FASTER, HIGHER, STRONGER - OR JUST WRONG?

Flaws in the framework recommended by the Land & Water Forum's Second Report

Derek Nolan, Bal Matheson, James Gardner-Hopkins and Bronwyn Carruthers

Russell McVeagh **12 July 2012**

Introduction

1. In our paper entitled "A Better Approach to Improving the RMA Plan Process" dated 21 March 2012[1] we put forward our proposals for improving the processes for policy statements and plans under Schedule 1 of the Resource Management Act 1991 ("**RMA**"). We were particularly concerned about suggestions, primarily from local government, that the Environment Court's role should be significantly curtailed, with appeals only being permitted on points of law.

2. In our view, that approach was simplistic and sought to address the symptoms, rather than the causes, of extended planning processes. Rather than focus on the end of the process, we suggested that more effort be invested in developing a quality planning product from day one. Too often have we seen planning documents rushed out that are poorly thought through, and with very little proper consultation with key stakeholders. The result is inevitably a plethora of appeals and a virtual rewriting of the document through the submission and appeals process. The result of these processes is that parties' positions become entrenched, there is a loss of trust between the stakeholders and local government, and there is reluctance to compromise.

3. At the heart of these concerns is the immutable fact that, through planning documents, controls are imposed on what landowners can do with their land, and how they can use "their" natural resources (water, air, land etc). Ostensibly this restriction occurs for the public good, however one person's benefit is another's adverse effect. In other words, there will always be winners and losers from a planning process. The formulation of planning documents will therefore always remain an area of debate, and will often become an arena of intense conflict.

4. Any solution must, first and foremost, be aimed at delivering quality planning documents. Our paper argues for the retention of existing rights of appeal to the Environment Court because of the significant improvements that the appeal process makes to plans, with comparatively few cases actually proceeding to a full hearing. Instead the focus should be placed on reducing the frequency with which submitters feel the need to exercise their right of appeal through much better pre-notification consultation and collaboration over plan provisions. Further, to ensure the smooth and timely passage of new plans, we recommend new appeal management procedures for the Environment Court. The objective must be to ensure that all plans are processed and can become operative within four years; two years at the council hearing stage, and two years at the appeal stage, unless there are exceptional circumstances.

5. With all these points in mind, we read the Second Report of the Land & Water Forum ("**LAWF report**") with considerable interest. The LAWF report promised to represent a consensus on freshwater policy and plan making through collaboration. In reality, consensus was not reached in relation to all matters, most notably there was no agreement on the circumstances in which appeals to the Environment Court should be permitted. Unfortunately, after having considered the LAWF report at some length, and while we support a number of the proposals for improving pre-notification consultation

---

1 http://www.rmla.org.nz/upload/files/a_better_approach_to_improving_the_rma_plan_process.pdf or: http://www.russellmcveagh.com/_docs/RMupdateApril2012_460.html

and engagement as they align with our own recommendations, we are unable to support the recommended framework for decision making. In particular, we have significant concerns that the recommended framework:

(a) risks disenfranchising those who have not been able to secure a place on the collaborative group;

(b) undermines the integrity of the proposed independent hearing panel, by requiring that the panel's recommendation be referred back to the local authority for a final review and decision;

(c) contains an inherent and perverse incentive for the local authority to adopt the recommendation of the collaborative group, even if that was contrary to the recommendation of the independent hearing panel, because adopting the collaborative group's proposal will significantly restrict any prospect for appeals;

(d) attempts to significantly reduce the crucial role played by the Environment Court which, for the reasons explained in our earlier paper, is essential to ensuring that our planning documents are not only of the highest quality but are also robust, credible, and arrived at through transparent processes; and

(e) ignores opportunities to accelerate the Environment Court appeal process.

6. In terms of the concerns expressed earlier, it is essential that we have a commonly understood set of "rules" governing the formulation of planning documents, and it is also important that all those who want to participate can do so. As well as a rulebook and the ability to participate, we need a referee in whom all players can trust and who can be relied upon to guarantee a quality game. In our view, the Environment Court serves an increasingly valuable role as referee in planning disputes, whose decisions, while not always welcomed or agreed with by all parties to those proceedings, are nevertheless perceived as fair and transparent. Equally important is the Environment Court's role in ensuring that intellectual rigor is applied to the planning documents, so as to ensure that they are coherent, internally consistent and quality documents. Any proposed restriction of the right to seek a referee's ruling, or any attempt to replace the referee with one of the players, is a cause for serious concern. In respect of this last point, it is perhaps telling that the one area where the LAWF report was unable to record a consensus was in respect of the issue that was the nub of our previous paper, namely the circumstances in which appeals to the Environment Court should be permitted.

