days or by any other number of days as provided for in the referral order. A 'referral order' is undefined but may be assumed to be the notice required by cl 24(3). The expert panel, in undertaking its analysis of what may potentially be a vast volume of technical information, may require additional time for consideration and advice. There is provision for the panel to seek technical or specialist advice on any application (cl 10, Schedule 3), and further information in relation to consent applications (cl 28, Schedule 4), but there is no provision for the panel to consider if the timeframe is sufficient for seeking that advice.	Where an expert panel determines that the assistance of a special or technical adviser is necessary, the panel should be able to specify the additional time required for proper consideration of the advice sought. Similarly, where further information is sought by a panel for a consent application or notice of requirement, the panel should be empowered to specify any additional time required for their consideration of that information before reporting their recommendations.

Clause	Discussion	Recommended Changes
25(1)	*Panel reports and Ministers to decide whether to approve* The panel is required to prepare a report on the substantive application referred to it, 'substantive application' is undefined, but it is assumed that it is any application that has been referred to it under the Act.	Either define the term 'substantive application', or if there is no further clarification gained from using this term, remove 'substantive' and simply leave this as an application referred to the panel under the Act.
25(4)	*Panel reports and Ministers to decide whether to approve* Ministers may deviate from panel recommendations if "they have undertaken analysis of the recommendations and any conditions included in accordance with the relevant assessment criteria". It is unclear what scope is intended by 'deviate' – whether this is to reject, amend, or replace them. 'Relevant assessment criteria' is undefined.	'Deviate' should be clarified to state what actions Ministers are empowered to take in relation to the panel's recommendations. 'Relevant assessment criteria' must be defined. For consistency this must align with the criteria applied by, and information available to, the panel.
25(7)	*Panel reports and Ministers to decide whether to approve* The joint Ministers must approve the project, and any conditions, or decline to approve the project. Unlike cl 24(3)(b), there is no requirement for the Ministers to specify their reasons for approving a project, or for any of the conditions being imposed. There is also no requirement for Ministers to specify their reasons for deviating from a panel's recommendations, or any directions given for the panel's reconsideration, under cl	For transparency in public decision making, the Ministers must be required to specify their reasons for deviating from any of the panel's recommendations. Where directions are made to the panel by the Ministers, remitting an application back to them for reconsideration, the reasons for those directions must be specified by the Ministers.

Clause	Discussion	Recommended Changes
	25(4). Further, the Ministers are only required to notify the applicant. Good public decision making requires that decision makers are transparent about the content of their decisions. This is reflected in every fast-track regime prior to this Bill. The NDA required that if any provisions of any Order in Council (which granted consents/imposed conditions) differed from the recommendation of the Planning Tribunal, the Minister was required to provide a written statement of reasons at the same time the Order was laid in the House. The written report of the decision made by the panel in the COVID Act was required to set out the reasons for the panel's decisions, amongst other matters. The provisions of that Act were carried into the NBE Act, and continue in force under the current RMA, similarly requiring a statement of reasons from the panel.	The final decision of the Ministers, the reasons for it, and all information relating to the application must be made publicly available.
25(7)	*Panel reports and Ministers to decide whether to approve* Joint Ministers are final decision-makers, in a process where Ministers may apply (the Crown is included as 'any person' who may make an application or have a listed project), and Ministers determine the referral decision. This concentrates decision-making power in the hands of members of the Executive, with	As recommended by the Auditor-General, in addition to the Cabinet Manual requirements the Bill should include additional conflict of interest management to safeguard the decisions of joint Ministers from allegations of corrupt practice. It may also minimise litigation risk for Ministers.

