Resource Management Law Association of New Zealand Inc.

PROPOSAL BY THE NATIONAL COMMITTEE OF THE RESOURCE MANAGEMENT LAW ASSOCIATION OF NEW ZEALAND INCORPORATED ("RMLA")

2015 PROPOSED REFORMS TO THE FIRST SCHEDULE

EXECUTIVE SUMMARY

1. The purpose of this paper is to propose an alternative to the Schedule 1 procedure that is available to local authorities (on application to the Minister) to address **specific/discrete issues** where the need for timely response is most acute. The alternative would be available beyond freshwater management (where an alternative process is already contemplated by NPSFM 2014 and associated freshwater management reform proposals).

2. By contrast, the alternative process would not be available for more general full plan review proposals, whereby the RMLA National Committee remains of the view stated in its August 2012 Position Statement "Plan Agility and First Schedule Reform" (ie that the current Schedule 1 process continue, assisted by improvements in practice already underway such as, at the start of the process, better engagement by Councils, and, at the appeal stage, good case management by the Environment Court).

3. Specifically, the RMLA National Committee considers that any condensed or truncated planning process should only be available:

   (a) with Ministerial approval, where a council can demonstrate that there is a specific need for a fast track planning process, which outweighs any trade-off in the ability of affected persons and communities to participate in the process because of resourcing considerations, and gives sufficient reason to displace the Schedule 1 procedure (refer Appendix 2 for the suggested statutory tests upon which such approval may be granted); and

   (b) where the proposed change or variation is certified as having been developed prior to notification through a process approved by the Minister to a sufficient standard (of effective collaboration at the outset, with any departure requiring approval of the Minister).

Introduction

1. The Minister has announced an intention under the 2015 Reform Bill to speed up plan making processes, and foster collaborative ways of resolving resource management issues.

2. The RMLA understands that the Government remains concerned that the current Schedule 1 process is too slow and "cumbersome", and is committed to changing the RMA so that plans and plan changes can be delivered more quickly in response to emerging issues that are either cyclical, or need to be addressed rapidly before the issues or effects of concern become irreversible.

3. Previous reform proposals have signalled that the Schedule 1 process providing for an initial (informal) Council hearing of submissions followed by an Environment Court appeal phase might be supplemented with an alternative approach involving initial collaboration, a more formal hearing by appointed Commissioners, with limited scope for appeals, and be available at least in certain circumstances.[1]

4. A number of alternatives to the current Schedule 1 process have been adopted in specific circumstances (eg the Auckland Unitary Plan, Christchurch Replacement District Plan Review, and Special Housing Areas legislation). The RMLA understands that the Government is also considering the use of other tools to assist councils in adopting new plans or plan changes, such as the development of "template plans" and greater use of National Policy Statements and National Environmental Standards to provide more national direction.

5. In August 2012 the National Committee of the RMLA produced a Position Statement "Plan Agility and First Schedule Reform" ("**Position Statement**"). At that time, there was debate about whether full rights of appeal to the Environment Court (on a *de novo* basis) should remain available, particularly in respect of plan reviews and plan changes.

6. The Position Statement demonstrated that, applying best practice (including case management initiatives developed by the Environment Court at the appeal stage), the current Schedule 1 process can deliver a plan review within a three to four year timeframe. The National Committee was particularly concerned that quality planning outcomes would be compromised if participants were denied access to the Environment Court, and that the alternative processes being considered at the time (such as that in respect of the Auckland Unitary Plan) could create as many issues as they sought to resolve.

7. The Executive Summary to the Position Statement recorded:

> 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.
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> 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.

8. Bearing in mind that position, and the Government's remaining concerns over plan agility in the context just outlined, the purpose of this paper is to propose an alternative to the Schedule 1 procedure that is available to local authorities (on application to the Minister) to address **specific/discrete issues** where the need for timely response is most acute. The alternative would be available beyond freshwater management, where

[1]Refer page 7 of the Ministry for the Environment Publication *Resource Management Summary of Reform Proposals 2013* (August 2013), in relation to the "Joint Council Planning Process".

an alternative process is already contemplated by NPSFM 2014 and associated freshwater management reform proposals.

