Resource Management Law Association of New Zealand Inc.

Resource Management Law Association Submission

Freshwater Reform 2013 Discussion Document

April 2013

INTRODUCTION

1. This Submission is made on behalf of the Resource Management Law Association of New Zealand Inc ("**RMLA**").

2. The RMLA is concerned to promote within New Zealand:

   a. An understanding of Resource Management Law and its interpretation in a multi-disciplinary framework;

   b. Excellence in resource management policy and practice; and

   c. Resource management processes which are legally sound, effective and efficient and which produce high quality environmental outcomes.

3. The RMLA has a mixed membership. Members include lawyers, planners, judges, environmental consultants, environmental engineers, local authority officers and councillors, central government policy analysts, industry representatives etc.

Currently the Association has in order of 1,100 members. Within such an organisation there are inevitably a divergent range of interests and views.

4. While the membership has been consulted in preparing this submission, it is not possible for the RMLA to form a single universally accepted view on the proposed reforms. It should also be noted that a number of members may be putting in their own submissions and those may represent quite different approaches than the views expressed here.

5. For these reasons, this submission does not seek to advance any particular policy position in relation to the proposed reforms, but rather is made with a view to ensure that the reforms:

   a. Are consistent with the general framework of existing laws and policies of relevance, and work alongside the Resource Management Act 1991 ("**RMA**") where relevant.

   b. Are practicable and workable.

   c. Will assist in promoting best practice.

QUALITY DECISION-MAKING

Reform 1: A collaborative planning process for freshwater-related regional plans and policy statements

6. **Specific Matter**: It is proposed in the Freshwater Reform 2013 Discussion Document ("**Discussion Document**") that an optional collaborative planning process be introduced. The RMLA considers that collaboration is already occurring successfully at regional and national levels by some Local Government organisations on a voluntary basis and has been for a number of years. The reforms are described as a new approach to planning and decision-making processes based on it applying as a statutorily recognised approach. Councils will have the choice to use either the existing process (First Schedule RMA) or the proposed new collaborative planning model.

7. Only if the new collaborative model is chosen, will councils have to comply with requirements relating to:

a. Partnering with Iwi from the beginning of the process (to enable Iwi and councils to shape the nature of their relationship to suit local needs before decisions are made);

b. Appointment of at least one collaborative stakeholder group;

c. Giving public notice of the proposed methods of engagement with the wider community, the nature of advice sought from stakeholder groups, timeframes and deadlines for processes and what to do if collaboration breaks down; and

d. Use of an independent hearings panel that has power to run mediations and allow cross-examination.

8. A decision by a council whose process complies with all the above requirements will then be subject to very limited appeal rights. While not entirely clear from the bullet point on page 26 of the Discussion Document, it seems as if any appeals to the Environment Court will be:

a. Restricted to points on which a council deviates from the recommendations of the hearings panel; and

b. In these limited circumstances will be by way of "rehearing" only rather than the present "de novo" approach.

Otherwise, rights of appeal will be restricted to the High Court on points of law.

9. The new collaborative planning model is intended to incentivise Councils to engage in inclusive community discussion early in the process and the gathering of robust information rather than legal action and conflict.

10. **Submission**: The intended outcomes for this aspect of the reform, i.e., inclusive community discussion early in the process and the gathering of robust information rather than legal action, are examples of best-practice and are supported by the RMLA.

11. If collaboration is to work effectively such that the "hard decisions" are made at the plan / policy statement development stage (rather than in appeals or the consideration of consent applications), then broad engagement between all relevant

stakeholder interests, and clear and effective ground rules will be essential. This is also an area in which there would be a need for considerable "capacity development" within local authorities, and for the many and diverse Iwi, local interest and environmental groups that would be expected to participate in that type of process.

12. The RMLA is of the understanding that the Discussion Document appears to assume that a collaborative stakeholder group has no role to play once it has delivered its recommendations prior to public notification. This means that there is no role for the collaborative group in the hearings or in implementing the final policy package.

13. The RMLA is aware of widespread dissatisfaction amongst its members as to the historic manner and level of local authority engagement with a relevant range of community interests (including industry, business, private or Iwi / environmental interest groups) under the current first schedule procedures. The RMLA considers this to be a substantial reason why so many parties currently feel compelled to rely upon the appeal stage of the process; to address concerns raised in submissions following notification, that are not resolved in the Council's decisions on those submissions.

