A GUIDE TO CONSULTATION PROCESSES

10 Points In One Day Conference
Public Law and Judicial Review Stream
Rydges Hotel, Wellington
22 May 2014

1. WHY CONSULT

(a) Downsides

1.1. Consultation can be administratively burdensome, time consuming, and potentially resource intensive, both as to budget and personnel. It also provides an opportunity to be tripped up by prospective applicants for judicial review where no other decent grounds of challenge may previously have been available. All the same, it is a good thing, even where it is not legally required. There are at least four reasons why.

(b) Upsides

1.2. First, consultation is likely to help affected parties to better receive the outcomes, particularly where the outcomes are adverse to them. Second and related, transparency and inclusiveness are meaningful to us as people. They help justice to be done and seen to be done. Third, consultation improves outcomes. It "harnesses additional expertise outside government and transfers some costs of government regulation" to the affected parties (*Pork Industry Board* [2013] NZSC 154, [7]). Finally, consultation can help consultors to fend off other grounds of challenge. For instance, it can help to ensure they ask the right question, and that they have sufficient 'evidence' to answer it.

2. WHEN CONSULT

2.1. There is no general duty to consult affected parties before a course of action is taken.

(a) Consultor volunteers

2.2. That is, however, not to prevent a decision-maker from voluntarily consulting. Recognising its virtues (**para 1.2** above), consultation may be undertaken of one's own choice (*McInnes* [2001] 3 NZLR 11 (CA), [10]), including in addition to and outside of formal consultation programmes (*University Staff* [2002] NZAR 817 (HC), [102]). Consultation of this kind must also be conducted properly (*Coughlan* [2001] QB 213 (CA), [108]). Having chosen to consult it will be hard to argue that the Court should ignore an unfairness in the process because there was no duty to embark upon it (*NZ Vegetable and Potato Growers* HC Wellington CP139/02, 2 July 2002, [31]).

(b) Statute requires it

2.3. An obligation to consult may arise from statute (*Lab Tests* [2009] 1 NZLR 776 (CA), [313]). It may be provided for expressly (*Karaka Point* [2013] NZHC 2577, [78], [81]), or by necessary implication (*Nicholls* [1997] NZAR 351, 369 (HC)). A 'necessary implication' is "one which necessarily follows from the express provisions of the statute construed in their context"; it is something "Parliament would, if it had thought about it, probably have included" (*Morgan Grenfell* [2002] 2 WLR 1299 (HL), [45]).

(c) Common law requires it

2.4. Alternatively an obligation to consult can arise through the "supplementation of what is expressly enacted, so as to give effect to the requirements of natural justice" (*Fraser*

[1984] 1 NZLR 116, 121 (CA)). The nature and extent of any common law duty to consult will be dictated by any operative statutes (*GXL Royalties* [2010] NZAR 518 (CA), [44]; *Graham* (2013) 17 ELRNZ 299, [56]) as well as by any terms set out in a formal instrument (*Mason-Riseborough* (1997) 4 ELRNZ 31, 49 (EnvC)).

2.5. The common law duty to consult can arises in four situations. They are:

2.5.1 Promise/representation of consultation: This may be embodied in policy (*Thompson* [2000] NZAR 583 (HC), [14]-[15]); a formal/contractual agreement (*Lab Tests* [2009] 1 NZLR 776 (CA), [313]; *Association of University Staff* [2002] NZAR 817 (HC), [108]); or a less formal/oral undertaking (*Air NZ* [2009] NZAR 138 (HC), [59]), provided it is not inconsistent with statutory requirements and is reasonably capable of being relied upon (*Te HeuHeu* [1999] 1 NZLR 98, 127 (HC); *Ngati Koata* CA296/98, 18 December 1998, p9). Note that Courts will take a cautionary approach to expectations of consultation said to be based on statements in media articles rather than official policy documents or formal media releases (*Napier Public Health Action Group* [2007] 3 NZLR 559 (HC), [104], [107]);

2.5.2 Past practice of consultation: This is more likely to be the basis for a duty where there has been "an established practice of consultation" (*NZ Association for Migration and Investments* [2006] NZAR 45 (HC) at [187], [190]–[191]). For instance a "history of meetings and consultations between the parties" (*Begley* HC Rotorua M151/92, 5 September 1995, p17). Past practice (e.g. what occurred in the last contracting round) will be stronger still in pointing towards a duty to consult where it is supported by public assurances about consultation (*NZ Private Hospitals Association* HC Auckland CP440/94, 7 December 1994, p37). The consultor's predecessor's actions can be looked to as support for an entitlement to expect similar future treatment (*University of Auckland* [2004] 2 NZLR 668 (HC), [79]);

