There is No Plan B:

The Necessity of Public Participation in the Plan Making Process

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I

Introduction

> "A sense of place is a unique collection of qualities and characteristics – visual, cultural, social, and environmental – that provide meaning to a location. Sense of place is what makes one city or town different from another, but sense of place is also what makes our physical surroundings worth caring about."
>
> - Edward T. McMahon[1]

In this quote, McMahon elucidates the profound relationship humans have with space. The interaction of people with their physical surroundings is special and individually unique. Recognition and careful protection of sense of place is essential when a government proposes to regulate land-use in the form of plan making. The decision maker must grapple with the complexity of sense of place as one facet of the environmental problem-solving exercise. Creation of a plan requires a decision maker to weave together a community's visions and goals with regulation on activities within that community.

The effects of a plan are ubiquitous. A plan dictates where people live, work and play. Public participation is an integral part of the plan making process. It provides a decision maker with the appropriate information to make a robust decision. Participation enables people to share their experiences and knowledge of an environment but also express their vision for their community. Despite its essentiality, the inclusion of participation in the plan making process under the Resource Management Act 1991 (*"RMA"*) has come under threat.[2] The trajectory of the plan making process is now directed at providing a development-focused, faster and more cost-effective system.

In 2009, Parliament passed the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (*"RMSSAA"*) which first restricted participation in the plan making process.[3] The Ministry for the Environment tied this restriction to a dissatisfaction that the plan making process was unable to cheaply respond, in a timely manner, to emerging issues.[4] The scope of participation began to narrow in pursuit of faster and cheaper planning solutions.[5] This dissertation will focus on the degradation of public participation in the plan making process. It will consider participation in the 2013 Auckland Unitary Plan process and participation under changes made in the Resource Legislation Amendment Act 2017.

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[1] Edward McMahon 'The Place Making Dividend' (2010) <www.urbanland.uli.org>.

[2] Resource Management Act 1991 ("RMA").

[3] Resource Management (Simplifying and Streamlining) Amendment Act 2009.

[4] Ministry of Environment "Resource Management Amendment Act 2009: Fact sheet 5: Improving plan development and plan change processes" (Ministry for the Environment, October 2009).

[5] Above.

The core argument of this dissertation is that public participation, despite being a fundamental principle of environmental problem solving and resource management decision-making in New Zealand, is being undermined and eroded within the plan-making process. This dissertation will consider the broader nature of environmental problems and the critical role of public participation in the resolution of such problems before focusing on public participation within the plan making process. I will demonstrate that the changes made to the plan making process since the RMSSAA have substantially eroded this fundamental principle.

Chapter I shall consider the nature of environmental problems. The inherent complexity necessitates unique decision-making processes, legislative responses and institutional bodies. In particular, principles are used to provide flexible direction across diverse environmental problems. Public participation, as a core principle, provides for natural justice and adds legitimacy to a decision. The RMA's broad sustainable management purpose enables public participation to be incorporated into the decision-making process. The institutional bodies that manage environmental problems are established with a view for protecting and enhancing public participation. Local authorities are positioned to understand and respond to the needs of their communities. The Environment Court's jurisdiction enables it to hear from a wide variety of people, and to reconsider problems as if it were the primary decision maker.

Chapter II shall consider what comprises public participation and what constitutes good public participation. Public participation is an umbrella term for access to information, participation in the decision-making process and access to justice. Providing for all elements of participation is necessary to the effectiveness of that participation. Participation will take on different forms depending on the context of the decision and that form will have an impact on the outcome of a decision. The International Association for Public Participation posits participation on a spectrum reflecting three factors: the goal of public engagement, the promise made to the public and the techniques used to achieve public participation.

Chapter III shall outline the standard of public participation for the Schedule 1 plan-making process prior to 2009. Plan making, like all environmental problem-solving, requires public participation. Plan making permeates all facets of society. This chapter will identify how people could participate in plan making prior to the RMSSAA.

Chapter IV will outline the unique process used to create the Auckland Unitary Plan and consider the practical challenges associated with engaging in the process. The plan making process deviated from the Schedule 1 process and utilised an independent hearings panel, who ran the main participatory component. Components of the Schedule 1 process that were used to develop the Auckland Unitary Plan were altered to enable the process to occur under the

intense time pressure but as I suggest in the final chapter, the ethos that underpinned the process has infused the plan making process more generally.

