



Expert reviews – theory and practice

*“Not everyone’s an artist, but everyone’s a critic”
– Marcel du Champ.*

The quality of resource consent decisions depends on the quality of the information available to the decision maker. The applicant for a resource consent has the primary responsibility to provide good information to the consent authority. Where an application may have a significant adverse environmental effect, s 92(2) of the Resource Management Act 1991 (RMA) gives a consent authority the ability to commission a report relating to an application. Separately, council officers routinely obtain specialist advice as part of their s 42A reporting. This article considers practice in this area and attempts to provide guidance.

In resource management, context is important. In some contexts, a different approach might be justified. One such context might be where Te Ao Māori is concerned.

THE COSTS OF CONSENTING ARE INCREASING WELL ABOVE THE RATE OF INFLATION

The Ministry for the Environment (MfE) collects data from all territorial authorities in respect of the implementation of the RMA. In June 2024, MfE published *Ngā Tauria Whakatinana i te Ture Whakahaere Rawa* (Ministry for the Environment *Ngā tauria whakatinana i te Ture Whakahaere Rawa Patterns in Resource Management Act implementation: National Monitoring System data from 2014/15 to 2022/23* (ME 1833, June 2024), a report identifying trends in Resource Management Practice between 2014 and 2023. A number of trends are evident. The Council median charge for processing a non-notified consent without a hearing increased from \$1,280 to \$2,585

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between the year ended June 2015 and the year ended June 2022, an increase of 8.4 per cent per annum above inflation. Where the application was notified and there was a hearing, the average cost increased from \$8,220 to \$27,000 over the same time period, an increase of 22 per cent per annum above inflation.

While MfE collects some data about the use of s 92(2), that is primarily directed at when s 92(2) was used to stop the processing clock (457 times if you are interested). The data does not tell us how many times expert reports were commissioned.

I expect that part of the explanation for why the application fees for notified applications with a hearing are increasing is due to more work being done. Much of that work is likely to be undertaken by specialists. Those specialist reports will have been sought pursuant to s 92(2) or as part of the s 42A Report.

WHAT MIGHT THE TRIGGERS BE FOR REQUESTING AN EXPERT REVIEW?

Before a report may be commissioned under s 92(2), the consent authority needs to be satisfied that “the activity for which the resource consent is sought may ... have a significant adverse environmental effect”. While the same criterion do not apply to s 42A reports, it would be an unusual circumstance where the reporting officer commissions a report while being certain that an application would not have a significant adverse environmental effect.

The quality of the existing information is a relevant factor. One situation where a specialist report might be called for is where there are gaps in the information. The application would have, by this stage, passed the s 88(3) test meaning the application is not incomplete; nonetheless, s 92 is designed, in part, to remedy deficiencies in applications.

A further occasion where obtaining an expert review may be justified is where the expert reports which accompany the application appear to be advocacy. While the Code of Conduct for expert witnesses in the Environment Court (Environment Court of New Zealand / Te Kōti Taiao o Aotearoa Practice Note 2023) does not, in a formal sense, apply to Council hearings, s 9.2 and 9.3 of the Code are often used by analogy.

WHO IS THE TARGET AUDIENCE OF THE EXPERT REVIEW?

The primary audience for the expert review or specialist report is the decision maker who is delegated the task of granting or declining the application. A very close second are submitters. It will also be important to the applicant who will end up paying for the report and for the time of the consent officer who commissioned the report in the first place.

It should be obvious that the primary target audience of the report ought to be the decision-maker. The quality of decisions made depends on the quality of information supporting the decision. The nature of expert opinions is that peoples’ views may reasonably differ. Where an issue is critical to a decision and there is a genuine controversy or contest of opinions, a decision maker is likely to benefit from a second opinion, even if the first was entirely consistent with the Code of Conduct.

Having an independent view demonstrates that the process is robust. While there ought to be little difference between

an opinion commissioned by the applicant and an opinion commissioned independently of the applicant, a process can be enhanced by the presence of an independent view.

Sometimes the presence of that independent view itself will address submitters’ concerns, reducing costs and risks for all parties.