7. Our concerns with the LAWF report are described further below.

Left out in the cold: what of those who tried but could not be part of the stakeholder group?

8. The role of collaborative stakeholder group would be:[2]

> ... [T]o work together with the council and community to jointly develop freshwater policy or plan provisions for notification, public submissions and independent evaluation.

9. The LAWF report acknowledges that the process of allocating members to the collaborative stakeholder group would need to be rigorous and transparent - providing for public expressions of interest to participate.[3] However, little detail is provided as to how the collaborative stakeholder group would be constituted.

---

2 LAWF report, page 32
3 LAWF report, page 33

10. The LAWF report indicates that the membership of the collaborative stakeholder group should reflect:[4]

    (a) a balanced representation of the interests at play;

    (b) the scope of the matters under consideration; and

    (c) the range of matters potentially affected by the outcomes.

11. While the aim is to be inclusive in terms of membership of the collaborative stakeholder group, the LAWF report acknowledges that a group of 20 could become unwieldy. And yet it is not difficult to envisage that more than 20 groups would be interested in participating in a process which sets water allocation and quality limits for a region. The LAWF report suggests that if there are many expressions of interest to participate, a tiered structure (as used by the LAWF) may help achieve a balance between representation and efficiency.

12. The current LAWF structure involves the use of a small group (comprising representatives from 21 organisations) which meets on a monthly basis and reports to the Plenary (membership of 62 organisations). In addition, there are five working groups with around 12 members each which regularly meet to consider issues and frame options to be put to the small group and Plenary.

13. The LAWF process commenced in August 2009 and is still continuing almost three years later. Clearly collaboration takes time and hard work. It is not a quick fix. There are also some murmurs of discontent amongst members of the LAWF. Some members have reported to us that the process had been dominated by certain organisations, which was not acceptable in a collaborative process. Other members report feeling pressured to agree to certain matters fearing that they may be excluded from the next round of discussion if they disagree. They have instead sought to record their reservations about certain recommendations, only to have those reservations ignored. This has resulted in a level of dissatisfaction amongst some participants, who are having difficulty coming to grips with a collaborative process which seeks "consensus".

14. There are a number of other risks involved with the collaborative process. The LAWF report acknowledges that the collaborative process will be subject to the degree and capacity of funding available. For example, technical assistance will be required in terms of the science underpinning the water quality and quantity limits. It is not clear how such assistance would be funded.

15. The task of bringing together a group of diverse interests to reach a consensus on water quality and quantity issues for a region will not be an easy one. Presumably the collaborative group would have a chairperson although it is not clear what role that person would play. Would they play the role of a mediator or skilled facilitator? Would the chairperson be an independent appointment? In our view, there is a very high risk that, even with the appointment of a skilled and independent facilitator as the chairperson, a lot of time could be spent debating the issues without achieving much in terms of substantive outcomes. There is also a very real risk that one or more interests may have undue influence within the group.

16. Putting aside the problems associated with the collaborative stakeholder group itself for a moment, there is also the potential for those who fail to gain a place on the stakeholder group to feel disenfranchised. The collaborative stakeholder group will clearly have the upper hand compared to interests outside the group in that it will have the opportunity to produce the draft plan provisions. It will be responsible for framing not

---

4 LAWF report, page 33

only the issues, objectives and policies but also rules. It will be constrained only by the provisions of the proposed National Environmental Standard and any relevant provisions of a regional policy statement. It will have the benefit of being assisted by technical experts and will have an opportunity to work with the local authority to draft the provisions and get the local authority on side. It will represent a large and powerful section of the local community. It will be represented at the hearing. The plan provisions agreed by the collaborative group have a special status in that the group can seek the leave of the Environment Court to appeal the merit of the Council's decision on the basis that it does not give effect to the consensus of the collaborative group.

17. Given the nature and role of the collaborative group, it is unlikely that individuals and smaller groups will be brave enough (or well enough resourced) to challenge provisions that have been accepted by the group. A system which places so much emphasis on a group which represents only some of the interests in the community would seem to run counter to the principles of public participation which underpin the RMA.

