Policy Think Piece Case Study 2: Impact of consensus-based decision-making on land and water outcomes

Collaborative decision-making groups under the RMA – issues and solutions

Background

Regional Plan change processes under the RMA usually begin with a council-led consultation phase. This phase traverses what the issues are, and what community processes are needed to work toward developing a regional planning solution. A plan is then formulated and notified by the regulatory authority (regional council or unitary authority). This is the phase in which the public are able to make submissions and be heard as part of the hearing process. The hearing panel then considers the proposed plan in light of the submissions on it, and a "decisions" version of the Plan is notified by the council. Appeals may then be lodged by parties dissatisfied with the notified plan. Where there is an appeal, it is normally heard by the Environment Court, which makes final determinations on the plan and/or directs the relevant parties to resolve remaining issues within a certain timeframe. Any further appeals must be limited to points of law only, and are heard by the High Court.[1]

Leading up to the initial plan notification stage, and particularly in relation to freshwater management, there is a heavy reliance by many regional councils on working groups,[2] whose role it is to reach a consensus on what should be in the plan, including policy direction and rule formulation. The idea is that these groups should represent every facet of society, including the farming and irrigation sectors, health sector, iwi, and environmental and recreational groups. The objective is that through informed debate and discussion, supported by science and technical information, these groups will come to a consensus on the acceptable use of land and water in their region, catchment, or sub-catchment.

Such collaborative groups are also established by councils to resolve plan-specific issues, or as a deliberative body to facilitate a consent order (an agreed decision that results from an Environment Court process) and get a plan operative. An example is ECan's Good Management Practice Implementation Working Group and its associated Technical Working Group, discussed below.

Issue: Inequitable representation

Where such groups are formed, councils generally determine the fora's structure and membership, including guidelines around its operation, through terms of reference. Through this establishment process the council will make an effort to constitute an apparently balanced group, with representatives from all relevant sectors. However, groups repeatedly struggle to retain a balance between those who participate in a salaried capacity (e.g., industry representatives/lobbyists) and those who participate in a voluntary capacity (often at the expense of paid work).

The deliberative processes these groups undertake are invariably time-intensive and prolonged, sometimes continuing for years. Attrition is the inevitable result, and this is particularly marked among those participating in a voluntary capacity, including independent academics, iwi and NGO representatives, and community members. Where specific industries are likely to be affected by the plan, industry associations,

[1] http://www.qualityplanning.org.nz/index.php/plan-making/plan-making-0

[2] Plan consultation groups go by many names, such as community stakeholder groups, reference groups, community feedback/focus groups etc.

professional lobby groups and levy-funded organisations are professionally represented on the groups, often with the benefit of specially commissioned legal and technical advice, and generally numerically dominate over time. Citizen participation is often a lauded rather than an observed fact in these groups: there are few people in our communities able or committed enough to sit through many meetings over what potentially may be many years, in the face of, and usually outnumbered by, paid professional representations.

As a consequence of these inequities, such stakeholder groups are easily skewed towards economic interests. Any checks and balances provided by council processes are focused more on due process being followed, not on rectifying any inherent inequities in the process, nor indeed on the quality of the outcome.

How such groups make decisions is critical. Most regional stakeholder groups operate using a vote-based deliberation process or a council officer's interpretation of the group majority applies. Such majority voting will inevitably reflect any biases in representation within the group. In contrast, internationally, and also in the case of the New Zealand Land and Water Forum, collaborative stakeholder groups generally do not vote, to some extent mitigating the consequences of the professional/volunteer imbalances outlined above. Only unanimous decisions or recorded differences (proposing the majority decision alongside the dissenting (minority) view) are truly reflective of collaborative stakeholder group decisions.

In the case of a regional plan process, it is political representatives (i.e., elected councillors) who ultimately decide which of the group's proposals or recommendations to adopt as part of the regional draft plan, which is then notified and follows the subsequent statutory process. Industry groups and others with an economic interest in certain outcomes also have an opportunity to lobby political representatives at this point.