14. The RMLA is also aware that collaborative processes within specific catchment contexts have left some parties dissatisfied, that their "voice has not been heard", and concerned that a greater emphasis or reliance on collaboration within plan making processes would come at the expense of an Environment Court appeal right (on the merits). It was suggested in the Second Report of the Land and Water Forum (April 2012) (recommendation 23, figure 2, step 7) that appeal rights could be limited to matters of national significance or where the decision does not give effect to the consensus position of a collaborative group. The Discussion Document does not explain why this suggestion was not adopted, but there could be issues with the approach suggested in the April 2012 report, such as:

    a. Trying to define what might be a matter of "national significance", which could be very difficult in practice; and

    b. Tying the scope of appeals to whether the council does or doesn't give effect to consensus position of collaborative group (if the independent panel sees fit to depart from the position) could be seen as giving the collaborative group (which is unlikely to capture every interest) too great a position; it could also

provide an incentive for councils to go along with collaborative group position, simply to avoid being appealed, regardless of whether the council really agrees with or should agree with that position or not.

15. The RMLA would be very much interested in partnering with the Ministry including through the hosting of a road show series of workshops within which the concept, structure and content of plan / policy statement partnership agreements could be fleshed out, along with protocols and principles for effective and "best practice" collaboration.

16. Beyond that, the RMLA has made its position clear relative to the means by which it considers "plan agility" can best be secured through a greater emphasis on collaboration at the outset of the process, and through more effective and efficient case management procedures for the Environment Court appeal phase at the conclusion of the process.

17. In August 2012, the RMLA submitted to the Minister (and published) a "Position Statement", titled - Plan Agility and First Schedule Reform, of its National Committee (an unprecedented step), stating relative to the (then) current debate about whether full rights of appeal to the Environment Court on RMA planning documents should be retained as follows:

> *Rather than dispensing with any one or more phases of the current plan preparation process all together, the Ministry for the Environment should harness the range of constructive proposals for better public engagement at the outset of the plan review procedures (thereby reducing the need or likelihood of submitters exercising an appeal right), alongside the suggestions for continued improvement in the case management plan appeals, and as recently recounted by Acting Principal Environment Judge Newhook.*
>
> *Adopting that approach, along with further incentives to promote a genuine commitment to collaborative processes suggested in this document, we consider that the imperatives of plan agility can be realised without raising the strong concerns held by many members about a potential reduction in the quality of planning outcomes arising through a removed or limited right or scope of appeal to the Environment Court.*

18. The RMLA's Position Statement (Plan Agility and First Schedule Reform, para 23) urged consideration of costs and efficiencies relative to the "whole life cycle" of the

planning instrument in question, rather than confining attention to the preparation process. Any costs savings through the process might be outweighed through unnecessary or inappropriate requirements for resource consents to be obtained at substantial cost to industry, tax and rate payers, and arising through inappropriate plan provision requirements, consent thresholds and the like.

19. The RMLA's Position Statement further stated, and regarding the proposals for partial appeal rights (as proposed under the reforms), as follows:

> *The fact is that no alternative mechanism involving either a fully removed (High Court appeal only) or restricted right of appeal has been proposed that does not create its own perverse outcomes and incentives including:*
>
> *(a) For Councils to adopt the consensus outcome, rather than as recommended by a hearing panel, simply to avoid appeals (LAWF 2 proposal, refer second Russell McVeagh paper) [fn Faster Higher Stronger - or just wrong? (Russell McVeagh, July 2012)];*
>
> *(b) Use of independent hearing panels to give necessary rigour to first instance hearing and decision, while a key pretext for reform is that local body politicians should be making the value judgement/policy decisions involved in RMA planning;*
>
> *(c) Use of independent hearing panels, with suitably qualified members, together with full rights of cross examination (essential if there is only one hearing) will act as a deterrent for lay submitters to become involved in the process;*
>
> *(d) Difficulties in determining on what basis leave to appeal should be granted (for example, where a matter of national significance is at stake, as also proposed in the LAWF 2 paper) or inevitably placing pressure on what is meant by an 'error of law';*
>
> *(e) Inevitability of increased litigation over issues of leave to appeal within whatever scope is retained.*
>
> *We do not consider these options effectively resolve the issues they create; let alone seek to address.*

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

21. Any alternative process, including as proposed in the Discussion Document, i.e., appointment of an independent hearings panel to make recommendations, and an ability for the council to reject those recommendations, raises substantially problematic issues of procedural fairness, practicability and timing.

