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# **MAKING RULES WITHOUT LOOPHOLES**

**KATHRYN EDMONDS  
BA, LLB(Hons), Dip TP**

**WORKS CONSULTANCY SERVICES  
ENVIRONMENTAL DIVISION**

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# INTRODUCTION

- Why bother?
- Content
- Structure
- Expression
- Checklist
- Helpful Hints
- Questions

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# CONTENT OF RULES

## KEY PRINCIPLES #1

- *Plan rules are subordinate legislation*

Plan rules must have an enabling statute which authorises them. If they do not, then they are unlawful.

- *Link between objectives, policies, rules and other methods*

The rule should follow from the objectives and policies in the plan. It should also be the appropriate method. The requirements of Section 32 are also relevant.

- *A rule must stand alone*

Anyone affected by plan rules should be able to determine a rule's effect by looking at the rule.

Don't rely on the explanation or principal reasons, which are only an aid to statutory interpretation.

- *A rule must be certain*

- *A rule can defeat an objective and policy*

If there is a conflict between the objectives and policies and the rules, the rules prevail.

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## CONTENT OF PLANS COMMON PROBLEMS #1

- *Understand and reflect those presumptions*  
e.g. coastal marine area, land use, discharges.

To permit some activities requires a rule in a plan. To restrict other activities requires a rule in a plan.

- *Unlawful use of requirements of other legislation*

Don't include a requirement to comply with other Acts and Regulations or other subordinate legislation like Council Bylaws.

These requirements belong in those Acts and Regulations and not in plans.

- *Requiring other Resource Management Act consents*

Don't include a requirement to obtain other Resource Management Act consents.

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## CONTENT OF RULES COMMON PROBLEMS #2

- *Requiring consents under other Acts or Regulations*

Don't include a requirement to obtain consents under other Acts or Regulations.

- *Unlawful discretion traps*

The Act does not permit the Council to reserve any discretion to itself (or a third party) in applying rules. "In the opinion of the Council" or similar wording confers a discretion.

The Council cannot delegate its decision making power to a third party.

- *Certainty traps*

Use objective "effects" based threshold conditions, though sometimes subjective threshold conditions are acceptable.

Avoid the "best practicable option" as a threshold condition.

Use Codes of Practice with care. Such Codes are often suitable for decision making criteria, but not for incorporation as threshold conditions.

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## CONTENT OF RULES COMMON PROBLEMS #3

- *Reference to External Documents*

Refer to a particular version, and amend plan to accommodate updates.

- *Paraphrasing the Act*

Use the provisions in the Act e.g. on public notification rather than paraphrase them and get them wrong.

- *Misuse of controlled, restricted discretionary, and discretionary activities*

Confusion about requirement for and between standards, terms, and decision making criteria for each class of activity.

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# STRUCTURE #1

- *The structure of plans is important for clear rules*

Length and layout can help.

- *Division*

Do along logical lines.

Choose main headings and group rules under them.

Cross-references are acceptable.

- *Sequence*

Place headings and rules in logical order.

Space sequence: Puts known before unknown, general before particular, fundamental before less fundamental, permanent before temporary, technical housekeeping rules (like effective dates) at end.

Time sequence: Order actions or events.

- *Schedules*

Use for long and detailed matters or those which apply to several rules.

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## STRUCTURE #2

- *Paragraphing*

Split long sentences or a series of short sentences into short paragraphs.

Use a logical and consistent numbering system.

Use a progressive and consistent indentation. Make sure resuming words have the correct indentation.

Don't use "and" and "or" between items in a list. Put "and" or "or" before final item. Be consistent in cross-references.

- *Layout*

Set out the positive statement first.  
Follow with the conditions.

- *Avoid internal contradictions*

- *Consistency*

Be consistent in use of words and combinations of words.

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## STRUCTURE #3

- *Definitions*

Generally unnecessary. Use the common meaning, or extend it by using "includes". "Means" is restrictive.

Don't use "means and includes".

Avoid forced (humpty-dumpty) definitions.

Don't redefine words defined in the RMA. Limit term in rule applying it and not in definition.

Use defined terms consistently.

- *Ejusdem generis rule*

- *Provisos*

Don't use "provided".

Use other words or a new sentence.

Note: "except that", "but", "if"

- *Punctuation counts*

Draft the rule first, then punctuate.

Be consistent.

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## EXPRESSION #1

- *Use Plain English*
- *Use active not passive voice*
- *Use present rather than future tense*
- *Be brief (but clear)*

Remove redundant words, e.g. unless and until, keep and maintain.

- *Avoid jargon*
- *May, shall, will*

Lawyers use "*shall*" to impose obligations. "*Must*" is an acceptable alternative. It is clear, readily understood, and easier to use than shall.

Don't use "shall" where the rule is directory only and does not impose an obligation.

Use "*will*" to form future tenses.

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## EXPRESSION #2

- *"and" and/or "or"*

Avoid using "and/or". Use "or ... or both".

"And" can mean "both but not either alone" (joint sense), or "both and either one of them" (several sense). Generally means the second, but context can affect interpretation.

"Or" can mean "A or B or both" (inclusive meaning), or "A or B but not both of them" (exclusive meaning). Generally means the first, but context can affect interpretation.

- *Use of prepositions*

Ambiguity can occur when rules use prepositions (e.g. to) at the beginning of a phrase and do not repeat them before each item in the phrase.

- *Expressing time periods*

This needs care. Avoid "from" a date or event, and "between".

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## HELPFUL HINTS #1

- Don't leave writing the rules till the end of the plan writing process.
- Develop rules in tandem with objectives, policies, and methods.
- Edit ruthlessly.
- Do involve consents staff.
- Do consider effect of rules on real life situations in the district or region.
- Don't rely on the submission process to remake plan rules.

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## HELPFUL HINTS #2

- Do have independent reviews (can be in-house).
- Critically assess the value of other plans as precedents.
- The drafting in the RMA is not always a good model.

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# CHECKLIST FOR MAKING RULES #1 CONTENT

1. Meets the objectives and policies of the plan.
2. Accurately applies all relevant substantive law.
3. Complies with all prescribed requirements.

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## CHECKLIST FOR MAKING RULES #2 STRUCTURE

4. Uses precedents critically.
5. Creates a coherent set of rules which:
  - sequences material logically;
  - uses appropriate paragraphing and subparagraphing;
  - avoids internal contradictions;
  - is consistent in use of words;
  - uses definitions where appropriate;
  - is consistent in use of defined terms.

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## CHECKLIST FOR MAKING RULES #3 EXPRESSION

6. Uses Plain English:
- uses active not passive voice;
  - uses modern rather than archaic expressions (unless these have special legal meaning);
  - uses present rather than future tense;
  - uses "concrete" rather than "abstract" language.
7. Is concise.
8. Is precise.

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# IN CONCLUSION