The role of the applicant should not be overlooked. The applicant has a procedural role under s 92. Particularly where an expert review raises significant issues in respect of applications, it is useful to have that information as soon as possible. Substantial cost may have been incurred if the information is provided merely 15 working days prior to a hearing, by which time substantial preparation has been undertaken for that hearing and costs may have been wasted.

DOES THE EXPERT REVIEWER FOCUS ON THE METHODOLOGY OR THE MERITS?

Where a report has been commissioned to address a gap in the necessary information then this question does not arise. In such circumstances the report needs to address the merits.

In other cases, the applicant who is paying for the exercise, the processing officer who is commissioning the work and the person who has been commissioned ought to be clear on the scope of the brief.

Where existing information is being reviewed any report should, at a minimum, ensure that:

- (a) the right questions have been asked;
- (b) relevant information has been sourced;
- (c) the method used to assess the information is sufficiently robust;
- (d) the conclusions drawn from the analysis are both consistent with the analysis itself and plausible; and
- (e) if there is a deficiency, identifying if it is likely that that deficiency is material to the outcome.

In general, only if the last question above raises concerns should a full merits review be undertaken by the reviewer.

If the answer is that a merits assessment is required, a way forward needs to be discussed. I would imagine that the reviewer would report the fact of any expert conference (where that is appropriate) and any outcome agreed as part

of their report. This would be consistent with s 9.4 of the Code of Conduct.

The difference between the process that I have outlined and a full independent assessment, is that the latter is likely to cost significantly more with potentially less benefit to the ultimate decision maker. Where witnesses take different approaches and reach different outcomes, it is generally the task of the decision maker to first understand the differences and then to arrive at an assessment of likely environmental effects. As a consequence:

- (a) Express instructions should be sought before the expert reviewer undertakes any substantial work to repeat the primary author's work; and
- (b) Express instructions should be sought before adopting competing methodologies.

Being clear as to the purpose of an expert review manages, as best as possible, the expectations of consent officers, applicants, experts, expert reviewers, submitters and decision makers.

IS THE PURPOSE OF AN EXPERT REVIEW TO CONTRADICT?

While an expert reviewer may reach an opposite conclusion, the purpose of a report ought not to start from a position of opposition.

Again, by analogy, the Environment Court Practice Note is helpful. The Environment Court expects all expert witnesses to have an overriding duty of impartiality. An expert witness is not and must not behave as an advocate for the party who engages them. An expert reviewer or a person who is commissioned to prepare a report who sets out to arrive at a particular conclusion is unlikely to be of assistance to a decision maker, even at the council stage.

An expert reviewer should confine themselves to deficiencies material to the outcome. No good will come from contradiction on immaterial matters.

Does the nature of the expert's discipline influence the nature of an expert review?

Yes, the nature of the expert's discipline will influence the nature of an expert review. An obvious example is where a cultural impact assessment is called for. Cultural impact assessments are not appropriate to be confined to the methodology that I have outlined. A context specific

understanding of the work that needs to be done is appropriate.

In some disciplines, different practitioners use different tools of analysis. Examples include different engineering models being used to assess safety or differing landscape architecture assessment methodologies to assess landscape. Context specific judgments will need to be made as to the most helpful form of expert review in those circumstances.

Where two independent techniques come to more or less the same answer, it may be helpful for a decision maker to know that. Where the outcome is less straightforward, it is often worthwhile to encourage some sort of conference between the experts so that the decision maker is clear as to where the areas of agreement and areas of disagreement lie. Where such an outcome looks likely, an early discussion as to how those issues are best managed is encouraged.

CONCLUSION

Twelve years ago, the Environment Court discouraged parties from duplicating effort by calling expert review evidence on account of the high costs of litigation and the possibility that such practice may increase costs: see *Kircher v Marlborough District Council* [2010] NZEnvC 102, [2010] ELHNZ 142 at [49].

While we lack significant data on how our resource management process functions and whether it is making an environmental difference (see work undertaken by the Parliamentary Commissioner for the Environment), part of the reason why costs in resource management increase well above the rate of inflation is likely to be an increase in the use of expert reviews.

The purpose of this article is to identify a minimum framework for expert reviews. Particular circumstances will call for bespoke solutions.