Altitude with Attitude

Rebecca Macky, Third RMLA President

Welcome all to the 2012 RMLA Conference “Altitude with Attitude”. This Conference marks an historic milestone for the RMLA as it is 20 years since the first RMLA function in October 1992, and 19 years since the first Conference in Rotorua in October 1993.

At the time the RMA was powering up. It was bold and new ... it was a RISK. And who can forget that moment in Rotorua all those years ago, when Mike Foster took issue with our guest speaker and tipped him into the hotel swimming pool. There was an air of optimism about this brave new legislation.

When I arrived back in New Zealand from Brisbane in the summer of 1991/1992, there were no computers on our desks at Bell Gully. We all had a secretary and a dictaphone, and all calls came through the switchboard to the chunky phone on the desk. The printer printed and the photocopier copied. There were no cell phones except the bricks used by tradesmen, and Michael Douglas. And hardly anyone caught the train.

RMA statutory plans were produced on paper, submissions were typed on paper and lodged by post or fax, or in person. Email was in the future (but just around the corner) and no one had any real idea of the future impact of mobile phones, then of smart phones, email and the internet, an impact which is still developing and having profound effects on the way we live our lives. And the RMLA was just getting underway. How did it start?

The RMLA began in Sydney, at the International Conference on Environmental Law held in June 1989. I flew down from Brisbane, where I was working for a large national law firm, and had lunch with Peter Salmon QC (as he then was) and Derek Nolan (as he still is), sitting outside in the warm winter...
sun, at Darling Harbour.

At that Conference, Joseph Sax, of the University of California at Berkley, who has also spoken at the 2008 RMLA Conference in Dunedin, presented an unforgettable paper: "The Law of a Liveable Planet". Professor Sax quoted Kenneth Boulding, from his famous paper presented in Washington in 1966: "The Economics of the Coming Spaceship Earth". In his paper, Boulding suggested, radically, that the Earth is a finite entity to be cherished and protected, instead of being used to the utmost.

Professor Sax pursued this theme, suggesting the need for new environmental jurisprudence, including three new legal principles:

1. That property owners must bear affirmative obligations to use their property in the service of a habitable planet — for example, fencing-off dairy land from streams and planting riparian areas.

2. That the use of land is shaped more by its role in its ecosystem than by its capacity to produce a return — for example Variation 5, which caps the amount of nitrogen entering Lake Taupo; the Horizons One Plan provisions; and I read in yesterday's Otago Daily Times of the Otago Regional Council's attempts to "wipe out" horticulture through the introduction of nitrogen limits.

3. That decisions about the use of land — and water — will increasingly be made through public determination, such as the submissions and appeal process under the RMA.

His speech was radical, energising and accurate in its predictions of the future. We discussed it over lunch and built on that enthusiasm at our first lunch in Auckland, where a multi-disciplinary Association was mooted.

This Association was to be developed along the lines of the National Environmental Law Association of Australia (or NELA), which was established in 1982. NELA has always been multi-disciplinary, with membership open to anyone "with an interest in environmental law and policy".

Naturally, talking through the genesis of the RMLA took a great many lunches and needed a wider mandate that just us three, a mandate which was extended to other great lovers of lunch. A steering committee was formed to include Ian Cowper, Rob Fisher, Phil Mitchell, Adrienne Young-Cooper, and Judith Collins (not the Crusher Collins of the current Government).

Finally, the RMLA was born at a dinner held at the Royal New Zealand Yacht Squadron in Auckland on 1 October 1992, attended by 120, many of whom signed the Association’s formation papers, and all of whom enjoyed wonderfully witty speeches made by (the now Justice) Mark Cooper, (the soon to become Justice) Peter Salmon and the plain old, but very flamboyant, Ken Tremaine.

Peter Salmon became our first President, Derek Nolan our second, and I wish to pay tribute to the enormous contribution from them both to the Association and to resource management law and practice in New Zealand. I wish also at this point to acknowledge our one — and only — ever — Executive Officer. Karol Helmink was there at the beginning, and is here today. Seldom has an organisation been blessed with such a combination of institutional knowledge, complete reliability and organisational flair.

In the context of this opening address, at yet another lunch, Peter, Derek and I talked about the Conference's theme and the concept of risk and its counterpoint, resilience. Katherine Mansfield is famously quoted:

Risk! Risk anything! Care no more for the opinion of others, for those voices. Do the hardest thing on earth for you. Act for yourself. Face the truth.

And like all quotes, it can only be taken so far.

Risk in the context of an assessed situation is quite different to silly risk. Sir Paul Callahan thought that, in general, New Zealand is not a particularly risk-friendly country, so we have to be smarter and more energised, and think audaciously, such as with his idea to take the model used on offshore islands and make the whole of New Zealand pest free.

We can't live on unhealthy assumptions and we can't expect to live in the future as we have lived in the past. We need to be more innovative and willing to translate the examples of other people and places into our country's context. We also need to accept that the old common law maxim Volenti non fit injuria or, he who knowingly and voluntarily takes on a risk accepts the consequences, has been diluted by society's expectations that someone must be accountable. So it was refreshing to hear Jo Aley say after the disappointing place for her and team-mate Olivia (Polly Powrie) in one of the Olympic 470 races that “Yeah, we stuffed up, but we always have one bad race, we'll do better tomorrow”. And they did.

In one of the most well-known risks taken in the urban environment in recent times, Sir Nicholas Serota took
the “recklessly bold decision” to use the obsolete Bankside Power Station, in a disused part of town with no tourist amenities nearby, and to create the Tate Modern. This single unbelievably brave decision has not only regenerated the Southwark area, but arguably established the circumstances for London to bid for, and hold, the successful 2012 Olympics.

To take a local situation with which I am familiar, just think what we could do with the Parnell Mainline Steam site, the location of the new Parnell Railway Station. The local community has a vision for this site, which has immense historical value, of integrating new buildings with the historic rail architecture, linking Parnell into the Domain, day lighting the Waipapa Stream to emphasise its historic qualities, and making provision for urban intensification — all this is possible with vision and a little risk taking.

Under the RMA, we have ignored some risks (such as allowing development on liquefaction-prone land); refused to consider others (housing cows to manage nutrient runoff); or used the fear of uncertainty to suggest that an activity should not be allowed until all risks have been removed.

However, the RMA is not a risk-free statute. "No risk" is not only logically impossible, it would strangle all human endeavour. The Environment Court has had to deal with risk in a number of contexts and has shown excellent judgement in balancing the risk of acting, with the risk of not acting: such as with cell phone towers. In the Shirley Primary School case, the Court noted that "risk" has been usefully defined in terms that fit with the definition of "effect" as "the combination of the probability of occurrences of an undesired event and the possible extent of the event's consequences".

The Court found that if the risks associated with an activity were found to be acceptable, then the fears of the community should not be persuasive, because those fears were unreasonable. But new issues keep arising, for example, in response to the issue of affordable housing, the Productivity Commission has suggested that councils take a four-pronged approach, including:

- Taking a less constrained approach to housing in the city, suburbs and urban edges;
- Adopting a strategy of intensification and "orderly expansion" of urban areas;
- Flexibly approaching the balance between amenity and new development; and
- Promoting a competitive environment for the sale of construction-ready sections.

All quite sensible one would think, although the Report itself has been subject to a degree of criticism, in part because of its relatively narrow focus. The real concern with the response to the Report, is in terms of a proposed amendment to the RMA. Although yesterday Phil Mitchell summarised this response as providing a new section 6 matter for “urban growth”, the actual amendment requires councils to provide for the “reasonably foreseeable availability of land for urban expansion, use and development”.

Not only does this limit and direct councils’ options, it raises the very real risk that we continue with an outdated, largely discredited model of urban development, and we also risk failing to explore innovate options, provide for smaller households and ensure environmentally-responsible responses. It also implies the acceptance of continued and worsening traffic congestion, one of the most pressing urban issues. And it will mean that more of our precious land is taken up for roads … and for parking.

The other risk of taking a relatively “one size fits all” approach is that if councils are to be required to make land available to urban expansion, rural issues may be overlooked or ignored. Where under the old planning legislation, councils were actively required to avoid urban encroachment onto valuable rural land (and so on), no such balance is suggested in the next round of amendments.

That is one topic of discussion at this Conference, and in the wider context Paul Gilding is going to address us on risk and resilience, a paper I am very much looking forward to. With his message coming 56 years after Kenneth Boulding’s analogy of the Earth as a spaceship — that we have passed the limits of the Earth’s capacity to provide cheap, or even free, resources — we are confronting risks and needing resilience more than ever. We cannot simply do nothing, and we cannot continue as we have.

To this end, it will be interesting to explore the Conference theme over the next couple of days and we are delighted that the RMLA has taken the calculated risk of holding the 2012 Conference in Queenstown at the end of the ski season. It has paid off in spades, with a wonderful speaker and activity line-up, and a healthy number of attendees. Both Coronet and the Remarkables have a good snow base aided by a snowfall just last week I believe. Accordingly, and even though the Conference started yesterday with two excellent sessions, I am delighted now to declare the RMLA 2012 Conference “Altitude with Attitude” … OPEN.
The November 2012 issue of Resource Management Journal marks two significant events: the 20th anniversary of the first publication of the Journal; and the handover of editorial responsibility for the Journal from the RMLA Editorial Board to the RMLA Editorial Committee.

The first issue of Resource Management Journal was a four-page newsletter featuring an editorial about the launch of the new RMLA, details of the steering committee that had been appointed to oversee the new Association until the first elections for the National Committee could be held in the following year, a report on the inaugural dinner held on 1 October 1992 and excerpts from the President’s address, details about the drive to increase RMLA membership and on how the Journal could be developed over time, the first casenote about the High Court decision in Batchelor v Tauranga District Council by Ian Cowper, details about the submission process for the first New Zealand Coastal Policy Statement and comment on the proposed statement by Derek Nolan, and advance notice of the first regional events in Auckland and Wellington hosted by Simpson Grierson.

The Journal has come a long way since then, gradually developing into an eight-page newsletter in November 1993, 12-page newsletter in March 1994, 16-page newsletter in May 1994, 24-page newsletter in December 1994, 28-page newsletter in March 1995, and finally reaching its “steady-state” as a 40-page newsletter in June 1995. After these incremental developments the next significant development was the change of name from Resource Management News to Resource Management Journal in March 1999. The Journal then went through a stable period until the next major change in April 2010 when Resource Management Journal was first published for the RMLA by Thomson Reuters, followed by the move to become an e-journal in April 2012.

Throughout its 20-year history the Journal has been served by a small but dedicated editorial team, building up considerable experience in journal publication. Remarkably, that tradition continues to the present day with Caroline Miller, Mike Patrick and Royden Somerville having all served on the RMLA Editorial Committee for more than 10 years each. Remarkably, Caroline Miller in her history of the RMLA (see [2008] Resource Management Theory & Practice at 200) notes that your current General Editor became only the fourth General Editor in the life of Resource Management Journal in 2013 (see, at 217).

Similar to the first journal issue in November 1992, environmental and resource management law continues to develop in a dynamic way and this journal issue included articles and case notes on a wide variety of topical issues: Rachel Devine et al survey the key policy developments of 2012; Derek Nolan et al critically review the proposals for RMA amendments designed to pave the way for a streamlined unitary plan process in Auckland; the RMLA National Committee position paper on wider proposals for RMA amendments is republished to introduce that paper to a wider audience and inform debate on these important matters; Francelle Lupis examines the proposals for increased Court fees against access to justice principles; Sarah Ongley comments on the One Plan appeals and biodiversity; the RMLA Awards 2012 are celebrated, including the life-time achievement awards presented to Professor Peter Skelton and Associate Professor Kenneth Palmer; Bronwyn Carruthers et al note recent cases including the most recent application of the Eldamos and Long Bay tests in the character building litigation in Auckland; and advance notice is given of upcoming conferences – NELA Conference March 2013, IUCN Academy of Environmental Law Colloquium June 2013, and the RMLA Annual Conference September 2013.

On a personal note, it has been a pleasure to have served as General Editor of Resource Management Journal since 2003, working with excellent colleagues, and being privileged to review the steady flow of multi-disciplinary writing submitted by RMLA members for publication in the Journal. The willingness of members to give freely of their time and expertise in researching and writing articles on recent policy and case law developments, sharing experience from projects, and looking to the future regarding how the law should develop are the mainstays of the Journal.

I look forward to working with my colleagues in our new roles as members of the RMLA Editorial Board, and on behalf of my colleagues I wish the RMLA Editorial Committee well for their future trusteeship of Resource Management Journal: I am sure that
they will do well and that the Journal will continue to develop and flourish under the Editorship of Mercedes Lentz and Jacinta Ruru. It also falls to me to record our debt to Karol Helmink, whose incredible management skills ensure that we have been able to do the job of editing the Journal. Finally, and last but not least, welcome to the newest member of the RMLA Editorial Committee, Bronwyn Carruthers.

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Call for Contributions

Resource Management Journal

The Resource Management Journal’s mission is to facilitate communication between RMLA members on all matters relating to resource management. It provides members with a public forum for their views, as articles are largely written by Association members who are experts in their particular field.

Written contributions to the Resource Management Journal are welcome. If you would like to raise your profile and contribute to the Journal, a short synopsis should be forwarded by email to the Executive Officer (contact details below) who will pass that synopsis to the Editorial Committee for their review. Accordingly, synopsis and copy deadlines are as follows:

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The word limits for articles are now max/min limits; ie 2,400 words means 2,400 words, not more nor less. Articles should be:

- Single page article = 825 words
- Four page article = 3,300 words
- Six page article = 4,950 words (by invitation from the Editorial Committee)

Articles should be in accordance with the New Zealand Law Style Guide by Geoff McLay, Christopher Murray and Jonathan Orpin, the Law Foundation New Zealand. Note: All references are to be included in the body of the text and footnotes, endnotes and bibliographies are discouraged.

