Enhanced Policy Agility - Proposed Reform of the Resource Management Act

Local Government New Zealand Regional Sector Group, December 2011

1. Executive Summary

New Zealand's economy and our way of life are built on complex and distinctive environmental values and ecosystems. Our future economic performance and quality of life depends upon continued and increasingly intense use of our natural and physical resources.

The challenges of sustaining our environment, increasing demand for more intensive use of resources, and increasing competition between potential uses for our natural resources are reflected in complex issues across our diverse ecosystems and communities.

Values-based decision-making is the cornerstone of New Zealand's system of resource management. Effective resource management requires the careful weighing of science, economics, environmental values, risk and uncertainty, cultural and spiritual values, community values and aspirations, individual rights, as well as the rights and interests of future generations. When making complex resource management decisions there is no "right" or "factually correct" answer. Indeed, the challenge of facing decision-makers has been described as trying to reconcile the irreconcilable. Making public policy decisions of this nature is the legitimate and core role of elected representatives.

New Zealand's resource management system depends upon effective national, regional and local decision-making establishing the policies and rules that govern the management, use, development and allocation of our natural and physical resources. It is not currently possible to put regional and local policies and plans in place fast enough to deal with changing local and regional issues. This results in major costs to our environment, our economy and the well being of our people and communities.

Land use change and intensification in New Zealand is rapid, has profound economic value, and significant potential and actual environmental effects. Between 1992 (when the first regional policy statements were required under the RMA) and 2004 the number of diary cows in Canterbury increased four fold (from around 150,000 to around 600,000) and the total number of livestock units more than doubled. Over the same period the amount of urea applied to Canterbury farmland increased from around 10,000 tons per annum to over 95,000 tons per annum. Other regions have experienced equally or even more significant changes in land use and related resource management issues in both urban and rural contexts.

It takes on average around eight years for a local authority to develop a plan under the Resource Management Act and get it fully operative. Around a third of this time is associated with dealing with appeals to the Environment Court. The pace of land use change and the nature of environmental pressures are such that policy responses must be substantially faster than is currently possible.

This paper calls for reform to dramatically improve the ability to put in place effective resource management policies. It should be possible for a local authority to develop and make operative a complex resource management plan within a single three-year electoral cycle.

The single change that can transform the pace of resource management policy making is to remove recourse to the Environment Court on policy matters. The current role of the Court in making policy decisions is anomalous and causes perverse incentives that compound to make policy-making too slow. Without a change of this nature policy-making will continue to substantially lag behind the dynamic and rapidly changing effects associated with changes to land use and our economy.

There are a number of initiatives that could substantially improve the way in which the national interest is reflected in policy-making at regional and local levels. Greater use of national instruments, clear statements of the national interest and the potential for the Minister for the Environment to be represented in regional or local decisions could all contribute to both the quality and the timeliness of resource management decision-making.

2. Introduction

New Zealand's economy and our way of life are built on complex and distinctive environmental values and ecosystems. Our future economic performance and quality of life depends upon continued and increasingly intense use of our natural and physical resources. These resources are fundamental to life and include "the commons" – the natural and physical resources that are not private goods but are managed as genuine public goods for the collective benefit of all.

The challenges of sustaining our environment, increasing demand for more intensive use of resources, and increasing competition between potential uses for our natural resources are reflected in complex issues across our diverse ecosystems and communities. Effectively addressing these issues requires sound and timely decision-making.

New Zealand's local authorities have an abiding and deep concern that under the current framework of the Resource Management Act (RMA) it is not possible to develop and implement resource management policy quickly enough to respond to rapidly changing use of resources and consequential effects on our environment. This situation is not new but the consequences of this problem are becoming more and more marked. The difficulty of putting in place effective resource management policy is now reflected in significant environmental degradation and in significant lost economic opportunity. This situation cannot continue.

This paper calls for reform to dramatically improve the ability to put in place effective resource management policies. The speed with which policies can be adjusted and changed to reflect the dynamic nature of pressures on our

economy and on our natural and physical resources needs to be substantially increased.

3. Fundamental Considerations

Managing the use and development of our natural and physical resources is fundamental to the effective and efficient operation of our economy. The policies and rules that govern the use and allocation of "the commons" directly impact on the economic value of resources and the structure and operation of property markets. They also govern the development and operation of major infrastructure.