Chapter V shall consider the Resource Legislation Amendment Act 2017 which introduces limited notification to Schedule 1 plan making and two new plan making processes; collaborative plan making and streamlined plan making. The amendment and new processes mark a further degradation of public participation routes in plan making. There present significant challenges to accessing information, restrictions on participation and access to recourse.

I conclude that the 2017 amendment continues a trend of degrading and limiting public participation. Reflecting whether it is desirable to continue on this trajectory given the fundamental role public participation has in environmental problem solving.

Chapter I: The Nature of Environmental Problems

Environmental problems are inherently complex. The complexity and diverse perception of environmental problems has shaped the development of environmental law, but it has also moulded how the law operates.[6] The role of environmental principles is fundamental to this unique process. Public participation is pertinent to the resolution of environmental decisions. It is essential to identifying the depth and complexity in an environmental problem. The importance of public participation has been recognised as a fundamental principle used to resolve environmental problems. Public participation is foundational to the legislative response to environmental problems, providing broad scope for engaging the views of people. The institutional bodies that oversee and resolve environmental problems have also been established with the ability to incorporate public participation into the problem-solving problem. This chapter will examine the nature of environmental problems and highlight why these problems necessitate public participation. It will then consider how public participation has been incorporated into the law in a variety of ways.

A Environmental problems

In order to understand what constitutes an environmental problem, one must first consider what the environment is. The environment is not limited to things only occurring naturally. It has a very wide scope. Defined in the same breadth in the RMA the environment can be a natural or man-made space, including ecosystems, resources, surroundings, conditions and value of a space.[7] Environmental law regulates the interaction between people and the environment to prevent environmental problems from arising. All human activity will affect the environment. However, whether this is sufficiently negative to categorise it as a problem, will vary from person to person. The perception of an environmental problem will reflect an individual's values. For example, an individual may perceive utilising resource as more important than the protection of the landscape that the resources are situated in, because of underlying values and interactions. People have different interactions with the environment. Combined with the complexity of the ecological systems and the social systems in the environment, managing environmental problems is very difficult.

The complexity and breadth of environmental problems can be demonstrated by an example. Imagine the issues arising from an open cast coal mine near a rural town bordering a conservation area. People in the town are set to gain economically, however they are also

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[6] Elizabeth Fisher, Bettina Lange and Eloise Scotford (eds) *Environmental Law: Theory, Cases and Materials* (Oxford University Press, Oxford, 2013) at 21 – 23.

[7] Above n 2, s 2.

affected by the noise, dust and the future effects of climate change. The location may also have special heritage value. The fauna in the conservation area although not directly in harm's way may be sensitive to the work at the mine. It is easy to see a number of potential issues: economic, health, social, generational, heritage, ecological. Considering each of these facets with respect to an individual's views, will make it extremely difficult to resolve the problem. Furthermore, it is difficult to confine an environmental problem spatially, because it will depend on the degree of impact one considers qualifying as a negative effect. The problem with the complexity present in environmental problems is aptly captured by John Dryzek: [8]

> "The more complex a situation, the larger is the number of plausible perspectives upon it because the harder it is to prove any one of them wrong in simple terms."

In turn, the greater the number of perspectives on the issues, the greater the number of perspectives on the resolution to the issues. The complexity of an environmental issue is better understood with input by people. Environmental problems are polycentric problems; there is interconnectivity between all facets of an environmental problem as illustrated in the above example.[9]

1 Polycentricity

Lon Fuller likened polycentric problems to spider webs.[10] By this, he suggested that to pull on one strand, or determine the outcome of one factor, will redistribute the tensions between the other factors across the web. Each junction of the strands represents a different interaction between different factors, creating a 'many-centred', or polycentric issue.[11] Environmental problems possess this interconnected complexity, which makes them complicated to resolve. Chief Justice Brian Preston articulated this in the landmark decision *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2013] NSWLEC 48:[12]

> "Polycentric problems cannot be resolved by identifying each issue at the start then sequentially resolving each of the originally identified issues. In a polycentric problem, the resolution of one issue will have repercussions on the other issues; the other issues may change in nature and scope depending on how the first issue is resolved."

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[8] John S Dryzek *The Politics of the Earth* (Oxford University Press, Oxford, 2005) at 8.

[9] Fisher, Lange and Scotford, above n 5, at 25.

[10] L Fuller "The Forms and Limits of Adjudication" (1978) HLR 353 at 395.

