Chief Freshwater Commissioner and Freshwater Hearings Panels

Practice and Procedures Note 2020

This guide to procedure and practices to be followed in proceedings before Freshwater Hearings Panels is not a set of inflexible rules but is a guide to be followed unless there is good reason to do otherwise. Legislative references are to the Resource Management Act 1991, and mainly to Schedule 1, Part 4 – Subpart 1 of that Act.

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1 Communication

1.1 Glossary of Terms

When used in this Practice and Procedures Note, these words are intended to have the following meanings:

a. **chairperson** means the chairperson of a Freshwater Hearings Panel;

b. **Chief** means the Chief Freshwater Commissioner

c. **clause (or cl)** means a provision in Schedule 1, Part 4 – Subpart 1 of the RMA

d. **council** means the regional council or unitary authority which has referred the plan provisions in issue for the Panel's recommendations;

e. **expert conferencing** means a process by which expert witnesses confer and attempt to reach agreement on issues, or at least to clearly identify the issues on which they cannot agree, and the reasons for that disagreement. Such a conference is a structured discussion between peers within a field of expertise which can narrow points of difference and save hearing time. All experts have a duty to ensure that any conference is a genuine dialogue between them in a common effort to reach agreement about the relevant facts and issues;

f. **expert witness** means a person who would be recognised by a Freshwater Hearings Panel as an expert in his or her field by reason of relevant qualifications and/or experience;

g. **freshwater planning instrument** has the meaning given to it by s80A(2) and (8) RMA;

h. **hearing** means the overall process undertaken by a Freshwater Hearings Panel under Schedule 1, Part 4 – Subpart 1 of the RMA

i. **hearing session** means a particular session at which evidence and/or submissions are heard by the Freshwater Hearings Panel as part of the hearing;

j. **mediation** is a process of assisted (or alternate) dispute resolution (ADR) to discuss a dispute and work toward a solution that is acceptable to all parties rather than have a Panel impose an outcome on the parties;

k. **member of the public** means any person who is not a submitter, a witness, a representative of the relevant Council, a member of the Panel or one of the support staff assisting the Panel;

l. **non-expert witness** means a witness who is not an expert witness;

m. **panel** means the Freshwater Hearings Panel established to consider the freshwater planning instrument in issue;

n. **party or parties** means a person or organisation making a submission to a panel about a freshwater planning instrument referred to it.

o. **representation** means the case or arguments advanced in support of a submission and may include legal submissions;

p. **RMA** means the Resource Management Act 1991;

q. **submission –**

(a) means a written or an electronic submission received by a Panel about the freshwater planning instrument in issue; and

(b) includes a further written or electronic submission on that planning instrument.

r. **submitter** includes a person representing a submitter.

1.2 **Communicating with the Panels**

(a) No person should attempt to communicate directly with any member of a Panel, except in an open hearing or at a Panel convened conference.

(b) All communication (including general inquiries, procedural requests and documents) are to be sent to email, mail or delivery addresses to be advised by each Panel after it is established.

(c) Any communication and document sent to the Panel will be treated as official information to be publicly available unless there is good reason for withholding it.

(d) Copies of all communications must be sent to all other parties, so that they may have the opportunity to respond.

(e) It is generally inappropriate to seek to communicate with the Panel after a hearing has concluded and prior to the issue of the Panel's recommendation.

(f) Communications may be electronic – see Appendix 1 for details.

1.3 **Communication and co-operation amongst parties**

(a) Counsel and parties have a duty to the Panel, at all stages of any proceeding, to work constructively together to ensure that case management objectives are achieved. This duty extends to treating each other respectfully and professionally. Counsel also have a duty to keep their clients informed of possible solutions to issues, and of alternatives to litigation that are reasonably available.

(b) All parties, whether or not represented by counsel, have a duty to the Panel, at all stages of a proceeding, to work constructively to find solutions and narrow issues (whether of process or of substance). This duty extends to always treating other parties, their witnesses, and their representatives respectfully.

1.4 **Managing large numbers of parties**

(a) Because the referral process leads to a first-instance hearing before the Panel, there are likely to be a substantial number of parties. Clause 46 enables the Chairperson of the Panel to appoint a *friend of submitter*s, to whom parties and intending parties can have access free of charge for advice about the Panel's practice and procedures. These advisors are not able to give advice about the substantive law applicable to the proceedings, or areas of expertise that may be relevant to the issues of the case.

(b) As the Council referring the matter to the Panel will generally be required to meet the costs of appointing a *friend of submitters*, the Panel will invite submissions from the Council before any appointment is made.

(c) The Chairperson may take other steps to enhance the efficiency of the process, particularly where there are many parties registered, including directing communication by electronic means wherever possible, use of the Office of the Chief Freshwater Commissioner's website in an interactive way for such things as the exchange of evidence, and other means.

1.5 **Parties acting jointly**

Where large numbers of parties are involved, the Panel may take steps to encourage them to group together and act together in the interests of efficiency and cost saving.

2 Case management

2.1 **Objectives of case management**

The objectives of case management by the Panel are to –

(a) ensure an appropriate, fair and transparent process;

(b) recognise tikanga Maori, and give effect to the Maori Language Act 2016;

(c) improve the quality of the litigation process and its outcomes;

(d) maintain public confidence in the Hearings Panel process;

(e) efficiently use available legal, expert and administrative resources;

(f) achieve the purpose of the relevant legislation; and

(g) recognise New Zealand sign language where appropriate and receive material in sign language if required.

2.2 **The essential features of case management**

The essential features of case management are –

(a) Identification at an early stage of the issues in dispute and encouragement of agreement by negotiation, or the use of alternative dispute resolution (ADR) processes (principally mediation) under cl 41.

(b) Planning the course of the proceedings soon after commencement so that the parties and counsel are better aware of the events that will occur, and the likely time and cost involved.

(c) Reduction in the delay and expense of preliminary processes.

(d) Panel supervision of more complex issues through directions and conferences, timed to occur at critical points in the progress of those hearings. In consultation with counsel and the parties, the Panel will settle pre-hearing steps and specify timetables to meet the needs of such hearings.

(e) Monitoring dates to ensure that events occur as timetabled so that there is orderly progress towards conclusion; parties' preparation is facilitated; and prompt settlement is encouraged wherever possible.