Clause	Discussion	Recommended Changes
	the potential for actual or perceived conflicts of interest in the outcomes of their decisions.	
25(9)	*Panel reports and Ministers to decide whether to approve* An applicant, if their application for approval is declined, may reapply. An application for approval that is declined may be either a listed or referred project. The application would have been subject to either process under the Bill, accepted for referral by Ministers (if not listed), and assessed by the expert panel. Given the greater likelihood of a favourable outcome that attaches to fast-tracked projects due in part to the weighting attributed to the purpose of the Act, an application that is notwithstanding that, declined, is unlikely to be suitable for a fast-track process. If the necessary supporting information cannot be supplied, the timeframes too short, or information lacks specificity or certainty, the project should be subject to the ordinary approvals process where those matters can be properly addressed.	An applicant should only be able to apply for fast-track treatment once for any proposed project.
26(1)(e)	*Appeal* The list of those that have standing to bring an appeal includes "any person who has an interest in the decision appealed against that is greater than that of the general public". The general	To avoid ambiguity or suggesting that the public has a lesser interest in points of law, this clause should specify the persons that would have such an interest, e.g. environmental interest

Clause	Discussion	Recommended Changes
	public has the greatest of interest in points of law, given the very reasons for law-making. To confine standing only to those who have participated in the process cuts out the judicial function of examining the exercise of executive power by way of appeal. It can be assumed that constraints on the courts were not intended, as the clause is clearly drafted to include a greater variety of persons (including organisations), to bring an appeal.	groups, industry organisations, or be amended so that any person with an interest may appeal.
Sched 3		
cl 1	*Functions of expert panel* The functions of the panel provide that the panel may recommend that an approval be declined if any mandatory requirements that relate to the activity are not able to be met. It is unclear if this is intended to be a limitation on the ability of the panel to recommend declining to approve an activity, and 'mandatory requirements' are not defined or otherwise referenced. The panel is essentially an advisory body, as it is only empowered to make recommendations to the joint Ministers (cl1(4)). This is contrary to previous fast-track regimes (COVID and NBE Acts) where the expert panel was the decision maker.	The function of the expert panel should be to determine whether to recommend that all or part of a project should be approved or declined, and any conditions that should be imposed if the project is approved, for any reason the panel sees fit. Clause 1(3) could be read to imply that the panel could only recommend that a project be declined if a mandatory condition (which is undefined) is not met. This would fetter the panel's ability to do its job properly. Subclause (3) should be deleted. To reiterate, the better solution would be for the panel to be the final decision maker.

Clause	Discussion	Recommended Changes
	The panel receives the application, and all the information that is required to accompany it. Its role is to be an *expert* panel, and it is in the best position both to consider proposed projects and to determine whether they should proceed.	
Sched 4		
cl 12	*Information required* The previous compliance record of the applicant is not included in the information that is required for applications and will not be provided to the expert panel. This clause only applies to consent applications. Where compliance history is required for the project's referral application in respect of other approvals that are being sought, this information should also be provided to the panel for consideration.	This information should be included in the detailed applications for all projects, for consideration by the expert panel in making their recommendations on both accepting/declining the application for approvals, and any conditions.

Clause	Discussion	Recommended Changes
cl 20	*Notification* Persons who must or may be invited to comment on listed or referred projects do not include expert organisations. Their comment on the application, and specifically the detailed technical information that accompanies it, may be of great assistance to the panel in their deliberations. Part 6AA, section 149F(3) of the RMA makes provision for those who can make further submissions on a proposal of national significance, that includes experts generally. A list of expert organisations was included in the COVID Act, see cl 17(6)(k)-(u) of Schedule 6.	Amend to include those who can make further submissions, as part of the process for proposals of national significance under the RMA, as specified generally in section 149F(3). *or* Add the list of expert organisations from the COVID Act to the persons who must or may be invited by the panel to comment on listed or preferred projects.
cl 20(3)(h)	*Notification* The panel must invite comments from Ministers of the Crown responsible for the listed portfolios. The extensive list does not include the Minister for the Environment.	The environment portfolio is relevant to every project that seeks approvals under this Act. The Minister for the Environment should be included.
cl 32	*Panel consideration* The expert panel, when assessing the application, must give weight to a list of prioritised matters. Accorded the highest priority is the purpose of the Act, which then prevails over the remainder of the list, and minimises the consideration given to those matters. This may confine the expert panel to finding in	The list of matters for consideration should not be placed in any hierarchy, permitting the panel to apply its expert judgment to applications.