[11] Above at 399.

[12] *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2013] NSWLEC 48 at [32].

As there are a number of factors operating within a problem, environmental problems can affect a wide variety of people. The collective impact of environmental problems necessitates a unique response to these problems and in particular a strong mandate for people to be involved in the resolution or regulation of environmental problems.

2 Collective action and common property

Environmental problems are not solely the product of an autonomous action, nor do they only affect identified individuals.[13] Environmental problems are the product of and affect many people. Similarly, an individual is often unable to resolve an environmental problem alone, rather these problems must be resolved collectively.[14] Collective action refers to decisions that are made independently of the pursuit of self-interest, but the outcome of these decisions have wide spread effect on many people.[15] Although an individual will often act in their self-interest to benefit themselves, the group will benefit more if the work together towards a common goal.

The risks of not resolving a collective environmental problem are significant. A collective action problem within the environment may not be reversible without cost, or at all. Effects can span wide temporal periods, affecting communities of people for many generations. The resolution of a collective action issue must balance the best public interest outcome against the expense of regulating individual action.

A further facet of the collective action nature of environmental problems is that they affect common property resources rather than private property. Garrett Hardin famously argued that common property held and used collectively will always be degraded because of self-interested behaviour.[16] Hardin attributed this behaviour in part to social arrangements that encourage environmental exploitation.[17] He proposed that resources that were owned privately would provide the best preservation.[18] Elinor Ostrum critiqued Hardin's approach to resource management, based on the collective action argument.[19] She argued that environmental problems could be resolved by appreciating the collective impact of the issue and the importance of monitoring collective behaviour.[20]

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[13] Fisher, Lange and Scotford, above n 6, at 24.
[14] Above.
[15] Above.
[16] Garett Hardin 'Tragedy of the Commons' (1968) Science 162(3859) 1243.
[17] Above.
[18] Above.
[19] Elinor Ostrum *Governing the Commons* (Cambridge University Press, Cambridge, 1990).
[20] Above at 5-7.

The way common property is used can significantly impact people. The management of common property resources attract the interest of all people. People have a moral right to be involved in decision-making around common property resources because it will have huge ramifications if these are managed poorly. For example, poor air quality management can have serious health ramifications on people. Environmental problems necessitate collective buy-in and participation because that results in the best management of problems and the most satisfactory outcome to the most people.

3 Necessity of people to environmental problem-solving

Environmental problems are wide multivariate issues for finding fact, understanding values and appreciating the relationships of people within and with their environment.[21] Problems are complex and have broad ramifications, which necessitates participation of the public in these decisions. People are the best source of information in an environmental problem.[22] In environmental problems regarding common property resources, it is essential that the views and goals of the community are collected, so that they can best be regulated for collective good. It is also important that if private property will be affected by resolution of an environmental problem that people affected have their say in the resolution process.

Environmental problem solving is only as strong as the information that it is based on. The interactions of people and the environment form a significant part of the pool of information to help resolve that environmental problems. With a preference for scientific and technical evidence, these interactions can easily be excluded from the pool of information that informs the resolution of a decision. Public participation is a way for this information to be brought to the fore. It also enables scientific and technical evidence to be tested against the word of the people who actually encounter the environment. The ability to access information and to participate in the problem-solving process can critically affect substantive justice. Without the correct information, a poorer quality decision may be made, having substantial ramifications on people. The polycentric nature of environmental problems and role of collective action problems necessitates public participation in the problem-solving process.

B How do people resolve environmental problems?

Environmental problems do not sit prettily into well-defined boxes. Law has been engaged as the main form of protection, conservation and preservation of the environment where resources

[21] Alec Dawson 'Principles, Participation, and Proposed Changes to the Resource Management Act' (2016) NZULR 27(1) 185 at 197.
[22] Chief Justice Sian Elias 'Righting Environmental Justice' (2014) RMTP 47 at 53.

may be affected by human activity.[23] However, a crafted legal response is required for environmental problems. There has been a strong emphasis on the use of principles as a foundation to problem solving. Principles allow a decision-maker to consider both facts and value driven beliefs, critical aspects of environmental problems. Facts are objectively ascertained, whereas values are subjective and usually debated in the realm of politics.[24]

Principles are foundational concepts that provide coherence and legitimacy to the complex and difficult environmental problem-solving process.[25] In this setting, principles are a crystallisation of agreed environmental policy in general terms.[26] They are points of reference on how the environment should be used and protected.[27] Environmental principles have developed as a mechanism to provide clarity and direction when addressing difficulties inherent within environmental problems.

