BEFORE THE AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL

AUCKLAND

IN THE MATTER	of the Resource Management Act 1991 as amended by the Local Government (Auckland Transitional Provisions) Amendment Act 2010
AND	
IN THE MATTER	of submissions lodged on the Proposed Auckland Unitary Plan

JOINT MEMORANDUM OF COUNSEL SEEKING DIRECTIONS AS TO EXCHANGE AND PRESENTATION OF EVIDENCE

1 SEPTEMBER 2014

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MAY IT PLEASE THE PANEL:

1. This memorandum of counsel is filed on behalf of the clients listed below in response to requests from the Panel for suggestions as to how the proposed hearing process can be made more efficient and certain for participants, while ensuring that all parties receive a fair hearing and that the principles of natural justice are observed.

2. Many of the suggestions made below are as a result of counsels' experiences with Boards of Inquiry which, like the Hearing Panel, are required to operate under very tight timeframes.

3. In summary, counsel seek the following directions:

   (a) That all *reports* prepared by facilitators of expert conferences as required by paragraphs 44 and 45 of the Auckland Unitary Plan Hearing Procedures, as at 28 May 2014 ("**Hearing Procedures**"), and all *reports* prepared by mediators as required by paragraph 49 of the Hearing Procedures, be uploaded to the website at least 25 working days prior to any hearing, and that the parties are encouraged to cross refer to and adopt the contents of those documents where appropriate (without needing to repeat that material in their primary evidence).

   (b) That all *primary evidence* be provided to the Hearing Panel and uploaded to the Hearing Panel website at least 20 working days prior to any hearing.[1]

   (c) That all *rebuttal evidence* be provided to the Hearing Panel and uploaded to the Hearing Panel website at least 5 working days prior to any hearing. Any rebuttal evidence should be accompanied by a consolidated set of changes to the Unitary Plan provisions sought by that party.

   (d) That all *notices to cross examine* be provided to the Hearing Panel 2 working days prior to the hearing.[2]

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[1] The requirement that evidence be uploaded to the Hearing Panel website is consistent with the Auckland Unitary Plan Hearing Panel Procedures, Version 1.0, 28 May 2014, at paragraphs 27 and 58.

[2] While paragraph 72 of the Auckland Unitary Plan Hearing Panel Procedures, Version 1.0, 28 May 2014 states that "The Notice of Hearing for a hearing session will request that parties give notice to the Panel no later than 5 working days prior to the hearing session of any requests to

(e) That all evidence (primary and rebuttal) should contain an executive summary of no more than 3 pages.

(f) That all evidence will be pre-read, but that, in accordance with paragraphs 67 and 70 of the Hearing Procedures, parties shall be entitled (if they wish) to present their executive summary and, with leave of the Panel, to take the Panel through any key visual material, maps or diagrams that might assist the Panel understand their evidence.

(g) That no party shall be entitled to produce additional evidence to the Panel that is not in either their primary or rebuttal evidence, other than as a result of a request from the Hearing Panel for further information (in accordance with paragraph 66(d) of the Hearing Procedures), and in particular, no party should take the opportunity, while presenting their executive summary, to seek to introduce additional material.

(h) That the Panel direct that the rule in *Browne v Dunn*[3] shall not apply (ie there is no obligation to put your case to opposing witnesses through cross examination, and, if that does not occur, there will be no assumption made that any party agrees with the position put forward by any opposing party).

(i) That all substantial changes requested to the Unitary Plan provisions should be clearly described in original submissions or evidence and should not be produced for the first time in legal submissions or at the outset of the hearing.

4. Counsel appreciate that, for those hearings that have already been scheduled, the above suggested timeframes may need to be truncated. Further, Counsel acknowledge that throughout the process there may be situations where different timeframes may be required, and parties will of course be able to seek alternative timeframes from the Hearing Panel as the circumstances require.

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cross-examine witness(es)", this memorandum seeks 2 working days based on the directions sought for rebuttal evidence to be exchanged 5 days in advance at paragraph 3(c). Alternatively, as has happened with other Boards of Inquiry, an initial notice to cross examination could be given after receipt of primary evidence, with it being updated following receipt and review of rebuttal evidence.

[3] (1893) 6 R. 67, codified in section 92 of the Evidence Act 2006.

5. Those directions are sought because:

(a) Witnesses and counsel for all parties, along with the Hearing Panel, are and will continue to be under considerable pressure to meet the commitments detailed in the provisional schedule that has been released. In order to be able to prioritise work appropriately, it is desirable for there to be standard directions in respect of the timing and form of evidence. Counsel have acknowledged that there may be particular instances where tighter or amended timeframes may be required (eg to accommodate hearings which have already been scheduled).

