

How to Defend (and Attack) the Resource Management Act: The Principled  
Consequences of Reducing Public Participation in Environmental Decision-Making.

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“It could be argued that participation saves the otherwise vague and general delegations of power in the Act from illegitimacy and that the process can become a purpose.”

- Janet McLean at the time of the RMA’s creation in ‘New Zealand’s Resource Management Act 1991: Process with Purpose?’

“Ron, you’re not going to slaughter that pig, are ya?”

“Not to worry, I have a permit.”

“This just says, ‘I can do what I want’”

“I am the Director of the Parks Department, and this is a Park”

- Dialogue from a scene in the TV series *Parks and Recreation*.

## **Introduction**

The least controversial thing that can be said about the Resource Management Act 1991 ('The RMA' or 'The Act') is that it has been a controversial piece of legislation. It has been criticized for being both over<sup>1</sup> and under-protective of the environment,<sup>2</sup> for giving both too much<sup>3</sup> and too little recognition of Maori interests,<sup>4</sup> and has been blamed as a major barrier to economic growth.<sup>5</sup> This has made it a common target for reform.<sup>6</sup>

At the beginning of 2013, the Ministry for the Environment released a discussion document outlining the current Government's third round of proposed changes to the RMA.<sup>7</sup> This dissertation will focus on two aspects of the changes: the proposed changes to s 2 of the Act, which contains the purpose and principles of decision-making under the Act, and the various changes to the capacity for the public to participate in the plan-making and resource consent processes in the Act.

The core argument that this dissertation makes is that decisions under the Resource Management Act are of a sufficiently political nature to require substantial public participation in the process. The argument will proceed as follows: Firstly, to provide a summary of the nature of decision-making under the Act in practice, with the conclusion that the substantive guidance in ss 6 and 7, and even in practice s 5, is illusory and allows almost complete discretion in decision-making. This makes the decisions by nature political. Secondly, to advocate a positive principle in the creation of legislation that when such political decision-making is delegated in such a manner, it must be done so in conjunction with providing substantial public participation in the

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<sup>1</sup> Suri Ratnapala "Environmentalism versus Constitutionalism: A Contest Without Winners" (Paper presented at the Joint meeting of the Law and Economics Association of New Zealand and the New Zealand Association of Economists, Wellington, 2006).

<sup>2</sup> Forest and Bird New Zealand "Climate Change Must be Factored into RMA Decisions" (press release, 19 September 2013 ).

<sup>3</sup> David Round "Here Be Dragons?" (2005) 11 Otago LR 31.

<sup>4</sup> Erin Thompson "Maori and natural resource management" (2007) 7 BRMB 87.

<sup>5</sup> Roger Kerr "The Resource Management Act: Fundamentally Sound or Fundamentally Flawed?" (Paper presented at the Massey University Planning Programme, Palmerston North, 19 April 2002).

<sup>6</sup> I H Williams "The Resource Management Act 1991: Well Meant But Hardly Done" (2000) 9 Otago LR 673.

<sup>7</sup> Ministry for the Environment *Improving our Resource Management System: A Discussion Document* (Ministry for the Environment, 2013) .

process. Finally, I will show that the changes reduce public participation in a way that goes against this principle.

I come to a number of additional conclusions along the way. The first chapter addresses the Technical Advisory Group (TAG) report which advocated changes to ss 6 and 7 of the Act. It has dual purposes: to show that their diagnosis of the problem was incorrect and that their proposed changes will not bring about the changes they desire, and to show how Part 2 of the Act has been interpreted and the influence of ss 6 and 7 on the outcomes of decisions under the Act. The second chapter will then take this discussion and use it to assess the type of decision-making under the RMA on a spectrum from 'purely legal' to 'purely political' as an alternative metric to labels such as 'principles-based law' which have been offered in the past.<sup>8</sup> The third chapter adds the component of public participation, arguing for its necessity in a system of decision-making as politically-laden as the RMA. The final chapter will then address the proposed new changes to public participation under the RMA and the ways in which they could influence the substantive reasoning in the process.

A couple of preliminary issues are worth noting. Firstly, the reforms that have been proposed by the Government are not final and the form they take may well change as they are subjected to final drafting and Parliamentary process.<sup>9</sup> I address the changes that are in the *Summary of Reform Proposals* issued in August 2013,<sup>10</sup> although previous reports are also important in my discussion. Secondly, I am a member of an organization that has spoken out against parts of the current Government's environmental policy,<sup>11</sup> with particular attention to climate change issues but also including promotion of policies to do with housing and Local Government issues, both related to the Resource Management Act and potentially affected by the Government's changes. While this dissertation should be read with these views in mind, I also hold the pursuit of truth in high esteem and have made significant efforts to consciously counteract potential biases in the research and writing of this work.

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<sup>8</sup> Technical Advisory Group on RMA Principles *Report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group* (Ministry for the Environment, 2012) at 41.

<sup>9</sup> They have proven politically controversial: Isaac Davidson "Government coalition partners reject RMA proposal" *New Zealand Herald* (New Zealand, September 12 2013) .

<sup>10</sup> Ministry for the Environment *Resource Management: Summary of Reform Proposals 2013* (2013) .

<sup>11</sup> Specifically, Generation Zero. See <http://generationzero.org.nz/>.

## **1. How Not to Attack: Part 2 of the Resource Management Act 1991**

### A Brief Introduction to Part 2 of the Resource Management Act

The Resource Management Act was created as an integrated piece of legislation to control the use of land, water and air resources in New Zealand.<sup>12</sup> Its core function is to provide a framework for delegated legislation in the form of regional and district plans which set out the way that different types of resources can be used and what types of activities will be permitted or require resource consents.<sup>13</sup> The Act sets out procedural requirements for both plan development and the resource consenting process.<sup>14</sup> It also contains enforcement provisions for non-compliance with plans<sup>15</sup> and addresses other resource management issues,<sup>16</sup> but for the purpose of this dissertation, plan-making and resource consents can be seen as the core procedures that the RMA is used for.

Decision-making under the RMA is given to local authorities in the form of regional councils, district councils and unitary councils, who are responsible for the formation of plans and policy statements under the Act,<sup>17</sup> as well as making decisions over the granting of exceptions to the plan rules in the form of resource consents, usually through a committee of councilors.<sup>18</sup> Appeals are made to the Environment Court, which is given broad powers in its role to hear challenges to planning and resource consent decisions. It is able to change parts of local plans if requested,<sup>19</sup> consent appeals are heard de novo<sup>20</sup> and regular rules of evidence need not apply if the Court deems it necessary.<sup>21</sup> Hearings before the Court must consist of at least one judge and one environmental commissioner,<sup>22</sup> establishing its role clearly as a specialist court. Its decisions can only be appealed to higher courts on matters of law.<sup>23</sup>

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<sup>12</sup> Bret Birdsong "Adjudicating Sustainability: New Zealand's Environment Court and the Resource Management Act" (2002) 29(1) Ecology Law Quarterly 1.

<sup>13</sup> Resource Management Act 1991, Parts 4-6.

<sup>14</sup> At Part 5 and Part 6.

<sup>15</sup> At Part 3.

<sup>16</sup> For example, Part 8 is on designation and heritage orders, and Part 9 water conservation orders.

<sup>17</sup> At Part 5.

<sup>18</sup> At Part 6.

<sup>19</sup> At s 293.

<sup>20</sup> At s 290.

<sup>21</sup> At s 276.

<sup>22</sup> At s 265.

<sup>23</sup> At s 299.

Part 2 is the substantive guidance in the Act for decisions made by local authorities and the Environment Court. It sets out a purpose in s 5 which all decisions must promote: sustainable management of natural and physical resources. It then sets out a list of principles in ss 6 (matters of national significance) and 7 (other matters), and has a separate s 8 for the principles of the Treaty of Waitangi. Decision-makers must consider these principles to varying degrees: they must ‘recognise and provide for’ s 6 principles, ‘have particular regard to’ s 7 principles and ‘take into account’ the principles of the Treaty of Waitangi.

Between them, the purpose and principles sections lay out the need to take into account multiple considerations in the formation of plans and in determining whether or not to grant contentious resource consents. Section 5 builds in a clash between the needs of people and communities and a number of ecological concepts in s 5(2)(a) to (c), and the principles range from clear environmental concerns such as ‘the protection of outstanding natural features and landscapes’<sup>24</sup> to Maori spiritual concerns such as ‘the relationship of Maori and their culture and traditions with their ancestral lands’<sup>25</sup> to economic concerns such as ‘the efficient use and development of natural and physical resources’.<sup>26</sup> As a consequence, plan-making and resource consent decisions must be made to promote the purpose, and relevant principles from ss 6 and 7 must be appropriately considered.

### The Proposed Changes to Part 2 of the Act

In early 2012, the TAG report was released suggesting significant changes to ss 6 and 7 of the Act.<sup>27</sup> These were adopted in the proposed third round of changes to the Act in a discussion document in the beginning of 2013<sup>28</sup> and then finalized in a summary of changes released in August 2013.<sup>29</sup> The changes proposed would collapse ss 6 and 7 into a single section with the title ‘Principles’.<sup>30</sup> The proposed wording would direct decision-makers to ‘recognise and provide for’ the list of principles, and codify the ‘overall broad judgment approach’ that has been established as the method for

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<sup>24</sup> At s 6(b).

<sup>25</sup> At s 6(e).

<sup>26</sup> At s 7(j).

<sup>27</sup> Technical Advisory Group on RMA Principles, above n 8.

<sup>28</sup> Ministry for the Environment, above n 7.

<sup>29</sup> Ministry for the Environment, above n 10.

<sup>30</sup> At 13.



applying Part 2 of the Act.<sup>31</sup> Subsection (2) will make clear that there is no internal hierarchy in the principles.<sup>32</sup>

A number of ecological principles, including s 7(aa) ‘the ethic of stewardship’, s 7(d) ‘the maintenance and enhancement of the quality of the environment’ and a number of similar principles will be removed. A number of others will be changed, including changing the wording of ‘outstanding natural landscapes’ to ‘specified outstanding natural landscapes’ and ‘the intrinsic value of ecosystems’ to ‘the effective functioning of ecosystems’.<sup>33</sup> Several new principles, more directed towards the development of resources, will be included, such as s 6(k) ‘the effective functioning of the built environment including the availability of land for urban expansion, use, and development’ and s 6(m) ‘the efficient provision of infrastructure’.<sup>34</sup>

A new s 7 will be introduced, entitled ‘Methods’.<sup>35</sup> This sets out a list of good practices which decision-makers and plan developers ‘must endeavour’ to perform.<sup>36</sup> Most of them are unlikely to be seen as new or controversial, and include requirements such as ‘to use clear, concise language’<sup>37</sup> and ‘to use timely, efficient and cost-effective resource management processes’.<sup>38</sup> The one provision that may lead to greater controversy is the new s 7(d) ‘to ensure that restrictions are not imposed under this Act on the use of private land except to the extent that any restriction is reasonably required to achieve the purpose of this Act’,<sup>39</sup> which introduces the concept of private property protection where it has not been in Part 2 in the past.<sup>40</sup> Strangely, the new s 7 moves quite pedestrian procedural requirements into a part of the Act previously made up of broad principles, suggesting that the Government views these ‘methods’ as an aspect of sustainable management. Despite this, it is unlikely that the new s 7 will play a predominant role in Part 2 of the Act, or by extension the substantive decisions that are made.<sup>41</sup>

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<sup>31</sup> Ministry for the Environment, above n 10, at 13.

<sup>32</sup> At 13.

<sup>33</sup> At 13.

<sup>34</sup> At 13.

<sup>35</sup> At 14.

<sup>36</sup> At 14.

<sup>37</sup> The new s 7(b)(ii).

<sup>38</sup> The new s 7(a).

<sup>39</sup> Ministry for the Environment, above n 14.

<sup>40</sup> Explicit mention of property rights was considered in the drafting of the original Act but not included: Technical Advisory Group on RMA Principles, above n 8, at 51.

<sup>41</sup> With the possible exception of s 7(d).

The TAG offered a set of reasons for the changes in its report. They suggested that a disconnect existed between the way the Act was drafted and the ‘overall broad judgement approach’ that had been adopted as the way to interpret s 5 of the Act, and that this had significant consequences for decision-making.<sup>42</sup> Their view was that the largely environmental focus of the principles in ss 6 and 7 was leading to the prioritisation of environmental factors over other concerns, and they were concerned that the principles did not include the full range of factors that were encompassed in the s 5 purpose.<sup>43</sup> Added to this is the concern that the principles do not reflect the resource management priorities of contemporary New Zealand.<sup>44</sup>

This makes some significant assumptions about the way in which decisions are made under the Act. The TAG makes no specific reference to any situation in which the environmental factors are given undue weight, and its solution to the view that there are a wide range of factors not encompassed in ss 6 and 7 was to add a total of four new ones, three of which are related to buildings<sup>45</sup> and one on risk management for natural hazards.<sup>46</sup> It also suggests that the principles listed in ss 6 and 7 are in some way exhaustive of the considerations that decision-makers take into account, or are elevated ahead of other considerations in decisions that are made.

