



**Resource Management Law Association
of New Zealand Inc.**

Resource Management Law Association

Submission

Resource Management Reform 2013

Improving our Resource Management

System

March 2013

INTRODUCTION

1. This Submission on the *Improving our Resource Management System* Discussion Document ("**Discussion Document**") is made on behalf of the Resource Management Law Association of New Zealand Inc ("**RMLA**").
2. The RMLA is concerned to promote within New Zealand:
 - a. An understanding of Resource Management Law and its interpretation in a multi-disciplinary framework;
 - b. Excellence in resource management policy and practice;
 - c. Resource management processes which are legally sound, effective and efficient and which produce high quality environmental outcomes.

3. The RMLA has a mixed membership. Members include lawyers, planners, judges, environmental consultants, environmental engineers, local authority officers and councillors, central government policy analysts, industry representatives etc. Currently the Association has in order of 1,100 members. Within such an organisation there are inevitably a divergent range of interests and views.
4. While the membership has been consulted in preparing this submission, it is not possible for the RMLA to form a single universally accepted view on the proposed reforms. It should also be noted that a number of members may be putting in their own submissions and those may represent quite different approaches than the views expressed here.
5. For these reasons, this submission does not seek to advance any particular policy position in relation to the proposed reforms outlined in the Discussion Document, but rather it is made with a view to ensure that the reforms:
 - a. Are consistent with the general framework of existing laws and policies of relevance, and work alongside the Resource Management Act 1991 ("**RMA**") where relevant.
 - b. Are practicable and workable.
 - c. Will assist in promoting best practice.
6. For the above reasons also, this submission is largely focused on those aspects of the Discussion Document that address issues of statutory wording and process (costs and timeframes), rather than matters of substantive policy.
7. The RMLA acknowledges that the Discussion Document outlines the most substantive RMA reforms since its enactment. They will have profound implications for members.
8. Given the very short timeframe for response, the National Committee of the RMLA requests an opportunity to meet with the Minister and senior officials to discuss the comments made in these submissions in more detail, before the legislative phase of reform is commenced.

NEW SECTION 6 – PROPOSAL 3.1.1

9. **Specific matter:** Amalgamating / redrafting Sections 6 and 7.
10. **General Comment:** The RMLA generally supports amendments that would provide clearer national guidance on the broad judgments to be applied to RMA decision making and processes. However, we note that there will be a significant transitional cost (e.g. litigation, redrafting statutory planning documents) through the process of reinterpreting what is essentially a combining of Sections 6 and 7, removal of the current relative hierarchy between the two provisions, and the substantive changes to the wording of matters to be listed in the section.
11. There is now some 20 years of case law authorities relating to sections 6 and 7, and any substantial change is likely to require re-visitation of the authorities, and a period of uncertainty, until there has been guidance on the interpretation of the new section by the Courts. Existing planning instruments within the current second generation planning cycle will be tailored to achieving Part 2 of RMA as currently enacted. The RMLA is therefore concerned to minimise the transitional issues and costs raised by the reforms, and its submissions on the content of new sections 6 and 7 below are made with that concern in mind.
12. The proposed new introductory wording of Section 6 adopts an interpretation of Section 5 that may not have been originally intended by Parliament, by expressly codifying the overall broad judgement approach. Neither the Discussion Document nor the earlier TAG report explain in any detail why the approach that has been developed by the Courts has caused a mischief that requires legislative intervention and beyond expansion of the matters falling within the ambit of Section 6 itself, to better reflect the balance of interests inherent in any overall judgement.
13. The following specific points are noted:
 - a. Retaining the directive nature of the section (e.g. protection, preservation etc) is supported. However there is inconsistency in the language used. For example, why have the "directive" words (such as "...the protection of...") been retained in some clauses but not others?. It is also unclear why some provisions have retained the words "*the protection from inappropriate subdivision, use and development*" while others have not. For example, the lack of such directive words in respect of Sections 6(1)(d) (public access) and

- (h) (historic heritage) suggest that these matters are of less importance than others. This may not be intended.
- b. It is unclear why reference to the list being matters of national importance has been removed. If (as suggested in the TAG report¹) this is to ensure the subservience of the section to Section 5, it is considered that the existing wording "In achieving the purpose of the Act" is sufficient to that end, and the place of Section 6 relative to Section 5 is well established under case law commencing with *NZ Rail* in 1994. Deleting reference to the section as involving matters of national importance may therefore be taken to signal some sort of unintended "downgrade" to the significance of all the various matters now to be listed in Section 6.
- c. While the amendments propose changes to include the word "specified" in respect of outstanding landscapes and indigenous vegetation/habitats, the same qualification is not applied to either historic heritage (albeit this is dealt with under other legislation) or significant aquatic habitats. If there is to be a requirement that these matters must be specified in relevant plans in order to qualify for protection (which has benefits in terms of certainty), this places an additional expectation on councils developing those plans. The likely conflict that will ensue over whether or not a landscape or habitat reaches the threshold to be specified in a plan would be eased if clear national direction was provided about what is meant by "outstanding" or "significant", and if best practice guidance was given on how to apply these thresholds. As a minor drafting point, it may be appropriate for Section 6(c) to be worded as: "specified significant areas of vegetation, and *specified* significant habitats?" This would make it clear that both need to be specified (not just the first matter).
- d. As to new provision 6(1)(g) there may be value in separating out the "benefits" and "efficiency" aspects so that the existing 7(b) ("the efficient use and development of natural and physical resources") case law could be carried over more readily, and it is noted that the TAG report recommended separate provisions as to the efficient use of resources, and the benefits of that use.

¹ TAG report Page 67.

- e. It is unclear why the new Section 6(1)(i) refers to the "impacts" of climate change, rather than the "effects" of climate change (as per the existing 7(i)). For preservation of case law (and clarity, given the definition of "effect" in Section 3), it may be appropriate to retain the existing Section 7(i) wording.
- f. New Section 6(1)(j) could be amended to clarify that it is intended to read "benefits of efficient energy use and *benefits* of renewable generation" (while the second "benefits" could be read in, it may be better to include the term again if that is the intended meaning).
- g. As currently drafted, the consideration of built/urban environments has no reference to the importance of the quality of these environments and with removal of Section 7(c) amenity values, the importance to New Zealanders quality of living in urban environments appears to be diluted under the suggested changes. In Section 6(1)(k), it may be appropriate to refer also to the quality of the urban environment; not just the effective functioning of it.
- h. While "any finite characteristics of natural and physical resources" could be addressed in the context of Section 5 (the ability for future generations to use that resource), careful consideration should be given to the existing pressures on some of these resources (e.g. fresh water and the coastal environment) and the consequences of removing this specific provision.
- i. While proposed Section 6(2) suggests that there is no "hierarchy" in the matters referred to in Section 6(1), the use of directive language in some of the subsections but not others suggests that some matters are more important than others. If all Section 6(2) is intended to mean is that a matter that is listed ahead of, or behind, another is not necessarily of greater or lesser importance because of its order in the list, then some rewording may be necessary (as noted above) .