Furthermore, the final stages of the appeals processes and plan re-negotiation for consent orders are restricted to appellants, which may no longer represent the community. Not infrequently, only council planning officers represent the community (at least in principle) by this stage. This has further implications in terms of equitable representation and, in turn, the planning outcome.

Example: ECan's Good Management Practice Implementation Working Group

In Canterbury, the Good Management Practice Implementation Working Group was established by ECan in late 2018 to help resolve issues associated with the use of the "data portal" (see Policy Think Piece Case Study 1: Hinds Catchment).[3] That group's formation was critical to resolving the Plan appeals and is the basis of making the Plan operative by consent order as result of mediation. The data portal, which is formalised in the regional plan, directs farmers to take specific measures to reduce nitrogen losses on their farm, where the farm is operated under agreed good management practices (GMP). However, unanticipated and perverse technical outcomes have resulted from issues inherent in the farm portal, and the working group was established to investigate these issues.

Despite the importance of this tool in improving environmental outcomes in the Canterbury Region, the group is comprised solely of appellants to the proposed regional plan. That is, dairy and arable industry representatives, irrigation industry representatives and consultants, fertiliser company representatives, with two seats for NGOs, and one for iwi. In addition, there is one seat for a regional council officer. The original

[3] As part of the agreed terms for settling the appeals on Plan Change 5 (PC5), all parties agreed to establish a Good Practice Management Implementation Working Group (GMP) to address operational issues associated with the implementation of Plan Change 5. Specifically, the terms of that agreement require consideration of appellants' concerns relating to the operation and implementation of the irrigation and fertiliser proxies. The Working Group was asked to: consider issues relevant to implementing GMP loss rates; agree and provide advice to ECan on recommended solutions and findings; an determine "loss rates" and Portal fixes.

composition recommended by ECan was 12 members from industry sectors and three non-industry members.[4]

The imbalance is striking. There is no representation from the public health sector, hapū, local communities, independent academic experts or independent international experts. As with a regional plan process, while the group makes recommendations, the final decisions on how to proceed fall on the Council. There is no evidence or guarantee that Council has the expertise to identify and rectify any inherent biases in the advice as a consequence of vested interests.

Issue 2: Conflicts of Interest – the theory and practice

In the case of most working groups, the terms of reference explicitly require the avoidance of conflicts of interest. For example, the terms of reference for the Good Management Practice Implementation Working/Technical Group states:

> *Applying the following principles will contribute to public confidence in the process and the final outcome.*
>
> *Working Group members must:*
>
> - *Act in good faith, honestly and impartially, and avoid situations that might compromise their integrity, or that of the group, or otherwise lead to conflicts of interest, and*
> - *Declare a conflict of interest to the Working Group. They must withdraw from the discussion or activity if they believe they have a conflict of interest or a perception exists that there is a conflict of interest.*

The Officer of the Auditor General (OAG) defines a conflict of interest as follows:

> *A conflict of interest is when your duties or responsibilities to a public organisation could be affected by some other interest or duty that you have. Other interests might exist because of an individual's own financial affairs, a relationship or other role, or something an individual has said or done.*[5]

Furthermore, according to OAG's guidance, central to determining whether a conflict of interest exists is this central question:

> *Does the member's or official's other interest create an incentive for them to act in a way that may not be in the best interests of the public entity?*[6]

In many cases, the majority of a working group such as the example discussed above probably cannot meet the requirement to avoid conflict of interest, however that is defined. When this apparent failure is questioned, the prevalent attitude of the members is captured in the following statement: "I think you'll find everyone on the technical group is well able to lift themselves above the conflict of interest space". In other words, even where there is a clear conflict of interest, members are trusted by Council to set that vested interest aside when participating in the working group. Yet this practice is in direct conflict with the Council's own terms of reference for the group, which states that anyone with a conflict of interest (or even a perceived conflict of interest) should withdraw from discussion.