2.5.3 Impact of decision: The "demands of fairness in the particular circumstances [may] require the decision maker to consult either generally or with a particular person or persons" (*Nicholls* [1997] NZAR 351, 370 (HC)). An investment of substantial funds in the regulatory status quo can warrant this (*Gallagher* HC Wellington CP402/88, 28 July 1988, pp21-22). That will be the more so where a significant financial interest is coupled with a special local interest in the matter and previous consultation (*Leigh Fishermen's Association* HC Wellington CP266/95, 11 June 1997, pp27-28);

2.5.4 Treaty of Waitangi: Finally it is possible for a common law duty to consult to arise from the Treaty of Waitangi. The Treaty partnership does not require consultation in all cases (*Te Tai Tokerau Mapo Trust* HC Whangarei CIV-2010-488-307, 5 August 2011, [151]). For instance, the Crown "may have sufficient information in its possession for it to act consistently with its obligations under the Treaty without specific consultation" (*Radio Assets* [1996] 3 NZLR 140, 169 (CA)). But "where it seems there may be Treaty implications" (*Lands/SOE Case* [1987] 1 NZLR 641, 683 (CA)), and certainly on "truly major issues" (*Forestry Case* [1989] 2 NZLR 142, 152 (CA)), the Treaty responsibility to make informed decisions will require consultation.

3. WHO TO CONSULT

3.1. Consultation "takes its meaning from the context in which it is sought to be applied, having regard to the purposes of the particular Act" (*Lumber Specialties* [2000] 2 NZLR 347 (HC), [116]). Who needs consulting therefore varies with fact and context.

(a) 'All and sundry'

3.2. Within that conceptual framework, the starting point is that there is no requirement "in absolute terms to consult with all and sundry"; that "would be impossibly burdensome and might not be a very productive exercise" (*McInnes* [2001] 3 NZLR 11 (CA), [13]). The decision-maker (quoting *McInnes* [2001] 3 NZLR 11 (CA), [14]):

> "… must, of course, act reasonably in choosing whom to consult. He ought not, for example, to overlook organisations representing particular interests or individuals who are, by reason of expertise, in a position to express an informed view (and there is no suggestion that he did that). But the exercise of a discretion about what consultation is appropriate should not be confused with an obligation to give all interested persons, who may be experts or lay people, misguided or not, the opportunity of putting forward their views in the form of a submission."

(b) Named persons/bodies

3.3. A statute (or regulations) may single out who needs to be consulted, by name or by class. Where persons and groups are so singled out, they have a right to be consulted "irrespective of the extent to which… [the decision-maker and its advisors] were already informed" of their views (*Waikato Tainui* [2010] NZRMA 285 (HC), [92]).

(c) Uniquely/specially affected

3.4. Persons and bodies likely to be affected in a way that is significantly different from the public generally may have a legitimate expectation of being consulted. Such an expectation can be based on commercial operators being concerned for many years with particular markets and having existing rights and considerable financial interests in those markets (*Fowler & Roderique Ltd* [1987] 2 NZLR 56, 78 (CA); *Leigh Fishermen's Ass'n* HC Wellington CP266/95, 11 June 1997, 27-28; *SmithKline Beecham* [1992] NZAR 357, 367-368 (HC)). In contrast an indirect economic interest such as a contingent ownership right to land may not justify a legitimate expectation of consultation (*Ngati Awa* HC Wellington CP73/99, 21 April 1999, 15-17).

(d) Representative groups/bodies

3.5. Collective organisations, acting "as channels of communication between their members and the administration" (*Ass'n of University Staff* [2002] NZAR 817 (HC), [100]), will often be 'vehicles' for effective consultation (*McInnes* [2001] 3 NZLR 11 (CA), [15]). Indeed in some cases it can be appropriate to restrict consultation to representative bodies. So in *Stevenson* "[q]uestions of timing, commercial confidentiality or sensitivity and simple logistics" meant only the industry representative group and not individual apple and pear growers needed to be consulted on matters of commercial and marketing policy (*Stevenson* HC Wellington CP63/87, 6 November 1987, 13-14).

3.6. A similarly limited approach to consultation has been endorsed in Treaty settings (*Ngati Apa* [2007] 2 NZLR 80 (PC), [35]; *Muriwhenua* [1996] 3 NZLR 10, 19-20 (CA); *Morrison* HC Auckland CP122/99, 19 September 2003, [50]). An important flip-side of this is that the Crown will have difficulty saying consultation "with at least major iwi groups" having an interest was unworkable, particularly if unworkability lies in the fact

that "it may have been administratively inconvenient and politically unwelcome" (*Federation of Commercial Fishermen* HC Wellington CP237/95, 24 April 1997, 155).

3.7. In a Treaty context one Māori group or entity may claim to be the only or the most appropriate consultee. This may also be dispute. Where this occurs, Courts prefer to not resolve mana/status disputes in the consultation context (*Tawhai* HC Rotorua CIV2003-463-109, 27 June 2003, [22]; *Reihana* HC Invercargill CIV-2005-425-75, 19 December 2007, [56]-[59]). Note too the Te Ture Whenua/Māori Land Act 1993 procedures to obtain advice as to who is the most appropriate representative of a class/group of Māori.