According to Ronald Dworkin, principles are collective goals of the community as a whole.[28] They are not binding like legal rules, instead they provide a reason in favour of a solution without creating a binding norm.[29] However, unlike legal rules, principles are 'flexible instruments of action'.[30] They can be tailored by scholars, lawyers and judges to suit specific situations to achieve positive environmental outcomes. These outcomes are consistent with the underlying community interest. The consensus as to what the community interest is will only be identified through participation. Dworkin posited that principles have a dimension of weight, enabling principles to be weighed against another and compromised when they intersect.[31] The precautionary principle, polluter pays principle and public participation are core principles prominent in international environmental law and reflected in many domestic legal systems.[32]

A principled approach to resolving environmental problems gives legitimacy to this continually developing area of law by utilising a common approach in established areas of law. Principles also help resolve methodological problems created by the interdisciplinary nature of

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[23] Derek Nolan 'Introduction to Environmental law' in Derek Nolan (ed) *Environmental and Resource Management Law* (5th ed, LexisNexis, Wellington, 2015) at 1.

[24] Eloise Scotford *Environmental principles and the evolution of environmental law* (Hart Publishing, Oxford, 2017) at 46-48.

[25] Above, in Chapter 2.

[26] Above at 31-34.

[27] Fisher, Lange and Scotford, above n 6 at 785.

[28] Ronald Dworkin *Taking Rights Seriously* (Duckworth, London,1978) at 35.

[29] Above at 24.

[30] Nicholas de Sadeleer *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, Oxford, 2002) at 307.

[31] Dworkin, above n 28 at 24.

[32] Scotford, above n 24 at 31-34.

environmental problems. Principles enable a more consistent approach to environmental problems which further legitimises the decision-making process.[33] In a sense, principles provide stability to a dynamic area of law.

1 Foundations of public participation

The principle of public participation in environmental problem-solving is foundational part of international environmental law discourse and is included in a number of conventions and agreements. The Brundtland Report first recognised the involvement of people in environmental problem solving in their definition of sustainable development, which is:[34]

> a process of change in which the exploitation of resources, the development of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations.

The express inclusion of "human needs and aspirations" reflects the importance of the public as stakeholders. Identification of public interest is best achieved through providing pathways for participation.[35] The 1992 Rio Declaration on Environment and Development is often recognised as the first international instrument to directly address public participation.[36] Principle 10 outlines a general standard of public participation:[37]

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

Principle 10 was accompanied by Agenda 21, a more comprehensive plan of how action should be taken in regard to human actions that affect the environment.[38] Agenda 21 provides more detail of how environmental decision-making should incorporate:[39]

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[33] Above at 24.

[34] World Commission on Environment and Development *Our Common Future* 1987 (The Brundtland Report).

[35] Above at [96].

[36] United Nations Conference on Environment and Development: *Rio Declaration on Environment and Development* (1992) 31 ILM 874.

[37] Above at 878.

[38] Above in Agenda 21.

[39] Above.

> the need of individuals, groups and organisations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work.

The Aarhus Convention, which binds the European Union and 46 other nation states, is the most compelling recognition of a commitment to public participation.[40] This rights-based approach is formulated around three facets of public participation: access to information, participation in decision-making process and access to justice.

2 Natural justice and legitimising environmental problem-solving

Agenda 21 identifies the necessity of public participation when resolving an environmental problem. Notions of natural justice and fairness underpin this. It is only fair that in a decision affecting people, which environmental problems do, that people may know and contribute to that decision. Natural justice can be reduced to two rules; (a) a duty to afford the person or persons affected the opportunity to make submissions or answer the case (audi alteram partem) and (b) an obligation on the decision maker to act impartially, in good faith, for the proper purpose (nemo judex in causa sua).[41]

Participation adds legitimacy to environment problem solving because it ensures that people who are affected are at least able to give their perspective on an issue.[42] It is critical that perspectives are at least heard and fairly considered, even if they do not ultimately determine the outcome.[43] Interested parties are likely to be more accepting of a decision on a difficult issue, if they think that the decision maker has considered and addressed any issues that have been raised by the public.[44] In order for people to engage meaningfully, they must have access to information. The risk of not getting an environmental decision 'right' was articulately

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[40] Barry Barton 'Underlying Concepts and Theoretical Issues in Public Participation in Resources Development' in Alistair Lucas, George Pring and Donald Zillman (eds.) *Human Rights in Natural Resource Development* (Oxford University Press, Oxford, 2002) at 79.

