

# Issues with access to justice in the Environment Court of New Zealand

**Principal Environment Judge Laurie Newhook and Environment Judges David Kirkpatrick and John Hassan** *Environment Court of New Zealand*

## Introduction

New Zealand has until recent times been widely regarded as a world leader in terms of access to environmental justice. That reputation, however, has come under pressure with environmental legislation in this country having entered a state of considerable flux.

In this paper, we do not comment on government policy and the formulating of substantive laws, as it is not our place as judges to do so. It can, however, fall within our responsibilities as judges to make careful public observations about matters of court process and access to justice. This is what we set out to do in this paper, in the context of historic, current, and possible future legislative scenarios.

## Challenges facing environment courts and tribunals

Rock Pring produced an excellent keynote paper for the forum organised by Ceri Warnock and Judge Newhook at the 2016 Oslo Norway IUCNAEL Conference titled 'The Environment in Court'. His paper was called 'The challenges facing environmental judges in the next decade' and may be found at <https://environmental-adjudication.org/10-challenges-for-environmental-adjudicators/>. It examined ten challenges facing environmental adjudicators, as follows:

- Challenge 1 – Sustainability
- Challenge 2 – Climate change
- Challenge 3 – What is an 'environmental case'
- Challenge 4 – Access to environmental justice
- Challenge 5 – ADR
- Challenge 6 – International law
- Challenge 7 – Natural law
- Challenge 8 – Public trust doctrine
- Challenge 9 – Is precedent outdated?
- Challenge 10 – Personal challenges.

The present paper examines challenges, past and prospective, to access to environmental justice in the New Zealand Environment Court, focusing mainly on Challenge 4 (Access to environmental justice).

Before doing so, it might be useful however to note in relation to Challenge 5 (ADR), that the operation of alternative dispute resolution mechanisms in our court – employing mediation processes – is in very positive territory. This free service undertaken by independent facilitators, our Environment Commissioners, is successful in resolving about 75 per cent of the cases filed in the court, on a comparatively cost-effective basis. Challenge 4, in

contrast, might be thought quite richly to justify its label 'challenge'.

Challenges 4 and 5 are in fact seen by us to coalesce somewhat in the following way. Some academics such as Judith Resnik have expressed concern that ADR risks creating 'privatisation of adjudication', removing public law disputes from the public sphere.<sup>1</sup> We consider that there are important safeguards against this in the context of the work of the NZ Environment Court because first, ADR processes are facilitated by members of the court, our Commissioners, and secondly, resolution of cases in those processes is subject to final approval by a judge who will not sign off without enquiry or even a hearing in open court if there are problems such as want of jurisdiction.

## The New Zealand Environment Court

Judge Newhook has previously written quite extensively about the constitution, work, powers and practices of the New Zealand Environment Court. Persons interested can consult a variety of those materials on the website of the court, <https://environmentcourt.govt.nz>.

As for the constitution, work, powers and practices of the New Zealand Environment Court, we can do no better than to quote Ceri Warnock's recent and brilliantly succinct description:<sup>2</sup>

### Note on the New Zealand Environment Court

The specialist Environment Court (NZEnvC) is both a judicial body and a court of expertise: tenured and independent judges sit with expert 'lay' commissioners. It makes decisions impacting public resources and private property and so individual rights may be impacted: hence the constitutional propriety of an independent court determination. The Court determines some first instance decisions, but is predominantly concerned with appeals from Local Authority decision-making that it hears *de novo* on the merits. It is not confined to legality review. It is the primary environmental adjudicative body in New Zealand, empowered specifically to determine cases under the [Resource Management Act 1991] – and so all of the Court's decisions must accord with the statutory mandate to 'promote sustainable management' of the resources in question<sup>3</sup> – but it also has jurisdiction under a number of

1 Judith Resnik 'Reinventing courts as democratic institutions' (2014) 143 *Daedalus* 9.

2 Ceri Warnock and Ole Windahal Pedersen 'Environmental Adjudication: mapping the spectrum and identifying the fulcrum' *Public Law* 2017 (forthcoming).

3 RMA s 5(1).

other environmental statutes.<sup>4</sup> In one sense it is a classic judicial body. It finds facts and applies the law to those facts, and interprets both statute law and planning documents that constitute regulations in the statutory scheme.<sup>5</sup> It tends to follow litigious procedures (although, can control its own procedures and adopt an inquisitorial approach where appropriate),<sup>6</sup> and it also enforces the law (albeit, has a great deal of flexibility as to the enforcement approach it takes).<sup>7</sup> But the Court also has a regulatory role and is explicitly empowered under the RMA to hear and determine disputes concerning local authority plans and policy-documents, i.e. statutory regulations, to refine those documents to ensure that they 'promote sustainable management', and to give them final approval. In doing so, it must ensure full public participation.<sup>8</sup> The Court also has a role more traditionally reserved to the administration: it licenses specific activities as regards the take, use, development and discharge of/into land, air and water that are not automatically permitted, and in this sense is concerned with prediction, uncertainty, risk-evaluation and allocation. How to 'promote sustainable management' of a resource will be determined by the facts and relevant context of any given case but will be guided by the legislation and policy framework<sup>9</sup> that the Court must in turn interpret or may have played a role in crafting. The Court has considerable flexibility in terms of procedure, methods of interpretation, the decision-making process (with legal and non-legal expertise feeding into both fact and law evaluation, and the application of law to facts) and remedies.<sup>10</sup>

We are happy to work with that description of the court as a foundation for the matters to be discussed in this paper; but add for present purposes that references to fact-finding routinely include extensive adjudication on conflicting expert opinion about management of future states and risks.

