

The following paper was presented by its three authors at the international symposium **Environmental Adjudication in the 21st Century**, held under the auspices of the Environment Court of NZ and University of Otago on 11 April 2017 in Auckland¹.

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

Principal Environment Judge Laurie Newhook &
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New Zealand

- [1] Environmental law in New Zealand appears to have entered a period of considerable flux. While it is not our place as judges to comment on government policy and the formulating of substantive laws, our paper seeks to describe recent, past, current, and possible future legislative scenarios. Judges however feel able to speak carefully in public about matters of court process and access to justice. This is what we set out to do in this paper.
- [2] This Symposium follows a Judges Forum organised by Associate Professor Ceri Warnock and Principal Judge Newhook at the IUCNAEL Conference in Oslo, Norway, in June last year, entitled “The Environment in Court”. It also follows the establishment of their website <https://environmental-adjudication.org>, and work undertaken by Judge Newhook amongst others to assist Professor Emeritus George (Rock) Pring and Catherine (Kitty) Pring prepare for publication by the United National Environment Programme (UNEP) of their recent book “**Environmental Courts and Tribunals – A Guide for Policy Makers**”: <https://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf?sequence=1&isAllowed=y>. It also follows increasing collaboration amongst the Prings, Ceri Warnock, and Judge Newhook over many matters of access to environmental justice worldwide, with the result that the Prings have assisted strongly in the establishment of their website.

¹ Speakers at the symposium were drawn from judiciaries and academia around the World, and included the Right Honourable Lord Robert Carnwath of the UK Supreme Court as keynote speaker.

- [3] Rock Pring produced an excellent key-note paper for the forum last June, “The Challenges Facing Environmental Judges in the Next Decade”. That paper may be found at <https://environmental-adjudication.org/10-challenges-for-environmental-adjudicators/>. It examined 10 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
- [4] Our paper for this symposium will examine challenges past and prospective, to access to environmental justice in the New Zealand Environment Court, discussing in particular challenges 4 (Access to environmental justice) and 5 (ADR).
- [5] In our considered view, the operation of alternative dispute resolution (ADR) mechanisms in our court is in very positive territory. This free service undertaken by independent facilitators, our Environment Commissioners, is successful in resolving about three quarters of the cases filed in the Court. Challenge 4 on the other hand, may be thought quite richly to justify its label “challenge”.
- [6] These challenges may in fact be seen 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 sphere². 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

² Judith Resnik, “Reinventing Courts as Democratic Institutions” (2014)143 Daedalus 9.

without enquiry or even a hearing in open Court if there are problems such as want of jurisdiction.

- [7] We do not need to address the present audience extensively about the constitution, work, powers and practices of the New Zealand Environment Court. Persons interested can consult a variety of materials on the website of the court, <https://environmentcourt.govt.nz/>, including the paper given by Judge Newhook to the IUCNAEL Oslo Colloquium, entitled “Effectiveness and Legitimacy of Dispute Resolution in the New Zealand Environment Court”, inclusive of a section responding to the writings of others about whether there should be concern in a court like ours, about justiciability of “issue polycentricity”. The paper may be found at <https://environmentcourt.govt.nz/assets/Documents/Publications/Oslo-speech-for-IUCNAEL-Colloquium-June-2016.pdf>.
- [8] Another reason for not taking the time today to describe the constitution, work, powers and practices of the Court in detail is that Ceri Warnock recently scripted an approachable and brilliantly succinct description of the New Zealand Environment Court³. We can do no better than quote it here:

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 RMA – and so all of the Court’s decisions must accord with the statutory mandate to ‘promote sustainable management’ of the resources in question⁴ - but it also has jurisdiction under a number of other environmental statutes.⁵ 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.⁶ It tends to follow litigious procedures (although, can control its own procedures and adopt an

³ Ceri Warnock and Ole Windahal Pedersen “Environmental Adjudication: mapping the spectrum and identifying the fulcrum” (forthcoming, 2017).

⁴ RMA s 5(1)

⁵ 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 Roadway Powers Act 1989, EEZA 2012, Housing Accords and Special Housing Areas Act 2013, Land Transport Management Act 2003.