Acceptance of written work in the Resource Management Journal does not in any way indicate an adoption by RMLA of the opinions expressed by the authors. Authors remain responsible for their opinions, and any defamatory or litigious material and the Editor accepts no responsibility for such material.
As 2012 draws to an end, it’s that time of year when we can look back and reflect on the legislative and policy developments that have taken place and consider what might be waiting around the corner in 2013.

The past year has seen industrious policy work undertaken across a range of environmental issues, from fresh water and local government reform, to a review of the principles in the Resource Management Act (RMA). There have been reports on housing affordability, a review of the Crown minerals regime, and recommendations on how to modernise legislation governing official information. The Government has also developed a recovery strategy and new planning rules to guide the rebuild of Christchurch following the earthquakes in 2010 and 2011.

Legislative developments in 2012 included the enactment of environmental legislation for New Zealand’s Exclusive Economic Zone (EEZ) and Extended Continental Shelf (ECS). The relatively uncontroversial Heritage New Zealand Pouhere Taonga Bill continues to await its third reading; it may not be passed in 2012. Instead, focus is on passing amendments to the Emissions Trading Scheme and the RMA, including implementing a special process for developing the Auckland Unitary Plan and speeding up the planning process for notified consents. (At the time of writing this Bill had not been introduced to the House of Parliament.)

A common theme that is evident from policy and legislative developments in 2012 is the Government’s desire for faster and (to a lesser extent) better decision-making. In that vein we see more streamlining of governance structures and more directed and focussed decision-making processes. Collaborative approaches to decision-making are also being encouraged together with a watering down of appeal rights in various forums.

Below we discuss five areas of focus in 2012 and highlight how the above theme has become evident:

1. Local government reform.
2. The Land and Water Forum report on fresh water reform.
4. Debate about sections 6 and 7 of the RMA.
5. Proposals to amend the RMA to further streamline processes.

Local government reform

From early in the year it was clear that local government would be targeted for reform. In February, the former Minister of Local Government, Nick Smith, commented in a speech to the Tasman District Council that reforms were required to address the increasing, and unsustainable, rise in council rates. He suggested these increases were due in part to the previous local government reforms which had increased the scope of local government responsibilities. In March an eight-point work reform programme for local government called “Better Local Government” was announced. The programme aims to provide increased clarity about a council’s roles, stronger governance, improved efficiency and more responsible fiscal management.

The reforms will take place in two phases. As part of the first phase, amending legislation was introduced to Parliament in May. Key amendments proposed include:

- Refocusing the purpose of local government. No longer will the “four well-beings” be promoted when undertaking decisions. Instead local authorities will have a more limited purpose of “meeting the current and future needs of their communities for good-quality local infrastructure, local public services, and performance of regulatory functions”.
- Streamlining council reorganisation processes. The aim is to make it easier for council reorganisation proposals to proceed. One significant difference is a changed threshold: reorganisation proposals with “significant community support” can proceed, rather than the current requirement of support from more than 50 per cent of the votes cast in a poll.
- Introducing new fiscal responsibility requirements for income and expenditure and ensuring prudent debt levels. The new requirements will be set in regulations, which are to be developed in consultation with Local Government New Zealand.

Unsurprisingly the reforms have been met with strong criticism by local government. During the Select Committee process many councils questioned the evidence base of the Bill and the value of undermining local decision-making. The Bill is due...
to be reported back to the House of Representatives in early November. Many in local government circles are sceptical about the extent to which their feedback on the proposed changes will be taken on board.

In the meantime the work on the second phase of reforms is being undertaken:

- A taskforce was appointed in June to report to the Minister on streamlining and reducing costs of local government planning, consultation and reporting requirements. This report was due by the end of October but has not yet been publicly released.
- In July the Productivity Commission released an issues paper about local government regulatory performance. Submissions were sought about, amongst other things, regulatory variation between different councils, appropriate methods to assess performance and the financial consequences of various local government regulatory obligations. Feedback on the submissions is expected to be incorporated in a draft report in December 2012 by the Commission. That report will be subject to a further submission period until February 2013.
- In October an independent expert advisory group was established to explore, and report by February 2013, on ways to better manage the costs of local government infrastructure.
- The Auditor-General will report on development contributions in late 2012 as part of her standard review of 2012–2022 long-term local government plans. She is expected to address concerns about the inconsistency in their application and use by councils and whether they are adversely impacting on business, job growth and housing affordability.

These workstreams tend toward an outcome where regulatory roles between central and local government are re-allocated or “streamlining” to ensure more focused decision-making and greater controls over the use of money. The proposal to make it easier for re-organisation proposals to proceed is also consistent with the desire to simplify governance structures and paves the way for more council amalgamations.

Freshwater reform

Fresh water was a hot topic during the 2011 election campaign and it has continued to dominate the environmental reform agenda during 2012. Focus has been on appropriate governance structures and tools for managing freshwater resources within set limits — however, progress has been slow.

In April the Land and Water Forum released its second report on the above subjects (the first was released in October 2011). It contained recommendations regarding governance structures that have attracted considerable debate and comment. Amongst other things it recommended:

- Introducing a statutory presumption in favour of a collaborative process between regional councils, iwi and other key stakeholders in policy and decision-making on freshwater management, including in relation to national and regional planning instruments.
- Establishing a more integrated approach to setting national and local objectives for water bodies, including by directing regional councils to give effect to national objectives at a catchment level and setting limits for water takes and discharges of contaminants as rules in regional plans.
- Setting more prescriptive limits for freshwater quantity and quality at a national level and requiring regional compliance except in “exceptional circumstances”. Those circumstances would also be prescribed and should include situations such as the inability to meet a minimum level due to the natural conditions of a water body. The Forum has invited the Government to work with it to develop a system for establishing exceptions.
- Developing a national framework that defines bottom lines for water quality.

These recommendations continue the theme of recent years of greater central Government direction in resource management issues.

The Forum also identified limiting appeal rights on regional policies and plans concerning fresh water as a possible method of reducing litigation in this area in combination with collaborative processes. No consensus was reached about the nature and scope of appeal rights so it has been left for the Forum’s third report. That report, which is imminent at the time of writing, is expected to provide more detailed recommendations on how to manage fresh water within the proposed limits, including options for allocating freshwater resources. This is likely to direct further reforms to the RMA in 2013.

Enactment but not commencement of the EEZ Act

The key environmental legislation enacted in 2012 is the EEZ Act. The EEZ Act establishes the first comprehensive environmental consenting regime for activities in New Zealand’s EEZ and ECS. The Act will not commence until supporting regulations are created — this is expected to be in mid-2013.
The consenting regime under the EEZ Act is similar to the RMA regime. Activities are described in three categories: permitted, discretionary or prohibited. Permitted activities can be undertaken as of right, subject to any requirements prescribed in regulations, while discretionary activities require a marine consent from the Environmental Protection Authority (EPA).

Unlike the RMA regime, where over 95 per cent of resource consent applications are processed on a non-notified basis, all marine consent applications are required to be publicly notified. Applicants will therefore need to factor the cost and time of the public process, and the risk of appeals, into their project timeframes. The Government has estimated that the cost of hearing a marine consent application will be approximately $350,000 to $600,000 and that applications will take around six months to process.

The tests for the grant or decline of an application are also different to those provided in the RMA. Particular consideration is given to the adequacy of information available. If the EPA considers that the information available is uncertain or inadequate it is required to “favour caution and environmental protection”. This approach may lead to applications being granted subject to adaptive management conditions. For example large projects might be granted on a smaller scale to enable a test of the effects on the environment before the full-scale project proceeds.

The Government has indicated that the EEZ Act will not commence until the first set of regulations to support the legislation have been created. The first set of regulations is expected to classify activities as permitted, discretionary or prohibited and to prescribe the conditions that apply to permitted activities. The Government had originally indicated that these regulations would be promulgated before the end of the year but they are now expected in mid-2013.

In a related development, the Marine Legislation Bill (the Bill) was introduced just days after the EEZ Act was passed. This Bill makes further changes to the regulatory regime for activities in the EEZ and ECS. In particular the Bill proposes that the EPA (not Maritime New Zealand) should determine applications for discharge and dumping activities in the EEZ and ECS.

The Bill also establishes a new process for deciding discharge and dumping applications. This process is similar to the process for other applications for marine consents under the EEZ Act. However, it represents a significant departure from the existing process under the Maritime Transport Act 1994 as all applications for discharges and dumping would involve the public.

The Bill has been referred to the Transport and Industrial Relations Select Committee which is expected to report back in March. This, together with the creation of regulations under the EEZ Act, will ensure that legislative developments remain a focus for those operating offshore in 2013.

Debate about sections 6 and 7 of the RMA

Proving that there are no sacred cows in environmental law reform, the Government is considering a report from an independent Technical Advisory Group (TAG) about amending the principles of the RMA encapsulated by sections 6 and 7. The Government has maintained some distance from this report given its relatively controversial nature. This approach enables it to take or leave the recommendations made or to cherry pick any aspects it would like to adopt.

If implemented (in whole or in part), the TAG’s recommendations would result in significant changes to the way the RMA is interpreted and applied. Those recommendations include:

- Recasting section 6 as a set of sustainable management principles. This section would include a number of the principles in the current ss 6 and 7, with new principles addressing natural hazards, urban design, and infrastructure. Notable omissions from this list include the principles relating to amenity values, and habitats for trout and salmon. References to “protection, “maintenance and enhancement” and “preservation” would also be removed from the principles relating to natural character, outstanding natural landscapes and features, and access to the coast, lakes, rivers and wetlands.
- Inserting a new section 7 containing process-focussed “sustainable management methods”. These methods would, amongst other things, require decision-makers to:
  - Achieve timely, efficient and cost-effective resource management processes.
  - Create concise policy statements and plans using plain language.
  - Have regard to any voluntary form of environmental compensation, off-setting, or similar measures.
  - Promote collaboration between local authorities.
The TAG Report recommendations clearly favour the implementation of more focussed, timely and efficient resource management processes, and collaborative approaches to decision-making. So, while some aspects of the report are likely to be controversial, other suggestions will be favoured by policy makers.

Proposals to amend the RMA amendments to further streamline processes

To round out the year, the Minister for the Environment made announcements in October about further RMA streamlining reforms. In particular, the Government has accepted the arguments of Auckland Council that a special process should apply to deliver a quicker outcome on Auckland's Unitary Plan. It also proposes shortening the average time taken to process resource consent applications for "medium-sized" projects.

A special process for Auckland's Unitary Plan

The Minister has announced a one-off process that she believes will "improve the development of Auckland Council's first Unitary Plan, while ensuring that Aucklanders still have comprehensive input into the Plan". Essentially, the special process involves elements of a more collaborative approach to Plan development in the pre-notification drafting of the Plan, followed by consideration of submissions by an especially created hearing panel, with more limited appeal rights.

Before the Plan is notified, a draft plan is intended to be developed through considerably more collaboration with communities and stakeholders than would usually take place. The details about this aspect of the process are not expected to be prescribed in legislation. Instead the Council has commenced this process itself.

The proposed plan will be considered by a hearings panel that will be wholly independent from the Council, similar to the Boards of Inquiry established under the RMA for nationally significant projects. It is proposed that the panel will:

• Be chaired by a retired High Court or Environment Court judge. The other members of the panel will be appointed by the Ministers for the Environment and Conservation.
• Have the power to direct a robust mediation process, including caucusing of witnesses and grouping of issues, and to allow cross-examination.
• Make recommendations to Auckland Council.

The Council can chose to accept or reject the panel's recommendation. Two different appeal routes flow from that decision in an attempt to deliver operative plan provisions within three years:

• If the Council accepts the panel’s decision, the relevant provisions will be immediately operative, subject only to appeals on points of law.
• If it does not, then full appeal rights to the Environment Court will be available.

It is difficult to achieve effective public engagement even with the best of efforts and there is a risk that using a more formal Board of Inquiry-type approach will daunt rather than engage the public. Potential Chairs of the panel may question how all matters can be heard and determined within an indicative three years, by solely relying on pre-hearing conferences and the like rather than a preliminary council hearing. It is an ambitious target.

Faster "medium-sized" projects

The Government views the timeframes and costs of consenting "medium-sized" projects as a barrier to the development of housing and other projects. So it intends to amend the RMA to speed up the process. Key amendments proposed include:

• Imposing maximum time limits for processing notified and limited notified resource consent applications of 130-working days (or six months) and 100-working days (or roughly four-and-a-half to five months) respectively.
• Strengthening the requirements for applicants to include all relevant information in an application when it is lodged with a council.
• Limiting councils’ ability to "stop the clock" for further information requests. In particular, the clock will only stop after three working days to avoid extending the timeframes where the applicant provides the information quickly.
• Allowing councils to cancel applications that have been placed on hold by the applicant for more than 130 working days.

The Minister's announcement gives examples of "medium-sized" projects including retirement villages, gravel extraction, supermarkets and new retail developments. The implication in the announcement that these projects should be subject to some form of notification may be a little alarming to those involved in these projects.

Despite this nuance in the Minister's announcement, the imposition of a maximum processing timeframe (supported by the existing discount on administrative charges if there are delays) will be
warmly received by developers. The test will be whether these translate into a practical change in processing times, given that the existing RMA timeframes provide for an approximately six-month process and councils will retain the ability to double the timeframes if special circumstances apply or the applicant agrees.