(f) Requiring reports from parties on progress towards settlement or resolution of issues which are to:

1. be provided on or before a specified date, after proper consultation amongst all parties
2. be succinct, while containing sufficient information for the Panel to assess whether progress towards resolution is actually being made
3. set out a precise draft timetable for any future steps to be taken towards the resolution of the proceeding, or any individual issues.

2.3 **Pre-hearing meetings and rulings – procedural issues**

(a) The Panel will expect the parties, and particularly their professional representatives, to take a proactive role in contacting, negotiating and resolving issues with other parties before seeking the Panel's assistance to determine procedural issues.

(b) A pre-hearing conference of the parties or their representatives may be convened under cl 41. The purpose of a pre-hearing conference is to ensure proper preparation for the fair and efficient hearing of the proceedings. Directions may be given about the resolution of preliminary questions; timetables for the exchange of evidence, and the date and duration of the hearing. Any request for such a conference should state the particular matters to be considered at the meeting, and give an indication of the ruling or direction sought. Any party who intends to take part in the substantive hearing must attend the meeting, or be represented at

it by someone who is thoroughly familiar with the party's position and the submissions and evidence to be given.

(c) The practical arrangements for such meetings will depend on the number of parties, their location (which may affect the practicality and cost of attendance in person) and the issues to be discussed. Alternatives to having all parties present at one venue are telephone conferences, audio visual links, or a combination of such means.

(d) Notices of a pre-hearing meeting will state whether parties are invited or required to attend.

2.4 Setting down for hearing

The Chief must convene a Panel *as soon as practicable* after the date of referral of the freshwater planning instrument (cl 38). The panel is required to make its recommendations on that instrument no later than 40 working days before the expiry of 2 years after the date the instrument was notified (cl 51). The Chief will issue a notice of hearing as soon as the parties' preparation is scheduled to be completed and the Panel's schedule allows. Therefore, if there are reasons why the hearing of a proceeding should be deferred, the Panel should be informed as soon as those circumstances arise.

2.5 Adjournments

If, after a notice of hearing has been issued, any party wants an adjournment, they should advise the Chairperson of the Panel immediately, stating the grounds for the adjournment application, and simultaneously advising the other parties. An adjournment request, even if all other parties consent, may not necessarily be granted.

2.6 Withdrawals and agreed outcomes

(a) Where any referral is to be withdrawn, or the parties have agreed on proposed recommendations, the parties must notify the Panel as soon as that course of action is reasonably certain.

(b) Issues resolved by agreement between the parties before a hearing will be referred to the Panel with a request to return the matter to the Council, in its recommendation report, on the agreed terms. In considering any draft agreement, Panels must have regard to the limitations imposed by the legislation, and the scope of the proceedings. It may be that a Panel will not be able to approve the terms sought by parties and may require amendments to the draft agreement,

whether to correct mistakes or ambiguities; to bring the terms of the agreement within jurisdiction, or to meet other points of legitimate concern. The agreed terms may include advice notes for the purpose of alerting parties, monitoring personnel, and others, to related matters.

2.7 **Witness summonses**

(a) To avoid the late summonsing of witnesses, the Panels will expect witness summonses to be served no later than 15 working days before the date of hearing. Except when a witness agrees to attend the hearing in circumstances where the issue of a summons is effectively a matter of form, the Panel will not normally issue a witness summons less than 15 working days before the hearing.

(b) Any person served with a witness summons is expected to prepare a written statement of evidence, even if he or she is to produce a previously prepared report or similar document.

2.8 **Co-operation in the preparation of evidence**

In preparing for the hearing, parties are expected to co-operate in ensuring that the proceedings are dealt with in a focussed way. With that in mind, parties are expected to, and may be expressly directed to, provide before or at the hearing, a statement of agreed facts and issues, and an agreed dossier or folder containing copies of relevant provisions of planning documents, and any other documents common to the parties. Succinctness and the avoidance of repetition aided by efficient cross-referencing, tabulation and indexing, are required by the Panels.

2.9 **Statements of evidence**

(a) In bringing a proceeding to hearing, the importance of thorough preparation of evidence, exhibits and submissions cannot be over-emphasised. The Panel members will always pre-read the written statements of evidence, and the hearing of witnesses will usually proceed straight to the questioning of them. There will be very limited opportunity for a witness to insert matters omitted from his or her written statement or to correct substantive errors, other than to address matters that have newly emerged after the exchange of evidence statements, or at the hearing.

(b) The Panels will require that copies of a witness's statement of evidence (including photographs and other visual presentations other than models) are to be provided by the party calling the witness to all other parties, prior to the hearing. In most cases, timetable directions will specify the times when statements of evidence are

to be delivered to the other parties. Where no special direction has been given, statements of evidence are to be delivered not less than 5 working days before the hearing is to start. (Refer also to Appendix 1 to this Practice Note concerning delivery by electronic means). If there is significant delay in delivering copies of a statement of evidence, leave of the Panel will be required to call the witness, and the failure to comply will need to be explained. Failing adequate explanation, leave to call the witness may be refused, if an adjournment is necessary.

(c) The Panel may direct, either generally or in a particular proceeding,that the length of any statement of evidence, from any witness, shall not exceed a set number of A4 pages single-sided with print not smaller than Arial font size 11 and line spacing not less than 1.5. That page limit may be exceeded only on an exemption granted after good reason has been established by the party wishing to do so.

2.10 **Rebuttal evidence**

(a) Rebuttal evidence should be confined to a response to matters raised by a witness called by another party, on topics not addressed in the evidence of the party seeking to call the rebuttal evidence, and which could not reasonably have been foreseen before the other party called that witness or produced his or her statement of evidence. The admission of rebuttal evidence is a matter for the Panel's discretion, to be exercised in the interests of fairness to the parties and the Panel being as fully informed of the issues as is reasonably possible.

(b) For further requirements about the evidence statements of expert witnesses, see Appendix 3 of this Practice Note.

2.11 **Format of Evidence**

(a) It is important for submitters to ensure that evidence is succinct and clearly sets out the issues and the changes being sought. Submitters are requested to:

  (i) Provide an effective summary statement;

  (ii) Clearly separate the matters agreed from the matters not agreed

  (iii) ; Focus the evidence on matters not agreed;

(b) All statements of evidence and legal submissions shall be:

  (i) headed clearly with:

    1. the name of the submitter who or on whose behalf the document is being lodged;
    2. the submission number;
    3. the Hearing Topic name and number;

4. whether they contain primary or rebuttal evidence;
5. if containing the evidence or submissions of someone rather than the submitter, the name of that witness or counsel; and
6. the date; and

(ii) on white A4 paper in Arial 11 point font with sufficient margins and line-spacing of 1.5;

(iii) in sequentially numbered paragraphs with coherently numbered or lettered sub-paragraphs; and

(iv) lodged electronically in either unsecured and searchable .pdf or unsecured .doc format.