4. HOW TO CONSULT

4.1. Where a statute sets out what must be done, the prescribed process must be strictly complied with (*Karaka Point* [2013] NZHC 2577, [78], [81]; *Nelson Gambling Taskforce* HC Nelson CIV-2010-442-368, 26 August 2011, [19], [29]).

(a) The *WIAP* criteria

4.2. Where a statute does not prescribe set machinery for consultation, the object and nature of consultation should be related to the purpose for which it is required (*Hamilton City* [1972] NZLR 605, 643 (SC)). "What is required for a high level decision affecting many people would be wholly inappropriate for a much less significant decision affecting a few people" (*Karaka Point* [2014] NZAR 244 (HC), [19]). Absent statutory guidance, the Full Bench decision in *WIAP* [1993] 1 NZLR 671, 676, 683-684 (CA) will be the starting point for analysis (*Pork Industry Board* [2013] NZSC 154, [168]). Within the framework *WIAP* provides advisors should look to the wealth of case-law in this field for guidance. But it should not be treated as a rigid framework. Past decisions represent a readily available series of signposts, acting as good pointers to ultimately common sense principles. But here as everywhere, context will be everything.

(b) Some 'rules of thumb'

i) Consultor to develop the consultation process

4.3. The first step to meaningful consultation is the development of a proposal to consult on. Almost always it will be for the consultor internally to develop a proposal on which to consult. The exception to that 'rule' will be statutory, as in *Retirement Villages Association* HC Wellington CIV-2007-485-2139, 19 December 2007, [59]-[70].

4.4. Once a proposal has been developed, a process for consultation needs to be worked out. 'Single-layered' consultations (i.e. proposal, consultation, decision) are common. But two-layered or staged processes of consultation are being used with more frequency. They too can be permissible. Waikato University's restructuring is a case in point. The process there was a decision in principle as to what the administrative units were to be, but then to leave over for further consultation the details that would attend on the first decision. This was legitimate (*Ass'n of University Staff* [2002] NZAR 817 (HC), [126], [129]-[133]). There is, however, an important limit to the use of a phased process of consultation. It is that mandatory statutory requirements must be capable of being met and must in fact be met through the phased processes (*Breckland DC* [2009] EWCA Civ 239, [49], [68]-[69]; *MOM Case* [2013] 3 NZLR 31 (SC), [90], [149]-[150]).

ii) Consultor effectively to notify consultees

4.5. Affected persons and bodies first need to know about a consultation in order to be able to meaningfully participate in it. There are today many ways a consultor can notify this.

They include mailouts (*Karaka Point* [2014] NZAR 244 (HC), [24]); newspaper notices (*Karaka Point* [2014] NZAR 244 (HC), [24]); website postings (*Greenpeace* HC Wellington CP85/99, 7 May 1999, 14); conferences (*Lumber Specialties* [2000] 2 NZLR 347 (HC), [100]-[114]; *Electra* (2005) 2 NZCCLR 378 (HC), [27]); information sessions (*Turitea Reserve* [2008] 2 NZLR 661 (HC), [154]-[155]); and consultation hui (*Whata-Wickliffe* [2005] 1 NZLR 388 (CA), [39]).

4.6. If a statute requires notification by a prescribed manner, it should be used. Otherwise consultation "need not be in any particular form" (*MOM case* [2012] NZHC 3338, [296]). Although note an EnvC case finding that it was a potential breach of RMA consultation obligations for the Minister to rely upon external consultants to consult with iwi as that meant the Minister had not engaged "kanohi ki te kanohi (face-to-face) with [iwi] representatives" (*Tuhua Trust Board* [2012] NZEnvC202, [35]-[36]). The Waitangi Tribunal has also recognised in its reports "the much greater effectiveness of kanohi ki te kanohi over conventional mail hand-outs and the distribution through other means of written material without personal contact and discussion" (*Māori Electoral Option Report*, Wai-413, 1994, section 4.6). Although note as a counterweight to that *Federation of Commercial Fishermen* HC Wellington CP237/95, 24 April 1997, 155:

> "[C]onsultation need not necessarily have involved numerous and protracted hui. … Māori sometimes must adjust traditional and preferred methods of decision making and communication to modern necessities. Or risk not being heard."

