Resource Management Law Association of New Zealand Inc.

POSITION STATEMENT OF THE NATIONAL COMMITTEE OF THE RESOURCE MANAGEMENT LAW ASSOCIATION OF NEW ZEALAND INCORPORATED ("**RMLA**")

PLAN AGILITY AND FIRST SCHEDULE REFORM

Purpose

1. The purpose of this paper is to state the position of the National Committee of the RMLA in the context of the current debate about whether full rights of appeal to the Environment Court on RMA planning documents should be retained as part of potential reform initiatives aimed at improving the responsiveness of planning instruments to changing circumstances (plan agility).

2. This position statement has been prepared with reference to a number of recent contributions including papers prepared by the Local Government sector, Land and Water Forum, and by the Environment Court itself in the context of a potential "bespoke" procedure for promulgation of the Auckland Unitary Plan.

3. The National Committee of the RMLA is taking this unprecedented step as a reflection of how significant it sees the issues involved to be; not just for the professions which the Association represent, but relative to the core objectives of the RMLA, and specifically that of promoting resource management processes that produce high quality environmental outcomes.

Executive Summary

4. Rather than dispensing with any one or more phases of the current plan preparation process altogether, 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 of plan appeals, and as recently recounted by Acting Principal Environment Judge Newhook.

5. 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.

Introduction

6. The core objectives of the RMLA are to promote, within New Zealand:

- an understanding of resource management law and its interpretation in a multi-disciplinary framework;
- excellence in resource management policy and practice; and
- resource management processes which are legally sound, effective and efficient and which produce high quality environmental outcomes.

7. The RMLA therefore has a substantial interest in the current debate around improving the timeliness of resource management plan and policy statement preparation, and in order to ensure that they remain responsive and relevant in dynamic social, economic and environmental circumstances. This issue or topic is often referenced as one of 'plan agility'.

8. The RMLA has previously suggested a framework for alternative collaborative plan making processes, at the invitation of the Minister for the Environment, against the background of information and opinion then available.[1]

9. That paper set out options for an alternative Schedule 1 procedure. The options included a reduced scope or degree of reliance on full rights of appeal to the Environment Court on planning instruments, but by no means recommended dispensing with such rights all together.

10. That paper also recorded at the outset, that given the diverse membership of the RMLA, the views expressed should not be considered as representative. It stated there may well be members that have a different view.

11. Now, some two years on, we have the benefit of a number of other contributions on this topic including:

- *Improving RMA Policy Making: Prescription for Reform* (Dormer and Payne, October 2011) ("**Dormer and Payne paper**").

[1] Alternative Collaborative Plan Making Processes – November 2010.

- *Enhanced Policy Agility – Proposed Reform of the Resource Management Act* (Local Government New Zealand Regional Sector Group, December 2011) ("**LGNZ paper**").

- *A Better Approach to Improving the RMA Plan Process* (Russell McVeagh, 21 March 2012).

- Second Report of the Land and Water Forum (*Setting Limits for Water Quality and Quantity Fresh Water Policy and Plan Making through Collaboration*) – April 2012 ("**LAWF 2 report**").

- *Faster, Higher, Stronger – Or Just Wrong*? (response to that paper from Russell McVeagh, July 2012).

- *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).

- Letter from President of New Zealand Law Society – Resource Management Act 1991 – appeals (16 August 2012).

- *Concerning Resolution of Large Groups of Plan Appeals – Think Piece* (Acting Principal Environment Judge Newhook, 20 August 2012).

12. We are also aware of proposals in relation to a specific procedure which the Auckland Council is requesting to be established through legislation for the purpose of the proposed Auckland Unitary Plan.

13. Out of concern at the significance of the issues and reform options discussed in these papers for future resource management decision making (a topic which sits at the core of the RMLA's objectives as set out above), the National Committee has decided that it is necessary to express a definitive statement of its position.

14. This is not a step that has precedent during the tenure of any of the current membership of the Committee; reflection again of how significant we see the issues involved to be, and of the level of concern held about some of the reform options being proposed.

15. Particular concern in that regard is held about proposals for wholesale removal of rights of appeal to the Environment Court on the merits of planning instruments (policy statements and plans) prepared under RMA.

16. We consider that the range of perspectives expressed in the contributions referenced above provides a representative platform against which this position about that concern can be formulated and expressed.

17. Further, that the previously consistent approach of not expressing a definitive view or policy position on proposed reform initiatives within the RLMA purview, is not tenable in this instance.

Statement of Position

18. The position the National Committee wishes to expressly place on the record about the issue of plan agility and the reform options being proposed regarding procedures for plan preparation is as follows.