14. **Recommendations:**

- a. Correct the inconsistent use of directive language, unless it is intended that different requirements or emphasis are to be set for the different matters referred to in the subsections;
- b. Clarify whether the matters listed are intended to remain matters of "national importance";

- c. Consider whether Section 6(1)(c) should be worded as: "specified significant areas of vegetation, and *specified* significant habitats?";
- d. Provide national direction around what is "significant" and "outstanding", and best practice guidance.
- e. Ensure that the costs to Councils (and others) of specifying the "outstanding" and "significant" matters in plans is taken into account in the Regulatory Impact Statement.
- f. Consider separating out the issues of "benefits" and "efficiency proposed in new Section 6(1)(g)";
- g. Recognise the importance of some finite characteristics of natural and physical resources;
- h. Consider wording Section 6(1)(i) to read to "effects" of climate change, rather than the "impacts" of climate change (as per the existing 7(i));
- i. Consider amending Section 6(1)(j) to clarify that it is intended to read "benefits of efficient energy use and *benefits* of renewable generation";
- j. Consider whether Section 6(2) is appropriately worded, if some matters listed are intended to have greater emphasis or importance than others given the different use of directive language, and different use of the phrase "inappropriate subdivision and development).

NEW SECTION 7 – PROPOSAL 3.1.1

- 15. **Specific matter:** Introducing a new Section 7 which changes the principles in Section 6 and 7 of the RMA.
- 16. **General comment:** There is a potential cost and potential for reduced efficiency in the elevation of "Methods" to Part 2. The unintended consequence is that they may create new avenues or platforms for litigation challenges to plan drafting and processes. We consider that addressing practice improvements via legislation needs careful consideration.

17. Overall this section is a somewhat anomalous collection of matters that include best practice, but whereby sub-sections 3 and address an ad-hoc set of matters that are out of character with the rest of the section. It is also unclear whether this section is intended to be applied as "principles" (like Section 6). We consider that addressing practice improvements via a general section needs careful consideration.
18. **Recommendation:** Review the workability of introducing practice improvements via legislation because there is significant potential to open up new avenues of litigation that were probably unintended. It may also be, for example, that some of the matters may be better placed in other sections of the Act. For example, Section 21 (under "miscellaneous provisions") already deals with avoiding unnecessary delay and it might be more appropriate to expand that duty, rather than adding a new 7(1) to similar effect.

CENTRAL GOVERNMENT DIRECTION – PROPOSAL 3.1.3

19. **Specific Matter:** Clarifying and extending Central Government powers to direct plan changes.
20. This aspect of the reforms intends to build upon the insertion of Section 25A of RMA in 2005 which currently provides an opportunity for the Minister to require that plans be made or changed to address issues within regional or territorial authority functions (Sections 30 and 31 respectively). The existing power does not allow the Minister to direct outcomes.
21. The rationale for reform contained in the discussion document is that the power has not yet been used, as it is unclear what process should be followed, and at what point ministerial intervention is appropriate.² The proposal envisages amendment to the Act to provide for 'stepped' intervention as follows:
- a. Identification of specific issues the Minister wants addressed, and inviting the relevant authority so say how it has been addressed in current planning.
 - b. The Minister to direct a plan change along with matters to be considered and *outcomes* to be achieved through such a plan change.
 - c. The Minister to directly amend an existing operative plan if not satisfied with the outcomes of the preceding two steps. This regulatory power would have

² Paragraph 39 of the discussion document.

statutory criteria governing its use (confining it to more urgent issues that are nationally or regionally significant).

22. **Submission:** The RMLA conditionally supports greater clarity or certainty within the section as to the manner and process through which ministerial direction may be applied under Section 25A.
23. The RMA has an intentionally devolved planning framework approach that is well established. A streamlined process for specific planning outcomes, driven by central Government, represents a significant statutory policy shift away from decentralisation of Government powers to local decision-making.
24. That said, reform aimed at promoting national guidance and direction to achieve a consistency in approach, as to the manner in which issues common to many districts and regions are addressed, is supported by the RMLA.
25. The RMLA has some concern about a potential increase in plans becoming "politicised" through interventions by successive governments (and ministers), and as might arise if the scope and extent of application of any such power is not appropriately constrained to emergency or extraordinary situations. The power to direct an outcome goes well beyond the existing power to direct that a particular issue be addressed.
26. There are also existing mechanisms within the Act (alongside existing Section 25A itself) through which regulation affecting changes to operative plans can be promoted.
27. Under Section 44A of RMLA, and following promulgation of a national environmental standard, any duplication or conflict must be resolved through immediate change to an operative plan (without using the first schedule process) – refer Sections 44A(4) and (5).
28. A similar provision applies relative to national policy statements, and to the extent directed by the national policy statement in question (Section 55(2)).
29. The concept of stepped intervention is supported but beyond clarifying the circumstances and procedures through which it may be progressed (under Section 25A), there certainly does not seem to be a case for Ministers to be able to directly amend existing plans 'by fiat' or decree.

30. Bearing in mind the public nature of the regional and district plan process (existing, or as proposed under the reforms), any direct intervention of that kind should be cautiously applied.
31. The existing processes surrounding preparation of an NPS or NES, and as to the consequences of them coming into force, provide a measure of procedural safeguard and scope for public input in relation to central government intervention, which should not be substantially eroded through the proposed reform.

32. **Recommendations:**

- a. Provide greater clarity or certainty within the section as to the manner and process through which ministerial direction may be applied under Section 25A;
- b. Consider whether it is necessary, or appropriate, to enable specific outcomes to be directed by the Minister through any revised process. If the matter is sufficiently important, and urgent, to require such intervention, then it may be more appropriate to legislate (as Parliament did in respect of the Christchurch earthquake issues), rather than to provide for amendment of plans by Ministerial direction. If that was to be enabled, the use of such power should be carefully circumscribed.

NPS AND NES PROCESS – PROPOSAL 3.1.4

33. **Specific matter:** Amending RMA to improve flexibility of NPSs and NESs and setting an agenda.
34. **General Comment:** The RMLA supports:
- a. The intent of combining NPS and NES processes;
- b. Allowing NPS or NES to be regional or local (e.g. where it is still nationally significant);
- c. Further streamlining processes for making NPS and NES; and
- d. The non-strategy agenda, 3 year prioritisation of NPS/NESs.

The following points are noted:

35. Some of the NPS/NES processes appear to have been very industry (or even provider) specific. More transparency on which NPS/NES are being developed, and when, might address this.
36. The intention of creating greater flexibility inherently suggests NPS and NES will be increasingly used by the Government to address resource management issues. Until very recently there has been a lack of willingness on the part of Government to use these tools. They are resource intensive for the Ministry for the Environment to produce, and are slow in their production. The Government needs to resource the Ministry to produce these documents and set appropriate priorities. A standardized template for plans will make it easier for plans have provisions inserted at a national level.

37. **Recommendation:** Specific matters that the RMLA considers would be appropriate for future NPS / NES:

- a. Plan standardisation (template plans and standard definitions);
- b. Natural Hazards NPS;
- c. Landscape assessment methodology NES (identification of outstanding natural landscapes for specification in regional plans);
- d. Biodiversity NPS;
- e. Urban design and/or housing affordability NPS;
- f. Traffic management NES for standardised rules; and
- g. Subdivision NES for standardised rules.

