RUSSELL McVEAGH

Submission to the New Zealand Productivity Commission on the Draft report *Towards better local government regulation*

6 March 2013

EXECUTIVE SUMMARY

1. This submission is made on behalf of the Russell McVeagh environmental and resource management group.

2. Russell McVeagh has one of New Zealand's longest established and most experienced environmental and resource management practices. The group has a wide range of experience in all areas of resource management law including obtaining resource consents, designations and other environmental approvals for major infrastructure and large commercial and industrial developments, providing advice to clients on new legislation and amendments to existing legislation, and advising on national and local authority planning documents (regional plans and policy statements, and district plans).

3. We have been advising a range of private sector clients and publicly owned entities on all aspects of the Resource Management Act 1991 ("**RMA**") since its enactment. We have experience working, for our clients, with district and regional councils around New Zealand and have extensive practical knowledge and understanding of the benefits - and difficulties - of plan making and consenting under the RMA.

4. The partners have taken a particular interest in the recent calls for reform of RMA plan-making processes.[1] We have also been closely watching the debate around the proposed process for the Auckland Combined Plan, and have been involved in advising our clients in relation to the Resource Management Reform Bill 2012. In relation to the plan-making process, we have proposed an alternative solution.[2]

5. Much of this recent debate includes questions around the role of the Environment Court, and whether the rights currently enjoyed by parties under the RMA to appeal decisions to that Court should be amended or even abolished.

6. The Productivity Commission's Draft report *Towards better local regulation* (December 2012) ("**Draft report**") raises questions about the role of appeals at Chapter 12. This submission addresses the matters raised in that chapter only, and does not discuss matters otherwise raised in the Draft report.

7. In our view:

   (a) The driving concern for those involved in the planning process should not be the length of time that it can take to resolve appeals; it should be the quality of the plan. Any solutions to the timing of the plan-making process must focus on delivering the best outcome, which surely must be a quality plan that works for the community and enables the creation of a productive and efficient economy, in a way which promotes the sustainable management of natural and physical resources.

   (b) The Draft report asserts a range of reasons for what it sees as a failure of submitters to "participate fully" in local decision making, thereby leading to a reduction in the quality of local decision-making. A key reason is what the Commission asserts, without evidence, is the practice of "keeping one's powder dry."

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1 *Faster, Higher, Stronger - or Just Wrong? Flaws in the framework recommended by the Land & Water Forum's Second Report* (Derek Nolan, Bal Matheson, James Gardner-Hopkins and Bronwyn Carruthers, 12 July 2012). See http://www.rmla.org.nz/upload/files/response_to_lawf_120712.pdf
A Better Approach to Improving the RMA Plan Process (Derek Nolan, Bal Matheson, James Gardner-Hopkins and Bronwyn Carruthers, 21 March 2012).
See http://www.rmla.org.nz/upload/files/a_better_approach_to_improving_the_rma_plan_process.pdf

2 *A Better Approach to Improving the RMA Plan Process*. Ibid.

(c) A more credible reason for poor quality local decision making (resulting in appeals) is that councils, particularly for plan changes, take a "decide, announce, defend" position.

(d) Councils are not infallible in their decisions at first instance. There are often many submitters seeking to be heard, and the process by which plans or consents are decided at the council hearing does not often allow a robust testing of the evidence.

(e) Appeals are often less about challenging council policy and more about the workability of plan provisions or resource consent conditions.

(f) Rather than removing or limiting the right to appeal to the Environment Court, there should first be a focus on reducing the frequency with which submitters feel the need to exercise their right.

(g) There are a range of improvements which could be made to the way in which councils go about preparing new plans, both during the critical pre-notification phase and after notification. There must be much greater consultation and discussion of the subject matter of all planning documents and greater collaboration over their content.

(h) An objective must also be to ensure that all plan processes at both the council and the appeal stages can be completed within four years; two years at the council level and two years at the Environment Court (with more rigorous case management), unless there are exceptional circumstances.

(i) The Environment Court is a unique appellate jurisdiction, and rightly so. It deals with multi-party, multi-issue matters, and considers a first instance decision made by elected representatives, on evidence which has not been tested by way of cross-examination. Hearings de novo, rather than by way of rehearing, remain the most appropriate way by which the Court should hear appeals.