18. In this regard, we note the alternative approach to better public engagement being taken by Auckland Council. For some time the Council has been consulting key interested parties and on some aspects parties has been working collaboratively on the initial drafting of its new Unitary Plan. However, the Council has also accepted that the wider community must have an equal stake in the Plan. On 3 July 2012 it announced it would be releasing a draft version of the Unitary Plan for feedback as it wanted "the broadest range of stakeholders, organisations and communities to help us determine how best to accomplish outcomes at a regional and local level".[5] The statement noted that the Council needs "to get all Aucklanders on board with the process". This commendable approach to engagement seems more likely to ensure no one is left out in the cold.

Another bite at the cherry: why should a local authority have a power of review and sign off on the recommendations of an independent hearing panel?

19. Under the process recommended in the LAWF report, the local authority could, in making its final decision, depart from the recommendation of the hearing panel, provided it states the reasons for doing so. We have significant concerns about this aspect of the proposed decision making framework.

20. Decision makers are bound by the administrative law principles that apply to decision making. All decisions must be reasonable and fair and based on probative evidence. Moreover, the RMA envisages hearings replete with procedural safeguards to ensure a fair and rigorous process by which evidence and submissions are tested.

21. If a local authority wishes to reject a hearing panel's recommendation, then it "must base its decision on material which, as a matter of reason, has some probative value".[6] Or put another way, the Council will be subject to legal challenge if the "weight given to relevant evidence is so disproportionate to its probative value as to be perverse".[7]

22. In *Re Erebus Royal Commission* the Privy Council cautioned that:[8]

> The person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value...
>
> The decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding that the

---

5 Auckland Council Media Release 3 July 2012

6 Joseph, Philip A, Constitutional and Administrative Law in New Zealand, page 982

7 Joseph, page 982, citing *Re Erebus Royal Commission* [1983] NZLR 66

8 *Re Erebus Royal Commission* [1983] NZLR 662 at 672 per Diplock LJ (PC). See also *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606 at 80

> reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.

23. More recently, the High Court explored the 'probative evidence rule' in *Samuel v Auckland City Council*[9] and held that if a decision-maker reaches a conclusion where there is nothing to support that conclusion, then that finding breaches the principles of natural justice.

24. In the case of a recommendation from a hearing panel that has followed due process and met all the requirements of its delegated power, the local authority should rely on that recommendation in the absence of a firm procedural or evidential reason why it should not. In most circumstances it will be difficult (if not impossible) for a local authority to find probative evidence that would reasonably justify a decision not to approve a hearing panel's recommendation, particularly if it can be shown that:

    (a) the hearing panel was appropriately appointed and followed correct procedure in carrying out its duties;

    (b) the evidence was extensive and provided a proper basis for the conclusions reached by the hearing panel;

    (c) the hearing panel fully considered the submissions in opposition to the matter being heard; and

    (d) the matter being heard was considered in accordance with the relevant key provisions of the RMA.

25. If any of those matters were established, such that there was a material concern about the integrity of the decision, then the only proper approach would be for the matter to be reheard in full, either by the local authority or by another independent panel appointed. It is never, and never would be, appropriate for the local authority to simply insert its own decision, without having heard the evidence. This is contrary to the approach in the LAWF report which suggests it would be appropriate for the regional council to reject, or "tweak", the decision of the hearing panel provided that it states its reasons for doing so.

26. We are also concerned that the process proposed in the LAWF report has some similarities to the process for restricted coastal activities previously included in the RMA but now repealed. The restricted coastal activity process involved:

    (a) the regional council establishing a hearing panel to consider the application;

    (b) the hearing panel making a recommendation to the Minister of Conservation;

    (c) possible appeals against the recommendation to the Environment Court in a de novo hearing; and

    (d) the Minister of Conservation making a final decision on the application on the basis of either the recommendation of the hearing panel (if not challenged), or the Environment Court's recommendation.

27. The shortcomings of the restricted coastal activity process were highlighted in the *Whangamata Marina* case.[10] In that case, the recommendation of the hearing committee (to decline an application to develop a marina) was successfully appealed to the Environment Court. The Minister subsequently departed from the Environment Court's recommendation to approve the marina, and declined the application to build the

---

9 *Samuel v Auckland City Council* (High Court, Auckland, CRI -2010-404-000469, 2 June 2011)

10 *Whangamata Marina Society Inc v Attorney-General* [2007] 1 NZLR 252 (HC)

marina development. The Minister's decision was then the subject of successful judicial review proceedings.

