

Regulatory Impact Statement

Invoking the Order in Council mechanism under the Hurunui/Kaikōura Earthquakes Recovery Bill 2016 (the Bill) to assist recovery in the areas affected by the Kaikoura earthquake sequence from 14 November 2016.

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Transport (the Ministry). It provides an analysis of whether to invoke the Order in Council mechanism under the Bill to amend various statutes to expedite the short-term recovery efforts in response to significant damage caused by the Kaikoura earthquake sequence.

Caveats, uncertainties and limitations of analysis

The RIS has been prepared under significant time constraints to ensure requisite powers under the Bill are used to facilitate quick recovery. As such, the Ministry's ability to test assumptions and dependencies, quantify risks, and develop and analyse options was limited. In many cases, quantification of impacts was not possible due to the urgency required and the lack of data on social, community and economic rebuilding impacts. Although there has not yet been time to explore other options, making an Order under the Bill does not constrain the Government from considering other options. Given the time available, consultation on a specific proposal to invoke the Order in Council mechanism has been limited to date. The Ministry continues to work with relevant agencies to ensure that the proposals in this RIS provide for an appropriate balance.

If it were not for these extraordinary circumstances and consequent short timeframes, the analysis would be more comprehensive. That said, it is important the Government expedites the recovery from the 14 November earthquakes, and their aftershocks.

When this RIS was completed, the Hurunui/Kaikōura Earthquakes Recovery Bill 2016 was yet to be enacted and was being considered by a select committee. This RIS assumes that the Bill is enacted with similar provisions to those in the Bill as introduced on 1 December 2016.

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Status quo and problem definition

14 November 2016 earthquakes have caused significant damage

1. A magnitude 7.8 earthquake occurred northeast of Culverden, New Zealand at 0002 NZDT on 14 November 2016. Strong to severe shaking was felt throughout New Zealand and lasted for over two minutes in some locations. There have been well over a thousand aftershocks, and seismic activity is expected to continue for some time.
2. This Kaikoura earthquake sequence has caused significant damage. The main impacts have been felt in Canterbury (Kaikoura and Hurunui Districts), Marlborough (Blenheim), and the Wellington central business district. Key immediate impacts include damage to local infrastructure and private and commercial buildings, road network in the north-east of the South Island, Wellington's CentrePort, and railway routes from Picton to Christchurch.
3. The experience from the Canterbury earthquakes suggest that the flow-on effects are likely to be widespread and have social, economic, cultural and environmental impacts. This may include discouraging people from living and working in the affected areas, increasing social and economic inequalities, decreasing investor confidence, exacerbating health problems associated with inadequate housing, affecting tourism, and increasing costs in other parts of the economy.

State Highway 1 and main rail trunk line are severed

4. State Highway 1 and the main trunk rail line north and south of Kaikoura were severely damaged by the earthquake sequence, severing a critical economic link for freight and the tourism industry for both the South Island and New Zealand. This placed significant capacity and safety pressures on other parts of the State Highway network.
5. Prior to the earthquake, State Highway 1 between Picton and Waipara carried around 2,700 movements per day, with around 550 heavy vehicle movements. The rail line carried one million tonnes of freight (80,000 truck equivalents per annum or around 220 trucks a day) and the Coastal Pacific tourism rail journey carried 45,000 tourists per annum. The summer peak traffic on State Highway 1 is around 5,500 vehicle movements per day.
6. Kaikoura also plays an important role in New Zealand's tourism industry. Kaikoura is especially susceptible to the downturn in tourism that has resulted from the loss of direct access to the town from the north and south. Tourism is responsible for around 12 percent of Kaikoura's economy while 27 percent of employment in the town is dependent on the industry.

Decisions on the most viable route have been made

7. The Government considered several options to reinstate the road and rail corridor. These options can be categorised into the following three broad approaches:
 - a. restoring the coastal route
 - b. upgrading the Lewis Pass alternative route
 - c. a new inland route (of which there are several potential routes).

8. In general, any new inland routes would have a very significant negative impact on the environment, and would be difficult to construct due to the terrain. They would be very expensive and, critically, they would take five to six years to complete. A further consideration was that several of these alignments could not support rail, due to the gradient of the proposed routes.
9. Upgrading the current alternate route through the Lewis Pass was a potentially viable option in terms of functionality and cost relative to the inland routes. However, this option would leave only one State Highway connection between the upper South Island (Tasman, Nelson, and Marlborough) and the remainder of the South Island. This option would also not be rail capable, and there are greater safety issues associated with a longer route.
10. The Government, therefore, decided that the most viable option for restoring these South Island transport links is to rebuild and improve State Highway 1 and the main trunk rail line along their current coastal route. There would also be improvements to the safety and resilience of the route. This would reinstate the road and rail corridor along the coastal alignment, provide greater resilience through increased separation of the transport corridor from natural hazards, and would deliver improved safety outcomes.
11. Solutions are still being designed but greater resilience will be provided by raising the level of the road where it is prone to flooding and by increasing separation from the hillside, allowing a catchment area for any potential rockfall. Improved safety outcomes will be provided through shoulder widening, slow vehicle bays and creating pull-off areas for truck loads to be checked and tourists to rest.
12. Subject to decisions on how the restoration work is consented, limited access could be restored in several months.