22. These issues were addressed by the RMLA relative to a similar reform process promoted for the Auckland Combined plan. As stated in the RMLA's submission on this aspect of the 2012 Bill:

> *164. Under the Hearing proposed for the Auckland Combined Plan however, and which may extend over three years, the Hearings Panel may hear from many hundreds if not thousands of witnesses and develop a collective experience or understanding of the issues being addressed; their relative significance, and with the benefit of any or all witnesses being tested through cross examination, along with the outputs of expert conferencing and alternative dispute resolution.*
>
> *165. It is of serious concern that the Council (as but one party to the process, albeit the proponent of the plan) could, and within a 20 working day period, displace the recommendations made by the Hearings Panel without having heard any of that evidence, or having had the benefit of the combined experience and (including) expert opinion presented to it over the full Hearing process.*
>
> *166. It was for this type of reason (and concern) that the High Court intervened in the Whangamata Marina Society case, finding that the Minister's discretion was confined (to reject a recommendation of the Environment Court) given it had not heard the witnesses or had an opportunity to test the quality of the evidence, and that it would be irrational for the Minister to rely on evidence which has been tested and rejected by the Environment Court, such that the Minister could only differ on the weight to be given to the relevant statutory criteria, applying the factual conclusions the Court itself reached.*

> *167. Bearing in mind the confinement of appeal rights (to cases where the Council does reject the Hearing Panel's recommendations) the upshot of the process for submitters would be that they may have succeeded in their objectives of persuading the Hearings Panel regarding a particular issue, only to be forced to appeal based on a recommendation being rejected by the Council, without it having heard their case.*
>
> *168. The RMLA recommends that this aspect of the procedure be seriously reconsidered, including through requiring that if the Council does not accept a Hearings Panel recommendation, it must appeal that recommendation to the Environment Court itself.*

23. That concern and recommendation applies equally relative to the proposed reforms outlined in the Discussion Document (council power to reject hearing panel recommendations).

24. That aside, and if the model is to be adopted, it would of course be vital that there be full rights of cross-examination of all evidence presented to the independent hearing commissioners. This is especially so with the proposal that even where there is a right of appeal to the Environment Court (on the basis that the council has rejected the independent hearings panel's recommendations) that hearing would be by way of "rehearing". The Discussion Document does indicate that cross examination will be available in its collaborative process (unlike the wider resource management reform discussion document *Improving our Resource Management System*). The RMLA supports this aspect of the Discussion Document, if a change is to be made to the process.

25. The Discussion Document states that the Environment Court could rehear evidence *where appropriate,* but the traditional approach for an appeal by way of rehearing is to conduct the appeal on the basis of the record of the decision making body below (*Hall v Chief Executive of Land Information New Zealand* CIV-2005-404-007222).

26. If it is proposed that the Environment Court would have the ability to rehear new evidence that would comprise a departure from the conventional understanding of what comprises an appeal by way of rehearing. The criteria for any such reconsideration of evidence would undoubtedly be of significant interest to resource management practitioners and participants, and strongly contested in their application once confirmed. It could also be appropriate for there to be a

presumption of parties being able to call evidence on any appeal before the Environment Court where the appealed version of the plan (ie council's "decision version") differs from the notified version, which is what the first round of evidence would have been based on. It is entirely conceivable that a council could adopt provisions that depart to some wide extent from those which evidence was heard on (but still being within scope).

27. Overall, and for these reasons, the RMLA opposes the proposal that Environment Court appeals occur by way of rehearing, rather than the present *de novo* approach.

28. These points aside, there is much to support in the notion of a collaborative plan / policy statement process through which an integrated planning framework can be established (from regional policy provisions down to the regulatory level, and at the outset).

