Improving RMA Policy Making: Prescription for Reform

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October 2011

Executive Summary

The Waikato Region, like a number of New Zealand regions, is facing significant pressure to manage competing interests to use, develop and protect natural and physical resources. These competing interests typically manifest in submissions and appeals on policy under the Resource Management Act (RMA) – no matter how collaborative the policy making process has been.

The Waikato Regional Council (WRC) is particularly concerned about the delays and costs involved in making policy operative under the RMA because of the significant opportunity costs and policy lag involved. A regional policy process costs ratepayers, taxpayers and submitters millions of dollars, and takes up to ten years to become operative. WRC's experience is that over 70% of the time occurs in the appeals phase of the process.

In addition to retaining the current Schedule One process, this paper assesses several options to improve policy making against some important principles:

a. would it achieve the desired result in terms of savings in both costs and delay/will it be both technically robust and efficient;

b. does it provide sufficiently for political accountability in respect of the decisions made;

c. does it trespass upon existing public rights to participate or impact upon existing protections as regards natural justice and fairness;

d. does it provide for a satisfactory degree of iwi participation; and

e. is it politically achievable.

The paper concludes that the following option should be made available for regional policy making:

a. a single hearing procedure from which appeals are available only on points of law;

b. the hearing chaired by an independent Commissioner appointed by the Minister for the Environment that is suitably qualified to manage complex RMA hearings with rights of cross-examination

c. the independent Chair deciding with the Council, the necessary composition of the hearing panel(s)[1] based on the policy issues under consideration.

[1] It may be desirable to have specialist panels formed to help hear and decide on technically complex issues (e.g. geothermal or agricultural).

1. The Issue: Cost and Delays

The issue which concerns the Waikato Regional Council (WRC) is the cost the Council and its community incurs in the preparation and adoption of policy statements and plans under the Resource Management Act 1991 (RMA).

The concern is of particular relevance at this precise time, as the Council continues development of its 2nd generation Proposed Regional Policy Statement and is considering a Regional Plan Change to address (inter alia) water quality issues.

The issue is one which has been well recognised in recent work undertaken for the Minister:

a. Ministry surveys. A report prepared by the Ministry in October 2008[2] recorded that of the cost to Councils of preparing a Plan Change, 37% was spent prior to notification, on consultation, research and drafting[3]; and that 27% was incurred in resolving appeals. That is to say, the appeal process added, on average about one-third to the cost of the exercise.

   The same report indicated that it takes, on average, 3.3 years to resolve all appeals after a Council has made its decision on submissions.

b. The TAG reports. The first of the Minister's TAG's which reported in February 2009, also noted that apart from the financial costs incurred by Councils in preparing and promulgating RMA documents, which of itself gave rise to a "pressing need" for reform, noted that additional

   > *"costs come in many forms, and benefit no one. It is important to remember that the costs [cited in the MfE study] are only those incurred by the Councils preparing the documents. They do not include those costs incurred by other public agencies in their involvement in the process, nor those borne by land owners and resource users affected by the documents, nor those of community groups or individuals. To these direct costs must be added the deadweight losses to the economy, and the higher prices paid by consumers of goods and services."*

   The first TAG was attracted to a system in which the right of appeal to the Environment Court was limited by a requirement to seek the leave of the Court, yet recommended that further study of the desirability or otherwise of retaining the right of appeal to the Environment Court on matters of policy be the subject of further study in Phase 2 of the reform process. As the WRC understands the matter, there has been no further subsequent investigation; and it is with the aim of resuming that process, that the Council has commissioned this work.

Two significant issues arise from the costs and delays:

- Opportunity cost – that the public and the private resources expended could be spent elsewhere, including for more productive purposes; and

- Policy lag – that the problem originally sought to be addressed has significantly evolved by the time a policy becomes operative (up to 10 years later).

It should be noted that the opportunity costs are not limited to Council but include all submitters and the Environment Court. Any reduction in time and costs will benefit all parties, including freeing up the Environment Court to reduce any back-log of cases.

[2] "RMA Schedule 1 Processes – Preliminary Assessment of Option for Future Amendments"

[3] The Council's own estimates in respect of the Proposed Regional Policy Statement hearings and appeals are that the costs and time to notification are $4.1m and 3 years respectively.

2. The Cause of these Costs and Delays

These costs and delays are very largely bound up with the participation regime and appeal rights enshrined in the RMA.