And regard should be had to be the list of matters in section 6 as proposed for matters of direction at a national level.

38. **Submission:** The RMLA supports the first initiative set out above (combined NPS/NES Process) as it would be consistent with the integrated planning model proposed elsewhere in the reforms (i.e. in the Freshwater Reform Discussion Document), and whereby combining policy and implementation elements in the one place makes sense (refer for example to the proposed National Objectives

Framework regarding implementation of the NPS (Freshwater Management) and which would likely have both policy and more prescriptive regulatory elements).

39. In relation to the clarification that NPSs can apply to a specific region or locality, this is also supported to an extent (albeit on the face of it, somewhat counterintuitive relative to a *national* policy instrument).
40. The RMLA suggests that some threshold test be applied i.e. that an NPS or NES could only be applied on a targeted (region or locality basis) where the matter in question has consequences of national significance (of the kind currently set out in Section 45(2) of RMA) notwithstanding that the issue arises within a district or regional context.
41. As to further streamlining the process, the RMLA notes that the 2005 and 2009 reforms themselves went a significant way to improving the efficiency of the relevant procedures, including as to the manner in which the national instruments were prepared, and also their effect in terms of resulting amendments to local authority planning instruments (as outlined above).
42. Section 46A of RMA already provides for an alternative "fast track" process for an NPS, albeit applying the requirements in Sections 51 and 52 as to the matters to be considered in preparing an NPS, and the Minister's power to amend an NPS at the conclusion of the process (relative to advice received).
43. It is also pointed out that under the current Resource Management Reform Bill (2012), additional steps in these processes are proposed, ie to expressly require the preparation of Section 32 evaluation reports, and that particular regard be had to those reports.
44. Any "further streamlining" which is actually necessary in light of the previous two rounds of reforms would obviously need to be consistent with the more stringent Section 32 obligations deliberately imposed in the 2012 bill for national planning instruments.

45. **Recommendations:**

- a. Allow for a combined NPS and NES process;
- b. Clarifying that NPSs and NESs can be targeted to a specific region or locality where the matter in question has consequences of national significance (of

the kind currently set out in section 45(2) of RMA) notwithstanding that the issue arises within a district or regional context; and

- c. Carefully consider whether further streamlining processes for developing NPSs and NESs are in fact necessary, and particularly where the 2012 bill introduced additional Section 32 requirements to ensure appropriate rigour is applied when developing national planning instruments.

PROPOSAL 3.2.1 SINGLE RESOURCE MANAGEMENT PLANS – NATIONAL TEMPLATES

- 46. **Specific Matter:** The RMLA's understanding of the intent of this aspect of the proposed reforms is to enable users of planning information to find "all the provisions they need in one location".
- 47. A national template is proposed for the structure and format of a single plan, to be in place within five years, such that for any district or broader area the three or more existing planning documents would be consolidated into one.
- 48. **Submission:** The RMLA considers that the intent of this aspect of the reforms has substantial merit.
- 49. The RMLA understands that a driver of this aspect of the reform is the Government's confidence and supply agreement with ACT New Zealand and which records as follows:

"A key change that both parties will work to achieve is in the planning area; where there is a need to reduce the clutter of planning documents and increase the efficiency of the planning process. ACT and National support simplifying the planning process, and will legislate to ensure that there is only one plan (a "unitary" plan) for each district."
- 50. Many members of the RMLA share the concern about the degree of clutter within the planning landscape, and the sheer scale and complexity of the range and extent of planning provisions with potential application to any given project, area of land or body of water.
- 51. Compounding the difficulty is the experience in many regions and whereby the various planning instruments at each level of the planning hierarchy are tracking

through different stages of the planning cycle and potentially "out of sync". It is not uncommon for district plan processes to be concluded (including now in the second generation phase) prior to the higher order policy statements becoming operative.

52. Planning instruments prepared by different local authorities frequently also take a different approach to common issues (for example earthworks, and with regional councils permitting what district plans restrict, and vice versa). This can arise despite the directives in Sections 75(3) and (4) of the Resource Management Act.
53. For these reasons, a move towards more integrated and consistent planning, adopting (as proposed):
 - a. A national planning template; and
 - b. Standardised terms, definitions and aspects of plan content (for standardised zones)

would be of considerable benefit not just for plan users, but also for consent authorities in processing, evaluating and determining resource consent applications, more efficiently and at reduced cost (in line with the intent of other aspects of the proposed reforms).

54. The issue of transition to the new framework and unitary plan model, and certainly within the timeframe proposed in the Discussion Document, is however problematic.
55. As the RMLA understands it this aspect of the proposed reforms would apply to not only future but existing planning instruments that, in many regions and districts within New Zealand, are currently tracking their way through the second generation cycle.
56. If this aspect of the reform is simply intended to 'staple plans together', as it has been described, then it would seem to serve little real purpose. Simply 'bolting' the various planning instruments currently in place (at any given stage of the planning cycle, and in whatever format they currently apply) would not reduce the degree of clutter, but simply put it all in one location.
57. If the intention were to make more substantive changes during the process of producing the single resource management plans, then, and particularly if not carefully managed, it is likely that there would be substantial transitional costs to those districts and regions (and their rate payers) that have already invested in the

current first schedule procedures for their second generation plans; and many are either now fully operative or well advanced through the appeal phase.

58. It is unclear what Section 32 requirements might apply to the process, and, whatever any additional requirements arise, it would be a significant burden for districts and regions currently in the middle of their second generation plan processes, to be to effectively required to "start again" (or initiate variations) to achieve consistency with a national template, and within five years of the reform legislation being enacted.
59. As they stand, those planning instruments may not be able to be readily or sensibly "retro-fitted" into a national template, to achieve the desired outcomes of this aspect of the reforms, and certainly within the proposed 'default' five year timeframe. That would be unless the Government was also proposing that there be some form of regulatory direction to amend such plans to the extent required (and without using the first schedule process), but with that in itself creating issues of unfairness and prejudice to those that have invested in the relevant processes thus far.
60. There would also need to be an appropriate process through which a national planning template is derived, and time for that to be completed. It would be essential for some form of public consultation and engagement with local authorities (and the resource management profession generally) to occur as part of that process, given its significance. The RMLA also notes that the Quality Planning website and Partners provide a substantial resource that could be drawn upon in terms of 'best practice' approaches to planning around key and significant resource management issues to inform a draft template for public input.
61. It is somewhat difficult to comment further on the template itself, until the nature and extent of it is more fully understood and the RMLA would welcome (and indeed requests) an opportunity for direct involvement in that initiative.
62. At this point, and for the above reasons, the RMLA recommends against creating an overly prescriptive national planning template which all existing (and any future completed) planning instruments tracking through (or about to commence) the first schedule procedures must be entirely tailored to within the proposed default five year period.
63. Instead, the objectives of this aspect of the reform would be best realised (at least in the complete sense) for future planning cycles, and it is noted that the confidence

and supply agreement does not specify a particular timeframe within which the goal of the unitary plan for each district must be achieved.