**In summary**

The direction of the legislative and policy reform that we have seen during 2012 can be seen as a continuation of the 2009 “simplifying and streamlining” reforms that aimed to improve the timeliness and efficiency of RMA processes. Those reforms saw the introduction of the direct referral and Board of Inquiry processes for nationally significant projects as well as discounts for delay and more prescription around processing timeframes. Recent proposals extend the same concepts to include smaller projects and specific councils.

Emphasis on collaboration with interested stakeholders has increased and helps to justify a reduction of appeal options at the other end of the process. This approach was identified in National’s Bluegreen manifesto before it was elected in 2008. It particularly has support from iwi who want levels of engagement increased, and is promoted by those not exhausted by the Land and Water Forum process. The approach to Christchurch planning under the Canterbury Earthquake Recovery Act 2011 is at an extreme — no public involvement and very limited appeal rights, while the effectiveness of public input into Auckland planning remains to be seen.

**What to expect in 2013?**

Putting the EEZ Act to one side, 2012 could be seen as a year for policy development and 2013 as the year for making legislative progress, as is typical for the middle of an electoral term.

The Government has clearly signalled its intentions: reform of local government and the RMA (including the special Auckland process). The extent of RMA reforms in 2013 will depend on the degree of appetite the Government has to address sections 6 and 7 and the politics around fresh water, which will resurface once the third Land and Water Forum report is released. Consultation about having fewer resource management plans is also likely.

As the childhood nursery rhyme goes, “Faster and faster we go, where we stop nobody knows”.

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

Introduction

The Environment Minister has announced a one-off process for the first Auckland Unitary Plan. The intention is to “improve the development of Auckland Council’s first Unitary Plan, while ensuring that Aucklanders still have comprehensive input into the plan”.

There is no current suggestion that the process is to be used for subsequent variations, plan changes or future unitary plans. Nor that this process will be rolled out for use in other parts of the country, or for regional policy statements, or for particular issues such as water allocation and quality.

While the proposal is a considerable improvement on what was being promoted by Auckland Council, a number of significant concerns arise, including:

• The premise that the Environment Court needs to be removed if the Unitary Plan is to be prepared in less than 6–10 years. This allegation is without any substantiated basis.

• The timeframes Council officers are having to work to has meant that in a number of areas, the “engagement” to date has been perfunctory. Much of the feedback given through the informal consultation is unlikely to be included in the draft Unitary Plan to be circulated early next year.

• The formal hearing process will be intimidating and too time-consuming and expensive for many lay persons and community groups. Many may choose not to participate at the Board of Inquiry hearing, where they would have presented to a Council hearing. The process will be poorer for the lack of a broad range of inputs. The experience of the current Board of Inquiry process indicates that such a process for the Auckland Unitary Plan will be extensive, with hearings on major topics lasting many weeks. All aspects of the Unitary Plan at issue will have to be the subject of Council briefs of evidence, submitters and further submitters who participate will need to exchange evidence, rebuttal evidence will be needed, and scores of parties (legally represented or otherwise) will have the right to cross-examine all witnesses.

• The suggestion that the Auckland Council can simply ignore the recommendations of the independent Board of Inquiry and make its own decisions in circumstances where the Council has heard none of the evidence and cross-examination is likely to be viewed by many parties as quite unacceptable. Leaving aside the fact that potentially this will expose every councillor to extensive lobbying, the suggestion breaches principles of natural justice, procedural propriety and established practice. Were any right along these lines to be given, perhaps it should require the Council to appeal the decision of the Board of Inquiry and to make its own case on appeal to the Environment Court as to why its proposed provisions should be preferred.

• The proposed timeframe of 3 years from notification to approval may be optimistic unless submissions are heard, and decisions are made, by multiple hearing panels. Either way, there will be considerably greater costs for most Auckland ratepayers involved in the process.

Questionable rationale for removing the Environment Court

It is clear the Minister understands the importance of Aucklanders having the ability to seek a full and impartial review of the Council’s Unitary Plan with sufficient safeguards and reviews. The announcement acknowledges that there needs to be a fair and independent process for making decisions that are based on robust evidence and advice. The new process involves the appointment, by the Ministers for the Environment and Conservation, of a highly skilled independent hearing panel to hear submissions, and the requirement for an independent audit of the Council’s section 32 analysis (to be coordinated by the Ministry for the Environment).

It is also clear that the rationale for introducing the new process is the perception that the current process takes too long, with statements such as:

I am, however, concerned that under the current process, the first Unitary Plan is estimated to take between 6 to 10 years to become operative.

Under the current plan development process … the Auckland Council has estimated that it could take up to 10 years for the Unitary Plan to become operative.

The expectation is that under the new process almost all of the plan will be operative within 3 years from notification, instead of the 7 to 10 years likely under the current process, approximately half of which would be due to the time taken for the council to resolve appeals in
The “solution” announced by the Minister is an attempt to speed up the process. There are two important points to make:

• As demonstrated by Acting Principal Judge Newhook in his discussion papers on this issue, there is no evidence to support the statement often made by Auckland Council that it is the Environment Court’s involvement that slows down the plan-making process. To the contrary, it is generally under-resourced or unmotivated councils that tend to draw out the plan-making process. In addition, Judge Newhook’s papers demonstrate a readiness by the Environment Court to expedite the resolution of appeals on large plans.

• The Auckland Council is not required to prepare and notify a Unitary Plan that combines its Regional Policy Statement, all Regional Plans and all District Plans. It is therefore not facing a logistical problem that has been thrust upon it. It decided, itself, to prepare one combined document. If the task ahead is now too daunting, it is open for it to reassess and confine the task to combining all of the District Plans, with a review of the Regional Policy Statement and outdated Regional Plans as separate tasks. Or for some other combination, such as commencing with new higher level objectives and policies only.

Early but only perfunctory engagement

The one-off process is based on an understanding that there “will be positive, collaborative and early engagement with communities and stakeholders when developing the Unitary Plan”. While the Council is demonstrating a willingness to consult and is running a series of workshops in a number of different workstreams, the officers involved have made it clear to date that any feedback provided may not be incorporated in the draft Unitary Plan simply because of the time involved and the scale of the task ahead. Unless sufficient time and resources are therefore invested in the more formal engagement process due to commence upon the release of the formal draft Unitary Plan next year, then any consultation and engagement is likely to be unsatisfactory and is certainly no justification for the loss of full rights of appeal.

A disenfranchising or costly hearing process

Our earlier papers have commented on how such a formal hearing process will be intimidating for many lay persons and community groups, particularly when they are facing the prospect of sustained and repeated cross-examination by a number of different parties’ representatives. It is virtually certain that many individuals and groups will choose not to become formally involved in the Board of Inquiry hearing process, whereby they might have presented to a Council hearing. The process will be poorer for the lack of a broad range of inputs from individuals and community groups.

The hearing of any topic (such as intensification of many existing neighbourhoods or on the position of urban limits) is also likely to result in hundreds of briefs of evidence by Council staff and consultants, by lay submitters, and by other submitters and their experts. These will all need to be exchanged, either read out at the Board hearings or pre-read, and all witnesses will potentially be cross-examined by lawyers representing the Council and the submitters, or by lay submitters. This will necessitate extensive hearing days, with significant costs and inconvenience to submitters (let alone the Council) on every topic in dispute. This is a completely different process to the one the public normally undergoes at the Council stage.

**Council’s power to ignore recommendations and make its own decisions**

Under the Board of Inquiry process introduced for proposals of national significance in the 2009 amendments, the Board has the final decision-making powers (except in the case of a regional coastal plan, where the Minister of Conservation has the final approval).

Under the Minister’s proposal, the Board will simply deliver its findings by way of recommendations to the Auckland Council. The Council will then make the decision on each submission, regardless of the fact that it has not attended the hearing, has not heard the evidence being given or the challenges to that evidence through cross-examination. When the Council accepts the Board’s finding and recommendation, the Council’s decision will be final subject only to appeals on points of law. However, the Minister is proposing to give the Council the power to reject the Board’s findings and recommendations, and to simply approve the Unitary Plan’s provisions as notified. This is a controversial aspect of the proposal.

The fact that the Minister has retained the normal right to appeal to the Environment Court in the event that the Council exercises this power is of little comfort, particularly given the length of time the new hearing process will take and the significant cost that will be involved for all participants. Having gone to the cost of
participating in an Environment Court-type hearing (including cross-examination) at first instance before the Board of Inquiry, to then have to undergo another similar hearing on appeal because the Council has decided to ignore the Board's recommendation, will be imposing major extra costs on ratepayers. The body that hears all of the evidence from both the Council and all other submitters, should be the body that makes the decision on the submissions. It would be a breach of natural justice to empower the Council to go against the recommendations of the Board.

This must also potentially expose all individual councillors to significant lobbying by those persons (whether other councillors, or Council officers or submitters) who are disaffected by the Board's recommendations. It will be surprising if this aspect of the proposal were to survive the Select Committee process. If it were to do so in some form, then perhaps the Council should to be bound by the Board of Inquiry’s decision, and if the Council wishes to appeal to the Environment Court, then it should do so. Forcing the Council to “front” any appeal and to justify its alternative might at least go some way to avoiding arbitrary decisions being made by Council to depart from the Board’s recommendations.

Time and cost

It is unclear from the Minister’s announcement whether the evidence will be heard by one hearing panel, or by a number of panels. Given the breadth of the issues to be addressed in the Unitary Plan, it is highly unlikely that one panel could be appointed with sufficient knowledge across all technical areas.

There is no evidence to suggest that the process will be any faster, and in fact it may end up being significantly longer once the logistics of the hearing are fully considered. While the intention is that the process will take only 3 years from notification to approval (with the option of extending that to 4 years), we are doubtful that completion within that timeframe is possible.

The Minister’s announcement indicates that the cost for the Council under the one-off process will be similar to the cost it would incur under the existing process. The announcement is, however, completely silent on the cost to submitters. It seems likely that the process will be significantly more expensive for all submitters as a Board of Inquiry process is far more time-consuming and expensive than a traditional Council hearing and, under the current system, relatively few submitters appeal, and most appeals are settled without full-scale appeal hearings.

Conclusion

It is clear that the Minister has given considerable thought to this issue. She has rejected the Auckland Council’s flawed proposal and has endeavoured to create a process that provides the independent and robust scrutiny at first instance, that is not usually available until the appeal stage. However, in deciding to act she appears to have believed the Council when it said the Unitary Plan would otherwise take 10 years to become operative, and does not seem to have challenged whether Auckland actually needs one combined Plan, all at once. It is also unclear whether the Minister has a good understanding of the logistics, significant timeframes and huge costs involved with having a Board of Inquiry type “pre-hearing” on all aspects of the Unitary Plan. Of great concern is the suggestion that the elected councillors can make a decision on submissions that ignores or rejects the findings and recommendations of the independent Board of Inquiry, without those councillors having first heard any of the submissions or argument on those points.

RMLA membership

The RMLA was formed in 1992 to provide a forum for all professionals and others interested in resource management and the environment. The objectives of the RMLA are to promote within New Zealand:

- An understanding of resource management law and its implementation in a multi-disciplinary framework;
- Excellence in resource management policy and practice;
- Resource management practices which are legally sound, effective, and efficient and which produce high quality environmental outcomes.

RMLA membership forms may be downloaded from the website www.rmla.org.nz. Annual subscription from 1 October is $155 ($77 for fulltime students) (GST inclusive @ 15%) for 12 months from 1 October. Subscriptions for members joining after 1 April are reduced to $77 ($38 for fulltime students) from 1 April to 30 September. Please make cheques payable to the Resource Management Law Association of New Zealand Inc.
Plan Agility and First Schedule Reform

Position Statement of the National Committee of the Resource Management Law Association of New Zealand Incorporated (RMLA)

Purpose

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).

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.

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 represents, 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

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.

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

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.

The RMLA therefore has a substantial interest in the current debate around improving the timeliness of resource management plan and policy statement preparations, 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”.

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.

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 altogether.

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 who have a different view.

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

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.

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.

This is not a step that has precedent during the tenure of any of the current membership of the Committee — a 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.

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 the RMA.

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

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

Statement of Position

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.

We accept the proposition put in the LGNZ paper 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 ecosystems and communities.

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

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.

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.

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.

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, and to tax and ratepayers. Conversely, less than necessary or appropriate consent thresholds may result in a potential cost to the environment.

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 and Dormer/Payne papers.

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.

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.

We challenge the proposition in the LGNZ paper that it is “not possible” 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.

We consider that there is a real prospect that the LGNZ goal of a planning instrument being operative within one term of local government 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).

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

**The role and place of collaboration**

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.

Useful contributions are made in both the LAWF 2 report and 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.

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. 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.

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.

We note that the LAWF process itself has taken some three years to determine a high-level framework for management of fresh water, but that 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.

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.

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.

An “80/20” model could be applied — that is, if 80 per cent of participants are satisfied with 80 per cent 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 per cent 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.

There is also a risk that, by 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.

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.

We question the assumption that it is not possible to have successful collaboration, at least to an extent that has a real potential to reduce the range and scope of subsequent appeals (which should be the objective), while at the same time 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. The consistent experience of 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.

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.

Such reliance on the appeal phase at present can instead, 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 a 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.

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 under the status quo precedes that)), proposals are emerging for not only greater but for complete reliance on the consultation (including collaboration) and council hearing phases (as with the LAWF 2 report).

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 — so in effect relying on the Environment Court model or phase for determination, not the initial council hearing phase.

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 had demonstrably failed to engage where that opportunity was afforded to them in the initial stage preceding notification.

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 s 290A of RMA).

Partial appeal rights

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.

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) The 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.

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

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.1 The extract from the LGNZ paper cited at the outset, itself suggests otherwise.