Resource management policies and rules are equally fundamental to maintaining the health and vitality of the natural systems that sustain life. They are also fundamental to the social and cultural well-being of people and communities and underpin the well-being of future generations. Dealing with these issues requires sophisticated and effective policy frameworks and rules that govern the use and allocation of resources.

Decisions relating to the allocation and use of resources, and in particular the balance between use and the protection of natural systems, are not simple. These decisions deal with the use, management and health of "the commons". They are inherently public policy decisions. They deal with public goods and the quality of the environment that we all share. These decisions are inherently values based. They require the careful weighing of science, economics, environmental values, risk and uncertainty, cultural and spiritual values, community values and aspirations, individual rights, as well as the rights and interests of future generations. When making decisions of this nature there is no "right" or "factually correct" answer. Indeed, the challenge of facing decision-makers has been described as trying to reconcile the irreconcilable. Decisions of this nature are inherently values based and must reflect the values of the community involved.

The RMA provides a national framework for values-based decision-making on the use and allocation of natural and physical resources. The framework provides for tiered decision-making that enables decisions to be made closest to the community of interest that is most directly affected by, and interested in, the decision. At its core the RMA intends that elected political representatives make values-based resource management decisions. It is a core tenet of our democracy that public policy decisions are made by elected representatives who reflect the values of their community and are accountable to that community.

The tiered framework of decision-making under the RMA reflects national, regional and local communities of interest. It provides for a nested hierarchy of objectives, policies and rules that ensure that in any decision relevant matters of national, regional and local important are considered. The tiered framework utilises New Zealand's system of government to involve elected representatives at each level of government in making values-based policy decisions.

The decisions that elected representatives make under the RMA are very similar, and often less complex or far reaching than decisions that they make under other legislation. Decisions to tax, to seize property for non-payment of rates, to spend significant public money, to build new pubic infrastructure or to establish by-laws that regulate public behaviour are all fundamental

public policy decisions. Local authorities make these decisions in accordance with complex legislative procedural requirements. There is no ability to challenge these decisions and take them to another jurisdiction. They cannot be appealed. The only avenues for the public to object are through judicial review of legality of the decision, or through the ballot box at the next election.

Another key element of values-based public policy decision-making is the involvement of the public. Resource management decisions affect the scope and nature of the activities that people and businesses can undertake on their property, they shape the nature and value of the "commons" that we all enjoy, and they set the rules for relationships between neighbours. There are natural justice issues in making decisions that affect the rights and property of individuals. Before a decision that directly affects the property of an individual is made they must have the opportunity to have their interest appropriately recognised. Whether it is by way of a Parliamentary Select Committee, or a council submissions and hearing process, New Zealand's democracy is based on strong opportunities for public participation in decision-making. Public participation adds to the rigour of the decision-making process. It ensures that decision-makers are aware of the consequences and impacts of decisions. It also ensures that decision-makers understand the values of the community that will be affected by any decision. Reasonable access to accountable decision-makers is an essential component of effective public involvement.

4. The "Problem"

To be effective resource managers require the ability to put in place and change over time the hierarchy of management instruments provided for by the RMA. Policy statements and plans establish the framework within which all matters of national, regional and local importance are brought to bear on any resource management decision. These documents establish the policy outcomes that the community expects. They establish the rules by which resources are managed and allocated.

Policy statements and plans are required to deal with the particular resource management issues that are relevant to the area at the time that they are developed, or are reasonably foreseen. Understandably, policy statements and plans do not deal with issues that are not relevant or foreseen. For example, those who prepared plans for both Southland and Canterbury did not foresee the wholesale changes in land use associated with the conversion of very large parts of their region to dairy farming. Neither did they foresee the arrival of didimo and potential impact that organism could have on the use of rivers and streams.

As new pressures or issues emerge policy statements and plans must be able to be changed quickly enough to enable a meaningful response. Failure to adjust the policy framework can (and has) result in quite damaging environmental outcomes. A lack of responsiveness can also result in substantial missed economic opportunities.