64. For example, a national template would be of most benefit to those areas within which local government amalgamation (or reorganisation) is being promoted, including by way of response to the Local Government Amendment Act 2012.
65. By way of a case in point, the combined unitary plan envisaged for Auckland following amalgamation would achieve the goal of reduced clutter and integration behind this aspect of the reform.
66. In that case however there is a clear understanding at the outset of the jurisdictional boundaries of the area to which the unitary plan would apply, and scope for integration between the regional policy statement aspects of the document through to the regional and district level regulation frameworks, from the outset.
67. Close attention will also need to be given to issues such as:
 - a. The relationship between the regulations of the "regional" and "district" rule components of the combined plan, and as they relate to the duties and restrictions in Sections 9 to 15 (which contain reverse presumptions as to what may proceed as of right, or only as expressly allowed by a rule in a regional plan);
 - b. The implications of Section 86B(3) of the Resource Management Act, as to when particular kinds of rules become operative.
68. Again, these issues are likely best addressed at the outset of the processes, and before populating the template at the commencement of the first schedule procedures, than for a 'retrofit' scenario.

Recommendations

69. The RMLA recommends the Ministry consider a staged approach and whereby:
 - a. Only a set of minimum requirements (particularly around technical matters, use of terminology, definitions and/ or standards for technical matters) are initially introduced, and which must be applied throughout the planning instruments covered by the template from the outset;

- b. Councils have an election to adopt any more substantive requirements (including "off the shelf" zones), but not be compelled to do so;
- c. There be an appropriate process of public consultation surrounding preparation of a national template, with input from bodies such as NZPI and RMLA, and drawing on existing resources such as the QP website;
- d. Within 10 years (the statutory timeframe for substantial review) full implementation of the national planning template framework and approach must be applied.

PROPOSAL 3.2.3 SINGLE RESOURCE MANAGEMENT PLANS VIA JOINT PROCESS WITH NARROWED APPEALS.

70. **Specific Matter:** The essence of this reform initiative is to incentivise the promulgation of combined resource management plans through enabling councils to access a streamlined plan development process with limited rights of appeal, where there is:
- a. one set of rules per area;
 - b. effective (assumed integrated) catchment management (eg, water, land); and
 - c. material efficiency cost gains would be achieved.
71. Where those criteria are achieved, the alternative plan making process would involve:
- a. an initial plan partnership agreement;
 - b. pre-notification engagement and collaboration;
 - c. an independent hearings panel; and
 - d. narrowed appeals to the Environment Court.
72. The stated aims of the reforms in this area are to:
- a. "front end" the plan development process encouraging upfront engagement with the 'hard decisions' prior to plan notification;

- b. facilitate integrated internally coherent plans that are more user friendly; and
 - c. lower longer term costs in plan development and review.
73. **Submission:** The three intended outcomes for this aspect of the reform are of course supported by the RMLA. Also supported is the concept of a "plan partnership agreement" of the nature and intent described on page 45 of the discussion document.
74. If collaboration is to work effectively such that the "hard decisions" are made at the plan development stage (rather than in appeals or consents), then broad engagement between all relevant stakeholder interests, and clear and effective ground rules will be essential.
75. This is also an area in which there would be a need for considerable "capacity development" within local authorities, and as well as for the benefit of the many and diverse iwi, local interest and environmental groups that would be expected to participate in that type of process.
76. The RMLA is aware of widespread dissatisfaction amongst its members as to the historic manner and level of local authority engagement with a relevant range of community interests (including industry, business, private or iwi/ environmental interest groups) under the current first schedule procedures. The RMLA considers this to be a substantial reason why so many parties currently feel compelled to rely upon the appeal stage of the process; to address concerns raised in submissions following notification, that are not resolved in the Council's decisions on those submissions.
77. The RMLA is also aware that collaborative processes within specific catchment contexts have left some parties dissatisfied, that their "voice has not been heard", and concerned that a greater emphasis or reliance on collaboration within plan making processes would come at the expense of an Environment Court appeal right (on the merits).
78. **The RMLA would be very much interested in partnering with the Ministry including through the hosting of a road show series of workshops within which the concept, structure and content of plan partnership agreements could be fleshed out, along with protocols and principles for effective and "best practice" collaboration.**

79. Beyond that, the RMLA has made its position clear relative to the means by which it considers "plan agility" can best be secured through a greater emphasis on collaboration at the outset of the process, and through more effective and efficient case management procedures for the Environment Court appeal phase at the conclusion of the process.
80. In August 2012, the RMLA submitted to the Minister (and published) a "Position Statement" of its National Committee (an unprecedented step), stating relative to the (then) current debate about whether full rights of appeal to the Environment Court on RMA planning documents should be retained as follows:

Rather than dispensing with any one or more phases of the current plan preparation process all together, the Ministry for the Environment should harness the range of constructive proposals for better public engagement at the outset of the plan review procedures (thereby reducing the need or likelihood of submitters exercising an appeal right), alongside the suggestions for continued improvement in the case management plan appeals, and as recently recounted by Acting Principal Environment Judge Newhook.

Adopting that approach, along with further incentives to promote a genuine commitment to collaborative processes suggested in this document, we consider that the imperatives of plan agility can be realised without raising the strong concerns held by many members about a potential reduction in the quality of planning outcomes arising through a removed or limited right or scope of appeal to the Environment Court.

81. As also stated in the Position Paper, the RMLA considers that through adopting best practice throughout the plan process from initial collaboration or consultation to the manner in which the Environment Court appeal phase is managed, a rough template timeframe of "2+2" (two years for consultation/ collaboration and Council decision, two years for Environment Court appeal phase) would be achievable. On that basis it is not necessary to completely abandon any one or more stages of the current process, and even if "timeliness" alone were the essential yard stick of good planning (which the RMLA rejects).
82. The Position Paper urged consideration of costs and efficiencies relative to the "whole life cycle" of the planning instrument in question, rather than confining attention to of the plan preparation process. Any costs savings through the process might be outweighed through unnecessary or inappropriate requirements for resource consents to be obtained at substantial cost to industry, tax and rate payers,

and arising through inappropriate plan provision requirements, consent thresholds and the like.

83. The Position Paper further stated, and regarding proposals for partial appeal rights (as proposed under the reforms), as follows:

The fact is that no alternative mechanism involving either a fully removed (High Court appeal only) or restricted right of appeal has been proposed that does not create its own perverse outcomes and incentives including:

- (a) *For Councils to adopt the consensus outcome, rather than as recommended by a hearing panel, simply to avoid appeals (LAWF 2 proposal, refer second Russell McVeagh paper);*
- (b) *Use of independent hearing panels to give necessary rigour to first instance hearing and decision, while a key pretext for reform is that local body politicians should be making the value judgement/policy decisions involved in RMA planning;*
- (c) *Use of independent hearing panels, with suitably qualified members, together with full rights of cross examination (essential if there is only one hearing) will act as a deterrent for lay submitters to become involved in the process;*
- (d) *Difficulties in determining on what basis leave to appeal should be granted (for example, where a matter of national significance is at stake, as also proposed in the LAWF 2 paper) or inevitably placing pressure on what is meant by an 'error of law';*
- (e) *Inevitability of increased litigation over issues of leave to appeal within whatever scope is retained.*

We do not consider these options effectively resolve the issues they create; let alone seek to address.