29. The Ministry would however need to carefully consider the relationship between this proposed aspect of the reforms, and the proposal in the resource management reform discussion document *Improving our Resource Management System*. Taking this into consideration, the RMLA is not at all clear as to how catchment based collaboratively derived planning frameworks would sit within the type of single resource management plans proposed in the resource management reform discussion document.

30. There is no guidance in the Discussion Document, or from meetings attended by RMLA members, on how the freshwater and resource management reforms are to fit together. If councils are to opt for an integrated regional and district plan, the RMLA can envisage the following issues:

    a. There can be overlap in council functions, i.e. water, human health, land management and subdivision. This may lead to confusion about what matters will be decided by the regional council and which by the district council.

    b. It may take a lengthy amount of time to identify which parts of a regional plan are directly or indirectly water related. This has implications for resourcing collaborative groups who need to distil all the information and make recommendations on complex matters.

c. An integrated plan will increase the scope of any plan review, which will mean the collaborative process for integrated plans is likely to take a much greater time. This will lead to issues around agreeing membership, appointment of members, the process itself, resourcing issues and increased bureaucracy.

31. The concept of the alternative "streamlined plan development process" being an option (to the current First Schedule process) is supported, noting as the RMLA did in its 2012 Position Paper, that there is nothing to stop a collaborative approach being employed under the existing First Schedule RMA procedures.

32. The RMLA seriously questions whether it is realistic to expect that the alternative path could in fact produce a more streamlined outcome that brings material efficiency / cost gains for a plan comprising both regional and territorial authority dimensions, and across an entire district / region or unitary authority, alongside (or encompassing) the outputs of the implementation of the proposed National Objectives Framework for Freshwater management.

33. **Recommendations:** The RMLA supports the intent of the reform to encourage increased collaboration and provide an additional optional path to plan preparation. However, it is considered that the incentives or criteria through which access to the alternative process are proposed to be made available need further consideration, and as to whether they are practicable or desirable based on a further cost/benefit analysis of the reforms in detail.

34. The RMLA opposes any option or alternative process that dispenses with (or narrows) rights of appeal to the Environment Court and strongly recommends this aspect of the reforms be abandoned. Without departing from that position, as the Discussion Document recognises, if there is to be a narrowing of rights of appeal then enabling cross examination before the independent panel hearing will be necessary and is supported by the RMLA.

35. The RMLA has a nation-wide, multi-disciplinary, devolved structure and seeks to engage with the Ministry to promote best practice in collaboration prior to plan notification, so that the incentive or perceived need to appeal is reduced.

Reform 2: Effective provisions for Iwi / Maori involvement in freshwater planning

36. **Specific matter:** A statutory requirement ensuring Iwi have a place alongside other key parties and interests in alternative collaborative planning processes.

37. **Submission:** The RMLA supports increased Iwi participation in the planning process. Iwi should have a role in providing advice and formal recommendation to a council regardless of whether collaborative or First Schedule RMA processes are used.

38. **Specific matter:** A role for Iwi in providing advice and formal recommendations to a council ahead of its decisions on submissions, with a statutory requirement for the advice and recommendations to be explicitly considered before decisions are made.

39. **Submission:** The RMLA notes that as practitioners in our experience, costs are a key issue and barrier in Maori (and Iwi) participation. Linkages with the discussion document on RMA reform will be important for any reforms in this area. If joint plans are developed then the processes for Iwi/Maori participation will need to be clear with time frames and cost limitations to the extent of consultation understood by all parties from the outset, particularly if different processes are proposed for water resource management.

SETTING FRESHWATER OBJECTIVES AND LIMITS

Reform 3: A National Objectives Framework

40. **Specific matter:** Consequential changes will be made to the National Policy Statement and possibly other regulation-making powers to facilitate a National Objectives Framework along with other amendments to section 69 and Schedule 3 of the RMA.

41. The Framework will have a standard list of possible values, such as swimming, fishing or irrigating and set standards for those values, in bands A - D. The Framework will not detail every value and water body type immediately but will be populated progressively over time as information becomes available. To implement the Framework it is intended to change section 69, which deals with rules about water quality, and remove Schedule 3, which lists water quality classes and corresponding standards, from the RMA.

42. The Discussion Document envisages that the local community will consider which values from the framework are relevant for a particular freshwater body and what band (A – D) will apply, taking into account local conditions.