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 the 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. 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.

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, given the much more direct requirement under the RMA that it must achieve the purpose of the Act (section 32), than applies to policy set within the devolved legislative framework and decision-making processes set up under the LGA.

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 to be lightly dispensed with.

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.

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, 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 that the High Court intervened. We note and accept that this decision is the subject of further appeal but that the principles mentioned here, and as addressed in the case, are well established.

Conclusions

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, resourced and trialled before any decision is made to dispense with any one or more phases of the current plan-preparation process altogether.

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 being produced more quickly, create as many social, economic or environmental challenges and inefficiencies as they purport to resolve.

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.

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.

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 shows that this is not the best forum to advance a considered and evidence-based policy discussion.

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.

We are not suggesting the Ministry should not review and seriously consider alternative forms of plan-making processes — what we are saying 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.

Collaboration and consultation (indeed greater public engagement across the board) at the outset should be supported in order to promote better, 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.

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, against the background of this statement of position, and above all to further the goals and objectives of the RMLA as set out at the outset of this document.
Introduction

The right of recourse to the courts lies at the heart of our justice system. It is a basic principle that participants should have the ability to bring a case, or oppose one vigorously, without undue impediment or obstacle. In saying that, participation in court processes brings a raft of private, as well as public, benefits but also significant costs for parties and the courts. With rights come responsibilities. Accordingly, those who use our courts and tribunals have an obligation to exercise those rights in an efficient and disciplined manner and not to engage in behaviours that would constitute an abuse of process. While the imposition of court fees is one way of ensuring such disciplined participation, for many the cost of initiating or joining such a proceeding can cause them to stumble at the first hurdle. Yet the Environment Court has fewer hurdles than most. There has long been a presumption of public participation in the RMA regime and processes in that jurisdiction are arguably still more accessible than elsewhere. But will a proposed increase in fees “price out” the potential for public participation?

A recently released Ministry of Justice consultation paper, Civil Fees Review — a Public Consultation Paper September 2012, proposes a comprehensive review of fees in courts and tribunals in the civil jurisdiction, including the Environment Court. This is the first substantive review of fees since 2003. The paper suggests a framework based on “first principles”, which seeks to balance meaningful access to justice with a user-pays system that recognises the various private benefits arising from the court system.

The paper, certainly with respect to Environment Court fees, is well-timed. The RMA “simplifying and streamlining” amendments which are on-going, and the recent debate about curtailing rights of appeal to the Environment Court, have both focussed attention on whether court processes require improvement and, if so, how that ought to be achieved. In light of that debate, if the parties continue to contribute almost nothing for the services received from the Court, should the Court be expected to respond enthusiastically to calls for greater resourcing and more attentive case-management? Can parties expect improvements when they are not willing to pay for them?

Review of fees

In September 2011 the Government initiated a review of civil court and tribunal fees, on the basis that a “first-principles” review was long overdue.

As a result of the review, the Ministry of Justice was commissioned to develop a framework for fee setting. The consultation paper sets out the proposed framework that has been adopted, including the approach to fee setting and the proposed implementation of new fee regimes. An underlying principle of the proposed framework is that the public and private benefits generated by access to the courts should be shared between taxpayers (in proportion to the public benefits arising) and users of the system (in proportion to the benefits gained by participants). When considering that balance, the Ministry found that Environment Court fees are currently too low because:

(a) some services/applications have no fee attached;
(b) fees do not reflect registry or judicial effort involved with applications/process; and
(c) fees do not reflect the private benefits that are often associated with applications.

In part to justify the proposed increases, the paper points out that in some jurisdictions, for example the United Kingdom, courts pursue a policy much closer to full-cost pricing (the English courts currently recover approximately 80 per cent of their running costs). By contrast, the Environment Court currently recovers approximately 2 per cent of the total cost of running the Court each year. If the Ministry’s
proposed fees are implemented by Government, this may increase to approximately 5.5 per cent. While only a small “stepped” increase, the results of the review are intended to form the basis for regular fee adjustments and, ultimately, a shift to greater cost recovery for judicial services.

**Proposed fees**

So what are the key aspects of the proposal by the Ministry? In brief:

(a) **Increasing the filing fee for appeal proceedings (to $320 or $600, depending on whether a separate mediation fee is introduced) and directly referred applications (to $600):** This proposed increase is suggested on the basis that appeals take a significant proportion of court time (requiring administration time, court conferences, case management attendances etc) notwithstanding that most do not proceed to hearing. The Ministry’s paper notes that consideration was given to raising the fee to a much higher figure (in the region of $10,000) on the basis that direct referrals can be complex matters, however it was decided that it was more appropriate to calculate and recover costs at the close of proceedings, as currently occurs.

(b) **Introducing a fee for mediation ($100) or including this in the filing fee for appeal proceedings:** The paper notes that mediation represents a significant proportion of the Court’s work, although services are currently provided entirely free of charge.

(c) **Introducing a fee for s 274 parties wishing to join proceedings ($100) and certain interlocutory applications ($200):** The paper notes that over the last several years there have been many s 274 parties joining proceedings, which results in increased length and complexity of hearings (due to their ability to appear, present submissions, call evidence, and cross-examine other witnesses). At present these parties do not pay any fee to join. The fee has been deliberately set at a low level to avoid being a barrier to public participation, as the Ministry notes that “this would be contrary to the aim of the RMA”.

(d) **Introducing a hearing fee of $350 per half day:** At present there are no hearing fees in the Environment Court. The proposed fee is an attempt by the Ministry to recognise the costs associated with running a hearing (including when on circuit), and have been reduced (ie by comparison to the District Court or High Court daily fees) to take account of the “strong public interest component” associated with appeals to the Environment Court.

(e) **Introducing a cost-recovery regime for directly referred matters:** The proposed regime would empower the Registrar to require an applicant to pay to the Crown the actual and reasonable costs incurred, which the Ministry considers would be more efficient than the current cost-recovery process via s 285 of the RMA. Cost recovery would still occur following the hearing, although the Crown would be required, on request, to provide an estimate of the costs likely to be recovered.

Under the proposal, fees would be payable by the “relevant user” — usually the applicant, appellant or initiator. A multiple fee system will be introduced (rather than a single fee system payable at the outset) with fees payable at various stages in the process; eg application phase, mediation phase, interlocutory phase and hearing phase. The Ministry considers that this is more likely to encourage access to the Environment Court as users will be able to initiate proceedings without necessarily incurring the total cost of a full hearing upfront. This also reflects the reality of Environment Court appeal processes, whereby most appeals are (or should be) resolved prior to a substantive hearing.

**Prohibitive cost?**

For many, it is almost instinctive to object to fee hikes of any kind, particularly for what is perceived to be a public service. As a result, any proposed increase in court fees will inevitably attract negative responses from those who believe access to the court system should be an entitlement, irrespective of costs that may flow to other participants or taxpayers in order to fund the service.

For those who oppose fee increases, introducing a new suite of charges in the Environment Court will almost certainly result in some changes to how people involve themselves in the process. While the proposed fees will likely mean very little to larger corporate and industry participants, there may be lay litigants or other submitters, including public interest groups, who have cause to hesitate on grounds of cost before initiating or joining proceedings. But does an increase in fees necessarily mean that some voices will be heard less often when considering matters in the round? It is critical that parties should take account of the costs involved when pursuing matters to court, and that is equally true for experienced players as it is for lay litigants. However society is moving toward a user-pays model and therefore a real concern only presents itself when fees are so high as to represent a significant
impediment to participation, or could be said to penalise only a particular group.

The issue comes to a head with the introduction of a small fee for s 274 parties seeking to join appeals. Of course there is a risk of maybe some reduction in the number of parties wishing to join matters to preserve the status quo — particularly in respect of large plan appeals where there is likely to be a significant reduction in the number of s 274 parties on particular topics and appeal points (while an appeal can cover many topics, a s 274 notice needs to be lodged in respect of each appeal the party wishes to join). However, in reality the proposed fee is modest and has not been set at a level that would act as any significant impediment to the Court’s services. In that respect, while equality under the law requires that legal rights/processes are available to all without distinction as to financial (or other) resources, charging fees associated with the ability to participate in those processes is not incompatible with equality of justice, as long as there are measures in place to act as a counterbalance.

The paper suggests that existing safeguards, including fee waiver provisions and orders for costs, will continue to act as sufficient mechanisms to preserve rights of access to justice. For example, s 281A of the RMA provides that the Registrar of the Environment Court can waive, reduce or postpone the payment of any fees if persons are unable to pay the fee in whole or in part, or the proceedings concern a matter of public interest and are unlikely to be commenced or continued if the fee is not waived. It appears that this section is rarely invoked at present (undoubtedly as a result of the current low-fee structure), however if the Ministry’s proposals are introduced, then in order to preserve access to the Court, these powers might be expected to be exercised more frequently.

While not strictly an issue of prohibitive cost, the proposal to introduce a cost-recovery regime for directly referred applications may result in fewer applicants considering that route to the Environment Court. At present there are two primary advantages to the directly-referred route for any application — bypassing the original council hearing can save an applicant both the time and cost usually associated with a two-step process. However, by introducing a cost-recovery regime that allows the Court to recover its “actual and reasonable costs”, there is a possibility that the costs sought to be recovered will escalate. Arguably this may remove the key incentive for pursuing a directly referred application, however the direct-referral process was intended to be a time-saver, not necessarily a cost-saver, and a direct referral need not necessarily be cheaper to remain attractive to applicants who are operating within strict time constraints. However, even with the proposed cost-recovery proposal, a direct referral is likely to remain more cost-effective than the two-step hearing process, particularly if the proposed appeal and hearing fees are introduced in their entirety.

What might be gained?

The Environment Court is used by all parts of the community. Most participants undoubtedly have a shared goal in streamlining the processes, and limiting time and costs associated with involvement in an Environment Court proceeding, up to a point (a certain amount of time is needed in most cases to achieve robust decisions that will not be the subject of further appeal). So how do these proposed fee changes reflect that goal?

There is an undeniable relationship between the way in which the Court is funded and the rate at which cases can be determined and disposed of. Over the last several years there has been a dedicated effort by the Court to reduce an existing case backlog through enhanced mediation processes, more vigilant case management, and recently the increase in filing fees for appeals has had its own impact on the number of appeals before the Court. In that respect, recent suggestions that matters can spend a disproportionate amount of time on the Environment Court’s books are inaccurate and out of step with the progress that has been made.

However, enabling the Court to recover a greater proportion of its costs will allow progress to continue to be made. Contributing to costs will permit more rigorous management by all divisions of the Court, and will allow resourcing at both staff and judicial levels to be addressed if necessary — for example, large and complex plan matters could potentially have a number of judges and commissioners involved, to hear different aspects of the plan by topic.

The Environment Court itself has been working actively on this issue in recent times, with changes to the Practice Note (and more expected to follow); working with interested parties to agree procedures around caucusing of experts; pro-active case management; and examining its own past experience with large plan appeals (refer “Current and Recent Past Practice of the Environment Court Concerning Appeals on Proposed Plans and Policy Statements” July 2012, by Acting Principal Environment Judge
There have been many suggestions and proposed solutions from other parties as well, both in response to recent experience (good and bad) with large plan appeals, and as part of the debate surrounding the one-off proposed process for the Auckland Unitary Plan. Most of the solutions (at least those which advocate for the continued involvement of the Environment Court) equate to more pressure on the Court to meet timeframes; employ attentive case management of appeals; facilitate intensive and extensive mediation sessions; and otherwise offer more bang for participants’ buck. Irrespective of the Minister’s proposed solution for the Unitary Plan, there are still plenty of complex matters that will proceed to the Environment Court by various routes, and there seems to be agreement amongst all parties that the Court should continue to look for ways to improve its approach to those matters and focus on better and faster outcomes.

Given these desired “performance targets”, it seems appropriate that there be a small uplift in Environment Court fees, particularly where those fees relate to, and may have positive impacts on, the processing of large and complex matters. If the fees are set at a level that will not prejudice participation, yet will recognise the extensive resources required of the Court to deal with those matters in a timely fashion, all parties will be better off. The relatively minor fee increases proposed in the paper seem to achieve this balance.

**Suggested improvements to fee proposal**

The Ministry’s proposal to increase fees is likely to be welcomed by many, and accepted or tolerated by most others. However, some refinements are worth considering:

(a) **Reconsider mediation fees**: The proposed mediation fee is suitably low and, compared with the higher fees for hearing days, may serve to encourage parties to focus their attentions on this first, more collaborative process. However, in the absence of mandatory mediation requirements, charging a fee — particularly of only one party — could create tensions that will detract from the intent of the process altogether. On that basis, mediation might fall within the category of services for which it is less suitable to recover costs, given the associated public benefits and potential for Court time to be avoided altogether. If mediation fees are to be proposed, they might more appropriately be spread across all participating parties.

(b) **Clear direction as to what increased fees are to be allocated to**: The uplift in Court funding should not just address any existing cost shortfall, but should be directed toward improvements in resourcing that will allow processes to be streamlined. The ultimate allocation of revenue received from increased fees should be made transparent to all users, in order to be more effective: ie, will more judges or Court staff be appointed to increase process efficiency?

(c) **Examine appropriateness of requiring all parties to contribute to costs**: There are a number of considerations attached to the “initiator pays” concept that merit further exploration. An appellant in a straightforward resource consent appeal, with limited parties, might most appropriately shoulder the majority of the Court’s costs of hearing. However, where there are a large number of s 274 parties, each with their own counsel and several witnesses, it seems appropriate for other parties to also contribute in a proportion that reflects the additional hearing time necessary to accommodate their case. Other questions arise when considering a “cost split”: Should it only be parties who support the appellant’s position who are required to contribute to costs? If s 274 parties in support of the respondent are required to pay, should the respondent also contribute to the hearing costs? Should local authorities be exempt? It seems clear, although not expressly addressed in the paper, that in the case of a s 274 party taking up an appeal (if the appellant withdraws) the s 274 should become responsible for those hearing costs.