To illustrate:

Variation No. 2 (Geothermal) to the Proposed Waikato Regional Plan (total cost $1.5 million)							
Notification	Hearings	Decisions	First Environment Court Hearing	Second Environment Court Hearing	Mediation & Negotiation following interim decision	High Court Appeals	Operative
August 2003	February 2004 (Approx 2 weeks of hearing time)	June 2004	September 2005	August 2006	2006 – 2007	September 2007	November 2008

Less than 12 months 3 years

Variation No. 5 (Lake Taupo Catchment) to the Proposed Waikato Regional Plan							
Notification	Hearings	Decisions	Environment Court Hearing	Interim Decision	Negotiation and caucusing following interim decision	Final decision of Environment Court	Operative
July 2005	May – June 2006 (Approx 3 weeks of hearing time)	March 2007	May - June 2008	November 2008	January 2009 - December 2010	June 2011	7 July 2011

Less than 2 years 5 years

Variation No. 6 (Water Allocation) to the Waikato Regional Plan provides another example. From notification to decision took two years. Variation No. 6 is currently in its third year of the appeals process.

Other jurisdictions are able to secure much quicker adoption of their planning instruments. For example the Southeast Queensland Regional Plan took seven months from notification to adoption; but these jurisdictions do not have the participation and appeal rights that we do. For example, in the UK there is certainly provision for submissions to be made in respect of regional plans, but there is no right that guarantees submitters a hearing, and there is certainly no right of appeal.

In a New Zealand context, Regional Land Transport Strategies as required under the Land Transport Management Act 2003 are consulted on via the Local Government Act's special consultative procedure (s83) and take approximately six months from notification to adoption.

Similarly, bylaws developed to address problems in communities such as safety on waterways or dog control follow the special consultative procedure and take well less than a year from notification to adoption.

Parliament recently made substantial progress in speeding up the process for applicants for consent, particularly in respect of projects of national importance: e.g. the Waterview Board of Inquiry recently completed its task in respect of arguably the biggest infrastructure project to be approved under the RMA, in a week over nine months from filing to decision.

Unfortunately these recent improvements in respect of applications and projects under the Act have not (with the exception of policy development in respect of aquaculture[4]) been matched by reforms to the Plan making process. Arguably some Plans, or portions of Plans could be referred by the Minister to a Board; for example it could not be denied that the control of the flow of pollutants into Lake Taupo or the utilisation of the flow of the major South Island rivers for irrigation purposes is of national interest.

Nevertheless, for a variety of reasons, for example the precise drafting of the legislation, and concerns around the lack of political accountability, it is clear that there are significant obstacles in the way of utilising the reforms of the Simplifying & Streamlining Act to assist with securing a speedier plan approval process.

Returning then to the time line above it is clear that a substantial proportion of the delays occur after the making of the Council decision and that many delays are beyond the control of Council[5]. It is also apparent that some parties do not participate fully in the Council hearing process, leaving their 'powder dry' for the appeal process. Knowing that an Environment Court appeal process exists means that there is no incentive for parties to resolve issues during the council hearing process. Similarly from the Council's estimates and the MfE data, a substantial proportion of the costs are also incurred after the Council decision. The value of duplicating or repeating evidence at both the council hearing and the Environment Court stages is also questioned.

The Waikato Regional Council accepts that New Zealanders have, at least since the passage of the Town and Country Planning Act 1953, supported a planning regime with extensive rights of consultation, submission, hearing and appeal. The concern is that while public consultation adds value to policy making this value is outweighed by the time and cost involved. In addition, Council's experience is that public participation in the process dramatically falls away in the process following the Council decision, with largely only commercial interests participating in Environment Court hearings.

The Council would not propose significant departures be made to this regime without an appropriate level of public debate; and has therefore sought in this proposal to address the substantive problems of costs and delays without impacting significantly upon the traditions of the present regime.

[4] Central government has sped up the coastal plan change process to enable aquaculture in the Tasman and Hauraki areas. Technical support from WRC has ensured consistency with existing planning documents and aided in the achievement of a workable outcome.

[5] For example, Variation No. 6 Environment Court hearings were delayed because Court resources were diverted to consider the application to the EPA for Tauhara II by Contact Energy. Variation No. 5 (Lake Taupo) Environment Court hearings were concluded more quickly, but final decisions were delayed by tactics of parties in the subsequent negotiations.

3. The Road to Reform – The Options

The question then is what part of these procedures could helpfully be abridged in such a way as to both leave existing rights and accountabilities largely intact, but also make significant efficiency gains?

