

**ADDRESS TO THE RESOURCE MANAGEMENT LAW ASSOCIATION
SALMON LECTURE**

**Held at the Northern Club, Auckland
Thursday 25 July 2013**

“RIGHTING ENVIRONMENTAL JUSTICE”

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Some years ago, shortly after enactment of the Resource Management Act, I delivered a paper at an Environmental Law Conference in Auckland in which I offered some thoughts about it. I thought that paper might be a good point of departure for this evening’s lecture, but have not been able to find a copy. The paper drew some criticism from the then Minister for the Environment, Simon Upton. He had put huge personal effort into completing the reform started years earlier by Sir Geoffrey Palmer, so it is understandable that he was protective of it. What irritated Mr Upton was a newspaper report that I had questioned whether the Act was “flawed by overambition”. I do remember using that phrase, but I cannot remember how I justified it.

From that early controversy I draw two thoughts. First, the immediate excitements do pass and the things that agitate us today evaporate soon enough – like the papers we toil over to write or read. There is some comfort in thinking such contributions will not in the end do too much harm. Secondly and more importantly, that is not true of the general topic of environmental law. It is always a flash-point. It is always politically contentious. It is always a subject in motion, constantly under review. One of the reasons I have declined in the past to accept the honour of delivering the Salmon Lecture is that the law seems always to be difficult to address without wading into the sort of turbulent waters Chief Justices should stay out of. In the end, however, I allowed myself to be tempted, although I wish I had paid more attention to timing, since the controversies seem particularly noisy at the moment and I do not want to add noise of my own. But I thought it was high time I agreed to speak and acknowledge in this way the huge contribution made to environmental justice by my friend and admired colleague, Peter Salmon.

If revisiting the suggestion that the Resource Management Act was “overambitious”, today it would not perhaps be necessary to go beyond pointing to volume 41 of the Bound Reprinted Statutes. The Act takes up almost the entire volume and the section numbers have been obliged by amendment to adopt the sort of alphabet soup consistency of the technical and turgid Income Tax Act 2007. So, for example, s 165ZFG is obliged to cross-refer to s 165ZFF. As if 433 sections is not long enough,

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important procedural provisions and references to other legislative provisions are contained in a further 12 schedules.

The five amending Acts since 2003 are also republished. They contain important transitional provisions and purpose provisions which, although not carried into the principal Act, have been argued in a number of difficult cases in the courts to rule it from their graves. So, for example, the purpose provision of the Resource Management (Energy and Climate Change) Amendment Act 2004 has been much relied on in argument in two cases before the Supreme Court, *Genesis Power Ltd v Greenpeace New Zealand Inc*² and *West Coast ENT Inc v Buller Coal Ltd*.³ And the purpose to be gleaned from the title of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 and the Parliamentary statements made at its enactment⁴ is similarly sure to arise in cases dealing with the substantive provisions introduced by that Amendment Act.

The complexity in the Income Tax Act is understandable. It is a technical Act dealing with a wholly artificial universe constructed by law. But the Resource Management Act is an Act that affects people and their aspirations in the real world. It is a framework of values for practical living and for the management of disagreements about the physical environment. It is meant to engage communities, not alienate them. So impenetrability and complexity in this statute is not a good thing.

Before offering some perspectives on environmental justice, I want to step back a little, to think about how environmental law and its administration fits within our wider legal order. It seems to me that this positioning is necessary context for any understanding of present environmental law and where it may be heading.

Administrative justice

The connections environmental law has with the wider legal system are easily overlooked if the subject is viewed as an island. I think that impoverishes understanding of environmental justice and may lead us to overlook wider principle and standards of general application. So I want to start by looking at the wider legal and constitutional framework.

Sir Robin Cooke, writing about the Town and Country Planning Act, made the point that planning law is a branch of administrative law.⁵ That was, he said, not only in the sense that all exercising powers under this legislation

² *Genesis Power Ltd v Greenpeace New Zealand Inc* [2008] NZSC 112; [2009] 1 NZLR 730.

³ Leave to appeal was granted by the Supreme Court in *West Coast ENT Inc v Buller Coal Ltd* [2012] NZSC 107.

⁴ See (8 September 2009) 657 NZPD 6134.