(d) **Contribution from respondent in context of plan appeals**: In respect of an appeal against the grant or otherwise of a resource consent, the “initiator pays” concept is probably the correct approach, as the applicant or appellant is responsible for seeking the consent, and generating much of the Court’s resulting workload, and will also have the most to gain if the consent is obtained on satisfactory conditions. However there are some concerns with the “initiator pays” concept in the context of large plan appeals. The paper suggests that the proposed fee of $350 per half day would be payable in advance by the initiator of proceedings, or each initiator if there is more than one (for an estimated proportion of the hearing time each requires). So, in the context of a large plan appeal, there could be any number of initiators, who would find themselves responsible for some proportion of hearing time on top of appeal and mediation fees.
What this approach lacks is recognition of the fact that often the large number of appeals on plans result from a less than satisfactory “first round” council process, including insufficient consultation with key stakeholders etc. If this process is not completed properly it can result in a large number of appeals being lodged, and a number of key issues being pursued on appeal, that might otherwise have been resolved through the initial council hearing phase. In that scenario, is it equitable for the appellants on the decisions version of the plan to shoulder the cost of lengthy hearing processes, just to achieve robust planning provisions that meet the purpose of the Act? Or should the respondent contribute a reasonable proportion of costs, particularly if its decisions version document is not upheld by the Court? To address this in part, the multiple fee system could be revised to introduce a different fee schedule in respect of matters on the complex track, rather than the standard track. At a minimum, separate fee schedules will be required for plan change appeals, resource consent appeals and designation appeals.

(e) Revisions to multiple fee system to ensure no wasted Court time: The Court is now spending more time pre-reading evidence and applications in order to reduce the amount of hearing time actually required. If the proposal stands, the Court will not recover for any of that time, other than by way of the filing fee. In some situations settlement occurs at the eleventh hour, meaning that pre-reading time is effectively wasted Court resource. To partially address costs associated with pre-reading and cases that settle prior to hearing, the Ministry could consider an additional tier in the multiple fee system, i.e a setting-down fee when a hearing date is sought, or fees payable on exchange of evidence.

(f) Certainty in respect of directly referred matters:

While there is merit in formalising the cost-recovery regime, the motivation to do so should be to provide greater certainty to applicants in respect of their cost exposure for such a process. The Ministry’s proposal appears to be an attempt to formalise the cost-recovery application process that currently occurs, rather than to increase the costs sought to be recovered, however the wide scope of “actual costs” able to be recovered could result in some hefty post-hearing invoices (or at least the anticipation of some). While the ability to request an estimate of costs may address this concern, it seems that a schedule of fees addressing the likely costs associated with a directly referred matter could be prepared (for example set fees for hearing days, reading days, etc), providing greater certainty and transparency at the outset, rather than the close, of proceedings. However, some discretion might remain with respect to the schedule of fees as, given the larger number of participant submitters often involved with a directly referred matter, presentations by s 274 parties can contribute significantly to the overall cost of the proceeding and an applicant ought not necessarily carry the full burden in that case.

Conclusion

Submissions on the consultation paper closed on Friday 2 November. The feedback received, while not yet published, may result in amendments to the final proposals put forward for Government consideration. If any changes are to be made to the current fee structure, they are likely to be implemented from early 2013 onward. At that point it will be clear whether the increases have any real impact on those accessing the Court’s services, or whether they prove to be a small price to pay for a value received by all.

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**RMLA Awards 2012 celebrating the success of:**

Professor Peter Skelton, recipient of the Principal Judge John Bollard Lifetime Commemorative Award in recognition of his contribution to New Zealand environmental law as lawyer, judge, academic and independent hearings commissioner;

Beca and the Stronger Christchurch Infrastructure Rebuild Team, recipients of the Project Award;

Details of the citations for these awards can be viewed on the RMLA website: www.rmla.org.nz.

► further awards on page 33
Rule-making when all Higher Order Provisions are Set — A More Simple and Streamlined Approach

Bronwyn Carruthers, Partner, and Simon Pilkington, Solicitor, Russell McVeagh

Introduction

Eldamos Investments Ltd v Gisborne District Council EnvC W047/05 (Eldamos) and Long Bay-Okura Great Parks Society Inc v North Shore City Council EnvC A078/08 (Long Bay) set out the approach required of decision-makers in the preparation and change of district plans under the Resource Management Act 1991 (RMA). Elaborating on the Eldamos test, the Environment Court in Long Bay set out certain steps “A” to “E” for decision-makers relating to general and preliminary requirements, the s 32 test for objectives, the s 32 test for policies and rules, and references to other statutes.

Where the objectives, policies and rules of a proposed district plan or plan change are in dispute, the Eldamos and Long Bay tests provide a step-by-step guide for the decision-maker to determine the district plan’s objectives, the policies which must implement the objectives, and the rules which in turn must implement the policies and objectives. This step-by-step guide has been followed by the Court in many cases.

The Environment Court has also held that it is good practice to decide objectives and policies first before rules or other methods, and has adjourned appeals on proposed rules until final decisions have been made on the relevant objectives and policies in dispute (Rimanui Farms Ltd v Rodney District Council EnvC A109/06). Indeed, it is becoming less common for the objectives and policies of a proposed district plan or plan change to be in dispute before the Environment Court at the same time as the rules. Increasingly, the approach being taken is to settle the higher-level provisions first through the mediation and appeals processes, before later determining the rules which will give effect to the settled higher-level provisions of the plan.

The settlement of higher-level plan provisions first, before determining the rules, makes sense. Section 32 requires that rules must give effect to the objectives and policies of a plan, not the other way around (Shaw v Selwyn District Council C883/2000 at [13]). It is therefore sensible to settle the higher-level provisions first otherwise there is a risk, once those higher-level provisions have been settled, that the rules of the proposed plan will need to be revisited to ensure that they meet the required test under s 32.

But this raises a question as to what is actually required of the decision-maker under s 32 when the Eldamos/Long Bay tests have already been undertaken in respect of the plan’s objectives and policies, and only the rules are left in dispute? On the one hand, rules can be seen vertically as giving effect to the particular policies and objectives of the particular part or chapter of the plan under which those rules sit. For example, height limits and setback requirements can be seen as rules which give effect to the particular objectives and policies of a plan relating to built form. Seen in this light, it is logical to suggest that the decision-maker is required under s 32 to determine height limits and setback requirements with reference only to those higher-order built form objectives and policies which those rules have been designed specifically to give effect to.

On the other hand, taken holistically, the objectives and policies of a plan can be seen as reflecting the broader strategic and policy decisions taken by a territorial authority in order to give effect to the sustainable management purpose of the RMA in its particular region or district. A local authority, for example, may have decided to provide for greater intensification of development in its district. This would likely be reflected primarily in the plan through objectives and policies providing specifically for intensification. But rules which have been designed to give effect to other objectives and policies of the plan — for example height limits and set back requirements designed principally to give effect to the built form objectives and policies of the plan — are also likely to have an impact in giving effect to the objectives and policies of the plan providing for intensification. Seen in this light, what is required of the decision-maker under s 32 in determining the rules of a proposed plan or plan change is a broader assessment which gives consideration to how the proposed rules will give effect in an holistic fashion to all the settled objectives and policies of the plan.

Art Deco Society (Auckland) Inc v Auckland Council

Issue before the Court

The question of what is required of the decision-maker under s 32 where the objectives and policies of a proposed plan have been settled and only the rules are left in dispute was recently at issue before the Environment Court in Art Deco Society (Auckland)
In this case the Court was required to determine whether five existing buildings in the Wynyard Quarter should be identified as character buildings on Quarter Plan G of proposed Plan Modification Number 4 to the Auckland City Operative District Plan (Central Area Section) 2004 (Plan Change 4). The decision provides a useful clarification for the application of the Eldamos/Long Bay tests in situations where the objectives and policies of a proposed plan have been settled and only the rules or methods remain at issue.

These proceedings began as an appeal by the former Auckland Regional Council (ARC) against the decision by the former Auckland City Council (ACC) to identify eight existing buildings in the Wynyard Quarter as character buildings on Quarter Plan G of Plan Change 4. The ARC sought that an additional five existing buildings be added to Quarter Plan G as identified character buildings. The Art Deco Society (Auckland) Inc (the Society), as a s 274 party to the appeal, took over the ARC's appeal as successor after both the ARC and ACC were replaced by the Auckland Council and the new unitary authority resolved not to pursue the appeal.

Plan Change 4 provides for the comprehensive redevelopment of the Wynyard Quarter. It contains a relatively complex regulatory framework, the majority of which was already operative before this appeal reached the Court following extensive mediation processes in a number of related appeals and the issuing of 21 consent orders. In particular, Plan Change 4 contains 12 objectives and sets of related policies relating to various matters including social and economic objectives, built form objectives, urban design objectives, remediation objectives, and character objectives. These were all settled by way of various consent orders prior to the hearing.

In relation to character, Objective 14.9.3.3 of Plan Change 4 is:

The protection and enhancement of identified character buildings and the retention of a unique character within Wynyard Quarter that is reflective of its maritime use and location.

The Court held that Objective 14.9.3.3 has two parts: the protection and enhancement of “identified character buildings”; and the retention of a unique character within the Wynyard Quarter that is reflective of its maritime use and locations. A similar pattern emerges in the policies that relate to Objective 14.9.9.3. The “identified” character buildings that are to be retained must be a subset of all character buildings and the wording “identified character buildings”, where employed, offered no guidance as to which particular character buildings should be identified, apart from the implication that some kind of screening process for character buildings is required.

The prescribed methods for giving effect to Objective 14.9.9.3 and its related policies include “identifying character buildings on Quarter Plan G”. The further methods set out, in so far as they assist, relate to the processes for dealing with buildings once they have been identified as character buildings on Quarter Plan G (for example, by requiring any proposal to alter, add to, demolish or remove those buildings subject to obtaining a restricted-discretionary resource consent).

The Court heard a significant amount of expert evidence as to what constitutes a “character building” and whether the five buildings in dispute were “character buildings” in the Wynyard Quarter that should be “identified” as such on Quarter Plan G. Ultimately the Court determined these proceedings in favour of the Council and declined to identify the disputed buildings as character buildings on Quarter Plan G. While that outcome will be significant for the on-going redevelopment of the Wynyard Quarter, what is more significant for resource management practitioners is how the Court reached that decision and, in particular, how the Court defined its decision-making role under s 32.

The Society’s approach

Accepting that the Long Bay process had already been undertaken in settling the objectives and policies of Plan Change 4, the Society submitted that the main issue before the Court was whether one particular method — Quarter Plan G — should be amended to better implement its higher-order Objective 14.9.3.3 and related policies. The Society submitted that Quarter Plan G is not intended to implement any other objectives and policies of Plan Change 4 and that, if it was, Plan Change 4 would say so. The Society also submitted that methods do not implement other methods; instead they sit in a vertical or silo relationship with their individual policies and objectives.

The result, the Society submitted, was that the Court should take a “vertical” or “silo” view of the relationship between Plan Change 4’s objectives, policies and methods whereby predominant weight should be given only to Objective 14.9.3.3 and its related policies in determining whether to identify the five
disputed buildings as character buildings on Quarter Plan G. Any conflict between the identification of the five disputed buildings on Quarter Plan G and the other objectives, policies and rules of the Plan Change could be resolved later at the resource consent stage.

In their evidence in support of the identification of the five disputed buildings as character buildings on Quarter Plan G, the witnesses for the Society therefore focussed almost entirely on Objective 14.9.3.3 and its related policies, with little or no reference to the other objectives and policies of Plan Change 4. For example, the conservation architects did not consider how, if the buildings in dispute were retained as character buildings, the objectives and policies of Plan Change 4 relating to the retention of certain view shafts and the creation and enhancement of public spaces, could also be accommodated. Under cross-examination, the heritage adviser also conceded that her evidence focussed almost solely on character buildings and Objective 14.9.93 and did not offer a balancing of all objectives and policies of Plan Change 4.

**The approach advocated by Council and s 274 parties**

Witnesses for the Council and the s 274 parties adopted a broader approach and placed their assessments of whether the five disputed buildings should be identified on Quarter Plan G within the context of all the objectives and policies of Plan Change 4. For example, Mr DJ Scott, the landscape architect called by the s 274 party Viaduct Harbour Holdings Ltd (VHHL), gave evidence that given the height, scale and bulk of what is proposed by Plan Change 4, the Plan Change as a whole envisaged “a new character” for the Wynyard Quarter. In addition, Mr Scott gave evidence that the “diminutive scale” of the five buildings in dispute was not consistent with the objectives and policies of Plan Change 4 which seek to highlight and mark the location of significant spaces, streets and public open space.

The consultant planner called by the Council, Mr NJ Roberts, also gave evidence that as a matter of planning strategy a deliberately holistic and comprehensive structure planning approach had been taken concerning the preparation and promulgation of Plan Change 4. Inevitably, where such a diverse range of issues is sought to be managed through this process, there will be competing objectives and policies. The methods and rules of Plan Change 4, in Mr Roberts’ opinion, had accordingly been designed to most appropriately achieve the objectives and policies of the Plan Change “in the round” by balancing the competing range of matters to be addressed by each objective and policy. Therefore, when undertaking a s 32 analysis of the methods and rules of Plan Change 4, Mr Roberts said that the correct approach was to look at the methods and rules available and make a judgment as to whether or not they achieve the objectives and policies of Plan Change 4 in an holistic manner.