43. A subset of values will apply nationally to all water bodies – these are ecosystem health and general protection for indigenous species and human health for secondary contact.

44. **Submission:** The RMLA queries the necessity of introducing a new National Objective Framework by way of regulation that sets various limits around water when there is already a framework in place in section 69 and Schedule 3 that with some amendment, could achieve the same objective.

45. As section 69 currently stands, a council can opt in to its requirements. If a council provides in its plan that a water body is to be management for a water quality class (value) identified in Schedule 3, then section 69 (1) requires that the rules in the plan require the observance of the standards specified for that purpose (unless in the council's opinion those standards are not stringent enough, in which case more stringent standards can be applied). The purposes currently provided for in Schedule 3 are:

> *1. Class AE Water (being water managed for aquatic ecosystem purposes)*
>
> *2 Class F Water (being water managed for fishery purposes)*
>
> *3 Class FS Water (being water managed for fish spawning purposes)*
>
> *4 Class SG Water (being water managed for the gathering or cultivating of shellfish for human consumption)*
>
> *5 Class CR Water (being water managed for contact recreation purposes)*
>
> *6 Class WS Water (being water managed for water supply purposes)*
>
> *7 Class I Water (being water managed for irrigation purposes)*
>
> *8 Class IA Water (being water managed for industrial abstraction)*
>
> *9 Class NS Water (being water managed in its natural state).*
>
> *10 Class A Water (being water managed for aesthetic purposes)*
>
> *11 Class C Water (being water managed for cultural purposes)*

46. Section 69 and Schedule 3 are optional, but could be amended to achieve the objectives of this reform point, particularly:

    a. Ensuring all water bodies are managed to meet the standards for ecosystem health and human health for secondary contact.

    b. Expanding the purposes for management listed in Schedule 3 to encompass those envisaged in the National Objectives Framework. Ecosystem health is already included in Schedule 3, however human health for secondary contact is not, and would need to be added. Additional values could also be added progressively, as is envisaged in the Discussion Document.

    c. Expand the standards imposed in Schedule 3 to include standards in bands A – D.

47. The RMLA considers that the objective of having Councils impose consistent limits for identified values could be achieved by either strengthening section 69 and schedule 3 of the RMA, improving and better utilising that aspect of the RMA, or by the proposal outlined in the Discussion Document.

48. In order to address any concern that the process of progressively updating and populating Schedule 3 may be onerous, it could be specified in section 69 that the Governor General may amend the Schedule, by Order in Council, on the recommendation of the Minister, similar to the manner in which section 61 (4) of the Crown Minerals Act 1991 states that Schedule 4 to that Act can be amended.

49. **Recommendation:** Consider that the National Objectives Framework could be achieved through an alternative means to the NPS, by amending section 69 and Schedule 3. An alternative framework could include:

50. Amending Schedule 3 by:

    a. Adding new water quality class "Human health for secondary contact";

    b. Adding additional water quality bands A – D for each water quality class; and

    c. Adding to Schedule 3 progressively.

51. Amending section 69 as follows:

69 Rules relating to water quality

(1A) A regional council shall provide that all waters are to be managed for classes AE and [*insert new code for human health for secondary contact – not currently in Schedule 3*] specified in Schedule 3.

(a)The rules in the plan about the quality of waters shall require observance of the minimum standards specified in that schedule],

(1) Where a regional council—

(a) provides in a plan that certain waters are to be managed for any purpose described in respect of any of the classes specified in Schedule 3; and

(b) includes rules in the plan about the quality of water in those waters,—

the rules shall require the observance of the minimum standards specified in that schedule in respect of the appropriate class or classes unless, in the council's opinion, those standards are not adequate or appropriate in respect of those waters in which case the rules may state standards that are more stringent or specific.

(2) Where a regional council provides in a plan that certain waters are to be managed for any purpose for which the classes specified in Schedule 3 are not adequate or appropriate, the council may state in the plan new classes and standards about the quality of water in those waters.

(3) Subject to the need to allow for reasonable mixing of a discharged contaminant or water, a regional council shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters at the time of the public notification of the proposed plan unless it is consistent with the purpose of this Act to do so.

(4) the Governor-General may from time to time, by Order in Council made on the recommendation of the Minister, amend Schedule 3.