⁵ Robin Cooke "Forward" in Kenneth Palmer *Planning and Development Law in New Zealand* (Sweet & Maxwell, Wellington, 1984) at v.

were subject to the supervisory jurisdiction of the High Court.⁶ More importantly, he thought that “the systems of control established represent a response to the challenge to the modern State of reconciling three demands”:⁷

the demand for essential fairness of procedure and impartial consideration in an essentially judicial manner – goals often seen as particularly linked with the protection of individual rights; the demand for a substantial degree of democratic participation in processes of decision-making that affect many people or even virtually the whole community; and the demand for harnessing the skills of specialist professions and sciences.

“Behind every theory of administrative law, there lies a theory of the state”.⁸ Although we do not have much occasion to worry about such matters, the New Zealand constitution is not free of theoretical underpinnings. The Supreme Court Act 2003 recently identified two such constitutional theories as “the rule of law and the sovereignty of Parliament”.⁹ To these, the New Zealand Constitution Act 1986 and the New Zealand Bill of Rights Act 1990 (both constitutional statutes) add a separation of powers between three branches of government: the legislature, the executive, and the judiciary. Of course the separation of powers is not strictly observed between institutions in a Westminster system. So, for example, in our system legislative functions can be devolved upon the executive and upon other bodies, such as local authorities under the Resource Management Act.

Both the executive and the judiciary derive many of their powers from legislation. In the case of the executive the sphere of original power not derived from statute is confined to the greatly reduced prerogative powers of the Crown and those ancillary and powers necessary to enable it to fulfil its statutory and prerogative powers. The judicial powers of the High Court, however, include the inherent substantive jurisdiction not supplanted by statute and the authority to declare what the law is and hold the executive within its lawful powers. That function is the basis of the judicial review jurisdiction of the High Court, essential to the rule of law.

The modern administrative state was a change in social and government culture. It conferred and dispersed executive power both to make rules and to apply them to individual cases. One of the areas in which such powers were conferred was in environmental regulation, when private law remedies such as in nuisance and negligence were found to be inadequate to modern conditions and the state moved to regulate use of land and resources by laws. These legal rules were then applied in actual cases by administrators.

⁶ At v.

⁷ At v.

⁸ Carol Harlow and Richard Rawlings *Law and Administration* (2nd ed, Butterworths, London, 1997) at 2.

⁹ Section 3(2).

Regulation of land and resource use, as in the case of other regulation or distribution of benefit under the administrative state, inevitably required conferral and delegation of wide discretion to meet individual cases. Wherever there is discretionary power, the door is opened to what Felix Frankfurter described as “its potential abuse, arbitrariness”.¹⁰ Arbitrariness, the antithesis of the rule of law, is abuse of power which has always engaged the attention of the courts in private law contexts. The administrative state threw up in public law contexts in more acute ways and over a wider range of activities new aspects of what were familiar conflicts between rule and discretion.

In New Zealand and in the United Kingdom the common law lagged badly in recognising that the administrative state was properly subject to legal principles. Developing administrative justice was the great work of the common law in the 1960s and 1970s after the courts woke up to how much injustice had resulted from their subsidence into a sort of “law is law” formalism in which, as the great public lawyer Sir William Wade said:¹¹

[they] declined to apply the principles of natural justice, allowed Ministers unfettered discretion where blank cheque powers were given by statute, decline to control the patent legal errors of tribunals, permitted the free abuse of Crown privilege, and so forth.

Many of the landmark administrative law cases which reasserted legal principle over the exercise of power were cases concerned with environmental regulation and its application.¹²

The courts, after the period of “backsliding”¹³ came to an end, developed the principles on which supervisory restraint over untrammelled discretion is exercised by way of judicial review. Much of this work entails interpretation of the terms in which and the purposes for which discretionary power is granted by statutes and rules. That supervision is to ensure the lawfulness of the exercise of power. Administrative law also entails supervision for procedural fairness (the right to be heard where interests are affected) and reasonableness in decision-making (a protection against arbitrary outcomes).

The supervisory jurisdiction exercised by superior courts by way of judicial review does not put the court in the position of the primary decision-maker. A primary decision-maker, who observes the legal limits of the power exercised and who acts fairly, is entitled to decide which option within a range of reasonable outcomes to prefer.

Statutory appeal to the High Court on the grounds of error of law (such as is provided under the Resource Management Act) does not differ greatly from

¹⁰ Felix Frankfurter “The Task of Administrative Law” (1926) 75 *University of Pennsylvania Law Review* 614 at 618.