Counsel for VHHL and the Council therefore submitted that when considering under s 32 whether the method (ie to identify the disputed buildings as character buildings on Quarter Plan G) was the most appropriate to give effect to the objectives and policies in Plan Change 4, the Court should adopt:

... an holistic approach to the objectives, policies and methods whereby all twelve objectives and their related policies and methods are considered “in the round”.

**The Court’s approach**

In determining the dispute about whether it should adopt an holistic approach, or a more focussed “vertical” or “silo” approach to the objectives, policies and methods/rules of Plan Change 4, the Environment Court started with the Long Bay test:

[15] We remind ourselves about the Long Bay approach. We consider that the guidance there provided concerning evaluation and implementation of various types of plan provisions respectively, is helpful. For instance, it is recorded that each proposed objective in a district plan (change) is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act. In contrast, policies and methods are treated in a more holistic or global fashion — and “policies are to implement the objectives, and rules (if any) are to implement the policies; each proposed policy or method is to be examined having regard to its efficiency and effectiveness, as to whether it is the most appropriate method for achieving the objectives of the district plan, taking into account benefits and costs of the proposed policies and methods, and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods”. (emphasis added by the Court)

Critically, the Court considered that the pluralisation of “objectives” in the description in Long Bay of the s 32 tests for policies and rules pointed powerfully in the direction of the holistic approach advocated by the Council and the s 274 parties. In addition, the Court held that the “overall broad judgment” approach required when applying the overarching sustainable management purpose of the RMA set out in s 5, also points powerfully to adopting an holistic approach towards its decision-making role under s 32 in respect...
of district plan rules and methods.

Turning to the provisions of Plan Change 4 itself, the Court held that taken by themselves Objective 14.9.3.3 and its related policies are flag-bearers for the recognition of character elements in the Wynyard Quarter. But they are devoid of any context for doing so and consideration of these provisions alone will not give rise to a balanced decision being taken under s 32 as to whether a building should be identified on Quarter Plan G. To adopt the “silo” approach advocated by the Society therefore carried a risk of undue focus being placed on the character provisions of the Plan Change, where such an emphasis is not required or even suggested by Plan Change 4 itself.

Accordingly, in assessing the disputed buildings, the Court was not prepared to overlook the range of objectives in Plan Change 4, or that these other objectives related to matters that competed with the character objective of the Plan Change such as providing for social and economic development, and the desire to create a waterfront park with a complementary hierarchy of open spaces, pedestrian connectivity and a high-quality of urban design. Viewed holistically, the Court did not accept that the most appropriate method for giving effect to the objectives and policies of Plan Change 4 “in the round” was to identify the five buildings in dispute as character buildings on Quarter Plan G. To list those buildings would, the Court held, significantly affect implementation of the vision for the Wynyard Quarter that is reflected in all 12 objectives of Plan Change 4.

Comment

The Court’s decision in Art Deco Society (Auckland) Inc v Auckland Council provides a useful clarification for the application of the Eldamos/Long Bay tests under s 32 in situations where the objectives and policies of a proposed plan have been settled and only the rules or methods are at issue. The correct approach in these situations is to look at the methods and rules available and make a judgment as to whether or not they will achieve the objectives and policies of the proposed plan in the round. This broader or “holistic” approach is ordained by the RMA, and in particular is set out in the Long Bay test which requires decision-makers to assess whether a method or rule is the most appropriate method for achieving all the objectives of the proposed plan or plan change.

The danger if the decision-maker does not adopt this approach to the s 32 assessment for rules and methods is also clear from the Environment Court’s decision in Art Deco Society (Auckland) Inc v Auckland Council. Adopting a “vertical” or “silo” assessment of a proposed rule or method by giving predominant weight only to its specific objective and related policies places the decision-maker at risk of setting down rules which may in turn significantly affect the implementation of the holistic vision of a proposed plan or plan change, as reflected in all the settled objectives and policies.

An additional interesting aspect of this case is that the Court did not explicitly address the other elements of the Eldamos/Long Bay tests in determining whether the five disputed buildings should be identified as character buildings on Quarter Plan G.

In other cases where the Environment Court has been required to determine proposed plan rules or methods, including cases where there has been no dispute as to the objectives and policies of the proposed plan, the Court has considered whether the rules will assist the territorial authority to carry out its functions in order to achieve the purpose of the RMA, are in accordance with Part 2 of the RMA, and are consistent with the provisions of the relevant operative Regional Policy Statement (Shepherd v Rodney District Council A024/09; Environment Defence Society Inc v Rodney District Council A117/09). The requirements to assess proposed plan provisions (including methods and rules) against the sustainable management purpose, Part 2 of the RMA, and for consistency against the operative Regional Policy Statement, are set out in the Eldamos/Long Bay tests and sit above the s 32 tests for objectives, policies and rules.

In this case, the Court did not explicitly assess the proposed identification of the five disputed buildings against these broader elements of the Eldamos/Long Bay tests. This may have simply been because all parties accepted that the “Long Bay process” had already been undertaken through the settlement of the objectives and their related policies. But in accepting that the “Long Bay process” had already been undertaken, implicitly the Court also accepted that it only needed to assess whether or not the identification of the five disputed buildings on Quarter Plan G was the most appropriate method for achieving all the objectives and policies of Plan Change 4, and did not need to turn its mind to whether the rules of Plan Change 4 would also meet the other elements of the Eldamos/Long Bay tests which the Court would usually directly consider.

This represents a departure from the Court’s approach in other cases where only the rules of a proposed plan are in dispute. It will be interesting to see whether the Court will adopt the same approach in the future.
Introduction

In 1999, David Norton and Judith Roper-Lindsay prepared a Discussion Paper for the Ministry for the Environment entitled *Criteria for Assessing Ecological Significance under section 6(c) of the Resource Management Act 1991*. Drawing on this work, and from earlier assessment schemes such as the Protected Natural Areas Programme, the authors published a proposed set of criteria for assessing significance under s 6(c) of the Resource Management Act (RMA) (D Norton and J Roper-Lindsay "Assessing significance for biodiversity conservation on private land in New Zealand" NZ Journal of Ecology (2004) 28(2): 295). These four criteria were:

- (a) rarity and distinctiveness;
- (b) representativeness;
- (c) ecological context; and
- (d) sustainability.

The nature of the sustainability criterion has been the subject of substantial debate. A critique on the use of a sustainability criterion for identifying significant natural areas was published in 2008 (S Walker et al “Halting indigenous biodiversity decline: ambiguity, equity, and outcomes in RMA assessment of significance” NZ Journal of Ecology (2008) 32(2): 225). This critique questioned whether using a sustainability criterion would effectively maintain biological diversity, given that habitats extensively cleared in the past, and under development pressure today, are unlikely to be of high quality.


The Norton-Roper-Lindsay criteria were first proposed in 1999. Since then, experience in their application, changes to the RMA, and developments in biodiversity policy and management at local, national and international levels (eg Norton 2008) suggest that they should be reviewed. ... We believe that the identification of significance under section 6(c) should be a relatively objective process and that the debate needs to move on to determining the most appropriate way to provide for the protection of the values once identified. We therefore suggest that ecologists, planners and lawyers involved with RMA debates should come together to address these different perspectives and provide clear advice to local authorities and others involved in the RMA process.

The Environment Court and the High Court have now considered criteria for determining significance under s 6(c). The following decisions consider whether a high quality threshold, or a form of sustainability, is a necessary prerequisite for s 6(c) status:

- *Friends of Shearer Swamp Inc v West Coast Regional Council* first interim decision [2010] NZEnvC 345; High Court decision [2012] NZRMA 45; second interim decision [2012] NZEnvC 6; third interim decision [2012] NZEnvC 53; final decision [2012] NZEnvC 162 (collectively the FOSS case); and
- *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 (Horizons One Plan interim decision).

Both the Environment Court and the High Court have found that s 5 matters are not assessed at the stage of identifying significant natural areas under s 6(c). Rather, s 5 matters come into play in the regime for managing significant natural areas. If a land environment is depleted from its historical extent beyond ecologically-set thresholds, then it should be considered significant under s 6(c). There is no further requirement for such areas to meet a “high quality” or sustainability threshold.

In the absence of an operative national policy statement on this matter, these decisions provide much needed guidance to local authorities on the interpretation of s 6(c).

What is the sustainability criterion for identifying significance?

In their 2004 article, Norton and Roper-Lindsay stated that a site would be considered positive for sustainability if:

- “key ecological processes remain viable or still influence the site”;
- “the key ecosystems within the site are known to be or are likely to be resilient to existing or potential threats under some realistic level of management activity”; and
- “existing or potential land and water uses in the area around the site could be feasibly modified to protect ecological values”.

It was proposed by the authors that sustainability be a “secondary criterion or qualifier” upon their other...
three criteria, consistent with s 5 of the RMA.

How was the sustainability criterion dealt with in the FOSS case?

The FOSS case dealt with the identification of significant wetlands in the West Coast Proposed Regional Land and Riverbed Plan for the purposes of s 6(c). The case considered how the significance criteria should be formulated for the purpose of identifying additional wetlands that were not already contained in a schedule, Schedule 1 of the Plan. After an extensive conferencing phase, all ecologists giving evidence agreed that to qualify as a significant wetland, the wetland need only satisfy one of the following four criteria: representativeness, rarity, ecological context or distinctiveness. The first interim decision considered the proposed criterion for representativeness, and also whether a qualifier needed to be placed on the rarity criterion.

Rarity and representativeness

In the FOSS case, the definitions of rarity and representativeness were revisited from the Norton and Roper-Lindsay definitions. Under the Norton and Roper-Lindsay definitions, the concept of environments or habitats reduced from their original extent would be encapsulated under the representativeness criterion. However in the FOSS case this concept was placed under rarity. Wetlands that were members "of a wetland class that is now less than 30 per cent of its original extent as assessed at the ecological district and the freshwater biogeographic unit scales" were considered to be rare wetlands ("class" used in the sense described in PN Johnson and P Gerbeaux Wetland types in New Zealand Department of Conservation, Wellington, 2004).

Unlike many other regions in New Zealand, not all wetland classes in the West Coast Region are depleted. Some wetland classes have over 30 per cent of their original extent still remaining in the West Coast Region. These more common wetlands could still be considered significant if they fell under a (redefined) representativeness criterion. This included all wetlands containing indigenous vegetation types or fauna assemblages typical and generally in a condition that they would have been historically (c 1840).

In the Environment Court, the ecological evidence for Solid Energy proposed that the (redefined) rarity and representativeness criteria should be run together, such that even if a habitat-type was less than 30 per cent of its original extent, it would still need to satisfy a type of representativeness criteria — such as "good quality". The Regional Council proposed a somewhat different approach, which would recognise as significant only the "best of" the rare wetland classes, following a ranking of all wetlands in each class.

In its first interim decision the Environment Court rejected the proposal to run together the rarity and representativeness criteria. The Court also rejected a "best of" qualifier on the rarity criterion. The Court said (at [40]): "what is the best of is a subjective determination notwithstanding that ranking may make the assessment appear scientific". The Court accepted that it would be impractical to use this type of subjective criterion in circumstances where the Region's wetlands had not all been assessed, stating "the first applicant for resource consent would be required to undertake the entire threshold assessment for the class of wetland in respect of which his/her activity relates" (at [40]). Unless the first (hypothetical) applicant for consent undertook a full region-wide assessment, a subjective criterion such as the "best of" applied to one individual site could result in few wetlands in a class ultimately being considered significant. That is, in cases where many of the remaining examples in a wetland class were in degraded or in a poor state, a "best of" qualifier could lead to the dismissal of a number of sites that would otherwise be regarded as significant on any region-wide analysis.

In relation to those wetlands which had been identified and listed as significant (in Schedule 1 of the Plan) the Court commented that the Regional Council had superimposed inappropriate "further thresholds or filters" when identifying those wetlands (at [103]), stating:

We accept that some of the work done in compiling the Schedule 1 list was effectively making the RMA Part 2 evaluation and trade-offs prior to when it should be made. This confused management and planning consideration with the merits of ecological values. It resulted in a blend of policy and planning which it would be difficult and we are not equipped to, untangle. (At [105])

The Court agreed with submissions that there is a need for a distinction between the objective ecological processes of assessing significant wetlands, and the more subjective planning and social processes of providing protection for those wetlands.

FOSS High Court decision

The West Coast Regional Council appealed the
The High Court upheld the decision of the Environment Court. The High Court found that s 5 considerations come into play when considering the objectives, policies and rules that apply to significant natural areas and at the stage of consent processing — not at the stage of identifying those areas. The High Court also found that previous Environment Court caselaw, such as the decision in Minister of Conservation v Western Bay of Plenty District Council EnvC Auckland A71/2001, 3 August 2001, does not support the addition of a gloss such as "very" or "highly" to the word significant in s 6(c).

**The Horizons One Plan interim decision**

In the Horizons One Plan interim decision the Environment Court heard appeals on a groundbreaking combined Manawatu-Wanganui Regional Plan and Regional Policy Statement. In terms of biodiversity, the One Plan broke new ground by:

- Allocating to the Regional Council as distinct from district councils the function of controlling land use for the purpose of maintaining biological diversity, including through rules (the jurisdictional validity of which was upheld in separate preliminary decisions of the Environment Court and the High Court); and
- Using habitat descriptions to describe areas within the Region which should be considered significant — rather than using a listing or mapping approach.