(b) In order for the primary evidence to be as focussed as possible, any caucusing statements or agreed mediation outcomes need to be provided (at least) one week in advance of filing that evidence. It would be desirable for the Panel to emphasise that witnesses can rely on that material without needing to repeat it in each of their statements.

(c) Although the Hearing Procedures indicate at paragraph 64 that supplementary or rebuttal evidence will only be accepted at a hearing session with leave of the Panel, where circumstances make it necessary for such evidence to be provided, there must, with respect, be an opportunity to provide rebuttal evidence. This was an issue with the most recent Board of Inquiry for the Tukituki plan change and Ruataniwha storage proposal, where there was no provision made for submitters to provide rebuttal evidence against other submitters (in that situation the submitters sought a wide range of relief, which will certainly be the case for these hearings). Upon request by counsel for Fonterra and DairyNZ, the Panel in that case acknowledged the need for that step and made provision for it accordingly. Unless that opportunity is provided as part of this process, the cross examination required will be lengthy and complex, as the opposing case would need to be put through cross examination rather than clearly set out in rebuttal evidence.

(d) Counsel agree with the proposition that notices of cross examination should be provided in advance, however, these cannot be provided until all evidence is received (including all

rebuttal evidence). We have allowed for this in the timetable sought above. All rebuttal evidence also needs to be provided sufficiently in advance of the hearing for it to be reviewed for the purposes of cross examination notices, and where notices are issued, to allow time for that cross examination to be prepared. Allowing sufficient preparation time will again assist with focussed cross examination. (As noted in footnote 2, an alternative is for cross examination notices to be given after exchange of primary evidence, but updated after receipt of rebuttal evidence.)

(e) The form of evidence, and in particular the proposed executive summary and the opportunity to read this out, is of crucial importance to ensuring that the key points are emphasised and that witnesses (particularly inexperienced witnesses) are comfortable prior to any cross examination occurring. In addition, even expert witnesses find it difficult to summarise evidence "on the fly". For those reasons, we are proposing that all statements of evidence are directed to contain an executive summary, and that if parties wish to read out part of their evidence, then they are limited to their executive summary. Leave can be granted by the Panel for a witness to take the Panel to visuals, maps, diagrams etc, and certainly in the case of landscape/visual or urban design evidence that may be essential. From the perspective of natural justice however, it is imperative that, if parties have elected not to issue a cross examination notice (and potentially not attend the hearing) on the basis that they were comfortable with the nature of the evidence lodged by a party, then a party giving evidence cannot bolster their evidence or attempt to introduce substantive new evidence at the hearing itself. This occurred in the case of the Tukituki Board of Inquiry referred to earlier, where some witnesses took advantage of an opportunity to speak for 10 minutes and effectively introduced substantive new evidence. Unless the Panel is particularly vigilant on this point, counsel will have no choice but to attend most hearings and/or to issue cross examination notices to most witnesses "just in case" the witnesses endeavour to introduce new evidence at the hearing.

(f) While the position with respect to the rule in *Browne v Dunn* is usually that taken in the Environment Court and in Boards of Inquiry, counsel nonetheless seek the comfort of a formal direction to that effect. This will ensure that cross examination can be very focussed. Again, this was a direction made in the Tukituki and Ruakura Boards of Inquiry.

(g) The request that all substantive changes to the provisions of the Unitary Plan be clearly set out in original submissions or in the exchanged evidence may appear self evident. However, again, in some Boards of Inquiries, submitters have prepared complete "rewrites" of provisions at the time of presenting their case - well after all parties have exchanged evidence, and presented their cases. Parties need the comfort of knowing, when electing whether or not to appear or cross examine, that the provisions proposed will be substantially as set out in the earlier submissions or evidence. Counsel accept of course that minor refinements will (and ought to) be proposed during the hearing itself.

6. Counsel are available to attend a pre-hearing meeting or conference at short notice to elaborate upon any of the above matters raised.

7. A copy of this memorandum has been served on Auckland Council in accordance with the directions in Procedural Minute No. 5 (18 July 2014). As the directions sought in this memorandum will have implications for every submitter who elects to prepare and present evidence to the Panel, this memorandum has not otherwise been individually served on submitters. Instead, counsel respectfully request that formal service of this memorandum occur through the Hearing Panel website, in accordance with paragraph 27 of the Hearing Procedures.

Dated 1 September 2014

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