28. The High Court held that under section 119 of the RMA the Minister had a discretion to differ from the recommendation of the Environment Court provided that recommendation was taken into account and reasons were given.[11] However, that discretion was relatively confined:

(a) it was not the function of the Minister to hear witnesses and test the quality of the evidence;

(b) while under section 119(2) the Minister was required to have regard to the matters in section 104 of the RMA, the Minister can only consider evidence brought before the Court;

(c) it would be irrational for the Minister to rely on evidence which has been tested and rejected by the Environment Court as unreliable;[12]

(d) the Minister could differ only on the weight to be given to matters under section 104;[13]

(e) there was no process under section 119 for the Minister to rehear evidence and this was significant because the RMA hearing process ensured a fair and rigorous process by which evidence and submissions could be tested;[14] and

(f) if further clarification of a factual matter was needed, the Minister had a power to request further information from the Court.

29. The difficulties with the restricted coastal activity process highlighted in the *Whangamata Marina* case resulted in the repeal of the relevant provisions from the RMA in 2009. The prospect of the reintroduction of a similar process for water quality and quantity provisions would be a step backwards. As discussed earlier, the concept of allowing a local authority to override the recommendation of a hearing panel, subject only to specifying its "reasons" for doing so, would be contrary to the principles of natural justice as articulated by the Privy Council in the *Erebus* case. Local authority decisions which depart from a hearing panel's recommendation would be fertile grounds for judicial review, particularly given that there would be very limited rights of appeal to the Environment Court. The dangers of such an approach were highlighted by the High Court in the *Whangamata Marina* case.

30. Under the current system councils often delegate the hearing of a plan change or application to a hearing panel or sub-committee of the council but retain the power to make the final decision. We are aware of several instances where councils have sought to depart from the recommendation of the hearing panel or sub-committee in their final decision. The RMA is silent on a council's ability to do so. Our experience is that, following legal advice, the council usually decides not to depart from the recommendation of the hearing panel or sub-committee. However, delays often result in the issue of the final decision while the council debates the correct approach. For that reason we suggest that amendment of the RMA to clarify the council's limited role in issuing a final decision would be useful.

31. We see absolutely no justification for a local authority to attempt to reinsert itself at the conclusion of the process and effectively have the "final say". If an independent hearing

---

11 Ibid at [94]
12 Ibid at [85]
13 Ibid at [92]
14 Ibid at [30]

panel were appointed with quality people and if the process were rigorous, then there would simply be no basis for the local authority to lawfully intervene. It would undermine the integrity of the independent hearing panel if the local authority were entitled, at the conclusion of that process, to "tweak" provisions or potentially to completely rewrite sections of the document. Any such intervention could be challenged by judicial review and any challenge would surely succeed. The process should simply require the hearing panel to make a recommendation that the local authority must either accept, or reject with the express provision that the hearing must be recommenced, which realistically is the position at law. The legislation should make it clear that there is no middle ground or ability for the local authority to "tweak" any provisions.

Perverse incentive to adopt collaborative group's recommendation to avoid appeals, even if contrary to the hearing panel's recommendation

32. The collaborative group would have a pivotal role in the process recommended in the LAWF report. It would be resourced with technical assistance and would have worked with the Council officers to develop the plan provisions. The collaborative group would contain individuals/organisations who were motivated to participate, and it stands to reason that these would also be the individuals/organisations which would be likely to appeal if they were dissatisfied with the local authority's decision.

33. Moreover, the collaborative group has special rights of appeal to seek the leave of the Environment Court to appeal the merits of any local authority decision which does not give effect to the consensus position of the collaborative group. There is a real risk that, even where a hearing panel has recommended that the provisions agreed to by the collaborative group should not be adopted, the local authority could seek to depart from the recommendation of the hearing panel in order to avoid appeals by the collaborative group. This would be particularly tempting to a local authority if the collaborative group were the only group that could seek leave to appeal to the Environment Court.