¹¹ HWR Wade *Constitutional Fundamentals* (Stevens & Sons, London, 1980) at 62.

¹² Such as *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

¹³ David Williams *Not in the Public Interest* (Hutchinson, London, 1965) at 216.

judicial review for legality, fairness and reasonableness. General appeal is different because the appeal body is entitled to substitute its view of the merits of any particular outcome for that of the primary decision-maker even if the decision first taken cannot be said to be unreasonable.¹⁴

Under the Resource Management Act, as under the Town and Country Planning legislation which preceded it, the general scheme is that merits review of decisions of local and regional authorities is undertaken by the Environment Court. There is further appeal for error of law to the High Court,¹⁵ to which recourse may also be had by way of judicial review. In some cases under the Act, the primary decision-maker is the Environment Court and appeals lie only for error of law.¹⁶ The Environment Court, like the Planning Appeal Tribunals to which it succeeded, therefore conducts a merits review when hearing appeals. The evidence is usually reheard and often new evidence is put before it which was not considered by the primary decision-maker.

Provision for merits review of administrative decisions has been an increasing trend in modern administrative law. I think it is part of a wider movement for justification for the exercise of power which has arisen out of modern government initiatives as in freedom of information, the setting up of auxiliary protections of good administration such as are provided by Ombudsmen, and human rights statements which stress the entitlement to procedural fairness and recognise that that justification for decisions which impact on rights is an aspect of human dignity. People want to know why decisions are taken by others exercising public powers which affect them. If they are given the dignity of reasons, they want them to justify the conclusion. The point that should be made immediately is that, although in our system of environmental law merits review has been provided by a court of record, the Environment Court, such merits review today is commonly provided within the administration, tribunals or other bodies which are not courts but part of the executive, although set up to exercise independent judgment. I want to come on to raise a question about our preference for judicial determination by courts, a matter praised by Sir Robin Cooke in the extract I have referred to, and whether it may need reconsideration if we move much further away from the bright lines usually associated with law. Before doing so I want to give a little history about environmental regulation and resolution of environmental disputes in New Zealand.

A little history of environmental law in New Zealand

Decisions about the environment they live in affect people directly in a number of ways. Regulation of the use of land directly affects property interests, both the land in issue and neighbouring land. Early planning statutes in all jurisdictions faced deep hostility, and were strictly supervised for legality by the courts, because they were seen to tend to expropriation of

¹⁴ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

¹⁵ Resource Management Act, s 299.

¹⁶ See, for example, ss 87D, 87F and 87G.

property interests. That is why close attention has always been paid to the criteria and standards by which discretion is conferred and by which it is exercised, in order that such regulation is predictable and the use of discretionary power can be explained.

The right of the community to impose restrictions on landowners in the wider public interest became accepted in part because there was wide public participation provided for in the subordinate legislative activity of establishing plans. That process bought democratic legitimacy. The plans and the principles of planning which grew up provided sufficient certainty and process to outweigh fears that change would itself be expropriatory. In the early years the desirability of certainty produced too much inflexibility and over time systems relaxed the application of planning rules in particular cases through allowing departures or authorising conditional consents to depart from plans.

The modern system of town planning can be recognised in the legislation of the 1920s, but was located within the administrative branch of government. The Town Planning Board set up in 1926 was chaired by the Minister of Works.¹⁷ The Board was replaced in the Town and Country Planning Act 1953 with a Town and Country Planning Appeal Board, chaired by a legally qualified chairman.¹⁸ It became substantially an appellate body, with the primary decision-maker being the territorial authorities. Regional planning authorities were provided for under the 1926 Act and several were set up although in 1973 the Town and Country Planning Review Committee described the uptake as disappointing and recommended sweeping changes.

After 1953, various discretionary powers to relax zoning to permit flexibility. Maintaining a balance between certainty for land use rights and flexibility has been a constant see-saw. The courts were hostile to wide discretion, which FB Adams J described in a planning case as contrary to the rule of law.¹⁹ After some doubt about whether conditional use provisions were valid, an amendment in 1966 introduced a statutory procedure for planning applications for conditional use.²⁰ Later, criteria to be used in such applications were enacted. Power to authorise departure from the district plan was authorised in 1966, although where the departure was significant, the Board had to authorise if special circumstances were established. In 1971 in *Attorney-General v Mount Roskill Borough* an ordinance providing a general discretion as to the design of buildings was held to be *ultra vires* in the High Court.²¹ Parliament then enacted in 1977 specific powers to adopt discretionary ordinances, initially in limited circumstances.²²

¹⁷ Town-planning Act 1926.