[41] Kenneth Palmer *Local Government Law in New Zealand* (2nd ed, Sweet and Maxwell, Wellington, 1993) at 65.

[42] Dawson, above n 21 at 197.

[43] Above.

[44] Thomas Dietz and Paul Stern *Public Participation and Environmental Assessment* (National Academies Press, Washington, 2008) at 50.

outlined by the Parliamentary Commissioner for the Environment in her report on public participation:[45]

> If conflict is not resolved in the decision-making process it will remain, manifesting in such forms as perennial relitigation of issues, public distrust, anger and cynicism, civil disobedience, and political instability. Generally, communities are more supportive of programmes and decisions that they have been involved in developing than those they feel have been imposed without consideration of their concerns. Community "ownership" of environmental problems also helps ensure sustainable solutions.

If issues are not resolved early in a process, they will fester, and create difficulties later on in the process. In a field dependent on building credibility with people that are affected by state regulation, it is essential that decisions resolving environmental problems are robust and endeavour to provide optimum outcomes for all parties.

Principles have been used in environmental problem solving to provide stability to the diverse and continually developing discipline. Public participation provides a decision maker with the greatest amount of information and legitimises decision-making. Its importance is recognised within the legislative response to environmental problems.

C Dealing with the inherent complexities through legislation

Environmental principles are foundational to the primary legislation for managing resources and general environmental problems in New Zealand, the RMA.[46] The RMA has a broad mandate over a plethora of problems. Chief Justice Sian Elias described the fundamental importance of the Act. It affects:[47]

> "…people and their aspirations in the real world. It is a framework of values for practical living and for the management of disagreements about the physical environment."

The RMA has over 433 sections, and an additional 12 schedules which outline a number of procedural provisions. It is an expansive framework that is used for resolving environmental problems. The Act has been subject to 18 significant amendments, adding more rules to the

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[45] Parliamentary Commissioner for the Environment 'Public Participation Under the Resource Management Act 1991 –The Management of Conflict' (Office of the Parliamentary Commissioner for the Environment, Wellington, 1996) at A15-16.

[46] RMA, above n 2. Mineral resources are regulated by the Crown Minerals Act 2002 and marine resources are managed by the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

[47] Elias CJ, above n 22 at 48.

already extensive Act.[48] The amendments have responded to the changing needs of people using the RMA, with the intention of making the framework work better.[49]

The demands of environmental problems have necessitated an integrated approach to management.[50] The law must be able to respond to the unique requirements of the environment, but it also must be able to consider people within that environment. It must be able to incorporate all elements of environmental complexity. The Act uses broad principles, values and standards that can apply widely. However, these broad principles, values and standards need people to create meaning in particular contexts. A person should be able to advocate for protection of private property rights and outline their vision for common property resources use.

The core purpose of the RMA demonstrates the ability of the Act to apply broadly and flexibly to different situations. The purpose is "to promote the sustainable management of natural and physical resources". However, sustainable management means:[51]

> …managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[48] These are the Resource Management Amendment Act 1993, Resource Management Amendment Act 1994, Resource Management Amendment Act 1994 (No 2), Resource Management Amendment Act 1996, Resource Management Amendment Act 1997, Resource Management (Aquaculture Moratorium) Amendment Act 2002, Resource Management Amendment Act 2003, Resource Management Amendment Act 2004, Resource Management Amendment Act 2004 (No 2), Resource Management (Aquaculture Moratorium Extension) Amendment Act 2004, Resource Management (Energy and Climate Change) Amendment Act 2004, Resource Management (Foreshore and Seabed) Amendment Act 2004, Resource Management (Waitaki Catchment) Amendment Act 2004, Resource Management Amendment Act 2005, Resource Management Amendment Act 2007, Resource Management (Simplifying and Streamlining) Amendment Act 2009, Resource Management Amendment Act 2013, Resource Legislation Amendment Act 2017.

[49] Geoffrey Palmer 'Ruminations on the problems with the Resource Management Act 1991' (2016) NZLJ 46 at 48-49.