Clause	Discussion	Recommended Changes
	favour of recommending every project that is referred to it, significantly fettering the discretion of the panel.	
cl 39(4)	The panel is limited in its final recommendation options to: - Decline - Approve - Approve, with recommended conditions This clause provides the panel with the ability to extend the period for considering the application, up to a further 25 working days or by any other number of days as specified in the referral order. The panel may form the opinion that the application cannot be determined in the time available, due to its complexity or technical specificity. Rather than decline the application and leaving the applicant to start a new consent application process, the panel could have the option to refer the application to an alternative consent process.	The panel should be empowered to make the decision that an application is better suited to a board of inquiry process and be able to refer it accordingly.
Sched 10		
cl 4	Section 61(2) of the Crown Minerals Act is to be amended, which are the matters the Ministers must consider. S 61(2)(c) now only requires that they *may* consider any policy statement or management plan for the Crown in relation to the land. The same amendment is replicated for s 61B(2).	Sections 61(2) and 61B(2) of the Crown Minerals Act should not be amended.

Clause	Discussion	Recommended Changes
	Removing mandatory consideration of applicable plans and rules risks removing the from consideration matters that are likely to be informed by place-specific considerations. If a regional benefit is being determined by the fast-track process, it should take account of policy or management plans that apply at the regional level. Further, if public participation is being heavily restricted, the policy and management plans should be able to be the bare minimum that reflect local considerations in the decision-making process. Such a change would also give the Minister the ability to make a decision that contradicts decisions made by other arms of the Crown.	
Sched 6		
cl 1(2)(e)	*Authority to do anything otherwise prohibited by the Wildlife Act 1953* Ministers or a panel (as applicable) must consider whether the conditions would minimise any impacts on protected wildlife, through avoidance, *mitigation or offsetting*, or that *compensation* should be provided for when impacts cannot be mitigated. The existing mitigation hierarchy includes offsetting as a last resort. While it is an established practice, there have been many documented issues with the implementation of offsetting both here and overseas. These largely amount to problems with	I recommend removing the reference to compensation. If it is included it must be defined and placed in the context of the existing mitigation hierarchy. The definition should specify that compensation cannot be used to justify taking any ecosystem beyond environmental limits (i.e. threatening the survival of species and putting the ecosystem at risk of collapse). The NPS-IB sets out the requirements for compensation at Appendix 4, and a definition at paragraph 1.6(1), which could be incorporated into the Bill.

Clause	Discussion	Recommended Changes
	measurement and monitoring. The addition of compensation to the mitigation hierarchy adds further risks to the loss of biodiversity.	If offsetting and compensation are to be used, then the precautionary principle suggests that the goal should be a net gain of biodiversity. The monitoring of offsetting and compensation needs to be built into consent conditions and cost recovery.
Sched 13		
	Pursuant to section 21 of the Environment Act 1986, the Commissioner has the right to be heard in any proceedings that arise from the obtaining, or attempt to obtain, any consent. Consent is defined by reference to the Act's schedule, which specifies the list of statutes which grant 'consent'. Schedule 13 of the Bill, amendment to other legislation, does not list an amendment to the schedule of the Environment Act which would add the Fast-track Approvals Act to the list. As drafted, approvals that are given under this Bill are not considered 'consents' for the purposes of the Schedule to the Environment Act 1986. This is contrary to them being a 'consent' if approved under their relevant legislation. Pursuant to cl 10(5) of the Bill, approvals are to 'be treated as it they were granted, issued , or entered into in accordance with the legislation that establishes or provides for it'.	For the avoidance of doubt, amendments to other legislation should include an amendment to the Schedule of the Environment Act, adding the Fast-track Approvals Act to that list.

Clause	Discussion	Recommended Changes
	While it is possible that cl 10(5) could be relied on as a sound basis for the Commissioner to be heard, it would be better to put the matter beyond doubt.	
Other	There is no sunset clause for this Bill, and it is unclear if it is intended to be an enduring legislative solution, or a temporary measure – either to remedy a current infrastructure deficit (addressing urgent requirements) or to remain in place until the next RMA reform is completed, and new legislation is introduced.	The Bill should be subject to a sunset provision, so that it only exists to facilitate the necessary projects, and then expires.