We also wish to emphasise one of the facets of the above, the legislative context in which the court (along with all planning and consent authorities in NZ) is duty-bound to *promote* the sustainable management of natural and physical resources.<sup>11</sup>

The court embraces change for positive effect, and is constantly looking for efficiencies and to enhance access to justice, working with regular parties, the professions and other stakeholders. The court is in fact directed by statute to operate efficiently and in a timely and cost-effective manner.<sup>12</sup> Particularly apposite in this regard is section 269

of the Resource Management Act 1991 (RMA), giving the court broad powers of procedure and ordaining that it may conduct proceedings without procedural formality where consistent with fairness and efficiency. The judges of the court have interpreted section 269 as meaning that the court should be considered publicly accessible or even 'user friendly', commensurate nevertheless with efficiency, fairness to all, and due respect for the institution. To this end, the court aims to carry out its role in not only promoting efficiencies but at the same time adhering to the important principles of the rule of law. We stress the need to think and work creatively, and strongly believe that access to justice can operate hand in hand with working efficiently.

In this respect, reference should be made to the court's extensive Practice Note (2014) which has been developed incrementally over a number of years: <https://environmentcourt.govt.nz/assets/Documents/Publications/2014-ENVC-practice-notes.pdf>. The introductory provisions to the Practice Note record that it is not a set of inflexible rules, but a guide to practice in the court to be followed unless there is good reason to do otherwise.

The Practice Note focuses significantly on efficiency and accessibility; robust case management by the judges; judicial conferences; the importance of and procedures for alternative dispute resolution, including mediation and facilitated independent conferencing of expert witnesses; and the use of electronic media for access to the court and communication amongst parties.

Earlier papers published by the judges, including those referenced above, have described electronic innovations in the court in recent years, including use of electronic tablets for hearings, interactive use of the court's website, and non-electronic innovations including the use of process advisors for submitters in large cases. These innovations evidence how – in a 21st century context – we can become more efficient while remaining true to rule of law principles. Both can be achieved if we give careful thought to the issues.

### Alternative adjudicative processes

The following section of this paper concerns the many kinds of new hearing processes introduced by legislation in recent years. The effect is an increasingly pluralistic approach to environmental adjudication in New Zealand. These processes essentially run in parallel with the work of the Environment Court but do not have the same constitutional quality of full independence from government, lacking security of tenure for members amongst other things. Included are Boards of Inquiry, applications to the Environmental Protection Authority in the Exclusive Economic Zone of New Zealand (EEZ), and hearing panels established to determine the Proposed Auckland Unitary Plan and Christchurch Replacement District Plan. There are further processes in the wings being advanced by the Ministry of Business Innovation and Employment, the NZ Treasury, and the NZ Productivity Commission.

Two of the three of us have in recent times been involved in running such processes: Judge David Kirkpatrick chaired the Independent Hearing Panel for the Proposed

4 Including: Biosecurity Act 1993, Crown Minerals Act 1991, Electricity Act 1992, Forests Act 1949, Heritage New Zealand Pouhere Taonga Act 2014, Local Government Act 1974, Public Works Act 1981, Government Rounding Powers Act 1989, EEZA 2012, Housing Accords and Special Housing Areas Act 2013, Land Transport Management Act 2003.

5 Ceri Warnock 'Reconceptualising the role of the New Zealand Environment Court' (2014) 26 JEL 507.

6 Laurie Newhook 'The constitution, work, powers and practices in trial and pre-trial work of the Environment Court of New Zealand' (International Forum of Environment Judges, IUCN AEL Colloquium, Oslo, June 2016) (available at <https://environmental-adjudication.org>).

7 RMA, pt 12.

8 *Canterbury Regional Council v Apple Fields Ltd* [2003] NZRMA 508 (HC).

9 *Environmental Defence Society Incorporated v Marlborough District Council* [2014] NZSC 38 [10]–[11].

10 Including civil, criminal and reflexive responses, see RMA pt 12.

11 Section 5 RMA.

12 See sections 251(2) and 269(2) RMA in particular.

Auckland Unitary Plan during 2014 to 2016, and Judge John Hassan was Deputy Chair of the Independent Hearings Panel for the Christchurch Replacement District Plan during the same period.

### The traditional adjudicatory approaches

As originally enacted, the Resource Management Act 1991 (RMA) provided only two routes for obtaining a resource consent:

- (a) by application to a consent authority (i.e. at Local Authority level) and, if there were an appeal from that authority's decision, by hearing before the Planning Tribunal (now, the Environment Court); or
- (b) by call-in by the Minister for the Environment for consideration, hearing and recommendation by a board of inquiry and a subsequent decision by the Minister for matters of national importance.

The first route has been the 'standard' procedure well before the RMA came into force. It potentially provides for two levels of adjudication on the merits.

A first instance hearing is held before the consent authority, being a city or district council in relation to land uses and subdivisions or a regional council in relation to water and discharge permits (and the Minister of Conservation on some classes of coastal permit). Joint or combined hearings can occur if proposals involve consents under more than one district plan or a district plan and a regional plan. Consent authorities routinely delegate this hearing function to a committee of its members or a panel made up of its members or its appointed independent commissioners, or both. Cross-examination of witnesses is not undertaken; questioning is done only by panel members, and hearings are relatively informal.