(c) The content of all statements of evidence or legal submissions must commence with a summary statement of the content of the document which is no more than 3 pages long. Parties are strongly encouraged to be succinct, to focus on matters that are in issue, to state clearly the reasons for their support of or opposition to the provisions of the planning document in issue and to state clearly the outcome they seek.

(d) Any tables, figures or diagrams in any statement of evidence shall be numbered, titled and cross-referenced to the relevant text of the evidence.

(e) Changes to text should be shown in marked-up format as underlined additions and struck-through deletions. Changes to text should **not** be presented using a tracked-change word-processing tool because of the problems created by such tools for numbering and formatting. Wherever possible, such marked-up versions should be based on the latest version provided by the relevant Council.

(f) Statements of evidence shall be focussed on the particular provisions of the planning document in issue which are of concern to the party and which the party seeks to change. Incidental or background material or references should be placed in appendices.

(g) All **expert** evidence is to be prepared in accordance with the Code of Conduct for Expert Witnesses as set out in Appendix 3.

(h) All **expert** evidence is to set out the key facts and assumptions relied upon, identify the methodology and standards used in arriving at any opinion and clearly explain the opinion arrived at.

(i) Where a witness is giving the same or similar evidence for more than one party on the same topic, all such statements of evidence should identify all parties for whom the evidence is being given and whether there are any material differences between the statements.

2.12 **Exhibits**

(a) All parties are to confer well in advance of the hearing and, wherever possible, produce one agreed set of documents, photographs or other similar exhibits. All exhibits, including photographs and other visual presentations, are to be presented in a practical and manageable form, and should be of sufficient scale to be clearly legible. Individual documents or photographs should be separately identified. A bundle of documents, or a series of photographs, should be presented in a paginated and indexed folder or binder with protruding tabs. Aerial photographs with, where relevant, contour lines endorsed are a useful exhibit.

(b) In exceptional circumstances, if a photograph or other visual presentation is of a size or kind that is impractical to provide to other parties, it will suffice for the party intending to produce it at the hearing to notify the other parties at the time it is due for exchange as to where it may conveniently be inspected.

2.13 **Planning documents, maps etc**

In any proceeding, if it is not practicable to access them electronically at a particular venue, the Council involved should bring to the hearing sufficient copies of the relevant regional and district plan(s) for the use of members of the Panel during the hearing. This may particularly apply to maps, plans and other large graphics. The Panel may need to retain a copy for reference in its deliberations and in the preparation of its decision. It is recognised that increasing numbers of planning documents may be updated in an electronic format only, and the necessary arrangements will have to be made for those to be accessible. Where that is done, the version supplied should be dated, to ensure that it is the applicable version.

2.14 **Citation of relevant judicial decisions**

(a) A considered and discerning approach to the citation of cases should be adopted, with particular emphasis on –

(i) citation of only the most recent or authoritative statement on a point, rather than a number of cases saying more or less the same thing;

(ii) identification of relevant passages by paragraph and/or page number;

(iii) identification of official report citations where such exist; and

(iv) succinctness and the avoidance of needless repetition.

(b) The Panels do not expect bundles or casebooks of authorities to be provided beyond those cases that are to be specifically drawn to the Panel's attention and

relied upon. Where reasonably accessible, electronic copies of authorities are acceptable.

3 Alternative Dispute Resolution (ADR)

3.1 The ADR process generally – and mediation in particular

(a) Cl 44 enables mediation and other forms of ADR. The Chief Freshwater Commissioner actively encourages ADR and Hearing Panels may offer a mediation service facilitated by their members or other persons appointed to bring professional skills and specialist knowledge to the task.

(b) Mediation and other forms of ADR are particularly well-suited to resolve many environmental disputes. ADR techniques are often highly cost-effective compared with proceeding to a full hearing. Outcomes may also be reached beyond the jurisdiction of the Hearing Panel in a hearing by way of side agreements that will not be part of a recommendation made by the Panel: [see (i) below]. To have reasonable prospects of success, sound preparation and input are important. The protocol in Appendix 2 of this Practice Note is intended to provide guidance and encouragement to that end.

(c) The Hearing Panel process does not make ADR processes mandatory, but Chairpersons may direct that ADR processes be attempted because issues of public interest are present in most environment cases. If ADR processes are declined by parties, or if a co-operative approach is resisted, the case is likely to be set down for hearing at the earliest possible time. It is widely recognised that ADR processes offer the most value when they are constructively embraced, as they offer reduced litigation cost, flexibility, an interests-based approach, ownership of resolution of the dispute, and are often more conducive to the preservation of inter-party relationships.

(d) During all stages of a proceeding, the Hearing Panel expects parties to continue to address the possibility of ADR on an objective basis, and to employ it constructively. Even in cases where ADR processes might not produce a complete settlement, they may be used as a means to narrow and settle issues.

(e) Proceedings in which ADR has been successful may be referred to a Panel with a request for the making of agreed recommendations to the Council. The “Settlement” section of Appendix 2 outlines the matters which must be considered before a draft agreement can be approved, and these should be considered in recording any agreement, and in drafting the proposed recommendations.

(f) All parties at ADR sessions are to be represented throughout by a person or persons holding authority from the party to settle the dispute. Any party desiring

not to be so represented shall give not less than seven days written notice to the Panel and all other parties to the ADR session. The Chairperson, or the person facilitating the mediation, will have discretion as to whether the party may participate other than on the basis of its representative having authority to settle, and this will depend on whether there are special reasons in the context of the particular session.

(g) Mediation and other ADR processes can sometimes produce, in addition to any agreed recommendation, outcomes that are beyond the jurisdiction of the Panel. Such additional matters should not be included in a draft agreement, but should instead be recorded in a separate agreement that may be enforceable in other forums.

(h) Where parties agree to undertake ADR, the proceeding may either be placed "on hold" for a suitable period or, if directed by the Chairperson, the parties may be required to continue preparation for a hearing in parallel with the ADR process.