⁶ Ceri Warnock, ‘Reconceptualising the Role of the New Zealand Environment Court’ (2014) 26 JEL 507

inquisitorial approach where appropriate),⁷ and it also enforces the law (albeit, has a great deal of flexibility as to the enforcement approach it takes).⁸ 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.⁹ 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 framework¹⁰ 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.¹¹

- [9] 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.
- [10] 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 manner¹². Particularly apposite in this regard, is section 269 of the Resource Management Act 1991, 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 s269 as meaning that it should be considered publically 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 important principles of the rule of law. We stress the need to think and

⁷ 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)

⁸ RMA, pt 12.

⁹ *Canterbury Regional Council v Apple Fields Ltd* [2003] NZRMA 508 (HC)

¹⁰ *Environmental Defence Society Incorporated v Marlborough District Council*, [10-11]

¹¹ Including civil, criminal and reflexive responses, see RMA pt 12.

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

work creatively, and strongly believe that access to justice can operate hand in hand with working efficiently.

- [11] 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.
- [12] 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.
- [13] Earlier papers published by the Judges, including those referenced above, have described electronic innovations in the court in recent years, including use of iPads for hearings, interactive use of the court's website, and non-electronic innovations including the use of process advisors of 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 Dispute Resolution

- [14] Mediation and other types of alternative dispute resolution merit particular focus.
- [15] As in many Environment Courts and Tribunals, mediation has become a mainstay of case resolution in recent years. In New Zealand it is authorised by s 268 of the Resource Management Act 1991, and is a free service conducted by the Court's Commissioners who are fully trained in the technique and very experienced.
- [16] Mediation is conducted very early in the life of most cases, and results in resolution of approximately 75 percent of all cases filed in the Court.
- [17] There are two extensive sections in our current Practice Note, which became operative at the end of 2014. The first is a section "Alternative Dispute Resolution", and the second is a procedural protocol annexed to the Practice Note.

- [18] Mediation is not compulsory, and parties can refuse to agree to go to undertake it. However the technique is strongly encouraged by the Judges because, even if a case is not capable of full settlement, some aspects can get resolved, thus narrowing issues in dispute, reducing Court hearing time and reducing cost to all parties. The Court encourages parties to understand that there are often many ways of viewing any particular problem and how it might be resolved. Resolution of cases can sometimes be quite innovative. For instance, side agreements on other matters outside the jurisdiction of the dispute are sometimes entered into. Those side agreements are not seen by the case-managing Judge.
- [19] Matters discussed during mediation are confidential to the parties. Only the written signed outcome from mediation can be reported to the Judge. As is well-known, this confidentiality is important for the process. It means that the parties can make offers or suggestions aimed at resolving the matters without fear of later adverse consequences.
- [20] When agreement is reached on all or some matters in dispute, a draft Consent Memorandum is drawn up either at the mediation or afterwards by the lawyers or parties present. Once the wording is agreed to by all parties and signed, it is placed before the Judge with a request that a Consent Order be made. In considering a draft Consent Order the Court will ensure that the result conforms to the requirements of the Resource Management Act. On some occasions, the request can be refused by a Judge for cause such as want of jurisdiction, whereupon matters either become the subject of further mediation or negotiation, or go to hearing on some issues.
- [21] As is also well-known, mediation is invariably much less expensive than a court hearing with its attendant legal and witness expenses, and risk of an award of costs by the Court.
- [22] Mediation is used to resolve all three main types of the civil jurisdiction of the Court, appeals about plan making, appeals about consenting, and enforcement. In New Zealand the Environment Court does not hear prosecutions for breaches of the Resource Management Act and plans. Those are heard in the District Court, by Judges holding dual District Court and Environment Court warrants. The mediation service is not engaged in such cases.

Alternative Adjudicative Processes

- [23] The following section of this paper concerns many kinds of new hearing processes introduced by legislation in recent years. They essentially run in parallel with the work of the fully independent Environment Court but do not have that quality, 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'), Proposed Auckland Unitary Plan, and Christchurch Replacement District Plan.
- [24] 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.
- [25] These matters are described in this paper by Environment Judge David Kirkpatrick who chaired the Independent Hearing Panel for the Proposed Auckland Unitary Plan during 2014 to 2016, and Environment Judge John Hassan who was Deputy Chair of the Independent Hearings Panel for the Christchurch Replacement District Plan during the same period.

The procedural starting point

- [26] 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 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.
- [27] Essentially the same procedures are applied to hearings of submissions on reviews, changes or variations of district and regional plans. This discussion should be read as applying to both the resource consent process and the planning process, *mutatis mutandis*, unless the context otherwise requires.