¹⁸ Town and Country Planning Act 1953, ss 39–43.

¹⁹ *Wong v Northcote Borough* [1952] NZLR 417 (SC) at 423.

²⁰ Town and Country Planning Amendment Act 1966.

²¹ *Attorney-General v Mount Roskill Borough* [1971] NZLR 1030 (SC).

²² Town and Country Planning Act 1977.

Originally model ordinances were provided for councils, but these were removed in the 1977 Act. That Act also conferred wider discretion on local authorities to grant consents which departed from plans.²³ Statutory recognition was given, following the recommendation of a Review Committee,²⁴ to matters of national importance for the first time in 1973.²⁵ These were expanded in the 1977 Act as an important statement of purposes that regional and local councils were obliged to observe. They included the preservation of the coastal environment and the margins of rivers and lakes, avoiding urban development upon agricultural land of high productive value, and preventing sporadic urban subdivision and development in rural areas. The statements of matters of national importance were used by the Town and Country Planning Tribunals and by the Courts in the exercise of supervisory jurisdiction as important organising principles and legal standards against which to assess the legality and reasonableness of planning rules and decisions.

Objection rights were granted to object to provisions in a proposed planning scheme or change to persons affected and organisations representing the public interest. In respect of planning applications, there was originally no right to object on the grounds of public interest alone. But this restriction was removed in 1977, allowing the public interest to be a ground of objection. In 1979, as a result of government concerns about delays in significant public works and the need to obtain separate land use consents and water consents, the National Development Act 1979 was passed, giving government the ultimate power to take final decisions. The Act could be invoked by Order in Council.

In 1983, in a foreword to Kenneth Palmer's Book on *Planning and Development Law in New Zealand*,²⁶ Sir Robin Cooke praised the New Zealand planning legislation (contained then in a number of Acts). He pointed out that the New Zealand solution had combined "public participatory elements at local authority level" with "quite liberal rights of objection".²⁷ "[I]ntegration with the overall legal system" he considered was:²⁸

accomplished through the appointment to preside at the Tribunal hearings of District Court Judges selected for their interest and experience in planning matters; with provision for occasional resort when necessary to the superior courts of general jurisdiction (including the Administrative Division of the High Court) as the ultimate constitutional authorities on questions of law.

Sir Robin's verdict was that "by and large the system has served the country well". Leaving aside what he clearly regarded as the aberration of the "fast-

²³ Section 74.

²⁴ Town and Country Planning Act Review Committee *Report to Government* (1973).

²⁵ Town and Country Planning Amendment Act 1973.

²⁶ Forward to Kenneth Palmer *Planning and Development Law in New Zealand* (Sweet & Maxwell, Wellington, 1984).

²⁷ At v.

²⁸ At v-vi.

tracked” “think big” projects of the Muldoon years, he did not think it too much to call the system “a brilliant success”.²⁹

Thirty years on, that seems a simpler time. Although Sir Robin Cooke pointed to the “increasing sophistication and complexity” of the issues before the Planning Tribunal,³⁰ few of the then current examples he gave would I think strike us today as issues of great sophistication and complexity. Those he referred to were:³¹

provision in district schemes for facilities for the handicapped; problems concerning who should pay for interference-with-sunlight restrictions imposed in the interests of shopping malls; rising community expectations as to acceptable noise levels; LPG storage tanks for peak-load shaving gas production; competing demands for geothermal resources.

Only in the last example (“competing demands for geothermal resources”) is there a hint of the sort of challenges in balancing competing interests and rationing resources that have come to dominate environmental justice in our time.

The Resource Management Act 1991

The Resource Management Act was enacted after an effort that took the best part of a decade. Although in part developed to simplify and bring together in one statute the resource regulation found scattered in a number of Acts, a driving force in the reforms was ideological. I was in at some of the early public discussions and a member of one of the working parties in which Treasury officials and environmental lawyers largely talked past each other. I remember one official saying in exasperation about the lawyers that we were obsessed with plans and rules – like something, she said, “out of Stalinist Russia” – and that we had to let go the idea that environmental justice was about imposing good outcomes. The free market had arrived.