In 2008 the Ministry for the Environment undertook research into the time it took to complete the development of a plan under the RMA. At that time the Ministry identified that after 17 years of the RMA five local authorities still did not have operative first generation plans. A similar number of local authorities had not notified their second generation plans. The Ministry

survey of local authorities revealed that the average time that it took to move a plan through the process from notification through to making it operative was 6.4 years. Their work also indicated that more than two thirds of plans took between 3 and 8 years. On average more than 3 years of the time it took to develop a plan was associated with the resolution of appeals. Adding to this the period of time that councils must spend developing policy before it has a plan that it can publicly notify the average total time that it took to develop a plan to be operative was 8.2 years.

It is important to see how the time it takes to develop plans fits in the context of the scale and nature of land use change. In 1991-92, when regional councils developed the first generation of regional policy statements under the RMA there were around 1.05m sheep, 150,000 dairy cattle, 170,000 beef cattle and 300,000 deer in the Canterbury region. By 2004 there were around 750,000 sheep, 600,000 dairy cattle, 500,000 beef cattle and 450,000 deer. The number of dairy cattle in Canterbury more than doubled between 1999 and 2004. In 1992 around 10,000 tons of urea per annum were applied to farmland in Canterbury. By 2004 this had increased to around 95,000 tons per annum. Between 2002 and 2004 the annual increase in urea application was more than twice the total application in 1992. There were a range of particular circumstances in Canterbury that frustrated the development and implementation of new plans. Never-the-less, if it takes on average 8.2 years to put a new plan in place there is simply no way that the current approach to plan making will deliver a timely policy response to the sort of change economic and environmental change that has been experienced in New Zealand.

Since the 2008 Ministry survey there have been a number of changes that have worked to both speed up the process and reduce the impact of delays. Provisions that make new policies operative from notification are helpful. A number of councils are undertaking reviews of their plans as a series of plan changes rather than notifying a new plan. This approach may also save significant time and focus resources on priority issues.

Recent reforms to speed up RMA processes have provided greater ability to make national level decisions more quickly. The ability to establish national policy statements has been enhanced and the process streamlined. The ability to deal with nationally important projects has been improved, with national call-in of consents and streamlined decision-making. These improvements have not addressed the substantial challenge that local authorities face in putting in place policy statements and plans. Securing the benefits of these changes will only be possible if there are consequential changes to increase the speed with which regional and local policies and plans can be put in place. The implementation of national policy statements requires changes to regional policy statements, and regional and district plans. National instruments will be ineffective if local authorities are unable to translate them into effective provisions in their policy statements and plans in meaningful timeframes. Equally, nationally important infrastructure projects are still governed by the rules in regional and district plans. Timely and sensible decisions on major projects are still dependent upon the ability of regional and local authorities to put in place robust and appropriate policies in their policy statements and plans.

The Ministry's 2010/11 survey of local authorities reports the time taken to complete plan changes for those that were completed in 2010/11. This shows a relatively rapid average process time for council initiated plan changes of just 17 months. The same survey shows an average timeframe for

completion of a plan variation of 3.75 years. The 2010/11 survey records a total of 610 plan changes or variations underway and only 226 completed in that year. Despite the major effort that was made to resolve Auckland appeals before the establishment of the Auckland Council, fewer plan changes or variations were completed in the 2010/11 year (226) than were completed in the 2007/08 year (274). This tends to suggest that the once the plan changes that have yet to be completed are considered the average completion time for a plan change, let alone the timeframe for developing a new plan, will not have shifted dramatically from those recorded in 2008.

The direct cost of plan changes and appeals is substantial. The 2008 Ministry survey revealed an average cost for a developing a plan of $1.9m. The same survey noted the costs to Queenstown Lakes District of more than $15m spread over 10 years and another local authority that estimated the costs of their plan to be $17m. Importantly, the Ministry survey identified that on average 27% of the costs to the council from a plan development process related to resolving appeals.

In addition to council cost there are substantial costs to the other parties who participate in the process. For large plans with a number of complex appeals the cost to any applicant of initiating and prosecuting an appeal would be of the same order as the council's costs. This is a dead weight cost that is substantial. Expenditure on this activity is unproductive and a substantial diversion of resources away from productive investment.