Large scale earthworks and reclamation needed

13. Significant works are required to restore the main trunk rail line and State Highway 1 along the current coastal route.
14. Large scale earthworks are needed to clear slips (including possible blasting) and stabilise slopes, with associated:
 - a. vegetation removal / wildlife disturbance
 - b. works in watercourses
 - c. discharge of dust and other contaminants to air and water
 - d. possible disturbance of archaeological sites.
15. Coastal reclamation will also be required, which will include the following activities in the coastal marine area:
 - a. clearing vegetation
 - b. disturbing wildlife (probably including seals)
 - c. building support structures
 - d. depositing earth and fill material

- e. resurfacing, repairing and realigning the State Highway and rail line, including repairs to bridges and tunnels.

16. New structures will also be needed in the coastal marine area, including:

- a. repairing and replacing culverts, stabilising river banks, and other works in watercourses.
- b. coastal and freshwater water takes and diversions
- c. geotechnical investigations (including drilling bores)
- d. repairing and replacing storm water treatment infrastructure.

Expected timeframes for various statutory consents would delay the restoration of rail and road

17. Due to the scale and location of the landslips along the coastal route, the extent of damage, and the planned use of slip material to place the transport corridor on a more seaward alignment than its current position, the necessary works will involve activities that require consents under the Resource Management Act 1991 (RMA).

18. Some activities, such as the placement or disposal of landslip material in the coastal marine area or alterations to the existing route configuration, are prohibited under the relevant RMA regional/coastal plans.

19. Some of the issues involved with following current processes include:

- a. addressing the time usually needed to secure consents under the RMA and the risk that some necessary consents may be declined
- b. the need to ensure that the restoration work should qualify as “exceptional circumstances” in terms of the RMA to avoid consenting risks
- c. addressing the time usually required to prepare consent applications
- d. the lack of certainty of the types of effects that consent conditions should address
- e. the need to avoid public notifications because of the time that would otherwise be required for public submissions, hearings and appeals to the Environment Court
- f. the risk of consents not aligning with the relevant planning documents
- g. allowing for consents on reclaimed land to be granted prior to a legal survey of that land
- h. avoiding the need for consents for temporary work depots and parking facilities for those involved in the restoration work - the Canterbury earthquakes demonstrated these facilities are needed given the scale of resources required for the restoration works
- i. avoiding uncertainty over the conditions attaching to alterations to designations
- j. avoiding potential delays from the need to prepare outline plans of works

- k. due to the highly-constrained nature of the environment and the position of the coastal route, there are authorisation issues because it is not practical to completely avoid restoration works:
 - i. that take place on the boundaries of the Ohau Point New Zealand Fur Seal Sanctuary or Hikurangi Marine reserve
 - ii. that may impact protected wildlife, including marine animals
 - iii. that take place in reserves
 - l. due to the highly-constrained nature of the environment and the position of the coastal route, it is not practical to completely avoid disturbing archaeological sites – greater certainty is needed that the emergency applications procedures under the relevant act can be applied and not appealed
 - m. the need to avoid delays to the acquisition of land and the diversion of resources by removing objection rights.
20. The time needed for RMA consents, and for plan amendments to allow currently prohibited works to be consented, would significantly extend the potential period of several months to complete the rebuild. The NZ Transport Agency, which is responsible for the State Highway work, estimates that the consenting process for the Government's preferred option of rebuilding and improving the coastal route would take 2 to 2 ½ years. Construction time would need to be added to this time.
21. Further statutory restrictions on approval, consenting and licensing requirements under several other Acts listed in Schedule 2 of the Bill will also apply to activities undertaken during the rebuild. As is the case with RMA consenting procedures and plan restrictions, following the normal compliance and authorisation procedures will extend the timeframe for, or in some cases prevent rebuild activities.

Order in Council mechanism available to expedite consenting processes

22. Clause 7 of the Bill contains an Order in Council mechanism to grant exemptions from, modify, or extend any provisions of certain specified enactments. This mechanism can be used to truncate the time and processes that would usually be involved in a project of this scale and complexity. It is proposed to use this mechanism by making an Order in Council under the Bill (the Order). The proposed Order is attached as Appendix 1.

The Order needs to be in place as soon as possible

23. Economic and social recovery is critically dependent on restoring efficient freight and vehicle links and access to the township of Kaikoura and its associated communities. The Order will expedite the restoration of rail and road access, which will positively influence the pace and trajectory of the recovery.