The standard procedure

- [28] The first route has been the “standard” procedure since even before the RMA came into force. It provides for two levels of adjudication on the merits.
- [29] 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. Joint or combined hearings can occur if proposals involve consents under more than one district plan or a district plan and a regional plan.
- [30] A consent authority will 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).
- [31] The authority must hold such a hearing in public and must:
- a. avoid unnecessary formality; and
 - b. recognise tikanga Maori where appropriate, and receive evidence written or spoken in Maori¹³; and
 - c. not permit any person other than the chairperson or other member of the hearing body to question any party or witness; and
 - d. not permit cross-examination.
- [32] 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.
- [33] An appeal hearing before the Environment Court is conducted as a full hearing *de novo*. Where the grounds of appeal or the relief sought are confined to specific issues or outcomes (such as particular conditions) then the Court’s hearing may be focussed on those matters.
- [34] Hearings before the Court are conducted according to the Court’s procedures.¹⁴ These are formal and include the right of each party to cross-examine the witnesses of an opposing party.
- [35] Beyond that right of appeal, there is a further right of appeal to the High Court, but only on a question of law.¹⁵ the High Court has stated on many occasions that it will

¹³ In accordance with Te Ture mō Te Reo Māori 2016 / the Māori Language Act 2016.

¹⁴ Part 11 of the Resource Management Act 1991, esp. ss 269 - 298

¹⁵ SS 299 – 308 Resource Management Act 1991.

be vigilant to resist attempts to re-litigate factual findings in an appeal limited to a question of law.¹⁶

- [36] 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 a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard.

The call in procedure

- [37] The second 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.¹⁷
- [38] In considering whether a proposal was of national significance, the Minister could have regard to any relevant factor including whether the proposal:
- (a) has aroused widespread public concern or interest regarding its actual or likely effect on the environment, including the global environment; or
 - (b) involves or is likely to involve significant use of natural and physical resources; or
 - (c) affects or is likely to affect any structure, feature, place, or area of national significance; or
 - (d) affects or is likely to affect more than one region or district; or
 - (e) affects or is likely to affect or is relevant to New Zealand's international obligations to the global environment; or
 - (f) involves or is likely to involve technology, processes, or methods which are new to New Zealand and which may affect the environment; or
 - (g) results or is likely to result in or contribute to significant or irreversible changes to the environment, including the global environment; or
 - (h) is or is likely to be significant in terms of section 8 (Treaty of Waitangi).

¹⁶ *New Zealand Suncorn Construction Ltd v Auckland City Council* [1997] NZRMA 419 (HC) at 426.

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

- [39] This route has been followed only once. In 1993, the Minister for the Environment established a board of inquiry to hear an application for an air discharge permit for the Electricity Corporation of New Zealand's proposed 400 megawatt power station at Stratford in Taranaki. In February 1995, the board of inquiry concluded that the station's operation would significantly increase New Zealand's emissions of carbon dioxide and make it more difficult to meet its obligation to reduce the emission of greenhouse gases to 1990 levels in terms of the United Nations Framework Convention on Climate Change. The board of inquiry recommended that ECNZ must establish a carbon sink "sufficient to eventually store in perpetuity the equivalent quantity of carbon emitted from the site over the term of the permit." In March 1995, the Minister approved the expansion of the power station on the condition that forests were planted to create a carbon sink or the effect of emissions was reduced by greater efficiency elsewhere. In June 2003, a hearing committee of the Taranaki Regional Council granted an application to delete the consent conditions requiring mitigation of carbon dioxide emissions.
- [40] The provisions in relation to a ministerial call in were substantially amended in 2005. The Minister's power of decision was transferred to the board of inquiry, and the independence of the board was strengthened by a requirement that the chairperson be a current or retired judge. The Minister was authorised to recover the costs of the process from the applicant.
- [41] It is pertinent to note that another change in the 2005 Amendment Act was the introduction of requirements for persons hearing applications to be accredited following training in conducting hearings and making decisions under the RMA.

2009 Amendments

- [42] The Resource Management (Simplifying and Streamlining) Amendment Act 2009 made many changes to the RMA. For present purposes, the most significant were the repeal of the provisions for ministerial call-in and the enactment of new sections 87C – 87I and a new Part 6AA of the RMA.¹⁸
- [43] These amendments introduced two new procedures for hearing and determining resource consent applications:
- a. By direct referral to the Environment Court under ss 87C – 87I; and

¹⁸

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.