A decision of a consent authority may then be the subject of an appeal to the Environment Court by the applicant or by a submitter (which appeal such parties or any other person who obtains leave in accordance with the statutory tests<sup>13</sup> can join), the hearing of which – if the case is not earlier resolved through alternative dispute resolution – is conducted as a full hearing *de novo*.

Hearings before the court are conducted according to the court's procedures,<sup>14</sup> are more formal, and include rights of cross-examination.

Beyond that right of appeal, there is a further right of appeal to the High Court, but only on a question of law.<sup>15</sup> The High Court has stated on many occasions that it will be vigilant to resist attempts to re-litigate factual findings in an appeal limited to a question of law.<sup>16</sup>

Further appeals can be made to the Court of Appeal and to the Supreme Court, with leave where it can be demonstrated that the appeal involves a matter of general or public importance or that a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard.

The second traditional route authorised the Minister for the Environment to direct that she or he would decide any particular application or all applications for resource consents in respect of a proposal that the Minister considered to be of national significance.<sup>17</sup> This route has been followed only once, in 1993.

### 2009 Amendments

The Resource Management (Simplifying and Streamlining) Amendment Act 2009 made many changes to the RMA. For present purposes, the most significant were the replacement of ministerial call-in with two new procedures for hearing and determining resource consent applications:<sup>18</sup>

- (a) by direct referral to the Environment Court under ss 87C–87I
- (b) by a board of inquiry under Part 6AA.<sup>19</sup>

### Direct referral

An applicant for resource consent who wishes to go directly to a hearing in the Environment Court may apply to the consent authority. If the consent authority grants that procedural application, it must prepare a report on the substantive issues of the proposal and suggest conditions that it considers should be imposed if the application is granted. The applicant must then apply to the Environment Court for orders for a direct referral hearing.

The hearing of a directly referred matter is generally the same as any appeal hearing before the court.

The position with costs is, however, substantially different to the usual position. Unlike the usual discretion given to the court in other proceedings, in a directly referred hearing the court must apply presumptions that costs are not to be awarded against a submitter participating under s 279 RMA and that the court's costs and expenses are to be paid by the applicant.

Commentators have noted that while a direct referral procedure enables the parties (both applicant and submitters) to avoid the time and cost inherent in a two-step process, it removes the possibility that at least some of the issues arising from a proposal may be explored and resolved at first instance, which can often be of benefit. It also removes the less formal and less adversarial first instance hearing which can be better suited to addressing the concerns of neighbours than the more rigorous procedures in court (even allowing for the court's options of alternative dispute resolution).

### Boards of inquiry

The Minister for the Environment may appoint and direct to a board of inquiry any proposal that, according to statutory criteria, qualifies as a matter of national importance.

<sup>13</sup> RMA s 274.

<sup>14</sup> Part 11 of the Resource Management Act 1991, especially ss 269 to 298.

<sup>15</sup> Sections 299–308 Resource Management Act 1991.

<sup>16</sup> *New Zealand Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419 (High Court) at 426.

<sup>17</sup> Sections 140–150 Resource Management Act 1991 as originally enacted and now repealed.

<sup>18</sup> A useful commentary on these amendments is a paper by Gardner-Hopkins and Robinson, *Participation in the Brave New World*, NZLS CLE Intensive on the RMA – Strategic Engagement, July 2011.

<sup>19</sup> Sections 140–149ZE Resource Management Act 1991.

A key aspect of process is the requirement that the final report and decision of the board of inquiry must be delivered no later than nine months after the proposal was notified.<sup>20</sup> (The Minister may extend that time but only if there are special circumstances and in any event the time period as extended may not exceed 18 months unless the applicant agrees.<sup>21</sup>)

The imposition of and emphasis on time limits may have the most far-reaching effects on the hearing and adjudicative processes. While the efficient use of hearing time and the desirability of avoiding delay cannot be denied, the imposition of a time limit in advance of identification of the nature of the project and the issues related to it is a doubtful management technique. Experience shows that the consequences of such an overarching deadline include the necessary imposition of strict limits on the time available for the presentation of cases and for cross-examination. An applicant may be better placed than submitters or the board itself because the applicant can at least choose when to apply. The other parties must then respond with the clock ticking, and the board must deliberate and prepare its report and decision with haste once the hearing has concluded.

### Exclusive Economic Zone consents

In general, the boundary of a district ends at the line of mean high water springs (MHWS). The boundary of a region extends across the foreshore and then 12 nautical miles seaward. Since the Third United Nations Conference on the Law of the Sea concluded in 1982, New Zealand has claimed an exclusive economic zone (EEZ) extending 200 nautical miles (about 370 km) seaward of MHWS. As an isolated island nation, New Zealand's EEZ is substantial (apparently the fourth largest in the world) and covers an area of over 4 million square kilometres (about 15 times the country's land area).

The sustainable management of the resources of this vast area is not governed under the RMA, but instead is subject to the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. Under that Act, the Environmental Protection Authority has the functions of deciding applications for marine consents in respect of such activities as exploration for and extraction of petroleum and minerals, aquaculture, carbon capture and storage and marine energy generation. It also has the functions of monitoring compliance and enforcing the legislation.

The EPA may choose to exercise its power to decide on applications itself, or in the case of nationally significant cross-boundary<sup>22</sup> activities delegate this to a board of inquiry.<sup>23</sup> The constitution of the EPA is very different to the Environment Court. Decision-makers are appointed by the Minister; appointees do not have security of tenure, and there is no legislative requirement for any of them to be legally trained.

