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Tēnā koe Jane

Review of Fast-track Approvals Panel Conveners' Practice and Procedure Guidance Note 2025

The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the invitation to provide feedback on the review of the Fast-track Approvals Practice and Procedure Guidance Note 2025 (**Guidance Note**). The comments provided below have been prepared with input from members of the Law Society's Environment Law Committee who have been closely involved in the first year of operation of Fast-track hearings panels.

Your letter to us invited comment on:

- a. any new topics that could be included in the Guidance Note;
- b. possible new procedures or innovations; and
- c. any existing sections of the Guidance Note that could be clarified or supplemented.

Our response provides suggestions on:

- a. several additional matters that the Guidance Note could address; and
- b. a recommended new practice of routinely recirculating the Guidance Note to all panel members, technical advisors and parties early in the Fast-track process.

Panel's response to unsolicited comments

(a) From parties

Unsolicited, additional comments from parties who have previously been invited to comment (and have already commented) can arguably be accepted after the timeframe for formally providing comments under the discretion in section 81(6) of the Fast-track Approvals Act 2024 (**FTAA**), or may be the subject of a request for information from a party invited to comment under section 67 even where that party has not provided comments previously. Given the power to accept late comments and request further information is discretionary, the Law Society considers that some clarification of the process would be helpful in the Guidance Note, perhaps addressing three points:

- a. **The process that should be followed by a party wishing to insert their viewpoint.** For late comments, we consider that best practice would be submission of a comment in draft, under cover of a memorandum setting out the reasons why it was late, and why it has been provided (and should be accepted) after the time provided for making comments.
- b. **The criteria on which the Panel might exercise their discretion.** Relevant criteria could include responding to new information provided by the applicant or a council / administering agency after the time for comments has passed, and providing information not available at the time comments were able to be made, but which could usefully inform the draft decision process (rather than attempting to raise such comments as part of their comments on draft conditions). There could be other valid reasons for determining it is appropriate to admit or exclude further comments (such as the timing of receipt, prejudice to the parties or process), making it desirable to specify any such criteria on an inclusive basis.
- c. **Right of reply.** The Guidance Note should also note the procedural desirability of providing the applicant a right of reply to further comments invited by way of section 67 request if possible, and a mandatory right of response by the applicant (under section 55) if additional information is accepted as a late comment pursuant to section 81(6).

(b) From non-parties

We have observed that unsolicited comments from non-parties appear to be becoming more common. They may include a request from someone to be invited to comment, or someone who is seeking to contest aspects or put further information forward partway through the process (after the panel has formally invited comments).

We recommend addressing this issue in the Guidance Note. Doing so might assist people to understand concerns that can arise and / or limitations on what will be permissible, and thereby deter unsolicited comments where there is no jurisdiction to receive them. It also would assist panels to write up their responses to such material.

Managing information creep after receipt of comments

After receipt of comments, the need may arise to respond to the issue of 'information creep'. As the applicant replies to comments and answers subsequent requests for information, there is potential for new information to emerge, new legal arguments to be made, and / or for the shape of an application to change. Any or all of these situations might justify giving some or all commenting parties the opportunity to provide their views on natural justice grounds. Section 67 provides an opportunity for further comments to be requested by invited parties by way of a further information request.

In the Law Society's view, the Guidance Note should alert panels to the need to keep the issue continually under review. It should record that, provided doing so is appropriate, panels need to ensure that the applicant is given a right to respond if possible.

Late invitations to comment

The Guidance Note does not currently provide for the situation where a panel identifies belatedly that parties have not been invited to comment who had a right under section 53 to comment, or who with hindsight should have been invited in the exercise of the panel's

discretion. This may be because the FTAA does not appear to clearly provide for this situation. While the legislative gap may be intentional, given the situation is arising in practice with some regularity, the Guidance Note could consider clarifying two potential scenarios.