In the rest of this chapter I will address this perspective on Part 2, looking at the overall broad judgement test and its application, the impact of the apparent principled hierarchy and the place of principles that are not listed in ss 6 and 7. I will argue that the drafting of the statute, its interpretation and use of the ‘overall broad judgement’ test, and the subsequent judicial treatment of the apparent hierarchy in Part 2 allow local authorities and the Environment Court to incorporate almost any principles into their substantive decisions. I will conclude from this that the concerns of the TAG are misplaced and that decision-making under Part 2 will not necessarily change in the manner they have predicted. This discussion also has consequences for much of the political opposition to the Act, which has often focused on the changes to Part 2,

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<sup>42</sup> Technical Advisory Group on RMA Principles, above n 8, at 35.

<sup>43</sup> At 35.

<sup>44</sup> At 39.

<sup>45</sup> At 10.

<sup>46</sup> At 10.

seeing the removal of environmental protection provisions as likely to cause lesser protection of the environment in our resource management system.<sup>47</sup>

### The Interpretation of Section 5 and the ‘Overall Broad Judgement Approach’

When Simon Upton introduced the RMA in 1993, he had a particular idea of what ‘sustainable management’ was to mean. In his speech to Parliament during the Bill’s third reading, he stated that the ecological values set out in paragraphs (a) to (c) in s 5(2) set out a set of ‘biophysical bottom lines’ which would provide a basic level of environmental protection, above which activities would be allowed according to how they fit with human concerns.<sup>48</sup>

The actual approach to the interpretation of ‘sustainable management’ by the Courts has been significantly different. The meaning of the section hinges on the linking word ‘while’: treating it as a subordinating conjunction (implying a requirement) would support the environmental bottom lines approach, as it would demand maintenance of the ecological values described as a priority above other values.<sup>49</sup> Interpreting it instead as a coordinating conjunction would justify a broader view: that these values were to be judged alongside the more anthropocentric views embodied in the main text of s 5(2).<sup>50</sup> In *New Zealand Rail Limited v Marlborough District Council*,<sup>51</sup> the High Court had to address for the first time the issue of interpreting s 5. Greig J laid down a clear interpretive approach to Part 2 of the Act:

‘It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning

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<sup>47</sup> Examples include Parliamentary Commissioner for the Environment "Improving our Resource Management System: A Discussion Document. Submission to the Minister for the Environment" (2013) ; Anton Oliver "Gutting the RMA and Kiwi Values" *Fish and Game New Zealand* (Auckland, August 2013) 32 and Sir Geoffrey Palmer "Re: Impacts of The Proposed Changes to Part 2 of the Act" (Memorandum to Bryce Johnson, Chief Executive, Fish and Game New Zealand, 22 May 2013).

<sup>48</sup> 51b Hansard, Resource Management Bill Third Reading, 3018–3020.

<sup>49</sup> David Grinlinton "Contemporary Environmental Law in New Zealand" in Klaus Bosselmann and David Grinlinton (eds) *Environmental Law for a Sustainable Society* (The New Zealand Centre for Environmental Law, Auckland, 2002) at 27.

<sup>50</sup> At 27.

<sup>51</sup> *New Zealand Rail Limited v Marlborough District Council* [1994] NZRMA 70.

Tribunal, with special expertise and skills, is established to oversee and to promote the objectives and the policies and the principles under the Act.<sup>52</sup>

He went on to explicitly state that the natural environment did not have to be put at the forefront, nor at the expense of other considerations, firmly rejecting the idea of an absolute bottom line of environmental protection.<sup>53</sup>

Greig J makes it clear in his language that decisions under the Act are decisions of policy, and that the Planning Tribunal (now the Environment Court) is a body specifically established to make such decisions. The judge did not specifically go on to address the place of ss 6 and 7, however his statements certainly support giving decision-makers discretion over the application of Part 2.

This approach to s 5 was further confirmed in the unique case of *Trio Holdings v Marlborough District Council*.<sup>54</sup> The applicant for the resource consent proposed to farm sponges in order to produce a substance that had the potential to treat cancerous tumours.<sup>55</sup> Similarly to *NZ Rail*, the challenging party claimed that to allow the development would harm the natural character of an otherwise pristine environment.<sup>56</sup> Once again the Court rejected an approach that placed an absolute bottom line on the damage that could be done to the environment, instead stating that the benefits of the development were not outweighed by the minimal reduction in the natural character of the coast.<sup>57</sup>

The first actual use of the term ‘overall broad judgement’ occurs in *North Shore City Council v Auckland Regional Council (Okura)*<sup>58</sup> where the court confirmed that the single question is whether or not the purpose of sustainable management is promoted, and that this requires a comparison and determination between conflicting considerations.<sup>59</sup> The overall broad judgement has since stood as the test by which decision-makers are to assess the merits of decisions under the Act. No court has opted to re-open the question at any level. It has been re-stated as the test to be

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<sup>52</sup> *New Zealand Rail Limited v Marlborough District Council* [1994] NZRMA 70 at 86.

<sup>53</sup> At 86.

<sup>54</sup> *Trio Holdings v Marlborough District Council* [1997] NZRMA 97.

<sup>55</sup> At 114.

<sup>56</sup> At 114.

<sup>57</sup> At 116.

<sup>58</sup> *North Shore City Council v Auckland Regional Council (Okura)* [1997] NZRMA 59.

<sup>59</sup> At 94.

adopted in numerous circumstances in the Environment Court<sup>60</sup> and High Court,<sup>61</sup> and the Court of Appeal has stated that “The Court must weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole”.<sup>62</sup> It is worth noting that the test has never been extensively argued in either the Court of Appeal or the Supreme Court. Although changing the approach now would be to overturn two decades of custom in the lower courts, the option for change currently exists. This option would be removed by the proposed reforms, which seek to codify the overall broad judgement test.<sup>63</sup> The TAG’s terms of reference did not allow it to suggest amendments to s 5,<sup>64</sup> however this change has the effect of directing its interpretation.

### Sections 6 and 7: A Hierarchy?

A plain reading of ss 6 and 7 suggests the values in s 6 are a priority. They are labeled ‘matters of national significance’.<sup>65</sup> Decision-makers must ‘recognise and provide’ for them, while they must ‘have particular regard’ to the s 7 Principles, implying the s 6 Principles are of higher importance.<sup>66</sup>

In practice, there is little evidence that s 6 factors are valued higher than those in s 7. Although the Courts have made reference to the hierarchy on numerous occasions,<sup>67</sup> other judgments make it clear that the Environment Court will not treat ss 6 to 8 as hierarchical where it would not make sense on the facts. Two particular cases stand out. The first is the *Auckland Volcanic Cones* case,<sup>68</sup> which concerned an application to put a significant roading project through the Mount Roskill area in a way that

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<sup>60</sup> Recent examples include *West Coast Environmental Network Inc ("WCENT") v West Coast Regional Council* [2013] NZENVC 47 at [333]; *Sandspit Yacht Club Marina Society Inc v Auckland Council* [2012] NZENVC 52 at [183] and *Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407 at [55].

<sup>61</sup> *Man O'War Station v Auckland Regional Council* CIV-2010-404-005288 at [17]; *Foodstuffs (South Island) Ltd v Queenstown Lakes District Council* [2012] NZHC 135 at [284]; *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2013] NZHC 1992 at [57]; *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1346 at [334].

<sup>62</sup> *Watercare Services Ltd v Minihinnick* [1998] 1 NZLR 294 at 305.

<sup>63</sup> Ministry for the Environment, above n 10, at 13.

<sup>64</sup> Technical Advisory Group on RMA Principles, above n 8, at 15.

<sup>65</sup> s 6 Resource Management Act 1991.

<sup>66</sup> s 7 Resource Management Act 1991.

<sup>67</sup> See, for example, *Meridian Energy Ltd v Hurunui District Council* [2013] NZENVC 59, *Land Air Water Association v Waikato Regional Council* (ENC Auckland A110/01, 23 October 2001), *Fugle v Cowie* [1998] 1 NZLR 104.

<sup>68</sup> *Auckland Volcanic Cones Society Inc v Transit New Zealand* [2003] NZRMA 316.

would encroach on the appearance of the Mt Roskill cone.<sup>69</sup> The Auckland Volcanic Cones Defence Society requested a number of changes to the road to make it less intrusive on Mt Roskill.<sup>70</sup> The Environment Court found that the State Highway extension through the area was a matter of national importance despite having no basis to do so in statute.<sup>71</sup> They then found a shifting of the road would have significant consequences relevant to people and communities in the area, providing an overpowering reason not to shift the construction of the road.<sup>72</sup> On appeal, it was claimed that they had failed to give appropriate weight to Mt Roskill as a matter of national importance.<sup>73</sup> The High Court held that a matter of national importance does not create an absolute bar for development and upheld the decision.<sup>74</sup> The indication from the case was clearly that other considerations, in the context of the case, can over-rule a matter of national significance.

The hierarchy is even more explicitly dismissed in *Ruahine v Bay of Plenty Regional Council*<sup>75</sup> where Priestley J acknowledged that although it existed, he doubted ‘whether much significance hangs on the hierarchy’<sup>76</sup> and then explained that it was context-dependent:

“Whether an obligation to “take into account” has lesser importance than an obligation to “recognise and provide” involves an interpretative exercise which must ultimately depend on the relevant subject matter of each of the three sections and the context of the evaluation.”<sup>77</sup>

This leaves it entirely open to the judge to choose on the basis of the facts before them whether a s 6 principle should be deemed of greater importance than one in s 7.

The foundation for this position on the statutory hierarchy is that ultimately the s 5 purpose must be the dominant test for decision-makers under the Act.<sup>78</sup> This means that if, in any one instance, considering a s 6 matter to be more important than a s 7 matter would be inconsistent with the aim of ‘sustainable management’ under the Act,

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<sup>69</sup> At [2].

<sup>70</sup> At [7].

<sup>71</sup> At [35].

<sup>72</sup> At [9].

<sup>73</sup> At [20].

<sup>74</sup> At [29].

<sup>75</sup> *Ruahine v Bay of Plenty Regional Council*, above n 60.

<sup>76</sup> At [66].

<sup>77</sup> At [68].

<sup>78</sup> At [65].

then that step should not be taken and the apparent hierarchy in the Act should be reversed.

To the degree that there appears to be a hierarchy between ss 6 and 7, it can be put down to the language used in the principles rather than the values being promoted in them. An ‘outstanding natural landscape’ is clearly going to involve major natural landforms which are valued by large numbers of people. The language of s 7 is often more mild by comparison: if we were to change ‘amenity values’ to ‘outstanding amenity values’ the two principles may be considered to be equal. The s 6 matters are more broadly worded and more likely to feature in decision-making, as they encompass a wider set of features, while the s 7 values are more specific and thus come up more rarely. However when they do, there is every reason to believe the Courts can weigh them at least equally with s 6 matters, depending on the context of the case.

### Other Principles

The dominance of s 5 in fact goes substantially further than allowing the apparent hierarchy of ss 6 and 7 to be reversed. The s 5 definition of sustainable management sets out that resources must be managed in a way that ‘enables people and communities provide for their social, economic and cultural well-being’.<sup>79</sup> This very broad definition encompasses a very wide set of possible value considerations that can be taken into account under the Act, and ultimately should allow any of the matters in ss 6 and 7 to be considered subordinate to an entirely different issue (otherwise unmentioned in the Act) that the decision-maker considers to be crucial to the sustainable management of the relevant resource at the time. The first time this was directly addressed was in *Cook Islands Community Centre*,<sup>80</sup> where the Court had to determine whether to approve a resource consent decision for a Maori funeral parlour sited over the road from the eponymous Community Centre. The Cook Islanders claimed that they had a deep cultural respect for the dead and would not be able to conduct any activities if there was a ceremony being conducted in the parlour.<sup>81</sup> This had the potential to be hugely obstructive as funerals happen at short

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<sup>79</sup> s 5(2) Resource Management Act 1991.

<sup>80</sup> *Cook Islands Community Centre v Hastings District Council* [1994] NZRMA 375.