8. We have structured our comments on the Draft report based on the headings in Chapter 12. We have also answered the six questions posed in the Draft report at **Appendix 1**.

9. We would welcome the opportunity to meet the Commission (as suggested at page vi of the Draft report) to discuss the issues and concerns raised in this submission.

INTRODUCTION AND THE LOCAL AUTHORITY REGULATION-MAKING PROCESS UNDER THE RMA (SECTIONS 12.1 AND 12.2)

10. The Draft report acknowledges that appeals to the Environment Court are generally limited to the most significant matters, and it is often apparent early in the process that a matter will go to appeal. However, the Draft report suggests that such a realisation can "disincentivise full participation in the policy process, to preserve resources and best information for the Environment Court ('keeping one's powder dry')." The Commission does not provide evidence for this presumption that submitters or applicants generally "keep their powder dry", but it forms a key assumption for much of the chapter.

11. In our experience, contrary to the Commission's assumption, participants in council processes do not "keep their powder dry" for appeals. Such an approach would be a waste of time and money. Often, the council process results in a positive outcome for submitters or the applicant, meaning that appeals are not required. This is all the more so if the effort put in at the council level is robust and fulsome.

12. The Draft report acknowledges that plan-making is "generally rigorous and resource-intensive", but considers the process to be insufficiently agile to respond to new or increasing environmental pressures. It considers that the appeals process "needs to be well calibrated to addressing matters that are legitimately addressed to it, and the policy-making process needs to incentivise participation in decision making outside appeals."

13. Plans are, in our view, necessarily resource intensive. They form the framework for resource management in New Zealand. They have a fundamental role in shaping the requirements for, and assessment of, all future consent applications. They may outline what activities can and cannot be undertaken and where, and provide guidance as to what may, should, or must be taken into consideration by decision makers determining consent applications.

14. As Elias CJ said in *Westfield v Discount Brands*[3]:

> The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The plan has legislative status. People and communities can order their lives under it with some assurance. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed.

15. Putting the effort in to get the framework right can pay big dividends later in terms of efficiency and in terms of timeliness of processing applications for consent, as well as ensuring suitable environmental protections are in place where required.

16. Without public participation through proper consultation, submission and hearing processes, policy makers may unknowingly become divorced from key sectors of society and may develop policy that is fundamentally at odds with those sectors. In making decisions as to what to include and what not to include in their plans, all such viewpoints must be on the table so that they can be properly considered in reaching an informed decision as to what position is ultimately taken in the plan.

17. It is important that there are processes in place to ensure the final document represents the community's aspirations. While the notified version of a policy statement or plan reflects the initial aspirations of the regional council or territorial authority, the intention is that the final version of the plan reflects the wider community's aspirations. This is the purpose of having public participation in the plan, and the reason why there is no presumption in favour of a council's position at the appeal stage.[4]

18. We agree that participation by the community outside of the appeals process should be incentivised. In a recent paper,[5] we considered a range of solutions which would, in our opinion, improve the plan preparation process. More time consulting with the community prior to preparing the wording of the plan and active engagement on the actual draft wording of the plan during the pre-notification process would reduce the number of appeals.

19. Councils are not infallible in their decisions at first instance. There are often many submitters seeking to be heard, and councils do the best they can dealing with multiple issues and multiple parties, but the process by which plans or consents are decided at the council hearing does not often allow a robust testing of the evidence. Nor can it be expected that a council's first attempt at amendments to address the concerns raised

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3 [2005] NZSC 17, para [10].

4 *Leith v Auckland City Council*, Decision A34/95; *Gisborne District Council v Eldamos Investments Ltd*, HC Gisborne, CIV-2005-485-001241.

5 *A Better Approach to Improving the RMA Plan Process*. Above n 1.

(which is in effect what the decision is) will be perfect, and will not create additional issues or unforeseen implications.

20. We strongly consider there needs to be a clear decision-maker at the end of the process, with the ability to test the evidence and to improve on the first instance decision. There are inevitably compromises made along the way in relation to many projects, and an objective decision-maker needs to ensure any decision made meets the purpose of the RMA and is effective.

Private plan changes

21. The Draft report suggests that private plan changes are an unusual form of regulation, and that the Commission would ordinarily expect regulators to "set the rules, and require people to work within them."