- b. By a board of inquiry under Part 6AA.¹⁹

Direct Referral

- [44] 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.
- [45] There are no statutory considerations or thresholds to guide the consent authority's decision on the procedural application, other than that it be made in time (within 5 days of the closing of submissions) and in the correct form and that the substantive application is complete. Submitters are not entitled to be heard on the procedural application.
- [46] There are also no provisions to guide the Court in determining the procedural application: it has been held that there is no discretion to refuse such an application.²⁰ While the requirement for an application to be made might indicate some general discretion, the statutory provisions appear only to require the applicant to maintain the application.
- [47] There is also uncertainty about the role of the consent authority once it has lodged its report and suggested conditions. On one approach it should remain as a participant, assisting the Court as it would on any appeal and in light of its role, should consent be granted, in monitoring and enforcing the conditions of the consent; on another approach, it has no stated role in the process and may choose not to participate.
- [48] The hearing of a directly referred matter is otherwise essentially the same as any appeal hearing before the Court.
- [49] 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.

¹⁹ Sections 140 – 149ZE Resource Management Act 1991.

²⁰ *Progressive Enterprises Ltd v Rodney District Council* [2010] NZEnvC 221.

[50] 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

[51] The procedures for dealing with applications for resource consent by a board of inquiry were substantially amended by Part 6AA as inserted by the 2009 Amendment Act. The Minister still has a power to call in an application and may also call in a request for a plan change or a notice of requirement for a designation. Such a call in may be on her or his own motion or at the request of an applicant or a consent authority.

[52] As well, an applicant may apply to the Environmental Protection Authority (**EPA**) for such a call-in.²¹

[53] The criteria that may be considered by the Minister are those listed above in relation to the earlier call-in procedure, with the addition²² of whether the proposal :

- will assist the Crown in fulfilling its public health, welfare, security, or safety obligations or functions; or
- relates to a network utility operation that extends or is proposed to extend to more than 1 district or region

[54] It has been noted that the real issue is perhaps not so much whether a proposal fits within any of these criteria (as almost any project could) as whether the Minister considers it appropriate to refer the proposal to a board of inquiry.²³ In practice, the most significant consideration appears to be the requirement that the final report

²¹ Originally a unit within the Ministry for the Environment; now established as a separate Crown entity under the Environmental Authority Act 2011. The EPA's functions extend beyond its role under Part 6AA.

²² As inserted by the Resource Management Amendment Act 2011.

²³ Gardner-Hopkins and Robinson, *supra* fn 15.

and decision of the board of inquiry must be done no later than 9 months after the proposal was notified.²⁴ 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.²⁵

- [55] 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 the nature of the project and the issues related to it is a doubtful management technique. Experience shows that the consequences of such an over-arching deadline include the imposition of strict limits on the time available for the presentation of cases and for cross-examination. That can be to the detriment of everyone, although an applicant may be better placed than submitters or the board itself because the applicant can at least choose when to apply, but the other parties must then respond with the clock ticking, and the board must deliberate and prepare its report and decision once the hearing has concluded.

Exclusive Economic Zone consents

- [56] 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 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).
- [57] 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 EPA 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.

²⁴ S 149R Resource Management Act 1991.

²⁵ S 149S Resource Management Act 1991.

- [58] In exercising its power to decide on applications, the EPA may do this itself or in the case of nationally significant cross-boundary²⁶ activities it may delegate this to a board of inquiry.²⁷
- [59] 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

- [60] Special circumstances in Auckland and Christchurch led to special processes for preparing plans in those cities.
- [61] In Auckland, local government was reorganised in 2010, merging 8 authorities into a unitary council.²⁸ As at the date of amalgamation, there were 14 separate plans in force. Special legislation²⁹ 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.
- [62] The process for preparing this plan and making decisions on submissions on 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 mana whenua groups, being the 19 iwi who are tangata whenua in Tamaki Makaurau and are recognised by the Council as having a mandate to speak for Māori in the region.
- [63] 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

²⁶ Being the boundary between the territorial sea and the EEZ.

²⁷ S 16(b) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

²⁸ The Local Government (Auckland Council) Act 2009.

²⁹ Part 4 of the Local Government (Auckland Transitional Provisions) Act 2010

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.

- [64] 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.
- [65] 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. 4,300 submitters heard in 58 sessions over 249 days. 10,000 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.
- [66] 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. 65 to the Environment Court to be heard on their merits where the Council rejected the panel's recommendation;
 - b. 41 to the High Court on questions of law where the Council accepted the recommendation; and
 - c. 8 applications for judicial review relating mainly to jurisdictional matters.
- [67] The Auckland Unitary Plan is now operative in large part.
- [68] 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,³⁰ an independent

³⁰

Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014.

hearing panel was appointed in 2014 by the Ministers of the Environment and for Canterbury Earthquake Recovery.