<sup>81</sup> At 379.

notice, unlike some of the events the Cook Islanders wished to have.<sup>82</sup> Despite Part 2 making a number of specific references to Maori spiritual concerns, but not to those of Cook Islanders, the Planning Tribunal had little trouble rejecting the resource consent, clearly prioritizing the Cook Islanders' values where it saw that their social and cultural wellbeing would be significantly affected, in particular addressing ss 6 and 8 by stating:

‘we were disturbed that these matters were addressed to us as a reason for setting to one side the cultural value of the Cook Islands Community’.<sup>83</sup>

Subsequent cases have had little trouble considering a range of community values that go unmentioned in ss 6 or 7, including public health,<sup>84</sup> providing work in an area with high unemployment,<sup>85</sup> and evidently the immense value of the game of cricket in the recent decision on Hagley Oval in Christchurch.<sup>86</sup> In some instances, the Environment Court has nominated developments to be of national significance regardless of whether or not they are related to matter in s 6. It did this in both the *Auckland Volcanic Cones* case and in *Trio Holdings*.<sup>87</sup>

This is not a problem in and of itself. The statute would likely be unworkable if these principled concerns could not be considered, and injustices may occur if significant cultural, social or economic concerns could be overpowered by less strong claims that simply happen to have the protection of being explicitly mentioned in ss 6, 7 or 8. The outcome is a system where values are considered once they are brought to the attention of a decision-maker by participants in the process, regardless of whether or not they can be explicitly attached to a principle in s 6 or 7. The cost of this is the hierarchy between the other sections in Part 2: it makes no sense for an unmentioned principle to be introduced as more important than a s 6 principle if a s 7 principle cannot be more important as well. This is a necessary consequence of having an

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<sup>82</sup> At 379.

<sup>83</sup> At 381.

<sup>84</sup> *Tainui Hapu v Waikato Regional Council* (ENC Auckland A063/2004, 10 May 2004).

<sup>85</sup> *Buchanan v Northland Regional Council* [2002] BCL 530.

<sup>86</sup> Judge Borthwick opens with “Cricket has been played at the Oval in Hagley Park for nearly 150 years. Until recently the Oval was home to the St Albans, Riccarton and Christchurch Old Boys Collegians cricket clubs. Playing host to both domestic and international fixtures, the Oval is a venue that is highly valued by persons who enjoy the game.” *Re Canterbury Cricket Association Inc* [2013] NZEnvC 184 at [1] – [2].

<sup>87</sup> *Auckland Volcanic Cones Society Inc v Transit New Zealand*, above n 68, at [35]; *Trio Holdings v Marlborough District Council*, above n 54, at 116. Note that both of these cases occurred before 2009, when the National Government introduced a procedure to deal with proposals of national significance: Part 6AA Resource Management Act 1991.



‘overall broad judgement’ test, as it should allow principles to be factored on the merits of the individual case.

More importantly, it affects whether or not the principles in the Act can be viewed as even an attempt at a comprehensive list, and calls into question whether this is possible or even a worthy endeavour. A key problem for the TAG was the fact that a number of considerations were not included in the current list of matters in ss 6 and 7, and that the concerns that were in the section did not adequately reflect the values of contemporary New Zealand. The above analysis suggests that it is pointless to attempt to include all the values that contemporary New Zealand may have with regards to resource management, especially when the purpose goes as wide as anything that enables social, economic and cultural wellbeing. The way the TAG seems to have viewed decision-making is as though the principles in ss 6 and 7 are predominant, treated especially favourably or possibly even the only principles that decision-makers consider.<sup>88</sup> None of these is true. They are also somewhat disingenuous in that they then introduce a relatively small and specific set of new principles.<sup>89</sup> If indeed there was a concern that a number of significant principles were under-valued, a wider consultation process on adding principles may have been called for. Regardless, the conclusion is that the problems the TAG report seeks to address most likely do not exist, as virtually any principle can be covered by s 5 regardless of whether it is also covered in the other sections in Part 2.

#### The Value of Sections 6 and 7 in the Act

The discussion above highlighted the fact that the predominance of s 5 in RMA decision-making allows the apparent statutory hierarchy, and the principles listed, to be cast aside when the facts of the case suggest there is an issue of higher importance. This calls into question the need for the list of principles in the first place, as presumably any of the matters in ss 6 and 7 could simply be raised as a part of either the ‘social, economic and cultural well-being’ of communities or as an aspect of the ecological principles in s5(2)(a) to (c).

The degree to which having a listed principle influences its importance in the mind of a decision-maker under the Act is hard to assess. Legally, the decision-maker must

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<sup>88</sup> Technical Advisory Group on RMA Principles, above n 8, at 19.

<sup>89</sup> At 10.

explain how the principles in s 6 have been recognised and provided for.<sup>90</sup> This ensures that key values cannot be ignored in the process. A logical extension of this view is that there is a greater risk of values being ignored or not considered if they are not included in the list of principles in Part 2. But ultimately this makes the principles a procedural rather than substantive direction to decision-makers: they cannot ignore principles, but can treat them as more or less important based on the facts before them.

One view could be that the principles act as a checklist, which must be considered by a decision-maker. This is supported by Environment Court judgements, in which the Court often goes through the list of principles related to the case at hand.<sup>91</sup> However, whether or not this actually affects the substantive content or rules in the plan is less clear, in a context of significant public engagement and representative decision-making. Some plans make explicit reference to s 5 in their objective without referring to the rest of Part 2 at all.<sup>92</sup> Others mix references to principles in ss 6 and 7 with reference to other policy objectives.<sup>93</sup>

I would like to suggest that the real impact of having a list of principles in ss 6 and 7 is to ensure that particular values, which may not be those of the majority or ordinary New Zealander, are given due weight in the decision-making process. The intuitive basis for this is that any value that is commonplace in the community making the decision will have little problem being considered under the Act: it will be raised in consultation or by a decision-maker at the time as being a matter of concern and a person in the position of making a decision should have little problem noting its importance. Examples may be the need for employment, proper urban infrastructure or the protection of places of particular local pride, such as a landform of unusual significance. A minority viewpoint, on the other hand, will not be obvious, may involve intangible considerations and most likely will be based on a value system

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<sup>90</sup> Section 6 Resource Management Act 1991. The English Courts have addressed what is required to discharge a duty to recognize material considerations: *R v Derbyshire City Council, ex p Woods* [1997] EWCA Civ 971 (Brooke LJ).

<sup>91</sup> Good examples of this can be seen in *Upper Clutha Tracks Trust v Queenstown Lakes District Council* [2012] NZENV 43 [66] – [71]; *West Coast Environmental Network Inc ("WCENT") v West Coast Regional Council*, above n 60 at [313] – [334] and *Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8 at [68] – [111].

<sup>92</sup> For example: Dunedin District Plan, Volume 1, Section 4 'Sustainability' and City of Auckland District Plan, Central Area Section, Part 3 'Resource Management'.

<sup>93</sup> See the Nelson District Plan, Chapter 9 'Suburban Commercial Policies'; Wellington City District Plan, Volume 1 Chapter 4 'Residential Areas'.

different to that of a regular person in the community where the decision is being made.

The clearest example of this occurring in the Resource Management Act is through the recognition of Maori spiritual values in ss 6 and 7, and the Treaty of Waitangi in s8.<sup>94</sup> In a number of cases intangible Maori values have been given consideration and influenced decisions. In *Te Runanga O Taumarere v Northland Regional Council*<sup>95</sup> a water discharge permit was denied consent on the basis that discharging water that had been used to clean people into the ocean before passing through land would offend local Maori to the extent that they would not fish in the water anymore, even though in fact the water had been treated and there would be no health concerns with the discharge.<sup>96</sup> Similarly, in *TV3 Network Services v Waikato District Council* resource consent for a television translator was denied as it would offend waahi tapu of the local iwi,<sup>97</sup> and notoriously in the *Ngawha* cases the Courts grappled with the difficulty of duly considering the existence of a taniwha as a ‘metaphysical being’ (although in that case the consent was allowed).<sup>98</sup>

This was clearly not the major motivation for the original drafting of the principles. They instead (understandably) state a set of principles that seem of clear importance in an environmental management statute, regardless of how likely they are to be at the forefront of public concern in any given decision. For example, the protection of outstanding natural landscapes stands out as an example of a principle that should be protected under the application of a s 5 test for sustainable management, because it would be identified by participants in the process (and decision-makers) as an extremely important element of New Zealand’s environment.<sup>99</sup> Other values, such as ‘the protection of the habitat of trout and salmon’<sup>100</sup> and ‘the effects of climate

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<sup>94</sup> Resource Management Act 1991.

<sup>95</sup> *Te Runanga O Taumarere v Northland Regional Council* [1996] NZRMA77.

<sup>96</sup> At 92.

<sup>97</sup> *TV3 Network Services v Waikato District Council* [1998] 1 NZLR 360.

<sup>98</sup> *Friends and Community of Ngawha Inc. v Minister of Corrections* [2002] NZRMA 401 (HC).

<sup>99</sup> This depends upon whether the group of people interested in environmental issues engage in the decision-making process. There is significant evidence that the Environmental movement is well-organised and engaged: See *Summary of Submissions: Improving Our Resource Management System* (Ministry for the Environment, 2013) and case law indicates that many appellants are environmental organizations, for example in *Outstanding Landscape Protection Society Inc v Hastings District Council*, above n 91; *West Coast Environmental Network Inc ("WCENT") v West Coast Regional Council*, above n 60; *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 61.

<sup>100</sup> s 7(h) Resource Management Act 1991.

change<sup>101</sup> require a more sophisticated consideration of the consequences of the use of land and the groups affected by them, and are arguably more likely to be overridden by other concepts in a holistic ‘judgement’ test.<sup>102</sup> It is worth noting that this approach to the role of the principles would require legislators to determine and include the ‘minority’ values they felt may be under-valued and include them on that basis.

It was a significant concern of the TAG report that principles concerning economic development (represented in the new principles in the proposed changes) would be inadequately weighed in the overall broad judgement test as the principles currently in Part 2 pertain more to ecological and cultural interests.<sup>103</sup> Taking the conclusion of my discussion above, this can only be true if they are principles that would not be thought of or weighed appropriately without being included as principles in Part 2. The *Auckland Volcanic Cones* case is illuminating here. Despite the fact that Mt Roskill was deemed an outstanding natural landscape of national importance, the Environment Court still found both that the road itself was of national economic importance as a piece of infrastructure, and also that a shifting of the road would have consequences for the day-to-day life of the local community (for example by obstructing access to a local school), providing an overpowering reason not to shift the construction of the road.<sup>104</sup> To say that in this instance the current hierarchy of the values, or the lack of more development-focused values, had any adverse impact (or indeed any impact at all) on the decision-making process would simply be wrong. Council plans also make specific mention of economic issues in their policy concerns which carry over into rule development,<sup>105</sup> most likely because economic issues are raised in the participation process.

The major value concern that may currently be treated of lesser importance by Courts and in the ‘overall broad judgement test’ is peoples’ right to make use of private property as they see fit, as the nature of the RMA as a public decision-making statute

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<sup>101</sup> s 7(i).

<sup>102</sup> Examples of the Courts grappling with how to take climate change into account can be seen in *Greenpeace New Zealand Limited v Genesis Power Ltd* [2008] NZSC 112 and *West Coast ENT Incorporated v Buller Coal Limited* [2013] NZSC 87.

<sup>103</sup> Technical Advisory Group on RMA Principles, above n 8, at 18.

<sup>104</sup> *Auckland Volcanic Cones Society Inc v Transit New Zealand*, above n 68, at [54].

<sup>105</sup> See District plans referenced above n 92 and 93.

means that public concerns can over-ride an individual's private interest.<sup>106</sup> Both the TAG and the Ministry for the Environment have stated a desire to incorporate better recognition of private property rights into decision-making,<sup>107</sup> however the current proposal is not a new principle per se, but the inclusion of s 7(d) in the 'Methods' section, a somewhat out-of-place statement that private property rights should not be restricted in a way that is more than necessary to fulfill the purpose of the Act.<sup>108</sup> This leaves an Act with no apparent principled recognition of the importance of private property rights, and maintains community values as the over-riding concern in Part 2 of the Act. Whether this is reflected in the changes to public participation under the Act will be discussed in the second part of this dissertation.

### Conclusion

The TAG and Government are advocating reform on the basis that they feel the overall broad judgement test, and the environmentally-laden principles in Part 2 of the RMA, create a scenario where other values, which more properly reflect the values of contemporary New Zealand, are being under-weighted in decision-making. Opposition to the changes focuses on the environmental principles being taken away as they feel that the protections they ensure will no longer exist. In fact both sides are missing the reality of the overall broad judgement test: the principles in ss 6 and 7 are not superior to other values, and their absolute protection is by no means guaranteed just because they are listed in the Act. In fact, virtually any principles can be encompassed in the application of the 'sustainable management' purpose. The values to be considered in decisions under the Act do not arise from the words of the Act itself: they are a consequence of participation, not of law.

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<sup>106</sup> The Courts have found that the provisions of the Act take precedence over property rights at common law: *Falkner v Gisborne District Council* [1995] 3 NZLR 622 at 30.

<sup>107</sup> Technical Advisory Group on RMA Principles, above n 8, at 51; Ministry for the Environment, above n 10, at 12.

<sup>108</sup> Ministry for the Environment, above n 10, at 14.