The EPA's own procedures are similar to those of a terrestrial consent authority at first instance, except that questioning of witnesses by parties is permitted with the EPA's consent. For a board of inquiry, the relevant provisions of the RMA discussed above apply.

### Plan review processes

Special circumstances in Auckland and Christchurch led to the creation of alternative processes for preparing plans in those cities, as mentioned above.

In Auckland, local government was reorganised in 2010, merging eight authorities into a unitary council.<sup>24</sup> As at the date of amalgamation, there were 14 separate plans in force. Special legislation<sup>25</sup> addressed resource management planning for the new city by requiring a Unitary Plan to be prepared, being a combined regional policy statement and regional and district plans.

The process for preparing this plan and making decisions on submissions made in relation to it, involved numerous amendments to the standard provisions in Schedule 1 to the RMA. An independent hearings panel was established with members appointed by the Ministers for the Environment and of Local Government in consultation with the new Auckland Council and with Māori *mana whenua* groups, being the 19 Māori *iwi* (akin to tribe) who are *tangata whenua* ('peoples of that land') in Tamaki Makaurau area and are recognised by the Council as having a mandate to speak for Māori in the region.

The Panel was given the function of hearing submissions and of making *recommendations on the proposed plan* as distinct from the standard function in Schedule 1 of making *a decision on the provisions and matters raised in submissions*. This meant that the panel was not confined to the scope of submissions, but could make out-of-scope recommendations (which it was required to identify as such). The Council retained the role of decision-maker with limited appeal rights unless the Council made a decision which was different than the panel's recommendation.

The whole process was under a statutory deadline resulting in tight timing over 33 months from the notification of the Unitary Plan in September 2013 to the panel's recommendations on 22 July 2016 and the Council's decisions on 19 August 2016. It may be noted that the timeframe was set before the scale of the exercise was known.

The process was participatory, with 13,000 written submissions covering some 70 topics. Many submissions addressed multiple issues, so that there were 93,000 submission points, and 4,300 submitters were heard in 58 sessions over 249 days. Ten thousand pieces of evidence were presented, with much of that being expert evidence. To deal with the complexity of the evidence, the panel adopted both adversarial and inquisitorial methods, limiting presentation times and heavily discouraging cross-examination.

20 Section 149R Resource Management Act 1991.

21 Section 149S Resource Management Act 1991.

22 Being the boundary between the territorial sea and the EEZ.

23 Section 16(b) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

24 The Local Government (Auckland Council) Act 2009.

25 Part 4 of the Local Government (Auckland Transitional Provisions) Act 2010.

Ultimately the panel delivered its recommendations on time, consisting of an extensive overview (including a population and housing capacity analysis), with 58 topic reports and a completely revised plan, both text and maps. The Auckland Council accepted most recommendations. There have been relatively few appeals:

- (a) sixty-five to the Environment Court to be heard on their merits where the Council rejected the panel's recommendation;
- (b) forty-one to the High Court on questions of law where the Council accepted the recommendation; and
- (c) eight applications for judicial review relating mainly to jurisdictional matters.

The Auckland Unitary Plan is now operative in large part.

The situation in Christchurch City and Banks Peninsula was forced by the major earthquakes in September 2010 and February 2011. In their aftermath, the Christchurch City Council requested government intervention. Acting under the Canterbury Earthquake Recovery Act 2011 by Order in Council,<sup>26</sup> an independent hearing panel was appointed in 2014 by the Ministers of the Environment and for Canterbury Earthquake Recovery.

This panel had similarly tight deadlines to those in Auckland: it had to produce strategic directions by 28 February 2015 and the remainder of a replacement district plan by 16 December 2016.

Levels of participation were similarly high, with 4,800 written submissions and around 1,400 submitters being heard over 154 hearing days. There were 1,480 statements of evidence and submissions filed and 58 pre-hearing meetings, 40 expert conferences and 70 mediation sessions were held.

While the Auckland process involved a single Unitary Plan (combining the regional policy statement, regional plan, regional coastal plan and district plan) being produced and considered at once, a significant difference in Christchurch was an incremental approach whereby 'proposals' for chunks of the proposed replacement district plan were notified at different times. In the end there were 45 proposals notified, including five by the Panel's direction.

Another significant difference was that the Christchurch panel had a power of decision whereas the Auckland panel was a recommendatory body. The Christchurch panel issued more than 60 decisions over 27 months.

There have been even fewer appeals in Christchurch with ten appeals to the High Court. Seven concerned particular land zoning decisions and the others were on aspects of heritage, biodiversity, earthworks and airport noise. Bar one application for leave to appeal to the Court of Appeal, concerning a confined land zoning matter, all the appeals have been determined.

The Christchurch District Plan is thus largely in place.

The success of both processes in completing the tasks within the deadlines set should not obscure the concerns expressed throughout the process by all participants that the speed achieved came at high cost, particularly in terms

of significant pressure on all the people involved. Many individuals advised that they could not cope with the schedules for mediation and hearings or with the complexity of the processes used to deal with issues, and some withdrew. Even large organisations with good resources and extensive experience in resource management processes advised that they found it extremely difficult to keep pace and to provide good quality evidence, given the constraints of the process. These reactions raise an issue whether such processes can be relied on as a matter of routine and outside of special circumstances.

More broadly, commentators have said that the one-step process creates a real risk that as the contested issues addressed by these plans are not able to be reviewed on the merits at a second stage, the quality of the plans themselves may be reduced. This may have the effect of increasing litigation down the line.