(a) Omission to invite parties who should have been invited to comment

In the event of an omission by the EPA to invite parties who should have been invited (such as through an administrative error or oversight), but where the panel has properly directed the EPA to invite the overlooked party, we consider it clear that section 53 enables the matter to be corrected. That is because the timeframe in section 53(1) relates to when a panel must direct the EPA to extend the invite, not the date on which the invitation must be extended by the EPA. A process some panels have followed when this arises is to direct the EPA to issue a late invitation, provide the party concerned with the statutory time period to comment and advise the applicant that it is entitled to provide an additional response to the late comments if it wishes. In this scenario, the statutory requirement under section 53(2) to invite certain parties to comment has not been met due to error or administrative oversight. The panel's subsequent direction to the EPA is to correct that error.

(b) Parties not included in the panel's original direction

There is potentially a problem for panels if they consider they need to hear from an overlooked but potentially affected party, whose interest may not have been apparent at the time that the panel is required to invite comments (which occurs early in the process, within the first ten days). An example would be a third party who may be affected by an infrastructure condition offered by the applicant during the course of the application, or which the Panel is considering imposing under section 84A. Such conditions need not necessarily relate to the project area. This is different to the issues raised above, which relate to situations where parties were invited to comment but either were not notified in time or sought to provide additional comments later in the process. Where a panel has overlooked inviting a party, or their interest emerges later in the process, holding a hearing to understand the third party's position is not an option, as hearing rights are limited to invited commenters (as are the powers to request further information). The third party's views could potentially be sought indirectly, by asking the applicant or local authorities or administering agencies to consult with them and report back by way of a section 67 request. Another option might be to direct the EPA to commission a report from the third party (under section 67(1)(b)). However, these options seem a convoluted way of seeking such views, and would leave the third party without standing to appeal. Use of the clause 10 (Sch 3) procedural powers to address the issue seems unsuitable in such a scenario (for example, because it could have substantive implications). A judicial review risk potentially arises if the third party's rights are affected by the panel's decision, but they have not been provided with an opportunity to address the panel, and have been denied standing to appeal due to the panel's decision not to invite them to comment pursuant to the panel's general discretion under section 53(3).

Given there appears to be a legislative gap (potentially intentional) it may not be appropriate for the Guidance Note to address the issue. Rather, it may be a matter for legislative reform. However, we raise it for the Conveners' consideration. If there is a view as to the proper approach, clarification in the Guidance Note would be welcome, and would assist with consistency of approach between panels.

Scope of comments on conditions

We are aware of some Fast-track processes in which parties, in their comments on conditions, have gone beyond the scope of permissible comment and sought to contest or relitigate aspects of the draft decision. A recent example had a statement of evidence from a new witness called by an earlier commenter, seeking to support arguments made in the original comments, but filed with that parties' comments on conditions. To assist in addressing this, the distinction between different stages of the process, and the fact that it is only the two Ministers that have a statutory right to comment on the draft decision (as distinct from the draft conditions), might be useful points for the Guidance Note to address.

Media

The media are taking a keen interest in Fast-track decisions and participants are increasingly seeking to use the media to support their cases. This has resulted in the EPA being contacted for comment while processes are still live. A situation has occurred of a panel chair being phoned by a reporter directly seeking comment on a Fast-track process while the process was still very much in train. Advice in the Guidance Note may be in order regarding the quasi-judicial nature of the panel's role, and noting that panels make decisions based only on the material before them.

Routinely circulating the Guidance Note

A final practical suggestion is that it would be useful for the EPA or Panel Convenors to circulate the Guidance Note to all panel members, technical advisors and parties at some point early in the process in relation to each new matter, and encourage them to read it. It is easy to overlook matters in the Guidance if not regularly refreshed. There are also some points that applicants appear to have a tendency to forget, such as that all correspondence with the panel should be copied to all parties.

Next steps

We hope this feedback is useful. Please feel free to get in touch with me via the Law Society's Senior Law Reform and Advocacy Advisor, Claire Browning (claire.browning@lawsociety.org.nz) if you have any questions or wish to discuss this feedback further.

Nāku noa, nā

A handwritten signature in blue ink, appearing to read 'Mark Sherry'.

Mark Sherry
Vice President