84. Overall, the RMLA considers that a greater emphasis on collaboration should not come at the expense of merit based Environment Court appeals, nor need it do so. As also stated in the Position Paper, and most simply put, with better collaboration or stakeholder engagement at the outset, submitters are less likely to see a need to resort to the appeal phase.³

³ Paragraph 45 of the position paper.

85. Any alternative process, including as proposed in the Discussion Document, ie appointment of an independent hearings panel to make recommendations, and an ability for the council to reject those recommendations, raises substantially problematic issues of procedural fairness, practicability and timing.
86. These issues were addressed by the RMLA relative to a similar reform process promoted for the Auckland unitary plan.
87. As stated in the RMLA's submission on this aspect of the 2012 Bill:
164. *Under the Hearing proposed for the Auckland Combined Plan however, and which may extend over three years, the Hearings Panel may hear from many hundreds if not thousands of witnesses and develop a collective experience or understanding of the issues being addressed; their relative significance, and with the benefit of any or all witnesses being tested through cross examination, along with the outputs of expert conferencing and alternative dispute resolution.*
165. *It is of serious concern that the Council (as but one party to the process, albeit the proponent of the plan) could, and within a 20 working day period, displace the recommendations made by the Hearings Panel without having heard any of that evidence, or having had the benefit of the combined experience and (including) expert opinion presented to it over the full Hearing process.*
166. *It was for this type of reason (and concern) that the High Court intervened in the Whangamata Marina Society case, finding that the Minister's discretion was confined (to reject a recommendation of the Environment Court) given it had not heard the witnesses or had an opportunity to test the quality of the evidence, and that it would be irrational for the Minister to rely on evidence which has been tested and rejected by the Environment Court, such that the Minister could only differ on the weight to be given to the relevant statutory criteria, applying the factual conclusions the Court itself reached.*
167. *Bearing in mind the confinement of appeal rights (to cases where the Council does reject the Hearing Panel's recommendations) the upshot of the process for submitters would be that they may have succeeded in their objectives of persuading the Hearings Panel regarding a particular issue, only to be forced to appeal based on a recommendation being rejected by the Council, without it having heard their case.*

168. *The RMLA recommends that this aspect of the procedure be seriously reconsidered, including through requiring that if the Council does not accept a Hearings Panel recommendation, it must appeal that recommendation to the Environment Court itself.*
88. That concern and recommendation applies equally relative to the proposed reforms outlined in the Discussion Document (council power to reject hearing panel recommendations).
89. That aside, and if the model is to be adopted, it would of course be vital that there be full rights of cross-examination of all evidence presented to the independent hearing commissioners. This is especially so with the proposal that even where there is a right of appeal to the Environment Court (on the basis that the council has rejected the independent hearings panel's recommendations) that hearing would be by way of "rehearing".
90. The Discussion Document states that the Environment Court could rehear evidence *where appropriate*, but the traditional approach for an appeal by way of rehearing is to conduct the appeal on the basis of the record of the decision making body below (*Hall v Chief Executive of Land Information New Zealand CIV-2005-404-007222*).
91. If it is proposed that the Environment Court would have the ability to rehear new evidence, that would comprise a departure from the conventional understanding of what comprises an appeal by way of rehearing.
92. The criteria for any such reconsideration of evidence would undoubtedly be of significant interest to resource management practitioners and participants, and strongly contested in their application once confirmed.
93. Overall, and for these reasons, the RMLA opposes the proposal that Environment Court appeals occur by way of rehearing, rather than the present *de novo* approach.
94. These points aside, and referring to the submissions above (as to Section 3.2.1 of the Discussion Document) , there is much to support in the notion of an integrated unitary plan where the local authority boundary is clearly defined in advance, and through which an integrated planning framework can be established (from regional policy provisions down to the regulatory level, and at the outset). This is where the national template concept would have significant benefit.

95. The Ministry would however need to carefully consider the relationship between this proposed aspect of the reforms, and the proposal in the water reform discussion document, to set a collaborative framework for the implementation of the NPSFM relative to a proposed National Objectives Framework.
96. The RMLA is not at all clear as to how catchment based collaboratively derived planning frameworks in that context would sit within the type of single resource management plans proposed in this discussion document, and which would only be enabled (that is, access to the alternative streamline development process) where there is one set of rules per area.
97. The concept of the alternative "streamlined plan development process" being an option (to the current First Schedule process) is supported, noting as the RMLA did in its Position Paper, that there is nothing to stop a collaborative approach being employed under the existing First Schedule procedures themselves.
98. The RMLA seriously questions whether it is realistic to expect that the alternative path could in fact produce a more streamlined outcome that brings material efficiency/ cost gains for a plan comprising both regional and territorial authority dimensions, and across an entire district/ region or unitary authority, alongside (or encompassing) the outputs of the implementation of the proposed National Objectives Framework for Freshwater Management.

Recommendations

99. The RMLA supports the intent of the reform to combine and integrate planning documents, and provide an additional optional path to plan preparation. However, it is submitted that the incentives or criteria through which access to the alternative process are proposed to be made available need further consideration, and as to whether they are practicable or desirable based on a further cost/benefit analysis of the reforms in detail.
100. First and foremost, the RMLA opposes any option or alternative process that dispenses with (or narrows) rights of appeal to the Environment Court and strongly recommends this aspect of the reforms be abandoned.
101. It seeks to engage with the Ministry to promote best practice in collaboration prior to plan notification, so that the incentive or perceived need to appeal is reduced.

Standard Plan Appeals – Proposal 3.2.4

102. **Specific matter:** The Discussion Document proposes to provide additional tools for the Environment Court to allow for faster resolution of appeals. Proposals in the Discussion Document include to:
- a. Increase the Environment Court's existing power to enforce agreed timeframes, for example the time period for exchanging evidence.
 - b. Strengthen the existing provisions to require parties to undertake alternative dispute resolution.
 - c. Make any law changes required to deliver the full potential benefits of electronic case management.
103. **Submission:** The RMLA supports proposals to empower the faster resolution of Environment Court appeals.
104. Acting Principal Environment Court Judge Newhook prepared a discussion paper in July 2012 which discussed the Court's experience with various plan appeal processes, and suggested a number of potential improvements to case management techniques.⁴ Judge Newhook's papers also suggest various improvements which could be made to the case management of appeals.
105. Following that, in August 2012, the RMLA published a "Position Statement" of its National Committee which focussed on the (then) debate about whether full rights of appeal to the Environment Court on RMA planning documents should be retained. As part of that paper, the RMLA supported continued improvement in the case management of appeals.
106. In that context, the RMLA supports these proposals as identified in the Discussion Document.

CONSENTING – PROPOSALS 3.3.1, 3.3.2, 3.3.3, 3.3.4, 3.3.5, 3.3.7, 3.3.8

107. **Specific matter:** The Discussion Document proposes a new 10 working-day time limit for processing straight-forward, non-notified consents. The steps to reach a

⁴ See above n 1; *Current and Recent Past Practice of the Environment Court Concerning Appeals on Proposed Plans and Policy Statements* (Acting Principal Environment Judge Newhook, 31 July 2012). See <http://www.justice.govt.nz/courts/environment-court/annual-reports-of-the-registrar>

consent decision would be prescribed in the RMA, with the criteria for applications prescribed by regulations.