(i) The protocol in Appendix 2 is for use in mediations because that is the most common form of ADR offered. If parties seek the Panel's assistance in using some other ADR process, application should be made to the Chairperson who will confer with them and give directions, or otherwise assist if possible.

(j) Mediation meetings and discussions will not be open to members of the public.

(k) Direct negotiation, whether formal or informal, (as long as it is constructively focussed) should also be considered by the parties at all times.

4 Procedure at hearings

4.1 Order of parties

(a) The Panel will normally hear first the Council that has referred the freshwater planning instrument and the parties supporting the Council's documents, then the parties who oppose that outcome, or seek some variant of it.

(b) The order of parties in complex hearings can vary, and is a matter for the Panel to direct - which may include directing that hearings be 'grouped' by topic. The order of parties will be discussed at a pre-hearing conference, or made the subject of prior directions.

4.2 Opening and closing submissions

(a) The Panel expects that when parties open their cases, they will list the outstanding issues to be resolved by the Panel, outline the nature of the evidence to be called, state the resource management factors relevant to their case, and state the legal principles upon which they rely.

(b) The Panel will not normally allow parties who have heard all the evidence of opposing parties prior to opening their cases to make further or closing submissions in reply. After all the evidence has been heard, the parties who opened their cases, and called their evidence first, may have an opportunity to address the Panel in reply. That opportunity will be confined strictly to replying to those cases, and is not an opportunity simply to repeat that party's case. Persons who appear solely in support of a principal party are not normally allowed a separate opportunity to reply.

4.3 **Presentation of evidence**

(a) Subject to the possible use of electronic versions of documents (see Appendix 1), six copies of all statements of evidence and attachments are to be made available for the use of the Panel, and additional copies are to be supplied to all other parties. Six copies of exhibits and graphic presentations, such as documents or photographs, should be produced where practicable. Each party will be responsible for preparing the sets of evidence to be called in support of its case, unless the Panel directs otherwise.

(b) Unless there is good reason to do otherwise, the Panel will direct that evidence be given by the witnesses being sworn or making an affirmation, and then confirming their written briefs.

(c) The Panels will pre-read the statements of evidence prior to the notified hearing date. Another possibility, when the members of the Panel have not been able to pre-read the evidence, is to hear an opening submission and then retire to read the evidence. The Panel will endeavour to give parties notice when this is likely to occur.

(d) Unlike standard Schedule 1 plan hearings, cross-examination may take place at a freshwater planning process hearing. It should be particularly noted that cl 48(2) of Subpart 1 of Part 4, in contrast to the general practice in Courts, specifies that Hearings Panels have a discretion to regulate the conduct of any cross-examination of parties and witnesses, and to prohibit cross-examination at any hearing.

(e) The preceding paragraphs outline general practice. However, the Panel has the power to regulate its procedure as it sees fit, and it may therefore modify its procedure in particular cases if the orderly and logical presentation of evidence, and the timely and effective conduct of the proceeding, so require.

4.4 Visiting the site and locality involved

(a) It may be helpful for the members of the Panel to view the locality involved. In general, the taking of a view may assist the Panel to better understand the evidence presented. The Panel will normally confer with the parties about visiting the locality, including timing, a suggested itinerary, and other relevant details that the parties or the Panel may raise.

(b) If such a visit presents the Panel with additional or different information to that provided in the evidence lodged, or information that has not been correctly or accurately addressed in evidence, and the Panel considers that the information might influence it in making its decision, the parties will be consulted to ensure that they have an opportunity to explain or comment upon the information concerned before the report is finalised.

4.5 Time limit for the issuing of recommendations

The Panels are required to issue recommendations to the Council no later than 40 working days before the expiry of 2 years from the date on which the freshwater planning instrument in question was notified by the Council. The Council is then required to decide whether to accept or reject the recommendations, and to notify both the recommendations and its decision on them within 40 working days of receiving the report from the Panel.

5 Access to Panel Records

5.1 Records maintained

(a) The Panels will maintain files of records that comprise both the formal Record of Referrals (eg referral documents, planning documents, transcripts of evidence) and materials created by or for the members of the Panels. The former may be accessed (see below for detail) but the latter may not.

(b) Reference should be made to Rule 3.1 of the District Courts Rules 2014 as to what constitutes the formal Record (noting that there may be differences of terminology between the District Court and the Hearings Panels).

(c) Any material lodged with a Hearings Panel by parties must (subject to any Confidentiality Orders) be simultaneously copied to other parties in the case, and will become part of the formal Record.

5.2 **Access**

(a) Notes, research materials and the like made by or for Panel members do not constitute part of the formal Record, and will not be searchable by, or accessible to, any other person.

(b) Reference should be made to Rules 3.2 to 3.12 of the District Courts Rules 2014 concerning rights of access, persons who may search, and procedures, again noting possible differences of terminology.

Professor Peter Skelton CNZM
Chief Freshwater Commissioner
25 August 2020

APPENDIX 1 – LODGEMENT AND USE OF ELECTRONIC VERSIONS OF DOCUMENTS

1 Introduction

(a) The use in hearings of electronic versions of statements of evidence and exhibits may be expected to be standard practice. As technology evolves, and experience is gained in the use of electronic documents, this part of the Practice Note may be subject to modification in particular cases. When timetabling or other pre-hearing directions are made, the Panels will address the issue of electronic documentation, and may make such directions as are considered appropriate.

(b) The law and practice relating to privilege, confidentiality, and evidence apply to all documents in electronic form, and the Panels may direct that inadmissible material be removed from an electronic document.

(c) If the use of documents in electronic form at hearing is to be considered, the following issues should be addressed:

  (i) The scope and nature of the documents proposed to be lodged as part of the evidence or submissions.

  (ii) The documents a party intends to produce as exhibits.

  (iii) What documents will need to be in paper form.

  (iv) The conversion of all documents, or those that are agreed, into electronic form.

  (v) Arrangements for hard copies or assistance with electronic access, for parties unable to prepare, send, or access electronic documents

(d) An electronic bundle should be constructed so that documents such as new exhibits can, when appropriate, be added.

(e) If an order is made for the lodging of electronic documents the requirements and procedures in this Appendix will apply unless the order varies them.

(f) To avoid doubt, any party may request from the lodging party a hard copy version of any document lodged with the Panels, including referral documents, statements of evidence and exhibits, and the common bundle of documents.