In considering a case for reform, the WRC has evolved five principles by reference to which any proposal should be judged. These are:

a. would it achieve the desired result in terms of savings in both costs and delay/will it be both technically robust and efficient;

b. does it provide sufficiently for political accountability in respect of the decisions made;

c. does it trespass upon existing public rights to participate or impact upon existing protections as regards natural justice and fairness;

d. does it provide for a satisfactory degree of iwi participation; and

e. is it politically achievable.

The options would appear to be limited:

(1) direct referral to the Environment Court;

(2) call-in to a Board of Inquiry;

(3) adopt a model consistent with that in force in Australia whereby regional policy making is in fact undertaken at a State Government level (which would equate to Central Government in New Zealand);

(4) abolishing the right of appeal to the Environment Court and making the current Council decision final, subject to appeals on points of law only; or

(5) the introduction of a new one-hearing procedure, with cross-examination, but no right of appeal except on points of law.

In the Council's view, (1), (2) and (3) all both suffer from the same critical defect; they significantly reduce local accountability[6]. The Council regards it as imperative for community acceptance of the RPS, or indeed any other RMA document that it is, (and is recognised as truly being), the community's document.

Furthermore, (1) and (2) also suffer from a logistical difficulty which could be a significant impediment to a speedy resolution; they may not be sufficiently available in terms of sitting time, to enable an expeditious completion of the hearing process.

As was noted in the first TAG report, the appeal to the Environment Court on plan matters *"has historically provided an important mechanism for quality control and protection of property rights, as well as a means of ensuring that plans do in fact reflect the matters which Parliament has listed as being of national importance".* Merely leaving the present procedures intact, but simply removing the appeal to the Environment Court is likely to cause considerable anxiety amongst both the *"*development*"* and "Green" lobbies, neither of whom have a high degree of confidence in the universal competence of local authorities. Such an option is therefore most unlikely to be politically achievable, at least in the short term.

[6] That is, it removes decision making from elected representatives who are politically accountable to their community.

The introduction of a new procedure which would gain the confidence of all sides, but remove the delays associated with appeals; would rank highly in terms of being effective in achieving the desired outcome. Provided a satisfactory means of retaining local political accountability and guaranteeing iwi participation were to be found, a "one hearing" procedure would seem to represent a promising option for reform.

The passage of the Simplifying & Streamlining Bill through Parliament by 108-14 votes gives the Council confidence that the one stop hearing procedure which draws upon the philosophies of that legislation would also be politically achievable.

4. The Road to Reform – The Chosen Path

The WRC's conclusion is that what is required is creating a new option[7] for regional policy decision making:

a. a one-stop hearing procedure;

b. from which appeals are available only on points of law;

c. that has sufficient credibility that the decision will be widely accepted; and

d. which retains local accountability and representation,

in line with that which is suggested in (5) above being a panel, comprising political and technical experience to hear and decide on Regional planning documents. It is considered that such a panel would provide the accountability, ability to test evidence through the conduct of cross examination and provide for robust decision making that all participants could have confidence in. Any decisions from such a panel would only be appealable on points of law.

The principal features of the panel are:

(1) the Minister to appoint a nationwide pool of suitable qualified and accredited independent Commissioners. When a Schedule One hearing is required, a suitable and available Commissioner(s) will be appointed by the Minister (in consultation with Council) from the pool as Chairman of the Hearing to consider the submissions, conduct the hearing and release a decision;

(2) the chair of any hearing is to be a highly experienced lawyer or retired Environment Court judge or Commissioner appointed on the basis of their ability to conduct and manage a complex RMA hearing with rights of cross-examination;

(3) in light of the submissions received the independent Chair would consider and decide, with the Council, the necessary composition of the hearing panel(s);