4.7. Where more than one method is used to engage with consultees, Courts tend to assess the consultation process as a whole and determine whether it was adequate, rather than artificially analysing the particular methods used to consult (*Aorangi School* [2010] NZAR 132 (HC), [48]; *Macaskill* [2009] NZAR 111 (HC), [34]). Although note that any information should be notified in a uniform manner absent good (statutory) grounds to do otherwise. To quote McGechan J "if the Minister's thinking was sufficiently formulated … to make disclosure to one interest… that disclosure should have been general, giving maximum notice and opportunity to consider and rebut" (*Federation of Commercial Fishermen* HC Wellington CP237/95, 24 April 1997, 117).

iii) Consultor to disseminate appropriate information

4.8. Meaningful consultation requires consultors to make available "sufficient information to enable [affected parties] to be adequately informed so as to be able to make intelligent and useful responses" (*WIAP* [1993] 1 NZLR 671, 676 (CA)). This requires the dissemination of accurate, adequate and readily comprehensible information; qualities determined by the primary audience for and the purpose of a consultation (*Move Over Probation* HC Christchurch CIV-2010-409-1197, 21 April 2011, [15]).

4.9. If the general public is the primary audience, and if the importance of a key factor (e.g. cost) is played down or not presented so as to enable a critique, consultation materials may be inadequate (*Phillipstown School* [2013] NZHC 2641, [3], [46], [104]-[105]). On the other hand, if the general public is the primary audience, and if they would not have been misled even though legal experts might take issue with technical statements, materials likely will pass muster (*Christchurch CC* [2005] NZAR 558 (CA)).

4.10. Of the three requirements – (i) accurate, (ii) adequate and (iii) readily comprehensive – it is requirement (ii) that involves the greatest exercise of judgment and for this reason poses most risk. That said, helpful markers are identified in the case-law. The first is that what is being proposed should be notified. In *McInnes* this required the Minister of Transport to make available "the detail" of the proposed content of a rule introducing

new photographic driver licences, as he had done (*McInnes* [2001] 3 NZLR 11 (CA), [11]). Contrast the giving of general information at a special general meeting telling affected providers what was about to happen but not in detail. This was inadequate disclosure in the context of a move by the RHA from an RFP to a tender process for services contracts (*Private Hospitals Ass'n* HC Auckland CP440/94, 7 December 1994, 35-36). A second helpful marker is that the reasons for the proposal should be set out. In *Karaka Point* the consultation process miscarried because the consultation materials proposing a significant rates increase had not clearly articulated the basis on which that decision had been made (*Karaka Point* [2014] NZAR 244 (HC), [69]-[75], [78]).

Disclosing discarded options

4.11. What about proposals considered but discarded by the consultor (and its advisors) prior to consultation, must they be consulted on? The general rule is 'no', as the English High Court recently confirmed in *United Company Rusal* [2014] EWHC 890 (Admin), [73]:

> "The general rule is that a decision maker is entitled to narrow the options prior to consulting on the preferred option, and need not consult on discarded options, provided the proposed course has not been decided upon and can still be altered as a result of the consultation. It seems clear that the need to deal with alternative options only arises where there are specific reasons why it would be unfair not to do so."

4.12. But note *Contact Energy*, holding in the context of a consultation proposing changes to an electricity transmission pricing methodology that the Electricity Commission's failure to set out in its consultation paper the various options available to it in respect of the HVDC charge, not just the Commission's view on the best outcome, made the process defective. It meant that Contact Energy and Meridian had not been "adequately informed of what options were 'on the table'" for the Electricity Commission (*Contact Energy* HC Wellington CIV-2005-485-624, 29 August 2005, [29]).

Disclosing formulae/inputs

4.13. As regulations become more economically sophisticated and quantitative, Courts have come to expect more by way of disclosure, particularly in complex regulated industries with highly sophisticated stakeholders. This can be seen in *Air NZ*, holding that Nelson Airport was required "to identify the particular methodology employed if Air New Zealand was to be able to comment usefully on the proposed [landing] charges", including "individual building blocks [used in the methodology] – asset configuration and value, operating costs, rate of return, taxation, and allocation of the revenue requirement among services – to the extent material to the resulting charges" (*Air NZ* HC Nelson CIV-2007-442-584, 27 November 2008, [47]). Compare *Macaskill*, rejecting a claim that the legal standing of the various classes of discretionary beneficiaries of an energy trust and the basis upon which each was potentially entitled to capital needed to be explained in consultation materials, reasoning that "most consultees would have no interest in analysing that level of detail", so that "no more than that the drift or general effect of a proposal [needed to] be conveyed" (*Macaskill* [2009] NZAR 111 (HC), [31], [33]). Important here was who the primary audience was.