Although I did think that, in the end, those who saw the process through managed to achieve a workable solution, I have wondered in reading later assessments that the Environment Court has fundamentally misunderstood the meaning of sustainable management and the purpose of ss 6 and 7 of the Act,³² whether the compromises simply disguised the fact that the lawyers never really did get it. I am not being ironic here. It does seem to me now that there were much stronger intellectual positions in the drafting of the legislation than many of us with the background of the Town and Country Planning Act ever appreciated. And it may be that a purpose of employing amber lights (to adopt the Harlow/Rawlings imagery of administrative law³³)

²⁹

At v.

³⁰

At vi.

³¹

At vi.

³²

Such as the February 2012 report of the Minister for the Environment’s Resource Management Act 1991 Principles Technical Advisory Group.

³³

Harlow and Rawlings, above n 8.

to give greater freedom of action to development, provided the “bottom-lines” of protection for effects on the physical environment in the three ways identified in s 5(2) were met, was not carried out as the architects intended. It may not have been appreciated how revolutionary the new law was. Alternatively, it may have been that some of the compromises in the protracted legislative process obscured the shift or blunted it. It is curious that, despite views expressed at an early stage by Simon Upton³⁴ and now again put forward by the Technical Advisory Group,³⁵ challenges to the approach of the Environment Court were not appealed to the general courts or made the subject of legislative correction, given the opportunity provided by a number of amending Acts.

In an important article on “Purpose and Principle in the Resource Management Act” written in 1995, Simon Upton described the enactment of the legislation and in particular the drafting of s 5. The Act he said rejected the older legislative models with their concerns for directing and controlling social and outcomes in favour of concentration on effects, provided “hard environmental standards” were complied with, providing a “biophysical bottom line”.³⁶ Outcomes would be determined by the market. The aim of the reform was to throw out both the “familiar smorgasbord approach of the Town and Country Planning Act” and to reject any tweaking of it to set more contemporary concerns but which left matters “still looking like the basis of a balancing exercise requiring the wisdom of Solomon”.³⁷ The philosophy that won out was that advocated by Treasury, which Simon Upton described as confining “the Government’s proper statutory concern ... with the externalities of market outcomes” and as “seeking to create incentives to internalise those externalities wherever possible [in order to] minimise the dead weight costs of regulation”.³⁸ Upton concluded that the Act is “not concerned with the ‘need’ for any particular resource use”:³⁹

A statute concerned with the effects of resource use is not concerned with adjudicating between competing needs for resources which will, by definition, depend on the extent to which people and communities are prepared to pay for them. Distributional questions are the province of the tax system not the resource management system. Certainly, the notion of planning for the allocation of resources according to some centrally determined view of need has no place in the sort of market economy on which we rely today.

Sir Geoffrey Palmer, one of the architects, described the Act as “at the outer limits of the attainable in a law reform project, because it was so

³⁴ Simon Upton “The State Hammond Grace Lecture: Purpose and Principle in the Resource Management Act” (1995) 3 Waikato Law Review 17.

³⁵ Report of the Minister for the Environment’s Resource Management Act 1991 Principles Technical Advisory Group (Ministry for the Environment Wellington, February 2012). A PDF copy of the report is available on the Ministry for the Environment website at: <http://www.mfe.govt.nz/publications/rma/tag-rma-section6-7/tag-rma-section6-7.pdf> at 8.

³⁶ Upton, above n 34, at 26.

³⁷ At 29.

³⁸ At 37.

³⁹ At 41.

comprehensive and ambitious”.⁴⁰ He observed, perhaps presciently, that “To get it enacted at all was something of a miracle. To make it work properly is an even greater challenge”.⁴¹

The very familiarity of the continuation of identification of matters of national importance and suggestions of balancing in the key concept of sustainable development may have suggested old methods to old lawyers. The continuation of the Planning Tribunal, soon to be renamed the Environment Court, may have added to the sense of the familiar. There was enough to cope with in the size of legislation and the ambition of its scope.