- [69] This panel had similarly tight deadlines as 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.
- [70] Levels of participation were also similar, with 4,800 written submissions and around 1,400 submitters being heard over 154 hearing days. 1,480 statements of evidence and submissions were filed and 58 pre-hearing meetings, 40 expert conferences and 70 mediation sessions held.
- [71] 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.
- [72] 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.
- [73] There have been even fewer appeals in Christchurch with 10 appeals to the High Court. Six concern particular land zoning decisions and the others are on aspects of heritage, biodiversity, earthworks and airport noise. One appeal has settled, five have been determined and four decisions are awaited. In three cases leave has been sought to appeal to the Supreme Court.
- [74] The Christchurch District Plan is thus largely in place.
- [75] 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 people. 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 withdrew. Even large organisations with good resources and sometimes 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.

- [76] 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.

Marlborough Salmon Farm Relocation Advisory Panel

- [77] 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,³¹ on a proposal to amend³² 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.

- [78] This panel's published advisory information notes that its process is not a normal RMA plan change process and is the first time that 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.

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

Emeritus Professor Pring's Challenge 4 – Access to Environmental Justice

- [80] The following remarks by Principal Environment Judge Laurie Newhook need to be seen strictly through the lens of access to justice. It is not the business of the judiciary to engage in "patch protection", and we don't.

³¹ Under s 360B Resource Management Act 1991.

³² Under s 360A Resource Management Act 1991.

- [81] While there is a degree of emphasis on some significant erosions of access to environmental justice in New Zealand in our paper, it is proper to acknowledge first that there has been communication between us and Ministers about adding some elements to the jurisdiction of the New Zealand Environment Court – transferring 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.
- [82] Even without the need for legislative change, the judges of our court have taken over responsibility as chairs of the Land Valuation Tribunals throughout the country, in replacement 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 home-grown brand of robust case management, arrange alternative dispute resolution, and move matters quickly to hearing when necessary. In the few weeks we have held this jurisdiction, many cases have been resolved by various means including decision, conference, negotiation, and withdrawal.
- [83] 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.
- [84] Presently under examination for further possible legislative attention are numerous pieces of legislation dealing with land, water, public works, roading, local government, bio-security, climate response, energy reticulation, hazardous substances, construction, mining, property, utilities, animals, fisheries, public transport, and more. While the NZ Environment Court is still not something akin to a “one stop shop” like the LEC NSW or the Kenya LEC, noted by the Prings as exhibiting World’s best practice, an expansion of jurisdiction might move NZ closer to those models.

[85] I hold the view that such expansions of the jurisdiction of the Environment Court to include many of these matters, would embrace the tenet of access to justice in a peripheral sense, rather than to 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 mention.

[86] 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 would no doubt be 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.

[87] Justice Brian Preston made reference to Principle 10 in his paper delivered earlier in the day. He also made reference to an “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 focussed on Goal 16 and four relevant targets in his paper.

[88] For those of us with reasonably long term memories, one can recall the international Brundtland Report in 1987. We note with interest also the writings of Ian McChesney³³ who, in discussing the Brundtland Report noted in the late 1980s

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Ian G. McChesney, “The Brundtland Report and sustainable development in New Zealand”. Lincoln University New Zealand, February 1991.

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.

- [89] 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 it represents something closer to the “ecological” model, although others might place it somewhere between the “ecological” and “economic” models.
- [90] There is quite some irony in the timing of this symposium. When we commenced planning it nearly a year ago, we had no means of knowing that a longstanding piece of proposed legislation might come to fruition in a third reading before Parliament, just days before this gathering. The Resource Legislation Bill 2012, just enacted and awaiting Royal Assent, contains provisions of some controversy, some of which bear upon the issues of access to environmental justice of interest to us today.
- [91] We have seen a number of analyses of the Bill in the public domain from various organisations, such as the law societies, RMLA 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 years³⁴.
- [92] The 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.³⁵
- [93] 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.

³⁴ In particular we refer to commentary made by Derek Nolan QC, assisted by Simon Pilkinton, solicitor at Russell McVeagh.