Implications for land and water outcomes

There is an over-reliance on collaborative working groups in New Zealand, particularly at regional level. The attraction of these groups to politicians is obvious: they enable politicians to devolve the responsibility of

[4] Terms of Reference: (GMP Implementation Working Group October 2018).
[5] https://www.oag.govt.nz/good-practice/conflicts-of-interest
[6] https://www.oag.govt.nz/good-practice/conflicts-of-interest

decision-making on a range of politically contentious issues and policy, such as freshwater management. Furthermore, politicians, have reserved the right to 'cherry pick' the recommendations that will be adopted through the final plan or policy, thereby retaining ultimate political control, while reducing political risk.

Many working groups operating in the resource management sphere are skewed numerically or systemically by status quo-seeking industry groups. This is particularly evident where voting is used as part of the deliberative process. As such, these groups are not achieving the intent of the collaborative stakeholder model, which is to represent a balanced view on environmental issues and policy solutions.

This is leading to increased entrenchment towards the status quo and arrangements favouring incumbent stakeholders (generally those with an economic interest in the status quo). There is a consequent risk of lack of evolution in thinking or acknowledgment of the need for novel solutions informed by science.

A further flaw of these consensus-based stakeholder groups is that they are heavily reliant on the weighing of values. Science and technical advice informs decision-making, but it is ultimately values (and their relative priority) that determine outcomes. This creates a greater opportunity for representation biases to influence outcomes. In particular, pre-notification processes should be science-led, not values led. They should be focused on establishing baselines, pressures and outcomes based on factual evidence, not on the strength of arguments about the competing values of different groups of people in relation to extractive and non-extractive uses of the environment.

It is important to recall the purpose of the RMA, which is to "promote the sustainable management of natural and physical resources" (section 5(1)). Sustainable management allows for the use and development of natural and physical resources as long as three conditions are met, as set out in Section 5(2)(a)–(c):

> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Not one of these three bottom lines are value judgments; they are all able to be (indeed *must* be) established through scientific understandings of the environment and its limits. Similarly, all the matters listed in section 6, which further elaborate on these bottom lines, can be established with evidenced-based science. Values become more dominant in the RMA decision-making process when there is a tension between conflicting uses (often extractive (e.g., development) versus non-extractive (e.g., amenity, landscape values)) and these need to be weighed against each other, often involving subjective judgments to be made. But even here, the King Salmon case (2014) has made it clear that the bottom lines set out in Part 2 of the Act must be upheld, not weighed against each other in an 'overall broad judgment', as has been the prevalent approach in the past.

OLW solutions sought:

1. Good practice for collaborative decision-making: Genuine collaborative stakeholder engagements (with no voting) should be encouraged to deal with contentious and complex issues. Applied social science research is urgently required to provide New Zealand with guidance on best practice and its implementation. Such research should draw on international best practice, but adapted to New Zealand's national and regional decision-making contexts.

2. National-level baseline research: Urgent baseline research is required to feed into decision-making processes (both collaborative and council-led), to counteract the current reliance on value-based decision-making. There is inadequate investment in such research at the local and regional level, as

councils are constrained by funding allocations, which are determined by rates increase concerns and the political term. This baseline research to inform regional RMA decision-making must be produced at the national level, and should include assessments of human health impacts, and ecosystem/environmental effects.

3. National-level applied solutions research: In addition to this baseline research, more investment at the national level is required to develop sustainable land and water management solutions to reduce the reliance on industry agreed "good management practices" which have been demonstrated to be inadequate in their ability to deliver improved water quality outcomes.

4. Shift to national-level funding model: Both in terms of baseline and solutions-oriented research, greater scope and quality of research is required. Scope and funding should be liberated from politically and fiscally-constrained regional and unitary councils, and elevated to a combined (joint central/regional government funding) model, to achieve better outcomes nationally. The NSC should fund the transition to this model, in the immediate term providing top-up funding to regions to provide baseline and solutions-oriented science to inform RMA decision-making.