19. We accept the proposition put in the LGNZ paper[2] that:

> "Our future economic performance and quality of life depends upon continued and increasingly intense use of our natural and physical resources.
>
> The challenges of sustaining our environment, increasing demand for more intensive use of resources, and increasing competition between potential uses for our natural resources are reflected in complex issues across our diverse eco systems and communities."

20. We also accept as essential that we undertake plan preparation processes both faster *and* smarter to ensure that policies and plans are put in place in time to actually deal with the issues they seek to confront, and before they have progressed too far (or even irreversibly) in the direction sought to be corrected.

Quality is paramount

21. We further consider, however, that timely plan and policy statement preparation to achieve "plan agility" should not be at the expense of quality planning outcomes.

22. Any reform would become a self defeating exercise if the quality of the end product suffers to such an extent that greater overall social, economic or indeed environmental costs are imposed through inferior planning outcomes, than are saved through more timely preparation.

23. Put another way, it is not just the plan preparation phase that should be considered; but the position over the whole life cycle of the planning instrument itself.

24. To take but one example, a net overall loss position would very likely result from unnecessary or inappropriate requirements for resource consent processes to be entered into at substantial cost to industry, tax and ratepayers. Conversely, less than necessary or appropriate consent thresholds may result in a potential cost to the environment.

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25. Such costs and inefficiencies need to be considered alongside the costs of the current system (as associated with delays, and opportunity costs for those participating in the processes) stressed in the LGNZ [3] and Dormer/ Payne[4] papers.

26. At the (we consider all important) qualitative level, the LGNZ paper maintains that the track record of local authorities in defending policy decisions is good, and that many Councils have successfully defended every policy statement or plan appeal that has proceeded to appeal.[5]

27. In our opinion, the Russell McVeagh paper (and notably through discussion of the very examples relied on by Dormer and Payne; Variations 2, 5 and 6 to the Waikato Regional Plan) correctly confirms that the direct opposite can also apply, and that substantial resource management benefit around some of the most complex issues faced under RMA (including those where the need for plan agility is most profound) has resulted from recourse to the Environment Court.

28. We challenge the proposition in the LGNZ paper that it is "not possible"[6] to put in place regional and local policy statements and plans fast enough within the complex and rapidly changing resource management issues faced by communities, while retaining a full right of appeal (on the merits) to the Environment Court.

29. We consider that there is a real prospect that the LGNZ goal of a planning instrument being operative within one term of local government[7] could be achieved through progressive adoption and refinement of the best practice procedures that continue to be developed by the Environment Court (refer paper from Acting Principal Environment Judge Newhook referenced above), and at least on a rough template of "2+2" (two years for consultation/ collaboration and Council decision, two years for Environment Court appeal phase).

30. We do not therefore consider it necessary to completely abandon any one or more stages of the current procedures, and even if 'timeliness' alone were the essential yardstick of good planning (which we reject).

The role and place of collaboration

31. There is a degree of consensus between all of the various perspectives and alternative procedures addressed in the papers identified above, that a greater degree of collaboration at the outset of the plan and policy statement preparation processes would be beneficial. We agree.

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32. Useful contributions are made in both the LAWF 2 report and in the Russell McVeagh papers (as well as in the previous RMLA paper) as to what the initial collaboration procedures might involve, and that we consider could be accommodated within the existing legislation, without significant (if any) necessary amendment to the First Schedule.

33. Our concern at the present point, however, is that collaboration is a relatively new procedure in the New Zealand resource management context at least. We are certainly not yet at the point at which it would be appropriate to abandon the existing 'as of right' merits based appeal phase, simply to incentivise greater (if not complete) reliance upon it.[8]

34. There is a "leap of faith" underpinning the recommendations in the LAWF 2 report, given the relatively untested degree of experience and success rate for collaborative processes in a resource management context.

35. We are aware of advice to the effect that considerable capacity enhancement within relevant professional disciplines will need to be achieved if this 'paradigm shift' is to be effective. This is an area of 'capacity development' that the RMLA would be very keen to partner with the Ministry in progressing within the profession.

36. We note that the LAWF process itself has taken some three years to determine a high level framework for management of fresh water, but on this key issue (rights of appeal) no consensus has yet emerged. The time that the LAWF has taken to arrive at its conclusions on water related issues suggests that a collaborative process for all issues associated with an entire planning instrument could well take longer than current Schedule 1 processes.

37. We further note concerns expressed in the second Russell McVeagh paper at the possibility of certain parties dominating that process, and would observe that a degree of coercion is likely inherent in any objective of obtaining complete consensus.