108. **Submission:** The RMLA supports these changes, subject to reviewing detailed wording, as, in general, more streamlined RMA processes are desirable. However we record that this proposal appears to be out of step with the Resource Management Reform Bill, which proposes to amend the RMA to allow councils additional time in which to decide whether to notify consent applications (20 days rather than 10).
109. **Recommendations:** That the proposed 10 working-day time limit for processing straight-forward, non-notified consents be adopted. Consideration will need to be given to how this fits with the 2012 Bill that proposed 20 working days for a council to decide whether to notify.
110. **Specific matter:** The Discussion Document proposes to allow "approved exemptions" for activities involving only technical or minor rule breaches. Consent authorities will be given discretion to decide, on a case-by-case basis, whether resource consent is required, or whether an activity which breaches the rules in only a minor or technical way should be a "deemed permitted" activity". The Discussion Document sets out some examples of situations which might allow the grant of such an exemption, including when the environment is affected to "a very minor degree or less" or when plan objectives and policies "are not compromised", and proposes that the relevant thresholds be set in regulations.
111. **Submission:** The RMLA supports the intention to streamline consenting requirements for minor or technical rule breaches, but queries whether this proposal might in fact result in additional uncertainty given that some judgment will inevitably be required when granting an exemption, otherwise the permitted standard will effectively be raised.
112. A degree of analysis (even relative to any threshold regulations) will be required by councils to reach a conclusion that the threshold tests for granting an approved exemption are met in each case, and any decision made would remain potentially susceptible to judicial review. As a result, councils might take an overly cautious approach and the exemption process could be under-utilised.

113. Additionally, at a practical level, the material submitted by an applicant to satisfy the threshold tests, and the resources necessary for a council to make a valid decision to grant an approved exemption, are likely to be similar to that required when seeking consent for a simple development control modification. It may be more straightforward to utilise the development control modification or controlled activity consent process, in combination with the new 10 working-day process proposed for processing straight-forward, non-notified consents, to achieve a similar outcome for allowing very minor breaches. The RMLA is aware, however, that development control modifications in some existing plans fall to be assessed as fully discretionary activities. A consistent, less onerous, category for development control modifications might usefully be considered as part of the development of the single national plan template.

114. **Recommendations:** That further consideration be given as to whether, if the proposed 10 working-day time limit for processing straight-forward, non-notified consents is adopted, whether exemptions for minor rule breaches is necessary, particularly given that similar information requirements may be required as for a "10-day" consent.

115. **Specific matter:** The Discussion Document proposes that regulations be enacted establishing non-notification as a nationwide standard for certain activities.

116. **Submission/ Recommendation:** The RMLA supports this proposal, subject to reviewing detailed wording in a Bill, as more streamlined processes in general are supported. In addition to providing more certainty in any particular case, this proposal should encourage national consistency and will reduce uncertainty for applicants operating in multiple regions.

117. **Specific matter:** The Discussion Document proposes that consent conditions be limited to only those matters directly related to the reason or reasons that consent is required (although it also refers to conditions being imposed if they directly relate to "the adverse environmental effects of the proposed activity", which is wider).

118. **Submission:** The RMLA supports limiting the scope of consent conditions where appropriate and where there will be no adverse impact on achieving quality resource consent outcomes. In general, the proposal should reduce costs, eg the cost of compliance with a suite of conditions, or the need to challenge inappropriate conditions, some of which may have been imposed simply for completeness or out of

an abundance of caution. It should also reduce uncertainty, as the extent of conditions imposed can have implications for the ability of an applicant to exercise its consent, or the time in which it is possible to do so.

119. However, the RMLA is concerned that some plans use certain matters as a trigger for wider assessment. For example, traffic generation can be used as a trigger for wider assessment (on the basis that a major traffic generator is likely to have other effects as well). In those cases, it would be inappropriate to limit the imposition of conditions to traffic matters only. It is also possible that consent authorities might respond to amendments giving effect to this proposal by applying discretionary activity status for a wider range of activities, or by extending the matters on which they retain discretion where a restricted discretionary status is used, in order to preserve a broader ability to impose conditions. It may be that the "template plans" will assist in addressing both of these potential issues.
120. It may be useful if specific guidance is developed and given to councils as to when controlled and restricted activity statuses should be used, rather than full discretionary status; and what matters control or discretion should be reserved over. This could achieve the same outcome in respect of reducing the number of potential consent conditions, and could be considered as part of the preparation of a single national plan template. Alternatively, it may be appropriate for changes not to take effect until councils have had a chance to order their plans in anticipation of it, ie, through the national template process.
121. **Recommendation:** That a mechanism be introduced that requires consent conditions be limited to only those matters directly related to the reason or reasons that consent is required, provided that an exemption can be provided where a particular effect, like traffic, is deliberately used as a trigger for wider assessment. Consideration may be usefully given to addressing this issue in the development of any national template plan.
122. **Specific matter:** The Discussion Document proposes that the scope of submissions and third party appeals be limited to the reasons the consent application was notified and the environmental effects related to those reasons.
123. **Submission:** The RMLA supports limiting the scope of submissions and third party appeals to the reasons the consent application was notified. The consent process can be unnecessarily prolonged or expanded where a submitter (often a submitter

who is opposed to a particular proposal in its entirety) submits on effects beyond the direct impacts of the proposal on that particular submitter, which in turn can result in extensive delays and additional litigation costs as the matter proceeds on appeal. That said, a similar issue could arise to that identified above in the submission relating to limiting conditions, where an application might be notified because of breach of a "threshold standard" like traffic, where that signals a need to consider a wider range of issues. In those cases, while traffic might be an issue, so too might other aspects of the activity, and it may be that a submitter should not be precluded from raising a legitimate environmental effect.

124. Whatever the change, it may be appropriate to ensure that it aligns with any changes to the scope for imposing conditions - if a consent authority can impose conditions that relate to effects on third parties, then it would seem sensible for it to be able to hear submissions from those third parties. Again, a transitional provision may be required to enable councils to order their plans in anticipation of this/proceed through the national template process (with template guidance).
125. In addition to the proposal in the Discussion Document, the RMLA suggests that further amendments should be considered by the Government to section 96 of the RMA to provide clearer guidance on the format and content of submissions; for example, it should be clear in an original submission exactly which effects are being raised by a submitter (ie, effects associated with the operation of a particular intersection should be specified, rather than just "traffic effects"), and the basis on which a proposal is supported or opposed. This will significantly streamline processes, as submissions are often prepared on a very generic basis, resulting in applicants going to great lengths to address all the effects raised in evidence, only to have very narrow aspects raised by the submitter when appearing at the initial council hearing or on appeal. Alternatively, it can sometimes be that a submitter will focus on certain issues only at the council hearing, and then seek to raise wide ranging or other matters at the appeal stage, all relying on a generally cast initial submission.
126. **Recommendation:** That a mechanism be introduced limiting the scope of submissions and third party appeals to the reasons the consent application was notified, provided that an exemption can be provided where a particular effect, like traffic, is deliberately used as a trigger for wider assessment. Consideration should also be given to other changes that could be made to the submission process matters

that would streamline the process, such as restricting submitters to raising only matters that are referred to in their submissions.