There were differences between the old and the new which were acknowledged. The Planning Tribunal pointed out that, unlike matters of national importance in s 3 of the Town and Country Planning Act 1977, the principles contained in ss 6, 7 and 8 of the Resource Management Act were not ends in themselves.⁴² Rather, as was explained in *TV3 Network Services v Waikato Regional Council*, the Act required that the substantive provisions of the Act be approached by decision makers with the stated statutory principles and objectives in mind, to achieve consistency.⁴³ But for many, the purpose provisions of the Act seemed to provide a hierarchy of values to be applied which limited the scope of discretion, in much the same way as had been provided by the old s 3(1)(g) and to much the same effect. (Although Cooke P noted in one case that “the accumulation of words ... verg[ed] in places on turgidity”).⁴⁴

If “sustainable management” has not achieved the ends looked to by some, what of the “bottom line” of environmental protection? In 2008 the then Principal Judge of the Environment Court, Judge Bollard, expressed some concerns. He said that “decision-makers at all levels must reflect that if natural resources and environmental attributes that are popularly cherished in the generality are to be protected and maintained for the benefit of present and future generations [a much wider focus on sustainability] is required”.⁴⁵ He spoke of “ever-present calls for environmental compromises and trade-offs at the individual level, and in the light of the continual cumulative effect changes within districts and regions that all too often belatedly disclose mediocre environmental qualities in the long term sense, if not irreversible degrading outcomes”.⁴⁶ Judge Bollard looked to climate change being a driver of work for the Court, more litigation over scarce resources, particularly water, and more coastal hazard management cases arising out of climate change. He predicted increasing urban pressure on agricultural land. He

⁴⁰ Geoffrey Palmer *Environment: The International Challenge* (Victoria University Press, Wellington, 1995) at 147.

⁴¹ At 147.

⁴² *Reith v Ashburton District Council* [1994] NZRMA 241 (PT).

⁴³ *TV3 Network Services v Waikato District Council* [1998] 1 NZLR 360, [1997] NZRMA 539 (HC).

⁴⁴ *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA) at 20.

⁴⁵ John Bollard “Climate changes issues from the perspective of the Environment Court” (2008) 7 BRMB 127 at 130

⁴⁶ At 130.

spoke of the pressures to gain more ready access for tourism expansion and general recreational purposes to “a notably wider range of nationally cherished and isolated wilderness areas”.⁴⁷

Competing visions of environmental justice are inevitable. Inevitable too is the fact that community priorities in environmental matters will move around as social priorities and experiences change. The government is rightly concerned to ensure that affordable housing and how we deal with terrible disruption such as has been caused by the Christchurch earthquakes are properly reflected in environmental legislation. So regular review of our environmental legislation is to be expected and welcomed. We can expect some matters to continue to feature because they seem to have been long-supported and indeed “cherished” (to use the words of Judge Bollard) and because caring for the environment is a strong cultural ethic in our society. But change there will always be. And it is to be expected that fashions will come and go in the views of the policy makers about what reform is best at any time. It seems for example that the pendulum may have moved back from “effects-based management” to a preference for more government and local authority control over activities and outcomes. This is not necessarily inconsistent with more reliance on limits to discretionary standards and better standard setting, through legislation or through national policy statements, which at last seems to be gaining ground. If, however, the change is to wider discretion although with better identification of all interests to be balanced), as the Technical Advisory Group suggested might be the better response to the Environment Court’s broad balancing of interests, this may have implications for the role of the Court, that I want to come on to discuss.

Bottom lines and broad principles

What some commentators described as the “command and control approach” under the Town and Country Planning Act was one that Simon Upton suggested meant that decision-making was arrived at in what he called “a judicative euphoria”.⁴⁸ Now, “euphoria” is not a term I would employ in describing how those called upon to decide between incommensurable values feel at the end of the exercise. But there is a real and valid point here as to whether the shift in the ambition of the legislation from controlling outcomes to managing effects was one which called for a reconsideration of the use of judicial authority. Judicial method is best employed where there *is* a “command and control” framework.

Although it seems received wisdom that nothing very much changed in the approach of the Environment Court under the new legislation, I am not sure that the wide balancing it adopted against the context of Part 2 of the Resource Management Act was as protective of environmental “bottom lines” as under the Town and Country Planning Act. Judge Bollard may have been closer to the mark in referring to the pressure for compromises and trade-offs

⁴⁷ At 131.

⁴⁸ Upton, above n 34, at 25.

and mediocre outcomes for environmental qualities, if not “irreversibly degrading outcomes”.⁴⁹

It will be recalled that, in a number of decisions under the Resource Management Act, the Environment Court indicated that “broad judgment” was necessary to bring into account “conflicting considerations and their scale or degree of them, and their relative significance or proportion in the final outcome”.⁵⁰ I do not want to be taken to be criticising this approach. It may well be right. But I do think that the methodology adopted by the Environment Court was worth critical assessment. Indeed, I think it should properly have been the subject of appellate consideration if, as has been suggested, it impacted adversely on the scheme of the legislation. Wide balancing of values not easily compared is not a method generally favoured by the courts. And it may be that closer attention to the structure of the legislation might have brought about a different approach.