The other major cost of the current system is the opportunity cost of delays in decision-making. Opportunity costs can arise both as environmental losses that occur during the appeal process, or in other cases as the economic value that is lost as a result of being unable to utilise resources in the most efficient and intended way.

The opportunity cost of delay is difficult to quantify. However, the most obvious example of the issues that arise from an inability to put effective policies and plans in place is in Canterbury. Ultimately, the impasse around planning instruments was resolved by the removal of a council and specific legislation that cleared the way for the rapid approval of a new policy framework and rules.

Any system of rules creates incentives for particular behaviours. The current ability to appeal policies to the Environment Court creates a number of incentives that reinforce the very long time that it takes to complete a plan development process. From the outset of a plan development process the incentive for anyone other than the council is defer expenditure or effort and try to secure their objectives with the least possible effort or expenditure. This means that by the time of the council hearing few of the major submitters will have prepared a full brief of evidence to support their submission. The cost of a full brief of evidence is not incurred until after a submitter appeals. This is rational behaviour, but it invariably means that the council hearing does not benefit from the same level of evidence or research that would be presented to the Environment Court. This is a substantial issue in terms of the potential rigour and robustness of the council decision.

Where a party is adversely affected by a proposed plan, but can continue to undertake their current activities until such time as new policies and rules come into effect there is little incentive to settle or reach a compromise. Rather, it is in that party's interest to make the process take as long as possible at the lowest possible cost to themselves. This incentive is reflected

in the profound difficulty that councils can experience trying to get an appeal into a court room.

Despite the changes to the RMA intended to limit the scope for using it for anti-competitive purposes there is still ample incentive for large organisations, or sector groups to do so. For instance, where a particular sector has historically enjoyed very favourable access to resources and a new allocation mechanism is proposed that would benefit another sector, there is strong incentive to fight that and pursue every possible legal means to do so. This dynamic has been at play in all of the major water allocation decisions in the country. The competition for water between users creates powerful motivation to delay and frustrate any initiative that would change the allocation system. Within the current resource management system the easiest way to achieve this objective is to take the matter to the Environment Court and use every opportunity to delay a proposed plan becoming operative.

The current system also creates perverse incentives for local authorities. The current average time for developing a plan to the point that it becomes operative spans three electoral cycles. When a council considers its priorities and where its efforts might make the biggest difference there is little incentive to commit to an eight-year process that has substantial cost but indeterminate benefits. Every council knows that ultimately all of the major and contentious policy decisions that are provided for in their policy statement or plan will be referred to the Environment Court. The decision will then be made by a court with no accountability to the community and yet the council will be held accountable for the decision and the provisions of the plan – no matter what decision the Court makes. Councillors know that they can spend years of community service dealing with complex and challenging issues, with difficult community relationships and intractable conflicts only for a group of unaccountable people to make the ultimate decision for them. Equally councillors know that if they embark on a significant resource management policy process it is most unlikely that it can be completed within one term. All their work can then be overturned by the next council. This provides little incentive for Councils to devote time and energy to RMA policy processes.

The length of time that RMA policy processes take is also a major issue for a local authority attempting to resource the process. It is commonplace for there to be major changes in key personnel within the life of the plan development process. Staff typically seek new opportunities at the end of each key phase of the process – after notification, at the completion of council hearings and at the completion of appeals. These changes in key staff make it difficult to maintain continuity and also contribute to the lengthy time that it takes to make a plan operative.

Given the nature of the “problem” and the associated costs it is vital that further reform of the RMA and resource management practice deliver the ability to develop and make operative a policy statement or plan that deals with complex policy issues within one three year electoral term. At the very least, further reform needs to dramatically improve the agility and responsiveness of policy making under the RMA.

No consideration of improving the timeliness of policy statements and plans can proceed without also considering the quality of the resulting policy. Despite the perverse incentives that are discussed above, the track record of local authorities in developing resource management policy is quite good. Within the current framework of appeals the overwhelming body of policy

becomes operative without being considered by the Environment Court. For this to happen no individual or group of interests (including the government) consider that the policy and its effects warrant the cost and effort of an appeal. The track record of local authorities in defending policy decisions in the Environment Court is good. The Environment Court has upheld considerably more local authority policy decisions than it has over-turned. Indeed, a significant number of councils have successfully defended every policy statement or plan appeal that has proceeded to an Environment Court hearing. This is a considerable endorsement of the quality of the decisions that are made by local authorities. As discussed above, the perverse incentives of the current system mean that the local authority seldom has the benefit of the full breadth and depth of evidence that is presented to the Court. Changes that remove the perverse incentives, improve the engagement between the council and affected parties before notification, and also improve the nature of the evidence that is presented at council hearings can only improve the nature of resource management policy making.