## **2. The Type of Decision-Making in the Resource Management Act**

Chapter One considered the interpretation of Part 2 of the RMA and whether or not this reflected TAG's perspective on decision-making under the Act. This chapter will rely on large portions of that discussion to ask answer a different question: what type of decision-making is occurring under the Resource Management Act?<sup>109</sup>

### **'Legal Decisions' versus 'Political Decisions' as a spectrum of decision-making**

For a long time in public law the courts have insisted that it is not their role to make 'political' decisions, and that the realm of the courts is to adjudicate over issues of law.<sup>110</sup> It is not too much of a step to see this is as an exercise in drawing a line in a spectrum between 'purely legal' decisions (if such a thing can exist) and 'purely political decisions'. Many decisions will involve elements of both, however at a certain point a decision is seen as too political for a court of law to adjudicate over it.<sup>111</sup>

I will use a simple example to indicate the difference. On the one hand, you have the decision as to whether or not someone is guilty of drink driving. The evidence shows that a person definitely had blood alcohol content above a certain amount: the judge is then obliged to find them guilty. It is a very simple application of a rule with simple, clear criteria for doing so. It is a 'legal' decision. On the other hand, you have the choice by Parliament to set the blood alcohol limit while driving. Reducing the limit will probably make roads safer and lower the chances of crashes; it will also impose an extra requirement on people who want to go out to drink, and also may end up with people being punished or unable to drive who pose no danger if they do so. This is a

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<sup>109</sup> This has been done before. At the Act's inception Janet McLean described the lack of legal guidance in the Act: Janet McLean "New Zealand's Resource Management Act 1991: Process With Purpose?" (1992) 7(4) 1992 538, and subsequent writers have addressed the policy-laden nature of decision-making: R Somerville "A Public Law Response to Environmental Risk" (2002) 10 Otago LR 143 and Stephen Rivers-McCombs "Planning in Wonderland: The RMA, Local Democracy and the Rule of Law" (2011) 9 NZJPL 43. These writers point directly at the discretionary nature of decisions under the Act: This dissertation treats the question as one of where decisions fit on a spectrum.

<sup>110</sup> Lon Fuller "The Forms and Limits of Adjudication" (1978) 92(2) Harv L Rev 353 at 355; the most notable New Zealand case authority is *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA), where the Court of Appeal stated 'There comes a point where public policies are so significant and appropriate for weighing by those elected by the community for that purpose that the courts should defer to their decision...' at 546.

<sup>111</sup> The analysis in this chapter derives from concepts of what is 'justiciable' in public law. See Geoffrey Marshall "Justiciability" in A. G. Guest (ed) *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford University Press, London, 1961).

value judgment with broad social application that the decision-maker has to make. This is a 'political' decision.<sup>112</sup>

Administrative law has historically wrestled with these concepts as a binary rather than a spectrum.<sup>113</sup> This has been necessary in a realm where the scope of judicial review of administrative action needs to have a dividing line in terms of what is amenable to be reviewed by the courts.<sup>114</sup> In the formation of legislation which delegates decision-making power, the spectrum is more useful as a tool to assess the degree to which there should be provision for public participation in decision-making. The nature of the decision being made has affected the degree to which courts investigate the merits of decisions. Historically, the merits of decisions would only be addressed if there was "something overwhelming"<sup>115</sup> or "irrationality"<sup>116</sup> in the decision. Modern judicial review recognizes a sliding threshold for the intensity of review, depending on a number of factors related to the case, in particular when it may involve an interference with human rights.<sup>117</sup> While the courts have been comfortable stating which decisions may be 'high policy' or obviously political decisions,<sup>118</sup> there is certainly no settled definition of what a 'political decision' is.

There are a number of factors that can be attributed to political, rather than legal, decision-making. A purely legal decision can be characterized as a simple application of a clear rule to facts. Aspects of a decision that make it more values-laden will make it more political. This starts with the interpretation of the meaning of a rule where it is ambiguous: at the point where we need to select between different plausible interpretations and look to justifications for them, values become engaged in the decision-making process.<sup>119</sup> Decisions that involve making predictions of future

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<sup>112</sup> This is not to be confused with a decision that should be determined *by a political branch of Government*, as mentioned in Rivers-McCombs, above n 109 and Sir Kenneth Keith QC "Policy and Law: Politicians and Judges (and Poets)" in B D Gray and R B McClintock (eds) *Court and Policy: Checking the Balance* (Brooker's Ltd, Wellington, 1995).

<sup>113</sup> In British legal systems the term 'political' is less common. Terms such as 'a decision of high policy' may be used instead: Peter Cane *Administrative Law: Fourth Edition* (Oxford University Press, Oxford, 2004) at 55.

<sup>114</sup> At 54.

<sup>115</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230.

<sup>116</sup> *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537.

<sup>117</sup> James Palmer and Kate Wevers "Judicial Review in a Commercial Context" (2009) NZLJ 14.

<sup>118</sup> M. C. Harris "The Courts and the Cabinet: Unfastening the Buckle?" (1989) PL 251 at 279.

<sup>119</sup> The Hon. Sir Anthony Mason "Legislative and Judicial Law-Making: Can we Locate an Identifiable Boundary?" (2003) 24 Adel L Rev 15. Many legal thinkers believe there are correct ways to make these judgements: See Ronald Dworkin *Taking Rights Seriously* (Gerald Duckworth and Co Ltd,

impacts will immediately engage the issue of what we should want to happen, but importantly in RMA decisions, what risks we are prepared to take.<sup>120</sup> Any decision involving the formation of rules that establish obligations on people necessarily involves political considerations.<sup>121</sup> What is by its nature political can therefore be crystallized into the point we consider what a rule or state of affairs should be, not merely what it is. Additional factors include the quantity of people affected by the decision, when the decision has particularly severe impacts on the people in question, and when the outcome of the decision is very broad, engaging questions of overall direction and national or regional priorities rather than individual circumstances.<sup>122</sup>

The degree to which Courts are making political decisions, rather than decisions of legal fact, is the defining issue in the clash between legal positivists and realists.<sup>123</sup> A common positivist claim is that while laws may embody values and although decisions about what the law is have principled consequences, there are nevertheless answers at law for all questions that are faced by the Courts.<sup>124</sup> A key characteristic of political decisions is that the answers are not to be found in legal precedent or written on paper; they are philosophical or based on popular opinion, or may have no right answer at all.<sup>125</sup>

However, the relevant point is not whether the courts make political decisions, or even whether they are suitable forums for political decision-making. Modern statute gives the Courts discretion to make value judgements,<sup>126</sup> define rights and interpret statutes according to how they best accord with them,<sup>127</sup> and legal decisions at the highest level can have significant consequences for how people, businesses and communities carry out their day-to-day lives, particularly in the development of new

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London, 1977) and H L A Hart *The Concept of Law* (Clarendon Press, Oxford, 1961) for some nifty ideas on the matter.

<sup>120</sup> Somerville, above n 109 at 144.

<sup>121</sup> Rivers-McCombs, above n 109 at 47; Jeremy Waldron "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346 at 1386.

<sup>122</sup> Lon Fuller termed these elements the 'polycentric' elements of the decision: Fuller, above n 108. Also see Cane, above n 110, at 55-58.

<sup>123</sup> Compare Mason, above n 119 to John Smillie "Who Wants Juristocracy?" (2006) 11 Otago LR 183.

<sup>124</sup> Hart and Dworkin have competing approaches.

<sup>125</sup> Cane, above n 110, at 55.

<sup>126</sup> A good example s 4 Care of Children Act 2004, which gives the Family Court the power to determine the 'Children's Welfare and Best Interests'. Extensive discussion for the New Zealand context can be found in Michael Taggart, 'The Law-Making Power of the Judiciary' in Philip Joseph, ed. *Essays on the Constitution* (Brooker's, Wellington, 1995).

<sup>127</sup> New Zealand Bill of Rights Act 1990.



strands of common law.<sup>128</sup> In other jurisdictions, Courts are given the power to strike down laws that are unconstitutional, in some instances on the basis of the policy consequences of those laws.<sup>129</sup> What a political decision is should be considered separate from what a decision appropriate for an adjudicative procedure is. Decisions involving values, or even rules of broad application, may be made in a context of adjudication. The spectrum is merely illustrative of different forms of decision-making: they may be carried out by various types of decision-makers, in various forums and with various procedures. It will be my argument that the unifying feature is an expectation of greater public participation with more political decisions.

### RMA Decision-Making

Decision-making under the RMA is not “purely legal”. It is done in a legal environment, at least by the stage that decisions are being made in the Environment Court. The Court is a court of record in the New Zealand judicial system, with presiding judges, environmental lawyers playing advocacy roles, and decisions being made according to a systematic procedure.<sup>130</sup> It is concerned with the application of an Act of Parliament. It is worth noting from the outset one distinctive feature of the Environment Court from other Courts of law: The Court of Appeal has determined that its substantive decisions do not have precedent effect.<sup>131</sup>

The TAG describes the Resource Management Act as ‘principles-based law’ on the understanding that it sets out high-level principles and objectives as an alternative to prescriptive rules that set out the law for every situation that may arise.<sup>132</sup> The problem with this description of decision-making is, as can be taken from the first Chapter of this dissertation, the purpose statement of ‘sustainable management’ can incorporate virtually any set of principles that fit within the interests of communities. This means it is less a guiding principle and more a statement that decisions are made in the general public interest.

The consequence of this is that Part 2 does not provide a comprehensive set of principles to be considered, and the inclusion of some does not exclude others. This is

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<sup>128</sup> For example, in recent moves towards recognising different forms of privacy torts: Simon Connell “Intrusion upon Seclusion” (2012) NZLJ 315; Mason, above n 119 at 35.

<sup>129</sup> Waldron, above n 121.

<sup>130</sup> Part 11 Resource Management Act 1991.

<sup>131</sup> *Dye v Auckland Regional Council* [2001] NZRMA 513 at [32].

<sup>132</sup> Technical Advisory Group on RMA Principles, above n 8, at 41.

in contrast to other areas of principles-based law, such as the Official Information Act<sup>133</sup> or the balancing test for exclusion of improperly obtained evidence in the Evidence Act 2006,<sup>134</sup> which, while it does include the statement ‘among any other matters’, nevertheless contains a list of criteria that is close to comprehensive, and as a consequence is likely to limit the addition of further criteria to the test.<sup>135</sup> They are also much more specific in content than the principles in ss 6 and 7.<sup>136</sup> The RMA can be viewed as further to the ‘political’ end of the spectrum than these other forms of principles-based law.

In fact, the principles are so vaguely worded that the Environment Court is in a position where it determines their very meaning. It did this most notably in *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council*,<sup>137</sup> where a criteria for what made a landscape ‘outstanding’ were established, including a set of factors from ‘natural science factors’ to ‘transient values’ to ‘its values to tangata whenua’.<sup>138</sup>

To make this clearer, it is worth showing that the capacity for the Environment Court to determine the meaning of the principles in the Act will affect the impact of the new principles that the Government wishes to introduce. A couple of examples highlight this. Firstly, the new proposed principle s 6(k) ‘the effective functioning of the built environment including the availability of land to support changes in population and urban development demand’<sup>139</sup>. On the one hand, this appears to support a reasonably simple idea: that plans and consents should reflect the need to increase availability of land for more building construction, probably to ease high housing prices in inner-city areas. This is supported by the explicit inclusion of ‘urban expansion’ in earlier drafts

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<sup>133</sup> Part 1 Official Information Act 1982

<sup>134</sup> s 30(3) Evidence Act 2006.

<sup>135</sup> This is based on a plain reading of the section. The fact that the considerations in s30 pertain to a specific set of circumstances allows them to encompass more detailed circumstances. There is certainly still discretion in both of these statutes, and limited capacity for other considerations: See *Hamed v R* [2011] NZSC 101 at [201] for consideration of the importance of the evidence to the police case, an unlisted matter.

<sup>136</sup> The crucial aspect is that the Acts I am using as examples (the Official Information Act and Evidence Act) have nothing to compare to the s 5 over-ride: the principles must actually be weighed against each other rather than considered elements of a broader ‘sustainable management’ test. See Official Information Act, above n 133, and Evidence Act, above n 134.

<sup>137</sup> *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* [1999] NZRMA 209.

<sup>138</sup> *Wakatipu Environmental Society Incorporated and ors v Queenstown-Lakes District Council* [2000] NZRMA 59 at 61. The court will probably have less power over natural landscapes under the changes which determine that they must be ‘specified’: *Resource Management: Summary of Reform Proposals 2013* at 13.

<sup>139</sup> Ministry for the Environment, above n 10, at 13.

of the section.<sup>140</sup> However, there is a school of thought that believes urban expansion, particularly increasing sprawl and ever-expanding city limits, can never create an effectively functioning built environment.<sup>141</sup> This school of thought would advocate an interpretation of the principle to support easing height restrictions on inner-city buildings in order to allow for medium density housing as an alternative.<sup>142</sup> This would allow for greater access to housing (the primary goal attached to the aim of ‘urban expansion’) and is supported by evidence suggesting that much closer management of urban expansion is needed for there to be an ‘effective’ urban environment.<sup>143</sup> An additional view would state that medium-density housing would affect the quality of life of people already in the locations being considered, as it would make for less spacious living and less sunlight on peoples’ homes.<sup>144</sup> The true meaning of this principle is not in any way clear: several different attitudes towards it could be raised, requiring decision-makers to interpret the meaning of the principle in a similar manner to how they had to define the meaning of an ‘outstanding natural landscape’. It could be interpreted in such a way that is contrary to the apparent intentions of the legislators, depending on what the Court was convinced was more in line with ‘sustainable management’ in a particular case.<sup>145</sup>

A different set of problems could arise with the final new ‘method’ in s 7(d), which is to ‘ensure that restrictions are not imposed under this Act on the use of private land

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<sup>140</sup> Technical Advisory Group on RMA Principles, above n 8, at 11.