Objectives

24. The impetus for the proposed Order is to assist earthquake-affected areas, councils and communities to respond to, and recover from, the Kaikoura earthquake sequence.
25. The objective is to restore the environmental, economic, social and cultural well-being, and resilience of affected communities by:

- a. facilitating the planning and rebuilding of State Highway 1 and the main trunk rail line as quickly as possible
- b. limiting, where possible and practical, the negative impacts on the environment resulting from any associated works
- c. using the Order in Council mechanism under the Bill appropriately.

Options and impact analysis

26. There are no non-regulatory options available to wholly or partly achieve the objectives set out above. This RIS considers two regulatory options:

- a. Option 1 (Status Quo – compliance with existing statutes) – this option would involve following the requirements of relevant enactments as the restoration work progresses
- b. Option 2 (Order in Council under the Hurunui/Kaikōura Earthquakes Recovery Bill 2016) – this option involves modifying certain enactments to streamline and shorten planning processes and construction time.

27. An analysis of the regulatory options is set out below.

Option 1: Status quo - compliance with existing planning statutes (not preferred)

28. As set out in the problem definition, much work needs to be carried out to restore the use of State Highway 1 and the main trunk rail line through Kaikoura. Option 1 envisages that the work would be carried out by following the process and requirements of any relevant enactments, such as the RMA and the Conservation Act 1987. At a high level, the purpose of such legislation, and the processes they establish, is to manage impacts on the environment and sensitive sites, whether because they are important to New Zealand's history or help to protect and preserve wildlife and their habitats. The processes under such legislation also often seek to facilitate community involvement in decisions that affect such sites.

29. The RMA provides expedited processes for projects of national significance. Even so, the status quo option is not supported as the standard timeframes and processes would not allow efficient freight and vehicle links and access to Kaikoura to be restored as quickly as possible. This approach would inevitably extend the time needed for the work and, consequently, would adversely impact affected communities and local, regional and national economies. Slow restoration would also result in reduced public confidence in the recovery process.

Option 2: Order in Council under the Hurunui/Kaikōura Earthquakes Recovery Bill 2016 (preferred)

30. The proposed Order would authorise categories of activity, as set out in the Problem definition, that will, or may, be necessary to rebuild and improve the coastal transport corridor.

31. The Order would modify the application of the following statutes in the following ways:

- a. RMA: deem restoration work to be a controlled activity in terms of the RMA and establishing how conditions are to be applied to resource consents.

- b. Wildlife Act 1953: set out a strict timeline for issuing authorities under the Wildlife Act and the conditions that must be met.
- c. Marine Mammals Protection Act 1978: exempt the need to obtain a permit from the Minister, to hold or take marine mammals.
- d. Marine Reserves Act 1971: deem works within the Hikurangi Marine Reserve to be authorised works for the Marine Reserves Act and establish the conditions that must be complied with.
- e. Kaikōura (Te Tai o Marokura) Marine Management Act 2014: deem that restrictions under the Kaikōura (Te Tai o Marokura) Marine Management Act do not apply for restoration work within the Ohau Point New Zealand Fur Seal Sanctuary.
- f. Heritage New Zealand Pouhere Taonga Act 2014: set out a strict timeline for issuing authorities under Part 3 of the Heritage New Zealand Pouhere Taonga Act.
- g. Conservation Act: exempt restoration work in any Conservation Land from the requirement for a concession, and set out the conditions that must be complied with.
- h. Reserves Act 1977: create a notification regime and a deemed licence for restoration work in a reserve.
- i. Public Works Acts 1981: suspend or reduce the requirements for compulsorily acquiring or legalising ownership of land, including any reclaimed land.

Benefits, impacts and mitigations of preferred option, Option 2

Benefits

- 32. The main benefit of the legislation is streamlining the consent processes. This will enable construction to begin much more quickly and facilitate construction once it begins. Continued diversion of road and rail traffic has significant cost implications for the local and regional economies, and the national economy. The typical travel time for Picton to Christchurch freight has increased from around 5.5 hours to 7.5 - 9.0 hours (including mandatory breaks). There are also adverse safety implications of using the alternative route.
- 33. Provisional estimates indicate road disruptions add around \$400 million for the first six months to total New Zealand road freight transport cost due to increased travel distances.
- 34. The adverse impact on total NZ GDP from severing the existing transport links has been estimated at -0.2 percent (6 months to 1 year). Failure to restore these links is likely to result in continuing adverse impacts. These estimates include increased economic activities by utilities, construction and transport industries, which will peak within first 6 months.
- 35. Rectifying the adverse impact of community severance on the well-being of local communities and people is significant, but difficult to quantify.