Certainly, the Technical Advisory group formed the view that the Environment Court had undermined the purpose of the legislation, by substituting for the “bottom-line” environmental protection included in the foundation concept of “sustainable management” an “overall broad judgment” in which the Part II matters overshadow “the broad scope of issues inherent in the scope of sustainable management”.⁵¹ The remedy recommended by the Technical Advisory Group is that it is now appropriate that “explicit recognition be given that it is an overall broad judgment that is to be applied”.⁵² That, it suggested, would require amplification of ss 6 and 7 “by reference to other issues also central to informing an overall broad judgement of what constitutes sustainable management”.⁵³ The Group proposed a “suite of ‘principles’, ... combined into one list which decision-makers are required to ‘recognise and provide for’”.⁵⁴

It has been suggested that the Technical Advisory Group proposals will lead to even greater discretion in environmental decisionmaking.⁵⁵ If so, it needs to be noted that increasing the area of discretion is contrary to the drift in most areas of administrative law. As has already been discussed, discretion opens the door for arbitrariness and inequality of treatment. In most areas, good administration is now recognised to require systems and processes to cut down such risks. Such system may be in the form of hard law, such as regulations or planning documents, or in “soft-law”, as is provided by manuals and published practices. Whether more discretion overall is the thrust of what is proposed is not clear. Certainly, the Technical Advisory Group seems to have thought that national, regional and local planning

⁴⁹ Bollard, above n 45, at 130.

⁵⁰ *Genesis Power Ltd v Franklin District Council* EnvC A148/05.

⁵¹ Technical Advisory Group, above n 35, at 8.

⁵² At 9.

⁵³ At 9.

⁵⁴ At 9. It also proposed a number of procedural requirements to assure “timely, efficient and cost-effective resource management processes”.

⁵⁵ John Hassan and Louise Cooney “Review of sections 6 and 7: principle, processes and confidence in decision-makers” (2012) 9 BRMB 167 at 167.

would express the policies to be adopted under the lighter legislative principles.

The Minister for the Environment continues to stress protection of “bottom-line” values, which may be thought to suggest some minimum standards. Her press release in February of this year announced “a revamp of the resource management system to make it easier to use, increase certainty and predictability, attract investment, reduce unnecessary duplication and cost, whilst continuing to protect the environment”.⁵⁶ The Act “had not lived up to its full promise” however of “enabling growth as long as environmental bottom lines were met”.

Judicial function and environmental justice

The Minister for the Environment, in raising questions about whether the legislation has lived up to expectations, acknowledged the important role played by the Environment Court. She expressed the view, however, that “[t]he judiciary should not be placed in the position of having to determine values or policy – this role should be played by publicly-accountable, elected representatives”.

I have sympathy for the view that the judiciary should not be placed in the position of having to determine values or policy. That is why I started out this evening by seeking to position environmental justice within administrative law more generally. Starting from this position, it is not immediately evident that the best cure is to provide wider discretion and fewer bright lines through ranking of interests identified in rules (whether set in primary or secondary legislation). If judicial involvement in primary decisionmaking and merits review is something we want to retain (and there are some advantages in it I think which we should be slow to throw aside, and to which I want to refer in a moment), then the better course may be to make more political effort to identify and prioritise the values the courts are to apply. If greater discretion in balancing disparate ends is however preferred, we may have to rethink our institutional checks. It may be necessary to consider whether primary decision-making in a more discretionary setting and merits review of it should be an administrative function rather than a judicial one, while leaving minimum standards of legality, fairness and reasonableness to be the subject of judicial review.

I should stress that I am not advocating any position here. I am suggesting that we need to think matters through which may impact on our institutions as well as on the substantive law and outcomes. Even if we are not at that point, yet, we may need to appreciate that we are on a continuum in which the justification for judicial involvement may be becoming increasingly thin. And potentially dangerous for the institution.

⁵⁶ The Hon Amy Adams “RMA discussion document launched” (press release, 28 February 2013).

Judge Bollard spoke of the ever-present calls for compromises and trade-offs. It would be naive to think that these pressures are not felt by a specialist court operating in a sometimes hostile setting.