5. Possible Solutions

There are a number of resource management practice initiatives that could contribute to speeding up policy making. The identified improvements to council practice and processes are set out below.

(a) Council policy development and pre-notification practice has evolved to become more and more comprehensive. "Best practice" has tended to add time and cost and more complexity rather than to simplify the process. This generally reflects the increasing emphasis of the Local Government Act on public engagement and the specific obligations to take account of public views through out the decision-making process. Councils could make a concerted effort to review and streamline their policy development processes.

There is little or no statutory requirement for extensive pre-notification processes. Local authorities have the ability to decide for themselves on the level of engagement that is required, guided by the decision-making requirements of the Local Government Act and the nature, complexity and level of controversy of the proposals. Many councils have chosen to put greater effort into trying to build consensus-based policy that can be implemented in a timely fashion. It has been hoped that working with interested and affected parties before notification would reduce the over-time of the policy process.

At this stage it is not yet clear if extensive pre-notification engagement speeds up the policy making process over all. In some instances this approach has clearly sped up the overall process. In others there is evidence that increased pre-notification engagement simply prolonged the debate within a community. Certainly, whilst current appeal rights exist, there is little incentive to approach pre-notification or even council hearing processes with a genuine spirit of seeking consensus.

(b) Councils have an obligation to complete analysis to support their proposed policy. The level of effort that is devoted to this Section 32 analysis and reporting is substantial and increasing. Many local authorities deliver Section 32 analysis that is considerably more sophisticated and expensive than is considered necessary at a national level for a regulatory impact statement or to underpin a NPS or NES.

There are legitimate questions over the level of analysis that is required to underpin a policy.

(c) There is considerable scope to simplify the way in which policies, methods and rules are written. There is no statutory need to have lengthy descriptive commentary to support policies, methods and rules. Adding commentary adds to text that can be the subject of submissions and appeals without adding to the legal weight of the policies or rules themselves. Councils could choose a simpler, more direct expression of policies and rules.

(d) Following the RMA reforms of 2008 Councils are not required to include non-regulatory methods in their plans. Including non-regulatory methods in plans adds to text that can be the subject of submissions and appeals without adding to the legal weight of the policies or rules themselves. Non-regulatory methods can and should be dealt with through Local Government Act and Annual Plan processes.

(e) The scope of a plan change is a key factor in determining how long it will take. Careful packaging and sequencing of a number of smaller plan changes is likely to deliver a faster outcome than one very large omnibus change. However, where a comprehensive suite of changes is required (for instance to implement a complex NPS) it may not be possible to progress these as a number of smaller changes.

(f) Councils could exercise more discipline in ruling out submissions that are late or off-topic. Without being draconian councils can legitimately rule out submissions that do not address the matters at hand and therefore reduce all of the effort that is required to consider them at every stage of the subsequent process.

(g) The analysis of submissions is a key issue in being able to focus the hearing on the matters that are important. This is a key issue of staff competency and capacity that the local government sector needs to reinforce. A lack of staff continuity through the plan development and plan change process is one of the causes of delay in the process. Ironically, if the overall process were faster local authorities would be less exposed to major changes in personnel at key stages of the process.

(h) Requiring evidence at the time of submission could significantly reduce the time taken to complete the council hearing process. Providing the evidence early would flush out the issues in a way that would enable the council to better focus the hearing and its efforts to addressing the issues.

(i) Effective chairmanship of a hearings committee is the key to making them progress effectively. Ensuring that all hearing panel chairmen have the right skills to run the process could deliver a system wide improvement.

(j) Within the current framework of appeals to the Environment Court it would be beneficial to applying specific timelines for mediation. The Court could provide greater incentives for progressing issues by establishing a clear and ambitious timetable for mediation and firm hearing dates that it will adhere to.