### Marlborough Salmon Farm Relocation Advisory Panel

The most recent example of a special tribunal to address a resource management matter is the establishment of an advisory panel to report to the Minister for Primary Industries, exercising the powers of the Minister of Aquaculture,<sup>27</sup> on a proposal to amend<sup>28</sup> the provisions of a regional coastal plan that relate to the management of aquaculture, being the relocation of certain salmon farms in the Marlborough Sounds.

This panel's published advisory information notes that its process is not a normal RMA plan change process and is the first occasion where this particular regulation-making power has been considered. The panel indicates that it intends to proceed in a manner more akin to a first instance hearing before a consent authority than to the Environment Court. Its role is to report to the Minister on the comments presented to it, not to make a decision on the proposal for regulations.

The panel is now in the midst of its process. It remains to be seen how this new process goes.

### Recent legislative change: further reductions in access to environmental justice in the Environment Court

On 18 April 2017, a long and complex collection of amendments to the RMA was enacted in the Resource Legislation Amendment Act 2017.

Included were a number of changes to rights of appeal to the Environment Court, many cancelling or significantly limiting access to the court.

One particular change which comes into effect in October 2017 is to cancel entirely any right of appeal to the Environment Court concerning the majority of cases in three classes of consenting, called boundary activities, subdivision, and many kinds of housing development. Leaving aside that there will likely be arguments to be

26 Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014.

27 Under s360B Resource Management Act 1991.

28 Under s360A Resource Management Act 1991.

resolved by courts about definitions and the applicability of the changes in many cases, many different types of people involved in the field have publicly expressed anxiety at loss of access to the Environment Court, including members of the public who might in future be adversely affected by the activities, NGOs, and subdividers and developers. Some are also clearly anxious that there is now a large gap in appellate merits consideration of matters potentially affecting the core purpose of the legislation, the promotion of sustainable management of natural and physical resources.

#### **Emeritus Professor Pring's Challenge 4 – Access to environmental justice**

The following remarks need to be seen strictly through the lens of *access to justice*. It is not the business of the judiciary to, and we expressly do not, engage in 'patch protection'.

While in this paper we have written about some significant erosions of access to environmental justice in New Zealand, there have been some moves at government level to add some elements to the jurisdiction of the New Zealand Environment Court – transferring to it judicial functions found in many statutes concerning land, water and air, where adjudication is currently undertaken before various tribunals and general courts. It is possible that legislative change might emerge to make the Environment Court the forum for these matters, many of which have considerable synergies with the work of the court under the RMA.

Even without the need for legislative change, the judges of our court have taken over responsibility as chairs of the Land Valuation Tribunals (LVT) throughout the country, in place of District Court Judges. We have been able to do this relatively quickly because we hold dual warrants, one for each court. The arrangement included that the registry functions of the LVT be absorbed into the Environment Court registries so that we could exercise our own brand of robust case management, arrange alternative dispute resolution, and move matters quickly to hearing when necessary. In the few months we have held this jurisdiction, many cases have been resolved by various means including decision, conference, negotiation, and withdrawal.

Significant parts of the LVT jurisdiction bear synergies with the work of the Environment Court concerning requirements for designation for public works under the RMA, and the access to justice objective is to offer, if not a 'one-stop shop' to parties, at least an expeditious sequence of case resolution steps under the RMA, the Public Works Act, the Land Act and related Acts and Regulations.

Further possible legislative attention might be given to numerous pieces of legislation dealing with land, water, public works, infrastructure, public transport, and other matters of development and conservation. While the NZ Environment Court cannot yet be called a 'one-stop shop' like the Land and Environment Court of New South Wales (LEC NSW) or the Kenya Land and Environment Court, noted by the Prings as exhibiting the world's best practice, an expansion of jurisdiction might move New Zealand closer to those models.

We hold the view that such expansions of our jurisdiction to include such matters would embrace the tenet of access to justice in a peripheral sense, rather than serve any core purpose of environmental law such as (in the RMA) the sustainable management of natural and physical resources. That is not to detract from the benefits that could flow from the specialist court attending to these matters. It is simply a statement that may signal that the enhancements might not be seen by some to balance or even mitigate erosion of access to environmental justice of the kinds we have discussed.

The lessening of access to justice that we are about to describe, might be thought by some appropriately to be assessed against the backdrop of international instruments to which New Zealand is a signatory. Prime amongst these is no doubt Principle 10 of the Rio Declaration on Environment and Development issued at the United Nations Conference on Environment and Development in Rio de Janeiro, June 1992. Principle 10 records:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Chief Justice Brian Preston of Land and Environment Court of New South Wales has made reference to Principle 10 in various of his many writings. In his paper for this collection, he also makes reference to the 'outcome document' adopted by the United Nations General Assembly in September 2015, 'Transforming our World: the 2030 Agenda for Sustainable Development', which contained many sustainable development goals, and numerous targets to achieve them. Justice Preston appropriately focuses on Goal 16 and four relevant targets in his paper:

For those of us with reasonably long memories, one can recall the international Brundtland Report in 1987. We note with interest also the writings of Ian McChesney<sup>29</sup> who, in discussing the Brundtland Report, noted in the late 1980s a tense but somewhat 'back room' debate about the issue of sustainable development, which he reported amounted to bitter departmental clashes over the very concept of sustainability. He reported that:

The interdepartmental working group mentioned above essentially split into two factions representing 'ecological' and 'economic' approaches, and their report to the RMLR Core Group presented two visions of sustainability.