The dangers of restricting the role of the Environment Court

34. As outlined in our previous paper, there are very real dangers associated with restricting the role of the Environment Court:

    (a) there would be no ability to improve plan provisions through the appeal process resulting in far greater costs to business and delays (approximately 90% of appeals are settled in any event);

    (b) the fact that local authorities know that their decisions can be appealed to the Environment Court means that local authorities take a much more responsible approach to their decision making and are more likely to put politics aside;

    (c) local authorities are more likely to accept submissions under the RMA process where there is a right of appeal than submissions where there is no right of appeal (for example, submissions on LTCCPs under the Local Government Act 2002); and

    (d) it would be a contradiction to allow appeals on the merits of resource consent applications as of right but not of the critical planning framework that will determine what consents are required and guide those future resource consent decisions.

35. Decisions on planning provisions relating to water quality and quantity are likely to be contentious and hotly contested. The stakes will be even higher if, as proposed in the LAWF report, any activity not complying with the bottom line limits is to be classified as a prohibited activity. Removing appeal rights will mean that such decisions, which have the potential to seriously impact on development rights, will not have the benefit of the

additional safeguard of a greater level of scrutiny by the Environment Court. The quality of the evidence produced at the Environment Court stage is often improved from that presented at a council level hearing. In addition, the evidence is tested in front of the Court by cross examination. In contrast, council level hearings have an element of informality to encourage public participation. If the right to appeal the local authority's decision is removed or greatly restricted, and the rigor of the hearing process at the council level is strengthened (for example by allowing cross examination, which it would need to do if there were no appeals) as suggested in the LAWF report, the public may be discouraged from participating in the process, contrary to the principles of public participation.

36. It has been suggested by some parties that a possible middle ground might be to allow proposed appellants to apply to the Environment Court to seek leave to lodge a merits-based appeal. This approach was considered during the process of amending the RMA in 2009. It was strongly opposed by a large number of submitters and rejected by the Select Committee. We agree that this approach would be difficult given that the merits of any particular appeal are often impossible to determine until all the evidence has been heard and tested. In other words, especially in the context of plan appeals, it would be virtually impossible for the Environment Court to develop and apply any meaningful threshold test that could be used to filter plan appeals at the outset of the appeal process.

37. The focus should not be on removing, or limiting, the right to appeal to the Environment Court. Instead the focus should be on reducing the frequency with which submitters feel the need to exercise that right and then having expedited procedures to resolve or determine any appeals that are still filed.

38. In our view, there is room for far more consultation and engagement with stakeholders prior to the release of draft plan provisions than usually occurs. Such consultation should in theory be happening routinely now as a matter of good practice. The Auckland Council's recent proposals are exactly what ought to occur for a major new plan. But carrying out good practice engagement at the council level should not be seen as something to be "rewarded" by then depriving the public of their general appeal rights.

39. In terms of engagement with stakeholders, we have significant concerns about the collaborative group process proposed in the LAWF report for the reasons outlined earlier in this paper. A collaborative group approach whereby the aim is to reach a consensus amongst those individuals participating in the group (to the exclusion of other stakeholders in the community), and a system which encourages so much weight to be placed on the "consensus", appears to be flawed. Rather, the process of plan formulation should remain in the hands of the council officers, who do not represent any particular stakeholder interest. There remains plenty of scope for a greater level of engagement during the plan preparation process, for example:

    (a) engagement with key stakeholders at a very early point in the process, to discuss the intended scope of the plan and the issues to be addressed;

    (b) establishing working groups to discuss ideas and issues during the initial drafting phase and encouraging such groups to work collaboratively together;

    (c) providing draft provisions to interested parties for rigorous assessment by those likely to use the provisions on a regular basis;

    (d) hosting caucusing sessions with interested parties including community groups to debate the provisions in an informal setting, and flush out any obvious errors, omissions or difficulties;

(e) releasing the draft policy statement or plan for wider feedback and comment before finalising the document for notification; and

(f) after the submission periods have occurred, holding pre-hearing meetings / mediations before council hearings take place with all who have submitted on certain provisions to see if consensus can be reached. Any revisions to the provisions can then be circulated in advance of the hearing, with submitters able to comment on the proposed changes and outline any remaining concerns.

40. In our view, Horizons' One Plan process provides one good example of how this process could work in practice. The One Plan involved the consolidation of six separate regional plans and the Regional Policy Statement into one document. As we understand it, the process began in late 2004 with almost three years of community and stakeholder consultation. The One Plan was notified on 31 May 2007. A total of 467 submissions and 62 further submissions were received. There were numerous pre-hearing meetings arranged by the Council. Some were facilitated by an independent person engaged by the Council and various reports were provided to, and were considered by, relevant hearing panels. Numerous other meetings occurred among officers and submitters. These meetings appeared to have narrowed the issues and achieved some consensus. Decisions on submissions were issued on 24 August 2010. Only 22 appeals were lodged with the Environment Court.