9. By contrast, it would not be available for more general full plan review proposals, whereby the RMLA National Committee remains of the view stated in the Executive Summary recorded above. National Committee further considers that such an alternative is unrealistic for a full plan review given the diverse range of issues that need to be resolved in such a review. For reasons explained in more detail below, the overall process may also actually take longer to complete, and/or produce inferior outcomes over the planning cycle, which have net adverse longer term consequences for the economy and environment alike.[2]

10. The National Committee has reflected carefully on the issues, and, in forming our views, we have taken into account our experience to date with the existing truncated processes. The lessons from those processes (in respect of what is working well, and what is impeding efficiency of process or good outcomes) have been applied in formulating the proposal. We have also consulted the membership, and taken into account feedback received in preparing this paper, including from the convenor of the Regional Sector Policy Managers Special Interest Group.[3]

Rationale for Proposal

11. The National Committee of the RMLA proposes as follows:

(a) ***There should remain a choice of process***. The First Schedule process remains appropriate for full plan reviews. The diverse range of issues that are at stake for a full plan review are such that a process premised on effective collaboration achieving some form of consensus at the outset is unrealistic. The experience of the Auckland Unitary Plan is that there are simply too many stakeholders involved across such a range of issues for collaboration to work effectively, in a timely way, and with a view to producing a coherent overall planning instrument that has integrity. Indeed, we would go so far to suggest it may be 'naive' to presume that collaboration would produce anything near an effective consensus in this scenario (full plan review), eliminating the need for basic issues of principle to be resolved in a contested forum though a judicial or at least quasi judicial process.[4]

(b) Alternatively, employing collaboration to achieve consensus would be time consuming. The Land and Water Forum process itself demonstrated this, in a situation where there were complex issues at stake, with many and divergent views around the table,[5] as would be the situation for a full plan review. A process premised on effective consensus may not therefore be as "fast" as desired. [6] Unlike the freshwater context as well, and for more general plan review purposes, there is not (and is unlikely to be) the degree of national guidance (such as the National Objectives Framework) available in guiding choices for local authorities and communities when attempting collaboration, and setting 'bottom lines'.

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[2] Refer paragraph 24 of the RMLA 2012 Position Statement, attached as **Appendix 1.**

[3] Steve Markham, Environmental Policy Manager at Tasman District Council. The group involves representation from the 16 regions' group of policy managers.

[4] For this reason, the Position Statement refers to the "80/20" model, where the more realistic objective of collaboration is 80% of participants being satisfied with 80% of the planning instrument ahead of notification, refer to paragraph 39.

[5] Refer to paragraph 36 of the Position Statement.

[6] One example referred to us is the Waikato Regional Council Water Quality plan change process, allowing 2 years (and monthly 2 day meetings of the stakeholder group) to attempt consensus before notification.

(c) That being the case, the 'two stage' process for full plan reviews remains appropriate (and superior), whereby the general public can at least access the first stage of the process without significant resources, and needing to retain experts and or lawyers.[7] The 'filtering' effect of this first step is highly effective, whereby remaining issues of principle or substance can then be resolved in a timely manner through the more efficient procedures now being employed by the Environment Court. Many appeals issues are resolved short of hearing, with the most recent experience being that the appeal phase can be concluded within as little as two years. The Otago Regional Council's Plan Change 6A (to the Otago Regional Water plan) is a case in point, for something as complex and controversial as the management of farming related nutrient leaching.[8]

(d) Not every planning issue may need 'fast-tracking'. For example, a council may only have recently completed a review process, and there may only be a relatively minor set of changes proposed (for example, to ensure that a new NPS is given effect to, and whereby the RMA provides alternatives to the First Schedule in any event[9]). Some issues such as noise management, landscape, heritage, and general zoning provisions (which would dominate much of a district level plan review at least) are generally not sufficiently 'acute' or 'dynamic' as to require or warrant urgent response.

(e) They can be contrasted with such issues as urban growth, land supply or water management where a stronger case for plan agility may be available, but bearing in mind the alternative procedures now established or proposed in the context of the freshwater reforms, NPSFM 2014, and the National Objectives Framework already in place. Furthermore, for what may be the most acute issues requiring more rapid intervention, notified rules generally have immediate effect in any event.[10]

(f) In our opinion, there should be a specific and identifiable need for the use of an alternative more condensed or truncated process. In a similar way, for example, to how an applicant must demonstrate that a proposal is of national significance to access the 9-month board of inquiry process, a council wishing to use the fast-track planning process should be able to demonstrate the need for it to be employed. We consider it appropriate for the Minister to approve any use of any fast-track process, based on the imperatives for plan agility at stake for the specific issue concerned. A suggested statutory trigger (set of criteria) for approval of (access to) the alternative procedure is set out in **Appendix 2.**