2 Cooperation

The duty of parties to co-operate in the preparation of the matter for hearing should be treated as including:

(a) An obligation, if requested, to provide electronic copies (multi-page images in PDF format) of statements of evidence, and any documents to be included in the bundle that were produced by that party;

(b) An obligation, where it is fair and cost efficient to do so, to agree a format for an electronic bundle and indexes that will be compatible with any litigation support or other software intended to be used by any party.

3 Obligations on party who files and serves the common bundle of documents

The party who is to file and serve the common bundle for the hearing will:

(a) File one electronic set using a method arranged in advance with the Panel such as on a USB flash drive or other suitable portable media device, or by secure online transfer;

(b) Serve one electronic set on each other party on a suitable portable media device, via a pre-arranged website, or in such other manner as may be agreed in advance with the recipient party:

(c) Serve one hard copy set of the electronic bundle on any other party who so requests, without charge.

4 Documents generally to be identical to hard copy

(a) Except as expressly noted in any relevant bundle index, documents contained in an electronic bundle should be identical to the corresponding documents in the hard copy bundles.

(b) One copy of every electronic document lodged with the Panel shall continue to be filed in hard copy.

(c) Subject to any Panel directions, an electronic bundle should comply with the default format specified below.

5 Default format

(a) This format prescription will apply unless varied by an order of the Panel. Electronic documents will consist of electronic copies of the witnesses' statements and exhibits. Documents in the electronic bundle will be contained in electronic

folders equivalent to the physical volumes of the hard copy, and within those folders each separate document will be a multipage image in PDF format.

(b) When practicable, all electronic documents will:

(i) Be in searchable PDF format; and

(ii) Use portrait orientation, with each page of an original document or case authority occupying a full A4 page in the PDF format (but the hard copy bundles may be printed double-sided).

(c) The above format is intended to be technology neutral so that an electronic document is usable in that electronic format, able to be printed to produce a hard copy set, and also suitable for importing into other litigation support software or applications that the parties may separately choose to use.

(d) To avoid incompatibility issues, folder or file names in an electronic bundle may not use the following characters: ` ~ ! @ # $ % ^ & * ( ) + = [ ] { } : ; ’ , ? | ” / - _ (and a full stop may only be used before the file extension).

(e) Where evidence and exhibits are provided in an electronic format other than PDF, care should be taken by the party producing to expressly confirm with the Panel that the format is compatible with and usable on the equipment available in the venue proposed to be used for the hearing.

(f) Where evidence and exhibits are provided in electronic format, the pages must be numbered from 1 – including the first or title page, and every divider or otherwise blank page in the document or its appendices should be included in the sequential numbering.

6 Folders and folder names

(a) Each folder within a bundle of electronic documents will be named with an appropriate description. If there is more than one volume of a particular type of bundle, the folder for that type of bundle will include subfolders for each volume.

(b) An electronic folder for documents in the common bundle will be called "Common Bundle". If there is more than one volume, the "Common Bundle" folder will include subfolders called "Common Bundle v1", "Common Bundle v2" etc;

(c) An electronic folder for witness statements or affidavits will be called "Briefs" or "Affidavits" as appropriate. That folder will contain a subfolder for the evidence of the party called "Council’s/ Submitter’s Briefs" etc.

(d) An electronic folder for legal authorities will be called "Authorities". If there is more than one volume, the "Authorities" folder will include subfolders called "Authorities v1", "Authorities v2" etc.

(e) An electronic folder for the parties’ written submissions will be called "Submissions".

7 Document names

Each document will be named with a description that begins with the relevant bundle page or tab number (so that the documents within the folder can be sorted in page or tab order) –

(a) The name of each document within a "Common Bundle" folder will correspond with the pagination number of the first page of that document, "CB001.pdf", "CB234.pdf" etc (or tab number if the bundle is not paginated);

(b) The name of each document within a "Briefs" or "Affidavits" folder will start with a number that groups the evidence from any given person together (preferably in the order in which the witnesses are likely to be called), followed by the surname of that witness, "1 Smith Sally.pdf", "1A Smith Sally Reply.pdf";

(c) The name of each document within an "Authorities" folder will start with the relevant tab number (or pagination number of the bundle if it does not contain tabs) and then an appropriate description of the legal authority, eg "***McGuire v Hastings DC*** (PC).pdf" etc;

(d) The name of each document within the "Submissions" folder will start with the relevant tab number (indicating the relative chronological order in which it was filed or presented) and then an appropriate description, eg "1 Submitter's opening submissions.pdf".

8 Indexes

Each folder type should include an index in searchable PDF format, with that index located at the highest relevant folder level for that bundle type:

(a) There should be two indexes to the "Common Bundle" folder or subfolders.

(b) The first index should be the index listing the documents in the order they appear in the common bundle, usually chronological.

(c) The second index should contain the same information but sorted by doc id;

(d) The index to the witness statements or affidavits in the "Briefs" or "Affidavits" folder will correspond with the order of the relevant bundle or bundles (usually by party and in the order in which the witnesses may be called);

(e) The index to the "Authorities" folder will correspond with the order of the relevant bundle or bundles.

9 Hyper-linking

(a) The witness statements or affidavits, legal submissions and indexes may contain hyperlinks to the relevant documents referred to.

(b) Each hyperlink will be relative (e.g "Common Bundle\Common Bundle v3\CB234.pdf"), meaning that it uses a path starting from where the hyperlinked document is located rather than starting from a specified hard drive.

APPENDIX 2 – PROTOCOL FOR PANEL ASSISTED MEDIATION

1 Initiation of mediation

(a) Mediation may be initiated at any time by the parties or at the suggestion of a Chairperson.

(b) Subject to any flexibility in procedure initiated or authorised by the Panel, the parties will be deemed to agree to be bound by this protocol and guided by this Practice Note. It is vital that the parties liaise in arranging times and venues for mediation meetings. Failure to co-operate in this way can result in a Chairperson issuing directions for the setting down of a hearing, or other steps. It would assist if the parties, in their reporting letter/memorandum requesting mediation could suggest some suitable dates.

2 Appointment of mediator

(a) The Chairperson of the relevant Panel may appoint a Panel member to act as mediator, or may appoint a person who is not a member of the Panel to do so. The mediator must have no personal interest in the matters in dispute, and no connection with any of the parties. Nor will he or she or have knowledge of the dispute, except to the extent disclosed to the parties and accepted by them for the purpose of proceeding with the mediation.