iv) Consultor to have a genuinely open mind

4.14. At the time a consultation process is undertaken the consultor's mind must be genuinely open to being "influenced" by responses (*Spectrum Resources* [1989] 3 NZLR 351, 359 (HC)). "[C]onsultation cannot occur when a proposal is already decided upon; consultation is the discussion that occurs before deciding what will be done" (*Waikato Tainui* [2010] NZRMA 285 (HC), [52]). It naturally follows that presentation of a fait

accompli outcome will not do (*Forestry case* [1989] 2 NZLR 142, 152 (CA); *Bishop* HC Palmerston North M47/97, 11 July 1997, 23). But a consultor is still entitled to form and express a "preliminary view" (*Contact Energy* HC Wellington CIV-2005-485-624, 29 August 2005, [30]), or a "developing inclination towards a particular course of action as the most likely and appropriate" (*Greenpeace* HC Wellington CP85/99, 7 May 1999, 17) – provided they retain a mind open to change. The logical corollary of this is that the consultor can modify their preliminary view after reviewing consultee responses (*Contact Energy* HC Wellington CIV-2005-485-624, 29 August 2005, [30]).

v) Consultor to give adequate time to respond

4.15. Meaningful consultation requires a "sufficient opportunity" to be given to consultees to respond to consultation materials (*NZ Fishing Industry Ass'n* [1988] 1 NZLR 544, 566 (CA)). This is an "objectively reasonable" period of time (*McInnes* [2001] 3 NZLR 11 (CA), [11]). How long that is will be fact and context specific; "In some situations adequate consultation could take place in one telephone call. In other contexts it might require years of formal meetings" (*WIAP* [1993] 1 NZLR 671, 675 (CA)).

4.16. Eight weeks was adequate to consult on new photographic driver licenses (*McInnes* [2001] 3 NZLR 11 (CA), [34]). And five days was sufficient to consult on a proposed new food standard in (*Greenpeace* HC Wellington CP85/99, 7 May 1999, 15). On the other hand, 14 local consultation hui over two weeks was inadequate engagement on a Māori language strategy intended to endure for a generation (Waitangi Tribunal, Wai-262, 2011, section 5.6.2, 163). And four days was inadequate to make detailed comments on a draft Retirement Villages Code of Practice that had not previously been seen (*Retirement Villages Ass'n* HC Wellington CIV-2007-485-2139, 19 December 2007, [80]-[98]). In so holding Simon France J stressed in *Retirement Villages Ass'n* that "timeframes must be sourced in sound reasons. It is not acceptable to unilaterally determine one, and then to consider that because everyone has been told about it, it is therefore somehow 'OK'" (at [96](c)). And further that (at [96](d)):

> "[T]he fact that a body such as the plaintiff seeks to do the best it can with the opportunities provided does not mean that the opportunities were sufficient. Nor do the plaintiff's efforts at trying to maximise the opportunities afforded somehow constitute an estoppel against it later complaining about the process."

Holiday periods

4.17. Where a consultation period will overlap with public holidays, and in particular the long Christmas holiday period, the Court of Appeal has indicated that "it might have been wiser to make greater allowance for the holiday period when potential submitters would very likely have their minds on relaxation and pleasure rather than on scrutinising a draft rule" (*McInnes* [2001] 3 NZLR 11 (CA), [34]).

vi) Consultor to genuinely consider responses

4.18. "[W]hile active listening is a necessary aspect of consultation, in itself it is not enough" (*Aorangi School* [2010] NZAR 132 (HC), [42]). Decision-makers must "impartially consider [consultation] submissions with an open mind, to consider and have regard to the substance of the submissions and to then make a judgment (which may well have a political flavour)" (*South Taranaki Energy Users* HC New Plymouth CP5/97, 26 August 1997, 27). The genuine consideration of consultee views should be apparent to the outside world (*Butler* HC New Plymouth CIV-2004-443-332, 19 August 2004, [42]), at least in the sense of the consultor being able to explain and demonstrate this if

challenged. Plainly a failure to consider consultation submissions at all is wrong in law (*Pascoe Properties* HC Nelson CIV-2011-442-126, 21 April 2011, [18]–[19]).

4.19. Courts naturally enough stress here that consultation is not be equated with negotiation; negotiation "implies a process which has as its object arriving at agreement", which is not the requirement (*WIAP* [1993] 1 NZLR 671, 676 (CA)). It follows that "[r]ejection of an interested party's submission does not oblige a Minister to re-open the issue for further debate" (*NZ Recreational Fishing* HC Auckland CIV-2005-404-4495, 21 March 2007, [106]). Similarly, a lack of consensus in favour of the resulting decision is not legally problematical (*Kawerau Intermediate* [2012] NZHC 1632, [79]). In addition, consultation "is not only different from negotiation, it is also different from an adversarial process" (*Greenpeace* HC Wellington CP492/93, 27 November 1995, 16):

> "The Minister was not, in this case, required to reconcile the differing points of view. However, he was obliged to make an informed decision, one which was made in the light of the responses of those persons or organisations identified as appropriate to make such responses. I do not see that the Minister was required to give all persons from whom a response was sought, the opportunity to comment upon the responses of others. There was no suggestion that the applicant would have changed its stance on being confronted with Dr Punt's views. The applicant's complaint here, is rather that it had no opportunity to controvert those views. That is closer to negotiation, not to say contention, than consultation."