(g) ***Where a proposed plan or change is to be fast-tracked, it must be of a sufficient (high) quality***. If the proposed plan is of poor quality, and has been developed without adequate consultation or the use of a collaborative process, and/or without an adequate section 32 analysis (for example), it can be very difficult for its shortcomings to be addressed through a truncated process. This has been the experience of the Auckland Unitary Plan process, whereby there was a lack of effective consultation (and essentially no collaboration) ahead of

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[7] Lay submitters (in particular) have been seen to effectively abandon aspects of the process (e.g. mediations, hearings of evidence) within the Auckland Unitary Plan and Christchurch Replacement District Plan contexts, within what is perceived to be an overwhelming process for them that is highly pressured (in terms of time), and which basically demands expert advice from lawyers and consultants in order to "keep up" with what is going on, let alone participate effectively.

[8] The Otago Regional Council's Plan Change 6A to the Otago Regional Water plan was subject to 21 appeals, and was resolved without the need for an Environment Court hearing in less than 2 years.

[9] Refer section 44A of RMA (displacing Schedule 1 in cases of duplication or conflict with an NES), and section 55(2A) similarly to give effect to an NPS where so directed by that instrument.

[10] Section 86 B of RMA.

the Plan being notified.[11] There was no opportunity for *all* key stakeholders to thrash out the principal substantive issues that were inevitably going to emerge, before 'pen was put to paper' in the drafting stage. Collaboration with stakeholder groups, such as did occur, was selective, and sometimes cursory in extent. Yet this is an essential step of the process envisaged by the Freshwater Reform (2013 and Beyond) proposals[12] reflecting the recommendations of the Land and Water Forum.[13]

(h) We by no means mean to discredit the Auckland Unitary Plan process altogether. Generally speaking, it has worked effectively (overall, and to date) to achieve its intended outcome of delivering an efficient and timely procedure for preparation of an integrated 'Auckland wide' planning response to the issues faced by the region. But the process has presented very significant challenges. There have been a number of highly pressured mediations involving numerous parties essentially rewriting major components of critically important RPS sections 'on the fly', all in isolation (across topics[14]) within a matter of days before relevant hearings for each topic, and whereby the experts involved are also committed to preparing evidence, in a context of rapidly changing wording and policy approaches emerging around them.

(i) Were it not for the extreme level of good will, commitment, energy and expertise of the experts and advisors involved throughout, as well as that of the Hearings Panel in adapting to the rapidly changing policy outcomes placed before them in evidence (and being able to keep the overall picture in mind), the result could well have been 'shambolic'. That outcome would be the 'worst of both worlds' and must be avoided for any alternative process.

(j) We also mean no criticism of any party involved, including Auckland Council or the Hearings Panel themselves. The Hearings Panel has communicated effectively with participants, and established mechanisms for gaining feedback that enable it to refine its processes to improve the experience for submitters, as it progresses. The reality is though that the deadline for the recommendations and final decisions under the legislation compels the timing issues raised above, as did the 'die being cast' through the Council being required to notify a plan to meet that deadline without effective collaboration at the outset.

(k) To ensure that proposed plans or changes going through a fast-track process meet the necessary standard, the National Committee considers it essential, before notification, that the relevant plan be certified as having been developed in accordance with specific requirements approved by the Minister (such as through an effective collaborative process at the outset), and whereby best practice is employed[15] involving a prescribed[16] minimum range of interest groups that must be represented.[17] Consensus might be an objective, but

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[11] Acknowledging the opportunity to make written comments on a draft plan before it was formally notified.
[12] Refer page 25 of the Discussion Document.
[13] See in particular the Second Report (April 2012) "*Setting Limits for Water Quality and Quantity Freshwater Policy and Plan Making through Collaboration*" (paragraphs 131-132).
[14] Such as urban growth, water management, natural hazards, biodiversity, landscape and Mana Whenua.
[15] The RMLA intends partnering with the Ministry to promote a road show training series to elevate the level of skills within the broader resource management community regarding techniques in collaboration, and so to ensure the best outcomes are achieved ahead of plan notification. A best practice guideline would also be important so that all local authorities and potential participants have a common understanding over protocols and clear expectations of the process from the outset.
[16] By Ministerial approval, regulation or within the RMA itself.
[17] For example, relevant iwi, business sector, environmental interests, local community boards or representatives and the like.

should not (in our view) be a requirement,[18] especially given the time that may be required to achieve it in any given case.