3 Role of mediator

(a) The mediator is an independent intermediary who will seek to act impartially, fairly and objectively, and to treat the parties in an even-handed way. The role of the mediator is to assist the parties to arrive at agreement to settle the dispute or resolve particular issues which are part of the wider dispute.

(b) The mediator's role does not involve making a decision to be imposed on the parties.

(c) The mediator will seek to commence and conclude the mediation as promptly and efficiently as possible. He or she will aim to conclude the mediation in one session if possible, and the preference of the Chief Freshwater Commissioner is that mediation will not go beyond three sessions, except in exceptional circumstances. In appropriate cases the mediator may set a timeline to ensure that further steps, such as the provision of further information, are completed in a timely and sequential way.

4 Representation and attendance at mediation

(a) Parties may attend the mediation in person, or be represented by one or more persons. There is no requirement that a representative be a lawyer, or have other professional qualifications. The names and contact particulars of each representative and attendee are to be provided to the Hearings Panel and the other parties at least 5 working days in advance of the mediation, as part of the preparation for the mediation.

(b) Each party shall have at least one representative who is present through all sessions and who is authorised to participate, for instance by answering questions and co-operating in the mediation in any appropriate manner.

(c) Where a party appoints a representative to attend the mediation, the party will be taken, unless express advance notice to the contrary is given to the Panel and all other parties, as required by para 3.1(f) of the Practice and Procedure Note, to have given that representative full authority to resolve the issues at stake. (Refer to para 3.1(f) for the full detail on this.)

(d) Where issues in dispute relate to matters of expert opinion, the parties' relevant experts should, whenever reasonably practicable, attend the mediation, or at least be available by telephone, should the need arise to discuss such issues during the mediation.

5 Documents to be exchanged prior to mediation meetings

(a) Depending on the nature of the case, the mediator may request from the parties prior to or at the first meeting, a written synopsis of the dispute, the relevant facts (whether agreed between the parties or in contention in the proceedings), and their respective interests and concerns. Such a synopsis may include written statements of factual information or expert opinion.

(b) Copies of relevant documents should be attached to any such synopsis, or at least referred to with sufficient clarity for the mediator and other parties to understand

what they are and the particular aspects of them that are to be referred to or relied upon.

(c) Copies of any synopsis and other documents provided to the mediator are to be provided to all other parties. If, however, a party wishes to communicate confidential information to the mediator, the party must consult the mediator to make appropriate arrangements about the information and the subsequent appropriate conduct of the mediation.

(d) Any communication with the mediator outside of a mediation session must be directed through the Panel and with notice to all other parties.

6 Conduct of mediation

(a) The mediator may conduct the mediation as he or she thinks fit, having regard to the nature and circumstances of the dispute and the wishes of the parties.

(b) The Panel's staff will arrange premises for the mediation, and the mediator will arrange an appropriate timetable with assistance from the Hearings Officer.

(c) The parties will be expected to co-operate in good faith with the mediator and with each other in attempting to settle the dispute or issues. They will also be expected actively and constructively to assist the process by genuine participation in it, and by providing documents, information, submissions, and other assistance suggested or requested by the mediator.

(d) The mediation shall not be conducted under formal procedures or rules of evidence, and will be guided at all times by the mediator.

(e) At the commencement of the mediation, the mediator will usually make an opening statement covering issues such as the role of the mediator, the conduct of the mediation and the confidential nature of the process.

(f) The mediator may conduct joint or separate meetings with any one or more of the parties.

(g) The mediator may ask questions and seek clarification, and may request the parties to exchange further information, or further explain their positions and any information provided.

(h) In mediations involving a large number of parties, and/or complex issues, the Panel may arrange for co-mediation to be undertaken by more than one mediator. Co-mediations may also occasionally be undertaken in the interests of maintaining and enhancing the quality of the mediation service.

7 Confidentiality

(a) Mediation is a private procedure. The parties and the mediator (subject to rights of the parties to take legal advice during the process) shall maintain the

confidentiality of the process, and not discuss what occurred in the mediation with anyone not involved with the process.

(b) The mediator may meet separately with any party or parties and may be offered information which is to be kept confidential from other parties. Subject only to any overriding duty to the contrary imposed by law, the mediator shall keep that information confidential and not disclose it to anyone else without the consent of the party who provided it. The parties however should pay careful regard to whether settlement will be assisted by such conduct, however.

(c) Subject to (e) below, what is discussed or disclosed in a mediation shall not be referred to or relied upon in any other proceedings before a Hearings Panel or before a Court. Specifically, a party shall not, without the written consent of all other parties, introduce as evidence in any proceedings:

  (i) Documents prepared expressly for the mediation;

  (ii) A document disclosed at the mediation on terms that it remain confidential to those present;

  (iii) Admissions made by a party in the course of the mediation;

  (iv) Views expressed or suggestions made by any party concerning a possible settlement of the dispute;

  (v) Proposals made or views expressed by the mediator;

  (vi) The fact that a party had or had not indicated willingness to consider a proposal for settlement.

(d) Nothing in this Practice and Procedure Note shall prevent the discovery of, or affect the admissibility of, any evidence that is otherwise discoverable or admissible and that existed independently of the mediation process, merely because the evidence was presented or referred to in the course of the mediation.

(e) Communication between mediating parties:

  (i) As with mediations of legal disputes in New Zealand generally, communications amongst the parties and with the mediator will generally be treated as confidential and privileged, and not to be divulged in any Panel or Court proceeding.

  (ii) The parties may collectively waive this privilege.

(f) The mediator may sit as a member of the Hearings Panel to hear a proceeding on the dispute or issue mediated only if the parties, the member concerned, and the other members of the Panel are satisfied that it is appropriate.

8 Costs of mediation

The mediation, if conducted by a member of the Hearings Panel, will be without fee payable to the Panel. The parties shall meet their own costs of the mediation unless they agree otherwise between themselves.

9 Termination of mediation

(a) A party may withdraw from a mediation at any time, but is encouraged not to do so and instead to participate in the full spirit of endeavouring to settle the dispute, or at least elements of it.

(b) The mediation may be terminated at any time by agreement between the parties, or by direction of the mediator.

(c) The mediator may terminate the mediation if he or she considers that any person's safety is at risk.

10 Variation of this protocol

Subject to preceding matters which vest discretion in the Chair of the Panel, the parties may depart from this protocol by agreement and under the guidance of the mediator, but are encouraged to utilise as much of it as possible as a procedure for settling disputes.