<sup>141</sup> The issue has been raised as a defence of urban metropolitan limits: for example see *Papakura District Council v Ballantyne* HC Auckland CIV 2006-404-3269 (20 December 2007; at [50] – [64]. Dr. Wayne Batchis "Suburbanization and Constitutional Interpretation: Exclusionary Zoning and the Supreme Court Legacy of Enabling Sprawl" (2012) 8 Stanford Journal of Civil Rights and Civil Liberties 1.

<sup>142</sup> For more see Jeremy R Meredith "Sprawl and the New Urbanist Solution" (2003) 89 Va L Rev 447 and John R Nolon "Golden and Its Emanations: The Surprising Origins of Smart Growth" (2003) 35 The Urban Lawyer 15. For a New Zealand perspective see Jessica Irvine "A Changing Climate for Urban Design: An Examination of the New Zealand Regulatory Approach" (2008) 12 NZJEL 277.

<sup>143</sup> Patrick Gallagher "The Environmental, Social and Cultural Impacts of Sprawl" (2001) 15 Natural Resources and Environment 219. This is not to say there is no debate on the costs and benefits of low-density housing. For comprehensive discussion of the history of the ‘sprawl’ debate in America, see Robert W Burchell and Naveed A Shad "The Evolution of the Sprawl Debate in the United States" (1999) 5(2) Hastings West-Northwest Journal of Environmental Law and Policy 137.

<sup>144</sup> These kinds of concerns were raised in submissions on the Auckland Unitary Plan: *Summary of Residential Zones Feedback Report* (Auckland Council, 2013).

<sup>145</sup> The Courts are reluctant to use Parliamentary debates as an aid to interpretation, and certainly do not see them as an overwhelming influence on statutory interpretation: The Court states that Hansard is only to be used in ‘exceptional circumstances’ in *Wellington International Airport Ltd v Air NZ* [1991] 1 NZLR 671 at 28. It is clear that the interpretation of sustainable management went against statements by Simon Upton in Parliament in the RMA’s third reading: B V Harris "Sustainable Management as an Express Purpose of Environmental Legislation: the New Zealand Attempt" (1993) 8(1) Otago LR 51 at 59.

except to the extent that any restriction is reasonably required to achieve the purpose of this Act'.<sup>146</sup> Previous proposals for reform included the less clear 'achieve an appropriate balance between private and public interests in the use of land'.<sup>147</sup> This is somewhat out of place in the 'Methods' section as it clearly embodies a principled concern of the fair protection of property rights set against the public interest in sustainable management. It is unclear how this principle relates to the Principles in the new s 6, as any one of them could be used as a justification to over-ride private interests in land.<sup>148</sup> In addition, the new test clearly defers back to the purpose of the Act, meaning that the need for private interests to be respected is entirely subject to the meaning of 'sustainable management' in the instant case. This means it doesn't provide any clear mechanism to protect against any of the supposed threats that exist to private interests in the Act. The only way it could would open up the prospect of much wider considerations of what is a justified intrusion on private property: entire schools of political philosophy are dedicated to this question,<sup>149</sup> meaning if that inquiry was conducted it would be very difficult to predict where the line would be drawn. Regardless, the current wording gives significant discretion to the Environment Court to establish the point at which restrictions on private land become 'unnecessary'.

Although I have used these examples to illustrate the way in which decision-makers make significant values judgements in their decisions under the Act, there is an important additional conclusion: the TAG's aim of clarifying uncertainties in the Act<sup>150</sup> is unlikely to be realized in the changes they have introduced. There will be a period of litigation to determine the influence of the new provisions, and also how

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<sup>146</sup> This is subject to final drafting requirements, which may make the meaning of the provision clearer.

<sup>147</sup> Ministry for the Environment, above n 7, at 38.

<sup>148</sup> The basis for the TAG drafting the new requirement was in concerns over 'unnecessary over-regulation' (which is implicitly guarded against already under the requirements of councils when developing plans in s 32 of the Act: s 32(3) "An evaluation must examine... the extent to which each objective is the most appropriate way to achieve the purpose of this Act."). Provisions they thought over-reached into private property rights include a series of apparently absurd regulations, such as visual streetscape rules for parts of homes not facing the street, blanket protection on all houses built prior to 1940, and 1.2 limits on heights of front fences. All of these provisions could presumably be removed under the plan change provisions in the Act if indeed they do not promote the new meaning of sustainable management in any way. Potentially the newly proposed 'national planning template' (see Chapter 4) will prevent this kind of regulation as well.

<sup>149</sup> A good summary can be found in David Grinlinton and Prue Taylor (eds) *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff Publishers, Leiden, 2011).

<sup>150</sup> Technical Advisory Group on RMA Principles, above n 8, at 37.

they relate to the old set of principles in the Act. The place of private property rights may take some time to clarify under the current wording. The cure they have proposed to Part 2 is unlikely to work precisely because the concept of legal certainty cannot apply to decision-making that is by nature political. A much more directive set of rules would be necessary for that outcome to occur.<sup>151</sup> If anything, decisions under the Act must become more political and more discretionary, as any hierarchy that previously existed is being abolished. Additionally, the new principles are more likely to conflict with the ones being retained (considering that they are focused on development rather than environmental preservation). The immediate period of litigation after the introduction of the new principles will involve particularly political decisions to be made, as there will be scope for the Court to define precisely what the new principles are to mean.

There are a set of further reasons why RMA decisions are more accurately described as political. Firstly, the plurality of principled concerns is an issue that distinguishes RMA decisions from what could reasonably be described as principles-based law,<sup>152</sup> and indeed from regular decisions that the courts must face, which usually raise a single principled clash based on the competing interests of the parties.<sup>153</sup> RMA decisions can involve a range of potential values coming into conflict. Wind farm cases are an example of decisions that raise concerns on multiple levels.<sup>154</sup> The public need for electricity generation, the benefits from renewable energy generation and even potential local employment could be factored into the decision, while in opposition farms have been proposed on outstanding natural landscapes,<sup>155</sup> and could also impinge on the relationship between tangata whenua and the land, or simply affect the amenity value to the environment in which a local community lives.

Further confounding the difficulty of these interests is that the principles may be

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<sup>151</sup> The TAG did acknowledge that principles-based law can be uncertain: at 42.

<sup>152</sup> These different terms should be viewed as describing different points on the spectrum. Law which depends on principles can have a set of specific requirements, as in the Official Information Act or Evidence Act, or much broader statements on policy. For more see R. Grant Hammond "Embedding Policy Statements in Statutes: A Comparative Perspective on the Genesis of a New Public Law Jurisprudence" (1982) 5 Hastings Int'l & Comp L Rev 323.

<sup>153</sup> Fuller, above n 110.

<sup>154</sup> Examples include *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482; *Meridian Energy Ltd v Hurunui District Council*, above ; *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541.

<sup>155</sup> *Outstanding Landscape Protection Society Inc v Hastings District Council*, above n 91.

difficult or impossible to reconcile. High Court Justice J G Fogarty has made the following statement:

‘The truth is that there is an inherent conflict between conservation and development which no words can resolve.’<sup>156</sup>

The impact for a decision-maker is that there is not so much a ‘balancing test’ or ‘weighting’ of principles to be conducted, but they are placed in a position where one principle must be selected over another. In some cases this may seem to be simple: there may be significantly more impact to one set of values than the impact to the alternative set. However even this rests upon the judge stepping outside of any legal considerations and adopting a principled valuation system to assess the degree to which one value is ‘more affected’ than the other in the instant case.

This becomes even more complicated in cases where the decision is not an ‘easy’ one, and instead involves a direct clash of significant interests. This often occurs in resource consenting decisions, where there is a particular source of local opposition to development. An example of this is the recent case of *West Coast Environmental Network Inc ("WCENT") v West Coast Regional Council*,<sup>157</sup> which involved a decision to grant consent for a coal mine (worth a significant amount in economic terms) on the almost pristine Denniston Plateau on the West Coast of the South Island. The Court placed significant weight on offers of environmental compensation making up for the losses on the Plateau.<sup>158</sup> Although the compensation offered was significant, it would be hard to say that those in favour of preservation of such a unique environment could ever feel compensated by protection of an environment elsewhere: That kind of utilitarian compromise it as odds with the concept of an intrinsic value to a unique environment.<sup>159</sup> The final Denniston decision will have to involve the selection of one principle to maintain, while the other necessarily (and absolutely) loses out. The cases that have considered Maori interests but ultimately allowed resource consents face precisely the same problem: the case is decided in favour of one value entirely, as the

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<sup>156</sup> J G Fogarty "Giving Effect to Values in Statutes" (Paper presented at the New Zealand Law Society Seminar, 2001) at 23.

<sup>157</sup> *West Coast Environmental Network Inc ("WCENT") v West Coast Regional Council*, above n 60.

<sup>158</sup> At [208] – [250].

<sup>159</sup> Stephanie E. Curran "The Preservation of the Intrinsic" (2005) 9 NZJEL 51 at 64.

other one is entirely lost.<sup>160</sup>

### Conclusion

The fact that decision-making under the Act involves the ability to consider any values, determine what the meaning of those values are, and then select one to be preferred in any given case makes RMA decision-making demonstrably more political than legal. RMA decision-making involves the hearing of cases based on values to be brought forward to a local authority or Court, and then a values-based decision to be made. Although our resource management system may be incorporated into our judiciary and bear resemblance to law, it is really a case of Parliament delegating political responsibility to local authorities and the Environment Court, with the strongest legal requirement to consider a list of principles in Part 2.

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<sup>160</sup> See *Tainui Hapu v Waikato Regional Council*, above ; *Friends and Community of Ngawha Inc. v Minister of Corrections*, above n 98.

### **3. The Role of Public Participation in the RMA**

The need for public participation in decisions that affect the environment has been a source for significant discussion.<sup>161</sup> Conflicting views as to its necessity and desirability have existed in the past,<sup>162</sup> however by the time of the Act's creation it was agreed that a key principle of the legislation would be public participation in decisions under the Act.<sup>163</sup> Many of the recent and proposed reforms have been directed at a range of procedural aspects to decision-making under the Act. Virtually all of them have the impact of reducing the degree to which the public can engage with and influence decisions.<sup>164</sup> The previous Chapter explained that decision-making under the Act was by nature political. This Chapter will argue that as a consequence substantial public participation is necessary in the RMA.

#### **Why this Style of Decision-Making Demands Strong Public Participation**

At the beginning of the previous chapter I explained the concept of a 'spectrum' of types of decisions: at one end was a purely legal decision, and at the other was a purely political decision. Now imagine a parallel spectrum running alongside this one. At the 'legal' end of the spectrum, the public at large are not involved in decisions. The rule is what it says, and a judge can apply it without controversy. This is due to the question essentially being one of fact: what is the state of affairs, and whether or not the legal rule applies to them. At the political end, things are quite different. Before Parliament passes an Act, it is subject opposition scrutiny and then to a select committee stage where the public can make submissions for or against the decision.<sup>165</sup> At this stage new value considerations may be raised that Parliament and the drafters of the statute had not previously considered. To pass, the Bill must receive a majority vote of MPs. Ultimately, if the public does not like the decision, they have the option of voting for a different candidate or party at the next general election. At every stage

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<sup>161</sup> Robert Paehlke and Douglas Torgerson (eds) *Managing Leviathan: Environmental Politics and the Administrative State*, 2nd ed. (Broadview Press, Toronto, 2005) at 3.

<sup>162</sup> See Robert Paehlke "Democracy and Environmentalism: Opening the Door to the Administrative State" in Robert Paehlke and Douglas Torgerson (eds) *Managing Leviathan: Environmental Politics and the Administrative State* (Broadview Press, Toronto, 2005) for a seminal argument that environmentalism and democracy can go hand in hand.

<sup>163</sup> Geoffrey Palmer "The Making of The Resource Management Act" in *Environment - The International Challenge: Essays* (Victoria University Press, Wellington, 1995) at 146.

<sup>164</sup> See Chapter 4.

<sup>165</sup> Philip A Joseph *Constitutional and Administrative Law in New Zealand*, 3rd ed. (Brooker's, Wellington, 2007) at 313.



of the process, the public can participate, they can scrutinise the reasons for the decision, and the people who make it are ultimately accountable to them at the ballot box.