(l) ***The panel hearing a fast-tracked plan or change must have the necessary tools available to ensure that it can adequately test and consider the issues***. It is critical that the hearings panel is both sufficiently experienced and/or qualified, and has the full range of process tools available to it. In terms of composition, for example, if a plan change relates to water quality (say) then a panel member or members should have technical expertise in that area. In terms of process tools, the panel must, for example, be able to permit cross examination, require expert conferencing, and direct mediation. The precedents for this are available in the existing legislation and established procedures (as to Boards of Inquiry and for the Auckland Unitary Plan).

Discussion

12. The National Committee of the RMLA understands the Government's wish to speed up planning processes. However, we are concerned to ensure that any fast tracked process does not compromise plan quality or effective participation and access to justice for interested and/or affected persons, for the reasons expressed in the Position Statement. As noted, experience in respect of the Auckland Unitary Plan, for example, suggests that many parties (and lay people in particular) do not have the time and resources necessary to participate in a meaningful way. The process is arguably "too fast". Many residents/lay submitters have simply been unable to keep up and as a consequence have abandoned aspects of the process (such as participation in mediation or hearings). Similar criticisms have been made in respect of the Christchurch Replacement District Plan Review process, including from the point of view of both lay submitters, and those represented and there in a professional capacity.

13. This raises real 'access to justice' issues that we do not consider can simply be dismissed or even discounted, particularly for general plan review purposes.

14. The particular (but different) circumstances of Auckland and Christchurch (i.e. the unprecedented consolidation of multiple plans following amalgamation, and the post-earthquake need to update the city plan, respectively), warranted 'bespoke' condensed or truncated processes. The negative impacts on the ability to participate were no doubt considered, but perhaps outweighed by the pressing needs of Auckland and Christchurch respectively, in deciding to adopt the relevant special processes in those cases. As outlined above however, for more general issues in full plan reviews (and in the ordinary course), no particular need for urgency is apparent, and the existing two-step process is both appropriate and superior.

15. Any plan or change that is to be notified for a fast-track process must be of a high standard. Aspects of the Auckland Unitary Plan as notified, for example, have been criticised as having significant shortcomings (refer discussion above). Nor was the Council's section 32 analysis prepared in time for the Council to take it into account prior to notification. In Christchurch, the very comprehensive submission co-ordinated by CERA in respect of the Christchurch Proposed District Plan, among many other lengthy submissions, also strongly suggests that the notified version of that plan was not as well developed as it could have been.

Outline of Proposal

16. Against this background, the RMLA National Committee considers that any condensed or truncated planning process should only be available:

[18] Again, refer paragraph 39 of the Position Statement, cited earlier.

(a) with Ministerial approval, where a council can demonstrate that there is a specific need for a fast track planning process, which outweighs any trade-off in the ability of affected persons and communities to participate in the process because of resourcing considerations, and gives sufficient reason to displace the Schedule 1 procedure (refer Appendix 2 for the suggested statutory tests upon which such approval may be granted); and

(b) where the proposed change or variation is certified as having been developed prior to notification through a process approved by the Minister to a sufficient standard (of effective collaboration at the outset, with any departure requiring approval of the Minister).

17. The detail of the process to "unlock" the fast-track alternative process could include:

(a) The Council clearly identifying the "problem" or specific discrete issue, and why it needs to be resolved urgently through the fast-track planning process (and what disadvantages of using the fast-track process need to be considered).

(b) Ministerial approval that the matter is of sufficient importance and/or is otherwise appropriate for use of the fast-track process (employing the Appendix 2 statutory tests).

(c) Specific stakeholder engagement by the Council, with the minimum range of interests and key aspects of the process to be approved by the Minister, or set out through regulation. The process could include elements of the collaborative process being considered for freshwater identified by the Ministry for the Environment in its discussion document, *Freshwater Reform 2013 and beyond* (refer page 25 of that document).

(d) Depending on the scope/nature of the issues, the process requirements could include the following elements (or combination of them):

(i) Minimum requirements for consultation and engagement.

(ii) Use of an effective collaborative process involving all (prescribed) stakeholder representatives.

(iii) Preparation of a draft plan or change reflecting the outcomes of collaboration, with a requirement that it be reviewed in light of feedback on it.

(iv) Independent audit of the Council's section 32 evaluation, prior to notification of the plan or change (as with the Auckland Unitary Plan), with a requirement that the Council take into account that audit before notification.

(v) Certification, prior to notification, that all the required steps have been completed. A plan or change could not proceed to notification without completing the required steps with the Minister's approval.