The combined effect of all of the process improvement initiatives identified above would not be sufficient to enable a council to put a complex plan in place in one three year term of office. The single initiative that could transform the timeliness of effective policy-making would be to limit the role of Environment Court. Removing recourse to the Environment Court on policy decisions and limiting appeals to matters of law would profoundly change the quality, timeliness and nature of resource management decision-making. With the right approach to also change and reinforce the council hearing and decision making process this change could substantially improve the performance of the resource management system and deliver better outcomes.

6. The Proposed Change

The one single change that could dramatically improve the delivery of the resource management system would be to remove de novo Environment Court hearings on policy decisions. It is proposed that this change apply to all regional policy statements, all regional plans, all district plans and to all changes or variations to these policy statements and plans. All decisions on these policy statements and plans would be made through a single local authority hearings process.

Removing the ability to take appeals on policy matters to the Environment Court could remove at least third of the average time currently taken to develop a policy statement or plan and make it operative. This single change will remove the direct time associated with progressing appeals, mediation, preparing and presenting evidence and court decision-making. More importantly it will profoundly change the incentives, behaviour and engagement of all parties in the council process.

The Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 removed appeal rights in order to streamline plan making. This move has resulted in significant behaviour changes. Parties now have a clear incentive to engage fully and early in the plan development process. Parties know that to be effective they need to influence the decision-makers (in this case the commissioners). That means they need to be able to put on the table as early as possible their concerns and their evidence. Parties are now incentivised to seek win-win outcomes and to work constructively with each other to get a result. This is a very different set of incentives than those described above. In this situation effective pre-notification work delivers the least cost outcome for all of the players. Equally, this approach ensures that for any party that is not happy with the plan as notified the council hearing will benefit from the best evidence that there is.

The circumstances that gave rise to the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 are unique. In considering a broader application of the removal of appeal rights it is important to explore the possible scope of this and any other procedural changes that could help to ensure that as well as making decisions more quickly, sound decisions are made.

It is noted that it is currently possible to provide for a limited form of cross-examination in a council hearing by counsel asking questions of a witness through the chairman of the hearing panel. This practice could be adopted to strengthen the council hearing and decision-making processes. This approach

needs to be carefully managed. It is vital that any change to the hearings process does not disenfranchise ordinary members of the public who have legitimate interests, needs and rights to participate in the council submissions and hearing process.

Limited cross-examination mediated by the hearing chairman would ensure that the council hearing had access to the highest possible quality of evidence and advice before making a decision. However, it is important that council hearings do not take on all of the characteristics of a court. As is discussed below, public policy is the domain of elected representatives. The proper role of a hearing is to ensure that decision-makers fully understand the range of issues, values and consequences of possible decisions. It is not to determine according to the standard of the courts what is right and what is wrong.

Allowing for mediated cross-examination at a single council hearing would require the chair of the hearing to have particular skills in dealing with procedural fairness, managing time and ensuring that all submitters (irrespective of background or legal representation) can be heard. There may be a case for such hearing chairs to be appointed from a list of suitably qualified people. There should be no impediment to a sitting councillor with the right (and recognised) skills undertaking this role.

Along with mediated cross-examination it is proposed that the evidence be presented at the time of making a submission. This would enable all participants to know and respond to the issues and concerns being raised by other submitters.

There may well be circumstances in which a council determines that in order to achieve a robust decision and/or avoid perception of bias it is necessary or appropriate for someone other than an elected representative to make a resource management policy decision. This is a perfectly reasonable and legitimate approach. However, if the council is to be accountable to its community for the resource management decisions made on behalf of the community, the council must determine who will make those decisions. Appointing commissioners to act on behalf of the council is, and must be, a decision made by the council.

Making the proposed change will strengthen the nature and quality of democratic decision-making under the RMA. Where there is no right of appeal any decision-maker will feel the full weight of the obligation to ensure that the decision that he or she makes is the best one possible for their community. With no right of appeal councils and councillors who make controversial decisions will be clearly visible and directly accountable to their community for their decisions. Importantly, increasing the speed with which regional and district policy and plans can be put in place will substantially increase the effectiveness and timeliness of national policy.

7. Other Reasons to Make This Change

This paper has come to the proposed change to the role of the Environment Court through attempts to make the resource management system more responsive and better able to deliver timely policy decisions. There are other powerful arguments that support this change.