Recent legislative changes to the procedure of the Environment Court give it responsibilities to achieve compromises in environmental disputes and impact on the inclusiveness of its processes,⁵⁷ in which the public interest is now principally expressed by public agencies in plan setting. Again, I do not suggest that these are not sensible moves. But they reposition the Court in dispute resolution territory concerned principally with private interests.

This repositioning, together with proposals to relax still further the standards against which judicial decisions can be justified, may prompt questions as to the extent to which judicial authority and standing can properly be used. They may dress outcomes in a show of legal legitimacy that is not warranted.

The role of legally qualified chairs (including judicial officers) in chairing administrative tribunals and committees of inquiry is useful in ensuring observance of the principles of natural justice (which must be observed by all public bodies which determine rights or interests and can be supervised by judicial review). But such legal or judicial input does not transform the body into a judicial body.

When planning tribunals took over from Ministers as primary or additional decision-makers, they were clearly administrative bodies, and part of the Executive branch. The Environment Court is today constituted as a "Court of record" and as such positioned within the judicial branch.⁵⁸

Although the boundaries between policy and law are notoriously porous, there must be reason to doubt whether powers which are limited only by process requirements but otherwise require an at-large policy balance to be struck between incommensurable and broadly expressed values are appropriately exercised by a court.

I do not suggest that this is the position under the existing legislation or indeed that it would come about if some of the proposals currently being floated are adopted. But it is necessary to be careful whether the existing institutional arrangements which have been carried over from the former rule-based and activity-focussed regime require reassessment also along with the reassessment of Part 2. Effective judicial supervision occurs where there are minimum standards or an enacted hierarchy of values to be protected.

It is true that, in a number of areas of law, judges must assess values which are not commensurable. Human Rights litigation is the obvious example where it is necessary to decide which value is to prevail where two collide.

⁵⁷ As seen, for example, in s 268 of the Resource Management Act and the Environment Court's 2011 Practice Note.

⁵⁸ Resource Management Act, s 247.

The problem of incommensurability in such cases can however be exaggerated. As one commentator has said:⁵⁹

[W]e probably do not believe in complete incommensurability between constitutional values. Few would view with indifference a massive loss of liberty for a marginal gain in national security. Our problem is not that the values are incommensurable but that relative assessments can only be carried out in a crude manner.

And the courts have developed reasonableness and proportionality analysis in human rights cases which assist in coming to judgment even if a general balance is ultimately required. In such cases, courts are helped by the qualifications with which most human rights are expressed. Of help, too, are the overarching principles developed in the context of rights such as “human dignity” and what is justifiable in a “free and democratic society”. Human rights assessments are supported by well-developed ethical theory and international and comparative jurisprudence which is directly helpful because the standards are expressed to be universal. The frame of reference in such cases is relatively well-developed and turns on contextual assessment of identified and comparatively well-understood values. And, besides, human rights are expressed to be rights possessed by individuals. They are thus, inevitably, law and subject to judicial determination and vindication.

By contrast, environmental conflict is intrinsically much more difficult to resolve if the ends in view are not ordered in any way that provides a handle for decision-makers, as by setting minimum standards which do confer rights of enforcement. At-large judicial balancing may be at best unconvincing and at the worst may mask political judgments which cannot be adequately justified by reference to legal standards and which should be directly taken by those who are politically accountable. Although international standards may be expected to evolve, they are at present embryonic. And comparative law determinations about environmental values and priorities are very difficult to transplant. So there is a real question to be addressed about judicial decision-making if the Court is asked to resolve policy balancing that should be undertaken by the political branches of government.

If that position is reached, there will be some loss to our tradition. It is an important benefit of judicial process that it demonstrates the legitimacy of the exercise of power by explaining through the deliberative judicial method that decisions are within lawful authority and have been arrived at through fair processes and with outcomes that are reasonable. Such demonstration has value in itself even if challenges are unsuccessful. In the area of environmental justice, increasingly the territory of social dispute and human rights claims (a trend that is likely to continue under international lead), such demonstration of reasonableness and fairness in outcome and observance of legal constraints may have particular value. It would be a pity to lose such benefits, which are a principal contribution of judicial process in countries which live under the rule of law.

⁵⁹ Julian Rivers “Proportionality and Variable Intensity of Review” (2006) 65 Cambridge Law Journal 174 at 201.