127. **Specific matter:** The Discussion Document proposes that councils be required to set fixed charges for certain types of resource consents, depending on the type of activity, zone, level of non-compliance and/or activity status. This fixed charge would represent the full and final costs for the consent application. Where fixed charges are not required, councils will need to estimate the additional charges to the applicant in advance of the application being processed.
128. **Submission:** The RMLA supports the increased transparency and certainty for applicants that will be provided by this proposal. This proposal should also encourage greater national consistency in respect of fees charged.
129. The RMLA notes some concern this proposal may encourage councils to cross-subsidise the costs associated with various applications, depending on whether the size of the application proposal and the perceived ability of an applicant to bear costs (in a similar way that business differentials are applied to the payment of rates). The RMLA is opposed to applicants for larger proposals having to subsidise fees for minor consent processes. The fees charged by councils must always be equitable and directly related to the costs incurred in processing an application.
130. **Recommendation:** That additional certainty be provided in fixing charges for consent applications, provided that some applicants do not end up subsidising other applicants because of how the schedules of charges are developed and applied.
131. **Specific matter:** Memorandum accounts are a way of disclosing the accumulated balance of revenue and expenses incurred in the provision of certain outputs (or services) over a period. The Discussion Document proposes a new requirement for councils to publish memorandum accounts specifically for their consenting activities, in order to increase transparency around charging and to provide councils with a greater understanding of how their consent processing costs measure up against their charges.
132. **Submission/ Recommendation:** The RMLA supports this proposal, as it will allow councils to demonstrate the invoicing of equitable consent processing fees that are directly related to the costs of processing a particular application, whilst increasing accountability to ratepayers.

Reducing EPA Costs – Proposal 3.3.11

133. A proposal of national significance is currently directed to a Board of Inquiry for a decision, but the costs of the Board of Inquiry process are often extremely high. To address this issue, the Discussion Document proposes five changes, which are addressed in turn below.

134. **Specific matter:** The Discussion Document suggests that Boards of Inquiry be required to have regard to cost-effective processes and to the advice of the Environmental Protection Authority ("EPA") on administrative matters, when determining their procedures to reduce costs.

135. **Submission/ Recommendation:** Measures intended to appropriately reduce the often significant costs associated with the Board of Inquiry process are supported. The RMLA also suggests Boards of Inquiry be required to provide cost estimates to applicants in advance of the process, and to conform to those estimates unless it can be established that unanticipated costs (eg associated with longer sitting time) have arisen throughout the process.

136. **Specific matter:** The Discussion Document proposes that parties should be provided with documents electronically in the first instance, with hard copies made available on request.

137. **Submission/ Recommendation:** The RMLA supports this proposal, but considers that documents need *only* be provided electronically, unless the Board is satisfied that a person specifically requires hard copies (for example, due to not having access to a computer). The supply of hard copies of the comprehensive documents required for Board of Inquiry hearings to large numbers of submitters is extremely costly and many submitters seek to be provided with hard copies simply because they are entitled to request them. When applied across several hundred submitters, these requests can lead to significant costs for applicants.

138. **Specific Matter:** The Discussion Document proposes that the draft decision stage be deleted, or alternatively the period for commenting on the draft decision could be reduced from 20 working days to 10 working days.

139. **Submission/ Recommendation:** The RMLA strongly opposes this proposal. The draft decision stage is critical in order to achieve the best quality Board of Inquiry decisions. The full existing timeframe for comments is usually required, particularly

where the application deals with highly technical matters and the proposal (if granted at the draft stage) is subject to hundreds of conditions. 20 working days is required ensure that these can be carefully checked and clarified where necessary (often this is required to be undertaken by a large number of experts across a number of disciplines) as it is important to ensure that the Board of Inquiry decisions are completely accurate once released.

140. **Specific Matter:** The Discussion Document proposes to enable the EPA to provide planning advice to a Board of Inquiry, if requested.

141. **Submission/ Recommendation:** The RMLA generally supports this proposal. The EPA has planning expertise, and will usually have a planner allocated as part of the processing team for any application. Should a Board require planning advice, then that could then come from the EPA, rather than the Board having to appoint (at an applicant's cost) another planning expert. That said, the parties to the proceedings will have expert planners appearing before the Board and all those witnesses have duties to the Board. The RMLA would expect it to be rare for a Board to need additional expert planning advice in those circumstances.

142. **Specific Matter:** The Discussion Document proposes that any consent process be stopped if associated charges for the process that have been incurred to date have not been paid in full. It is also proposed to give the EPA the power to recover any such unpaid costs as a debt to the EPA.

143. **Submission/ Recommendation:** The RMLA opposes this proposal. The pressures of time and cost during a Board of Inquiry hearing are already significant, and to allow the process be stopped at any time for purely administrative reasons would place additional pressure on the applicant, submitters, and the Board. This is not a measure currently in place in respect of Environment Court or council processes and there is no justification for introducing it in respect of Board hearings only.

144. In addition, applicants should be entitled to use the separate costs objection process, prior to payment, where they consider the costs invoiced to be unjustifiably high, without threat of having the entire application process brought to a halt and additional holding costs incurred.

CHANGING CONSENT APPEALS FROM *DE NOVO* TO REHEARING – PROPOSAL 3.3.6

145. **Specific Matter:** The discussion document seeks feedback on the merits and risks of narrowing consent appeals as proposed for plan appeals (and as discussed earlier in these submissions), ie such that the Environment Court appeal would be way of rehearing rather than *de novo*. Also mooted is the possibility of a tribunal style resolution for minor matters.
146. **Submission:** A key consideration is why there might need to be a change from the Environment Court hearing appeals *de novo*, to by way of re-hearing. There appears to be an assumption that this will streamline the Environment Court appeals process.
147. The RMLA has significant reservations as to whether that would in fact be the case, but also considers that the change would require an even more fundamental change to the way by which hearings at first instance at the council level would need to be conducted. That change would affect a much greater number of people (both applicants, submitters and councils), as it would have to apply to all hearings at that first stage.
148. This is because an appeal by "rehearing" proceeds on the basis of the "record" of the proceeding from the tribunal or court being appealed from. Without leave, there is no production of fresh, or even updated evidence. There is no cross examination, the appeal court undertaking its evaluation of which witnesses to prefer based on their original evidence and record of cross examination.
149. Accordingly, if resource consent appeals were to be by way of "rehearing" rather than *de novo*, it would critical that the first instance hearing has full rights of cross-examination (for all parties), and that the proceedings be transcribed in full. Any application for leave to the Environment Court to produce fresh evidence would no doubt be strongly contested, and would introduce the issues addressed earlier in these submissions regarding the criteria by which such an application would be determined.
150. So, if appeals were to be by way of rehearing, that would in reality necessitate first instance council hearings being of 'Environment Court rigor' with cross examination, transcription, etc. It is hard to see how this would streamline matters, given that only a very small percentage of applications are actually appealed and go to an

Environment Court hearing. There is also currently an ability for an applicant to request direct referral (with that ability enhanced through the 2012 amendment bill).