38. We consider that the objective of collaboration should not necessarily be consensus, but rather a substantial reduction or narrowing of the range of potential disagreement between the competing perspectives and interests involved in the process.

39. An "80/20" model could be applied; that is, if 80% of participants are satisfied with 80% of the product of a planning instrument prior to notification, the procedure would have been well worthwhile. But there is likely to be sufficient resource management merit in the remaining 20% of issues (or perspectives) being more fully tested and as against the purpose and principles of the RMA. That was the experience regarding Variation 5 to Waikato Regional Plan, and where the Environment Court added substantial value to the outputs despite a considerable degree of public and stakeholder engagement prior to notification.

[8] As recommended in the LAWF 2 report, refer paragraphs 122, 126 and 132 (k).

40. There is also a risk that, coercion or otherwise, a complete consensus product does not represent (in section 32 terms) the most efficient, effective or appropriate means of achieving the purpose of the Act – any compromise is not necessarily the "right" outcome, especially in a public law context.

41. The Environment Court, under current procedures, does not 'blindly' accept the outcome of mediated settlements in Environment Court reference appeals, but will vet or screen them against the Part 2 considerations. We consider the same role should be preserved relative to the product of any collaborative procedure.

42. We question the assumption that it is not possible to have successful collaboration, at least to an extent that has real potential to reduce the range and scope of subsequent appeals (which should be the objective), and at the same time as retaining provision for merit based appeals. There is no evidential basis to that assertion within the New Zealand context that we are aware of, and certainly none referenced in the LAWF 2 report.[9]

43. The consistent experience of the National Committee members participating in the existing procedures, and in having represented a diverse range (and large number of) parties to these procedures, is that had there been greater or better engagement with the public and stakeholders at the outset by Councils, there would equally have been less need to rely on the appeal phase.

44. From our experience, no party entering resource management processes of this kind ever does so with the steadfast intent or "end game" strategy of inevitably utilising an Environment Court right of appeal. That is simply not the case. It makes no economic, practical or common sense to proceed on that basis. It is neither rational nor logical to do so.

45. Such reliance on the appeal phase at present can instead, and as discussed in the earlier RMLA paper, be a consequence of parties perceiving that they are on the "back foot" at the time planning instruments are notified, and with the need to refer matters to an appellate body to establish sufficient leverage or 'balance of power' during the subsequent stages of the process. With better collaboration or stakeholder engagement at the outset, submitters are less likely to see a need to resort to the appeal phase.

46. We observe and record a certain irony in that, out of apparent frustration at the delays resulting from the appeals phase of the current process (notably one third of the total process, such that some two thirds of the time occupied the under status quo precedes that),[10] proposals are emerging for not only greater but complete reliance on the

[9] Nor for that matter in the report of the Urban Technical Advisory Group report, July 2010, addressing this issue at paragraphs 300 et seq.
[10] Page 2 of Dormer and Payne paper, Page 1 of LGNZ paper.

consultation (including collaboration) and Council hearing phases (as with the LAWF 2 report).

47. Had more effective public and stakeholder engagement been the practice from the outset, the current plan agility issues may not have emerged to anywhere near the existing degree. The *appeals phase* should not however be the 'fall guy' to remedy the situation. This is both too extreme, and misdirected. Notably also, the Phase 1 (RMA reform) response to reduce process timeframes was to initiate direct referral and Board of Inquiry procedures, including for plan changes addressing issues of national significance; in effect relying on the Environment Court model or phase for determination, not the initial Council hearing phase.

48. To the extent any current 'gaming' is of concern, a more proportionate response to ensure the maximum degree of incentive associated with a collaborative process (while retaining appeal rights) would be to address the current practice of the Environment Court to generally not award costs in plan appeal situations, and to expressly direct such orders in situations where parties had (for example) presented substantial new evidence at the appeal stage that was not presented at the first instance hearing, or demonstrably failed to engage where that opportunity was afforded to them in the initial stage preceding notification.

49. Greater genuine effort by parties and commitment to the collaborative phase of the process might also be further encouraged through a requirement that the Environment Court give more weight to a Council decision that reflects the outcome of a collaborative process (reference s290A of RMA).

Partial Appeal Rights

50. A partial right of appeal, (for example) on the basis that a local authority decision departs from the outcome of a collaborative process (as proposed in the second LAWF 2 report) is highly problematic.

51. 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.

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

53. This is not the first time limitations on merit appeals have been raised. Following strong opposition, the proposal to restrict appeals to points of law unless an appellant successfully applied for leave from the Environment Court to appeal on the merits was rejected by the Select Committee during the RMA 2009 amendment process.