The proposition of this part of the chapter is that the more political a decision becomes, the more it demands active public participation in the process. The most political decisions are probably the decisions that determine the very political system we live in: our electoral system and the makeup of our constitution. Under this principle, they would demand widespread public engagement, lengthy submission processes, consultation with representatives of various groups and experts, and a final election requiring a strong majority to result in a constitution to be passed.<sup>166</sup> The next most political would be decisions of the broad direction of a country or region, commonly represented in general elections where different political parties compete and promote ideologies as indicators of the broad direction they would take the country in. The entire country is entitled to vote after a lengthy campaigning process (opening up the election to significant public scrutiny) and then each subsequent decision faces submission processes and scrutiny in Parliament.

The sources of this principle can be found in current elements of our constitutional framework. I have already mentioned the public scrutiny available for Acts of Parliament,<sup>167</sup> which are buttressed by requirements for the use of urgency.<sup>168</sup> Parliament itself allows for several stages of debate around laws,<sup>169</sup> and gives space for questions of Government to ensure further information about day-to-day political decisions is available.<sup>170</sup> We have a tradition of referenda as a first step to electoral reform,<sup>171</sup> and with the advent of MMP have ensured recognition of political parties and anti-defection rules to protect the proportionality of parliamentary representation.<sup>172</sup> The Official Information Act ensures the availability of information

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<sup>166</sup> For analysis of public participation in the development of constitutions see Vivien Hart *Democratic Constitution Making* (United States Institute of Peace, 2003) and James S. Fishkin "Deliberative Democracy and Constitutions" (2011) 28 *Social Philosophy and Policy* 242. New Zealand's own constitutional review has accepted the need for broad consensus and public discussion: Cabinet Paper, 'Consideration of Constitutional Issues' (8 December 2010) CR Cab Paper 8.12.10 at [12].

<sup>167</sup> Joseph, above n 165, at 313.

<sup>168</sup> Parliamentary Standing Order 54(3)

<sup>169</sup> Joseph, above n 165, at 313.

<sup>170</sup> At 325.

<sup>171</sup> At 341.

<sup>172</sup> At 346 and 351.

so that the public can participate.<sup>173</sup> Individuals and organisations are able to review decisions of Government on the basis of denying natural justice, inadequate consultation or a denial of legitimate expectations to be included in the decision.<sup>174</sup>

There are also philosophical reasons to demand public participation in Government. The founding justifications can be sourced in two principles: legitimacy and outcome.<sup>175</sup> Participation adds legitimacy to a decision as it ensures that the people who are affected were at least capable of expressing their views and (ideally) having them heard and fairly considered. Participation has also been viewed as resulting in better decision-making, as a wider variety of ideas and concerns are canvassed, increasing the information available in making the decision (both in terms of factual information and the values of the people affected).<sup>176</sup> The more ‘political’ a decision, the more important both of these become. A decision-maker must justify the legitimacy of a difficult value judgement by making interested parties feel their position on the question of value has been adequately heard. They must also ensure they have all relevant information to ensure that the decision has been made on a sound basis.

### The Rationale for Reducing Public Participation

A number of the changes being made to the Act reflect a preference for Central Government to have more power over decisions being made under the Act, reducing regional autonomy.<sup>177</sup> The primary justification for this is that there are particular

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<sup>173</sup> At 253 - 254.

<sup>174</sup> At 958 – 962.

<sup>175</sup> Well, almost. The extent to which participation is necessary for democracy was a cause of disagreement amongst twentieth century democratic theorists. See Carole Pateman *Participation and Democratic Theory* (Cambridge University Press, London, 1970). I use the concept of participation in a broad sense, which can include simple methods such as voting. Additionally, theorists would probably accept the usefulness of participation in delegated decision-making: Robert A. Dahl *Democracy and its Critics* (Yale University Press, New Haven, 1989) at 225 – 231. These principles can be drawn from John Stuart Mill "Considerations on Representative Government" in *On Liberty and Other Essays* (Oxford University Press, Oxford, 1991) 238 – 239 in his discussion of the supposed value of the all-knowing, perfectly virtuous despot. In Paehlke, above n 162, the author argues that public buy-in to environmental decisions is more likely with participation. These two principles are the ones the Waldron uses to attack judicial review of legislation in Waldron, above n 121.

<sup>176</sup> Legitimacy and Outcome overlap in many ways: Most likely people will feel as though a good outcome is more legitimate, and will feel a decision's outcome is better if they believe they were able to have their views considered in the process.

<sup>177</sup> Examples include the expanded powers of the Environmental Protection Agency in the first round of reform and the new national planning template for local authorities: See Part 6AA Resource Management Act 1991 and Ministry for the Environment, above n 10, at 6. The Government has

national aims which are better promoted through central, rather than regional, decision-making. At the moment these national goals centre around economic development and a desire for more affordable housing.<sup>178</sup> In future they could be quite different: developing more renewable energy power sources or changing urban planning to make cities more sustainable could be national policy priorities under a different Government.

The second justification is on the basis of efficiency. Even when purely political decisions are made under our democratic system we acknowledge that efficiency and cost concerns provide limits to participation in government.<sup>179</sup> If public involvement would stop any decision ever being made, it would make sense to limit it. The Ministry's discussion document describes resource management decision-making as 'cumbersome, costly and time-consuming',<sup>180</sup> and previous changes were aimed at 'frivolous and vexatious' submissions against applications for resource consents.<sup>181</sup> The question of what is the right of amount of public participation is therefore, to a degree, a relative one which involves issues of spending priorities and balance between the need for public engagement and a process which delivers results. However, as the previous discussion indicates, public participation should only be reduced in conjunction with increased legal oversight and guidance of the decision being made. Within a values-based system the least justifiable approach is increasing decision-maker discretion and reducing public participation at the same time.

### The Basic Requirement for Public Participation in the RMA

Engaging the public effectively in environmental decision-making is an issue that has become of worldwide interest since the last quarter of the twentieth century.<sup>182</sup> In his article "The Right to Participate in Decisions that Effect the Environment", Neil Popovic set out a holistic list of criteria for effective public participation in

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backed off on even greater powers for the Minister to change plans that are inconsistent with national goals.

<sup>178</sup> Reflected in New Zealand Government "Major reform of resource management system" (press release, 10 August 2013).

<sup>179</sup> For detailed discussion see Dahl, above n 175 at 225 – 231.

<sup>180</sup> Ministry for the Environment, above n 7, at 6.

<sup>181</sup> Ministry for the Environment *Reform of the Resource Management Act: Phase One Proposals* (Office of the Minister for the Environment, 2009) at 5.

<sup>182</sup> Barry Barton "Underlying Concepts and Theoretical Issues in Public Participation in Natural Resources Development" in Donald Zillman, Alastair Lucas and George Pring (eds) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, Oxford, 2002) at 77.

environmental decisions.<sup>183</sup> Other scholars have set out ideal ways to engage the public in an RMA-specific context.<sup>184</sup>

I will not focus on what would be an ideal system of public participation in the RMA or environmental decision-making. Instead, the spectrum I have proposed suggest that there is a baseline of expectation for participation in decisions based on their political content. In the RMA context, I would like to propose a simple minimum participation test connecting the requirements for public participation directly to the features of decision-making that make it political. The way in which decision-makers are to come to decisions under the Act is by considering a set of principles (which I prefer to refer to as ‘values’) and deciding which ones are the most significantly affected, and where necessary selecting between those values. As discussed in Part 1, it is also possible under the test for ‘sustainable management’ for virtually any value to be brought forward and treated as equal in principle when decisions are made, regardless of whether or not it explicitly features as one of the listed ‘matters’ in Part 2.

Taking the discretionary, values-laden nature of the RMA as a given, the next step is to ask what the basic requirements for public participation in this kind of decision-making are. This question is comparable to questions of minimum consultation requirements in judicial review.<sup>185</sup> However, the requirement in the RMA goes further than a right to fairness in procedure to a party who is affected by a decision: as it is a decision ostensibly in the public interest there must be an assurance that public values and viewpoints can be fairly considered in the process, not just where they stand against legal criteria or what facts arise in the circumstances. Accessibility and a right to present a perspective to the relevant decision-maker are therefore of utmost importance.

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<sup>183</sup> “(1) education about the environment and things that might affect it; (2) access to information (including the fact that information exists and is available); (3) a voice in decision-making; (4) transparency of decisional processes (by formal consideration of public input and explanation of how that input affected the decision at issue); (5) post-project analysis and monitoring, as well as access to pertinent information; (6) enforcement structures; and (7) recourse to independent tribunals for redress.” See Neil A. V. Popovic “The Right to Participate in Decisions that Affect the Environment” (1993) 10(2) *Pace Environmental Law Review* 683.

<sup>184</sup> See Elizabeth Toomey “Public Participation in Resource Management: The New Zealand Experience” (2012) 16 *NZJEL* 117.

<sup>185</sup> Discussion of criteria for consultation are in *Wellington International Airport Ltd v Air NZ*, above n 145.

Additionally, equal opportunity for representation of relevant interests is crucial. If this requirement is not met, then both the legitimacy of the decision and the outcome will be affected. The legitimacy aspect is clear: the group or individual unable to access the decision will not feel that Government takes into account their interests. The outcome effect is perhaps even more pernicious; in the RMA context, ‘sustainable management’ is defined according to the interests that are heard in the decision-making process. The wide array of values that would otherwise be considered according to the purpose and principles sections are narrowed to the values that are able to access decision-making. In other words, ‘sustainable management’ is defined according to the groups who can access the decision-making process. If the process does not allow for a wide range of concerns to be considered, then the conclusion should be that greater opportunity for public participation is required, or that decisions should be made more ‘legal’ through greater statutory guidance. As it stands, any part of the system that locks out a group from raising principled concerns under the Act would be failing to provide adequate public participation.

Part of the uniqueness to environmental decision-making comes from the fact that while decisions may involve a specific set of circumstances, they can nevertheless raise a number of principled clashes from a wide range of people. The example of a wind farm used above displays just this: despite the wide range of interests that can be raised in the decision, the issue is only raised when a specific set of facts arises. The outcome is that public participation is only effective in environmental decisions if it occurs locally: the wider the scale at which a decision is made, the more broad the principles at play become, and the more the people actually affected by the decision are locked out of the process.<sup>186</sup> Of course there is the additional factor that different parts of New Zealand have very different requirements for good environmental management. Prioritising development interests in Queenstown may have very different consequences to prioritising them in Auckland.<sup>187</sup> These factors support an additional requirement for strong local participation in decisions.

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<sup>186</sup> The need for strong local government participation can also be sourced from John Stuart Mill, who saw it as necessary for effective government. See Mill, above n 175, at 411.

<sup>187</sup> Clashes over development in Queenstown have led to some of the most controversial decisions by the Environment Court: see Rivers-McCombs, above n 109 at 50.

### Participation in the Resource Management Act: What it Looks Like Now

Plan-formation and applications for resource consents are the points in the Act where significant value judgements must be made. The creation of plans involves setting out policies and objectives, but more tangibly laying out the rules for activities involving the use of land, activities on the land, and discharges into water and air.<sup>188</sup> This makes them a form of legislation, and in the formation of them numerous principled questions arise, notably the extent to which the plan should protect the existing environment rather than make it easier to build and keep land prices low.

However, with the exception of ‘prohibited’ and ‘permitted’ activities,<sup>189</sup> the major consequence of a large number of planning rules is to impose a procedural requirement on people wishing to carry out activities involving the use of land, water and air, in the form of the resource consent application process. While this does place a burden on people wishing to carry out activities, it also means that major value-based decisions are not made solely at the planning stage, but when deciding whether to grant a resource consent. This is not altogether a bad thing: as a development can only be considered on its merits when it in fact arises, the planning stage is a less appropriate point to consider what developments may arise.

Being political decisions, both plan-making and resource consent decisions require the opportunity for public participation in the process. Currently, they both provide this opportunity. Schedule 1 of the Act places significant requirements for councils in publicly notifying and hearing submissions by interested parties in the plan-making process, and places specific requirements to consult certain groups.<sup>190</sup> There are rules strictly requiring either public notification or limited notification (to affected parties) if a resource consent will have certain affects on the environment,<sup>191</sup> and decisions not to notify can be appealed to the High Court.<sup>192</sup> Once notified, parties can participate through submissions on the proposal and in a hearing.<sup>193</sup>

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<sup>188</sup> Part 5 Resource Management Act 1991.

<sup>189</sup> The other categories are ‘controlled, restricted discretionary, discretionary and non-complying’, all of which are activities that can be performed with resource consents. See s 77A and Part 6 Resource Management Act 1991.

<sup>190</sup> Set out in Detail in Part 1, Schedule 1 Resource Management Act 1991.

<sup>191</sup> At ss 95A and 95B.

<sup>192</sup> Through normal judicial review processes: Derek Nolan (ed) *Environmental and Resource Management Law in New Zealand*, 3rd ed. (LexisNexis, Wellington, 2005) at 252.

<sup>193</sup> ss 96 – 103A Resource Management Act 1991.