New Zealanders might sense a little *déjà vu* in the current and rather more public debates about the RMA. As to what was enacted in the RMA in 1991, some might say that

<sup>29</sup> Ian G. McChesney 'The Brundtland Report and sustainable development in New Zealand'. Lincoln University New Zealand, February 1991.

it represents something closer to the 'ecological' model, although others might place it somewhere between the 'ecological' and 'economic' models.

We refer again to the legislative changes in New Zealand that have had the effect of reducing access to appellate environmental justice. We have seen a number of analyses of the most recent enactments in the public domain from various organisations, such as the law societies, the Resource Management Law Association, and law firms. Some in particular have discerned and commented on trends involving progressive reductions in access to justice through several amendments to the RMA in recent years.<sup>30</sup>

Several analyses have assisted us to navigate our way through various versions of the new Amendment Act, its precursor Bills, and explanatory notes. We acknowledge and generally accept the various authors' analyses, but take full responsibility for the accuracy or otherwise of descriptions of provisions which follow.

Our starting point is that the RMA as promulgated in 1991 ordained a regime for environmental decision-making that involved wide rights of public participation. While pre-dating the Rio Declaration by about a year, it could be said that its tenets were more or less in alignment with the principles enshrined in Rio.

Standing to participate in decision-making was established on a broad platform. Anyone could make submissions on proposed policy statements and plans (and further submissions thereon) and on notified resource consent applications. Submitters were entitled to be heard at public hearings on these matters, and subsequently to appeal council decisions about them to the Environment Court.

There was emphasis in the early stages on an expectation that applications for resource consent would be notified, something that has changed since.

Perhaps understandably, Parliament has since felt the need to balance rights of public participation against the desirability of timeliness of delivery of processing applications and decisions. It was widely believed that the sheer breadth of open standing to participate in the early stages often resulted in inefficient and costly delays for proponents of development and other activities. Subsequent reforms of the RMA have made changes to that situation and could be argued to have sought to find a balance between public participation and efficiency of decision-making.

Amendments in 1993 represented a step along that spectrum.

Amendments in 2003 introduced the concept of 'limited notification' to make rights participation more focused, but the presumption in favour of notification remained.

Amendments in 2009 significantly changed the notification framework. The statutory presumption in favour of

notification disappeared; the requirement for public notification was now to arise only where effects would be more than minor beyond adjacent land, unless an applicant requested public notification, or a rule in a plan required it; provision was made for limited notification on a wider footing. Applicants for resource consent could now feel greater certainty as to how applications would be processed. There emerged a very significant reduction in the numbers of notified applications. Numbers of appeals to the Environment Court understandably reduced quite significantly at this point.

Some commentators considered, and they might well be right, that there then emerged an increased desire by people to participate in plan-making processes, due to the reduction in opportunity to be involved in subsequent consenting processes. Further consequences appear to have included increased pressure through submissions on planning instruments against rules providing for non-notification of certain activities; there also emerged greater use of judicial review challenging decisions not to notify, or to notify applications only on a limited basis.

The 2009 amendments brought an increase in the promulgation of models of alternative hearing and dispute resolution such as the work of boards of inquiry previously referred to. Provision was also made for 'direct referral' of notified applications to the Environment Court bypassing a council level hearing; and with any right of further appeal to the High Court restricted to points of law only. The Environment Court has developed reasonably sophisticated procedures to deal with such cases, given that they often involve participation by large numbers of people. Proponents of direct referrals have been learning that it is necessary to prepare cases with great care, because they do not gain the benefit of problems being uncovered through the operation of a filter offered by first instance hearings before councils. Interestingly, the tight nine-month statutory timeframe for processing and resolving matters of national significance by boards of inquiry appointed one-off for specific cases does not generally allow for adjournments to repair problematic aspects of proposals. In those instances, there is an elevated risk that applications will be declined. Another aspect of such cases seems to be greater levels of expense for all involved.

As promulgated in 2012, the Resource Legislation Bill (now just enacted as the 2017 Amendment Act) introduced further amendments to the notification regime. It proposed that public notification would be precluded (unless there were special circumstances) for controlled activities, restricted discretionary or discretionary subdivision and residential activities, restricted discretionary, discretionary or non-complying boundary activities, and activities where a rule or a National Environmental Standard precludes public notification. Similar restrictions were proposed for limited notification processes in two circumstances.

In the paragraphs above, we described the removal of numbers of classes of appeal. A further change ushered in by the 2017 Act was that merit appeals would be restricted to matters raised in a person's submission, thus precluding appeals on matters that could not have been

<sup>30</sup> In particular we refer to commentary made by Derek Nolan QC, assisted by Simon Pilkinton, solicitor at Russell McVeagh, 'Changes to public participation under the Resource Management Act 1991', Legalwise Seminars 2017. See also Alec Dawson 'Principles, participation, and proposed changes to the RMA' (2016) 27 NZULR 185.

reasonably foreseen and raised in their submission because the application had been amended during the consenting process. Further, activities involving marginal or temporary non-compliances would now be deemed 'permitted'.

Possible consequences to these changes include that proponents might gain further certainty in relation to their applications; the role of the Environment Court in resource consent decision-making would be further reduced; commentators believe that there might be an increase in the use of High Court judicial review as an outlet for persons concerned about proposals and in particular about non-notification of them; and commentators also consider that there might be further encouragement for the public to participate in local and regional plan-making and in development at national level of proposed national policy statements and in national environmental standards, and also the newly proposed national planning standards that will set the shape of plans to come.