4.20. Whilst as a general rule consultation is not to be equated with negotiation, in a Treaty setting there can be a Crown obligation not merely to take into account Māori viewpoints but actively to protect and accommodate them. This principle was stated by Lord Cooke in these terms (*Whalewatching* [1995] 3 NZLR 553, 560 (CA)):

> "Since the *Lands case* … it has been established that the [Treaty] principles require active protection of Māori interests. To restrict this to consultation would be hollow. … In altogether rejecting protection of Ngai Tahu interests as a relevant factor, and in confining treaty principles to an empty obligation to consult, the argument for the Director-General goes too far."

4.21. Applying this principle in *Whalewatching*, the Director-General of Conservation was required to take into account, among the factors relevant to whether he should grant any further permits for commercial whale-watching, protection of the interests of Ngai Tahu in accordance with the Treaty (at 561-562). See similarly *Radio Assets* [1996] 3 NZLR 140, 169, 182 (CA) and more recently *Takamore Trustees* [2003] 3 NZLR 496 (HC), [86]. In considering practically what the duty to accommodate Treaty interests requires, note the EnvC's rejection of an argument that the law makes commissioning tangata whenua to prepare a cultural values report essential to adequate consultation on a proposal for resource consent (*Waikato RC* (A133/2006, 17 December 2006), [96]). The NZHC has also refused to intervene via judicial review to protect Treaty interests not timely raised by iwi in a consultation process (*Greenpeace* [2012] NZHC 1422, [140]).

5. SUMMARY/ADVICE PAPERS

5.1. In consultations involving a significant number of responses, or technically complex submissions, it is not uncommon for a consultor to seek and rely upon advice papers summarising the submissions made and presenting options for decision. There is nothing wrong with briefing papers of this kind being prepared and relied on in making a final decision. But such papers must be fair and accurate in the information they present, including their summary of consultation submissions. Where they do not meet that standard, the resulting decision may be invalid (*Air Nelson* [2008] NZAR 139 (CA), [39]-[40], [53]-[56]). Note though that advice papers are unlikely to be problematic for a failure to endorse or advance for approval a consultee's preferred option (*Butler* HC New Plymouth CIV-2004-443-332, 19 August 2004, [41]):

> "The Ministry's omission to include Kapuni's four-school proposal within Submission 1 (its recommendation to the Minister) is not evidence that its officials did not participate in earlier meetings with open minds, ignored what was said by Kapuni, or failed to wait until they had their say. Rather, it is evidence that the Ministry did not consider Kapuni's proposal worthy of an affirmative recommendation; it was not bound to endorse or even advance it to the Minister. In this context I repeat that Submission 1 appended the facilitator's Stage 2 report, which set out Kapuni's model, and that many others consulted in the South Egmont area were opposed to a four-school regime."

5.2. An important corollary of the acceptance of summary/advice papers by advisors is that such papers should be disclosed to consultees who request them, if not voluntarily. As one NZHC decision has pointed out such papers are readily available under the Official Information Act 1982 and, reflecting that, one would expect their informal disclosure – at least when requested (*Aorangi School* [2010] NZAR 132 (HC), [44], [47]).

6. FURTHER CONSULTATION ON CHANGES

6.1. Having gone through a consultation process and taken into account everything learned, a consultor may decide to modify its original proposal (*McInnes v* [2001] 3 NZLR 11 (CA), [16]). In some situations the fact that initial views have been modified as a result of the consultation process does not mean that a further round of consultation needs to be undertaken (*Contact Energy* HC Wellington CIV-2005-485-624, 29 August 2005, [30]). But in some cases that will be necessary. Just when this is required was addressed by the Court of Appeal in these terms (*McInnes* [2001] 3 NZLR 11 (CA), [16]):

> "If, as a result of the submission and consultation process, the draft is so transformed that what the Minister is then considering is really a completely new rule, the Minister would have to start again. This will sometimes be a difficult question of fact and degree upon which the Minister will no doubt take advice."

6.2. More recently the Supreme Court said in *Pork Industry Board* [2013] NZSC 154, [173]:

> "Ultimately, whether the obligation to consult again is triggered will depend upon the nature, extent and impact of the further work, the focus being on whether the work has led to a substantial change in the scientific basis for the chief technical officer's recommendation."

6.3. *Kina Beach Vineyard*, *Contact Energy* and *Leigh Fishermen's Ass'n* provide examples of post-consultation changes which fairness required the disclosure of and further consultation on. The first case involved a Council decision decreasing subdivision minimum lot sizes from 2 hectares (20,000 m2) to 5,000 m2 (*Kina Beach Vineyard* HC Nelson CP3/01, 24 May 2001, [62]-[64]). In the second, guidelines adopted after consultation represented the "complete antithesis" of the option consulted on (*Contact Energy* HC Wellington CIV-2005-485-624, 29 August 2005, [31]-[37]). The third case concerned a significant post-consultation extension of a closed fishing area both in size and in location (*Leigh Fishermen's Ass'n* HC Wellington CP266/95, 11 June 1997, 29).