22. This is an overly simplistic way of characterising such RMA processes as private plan changes. In our experience, in almost all cases, private plan changes are a site specific solution where it would be impractical to revisit or revise the general approach taken in the overarching objectives or policies of the operative plan. Private plan changes are tailored solutions for sites that enable an entire concept to be assessed against the existing planning framework, but enable development to proceed without unnecessary multiple consents being required.

23. It is also often impractical for developers to wait until a local authority has reviewed its plan and prepared a proposed plan in order to pursue development opportunities. In our experience, a particular planning or policy direction might be flagged by a council in relation to a particular zone or area, but it can take years for the council to turn that indication into planning provisions for public notification. Private plan changes allow applicants and developers to proceed with a proposal for consideration without having to wait for the council to get around to changing its plan.

24. Private plan changes also often provide a more efficient way to consent a development, if too many consents are required under the operative plan. Private plan changes can synthesise the matters to be consented in a more streamlined way. Private plan changes do not necessarily challenge council policy, but rather facilitate development based on that policy. For example, in Auckland, when large privately owned development sites are found near or within the Business 8 zone in the Auckland Council District Plan, they routinely expand by private plan change, relying on the Business 8 zoning to expand. This was the case with the expansion of Westfield's St Lukes shopping centre by private plan change.

25. In our opinion, private plan changes are often fundamental for significant development activity to proceed in this country.

26. The Draft report also seeks to understand how better to incentivise a greater range of people and their interests involved in the process. We consider that, based on our experience, the "decide, announce, defend" approach of many local authorities to planning provisions is in fact a key driver for disincentivising a collaborative approach early in the process.

27. Changing the process at council level, and removing appeals, is not going to cure the "decide, announce, defend" mentality of councils. In our opinion, this is the key reason why appeals need to be retained, because removing or curtailing them will not prevent council politicians from deciding that their draft plans are appropriate and should not be amended or changed in any significant way in response to submissions.

28. In our view, the "decide, announce, defend" approach to plan-making by councils is the most significant hurdle to efficient and effective plan-making.

THE RMA'S APPELLATE PROCEDURES - WHAT DECISIONS GET APPEALED? (SECTIONS 12.3 AND 12.4)

29. The Commission acknowledges that the national guidance anticipated for the Court from the start has not been provided until only recently.

30. We endorse this observation. In our experience, the Court is only now starting to operate in the environment that was originally intended. Further, most of the long delays on plan change decisions and appeals previously cited or experienced relate to "first generation" plan changes. These plans have now been developed, and councils no longer have the burden of reviewing their plans every 10 years. Further, changes in the RMA to, for example, the trade competition provisions, have resulted in less delays and litigation than previously experienced. The Environment Court has also continued to hone its case management with a range of initiatives designed at speeding up decision making.

31. We also think that comparisons of the Environment Court with other appellate procedures are simplistic, and fail to understand the reality of the Environment Court. It is a unique judicial institution, and rightly so. The nature of the cases before it are multi-issue and multi-party. Many cases before the Court involve a significant number of parties and dozens of issues. Cases often take many weeks to hear. The Court sits with Commissioners drawn from many and varied professional fields, who have high degrees of specialisation and expertise.

32. The type of evidence before the Court on RMA matters is also unique. In most cases, the vast majority - if not all - of the evidence before the Environment Court is opinion evidence, not factual. In most cases we are involved in, there are a large number of expert witnesses providing expert opinion evidence. Therefore, most of the Court's deliberations and decision-making is predictive in nature, and based on expert evidence received.

33. Decisions on appeal to the Court also arise from decisions made "in the first instance" by politicians, not by other courts or Tribunals.

34. In our experience, appeals are often less about challenging the thrust of the council's policy and more about the workability or implications of plan provisions or resource consent applications/conditions.

35. We support the role of the Environment Court and the unique role it plays in resource management matters. However, we consider that further efficiencies could be gained at the Environment Court process. In our paper,[6] we consider that a more aggressive appeal management process would reduce the length of time taken to resolve appeals and to keep them moving, when this is what most parties want to happen.

WHAT ARE THE CONCERNS WITH THE APPEAL PROCESS? WHAT ARE THE OPTIONS TO ENHANCE THE APPELLATE PROCEDURES? (SECTIONS 12.5 AND 12.6)

36. The Commission notes that the divergence of judgments between local authorities and the Court could be because the same evidence is not presented at Court as was at council level.