Habitats that were depleted from their historical extent with only 20 per cent or less of known or likely former indigenous cover remaining were listed in a schedule to the One Plan and classified as "threatened" habitats. Habitats with between 20 per cent and 50 per cent remaining cover were listed in the schedule and classified "at-risk". Habitats that were originally uncommon in New Zealand (ie at the time of human occupation) were listed in the same schedule and classified "rare". (The term rarity in the Horizons One Plan decision was used in a different way to that in the FOSS case.)

The position of Horizons Regional Council, the Minister of Conservation and the Wellington Fish and Game Council was that all "rare" and "threatened" habitats described in the schedule were significant under s 6(c) of the RMA, except if they came within a further set of objective criteria that excluded those sites that were unsuitable — due to small size or otherwise (such as some planted areas).

Meridian Energy Ltd’s ecologist considered that the condition, and in particular the functioning, of the habitats would need to be considered before determining whether such habitats had s 6(c) status. It was proposed that a site would need to at least have "functioning ecosystem processes" before it could be considered to be significant.

The Horizons One Plan contained a policy setting out criteria for identifying areas of significance under s 6(c) (Policy 12-6). Although it was intended that all "rare" and "threatened" habitat types would automatically qualify for significance, this Policy had the purpose of identifying whether "at risk" habitats, where identified on the ground, were significant. The Policy also had the purpose of setting out values which should be considered at the consenting stage, for all three habitat types. The Policy contained the statement:

> The potential adverse effects of an activity on a rare habitat, threatened habitat or at-risk habitat must be determined by the degree to which the proposed activity will diminish any of the above characteristics of the habitat that make it significant, while also having regard to any additional ecological values and to the ecological sustainability of that habitat. (At [3-44], emphasis added)

In relation to this Policy, the Court accepted that the matter of the condition of a habitat "can and should be dealt with at the resource consent stage when considering effects (including cumulative effects) and the other matters required under section 104". The Court commented that the approach recommended on behalf of Meridian Energy:
... we think, confuses these two steps and cuts across the need for a strong planning framework and a precautionary approach to a scarce and irreplaceable natural resource. (At [3-45])

The Environment Court in the Horizons One Plan interim decision found that habitats with 20 per cent or less of known or likely former cover remaining, and those habitats that were originally uncommon in New Zealand, should be identified as significant without needing to meet additional qualifiers such as having “functioning ecosystem processes”.

Discussion

These cases are authority that if a habitat is found to be historically depleted from its original extent to an ecologically-accepted threshold, the habitat can be considered significant under s 6(c) without further consideration as to quality or condition. The Horizons One Plan interim decision also made this finding in relation to those habitats thought to be originally uncommon in New Zealand. It is also not necessary to consider whether the habitat could recover under some level of management activity, or whether such management activity is realistic. Such considerations are only relevant at the stage of determining the appropriate management of significant areas, for example under the plan provisions and at the consenting stages.

It should be noted that considerations such as whether ecosystem processes are functioning normally can still be considered under other significance criteria, but such considerations should not be conjunctive with the criteria considered in these cases. For example, in the FOSS case (at [26]), the following was upheld by the Environment Court as part of the ecological context criterion: “it makes an important contribution to the ecological functions and processes within the wetland”. Areas meeting this criterion could qualify for significance even if they did not meet any of the other criteria. Another example is the criteria for representativeness used in the FOSS case. However such criteria dealing with quality considerations should be disjunctive and should not be a qualifier upon the criteria relating to: (a) sites that were uncommon in New Zealand originally and; (b) those sites that are significantly depleted from their historical extent.

The influence of section 30(1)(ga) of the RMA?

As noted by Norton and Roper-Lindsay (2008), there have been local, national and international developments in biodiversity policy since they originally proposed criteria for identifying significant sites under s 6(c). In relation to changes to the RMA, s 30(1)(ga) was enacted in 2003. This section added to the functions of regional councils “the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity”. District councils were also given a function for maintaining indigenous biological diversity. The function is to be allocated between district and regional councils in each region through the regional policy statement.

The function under s 30(1)(ga) clearly influenced both the Environment Court and the High Court in the above cases. For example, in the Horizons One Plan case, the Regional Council’s ecologist gave evidence that much of the remaining indigenous vegetation cover in the Horizons Region is fragmented and degraded, and ecological processes and functions compromised. The ecological evidence for the Minister of Conservation was that if a criterion such as “functioning ecosystem processes” was a prerequisite for significance then the vast majority of places in the Horizons Region may not be considered significant, including the best remaining examples of some rare habitats such as the coastal sand dunes of the Region. Specialist evidence on wetlands was that “considering as significant only those wetlands with high or even moderate values in the Region would exclude a very large number of wetlands and would fail to provide for the ongoing maintenance of the several wetland habitat types identified [in the Schedule to the One Plan] and their biodiversity”.

In relation to the ecological evidence of the Horizons Regional Council and the Minister of Conservation, the Environment Court commented:

These witnesses painted a graphic picture of the consequence of continuing to take out, or discount, the values of biodiversity across the region on the basis of its condition. (At [3-43])

Using the language of s 30(1)(ga), excluding degraded or poor quality habitats from identification as significant under s 6(c) ultimately would not provide for the maintenance of biological diversity across the Horizons Region.

The Proposed National Policy Statement on Biodiversity

As stated, there have been national and international developments in biodiversity policy since the Norton and Roper-Lindsay criteria were first proposed.
The "species area curve", which indicates that there will be a marked decline of species once a habitat becomes depleted by 80 per cent or more in the landscape, is now accepted ecological theory. Some ecologists propose a lower threshold such as 70 per cent depending on circumstances such as fragmentation of habitat — as in the FOSS case. National spatial datasets and satellite maps are now readily available identifying land environments that have 20 per cent or less remaining in indigenous cover (Land Environments of New Zealand and the Land Cover Database, the latter being regularly updated).

In 2007 the Government released the Statement of National Priorities for Protecting Rare and Threatened Native Biodiversity on Private Land. These Priorities are reflected in the Proposed National Policy Statement on Biodiversity ("proposed NPS"). The proposed NPS would provide that land environments that have 20 per cent or less remaining indigenous cover are to be identified as having s 6(c) status in any relevant regional policy statement, regional or district plan — without further sustainability or quality checks. The other areas that would be required to be identified as significant by the relevant local authority are:

- the naturally or originally uncommon ecosystem types (listed in Schedule One of the proposed NPS);
- indigenous vegetation or habitats associated with sand dunes;
- indigenous vegetation or habitats associated with wetlands; and
- habitats of threatened or at-risk species.

It is intended that local authorities would still have the ability to choose additional criteria for identifying significant natural areas beyond this set of five standard criteria. At least in relation to the standard criteria however, vegetation or habitat need not be "sustainable" or of "good quality" in order to be significant under s 6(c).

There were 426 submissions on the proposed NPS. The Ministry advises that although work is progressing on the issues raised by submitters, that work will need to be revisited in the context of the Ministry's wider reform programme.

In the meantime, the above decisions provide guidance to local authorities on the interpretation of section 6(c). For local authorities to fulfil the function of maintaining indigenous biological diversity within their boundaries, it is necessary to identify as s 6(c) areas those land environments which are significantly depleted from their original extent and those ecosystem types which were uncommon in New Zealand originally — even if they are of poor quality or in a degraded state.

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The author appeared on behalf of the Minister of Conservation in the Horizons One Plan case in relation to the biodiversity appeals.

Note: Federated Farmers of New Zealand has appealed the biodiversity component of the Horizons One Plan interim decision, however the grounds of appeal do not include a challenge to the Environment Court's findings on the criteria for identifying significance under s 6(c) of the RMA.
Recent Cases

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Application by TrustPower Ltd to amend the National Water Conservation (Rakaia River) Order 1988

Introduction

This case concerns a decision by an independent Hearing Committee appointed by Environment Canterbury (ECan) to consider an application by TrustPower Ltd to amend the National Water Conservation (Rakaia River) Order 1988 (RWCO). The amendments to the RWCO were sought to enable the future consenting, construction and operation of TrustPower’s proposed Lake Coleridge Project (the Project). As a Water Conservation Order (WCO), this application would normally have been considered within Part 9 of the Resource Management Act 1991 (RMA) under which a Special Tribunal would first hear the application and make a recommendation to the Minister and then the Environment Court would hear any subsequent appeals.

However, the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (ECan Act) appoints ECan, rather than a Special Tribunal, to make recommendations to the Minister and removes the Environment Court’s jurisdiction to consider any application to make or amend Water Conservation Orders (WCOs) in the Canterbury Region. In addition, the ECan Act also limits the right of appeal to the High Court on points of law only, reinserts Part 2 of the RMA as the overriding purpose for a WCO, and requires particular regard to be had to the Canterbury Water Management Strategy (CWMS) — a document promulgated through a non-statutory process. The decision reflects, to some extent, the difficulties that can arise when legislation is promulgated under urgency, and without proper consideration being given as to how the WCO process, substantially amended by the ECan Act, would work in practice.

Background

The Rakaia River was the first river in New Zealand to be protected by a Water Conservation Order in 1988. The RWCO, which was promulgated after a lengthy process, recognises the River’s outstanding natural characteristic as a braided river; its outstanding wildlife habitat and fisheries; and its outstanding recreational, angling and jet boating features. In order to protect these outstanding characteristics and features, the RWCO places a series of prohibitions and restrictions on the taking, use, damming, diversion and discharge of water within the wider Rakaia River system. In particular, clause 7 of the RWCO sets minimum flow requirements for each month of the year and prevents any abstractions from the River when flows are below these minima.

TrustPower has been involved in the Canterbury Region since its purchase of the Coleridge, Highbank and Montalto Hydro-Electric Power Stations (HEPS) in 1999 and its involvement in the Rangitata Diversion Race, an irrigation conveyance scheme supplying land between the Rakaia and Rangitata Rivers, through its shareholding in Rangitata Diversion Race Management Ltd. TrustPower had developed the Project to provide greater reliability for downstream irrigators and additional hydro-electricity generation capacity. The Project involved altering the operating regime for the Coleridge HEPS to utilise the storage capacity of Lake Coleridge to store water that could then be released to irrigators at times when the RWCO would otherwise prevent the take and diversion of water from the Rakaia River.

However, given the current restrictions in the RWCO, TrustPower sought to amend the terms and conditions of the RWCO to enable the future consenting, construction and operation of the Project. One of the key amendments sought by TrustPower was to ensure that water that was currently diverted into Lake Coleridge could, in some circumstances, be classified as “stored water” and available for release to irrigators as required, even if, at the time of release, the flows in the River were below the minimum flows specified in clause 7 of the RWCO.

The legal framework

WCOs are usually governed by Part 9 of the RMA. As this application concerned an amendment to a WCO in the Canterbury Region, the provisions of the ECan Act applied. Section 59 of the ECan Act sets out the matters that ECan must have particular regard to when considering whether to recommend that a WCO be made. This consideration is subject to Part 2 of the RMA.

After reviewing relevant provisions of the ECan Act, the Committee noted that the ECan Act significantly departs from the usual RMA framework that applies
to WCOs. The Committee identified four principal ways in which the ECan Act departs from the usual RMA framework for hearing and deciding WCO proceedings:

- the requirement that the application is subject to Part 2 of the RMA;
- the absence of a purpose statement;
- the requirement that particular regard is to be had to the vision and principles of the CWMS; and
- the removal of the jurisdiction of the Environment Court in relation to Canterbury WCOs and the limiting of rights of appeal to the High Court on questions of law only.

The first principal difference between the regimes is that s 50(2) of the ECan Act requires that any recommendations by ECan to the Minister must be subject to Part 2 of the RMA. In comparison, the Committee noted that s 199(1) of the RMA expressly states that WCO applications are not subject to Part 2 by commencing with the words “notwithstanding anything to the contrary in Part 2”. The Committee agreed with the submissions of TrustPower that the incorporation of Part 2 into the assessment of a Canterbury WCO meant that the Committee could broaden the range of matters to which it had regard (including both positive and negative effects of the variation and effects beyond a strict conservation assessment) and that the ECan Act also imported an obligation on the applicant to demonstrate how the proposed amendment would ensure that any effect would be appropriately avoided, remedied or mitigated. The Committee also acknowledged that the provisions of Part 2 must be given greater weight or primacy than other relevant considerations and will prevail in the event of a conflict.

However, the Committee did not agree with TrustPower’s submission that the incorporation of Part 2 also meant that an amendment could provide for a lesser level of protection to the outstanding features if that was necessary to achieve the purpose of the RMA and appropriate mitigation was provided so that the features would continue to be recognised and sustained, although in a slightly modified form. The Committee considered that the issue was more black and white — either the outstanding characteristics were recognised and sustained, or they were not. As discussed later, this finding highlights the uneasy relationship in the ECan Act between the historical conservation and protection purpose of the WCO process, with the enabling and sustainable management approach of the remainder of the RMA. The Committee was prepared to accept that, under the WCO process amended by the ECan Act, it was appropriate to consider whether the values could be recognised and sustained in a different way than provided for by the original RWCO (ie by different controls and restrictions).

The Committee also noted that this shift from a strict conservation approach is also confirmed by the fact that the ECan Act does not import the purpose statement set out in s 199(1) of the RMA, nor does it have its own. Section 199(1) states that the purpose of a WCO is to “recognise and sustain” the outstanding amenity or intrinsic values of the relevant water body. Therefore, for applications to vary a WCO under Part 9 of the RMA, considerable weight must be given to this strong conservation purpose. The Committee noted that this position was confirmed by both the Planning Tribunal and Court of Appeal in the original RWCO hearings, which emphasised that the overriding objective of the RWCO is the protection and preservation of outstanding features and that, in considering any competing or actual uses, the presumption must be in favour of conservation unless there is “a strong, really compelling case … to displace it” (Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc [1988] 1 NZLR 78 (CA), at 88 as per Cooke P). However, as the ECan Act has reinstated Part 2 as an overriding purpose for a Canterbury WCO, s 199(1), and the strict conservation approach to WCO applications, has been specifically excluded.