6.4. Those cases can be contrasted with *Pork Industry Board*, *Clubs NZ* and *McInnes*. In the first of these cases there was no obligation to consult further where work undertaken by officials subsequent to the consultation process did not involve a substantially different approach from the earlier scientific model and nor did it introduce substantially new data or other material (*Pork Industry Board* [2013] NZSC 154, [89]-[90], [172]-[173], [186]). Similarly in *Clubs NZ* new material was consistent with and merely confirmed data that had already been consulted on, and due to that it did not need to be further consulted upon (*Clubs NZ* [2014] NZHC 679, [51]-[53]). Finally in *McInnes* changes made between two drafts were not of sufficient "importance and novelty" to require

further consultation on the proposal to introduce a new photographic driver licence (*McInnes* [2001] 3 NZLR 11 (CA), [40]-[45]). The four changes in question were more demanding eyesight tests; requiring a written consent to the digitised storage of signatures; the staggering of license expiry dates; and some minor format changes.

7. CONSEQUENCES OF CONSULTATION FLAWS

7.1. Courts asked to scrutinise consultation processes "approach with caution any submission that an administrative law failing made no difference to [the] ultimate decision" (*Leigh Fishermen's Ass'n* HC Wellington CP266/95, 11 June 1997, 30). This was recently confirmed by the Supreme Court (*Pork Industry Board* [2013] NZSC 154, [89]), and reflects the general rule on the discretionary nature of relief in judicial review "that where grounds of review are established, strong reasons are required to decline to grant relief to the successful party" (*Simes* [2012] NZAR 1044 (CA), [117]).

(a) Quashing the outcome/restarting afresh

7.2. In some cases the appropriate remedy for a process that has miscarried will be an order setting aside the decision made or action taken consequential upon consultation and requiring consultation to begin afresh (*DFS* [2013] NZAR 175 (HC), [76]).

7.3. *Air Nelson* is one such case. There the Court of Appeal quashed increased landing charges that had been set by the Minister of Transport for the use of Hawkes bay airport (*Air Nelson* [2008] NZAR 139 (CA), [75]-[77]). *Karaka Point* provides a more recent example. The decision quashed there was one by a Council to move properties from the Picton Vicinity geographical rating area to the Picton geographical rating area (*Karaka Point* [2013] NZHC 2577, [83]-[85]). Finally note *Leigh Fishermen's Asss'n*, declaring that the Minister's decision to implement an area closure in the Hauraki Gulf was invalid, and further directing that that decision "insofar as it so extends the closure area is to be reconsidered, with Leigh Fishermen's Association Incorporated duly consulted" (*Leigh Fishermen's Asss'n* HC Wellington CP266/95, 11 June 1997, 33-34).

7.4. Where the relief sought is the quashing of regulations passed in consequence of a defective consultation, those regulations can be invalidated by Court order (*Board of Airline Rep's* HC Wellington CP391/98, 8 December 1998, 10). In that context, note the possibility of severing defective parts of a decision (or regulations) from effective parts. That approach was taken in *Air Nelson*, where the Court of Appeal quashed charges set for some but not other Hawkes Bay airport users (*Air Nelson* [2008] NZAR 139 (CA), [77]). In another case a declaration was granted that a decision banning all fishing in a marine reserve "was unlawful to the extent (and in no other respect) that it related to customary Māori fishing interests and the Minister is directed to reconsider his decision in that regard" (*Ngatiwai Trust* HC Whangarei CP39/98, 22 December 1998, 24).

(b) Resuming the consultation process

7.5. Instead of quashing the outcome of a consultation process and requiring the consultation to start afresh, the Court can require consultation to be resumed to give the affected party(ies) an input opportunity they should have had. *Phillipstown School* provides a recent example of this. There the NZHC concluded that unintended errors in the consultation process could be corrected by the process resuming before the Minister made a final decision (*Phillipstown School* [2013] NZHC 2641, [4], [125]). Miller J has similarly held that (*Air NZ* HC Nelson CIV-2007-442-584, 27 November 2008, [62]):

> "[T]o set the charges aside for reconsideration is not to require Nelson Airport to repeat the consultation process. It has already consulted at length and need

> only complement that exercise to the extent that its proposal changes materially as a result of the Court's judgment."

7.6. In other words, what is required in a resumed consultation is informed by what has already taken place, potentially justifying shorter timeframes and other limits being set. Quoting *NZ Private Hospitals Ass'n* HC Auckland CP440/94, 7 December 1994, 46:

> "[N]ow that the plaintiffs have already been supplied with the information they did not earlier have, [the further consultation] will not need to be extensive … [nor] absorb any large period of time, especially now that the plaintiffs have during the course of this litigation acquired a good deal of the knowledge which they do not appear to have had when tenders were originally called."