Reform 4: Further national direction and guidance on setting freshwater objectives and limits

52. **Specific matter:** Amendments will be made to the RMA to give central government the power to provide for regulations directing and guiding councils in respect of setting freshwater objectives and limits.

53. **Submission:** It is not specified why additional changes to the RMA are required to give effect to the objective of this reform, that could not otherwise be achieved by additional use of national instruments (NPS, NES and regulations), and/or non statutory guidance.

54. **Recommendation:** The objective of ensuring councils and communities have a clear understanding of what is expected of them when setting freshwater objectives is not a matter that requires a law change to achieve, but instead should be achieved with non-statutory guidance and support in combination with comprehensive NPS and NES requirements, which include requirements for robust analysis under section 32 of the RMA (the provisions of which are proposed to be strengthened in the 2012 RM Reform Bill).

Reform 5: Improving the process for Water Conservation Orders (WCOs)

55. **Specific matter:** It is proposed to introduce a formal role for regional councils and unitary authorities, by providing clear circumstances in which an application might be referred to a regional council or unitary authority for them to consider in regional planning process, or for it to be put on hold as a result of the advice from the council/authority.

56. **Submission:** WCOs like NPSs and NESs protect water bodies in a national context, by protecting those that stand out on a national comparative basis. As noted in the Discussion Document, they set freshwater objectives and limits. Under the current framework in Part 9 of the RMA an application is lodged with the Minister and in accordance with section 202 the Minister may either reject an application or accept it for processing and appoint a Special Tribunal to hear and report on the application.

57. No criteria are provided in section 202 in terms of the basis on which an application may be accepted or rejected.

58. The legal test and context in which WCOs are decided is quite different from that applied by regional councils in their regions. The focus for significance and protection in a region is a regional context and is subject to Part 2 of the RMA. A WCO is considered in a national context, and the purpose of WCOs as set out in section 199 is applied notwithstanding anything contrary to that purpose in Part 2 of the Act.

59. Given the context, statutory purpose and different legal test it does not seem appropriate that regional councils or unitary authorities should have the ability to be appointed decision maker, or able to direct that an application be placed on hold.

60. Councils and authorities have the right to submit on WCO applications, and consideration of RPSs and regional plans must be had regard to by the Special Tribunal and Environment Court in accordance with sections 207 and 212.

61. **Recommendation:** For the above reasons, the RMLA does not support the devolution of the consideration of WCO applications to sub-national agencies. As an alternative, the relevant regional council or unitary authority could perhaps be provided with the ability to request the Minister of Conservation put a WCO process on hold, with the Minister required to take into account the views of that council but able to make his or her own decision on the matter.

62. **Specific matter:** Align the process with a Board of Inquiry process for matters of national significance. For example have similar appointment provisions and/or only allow appeals on points of law.

63. **Submission:** The reference to "matters of national significance" is confusing in the Discussion Document and could be read in two ways. One interpretation is that it is suggesting a new threshold test of "national significance" be introduced for WCO applications. Such a threshold would merely replicate the current test and is unnecessary. The second interpretation is that it is additional words are describing the Board of Inquiry process. This interpretation is preferred.

64. Currently the WCO process involves a first instance hearing in front of a Special Tribunal appointed by the Minister, at which there is no ability to allow cross examination. Appeals are heard by the Environment Court.

65. While the first instance Special Tribunal hearing is a more approachable and slightly less informal hearing for lay submitters, there is considerable duplication between the Special Tribunal and Environment Court hearing. The efficiencies to be gained in having one substantive hearing need to be balanced against the losses in accessibility of the process. Similar issues apply when considering whether a proposal of national significance should proceed through a Board of Inquiry process.

66. It is relevant that any other proposal of national significance under the RMA, be it a resource consent or a plan, can access the Board of Inquiry process on application to the EPA or by call in. It seems appropriate and consistent that this process be available to WCO applications as well. It also seems appropriate that the use of the

Board of Inquiry be subject to the same pathway as set out in Part 6AA of the RMA i.e., the Minister has the discretion to decide whether an application will be heard by a Special Tribunal or a Board of Inquiry in the first instance, or alternatively an applicant can apply for the application to be heard by a Board of Inquiry.

67. **Recommendation:** Insert no additional reference to a threshold test of "national significance".