18. If these sorts of process requirements are put in place, that would assist in ensuring that the fast-track process will be available where speed is important or the circumstances otherwise require, but with safeguards to ensure that there is adequate engagement with the relevant stakeholders and communities in developing the plan/change, and that a quality planning instrument is notified for consideration through a truncated process.

19. In respect of the fast-track process post-notification, the hearing panel should be appointed at an early stage, so that they can start to make procedural directions and give submitters as much certainty and warning as to process and timing as possible. Panel composition is particularly important. It is anticipated, to the extent that the Auckland and Christchurch processes will be successful in producing quality plans, that a large measure of that success will be attributable to the high calibre of the members of those panels. That is another reason weighing against all plan processes proceeding down a fast-track process - there may not be enough commissioners of sufficient quality, experience, and expertise (let alone the desire) to populate hearings panels if all plan processes were fast-tracked.

20. The hearing panel should also have all of the necessary tools available to them to appropriately test the evidence before them and the position of the parties - particularly if appeals are to be limited. We have seen the Auckland Unitary Panel make good use of both expert conferencing and mediation for example (noting the issues above where there are so many parties (e.g. 40 plus) around the mediation table that the mediation is too unwieldy, and the pressure of time is unreasonable given the extent of changes being proposed/agreed at mediation[19]). Cross examination is also available (with leave) in both the Auckland Unitary Plan and Christchurch Replacement District Plan processes. It is also available, under the EEZ regime, to the decision making committees established by the Environmental Protection Authority. The experience to date in those processes is that cross examination is sparingly used (and that leave is rarely, if ever, given to cross examine lay people). Nevertheless, the National Committee considers it a necessary tool, for example, to allow proper testing of competing expert opinion.

21. In respect of whether or not a merit appeal to the Environment Court should be available (and, if so, in what circumstances), that may depend on who makes the final decision in respect of the fast-track planning process. In the Auckland Unitary Plan context, the Panel makes a recommendation to the Council, and, to the extent the Council rejects the Panel's recommendations, appeals are available to the Environment Court. In the Christchurch context, that Panel makes the final decision and there is no right of appeal.

22. From a process perspective, if it is the Council that makes the final decision, then, given that it is not the entity that has heard all the submissions and evidence, it seems appropriate that there be a right of appeal or challenge on the merits if it departs from the recommendations of the hearing panel. Otherwise, a Council could make any decision it wanted (but not having heard the evidence, etc.), with no consequence except a High Court appeal on a point of law. We expect, if departure opens up the prospect of a merits appeal, a Council would only depart from the Panel's recommendations in exceptional circumstances.

23. Another option (in this context) would be to confine Environment Court appeals to policies, methods and rules, as well as technical issues, rather than the broader strategic objectives of the plan (for example, confining the Court's jurisdiction to section 32 (1) (b) of RMA). Alternatively, the Environment Court might be afforded the role of determining 'point of law' appeals from the hearing panels involved in the alternative process, given its specialist experience in the issues involved, and with special leave required for any further appeal directly to the Court of Appeal.

[19] Again, an artefact of lack of effective collaboration at the outset, such that substantial changes at this later stage of the process are necessary.

24. The National Committee would welcome any opportunity to discuss issues further with the Minister and/or officials.

National Committee
RMLA

30 January 2015

Appendix 2

Suggested set of criteria for approval of (access to) the alternative procedure

Section [X] Criteria for alternative plan process

(1) Upon application by a local authority in the prescribed form, the Minister may approve the alternative to the Schedule 1 procedure provided for in [Schedule X] for any change or variation to a plan or proposed plan (but not for a plan review under section 79 of RMA).

(2) In deciding whether the alternative to the Schedule 1 procedure provided for in [Schedule X] may be used by a local authority, the Minister must be satisfied that the matter sought to be addressed in the variation or change:

(a) is of a nature and degree of significance that requires particular urgency in order to:

(i) achieve the objectives of the plan, or
(ii) recognise and provide for any matter of national importance, or
(iii) give effect to a national policy statement (where section 55(2A) of this Act does not otherwise apply in any event), and

(b) may not be effectively or efficiently addressed through the Schedule 1 procedure, and

(c) can be more effectively and efficiently addressed through the alternative procedure in [Schedule X], and

(d) is such that the alternative procedure in [Schedule X] is likely to produce an outcome that better promotes the purpose of this Act in relation to the matter, having regard to those matters that the Minister must certify as completed to the Minister's satisfaction under [Schedule X].