151. It is also important to recognise that the matters before the Environment Court differ from those that proceed to other appellate courts by way of rehearing. For example:
- a. The Environment Court is a specialist court tasked with determining whether a proposal promotes the sustainable management of natural and physical resources. Resource management proceedings are a type of public law proceeding, with the Environment Court required to apply an overall broad judgement, considering a range of matters, on which detailed technical evidence is routinely put forward.
 - b. Most resource management cases are about the future, and making predictions about the likelihood of effects that are yet to occur. This is very different to the evidence tendered in most other jurisdictions, which is usually centred on establishing what has happened in the past. The weight to be given to competing experts in resolving what are likely outcomes for the future requires the Court to hear from the experts directly, including through the process of cross examination, and questioning by the Court. When matters are finely balanced, relying on a transcript to decide which expert to prefer would further complicate an already difficult task.
 - c. In addition, an application proposal often evolves throughout the course of a hearing process (from council to Court), in response to submissions, suggestions from council officers, or matters raised by expert witnesses or by council decision makers or the Court. Evidence at the Environment Court Stage is often revised to take into account amendments to the proposal, or more focused on issues that have emerged through the course of the proceedings.
 - d. In addition, the proposal to change consent appeals from de novo to rehearing does not take into consideration the nature of the "first instance" decisions by councils which are the subject of Environment Court appeals. In resource management processes, community and stakeholder participation is a fundamental tenet, and councils, not permanently constituted judicial bodies (as with in other jurisdictions), make the initial decisions on consent applications. Evidence is not tested by cross-examination. Nor is there any

transcript record of the original hearings, which would be able to be considered by the Court on a rehearing. While the use of independent commissioners can provide some additional rigour, that is no substitute for a formal judicial process.

152. For all these reasons, if appeals to the Environment Court were to be limited to a rehearing, the RMLA considers that there must be appropriate testing of evidence (including cross-examination) in the first instance. The testing of evidence will protect the rights of those directly affected by consent decisions and ensure robust RMA outcomes. However cross-examination at council hearings would place a significant burden on all participants in that process, by making the process more expensive and time-consuming. For example a process with numerous submitters, each seeking to cross-examine the others witnesses, would exponentially increase the time and costs of a first instance hearing.
153. This is particularly so as, if an appeal is only to be by way of rehearing, applicants and submitters would need to ensure that their evidence at the first instance hearing was essentially "Environment Court quality", as there would be little opportunity to present additional evidence on appeal (with any applications for fresh evidence likely to be highly contested).
154. Overall, the RMLA considers that the effect of this proposal would be to increase the cost and formality of all first instance hearings, whilst limiting the fluidity of some applications to respond to issues raised throughout the appeal process.
155. The RMLA is therefore opposed to changing consent appeals from *de novo* to rehearing as the only option. A possible approach (although not one preferred by the RMLA) might be to provide for an election by the applicant to proceed by way of rehearing on appeal. An applicant might, for example, elect to advance in that way if they were satisfied with the manner in which factual information was produced at first instance. This would of course still however necessitate the keeping of a full transcript of the first instance hearing, and upon which the rehearing could proceed, so an applicant might need to request that at the outset in order to preserve the opportunity to proceed by way of rehearing. Given the availability of direct referral, providing such a further alternative may be unnecessary.
156. **Recommendation:** The RMLA recommends that Environment Court appeals remain *de novo*, rather than proceeding by way of rehearing, given the significant burden that

will transfer to all first instance hearings if a "rehearing" process is to be workable. Some consideration could be given to letting an applicant elect to proceed by way of rehearing, but there would be procedural difficulties in adopting that approach, and it may achieve little savings over the direct referral process, which is already provided for.

PROPOSAL: A LOWER COST TRIBUNAL-STYLE RESOLUTION PROCESS

157. **Specific matter:** The Discussion Document proposes the establishment of a lower cost tribunal-style resolution process for minor matters.

158. **Submission/ Recommendation:** The RMLA is unconvinced as to the merits of the creation of yet another body with decision-making powers under the RMA. Councils and the Environment Court are currently empowered to direct mediation or other alternate dispute resolution measures to resolve minor matters. Accordingly, the RMLA sees no role for an additional body to deal with minor matters, and considers that this proposal does not reflect the overall intention to streamline and simplify the RMA.

159. As an alternative, the RMLA considers that improvements could usefully be made to the existing powers of the Environment Court to deal with minor matters more efficiently. In particular, the RMLA suggests that Environment Judges or Commissioners be empowered to make decisions on minor matters on the papers and/or sitting alone. Alternatively, "Associate Judges", similar to those used in the High Court, could be appointed to deal with minor applications, consent orders, costs objections, or initial case management directions. If additional resources were applied in this way, the Court's substantive case-load could be significantly reduced, without the need for an additional tribunal to be established.

ALLOWING A SPECIFIED CROWN BODY TO PROCESS SOME TYPES OF CONSENT – PROPOSAL 3.3.9

160. **Specific matter:** The Discussion Document proposes that either the call-in provisions be expanded, or new legislation be developed to enable the Minister to designate nationally important issues, such as the availability of land for housing, to be eligible for an alternative consenting process in specified areas or circumstances. A dedicated Board of Inquiry, or Crown body, would process the consent applications within a three to four month timeframe.

161. **Submission/ Recommendation:** The RMLA understands the desire to have greater nationally consistency. However, it opposes the creation of an additional decision making body in the RMA space as it seems contrary to the overall streamlining objective of the reforms.
162. Rather, the RMLA considers that the same outcome could be achieved by expanding the existing national significance criteria in section 142 to include these types of considerations/proposals, such as the availability of land for housing. Proponents of these proposals would then have all of the options available to other proposals of national significance open to them, such as the Board of Inquiry process or direct referral to the Environment Court.
163. If a Crown body were adopted, the RMLA queries the proposed timeframes for decision-making by that body. There are already significant challenges with the nine month timeframe for Board of Inquiry proceedings. For contentious matters, it is difficult to imagine how the new body could complete the hearing process within a three or four month timeframe.

EFFECTIVE AND MEANINGFUL IWI/MĀORI PARTICIPATION – PROPOSAL 3.5

164. **Specific matter:** Clarifying the roles of iwi/Maori in plan making processes and improving existing tools in the RMA.
165. **Submission:** The RMLA supports measures to provide greater transparency of solutions and measures that are put in place to promote iwi/Maori participation.
166. While we did not have specific comment on the proposals in respect of effective and meaningful Maori participation, we noted that as practitioners in our experience, costs are a key barrier in Maori (and Iwi) participation. Linkages with the discussion document on water reform will be important for any reforms in this area. If joint plans are developed then the processes for iwi/Maori participation will need to be clear, particularly if different processes are proposed for water resource management.

A handwritten signature in black ink, appearing to read 'Blair Dickie', with a long horizontal flourish extending to the right.

Signature of Blair Dickie (President) on behalf of the Resource Management Law Association

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