Consideration of the application

The central issue for the Committee was whether the outstanding characteristics and features protected by the RWCO would continue to be protected if the application was granted. After considering the various expert evidence provided by both TrustPower and the submitters on various effects, the Committee was satisfied that there would be minimal, if any, adverse effects on the outstanding characteristics and features of Lake Coleridge and the Rakaia River.

The Committee then turned to the consideration of the application under s 50 of the ECan Act. Turning to the CWMS, the Committee held that the effects of the application on the environment must be given first-order priority and that issues relating to irrigation, renewable energy, recreation, tourism and amenity must be considered as second-order priority considerations. The Committee was satisfied that there would be substantial farming and economic benefits and some hydro-electricity benefits as a result of the increased provision of irrigation within the Region and that the Project is a key component of the water supply infrastructure envisaged under the CWMS.
The Committee held that the application was consistent with the relevant provisions of policy statements and plans. The Committee also commented that given its recent notification, the Committee was required by s 207(c) of the RMA to have regard to the proposed Canterbury Land & Water Regional Plan (the Proposed Plan). While the Committee held that because the Proposed Plan was at such an early stage it should be given little weight, the Proposed Plan did emphasise the matters set out in the CWMS and other regional planning instruments (such as the Canterbury Regional Policy Statement and the Natural Resources Regional Plan). In this respect, the Committee did not accept that the Proposed Plan provisions would require the application to be declined.

Turning to the final consideration of whether the application to be declined. The Committee was required by s 207(c) of the RMA to have regard to the vision and principles of the CWMS. This gives statutory weight to a document that was not developed through a formal process. The vision of the CWMS is consistent with the principle of sustainable management under s 5 of the RMA — that is, the vision aims to balance the use and development of water resources for social, economic and cultural wellbeing against the need to protect key environmental and cultural values.

From a practical perspective, this decision also illustrates the difficulties that can arise when legislation is promulgated under urgency, and without proper consideration being given as to how the amended WCO process under the ECan Act would work in practice. First, the ECan Act requires the Committee to apply the overall judgement of Part 2 focussing on sustainable management, together with a desire to continue to recognise and sustain the values and characteristics identified by the RWCO. However, there is a marked difference between these sustainable management and conservation purposes. In this case, where the Committee held that there would not be any significant effects from the changes proposed by TrustPower, these competing objectives could be more easily balanced. In another factual situation (eg where there were significant effects on certain outstanding values) the difficulties of reconciling these competing objectives would be far more difficult. This difficulty explains why WCOs are generally dealt with in a self-contained part of the RMA that is not subject to Part 2.

Secondly, the CWMS, part of which was given statutory weight, provides applicants and consent authorities with little guidance as to the intended priority between the different, and often competing, elements in the vision and principles (particularly as it is only the vision and principles of the CWMS which have been incorporated into the ECan Act). The potential problems that can arise when statutory weight is given to documents that have not been subjected to a formal statutory process have been previously raised in the author’s article “A weighting game: What statutory weight will Auckland’s Spatial Plan be given in the RMA?” (RMJ, August 2011).
it would be of concern if the Spatial Plan were to be imported into the RMA in the same way as the CWMS has been incorporated into the ECan Act. It is acknowledged that Russell McVeagh appeared before the Committee on behalf of TrustPower.


Swordfish Co Ltd v Buller District Council [2012] NZHC 2339

This decision concerned the review of an earlier decision by Associate High Court Judge Matthews (Swordfish Co Ltd v Buller District Council [2012] NZHC 1083) to decline to strike out Swordfish Co Ltd’s (Swordfish) claim that it was owed duties of care by the Buller District Council (the Council). Swordfish claimed that duties of care were owed by the Council in exercising its functions to effect the subdivision of land under the Resource Management Act 1991 (RMA). While the High Court on review expressed a concern that Swordfish’s claims would be unlikely to succeed at trial, it declined to strike them out, finding instead that the claims were not so untenable that they could not possibly succeed.

Background

In June 2006, the Council granted resource consent to Christoni Properties Ltd for a three-stage subdivision. The subdivision consent was subject to conditions relating to earthworks, fill and flood mitigation, which were required to be completed in respect of the land comprising all three stages of the subdivision before Stage 1 of the subdivision was completed.

Section 224(c) RMA provides that survey plans effecting subdivisions must not be issued unless a certificate is lodged with the Registrar-General of Land stating the consent conditions that have been complied with. Where continuing consent conditions have not been complied with, the territorial authority must issue a consent notice specifying those conditions, which may then be registered against the title to the subdivided land alerting potential purchasers to the non-compliance. There is no statutory duty to warn potential purchasers about issues with subdivided land.

In April 2008 the Council issued a s 224(c) certificate and a consent notice stating the consent conditions that had not been complied with for Stage 1. No consent notice was issued for Stages 2 and 3 of the subdivision despite the relevant consent conditions not being complied with for these two stages. Swordfish purchased Stages 2 and 3 without notice of the non-compliance with the conditions for earthworks, fill and flood mitigation or warning from the Council that the land was subject to unresolved fill and flood mitigation issues.

Swordfish issued proceedings alleging the Council owed duties of care to future owners of the Stage 2 and 3 land in relation to exercising its functions under ss 221–224 RMA, and a duty to warn owners of the fill and flood mitigation issues with that land. Swordfish alleged the Council breached those duties by issuing the s 224(c) certificate for Stage 1 when the conditions for Stages 2 and 3 were unfulfilled, by failing to issue consent notices over the Stage 2 and 3 land, and by not alerting purchasers of the fill and flood mitigation issues with the Stage 2 and 3 land.

Decision of Associate Judge Matthews

The Council applied to strike out Swordfish’s claims on the basis they had no realistic chance of success. Associate Judge Matthews was doubtful Swordfish’s claims would succeed; however, he declined to strike out the claims because evidence as to the processes followed by local authorities for effecting subdivisions under ss 221–224 RMA, and the potential costs to local authorities of discharging duties of care in exercising these functions, would assist the Court at trial in determining whether the alleged duties existed. The Associate Judge noted that strike-out applications must be approached with “extreme caution”.

Review of Associate Judge Matthews’ decision

On review of Associate Judge Matthews’ decision, the question before Whata J was essentially the same as that before the Associate Judge: on the facts as pleaded, was it arguable the Council owed duties to future purchasers in exercising functions under ss 221–224 RMA to effect subdivisions of land? If there was no arguable case, Swordfish’s claims would be struck out.

Whata J accepted that the “extreme caution” approach of Associate Judge Matthews was not “unduly anxious” and was appropriate for the purposes of a strike-out application. Whata J also held that there was no obvious error in the methodology adopted by Associate Judge Matthews in determining whether the alleged duties existed. Associate Judge
Matthews adopted an “orthodox” approach focusing on the tests of foreseeability, proximity and policy. Nevertheless, Whata J proceeded to separately apply these tests in order to determine whether Swordfish had an arguable case that the alleged duties of care existed.

In terms of reasonable foreseeability, Whata J held that by discharging their functions under ss 221–224 of the RMA, local authorities signal the readiness of subdivided land for development. Accordingly, as no consent notices were issued for the Stage 2 and 3 land, it was foreseeable that Swordfish would consider that land ready for development. It was also foreseeable that the failure to issue consent notices would cause damage, as Swordfish would need to pay to ensure compliance with the unfulfilled consent conditions.

As to proximity, the Court held ss 221–224 RMA required the Council to act in a precautionary way by securing compliance with subdivision consent conditions. This established prima facie proximity between the Council and subsequent owners of subdivided land, as subsequent owners would reasonably expect that subdivided lots will not issue without compliance with consent conditions having been secured by the Council. What a J did have concerns about the apparent lack of control exercised by councils under ss 221–224 RMA, in particular whether councils are reliant on consent holders to demonstrate compliance with consent conditions. However, on a strike-out application the Court could not rule on these factual matters. The finding that prima facie there was sufficient proximity for duties of care stood to be determined at trial on the basis of evidence as to councils’ actual processes under ss 221–224 RMA.

The Court also declined to determine whether any policy factors negated the imposition of the alleged duties. In particular, the Council argued the alleged duties should not be imposed as the claims are by a commercial developer for pure economic loss. In the Building Act context, the Court of Appeal had held that claims in respect of commercial property for pure economic loss were not actionable under the tort of negligence. The Court declined to rely on the Council’s Building Act analogy, as the Supreme Court was about to consider the Court of Appeal’s decision. The Court also held that a strike-out application was not the appropriate place to assess policy arguments. Whether it was fair, just and reasonable to impose the alleged duties could only be assessed at trial with reference to the full facts and the general experience of councils’ in exercising their functions under ss 221–224 RMA.

**Conclusion**

Whata J accordingly declined to review Associate Judge Matthews’ decision, as there was an arguable case that a council owes duties to future purchasers in exercising its functions under ss 221–224 RMA. However, Whata J was concerned that the Council’s alleged duty to warn Swordfish that the subdivided land had unresolved fill and flood protection issues was particularly unlikely to succeed. The RMA does not impose a statutory duty to warn purchasers of issues relating to subdivided land and a general duty to warn of such issues was therefore likely to conflict with the RMA’s detailed scheme for effecting subdivisions.

**Comment**

Whata J set out why the Court may ultimately be reluctant to uphold Swordfish’s claims at trial: duties of care on councils in relation to effecting subdivisions under the RMA may undermine the achievement of sustainable management, as councils may adopt a disproportionately cautious approach to assessing compliance with subdivision consent conditions.

On the other hand, Whata J also accepted that purchasers of subdivided land are arguably reliant on councils properly performing their functions under ss 221–224 RMA to assess compliance with subdivision consent conditions and to notify non-compliances, in much the same way as those purchasers rely on accurate Land Information Memorandums. Where purchasers have conducted appropriate due diligence before they purchase subdivided land, it may be reasonable to require local authorities to meet losses incurred by purchasers of subdivided land, where those losses have resulted from a council’s failure to properly exercise its functions under ss 221–224 RMA.

In addition, the Council will not be able to rely on the analogy to the Building Act case at trial to argue that the alleged duties should not be imposed as the claims by Swordfish are by a commercial developer for pure economic loss. The Supreme Court has recently released its decision in *Body Corporate 207624 v North Shore City Council* [2011] NZSC 82, where the Court held that claims in respect of commercial property for pure economic loss stemming from a local authority’s failure to properly exercise its functions under the Building Act are actionable under the tort of negligence.
As announced at the Queenstown Conference in September, the 2013 RMLA Conference will be held in New Plymouth. The Conference will continue the quest to reconcile economic opportunity and environmental protection using two industries of central relevance to the Taranaki Region, petroleum and dairy, as “case studies”. This will build on the theme of “risk and resilience” explored in Queenstown, and also fits within the broader theme of “agility” that will continue to permeate the work we do as RMLA over the coming 12 months, and as Government reform extends into the Part 2 and First Schedule domains of the RMA.

The Conference title symbolises the tensions within both the RMA itself, and central Government’s policy programme of securing a “brighter future” through gains in economic prosperity while ensuring that New Zealand’s unique natural resource base is sustained.

We wish to ensure that the Conference is as relevant and informative as possible, and above all that we deliver the conference event which members most want to attend in 2013.

As well as fostering leading edge debate over the issues surrounding the theme, we are therefore proposing a Conference that has an applied focus, exploring best practice around evaluations of risk and effect, management frameworks, and administration of the issues that should be of central relevance and assistance to industry, local authority, and practitioners alike.

To that end we are “calling for contributions”, seeking suggestions from within the membership as to:

- Possible speakers within the theme (domestic and international),
- Topics for keynote sessions,
- Topics for workshop sessions,
- Offers to contribute from within the membership (as keynote or workshop panellist).

For any suggestions or contributions within these contexts, please send in an abstract by email only, to Karol Helmink at karol.helmink@xtra.co.nz by 21 December 2012. An abstract of between 250–300 words is required, setting out a summary of the proposed topic, format (eg workshop or keynote session), and proposed speakers and presenters. It is noted that all speakers, other than keynote speakers, are expected to present and attend the Conference at their own cost and that any abstract accepted will require a full paper of the presentation to be published on the RMLA website as part of the Conference materials provided online to attendees.

Meantime, put it in your diary!
Registration Now Open!

We are happy to announce that online registration is now available for the 2013 NELA National Conference.

Register before December 12th 2012 to take advantage of the early-bird rates.

For registration and further details please visit: www.nelaconference.com.au

Program Highlights

The National Environmental Law Association will debate the role of state governments in delivering a low carbon future at its national conference in March 2013. The question has been hotly contested since the federal government introduced a carbon price, and some state governments withdrew programs such as subsidies for solar panels and support for wind farms.

The conference is unique in bringing together different aspects of clean energy law with environment and climate change lawyers, and those at the forefront of resources and energy regulation & planning, carbon credits and emissions trading.

The conference will feature the following speakers:

- Professor Michael B. Gerrard - via video link
- Dr Aileen McHarg
- Professor Hari M Osofsky
- Dr Malte Meinhausen
- His Hon Judge M E Rackemann
- Roger Wilkins AO

For a full list of the speakers and more information about the program, please go to www.nelaconference.com.au

About NELA

NELA is the leading Australian environmental law organisation devoted to promoting debate about environment and climate change law based on principles of ecologically sustainable development. More information about NELA can be found at www.nela.org.au