APPENDIX 3 – CODE OF CONDUCT FOR EXPERT WITNESSES

Expert witnesses

1 Code of Conduct

(a) A party who engages an expert witness must either give the expert witness a copy of this Code of Conduct, or be satisfied that the expert witness has seen the Code of Conduct and is familiar with it.

(b) An expert witness must comply with the Code of Conduct in preparing any affidavit or brief of evidence, or in giving any oral evidence before the Panel.

(c) The evidence of any expert witness who has not read, or does not agree to comply with, the Code of Conduct may be adduced only with leave of the Panel.

2 Duty to the Panel

(a) An expert witness has an overriding duty to impartially assist the Panel on matters within the expert's area of expertise.

(b) An expert witness is not, and must not behave as, an advocate for the party who engages the witness. Expert witnesses must declare any relationship with the parties calling them or any interest they may have in the outcome of the proceeding.

(c) Every expert witness is expected to treat the evidence of experts called by other parties with the respect due to the opinions of a professional colleague, even if there is fundamental disagreement between the views each expresses. Any criticism should be moderate in tone and directed to the evidence, and not to the person.

3 Evidence of an expert witness

(a) In any evidence given by an expert witness, that person must, in the witness's statement or affidavit (if the evidence is in writing) or orally (if the evidence is being given orally) –

i) acknowledge that he or she has read this Code of Conduct and agrees to comply with it;

ii) state the witness's qualifications as an expert;

iii) describe the ambit of the evidence given and state either that the evidence is within her or his area of expertise, or that the witness is relying on some other (identified) evidence;

iv) identify the data, information, facts, and assumptions considered in forming the witness's opinions;

v) state the reasons for the opinions expressed;

vi) state that he or she has not omitted to consider material facts known to the witness that might alter or detract from the opinions expressed;

vii) specify any literature or other material used or relied upon in support of the opinions expressed;

viii) describe any examinations, tests, or other investigations on which she or he has relied, and identify, and give details of, the qualifications of any person who carried them out; and

ix) if quoting from statutory instruments (including policy statements and plans), do so sparingly. A schedule of relevant quotations may be attached to the statement of evidence, or a folder containing relevant excerpts may be produced. If the statutory instrument is included in a common bundle of documents, a cross-reference to the bundle will suffice.

(b) If an expert witness believes that his or her evidence, or any part of it, may be incomplete or inaccurate without some qualification, that qualification must be stated in the evidence.

(c) If an expert witness believes that her or his opinions are not firm or concluded because of insufficient research or data, or for any other reason, that must be stated in the evidence.

(d) If after the exchange of a brief of evidence has occurred, an expert witness changes any of his or her opinions or conclusions, that must be communicated without delay to all parties to the proceeding.

APPENDIX 4 – PROTOCOL FOR EXPERT WITNESS CONFERENCES

1 Introduction

(a) Expert conferencing is a process in which expert witnesses confer and attempt to reach agreement on issues, or at least to clearly identify the issues on which they cannot agree, and the reasons for that disagreement. Such a conference is a structured discussion between peers within a field of expertise which can narrow points of difference and save hearing time. All experts have a duty to ensure that any conference is a genuine dialogue between them with the aim of reaching a common understanding of the relevant facts and issues. An expert witness conference is a forum in which to seek technical, scientific and other professional agreements amongst people holding relevant qualifications and/or experience.

(b) It is not a forum in which compromise or a mediated outcome between the experts is anticipated. Issues that are agreed are to be recorded. The Joint Witness Statement produced from the conference will identify the issues, both agreed and not agreed, accompanied by the experts' reasoning set out as succinctly as the circumstances will allow. The aim is that the parties and the Panel gain focus in the case and that the overall cost of the proceedings to all is reduced.

(c) It should be understood that the term 'expert' means a person who would be recognised by the Panel as an expert in his or her field by reason of relevant qualifications and/or experience. Persons not having such qualifications and/or experience, and Counsel and the parties, will not participate in conferences unless specifically directed by the Panel.

(d) Like mediation, conferencing is a private procedure and, apart from any agreed primary data, and the joint statement produced at the conclusion of the conference, what is said or done at the conference cannot be referred to or relied on in any proceeding before the Panel. In that sense it is a 'without prejudice' discussion, although those participating may report back to the parties engaging them.

(e) Every expert witness participating in a conference must agree to comply with the Code of Conduct for such witnesses, and not act as an advocate for the party who engages the witness. The expert witness must exercise independent and professional judgement and must not act on the instructions or directions of any person.

(f) An expert witness conference may occur at any stage of proceedings including, at the direction of the Panel, during a hearing, but the general expectation is that conferencing will occur prior to a hearing. In most cases the parties should be able to make the arrangements without Panel intervention, although the Panel will be willing to assist if required. Sound preparation is essential and the parties must allow adequate time for this process to be completed. Counsel are responsible for ensuring that the experts have all necessary documentation to enable proper preparation, and for briefing the experts on the process to be followed and their responsibilities as participants.

(g) The general expectation of the Panel is that the conference will occur after exchange of evidence-in-chief, but in particular cases, a Chairperson might direct that it proceed on the basis of 'will say' briefs being exchanged beforehand. If this occurs it is essential that the witnesses are nevertheless fully prepared, and the Panel will expect that:

  a) each expert witness will confirm any evidence given at an earlier hearing in relation to the same matter; or

  b) each expert witness will, except as otherwise directed by the Panel, provide to all other participating experts a summary 'will say' brief of relevant evidence, that will, as a minimum:

    (i) set out the key facts and assumptions relied upon;

    (ii) identify the methodology and standards used in arriving at his or her opinion;

    (iii) clearly explain the opinion arrived at.

(h) The Panel may limit the cross-examination of experts on the matters agreed to at the conference, and may restrict the calling of any further evidence, particularly where a witness attempts to introduce an issue or issues which the participants in the conference agreed did not need to be considered.

(i) While the experts participating in the conference may agree on matters within their fields of expertise, it should be understood that their agreement will not necessarily bind any party to a particular overall outcome.