This is not to say that public participation under the Act is an unqualified success. On the contrary, the Act's failure to effectively realise the ideal of community participation has been a significant source of criticism.<sup>194</sup> The first issue is in the efficacy of Local Government in engaging the public. In 1996, before any reductions to public participation in the Act had occurred, the Parliamentary Commissioner for the Environment consulted on the efficacy of public participation under the RMA.<sup>195</sup> Across 120 submissions a number of problems were raised, including lack of information about the process, equitable access to appeal, and failures of decision-makers to make proper use of public participation, including the failure to take certain interest groups into account.<sup>196</sup> Submitters commented that many of these problems could be resolved by more effective work by Councils.<sup>197</sup> More broadly, there is a significant body of evidence to suggest that public interest in Local Government at all is very low.<sup>198</sup>

The second source of criticism is the Environment Court itself. The court can hear *de novo* hearings on resource consents, and has the power to re-write sections of plans and policy documents despite being an unelected judicial body. Calls to reduce the powers of the Environment Court have been made in the past for precisely this reason, often invoking the doctrine of the separation of powers as an issue, as this is violated when the judiciary is given a political role.<sup>199</sup> Various other suggestions for reform have also been made to make the political role of the Environment Court more palatable.<sup>200</sup> It could also explain the complaints from both sides about the RMA, believing it to be inefficient law that represents values they disagree with, when in fact it sets up a process for political decision-making in a judicial forum. This creates the unusual situation of an adjudicator having the responsibility of assessing and coming to a conclusion on a decision on the basis of the public interest (embodied in

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<sup>194</sup> For a recent summary, see Toomey n 184.

<sup>195</sup> Toomey, above n 184.

<sup>196</sup> At 129.

<sup>197</sup> At 130.

<sup>198</sup> Although it varies between regions, voter turnout in elections is low and in many cases satisfaction with public participation processes is poor as well: Jean Drage *A Balancing Act: Decision-Making and Representation in New Zealand's Local Government* (Institute of Policy Studies, Wellington, 2008) at 123 - 164. This year's local body elections do not seem likely to show an improvement on this front: For a summary of this see Bryce Edwards "Politics Round-up: Why you shouldn't vote" (2013) <[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11134845](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11134845)>.

<sup>199</sup> Rivers-McCombs, above n 109.

<sup>200</sup> Royden Somerville QC "Submissions On: Striking the Balance - Appeal Processes - The Specialist Environment Court" (Submission to the New Zealand Law Commission, 2002); at 1 - 2; George Ruka and Catherine Iorns Magallanes "Environmental law or palm-tree justice?" (2009) NZLJ 185.

the concept of sustainable management), which is represented by the views of private parties.

This perspective is partly dependent on what type of public participation is deemed important under the Act. Public participation can be boiled down to three forms: popular participation, which occurs through voting; contributory participation, which may involve either competing arguments or deliberative discussion with some kind of adjudicator; and contestatory participation, which is the challenging of decisions made by Government.<sup>201</sup> The Resource Management Act incorporates aspects of all three. Popular decision-making comes in the form of elections for councils, which conduct the plan-making exercise.<sup>202</sup> Contributory decision-making comes in the form of public submissions on planning and consenting decisions, local authority hearings and also in appeals to the Environment Court which, being *de novo*, allow for the same process to take place.<sup>203</sup> Contestatory participation comes in the limited form of challenges on points of law to the higher courts (although we could also view appeals to the Environment Court as contestatory participation).<sup>204</sup>

Realistically, the most political decisions under the Act make the most significant utilisation of contributory participation, in the form of submission processes and hearings at both local authority level and the Environment Court. Contributory participation is conducive to a number of factors of RMA decision-making: it results in evidence-based decision-making (provided the adjudicators are competent) as there is an ultimate arbiter who makes a final decision; it allows for full consideration of specific fact scenarios; and it still provides for inclusion of wider views in the process.<sup>205</sup> It may have downsides in the form of the public not feeling as though their values decide the final decision, and also being time-consuming in ensuring that all views are properly canvassed and allowing full *de novo* appeals to the Environment Court where questions over the quality of the decisions by local authorities arise. A full evaluation of this style of participation in the process is beyond the scope of this dissertation: It would require an evaluation of the options of wider institutional reform. As it stands, the way the RMA provides for the public is through contributory

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<sup>201</sup> Peter Cane "Participation and Constitutionalism" in Claire Charters and Dean R Knight (ed) *We, The People(s): Participation in Governance* (Victoria University Press, Wellington, 2011) at 260.

<sup>202</sup> Part 4 Resource Management Act 1991.

<sup>203</sup> Part 6, Part 11 and Schedule 1.

<sup>204</sup> ss 299 – 308.

<sup>205</sup> Cane, above n 201, at 267 – 271.



participation: Changes to process must be assessed in terms of how they change the public's contribution.

#### **4. The Changes to Public Participation**

I now move from questions of principle back to discussion of the proposed reforms. Taking into account the principled requirement for participation established in the previous Chapter, I will now take a practical look at the three rounds of changes to the RMA by the Government and assess their likely impact on public participation in decisions under the Act.

##### **The Changes Since 2008**

The Government planned changes in the RMA to occur in three stages. The first stage came in 2009,<sup>206</sup> and introduced a number of reductions in public participation, including more punitive costs orders and reduced capacity for third parties<sup>207</sup> to represent the public interest has reduced the degree to which parties can litigate decisions, and some changes to planning processes and resource consenting.<sup>208</sup> These include extra requirements on further submitters, taking away the ability to challenge entire plans, and in the field of resource consents lifting the required impact on parties for limited notification and removing the statutory presumption of notification for resource consents.

These last two changes in particular have significant consequences in the historical context of public participation in the Act. Public participation has been regularly cited as one of the Act's key principles, particularly in cases where notification has been at issue.<sup>209</sup> It was most notably referenced in *Discount Brands Ltd v Westfield (New Zealand) Ltd*<sup>210</sup> where the Supreme Court emphasised the significance of public participation and ensuring parties had fair access to the process.<sup>211</sup> Removing the presumption of notification represents a principled shift away from public participation as a priority in RMA decisions.

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<sup>206</sup> Resource Management (Simplifying and Streamlining) Amendment Act 2009.

<sup>207</sup> This coincided with changes to the District Court Rules in 2009, which made it more difficult to change parties in a proceeding. Where previously a change could be made where it was 'desirable' to do so, it now must be 'necessary': Rule 3.35.8 District Court Rules.

<sup>208</sup> Toomey, above n 184.

<sup>209</sup> At 126.

<sup>210</sup> *Discount Brands Ltd. v Westfield (New Zealand) Ltd* [2005] NZSC 17.

<sup>211</sup> At [21], [25] and [46].

The second round of changes came in the form of the Resource Management Reform Bill 2012 (now enacted).<sup>212</sup> Two of the changes are particularly significant. The first is that it will compel local authorities to directly refer to the Environment Court ‘medium-sized projects’<sup>213</sup> which will be of a certain level of investment to be set in regulations by the Minister for the Environment.<sup>214</sup> Notwithstanding that this is a significant transfer of power in the resource consenting process from local authorities, the opportunity for direct referral may have the impact of locking out interests who would be better off included in the local authority stage. Participating in proceedings in the Environment Court is a significant cost,<sup>215</sup> certainly more costly than making a written submission and appearing at a hearing. The impact virtually guarantees that a set of people who would prefer to be heard in proceedings involving ‘medium-sized projects’ will instead be guaranteed to have no hearing at all.

The second change of importance is the proposed change to s 32.<sup>216</sup> This section sets out requirements for an evaluation of a proposed plan or policy statement. The current section requires an evaluation of ‘the benefits and costs of policies, rules or other methods’.<sup>217</sup> The change will introduce a number of additional requirements in this process:

“(2) An assessment under subsection (1)(b)(ii) must—

- (a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—
  - (i) economic growth that are anticipated to cease to be available; and
  - (ii) employment that are anticipated to be provided or reduced; and
- (b) if practicable, quantify the benefits and costs referred to in

<sup>212</sup> It passed its third reading on August 27 2013: New Zealand Government "Resource Management Reform Bill passes third reading" (press release, August 27 2013) .

<sup>213</sup> Clause 13 Resource Management Reform Bill 2012.

<sup>214</sup> Clause 61.

<sup>215</sup> David Grinlinton "Access to Environmental Justice in New Zealand" (1999) *Acta Juridica* 80 at 92. As Grinlinton predicted, the suggestions for reform have not been subsequently adopted.

<sup>216</sup> Clause 69. There were also public participation issues raised with the Auckland Unitary Plan process, for brevity I will not discuss those at this stage.

<sup>217</sup> s 32(4)(a) Resource Management Act 1991.

paragraph (a)...<sup>218</sup>

While this does have the advantage of added rigour to the development of plans, it necessarily shifts the process in favour of quantifiable economic interests, which will at the very least be better represented in evaluation reports that require further detail about them. This is pertinent where the section pertains to being about ‘environmental, economic, social and cultural effects’, directly connecting it to the purpose section of the Act. It is clear that the set of interests that can be encompassed in that statement go beyond the quantifiable and economic. The difficulty of the court in assessing the value of the relationship between tangata whenua and taniwha in *Ngawha* is just one real world example<sup>219</sup> which displays the inherent confounding factors in the exercise. Although attempts have been made to value the environment as an entity, this is practically difficult and still has gaps in terms of the values that can be assessed.<sup>220</sup> Cultural values are also not fully embodied in any outward economic expression: it comes in customs and ways of behaviour in people, or simply in their feelings of identity.<sup>221</sup> As a result, evaluations are likely to dedicate more attention to economic concerns than others, compromising the ability for certain values to be equally represented. This could potentially be remedied by reporting of qualitative assessments of the other impacts, although that may make the process much more difficult, lengthy and expensive.

The direction so far has been to reduce public participation under the Act. While I am assessing the new changes discretely, they must be viewed against a background of ongoing reductions in public participation up to this point.

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<sup>218</sup> Clause 61 Resource Management Reform Bill 2012.

<sup>219</sup> *Friends and Community of Ngawha Inc. v Minister of Corrections*, above n 98.

<sup>220</sup> Contingent valuation (or willingness-to-pay) is a commonly suggested method which has been substantially criticised: Frank A. Ward *Environmental and Natural Resource Economics* (Pearson Education, New Jersey, 2006). See also Rudiger Pethig (ed) *Valuing the Environment: Methodological and Measurement Issues* (Kluwer Academic Publishing, Dordrecht, 1994). It is also doubtful whether these methods would be successfully implemented by Local Government.

<sup>221</sup> Attempts to measure the economic value of culture have been made: Jeanette D. Snowball *Measuring the Value of Culture: Methods and Examples in Cultural Economics* (Springer-Verlag, Berlin, 2008). It may be possible in theory, but difficult in practice and at odds with the way in which peoples identify with culture as something intrinsic.

### The Proposed New Changes to Public Participation in Resource Consenting Decisions

The most detailed current proposals for changes are to the resource consenting process. The most significant change will be to restrict public submissions to the basis for notification set out in a local plan, rather than on all possible environmental effects of a proposed activity,<sup>222</sup> and consequently limiting grounds of appeal to the original content of the submission. The Law Society has pointed out a number of aspects to this change that pose problems.<sup>223</sup> Firstly, they make the point that Councils typically use a simple rule (such as a 0m height limit) to make notification compulsory where it may be controversial to perform an activity, and then allow the submissions process to inform them of the issues with the consent. Secondly, Councils often rely on submissions to become properly aware of all the issues around an activity. Finally, it restricts the information about a large number of environmental effects to the assessment of environmental effects (AEE) provided by the applicant, which is a compulsory document provided to detail predicted impacts of the activity on the local community and environment. While this in and of itself is an imperfect source of information, presumably it will place less of an onus to include content in the assessment of environmental effects, as there will be less of a need on the applicant to respond to a variety of concerns about the impacts their project will produce.

But most importantly, it has a crucial impact on who is able to raise questions of principle or value in the decision-making process. The Law Society's example of a height limit is useful to see how this works.<sup>224</sup> A Council may place a low height limit in an area so that all building resource consents must be notified. With the changes in place, height is the only issue on which submitters may comment. However, depending on the building being constructed, there may be a full variety of principled concerns that the building raises that genuinely impact on those people. The design of the building may have a negative aesthetic impact on the environment. It may be a building that raises cultural concerns for people in the area (much like the funeral parlour in *Cook Islands Community Centre*).<sup>225</sup> Under the changes, these principled concerns are locked out from consideration by a decision-maker. On the other hand,

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<sup>222</sup> The resource consent changes are laid out in Ministry for the Environment, above n 10, at 17 – 24.

<sup>223</sup> The New Zealand Law Society "Improving Our Resource Management System" (Submission on the Ministry for the Environment's Discussion Document, 8 April 2013); at 6 – 18.

<sup>224</sup> At 13.