Turning now to avenues for participation in policy and plan-making. The RMA as first promulgated, in its Schedule 1 ordained a two-step process, with submissions, further submissions and a council level hearing; followed by full appeals on the merits to the Environment Court. Some restriction on further submissions was introduced in the 2009 amendment.

The 2009 amendments also introduced provision for local authority and private plan changes, and notices of requirement involving a proposal of national significance to be referred to a one-step process either before a board of inquiry or the Environment Court. Appeals are limited to points of law in the High Court.

The 2017 Amendment Act introduces further limits on participation in policy and plan-making processes. Notification for plan changes and variations will be limited where all directly affected persons can purportedly be identified. The amendments also introduced alternative 'streamlined' and 'collaborative' planning processes, with limits on participation in first instance decision-making, and providing only limited rights for merits appeals. It introduced provision – indeed a requirement – for a national planning template to be developed, which itself could attract public submissions but with no right to be heard on the submissions.

Commentators have identified certain implications for policy and plan decision-making (remembering that this is an area that should attract greater public participation, given earlier limitations imposed on participation in consenting applications), as follows:

- Overall, rights of participation in decision-making have been very significantly reduced
- The option of the collaborative process for plan-making, if chosen by councils, will be very similar to the Auckland Unitary Plan process, so many of the concerns that arose from that process may continue and be more regularly experienced in the future
- Public participation having been substantially constrained in relation to consent decision-making, the reforms might be seen to erode the refuge in participation in policy and plan-making that arose in consequence

- Commentators accordingly perceive a continuing and significant erosion of the opportunity for citizens to participate in decision-making processes and obtain effective access to judicial proceedings.

Some commentators ask whether efficiency might in many instances have been better served by enhancing access to justice and balancing that participatory approach with more streamlined procedures rather than emphasising the latter to the virtual exclusion of the former.

### **Is the New Zealand Environment Court an 'activist' court?**

The New Zealand Environment Court is apparently one of the few courts in the world that entertains appeals about substantive issues in the preparation of local government planning instruments. It is important to remember, however, that the court does not have an involvement in the preparation of the more 'senior' instruments: national policy statements and national environmental standards. The latter two types of national instrument provide strong guidance for councils, parties, and the Environment Court in considering the contents of the 'lower order' regional and district plan and policy instruments. The court is also invariably fully informed about matters of regional and district policy, internally within the instruments under appeal, by other policy documents created by local and central government, and by expert evidence adduced by the councils and others.

The court is therefore significantly constrained in decision-making about planning instruments under appeal. Despite suggestions by some commentators, it has anything but a 'free hand' to make policy. It is required to make judgments, and weigh various issues against each other, informed by the evidence brought to it, and based on the RMA and directions given by the senior instruments.

It is our view that the New Zealand Environment Court cannot be considered in any objective sense an 'activist' court. While New Zealand is not possessed of a Constitution to trump ordinary legislation, the RMA, the national planning instruments, and decisions of higher courts on appeal, ensure that decision-making at Environment Court level is kept constrained on a largely predictable and calculable path.

There is another aspect of the constitution of the court that works as a constraint. Decisions are not solely made by judges. Commissioners (usually two) sit with a judge on a panel to hear cases and have an equal say in the outcome. The Commissioners are highly skilled non-legal professionals generally at the peak of their careers, and the deliberation process amounts in effect at times to a vigorous peer review of decisions in the course of preparation.

Despite all these constraints and principles, complaints are heard in some quarters suggesting that the Environment Court is a 'non-elected body that makes policy'. We resist such suggestions for the reasons we have just set out, and observe as well that many members of New Zealand society appreciate the presence of checks and balances in a system designed ultimately to serve the purpose



of the RMA: the sustainable management of natural and physical resources.

It is appropriate here to offer comments on a specific aspect of plan appeal work by the Environment Court, which in our view points strongly to the desirability of the jurisdiction being retained by the court in the interests of fairness and access to justice.

This aspect concerns quality of plan preparation and drafting. It is the experience of the Environment Court that the quality of local authority plan-making invariably falls short of required standards at first instance, often to a notable extent. There are many decisions of the court in relation to plan appeals where the opportunity has been taken to improve planning instruments by bringing internal consistency and clarity of wording, removing unlawful content, and ensuring adherence to the policy direction of senior instruments, amongst other things. The court is aware that improving some of these instruments has resulted in greater efficacy at the consenting stage, with a commensurate reduction in time and cost for all concerned. One of many examples concerns plan change applications made in relation to the extraction of geothermal energy in New Zealand's central North Island.<sup>31</sup> The court has been informed subsequently that consenting of major geothermal developments has been considerably assisted and quickened by the plan provisions having been extensively improved during the appeal process.

One possible concern we have heard in relation to the Environment Court's jurisdiction in plan change appeals, relates to the appropriateness or otherwise of determining 'polycentric' issues in an adjudicatory setting. The origins of this debate may derive from thinking advanced over 50 years ago by Michael Polanyi<sup>32</sup> and Lon Fuller.<sup>33</sup>

Fuller considered that a polycentric problem is one that comprises a large and complicated web of interdependent relationships, such that a change in one factor can produce an incalculable series of changes to other factors. His primary concern appeared to be that the more that decisions had the potential to affect large numbers of unrepresented persons, the greater might be the impact on the integrity of the adjudicatory process. In particular, Fuller suggested that disputes about resource allocation are unsuitable for adjudication by courts due to the presence of complex issues and interdependent interests being involved.<sup>34</sup>

31 *Geotherm Group Limited Decisions A 47/06 and A151/06* (Environment Court).