Importance of the issues at stake

54. We challenge the argument in the LGNZ paper that local government decision making in other contexts is more complex or far reaching than the RMA decision making.[11] The extract of the LGNZ paper cited at the outset (above) itself suggests otherwise.

55. The consequences of a long term plan along with decisions around rating, funding, and investment are more readily reversible (in the ballot box) than decisions made under RMA which in the context of plans can only be altered via further First Schedule processes, and which the LGNZ paper acknowledges are "fundamental" to maintaining the health and vitality of natural systems that sustain life, to social and cultural wellbeing and to the wellbeing of future generations.[12]

56. Simply put, the range, extent and longevity of interventions not just in property rights, but as to the allocation and use of resources that are vital to our overall economy, and which have inter-generational effects, are we suggest more profound under RMA decision making than in the other contexts referred to.

57. While we accept that there is a substantial "policy choice" element to resource management decision making, we equally challenge the proposition that the Environment Court has no appropriate role in testing that policy choice, and given the much more direct requirement under the RMA that it must achieve the purpose of the Act (section 32), than applies to

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policy set within the devolved legislative framework and decision making processes set up under LGA.

58. Finally, we observe that rights of appeal as to the merits of planning instruments have been part of our legal landscape for over half a century and ought not lightly be dispensed with.

59. As the High Court has recently confirmed, it is basic to our legal system (and one of the most deeply engrained common law or constitutional rights we have) that there is untrammelled access to the Courts to determine disputes over competing interests.

60. In *Independent Fisheries v* Minister *for Canterbury Earthquake Recovery*, the Court recorded that it has diligently protected fundamental rights including the right of access to the Courts. Government interventions in the Canterbury Region, including a decision to adopt the product of collaboration between some (but not all interested) parties, and which effectively denied access to the very Environment Court processes at issue in this paper, clearly drove the litigation behind that decision, and raised a concern of sufficient strength for the High Court to intervene. We note and accept that this decision is subject of further appeal; but the principles mentioned here and as addressed in the case are well established.

Conclusions

61. Overall, therefore, we strongly recommend that the suggested procedures around collaboration and improving best practice for case management of plan appeals in the papers identified at the outset be further investigated,[13] resourced and trialled before any decision is made to dispense with any one or more phases of the current plan preparation process all together.

62. The result may otherwise be planning outcomes that are the product of an enforced consensus; that are not properly tested against the sustainable management imperatives of the RMA, and that while *perhaps* produced more quickly, create as many social, economic or environmental challenges and inefficiencies as they purport to resolve.

63. In essence, therefore, and at least until collaboration procedures are better established along with the requisite degree of expertise in the resource management profession for it to work effectively, greater emphasis should instead be placed on:

(a) Improved collaboration processes at the outset, reducing the likelihood of submitters wishing to appeal; and

(b) Continued improvements to the case management of the appeals phase itself.

[13] Refer in particular paper by Acting Principal Judge Newhook, and paragraphs 44-50 of second Russell McVeagh paper.

64. This will in our view substantially achieve the plan agility imperative, but without the concerns raised here and elsewhere over the quality of the planning responses that result.

65. We accept that a review of the Environment Court's role and function in the plan preparation context is appropriate. It must however be undertaken in a considered manner. Any proposal of such a fundamental nature should not, we consider, be pursued through the select committee consultative process. Experience from amendments in 2004/2005 and 2009 clearly show that this is not the best forum to advance a considered and evidence based policy discussion.

66. As has been suggested by the technical advisory group reviewing sections 6 and 7 of the Act:

> "The appropriate frame of reference is to establish how the Court can support and add value to the resource management system to achieve least cost delivery of good environmental outcomes. That may involve changed functions; some deletions and some additions."

67. We are not suggesting that the Ministry should not review and seriously consider alternative forms of plan making processes; what we do say is that the argument that to have successful collaboration or achieve plan agility, it is necessary to dispense with rights of appeal to the Environment Court altogether, is unsubstantiated.

68. Collaboration and consultation (indeed greater public engagement across the board) at the outset should be supported in order to promote better and more timely planning outcomes and responses, but appeal rights must be afforded appropriately to recognise and provide for the considerable potential value that the Environment Court can add in terms of developing quality planning documents.

69. As we have previously indicated to the Minister, the National Committee would very much welcome the opportunity to meet with the Ministry to discuss the options for proposed reform in this context, and against the background of this statement of position. Above all, to further the goals and objectives of the RMLA as set out at the outset of this document.

National Committee
RMLA

30 August 2012