<sup>225</sup> *Cook Islands Community Centre v Hastings District Council*, above n 80.

all the value concerns of the applicant are able to be considered in the process. This is hugely problematic in a statute that ostensibly allows for a wide range of concerns to be considered: although the ‘sustainable management’ purpose deems a wide range of impacts to be of importance to decisions, the process may lock out proper consideration of the negative impacts to be raised against the project. This means the Act will still be fundamentally weighted in favour of a certain set of values: the values of developers. In a general sense, it would be safe to predict that developers are less likely to value the conservation of wildlife, or the protection of Maori customary values in land, than groups and individuals opposing development.<sup>226</sup>

The key justification for these changes is that it will prevent frivolous or irrelevant submissions.<sup>227</sup> The Law Society points out that this is not clearly a problem under the status quo,<sup>228</sup> and there are a number of ways vexatious litigants are dealt with in the Act. The first is that the Environment Court has the power to award significant costs as a disincentive to vexatious litigants.<sup>229</sup> In addition, where certain considerations have been deemed vexatious in the past, they have been explicitly excluded in the statute. Specifically, the 2009 changes to the Act stopped opposition on the basis of trade competition as this was essentially deemed a value that should not be taken into account under the Act.<sup>230</sup> If there are particular grounds of opposition that are to be deemed vexatious, the same approach could be taken. As it is, the changes have the potential to lock out a wide range of submitters’ concerns in the resource consent process.

There are other changes to the resource consent process that reduce the ability for the public to influence decisions. The power to place conditions on consents will be reduced,<sup>231</sup> and there are several new process which will create new ‘non-notified’ categories of submission. The most notable of these is the significant change around

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<sup>226</sup> Apologies to any exceptions.

<sup>227</sup> Ministry for the Environment, above n 7, at 54.

<sup>228</sup> The New Zealand Law Society, above ; at 12.

<sup>229</sup> Introduced in the Resource Management (Streamlining and Simplifying) Amendment Act 2009. See Toomey, above n 193, at 136.

<sup>230</sup> Part 11A Resource Management Act 1991.

<sup>231</sup> Technical Advisory Group on RMA Principles, above n 10, at 23. In fairness, they still allow for any conditions that are related to ‘the adverse effects of that aspect of proposed activity on the environment’. As the environment is defined very broadly in s 2 of the Act, there is still wide discretion to impose consents. This raises independent questions about the efficacy of the change.

new proposed subdivisions.<sup>232</sup> Firstly, the present statutory presumption for subdivisions is that they are prohibited unless explicitly provided for in a planning instrument.<sup>233</sup> This presumption will be reversed. Secondly, only individuals with assets physically or directly attached to the subdivision (where the subdivision has been ‘anticipated’ in the relevant plan) will be notified. Again, this is inserting values and principles of resource management into the procedural aspects of decision-making. Some subdivisions can be large.<sup>234</sup> They can have significant environmental, aesthetic and lifestyle consequences for the people who live near them, not only the people with land connected to them.<sup>235</sup> The change increases the risk that these values will be left unconsidered by decision-makers. Importantly it affects what the new principle for ‘the effective functioning of the built environment’<sup>236</sup> will come to mean: as individuals who wish to subdivide have greater representation in the process, the principle will likely be interpreted in their favour.

The Ministry has made clear it wants to see more involvement in plan-making rather than at the consent stage of decision-making, and suggest that the changes to participation in resource consent applications will provide an incentive do so.<sup>237</sup> There are problems with this as an aim. Firstly, the way in which the process is designed means that often the most political decisions are at the resource consenting stage. At the planning stage, local authorities place particular rules on activities using land, air or water, with consents required for acts that are classified as ‘discretionary’, ‘restricted discretionary’ or ‘non-complying’. Except for the option of ‘prohibited’ activities, this allows most potentially contentious developments to be classified in a way that puts off full discussion until the consent stage. Even if people are given a greater incentive to participate in the development stage, if they wish to make controversial developments more difficult or place stricter requirements on certain developments, they are unlikely to succeed in making the development ‘prohibited’,

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<sup>232</sup> At 18.

<sup>233</sup> s 11 Resource Management Act 1991.

<sup>234</sup> A representation of different sizes of subdivision in a region can be seen at Whangerei District Council "Whangerei District Growth Strategy" (2010) <<http://www.wdc.govt.nz/PlansPoliciesandBylaws/Plans/SustainableFutures/Final-Strategy/Documents/Final-Growth-Strategy/Part-A-Section-3-to-4.pdf>> at 23.

<sup>235</sup> Nolan, above n 192, at 228.

<sup>236</sup> The new s 6(I). See discussion in Chapter 2 above.

<sup>237</sup> Ministry for the Environment, above n 10, at 19.

resulting in exactly the same outcome from the planning stage, with most of the real adjudication over values clashes occurring at the consent stage.

The alternative outcome is that plans in the RMA feature a comprehensive list of the principled concerns that could arise when a proposed activity takes place. This is both implausible and contrary to the planning objectives set out in other parts of the changes.<sup>238</sup> The only outcome of consequence that can arise is that groups with significant concerns in development fail to have these included in a plan, and then cannot raise them in the consenting process either. This may benefit the individual who is asking for the resource consent, however in doing so it necessarily alters the process in a way that compromises some of the values that may be incorporated in the ‘sustainable management’ test. The procedural changes have a substantive result that is not in line with the Act’s purpose.

This has serious consequences for public participation in the political decisions of the RMA. As I have made clear, value decisions under the RMA depend upon values being raised during the process; they cannot all be found in the Act. The changes restrict the ability of the public to provide the key information on which a decision should be made, reducing the legitimacy of the process and the chance of a quality outcome.

### Changes to Public Participation in Plan-Making

The proposed changes to plan development are less clear at this stage. The first is the very vague change to ‘strengthen consultation requirements for parties affected by the plan’.<sup>239</sup> This seems to alter the premise that everyone in that area is affected by the plan and therefore should be engaged in the process of public participation. There is the important recognition that there will be better consultation with iwi,<sup>240</sup> however it is not clear who else fits under the group ‘affected by the plan’, who decides who this group is, nor how you would challenge being excluded from this consultation. It may well be based on property ownership as a tangible measurement of being affected by rules over the use of that property, which may have the effect of elevating property

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<sup>238</sup> Decreasing the quantity and complexity of plans is a core goal: Ministry for the Environment, above n 7, at 42.

<sup>239</sup> Ministry for the Environment, above n 10, at 10.

<sup>240</sup> At 8.



owners' rights to participate over other parties.<sup>241</sup> It also cannot be said to provide adequate public participation to guarantee the level of involvement in the planning process to compensate for the reductions at the resource consent stage. As the desire to involve more participation at the planning stage is the key justification for the reductions in the resource consent process, the overall outcome must be to say there is a significant reduction in the capacity for the public to participate in decisions.

The changes as initially proposed in the discussion document gave the impression that all Council planning processes would involve an 'independent hearings panel' which would hear submissions and then make recommendations to Council as to what should be included in the relevant plan.<sup>242</sup> The latest announcements give Councils the option of selecting between processes.<sup>243</sup> The process with the independent hearings panel significantly limits the appeal rights available to people who have submitted on a plan, in that they can only appeal on the basis of difference between the hearings panel and the Council. This means that the Environment Court's capacity is limited to validating the hearings panel (calling into question the need for the Court at all), rather than come to an independent conclusion as to what is best for 'sustainable management'. That decision would be largely in the hands of the unelected, non-judicial panel. It is unclear what the procedure for the panel will be, although the system closely resembles the one implemented for the Auckland Unitary Plan.<sup>244</sup>

### The Cumulative Impact of the Reductions in Public Participation Under the Act

In summary, the reductions have involved a number of changes to the resource consenting process, including changes to reduce the expectation of notification in the process, adjustments to limit the notification for resource consent applications, and potentially significant limits on the scope of submissions on notified resource

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<sup>241</sup> There has been contention on what an 'affected party' is with regard to limited notification of resource consents. The current leading case is *Northcote Mainstreet Inc v North Shore City Council* HC Auckland CIV 2004-404-6062 which adapted the test from *Discount Brands Ltd. v Westfield (New Zealand) Ltd*, above n 207 in light of statutory changes. While Lang J suggested that a property interest was not necessary, the general requirement of 'carrying on an activity that is proximate to the proposed activity' at [188] comes close to requiring a property interest, and excluded a community-based body from requiring notification.

<sup>242</sup> Ministry for the Environment, above n 7, at 46.

<sup>243</sup> Ministry for the Environment, above n 10, at 9.

<sup>244</sup> The role of an independent hearings panel for the Unitary Plan has come under fire: Derek Nolan and others "An appeal to retain due process and to focus on quality plans" (2012) 9 BRMB 157.

consents. The potential answer to this comes in the form of an unspecified 'incentive' to engage further in the planning process. However, evaluations for plans have been adjusted in such a way as to force economically quantifiable consequences to the fore, and this will be followed up by a national planning template and the option of a process which reduces the capacity for the general public to be heard and the appeal rights to the Environment Court. The overall impact of the changes fundamentally adjusts the way that the public is expected to participate in decision-making, and restricts their access to multiple parts of the process.

This adjustment in process has a substantive impact. The procedural changes to the consenting process are directed in favour of development interests. The changes to the planning process are in favour of economic valuation of the impacts of the plan. The outcome is that development and economic interests have greater capacity to have their interests represented and heard throughout resource management decision-making. While this kind of change may be a political one open to the Government, it is being made in the context of legislation that is to be interpreted and applied in a political way, where interests have in the past been largely represented through public participation in the process. Some of these values and interests are obstructive and expensive to deal with. That is the nature of cultural and environmental preservation: it is against rapid change that represents intrusion into pristine environments or places of sacred or cultural value.<sup>245</sup> More broadly, expense and time are a necessary aspect of adequate public participation. The conclusion of Part 2 of this chapter raises the true problem with these changes: decisions under the Act are political and often dependent on the values raised during the decision-making process. The principles in Part 2 offer little protection where the groups and individuals representing those principles are less capable of having them included in the process than the groups and individuals representing the interests of development. Even if no environmental protection principles were in Part 2, strong public participation would give them a greater chance of being protected.

If we assume that the current Government is pro-development and the opposition prefer preservation, then it is easy to see the focus on ss 6 and 7 from the perspective

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<sup>245</sup> Stephanie E. Curran "The Preservation of the Intrinsic" (2005) 9 NZJEL 51.

of both parties. The principles are of great rhetorical power. They seek to embody a set of values that large numbers of New Zealanders identify with. They also represent the eco-centric world-view that many people in business and development feel obstruct the country's progress.<sup>246</sup> But the Act is a framework for political decision-making, and 'sustainable management' has been interpreted in a manner that equates the language with the general public interest. In that scenario it is ensuring public participation that matters the most.

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<sup>246</sup> Ratnapala, above n 1.

## **5. Conclusion**

At the core of this dissertation is an argument about a legislator's responsibilities. The RMA is an Act that does not simply embed high-level principles as a part of its rules: it is a framework for local political decision-making. This may not have been the intention of the Act's architects. A combination of the drafting of the statute, initial decisions to avoid environmental bottom lines and the conclusion that decisions involved an 'overall broad judgement approach' have stripped the legislation of any obvious legal criteria and left it as a statement of such broad principle as to leave decision-making highly discretionary. Such an Act calls for requirements for public participation in the way these political decisions are made. The changes to the substantive provisions of the Act advocated by the TAG do nothing to make the decisions less political; if anything, they are more so. This is in conjunction with a set of changes to process which orient decisions in favour of a particular set of interests, and as a result prioritise a certain set of values in the decisions that are made. This change conflicts with the requirement for strong public participation that such a law demands. The goals of the TAG are also not furthered in any substantial way by the changes: there is little to support the idea that they are values that have been marginalised in RMA decisions.

The title of this dissertation displays my desire to establish a framework for criticizing the RMA and, in this case, claiming that reforms are not useful. Many of the attacks (and defences) of the Act focus on the sustainability provisions of Part 2 of the Act. The reality is that small adjustments to the principles in the Act will have very little noticeable impact on the substantive outcomes of decisions (although they may lead to a fresh round of attempts to make them do so).<sup>247</sup> On the other hand, changing the extent to which the public can contribute to decision-making will. It is this element of the reforms that deserves the attention of groups who are interested in opposing (or supporting) them.

This framework can also be used to suggest alternative reforms to the Act. The Environment Court sits in an uneasy place as a judicial body with the power to overrule decisions made by elected representatives after wide consultation. Similar questions hang over the efficacy of local government in engaging the public in

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<sup>247</sup> The New Zealand Law Society, above n 223, at 3.

environmental decisions, in particular in informing the public about the ways to engage in the process and the tangible impacts of environmental decision-making on the community. Future reforms and the best use of resources to engage the public are both opportunities for further inquiry. On the other hand, if participation is considered a hindrance to efficiency under the Act, work must be done to develop a stricter set of substantive legal criteria to ensure decision-makers are not simply exercising unrestrained political discretion with inadequate public input. As it stands, we have proposed reforms which will have minor impacts on the substantive decision-making under the Act (and if anything increase decision-making) while reducing the ways in which the public engage. ‘Sustainable management’ will mean something different; not through the slashing of principles in Part 2, but the quiet disappearance of consent conditions, plan provisions and concerned voices that will not be heard as an outcome of the multitude of procedural changes that have been proposed.

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