The current Environment Court is an anomaly. In a Westminster democracy values-based public policy making is the prerogative of elected

representatives. It is not the role of the judiciary. In all other aspects of public policy decision-making in New Zealand the judiciary is limited in its scope and role to dealing with matters of fact and matters of law. Its role is to interpret the law and to determine the facts in relation to the application of the law. No court other than the Environment Court makes pubic policy decisions. Indeed, where decisions by public bodies are the subject of possible judicial review the scope of the review is limited. In conducting a judicial review the court focuses on the veracity of the facts upon which the decision was made, whether the decision is lawful, whether required statutory processes have been followed, and a very particular test of whether the decision is unreasonable (could not have been made by a reasonable person acting reasonably). In all normal judicial work judges and lawyers deal with the balance of probabilities. This is in stark contrast to the weighing up of science, economics, environmental values, risk and uncertainty, cultural and spiritual values, community values and aspirations, individual rights, as well as the rights and interests of future generations that is required when making resource management policy decisions. A court is no place for decision-making where there is no "right" or "factually correct" answer.

Policy Statements and Plans made under the RMA are similar in nature and effect to regulations made by Order In Council or by responsible Ministers under the provisions numerous Acts of Parliament. The proper role of the Court with respect to these instruments is to interpret them in the context of disputes arising from their implementation. Similarly, the real role of the Environment Court should be to adjudicate on disputes arising from the interpretation and implementation of resource management policies. This is an important role and the key role of the judiciary in our democracy.

The role of the Environment Court has also given rise to a particularly unusual form of judicial precedent. In all other aspects of judicial practice precedent establishes the meaning of the law. Through the practice of the Environment Court precedent has been established in the weighing of values. This is fundamentally at odds with the values-based decision-making that sits at the core of the RMA. Courts are not established to mirror or represent the value judgments of people and communities. The values of people and communities change over time. They react to new pressures and different circumstances. Over the last generation we have witnessed profound changes in the way in which communities understand and value the environment. The precedent established by court decisions cannot bind or limit the ability of future decision-makers to arrive at different value judgements by weighing the circumstances that they face.
The role of the Environment Court is also anomalous with respect to the broad range of other decisions that are made by local authorities. The decisions that elected representatives make under the RMA are very similar, and often less complex or far reaching than decisions that they make under other legislation.

Decisions to tax (set rates), to seize property for non-payment of rates, to spend significant public money, to build new pubic infrastructure, or to establish by-laws that regulate public behaviour are all fundamental public policy decisions. Decisions made under the Local Government Act, the Local Government (Rating) Act, the Land Transport Management Act 2003, the Public Transport Management Act 2008 and others all apply the same general framework of decision-making within a prescribed process that requires consultation with the public and/or specifically named organisations and interests.

Local authorities routinely make decisions in accordance with the complex procedural requirements of these and other Acts of Parliament. There is no ability to challenge these decisions and take them to another jurisdiction. They cannot be appealed. The only avenues for the public to object are through judicial review of legality of the decision, or through the ballot box at the next election.

Interestingly, there has been debate over the potential for "Spatial Plans" to introduce an alternative decision-making and planning framework that would have standing under the RMA. The only "Spatial Plan" that currently has legislation is the Auckland Spatial Plan and this relies on the normal "Special Consultative Procedure" and related decision-making requirements of the Local Government Act.

8. The National Interest

It is argued above that values-based decision-making for and on behalf of people and communities is the prerogative and role of elected representatives. Applying this principle it follows that just as dealing with local and regional issues should be the prerogative of local and regional elected representatives, dealing with national issues should be the prerogative of national elected representatives.

The RMA provides a schema for the articulation of matters of national importance. At the highest level the Act itself establishes issues that must be recognised and provided for by all people exercising functions and powers under the Act. The RMA also provides for national instruments (National Policy Statements and National Environmental Standards) that establish policy and direction for all decision makers working within regional or local communities of interest. Recent changes to the Act have strengthened call-in provisions for consents that are of national importance, elevating their consideration beyond solely local decision-making.