37. As noted above, it is not our experience that applicants "keep their powder dry" at council level hearings, or fail to present strong evidence in order to "save" the best parts of their case for the Environment Court. If anything, in our experience it is more often

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[6] *A Better Approach to Improving the RMA Plan Process*. Above n 1.

submitters who do not present a fulsome case at Council level, and wait to see if more is needed on appeal.

38. Rather, the absence of cross examination at the council level hearing is the key reason for the council not being in the same position as the Court. The evidence presented by applicants or submitters to the council is not tested by cross examination to help the council decide what is best. In addition, councils do not often give evidence in support of either their plan changes or recommendations on a consent application, so at the council level it is a "given" for the hearing panel that their report is adequate and views defendable.

39. There is some merit in the consideration of appeals by way of rehearing rather than *de novo*, as arguably a *de novo* hearing should not allow a party to expand the scope of its case. Whatever the approach any appeal should be focused on the substantive matters at issue. The reality is that this is how it works in practice, and the Environment Court, through its robust case management processes, encourages parties to narrow the issues truly in contention.

40. In our view, it is absolutely critical that there is cross examination and testing of the evidence at council-level if there is to be a change to the Environment Court's way of hearing an appeal. With rehearing, the Environment Court would be relying on a transcript and the record from the council hearing, where the evidence presented was not subject to cross-examination. In other appellate jurisdictions, rehearing is appropriate because the decision at first instance has been made by a tribunal or court where evidence is tested by way of cross examination. This is a critical difference.

41. So, an alternative would be to require cross examination at council hearings. Given the figures on how few matters actually proceed to court and the simple fact that the Environment Court process is used for less than 1% of applications, however, it would be entirely inefficient and inappropriate for all council hearings to require cross examination.

THE CONTINUING ROLE OF LOCAL DECISION-MAKING (SECTION 12.7)

42. Under the heading "direct referral", the Commission seems to suggest that instead of providing the option of direct referral, another option could have been to restrict appeals on Council decisions.

43. With respect, that alternative would not have achieved the same outcome provided by direct referral. The benefit of direct referral is that it is an option available to an applicant where, at an early stage of the process, it is considered inevitable that not all parties will be satisfied with the Council's decision. It may be the applicant that is dissatisfied, or a submitter. Removing the ability to appeal as an alternative would have removed the ability for an applicant, when faced with an opposed Council, to take the matter to Court. We support the retention of the direct referral process.

44. That said, however, our experience suggests that the direct referral process could be improved. It has become evident that matters which originally appeared to be contentious (to the point where it was "inevitable" they would go on appeal) have been largely resolved between the parties to the point where most, if not all, matters have been agreed. The direct referral process does not envisage this outcome, and it is not possible to "settle" the application as there is no decision at first instance. Instead, the parties are faced with a situation where a hearing before the Environment Court is required to satisfy the decision-maker that consent can be granted, but there are no live issues as between the parties. In this situation, it may be preferable for the matter to be "reactivated" before the local authority so that consent can be granted in the usual way.

CURRENT LOCAL AUTHORITY DECISION MAKING UNDER MORE RESTRICTED APPEALS RIGHTS (SECTION 12.8)

45. The Commission notes that the bylaw-making process is much less "fraught" than the plan process. The Draft report says that plan changes "can take 10 years", whereas bylaws can be made in less than one.

46. The continued assertion that plan changes take "10 years" remains entirely unhelpful to any measured debate about plan processes. It is clear from Judge Newhook's careful analysis that this criticism of the Court process is not well-founded.[7] The allegation over "10 years" should be put aside as a red herring.

47. In any case, the process for bylaw making is readily distinguished from plan making. The Draft report notes that bylaws affect private property rights as plans do. This is simplistic. District and regional plans affect property rights in a much broader way than bylaws do. Section 145 of the Local Government Act 2002 limits the bylaw-making powers of territorial authorities to protecting the public from nuisance, protecting, promoting and maintain public health and safety, and minimising the potential for offensive behaviour in public places. In contrast, the duties, functions and powers of a local authority under Parts 3 and 4 of the RMA are far broader, and include a range of restrictions on land, water and air.