³⁵ The descriptions of the latest provisions are of them as confirmed by the second reading of the Bill. We will take the opportunity in later iterations of this paper to update the descriptions to any extent necessary on account of changes by the time the Bill had its third reading and passed into law.

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.

- [94] 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.
- [95] There was emphasis in the early stages on an expectation that applications for resource consent would be notified, something that has changed since.
- [96] Perhaps understandably, parliament has since felt the need to balance rights of public participation against the desirability of timeliness of delivery of 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.
- [97] Amendments in 1993 represented a step along that spectrum.
- [98] Amendments in 2003 introduced the concept of “limited notification” to make rights participation more focussed, but the presumption in favour of notification remained.
- [99] Amendments to the Act in 2009 significantly changed the notification framework. The 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.
- [100] 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.

[101] 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 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 9 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.

[102] As promulgated in 2012, the Resource Legislation Bill 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.

[103] After the processing of submissions to the Select Committee of the House, the Bill emerged in a form providing that there would be no merit appeals to the Environment Court for boundary activities, subdivision or residential activities, unless they were of non-complying status. Further, that merit appeals would be restricted to matters raised in a person's submission, thus precluding appeals on matters that could not have been reasonably foreseen and raised in their submission because the application had been amended through the consenting

process. Further, that activities involving marginal or temporary non-compliances be deemed “permitted”.

[104] Consequences include that proponents would 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.

[105] 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.

[106] Also introduced in the 2009 amendment was 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.

[107] The Resource Legislation Bill 2012 introduced proposals for further limits on participation in policy and plan making processes. It introduced further limited notification for plan changes and variations where all directly affected persons can purportedly be identified. It 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.

[108] Commentators have identified certain implications for policy and plan decision-making (remembering that that is an area attracting greater attention by participants, given earlier limitations imposed on participation in consenting), 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 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; and
- Commentators accordingly perceive a continuing and significant erosion of the opportunity for citizens to participate in decision-making processes and give effective access to judicial proceedings.

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

[110] The New Zealand Environment Court is apparently one of the few courts in the world that receives 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.

[111] 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 simply required to make value 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.

- [112] It is our view that the New Zealand Environment Court cannot be considered in any objective sense an “activist” court. 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 path.
- [113] There is another aspect of the work of the Court contributing something of a constraint. Decisions are not solely made by Judges. Commissioners (usually 2) 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 parties can be assured that the deliberation process amounts in effect at times to a vigorous peer-review of decisions in course of preparation!
- [114] 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.
- [115] It is appropriate here to offer comments on a specific aspect of plan appeal work by the Environment Court, which in my view points strongly to the desirability of the jurisdiction being retained in the interests of fairness and access to justice.
- [116] This aspect concerns quality of plan preparation and drafting. It is the experience of the Environment Court that this activity invariably falls short at first instance, often to a notable extent. There are many decisions of the Court on plan appeals where it can be seen that opportunity has been taken by it to improve the 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 some instruments improved in these ways have opened the way to subsequent ease of consenting developments, with commensurate reduction in time and cost for all concerned. One of many examples is a pair of decisions of the Court in 2006 concerning plan changes about extraction of geothermal energy in New Zealand’s central North Island³⁶. The Court has been informed subsequently that consenting of major geothermal developments has

³⁶*Geotherm Group Limited* Decisions A 47/06 and A151/06 (Environment Court)

been considerably assisted and quickened by the plan provisions having been extensively improved during the appeal process.

One more challenge?

- [117] 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*" (s251 RMA). Ministries and government departments world-wide 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).
- [118] Sometimes a government's Executive arm will work collaboratively with another of the three arms of government, the Judiciary, to devise and effect changes to enhance efficiency, cost-efficiency, and access to justice.
- [119] Unhappily, administrative support services for many courts in New Zealand, including the District Court and specialist courts like the Environment Court, have been subjected in the last year to staff restructuring proposals that we feel have not been brought about in such desirable ways.
- [120] 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 RMLA. 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.
- [121] Contrary to comment from our Court and other benches, the restructuring has proceeded along largely regional lines of organisation which we feel will 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 s251 RMA to be the responsibility of the Principal Environment Judge. At the same time, the Ministry is required to support 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

[122] 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.

[123] 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 occur in timely fashion, with decisions issued promptly. We consider it reasonable to claim that based on past initiatives undertaken collaboratively by the judiciary and the executive in recent years³⁷, 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 removal of significant checks and balances on first instance decision-making, and administrative restructuring.

³⁷ Obviously, excluding the staff re-structuring undertaken in the last year.