68. Amend Part 9 of the Act so that the relevant pathways in Part 6AA of the Act to the Board of Inquiry, either by the Minister's decision, or by the applicant's initiation, so that the Board of Inquiry option is available, as an alternative to the Special Tribunal process.

69. **Specific matter:** Require clear scope for the application to be established at the beginning of the process and prevent changes to that scope once consideration is underway.

Submission: Currently there is some uncertainty as to how far a decision maker can inquire beyond matters clearly raised in the application and submissions in support. This was referred to by the High Court in *Talley v Fowler* HC Wellington CIV-2005-485-117, 18 July 2005 as a "manifest policy gap":

> *[13] "Parliament has not identified and expressly provided in s 205(3) for submitters who oppose a variation of a WCO to seek at the same time to extend its scope. There is no intention of Parliament evident in either ss 205 or 216 or Part 9 generally that guides as a matter of policy the resolution of this gap. The safest course in this instance is to adopt the interpretation which adheres as closely as possible to the text of s 205, with the least policy making consequence".*
>
> *[14] "What is of least consequence depends on the context. In this instance adhering closely to the text of s 205, notwithstanding its manifest policy gap, has the consequence that the submitters in opposition cannot seek to extend the present WCO. However, if they elect to, they can make their own applications for variation, under s 216".*

70. Section 205 (3) enables submitters to extend the scope of the application as follows:

Any person who supports the making of a water conservation order but who would prefer—

(a) that the order instead preserve a different but related water body in the same catchment; or
(b) that different features and qualities of the water body be preserved,—
shall endeavour, in his or her submission,—
(c) to make that preference known to the tribunal;

71. It is submitted that the scope of an inquiry should be restricted to the application and the additional relief sought by submitters in accordance with section 205. It is desirable to retain the ability for submitters to extend the inquiry to related water bodies in the same catchment, and different values of the water bodies, in order to enable an efficient and comprehensive consideration of a catchment's potentially nationally outstanding values.

72. However, there is currently no requirement that a summary of the additional relief sought be publicly notified so that affected or interested parties can submit. It is recommended that a process be put in place similar to that in clauses 7 and 8 of the First Schedule to ensure affected parties and those representing relevant matters of public interest not already involved in the process can submit and have standing to take part in all relevant parts of the inquiry.

73. **Recommendation:** Introduce amendments to clarify that scope of an inquiry is restricted to matters raised in the application and by submitters pursuant to section 205.

74. Introduce a procedural step similar to clauses 7 and 8 of the First Schedule requiring public notice of submissions, and the ability for parties to further submit and obtain standing in respect of new matters raised through the submission process.

WATER QUALITY AND QUANTITY GUIDANCE

Reforms 6, 7 and 8

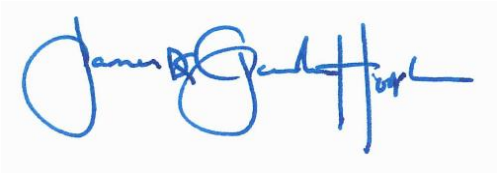
75. **Specific matter:** The Discussion Document includes several proposals to amend the system for managing water quantity and freshwater quality. The proposals for managing water quantity are to ensure that councils can obtain the information needed for freshwater accounting systems (reform 6), to account for all freshwater takes to improve the efficiency of water use (reform 7), and provide guidance on the specification of permits such as ensuring permit durations are not unnecessarily short (reform 8).

76. Amendments are proposed to the National Policy Statement for Freshwater Management to make it clear that councils are required to set allocation limits covering all water takes, which will identify the amount of water available for allocation. The next step of reforms for water quantity will address over-allocation, unauthorised takes, managing takes that do not require water permits, compliance and enforcement.

77. The reform proposals for managing water quality are intended to strengthen the science, research, knowledge and information; government leadership; and the development of good management practice toolkits. Once these measures are in place they will be monitored and assessed and further measures will be considered.

78. **Submission:** The RMLA supports the increased guidance around managing water quantity and freshwater quality. These non-statutory initiatives should be progressed as soon as practicably possible.

79. If there is any further opportunity to do so, the RMLA wishes to be heard in support of this submission.



Signature of James Gardner-Hopkins on behalf of the
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