48. Bylaws are a far less sophisticated tool than plans. Bylaws also cannot be appealed. The special consultative procedure under the Local Government Act 2002 is entirely different from the RMA and considers a range of very different objectives. The only way to challenge a bylaw once made is by judicial review, which is difficult, of limited success, time intensive and expensive. The fact that few bylaws are judicially reviewed does not in any way reflect the community's support of those bylaws.

49. In our view, there is very little in the bylaw making process which is illustrative or helpful for a consideration of the plan making process, other than that bylaws are made "more quickly". Again, in our opinion, the ultimate driver for those involved in the planning process should not be "how quickly can we make this plan?", but rather "how good is this plan?". Any solutions to the timing of the plan-making process must focus on delivering the best outcome, which surely must be a quality plan that works for the community and enables the creation of a productive and efficient economy.

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7 *Concerning Resolution of Large Groups of Plan Appeals – Think Piece* (Acting Principal Environment Judge Newhook, 20 August 2012). See http://www.propertynz.co.nz/files/Media/Judge%20Newhook%20Think%20Piece%20-%20Draft.pdf *Current and Recent Past Practice of the Environment Court Concerning Appeals on Proposed Plans and Policy Statements* (Acting Principal Environment Judge Newhook, 31 July 2012). See http://www.justice.govt.nz/courts/environment-court/annual-reports-of-the-registrar

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Appendix 1: Questions posed in Chapter 12

Q12.1 - Is the very low number of consents declined best explained by risky applications not being put forward, the consent process improving the applications, or too many low-risk activities needing consent?

1. The Draft report notes that only 1% of resource consent applications are declined. This figure, in our opinion, highlights the reality of applicants not "keeping their powder dry" at council level. Much of that success will have to do with an applicant presenting a full and competent case at Council level to ensure the best possible outcome for it.

2. The low number is also likely explained by too many low-risk activities needing consent. We consider that consenting requirements are often out of proportion to the actual environmental effects of them. We would support better guidance from central government to local authorities on more efficient and effective consenting.

Q12.2 - Would different planning approaches lead to less revisiting of regulation? What alternative approaches might there be?

3. We consider that private plan changes are a critical tool to enable regulation under the RMA to be agile. It may be that requiring planning documents to be less rigid, and instead allowing applicants to demonstrate the ability of the environment to sustain an activity, would provide greater flexibility. However, until a more "performance-based" planning framework is required in plans around New Zealand, the ability for private plan changes must be retained.

Q12.3 - What factors have the strongest influence on whether a District Plan or Regional Policy Statement are appealed?

4. The Commission notes that plans appear to be disproportionately appealed. We agree entirely that there is "more at stake" with plan changes across the community, and so stakeholders will want their say. The resultant appeals though have more to do with the "decide, announce, defend" mentality noted above than anything else though. In our experience, councils "announce, decide and defend" their plan changes, which leaves little option for stakeholders than to appeal.

Q12.4 - Overall, would it be feasible to narrow the legal scope of appeals?

5. While the option of rehearing initially has some merit, it fails to have regard to the unique multi-party, multi-issue nature of Environment Court appeals. As importantly, it fails to consider the nature of the "first instance" decision from council, which is primarily made by elected officials, and at which the evidence is not tested by cross examination. Rehearing at the Environment Court would place an unreasonable and unnecessary burden on the council hearing process to require cross-examination of the evidence, making the process more cumbersome and less agile. Cross examination at the council level would also further disincentivise participation there.

Q12.5 - Would it be feasible to narrow legal standing?

6. There may be further scope for reducing the broad standing under the many processes of the RMA to focus more on persons actually affected by a development. We do note that, in our experience, parties and issues are already significantly limited by the time of an appeal, and submitters often present cases jointly.

Q12.6 - What features of the bylaw-making process are distinct from the district plan-making process, and how might you use practice under the one to improve the process under the other?

7. The matters which bylaws address are very different to the matters which plan changes address. Comparing bylaws to regional and district plans is .like comparing apples to oranges.

8. Bylaws cannot be appealed. The special consultative procedure under the Local Government Act 2002 is entirely different form the RMA and considers a range of very different objectives. Plans affect the way in which people can deal with their land in a way that is very different from bylaws. The only way to challenge a bylaw once made is by judicial review, which is difficult, of limited success, time intensive and expensive. The fact that few bylaws are judicially reviewed does not in any way reflect the community's support of those bylaws.

9. There is very little in the bylaw making process which is illustrative or helpful for a consideration of the plan making process.