41. The process of resolving appeals to the One Plan began in February 2011. By November 2011 70% of the appeal points had been resolved through mediation. Environment Court hearings on the Natural Features and Landscapes, Indigenous Biological Diversity, and Sustainable Land-use and Accelerated Erosion and Surface Water Quality – Non-Point Source Discharges (Nutrient Management) topics have now been completed. The final timing is dependent on the Court timing for issuing decisions and consent orders, but it is anticipated the One Plan should be able to be made operative in the period September to December 2012. In total just three years have been spent on the One Plan post notification at the council level and just two years at the Environment Court stage.

42. At the appeal stage we understand that similarly speedy processes have occurred with Western Bay of Plenty and Far North District Council planning documents and there may be other recent examples.

43. While we acknowledge that the Horizons process at both Council and Court stages may not have been "perfect", it does illustrate what can be achieved with early engagement and with a commitment to resolving issues. It also confirms the importance of the crucial role that the Environment Court plays in ensuring that there is an independent arbiter available at the end of the process. This not only provides a venue for resolving any final disputes but, perhaps more importantly, also provides an added incentive for the parties to keep the process on track.

How to accelerate the process while retaining appeals to the Environment Court

44. We canvassed various options for improving the appeal stage of the process in our previous paper. A maximum four year path from notification to resolution of appeals should be the clear objective. At the appeal stage, that will require a much more rigorous and universal approach taken to case management by all divisions of the Environment Court, and better resourcing, motivation and adherence to deadlines by all involved in that process. In particular, we suggest that this could involve:

(a) approaching appeals in a systematic way with higher level strategic issues resolved first, followed by objectives and policies and then rules;

(b) much better resourcing within councils to provide the motivation to resolve appeals quickly, as all too often it is a lack of proper resourcing by councils that results in lengthy delays and poor turnaround;

(c) a more rigorous appeal management process involving such steps as an initial period allowed for normal negotiation and settlement, only if the parties are willing and consider there is likely to be benefit from doing so;

(d) a formal and probably mandatory mediation process where:

(i) both the council and appellants/s274 parties are required to circulate proposed amendments or provide comment within fixed deadlines; and

(ii) the council is required to have the appropriate delegation in place to settle the matter at mediation, without reporting back to a committee for approval, as the current practice of many councils to insist everything returns to a committee is a major cause of delays at present;

(e) perhaps after no more than nine months, evidence exchange timetables should be set for any remaining matters, with the intention that all evidence is exchanged within 12 months of the appeals being filed; and

(f) the second 12 months should be used for hearings and the issuing of decisions.

45. There may be other ways of achieving the same outcomes within two years and the Environment Court and the parties involved in some of the recent good examples should be encouraged to identify what steps were key to those successes. For example, early issue identification, urgent hearings to unblock difficult issues, and using multiple Judges and Commissioners on larger plans might all be useful techniques.

46. Any amendment to the RMA requiring the Court to determine appeals within specific timeframes could be problematic. Imposing time limits on the issue of decisions has the potential to compromise the quality of the decision, particularly if the Court is inadequately resourced to deal with the workload that would result. Although specific time limits for issuing decisions apply under the Board of Inquiry process under the RMA, a new Board of Inquiry is appointed for each new hearing and so it will be guaranteed that the Board is available and resourced to hear the case. This is very different to the way the Environment Court is resourced with its fixed appointment of judges. There is less flexibility to respond quickly to appoint new judges in response to fluctuating or rapidly increasing workloads in order to meet any prescribed timeframes. Moreover, it is difficult to envisage what penalty might apply if the Court failed to meet the specified timeframes.

47. Despite these difficulties, there are a number of other options involving various amendments to the RMA that may encourage the same outcome. For example, the RMA could be amended to require the Court to hear Schedule 1 matters with as much expedition as possible, with the objective of ensuring that appeals are disposed of within two years of lodgement unless there are exceptional circumstances.