Impacts and mitigations

36. The preferred option may be controversial as the delegation infringes established principles of the rule of law and may create risks of environmental harm. Measures can be put in place, and have been put in place, that will partially, but not fully, mitigate these infringements. These are discussed below.

Concern about bypassing usual statutory processes and procedures

37. The Bill contains a suite of controls to reduce the risks of the Order in Council mechanism being used inappropriately. These checks and balances go beyond those found in similar legislation used to aid recovery after the Canterbury earthquakes. The checks and balances are as follows:

- a. the Order must be necessary or desirable for the proposed purpose, and the extent of the Order must not be broader than is required
- b. there is a list of Acts that an Order can relate to, and some Acts are specifically excluded (for example, the New Zealand Bill of Rights Act 1990 and the Electoral Act 1993)
- c. a Review Panel, which must have iwi and local government representation and legal expertise, will review draft Orders in Council and provide advice to the relevant Minister
- d. the Minister will be required to publish his or her reasons for recommending an Order in Council, to increase transparency
- e. providing draft Orders to the Regulations Review Committee, or to leaders of political parties if the House is adjourned
- f. engaging with appropriate people or the public generally
- g. providing for sunset clauses for both the legislation and any Orders (the Bill provides that Orders expire at the close of 31 March 2018 and that the resulting Act is repealed on 1 April 2018).

Concern about environmental and other effects

38. For the most part, the Acts subject to the Order concern the management of environmental, ecological and cultural impacts. The nature of the restoration work proposed will have significant environmental impacts, and could affect historical sites and wildlife breeding areas. Many of these impacts are likely to fall in sensitive coastal areas, such as fur seal breeding areas and there are many areas of archaeological interest. It is not possible, at this stage, to quantify those impacts.

39. In respect of the RMA, the Bill provides that relevant Ministers must consider the effects on the environment of any controls provided for in the Order and whether those controls avoid, remedy, or mitigate any adverse effects.

40. To mitigate any concerns, the Order also provides for conditions to be applied to resource consents issued under the Bill. For certain specified consents, the Order also sets conditions that must be applied.

Concern about lack of appeal rights

41. There are limited rights to judicially review decisions made under the Bill. Generally, appeal rights provide a measure of protection against the exercise of powers. Under the status quo, the Minister's recommendations to the Governor General and any decision made can be challenged in the courts – i.e. aggrieved parties have the right to seek redress. However, given the scale of the natural disaster, delays caused by litigation could interrupt the delivery of key recovery activities. This could have significant implications for the trajectory and momentum of recovery. The controls on the making of Orders in Council under the Bill are designed to mitigate such concerns.

Consultation

42. While time has been limited, the Ministry has consulted several government agencies on the proposed Order. Several of these agencies are responsible for legislation affected by the proposed Order.

43. Agencies consulted included: the Department of Conservation, the Ministry of Culture and Heritage, the Ministry of Business, Innovation and Employment, the Ministry for the Environment, Land Information NZ, Maritime NZ, the NZ Transport Agency, the Ministry for Primary Industries, KiwiRail, Te Puni Kōkiri, the Treasury and the Department of Prime Minister and Cabinet.

44. There has not been time to consult externally on the proposed Order. Relevant local authorities and Te Rūnanga o Ngāi Tahu are aware of the possibility of an Order in Council under the Bill, and supported the Bill. Due to time constraints, a draft of the Order has not been provided to local government and other non-government stakeholders, including relevant iwi at the time this RIS was prepared. However, the draft Order has been informed by engagement at an operational level between the NZ Transport Agency and affected stakeholders. The Bill provides that Ministers engage with appropriate persons or the public generally. This is to be carried out by providing a document setting out the proposal for the Order on which written submissions can be made. The Bill provides that one member of the Hurunui/Kaikoura Earthquakes Recovery Review Panel be an iwi representative.

Conclusions and recommendations

45. To facilitate response and recovery in earthquake-affected areas, the preferred option is to make the Order to amend legislation, with appropriate controls to temper this power. The Order is the most cost-effective and appropriate means of expediting the Government's preferred rebuild option. In 1995, the Regulations Review Committee identified principles that should apply to the use of transitional override powers. The Committee noted that a provision that allows the making of regulations to amend the empowering Act should be used only in exceptional circumstances and should not be used routinely in reforming legislation. As set out in the problem definition, the recovery from the Kaikoura earthquake sequence constitutes that exceptional circumstance.

Implementation plan

46. The Order is planned to be enacted in the week beginning 19 December 2016.

Monitoring, evaluation and review

47. The Bill requires:

- a. the Order to expire on the close of 31 March 2018 (unless revoked earlier)
- b. the resulting Act to be repealed on 1 April 2018.

48. The Ministry expects the restoration work to be completed by the expiry of the Order and the Bill. However, the situation will continue to be closely monitored as the work progresses.