2 Statement of agreed facts, and resolved and unresolved issues

Unless previously undertaken in the course of the proceeding, the first step towards expert conferencing is the preparation of a ***Statement of agreed facts and of resolved and unresolved issues***, and a proposed agenda for expert conferencing. This step is to be led by counsel for the parties, where counsel has been instructed. If a party is self-represented, that party will need to be involved in the preparation of the statement. This document should include a description of the proposal, the local (and if relevant, wider) environment, and should refer to all relevant aspects of the case for the purpose of avoiding the need for each expert to re-state such facts in his or her evidence.

3 The Role of Counsel in expert conferencing

The role of Counsel includes:

(a) Identifying the key issues to be addressed;

(b) Proposing a conferencing timetable that will address the key issues and liaising with other counsel and the Panel in relation to this;

(c) Organising the Statement of facts and issues described above;

(d) Briefing witnesses on the case and discussing the implications of the witnesses' views on environmental effects, avoidance and mitigation thereof, and statutory provisions.

(e) Ensuring the client understands the purpose of conferencing, potential costs and possible outcomes;

(f) Ensuring that the experts have all necessary documentation to enable proper preparation; and

(g) Briefing the experts on the process to be followed, and their responsibilities as participants.

4 Preparation for Expert Conferencing

In most cases the parties should be able to make the arrangements for expert conferencing without Panel intervention, although the Panel will be willing to assist if required. Sound preparation is essential and the parties must allow adequate time for the conferencing process to be completed. Experts should also be thoroughly familiar with their material, the positions of their counterparts and any other relevant evidence. They should also know the content of the statement of agreed facts and issues resolved/unresolved (to the extent they are relevant to the issues to be discussed); and understand their role in expert conferencing.

5 Process of Expert Conferencing

(a) For a successful outcome to be achieved expert conferences should include:

(i) A pre-circulated agenda which, if so directed by the managing Panel member, is to be approved by the Panel;

(ii) Participants who are prepared;

(iii) Adequate time for reaching agreement;

(iv) Relevant documents and other exhibits should be provided and/or be electronically available; and

(v) Face to face conferencing is encouraged. Conferences should not take place by video link, telephone or emails unless the Panel approves otherwise.

(vi) The Joint Witness Statement should be documented and signed as soon as possible after the conclusion of the conference

(vii) The final statement should not be a re-statement of participants' evidence;

(b) Unless the Panel agrees otherwise, there may be an independent facilitator of the conference, who is to acquaint him/herself with potential imbalances amongst participants and who can assist to mitigate any imbalances in a fair way. In cases where there are only two witnesses within a given field of expertise, or where the experts have agreed to manage the process themselves, facilitation may not be necessary. Where this is suggested, the Panel should be consulted before arrangements are finalised.

(c) It may also be appropriate to engage a person to take notes of the discussions and their outcome, and to assist in drafting the Joint Witness Statement. Such a person will need sufficient familiarity with the issues to understand what should, and should not, be recorded.

(d) While the experts participating in the conference may agree on matters within their fields of expertise, it should be understood that their agreement will not necessarily bind any party, or the Panel, to a particular overall outcome, or to the wording of conditions.

6 Conferencing as part of case management

Expert conferencing is an essential element of case management and evidence exchange timetables. Parties are to take the lead in timetabling issues, and are to suggest to the Panel an efficient and effective approach to timetabling. To that end, subject to any directions from the Panel, at an early stage in case management the parties should direct their minds to it and provide to the Panel and all other parties:

(a) details of any expert conferencing that has already occurred;

(b) identification of the expert witnesses who are to confer, and their disciplines;

(c) whether it is appropriate to have a single or multi-disciplinary conference (the latter may be necessary where issues overlap);

(d) a proposed sequence by which the topics and their related issues are to proceed to conferencing; and

(e) whether a Panel member is requested to convene and facilitate the conference.

7 General Directions on Conferencing

Subject to any specific directions from the Panel, any expert conference is to be conducted subject to the following general conditions:

(a) before the conference the experts are to be provided (usually by counsel) with the following:

(i) a copy of the Hearing Panel Expert Witnesses Code of Conduct and this Protocol;

(ii) a copy of the referral to the Panel and any proposed amendment, the proposed plan provisions and all other documents necessary to enable them to thoroughly understand the issues in the proceeding;

(iii) copies of the relevant evidence (if prepared) and any relevant reports;

(b) the experts are to familiarise themselves with the Code of Conduct and this Protocol before commencing the conference;

(c) the experts are to confer in the absence of the parties and their legal counsel, except with the express consent of the Panel;

(d) the experts are not to be instructed as to what may be agreed or not agreed at the conference;

(e) the experts must confer in their roles as experts and are not to act as advocates for the parties who engage them;

(f) the experts must only confer on matters within their fields of expertise;

(g) while conferencing is inherently an iterative process and may require a number of meetings to be concluded, the experts may request that the Panel approve a formal adjournment of the process if, for instance, it is agreed that further information or analysis is required.

(h) at the conclusion of the conference the experts, without the assistance of counsel or the parties, will prepare and sign a Joint Witness Statement.

(i) the Joint Witness Statement is to be lodged with the Panel and circulated to all parties who have given an address for service.

(j) The joint witness statement will include the following matters:

(i) the key facts and assumptions that are agreed upon by the experts;

(ii) identification of any methodology or standards used by the experts in arriving at their opinions and reasons for differences in methodology and standards (if any);

(iii) the issues that are agreed between the experts;

(iv) the issues upon which the experts cannot agree and the reasons for their disagreement;

(v) an identification of all material regarded by the experts as primary data;

(vi) identification of published standards or papers relied upon in coming to their opinions;

(vii) confirmation that in producing the statement the experts have complied with the Code of Conduct for Expert Witnesses;

(viii) identification of issues which the experts agree are not adequately addressed by the evidence lodged to that point, and the reasons for such inadequacy; and

(ix) may include reservations by one or more participants about issues on which they are uncertain about the substantive law (for instance, whether the concept of a 'permitted baseline' applies) or about procedural matters;

(k) Other than matters agreed by the experts to be primary data, the matters discussed at the conference of expert witnesses (but not included in the Joint Witness Statement) must not be referred to at the hearing unless all the parties by whom the expert witnesses have been engaged so agree.

(l) No party may, without the express consent of all other parties, introduce as evidence documents expressly prepared for the conference except for documents containing only agreed primary data.

(m) The witnesses shall review their evidence in light of the Joint Witness Statement. If formal briefs were exchanged before the conference, they may be withdrawn and replaced by briefs which accord with the agreements reached and, where applicable, deal only with the issues remaining in dispute.