7.7. A particularly nuanced approach to relief where a consultation process had miscarried can be seen in *Bailey* [2013] 3 NZLR 679 (HC), [86]-[87]. There Whata J having found the consultation process to be flawed, directed the Council to reconsider its decision to proceed with the installation of a pressurised wastewater system after providing the applicant with the opportunity to present his views about that system. Whata J further directed that in doing that the form of the presentation "will be a matter for the Council to consider, but it will be necessary to demonstrate, in a transparent way, that the Council has considered the information provided by" the applicant. Whilst all this was taking place, the decision to be reconsidered would continue to have effect "unless and until revoked or amended by the Council" following the applicant's further input.

(c) Refusing relief notwithstanding problems

7.8. Finally it is possible that relief might be refused by the Court notwithstanding its having found one or more errors in a consultation process. *Napier Public Health Action Group* [2007] 3 NZLR 559 (HC), [115]-[119] is illustrative. There Heath J indicated (obiter) that if the Minister or the Crown Health Financing Agency had an obligation to consult, he would not have exercised his discretion to grant relief on the ground that for many years the Action Group had made clear its view on the topic of disposal of the hospital site, being implacable opposition. The Minister of Health and the Crown Health Financing Agency were in consequence well aware of the Action Group's concerns and the position it had taken, and further consultation would have been a futile exercise.

7.9. Relief was in fact refused in *Ngati Maru* HC Hamilton CIV2004-485-330, 27 August 2004, [116]. There the NZHC accepted that whilst the Council's failure to consult on a proposed development was a grave error of law, it could not be sheeted home to the developer, who stood to lose most from invalidating the resulting resource consent (which had also been implemented by the time the judicial review challenge was launched). In these circumstances, and recognising that the essence of the iwi's complaint was its loss of the right to be heard, Laurenson J:

> "[C]oncluded, after much thought, that if one considers the proportionality of the detriment to Ngati Maru compared to that of Mr Kruithof, it would not be right to order that the Council's decision be set aside. To do so would simply prolong, unnecessarily, the dissension between the parties. My reasons are:
>
> (a) The practical reality is that, even if Ngati Maru could substantiate their claim that the site is indeed, sacred land, nothing can now be done to effectively redress the physical effects of what has been done.
>
> (b) Ngati Maru's right to be notified in similar circumstances in the future has been clearly identified and, their claim to be heard in this case has been vindicated.
>
> (c) There will remain an opportunity for Ngati Maru to have their right to maintain their cultural concerns in relation to the remaining lot in the present

> subdivision. If Mr Kruithof decides to proceed with the development of the remaining section with two further dwellings, he will require a consent to do so. It may be that he will be entitled to do so but before any consent is given there will, I hope, be no doubt at all that Ngati Maru will be notified and their concerns taken into account."

7.10. Cases like *Ngati Maru* are rare however. As noted at the outset of this section, Courts rightly stress the importance of proper notice and consultation (see also *Retirement Villages Ass'n* HC Wellington CIV-2007-485-2139, 19 December 2007, [71]). Kós J recently summarised why they do so (*DFS* [2013] NZAR 175 (HC), [69]):

> "As the Court of Appeal said in *Chiu v Minister of Immigration* [[1994] 2 NZLR 541, 552-553 (CA)], the Court should be slow to deny remedy on the basis that a decision maker thinks it is likely to make the same decision all over again (in this instance, presumably, for the third time). As the Court of Appeal noted, there are five reasons for that. First, it is far from inevitable that if a matter is returned for reconsideration the result will be the same. Secondly, reconsideration is usually associated with an opportunity for fresh evidence and argument. That is a feature notably missing here. Thirdly, the individual hearing the application afresh will not necessarily be the decision maker or other person who has deposed as to the likely outcome. Or, it might be added, who has undertaken a purported reconsideration in fact. In the present case that raises a potential issue in relation to the appropriateness of the Chief Executive undertaking a directed reconsideration. But it is premature to express a view on that now. Fourthly, that justice must be seen to be done. Fifthly, the availability of judicial review may have a deterrent function…"

8. FINAL OBSERVATIONS

8.1. As the conceptual basis for the law of consultation is natural justice/fairness, the reality is that different judges can sometimes reach different views on the lawfulness of a consultation process on the same facts. Sensible guidance for lawyers advising consultors is to approach consultation with particular care when the subject-matter is controversial. Correspondingly, lawyers advising consultees should ensure that the positions they take – and, in Court, the cases they present – compellingly marshal the facts in a way which makes clear to the judge that an unfairness needs to be corrected.

Matthew Smith
Thorndon Chambers