48. The RMA could also be amended to give priority to appeals on policy statements and plans (as opposed to resource consent applications). There was precedent for this approach under the America's Cup (Planning) Act 1989 when the Planning Tribunal was

required to give priority to appeals brought under that Act over appeals brought under the Town and Country Planning Act 1977.[15]

49. The powers of the Environment Court are prescribed in Part 11 of the RMA. Under section 269 the Court has the power to regulate its own proceedings in such manner as it thinks fit. Specific powers conferred on the Court include the ability to order pre-hearing conferences (section 267) and alternative dispute resolution (section 268). However, it has a broad discretion in terms of how it uses these powers. There is scope to introduce more detailed guidance regarding the conduct of appeals including:

(a) a requirement that appeals on policy statements and plans must be set down for hearing within a set timeframe;

(b) the introduction of limits on the granting of adjournments;

(c) new requirements for appellants to comply with specified timeframes, for example the requirement to exchange evidence within 12 months of the lodgement of the appeal; and

(d) a new mandatory requirement for the Court to order alternative dispute resolution in certain circumstances. For example, in New South Wales section 34AA of Land and Environment Court Act 1979 contains a mandatory requirement for the Court to arrange a conciliation conference between the parties and their representatives with or without their consent in certain circumstances.

50. While amendments such as those specified above would assist in improving the management of appeals, clearly there is a strong relationship between the funding of the Court and the rate at which cases can be determined. A backlog of cases in the Environment Court reached crisis point just prior to 2002 due to funding issues and an increased workload under the RMA. Measures taken post 2002, including an increase in the number of judges and commissioners and increased case management, have contributed to a substantial reduction in the backlog of cases awaiting a hearing in the Environment Court.

Conclusion

51. We do not wish to give the impression that we disagree with everything in the LAWF report. We applaud the intent underlying the recommendations in the LAWF which is to encourage stakeholder participation early on in the plan process. We agree with the LAWF report that many local authorities do not engage enough, and/or at an early enough stage in the plan formulation process. However, there are compelling reasons why this process should be council led and multifaceted rather than left primarily in the hands of a possibly unwieldy collaborative group containing a large number of disparate interests with other parties and the wider community excluded or disadvantaged. In particular, we prefer a council led process incorporating not only better stakeholder consultation but also the use of industry working groups who might work collaboratively together, the early release of draft plan provisions for informal comment by the entire community and expert caucusing, as these would all assist in improving the early stages of the plan formulation process.

52. Rather than attempt to marginalise the role of the Environment Court, we should therefore instead focus on how to improve the quality of engagement and quality of decision making earlier on in the plan formulation process. Through a better first round, there will be fewer appeals lodged, and fewer issues pursued through those appeals.

---

15 Section 29(5) of the America's Cup (Planning) Act 1989

Together with more stringent obligations on appellants to progress their appeals in a timely manner, and a continued committed focus by the Environment Court on case management, we are confident that all appeals lodged would be capable of being resolved within a two year period (and probably in considerably less time). This will ensure that the Environment Court can continue to contribute its considerable expertise to the development of quality planning documents, and just as importantly it will remain as on-field referee, able to blow the whistle on planning processes or planning provisions which may have crossed the line.

53. It is not surprising that the suggestion to restrict appeal rights has found favour with some local authorities. The removal of the right of appeal to the Environment Court would see those councils retain their rights but at the expense of removal of the rights of those participating in the process. No doubt local authorities will be quick to assert that the suggestion that appeal rights should be retained is motivated by self interest on the part of the legal profession. However, the legal profession has an important role to play in terms of ensuring that due process is protected. Moreover, there was a public outcry in response to the proposal during the first round of amendments to the RMA in 2009 to restrict appeals on plans to points of law unless an appellant successfully applied for leave from the Environment Court to appeal on the merits. Numerous organisations from many different sectors opposed that restriction. As a result of that widespread opposition, the Select Committee recommended deleting the relevant clauses. Feedback from our clients and numerous other parties who we consulted or who have been in touch with us over our earlier paper indicates that the views of stakeholders have not changed in the intervening period. Clearly these are issues worth debating.

54. Every sector of the community has an interest in ensuring not only a quality plan formulation process but also a faster and more efficient process. Our experience has shown that the Environment Court plays an important and integral role in ensuring that district and regional plans are of high quality. This sentiment was echoed by several senior RMA practitioners and by iwi at a special valedictory sitting of the Environment Court to celebrate the judicial career of Environment Judge Gordon Whiting. Judge Whiting's significant contribution to the quality of numerous district and regional plans and to parties affected by those plans was specifically recognised. The reasons outlined in our earlier paper for retaining the rights of appeal to the Environment Court were also endorsed.