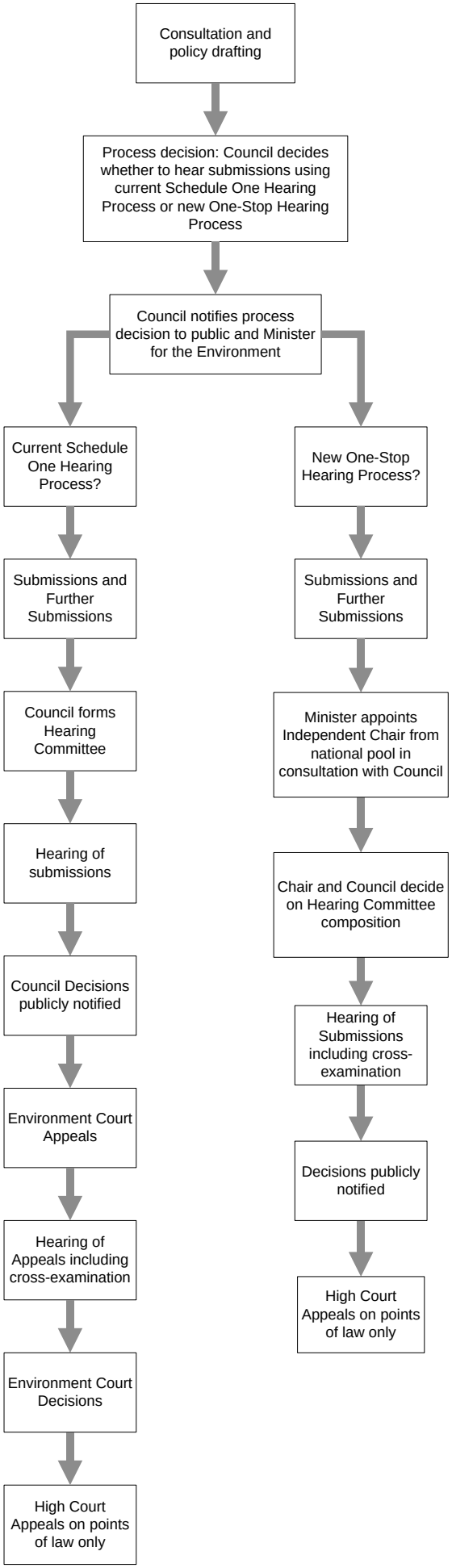
(4) there is a presumption that each hearing panel will have on it a majority of elected members of the Council. The qualification to this may be that the Chairman of the Panel could, perhaps with the consent of the Minister, determine that a submission or series of submissions are of such technical detail that a specialist panel is required to be formed – but nevertheless there should always be at least one councillor on it. A further variation is that it be a requirement that at least 40% of the panel be elected councillors; and

(5) it will also be so constituted as to contain appropriate iwi membership.

[7] The existing two stage Council-Environment Court process should be retained for those regional councils that wish to use it. In addition, some policy changes are not contentious/are not appealed.

This will mean that there will be a minimum of five people on any hearing panel. The Chair, the iwi membership plus three Councillors.

A flow-chart illustrating how the one-stop hearing could work alongside the current schedule one hearing is shown below.


Consultation and policy drafting
Process decision: Council decides whether to hear submissions using current Schedule One Hearing Process or new One-Stop Hearing Process
Council notifies process decision to public and Minister for the Environment
Current Schedule One Hearing Process?
Submissions and Further Submissions
Council forms Hearing Committee
Hearing of submissions
Council Decisions publicly notified
Environment Court Appeals
Hearing of Appeals including cross-examination
Environment Court Decisions
High Court Appeals on points of law only
New One-Stop Hearing Process?
Submissions and Further Submissions
Minister appoints Independent Chair from national pool in consultation with Council
Chair and Council decide on Hearing Committee composition
Hearing of Submissions including cross-examination
Decisions publicly notified
High Court Appeals on points of law only

5. Summary and Conclusion

Policy making under the RMA is currently costly and time consuming, resulting in issues such as policy-lag and opportunity costs. In light of the country's widely accepted freshwater challenges and fiscal constraints, these issues are particularly significant. There are a number of causes of such costs and delays including the lack of an incentive for parties to resolve issues at the council hearing when an appeal process exists. Taking into account important principles such as local political accountability, and iwi and public participation, a one-stop hearing process that involves a Minister-appointed independent chair is proposed as a solution for debate and discussion.

While we have described this as the "chosen path", that is not to say it is necessarily the only tenable option; merely that it is the one which most satisfies the Council's criteria. There are of course a number of variations that could be made to the chosen path without detracting from its viability. This is particularly so with respect to the detail of the method by which the panel is to be appointed, and especially the degree of Ministerial involvement.

The Council puts the chosen path forward not as a "one size fits all" solution: indeed, some Councils may prefer to retain the status quo, particularly for minor Plan Changes. Thus the Council is seeking an Amendment to the Act which would empower Councils to embark along the chosen path should they so wish.

The Council further acknowledges that other paths may be preferred by some Councils. There are after all a number of paths for the expedited consideration of consent applications, particularly for major projects. The Council sees no reason why a number of paths could not be made available for Plan matters. This chosen path is however the Waikato Regional Council's firmly expressed preference, and it urges the preparation of an amendment to the Act accordingly.