32 *The logic of liberty: reflections and rejoinders* (Routledge and Kegan Paul, London 1951).

33 'The forms and limits of adjudication' (1978–1979) 92 *Harvard L Rev* 353 – first written in 1957 and revised in 1959 and 1961 and published posthumously.

34 Cf S Theil 'Polycentricity – a fatal objection to the adjudication of environmental rights?' *UK Const. L Blog* (10 September 2015) (available at <http://ukconstitutionallaw.org>). Stefan Theil answers this concern by making the point that polycentric issues are abundant in modern life and courtrooms. He argues that while polycentricity is pervasive in modern legal adjudication, there is no clear evidence that entrusting such questions to courts is any less suitable than alternative modes of resolution. Further, he argues that it is not appropriate to reject the adjudication of polycentric issues, including those involving environmental protection, for the reasons advanced by some writers.

We hold the view that much litigation in courts around the world in the modern age is increasingly complex. Indeed, this must be trite. It must also be acknowledged that much complex litigation has the potential to impact unrepresented persons. A notable example is adjudication of human rights issues, but at the more mundane end of the spectrum simple issues of statutory interpretation can potentially have wide impacts.

As often recognised in 'Rules of Court', also in 'Practice Notes' such as those in our court, techniques are available to identify and place argument before courts concerning the interests of unrepresented persons. Courts like our own sometimes appoint an *amicus curiae*, and there is additional power available to the New Zealand Environment Court under s259 RMA, where we may appoint special advisors to assist the court. We also adopt a wide approach to *locus standi* when empowered to determine this issue.<sup>35</sup>

We also advance that the very nature of litigation under the Resource Management Act is not focused exclusively or even primarily on private interests, but is almost invariably heavily laced with matters of public interest. There can be little argument that in a democracy, society should not shrink from adjudication of matters of public interest for reasons of complexity or difficulty.

We understand that many members of New Zealand society appreciate the presence of checks and balances – including the power of the court to 'check' planning instruments – in a system designed ultimately to serve the purpose of the RMA, and protect the many interests of citizens in a principled way. Media reports of proceedings before the Select Committee of Parliament about submissions on the recently passed Amendment Act (by a range of submitters, from industrialists to environmental advocates) attest to this.<sup>36</sup> Many commentators confirm the integrity and ability of the New Zealand Environment Court to offer these checks and balances.

### One more challenge?

A less obvious but critical aspect of the court's efficient functioning, which can strongly impact on access to justice, concerns the administrative support supplied by the Ministry of Justice. The way in which administrative support is provided can influence, positively or negatively, the effectiveness of the work of the judges and Commissioners, including importantly as to the ability of the Principal Environment Judge to 'ensure the orderly and expeditious discharge of the business of the Court' (as mandated by statute: s251 RMA). Ministries and government departments worldwide quite regularly restructure administrative support for courts. Sometimes this is done on the basis of well-researched business cases to increase efficiency, reduce costs and, in an ideal world, create benefits of true cost-efficiency (in some contrast to short-term pure cost-saving).

35 For example under s 274 RMA.

36 See, for instance, *The New Zealand Herald*, Business Section, Friday 6 May 2016, p 2.

Sometimes one of the three arms of government, the executive, will work collaboratively with another; the judiciary, to devise and effect changes to enhance efficiency, cost-efficiency, and access to justice. Unhappily, administrative support services for many courts in New Zealand, including specialist courts like the Environment Court, have been subjected to staff restructuring proposals in the last two years that we feel have not been brought about in such desirable ways.

The staffing reforms were not informed by prior input from the judiciary, nor from representatives of the public who might have been expected to benefit from any positive reforms, such as the law societies and the Resource Management Law Association. Some official roles ordained by statute were proposed to be disestablished. The judiciary was simply invited to comment after promulgation of the proposals, at the same time as Ministry staff.

Despite commentary from our court and other benches, the restructuring has proceeded along largely regional lines of organisation which we feel do not fit comfortably with the national way which a court like ours must operate. Members of the Environment Court travel regularly on circuit around the country attending to all types of ADR and hearing work. The orderly and efficient discharge of the business of the court is ordained by s 251 RMA to be the responsibility of the Principal Environment Judge. The Ministry is required to support the same, and bears the cost of premises, equipment, and salaries. We consider that collaboration and co-operation would best serve the statutory and practical requirements placed on both arms of government.

## Conclusion

The New Zealand Environment Court has in recent years worked hard to foster efficiency and good access to justice. This has been done in strong collaboration with the executive arm of government. Electronic and other efficiencies have been trialled and put in place as mandated or encouraged by statute. Processes undertaken or managed by members of the court have been the subject of considerable study, consultation, and eventual implementation. The court embraces change for identifiable good.

For some years the court has been happy to be able claim that it has no backlog of cases awaiting determination. In fact, counsel and expert witnesses are sometimes heard to express concern about the speed with which they are directed to perform tasks on behalf of their clients! The great majority of cases are resolved within mere weeks or a few months through ADR processes, and hearings where needed occur in a timely fashion, with decisions issued promptly. We consider it reasonable to claim that based on previous initiatives undertaken collaboratively by the judiciary and the executive in past years,<sup>37</sup> the multiple objectives of access to justice, efficiency, cost-efficiency, and adherence to the rule of law have been well served. Perhaps it is against that backdrop we hear commentators questioning the need, even appropriateness, of some statutory reforms, particularly the removal of significant checks and balances on first instance decision-making, and administrative restructuring.

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<sup>37</sup> Obviously, excluding the staff restructuring undertaken in the last year.