For most of the life of the RMA there has been little expression of the national interest other than from the Act itself. In the first generation of regional policy statements and district plans the government played an active role as a submitter. At that time the Ministry for the Environment, the Department of Conservation, the (then) Ministry of Commerce, the (then) Department of Lands and Survey, and a range of other departments with land ownership interests made submissions and in some instances played an active role in appeals. The range of submissions councils received seldom expressed a whole of government view. It was not uncommon for submissions from departments to be in conflict with each other. Indeed, in one major appeal the Minister for the Environment and the Minister of Conservation were represented on opposite sides of the argument.

After the initial round of plan decisions government progressively withdrew from plan development and plan change processes. Until recently the only National Policy Statement under the RMA was the National Coastal Policy Statement. Successive governments have left regional and local authorities and the Environment Court to determine the national interest as they exercise their powers and functions under the RMA.

In proposing that regional policy statements and regional and district plans be developed through a single local authority hearing process with no right of appeal to the Environment Court it is important to ensure that national

interests are adequately dealt with. This has direct bearing on the quality and nature of the decisions that will result from the whole resource management system.

There are substantial avenues open to the government to express the national interest. Clearly there is scope to establish a fuller framework of National Policy Statements and National Environmental Standards. Importantly, National Policy Statements are not limited in their scope to dealing with the whole of the country. It would be quite proper for the Minister for the Environment to promulgate an NPS that dealt with a matter of national importance entirely within one region or district. A specific NPS could substantially direct the policies and corresponding rules that would be required in a regional policy statement, or regional or district plan.

There is also significant scope for government to influence and even direct regional or local decision-making through a clear expression of the national interest on any matter. Preparing and delivering a whole of government statement of the national interest would be a very powerful guide to any hearing and decision-making process. This is the approach has been adopted with respect to the development of the Auckland Council's spatial plan. Clearly the matters that the Auckland Council is dealing with are of national importance. The government's statements on these issues were a very powerful contribution to the policy development process.

An alternative approach would be to reflect national values and the national community of interest by providing for a specific role for the Minister (or his/her representative) in dealing with matters of national importance within a regional policy statement, district, or regional plan. Such a role would be similar to the role that the representative of the Minister of Conservation plays with respect to coastal plans and coastal permits. Such a representative should be the clear representative of the national interest and focus on the nationally important issues. They should be in addition to, and not in the place of the local elected representatives. Importantly, any person appointed to represent the national interest must be subject to the same obligations as any other member of the hearing panel. They must come to the panel with a mind that is open to the evidence and arguments that will be presented. They must hear the evidence fairly and they must make decisions based on the law and the information presented to them.

9. Conclusion

Values-based decision-making is the cornerstone of New Zealand's system of resource management. Resource management requires the careful weighing of science, economics, environmental values, risk and uncertainty, cultural and spiritual values, community values and aspirations, individual rights, as well as the rights and interests of future generations. When making complex resource management decisions there is no "right" or "factually correct" answer. Indeed, the challenge of facing decision-makers has been described as trying to reconcile the irreconcilable.

New Zealand's resource management system depends upon effective regional and local policy-making and the establishment of values-based policies and rules that govern the management, use, development and allocation of our natural and physical resources. The fundamental failing of our current system is that it is not possible to put in place regional and local policies and plans fast enough to deal with the complex and rapidly changing resource

management issues faced by communities and ecosystems. There are major costs to our environment, our economy and the well being of our people and communities as a consequence of this failing.

There are things that can be done by local authorities to improve the timeliness of their policy-making under the RMA. These are important but are not sufficient to solve the fundamental problem that policy-making is too slow.

The single change that can transform the timeliness and policy agility of resource management policy making is to remove recourse to the Environment Court on policy matters. The current role of the Court in making policy decisions is anomalous and introduces a wide range of perverse incentives that compound to make policy-making too slow. Without a change of this nature policy-making will continue to substantially lag behind the dynamic and rapidly changing effects associated with changes to land use and our economy.

In addition to removing recourse to the Environment Court there are a number of initiatives that could substantially improve the way in which the national interest is reflected in policy-making at regional and local levels. Greater use of national instruments, clear statements of the national interest and the potential for the Minister for the Environment to be represented in regional or local decisions are all initiatives that could improve both the quality and the timeliness of resource management decision-making.

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