[50] Nolan, above n 23 at 1.

[51] Above n 2, s 5.

The sustainable management purpose been likened to a policy statement.[52] It is broad and affords great flexibility to a decision maker to respond to the multiple elements and complexities within an environmental problem. There is a wide scope to what can be considered within environmental problem solving, which distinguishes it from other areas of law. People and communities are an essential part of the purpose, which means their interests and views should be sought in everything in pursuance of sustainable management.

D Dealing with the inherent complexities through the institutional framework

1 Environmental constitutionalism

To respond to the difficulties of environmental problems, environmental law allocates powers to different stakeholders through the framework chosen. The allocation of power, or 'power enabling' nature makes environmental law constitutional.[53] The distribution of the power is highly contestable which creates normative discourse in environment law. The allocation is split between the state, local authorities, private owners and the public at large. Further to the allocation of decision making power, environmental laws also determine what is relevant to a decision.[54] Those allocated powers must recognise what is at stake: environmental protection, private property rights and public interest among other things. The regulation of resources can infringe private property rights, and without public participation, it is difficult to justify that infringement, even if it is in pursuit of a conceivable community good.[55] These considerations necessitate consideration of people in the decision-making process. The institutional bodies used to resolve environmental problems have clear participatory elements to ensure that the power they are yielding is truly responsive to environmental problems.

2 Role of local authorities

Local authorities are the primary decision-makers under the RMA. They have the ability to respond to the needs of their community because they are based within these communities. This puts them in the best position to understand the nuances of the relationship between the community and the environment. Local authorities can use participation to inform their decisions more effectively than through participation in the form of representative democracy. Central government representatives may be removed from the location of an issue, the unique

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[52] *NZ Rail v Marlborough District* [1994] NZRMA 70 at 86.

[53] Elizabeth Fisher 'Towards Environmental Constitutionalism: A different vision of the Resource Management Act 1991?' (Address to Resource Management Law Association: Dunedin, 26 September 2014) at 5.

[54] Above at 6.

[55] Elias CJ, above n 22 at 53.

community requirements and the complexity of the issue and interactions at hand.[56] For example, the needs and interests of people in Wellington are different to those who live in Gisborne. Representative democracy may allow a lot of people to get involved, but it is not necessarily inclusive of all interests in a decision.[57] The higher level the decision, the more likely it is that people will be locked out of the process. Higher level decision-making is also more abstract, and has more difficult responding to the nuances of community issues.
Deliberative democracy, through public participation, is an effective mechanism for obtaining the consent of the governed in a more specific way than is possible with representative democracy.[58] It involves:[59]

> …collective decision-making by all who will be affected by the decision or their representative: this is the democratic part…and includes decision-making by means of argument offered by and to participants who are committed to the values of rationality and impartiality: this is the deliberative part.

Deliberative democracy further instils legitimacy into a decision as it recognises the 'on-the-ground' influence of individuals and community groups. The influence of public participation in environmental problem solving is also present in the adjudicative body that oversees the RMA.

3 Role of the Environment Court

The Environment Court has very unique jurisdiction relative to the main court system in New Zealand. The Court is not artificially constrained by de jure appeals and does not have staunch standing requirements which enables people access to the court to challenge decisions. This unique appeal route recognises the complexity in the decision-making process and the importance of allowing de novo appeals.

De novo appeals enable the Court to hear the problem afresh, considering all factors as if they were the decision-maker and request new information if it is appropriate. Per s 290, the Court "has the same power, duty, and discretion in respect of a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal or inquiry is brought".[60] The Environment Court bears, like all decision-makers under the Act, the responsibility for

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[56] Dietz and Stern, above n 44 at 50.
[57] Ceri Warnock 'Differing conceptions of environmental democracy in New Zealand resource management law' (2016) Australian Environment Review 253 at 254.
[58] Dietz and Stern, above n 44 at 50.
[59] John Elster *Deliberative Democracy* (Cambridge University Press, Cambridge, 1998) at 8.
[60] RMA, above n 2, s 290.

achieving the sustainable management purpose. It must assume a duty to make a difficult decision that will widely affect people. It must seek out all relevant information to inform that decision. It is empowered to hear a case afresh and consider the multivariate of elements. The challenges faced by a Court are eloquently captured by Royden Sommerville QC:[61]

> "…the wide scope of the law; value-laden issues; private and public law principles; the influence of international law; the development of a New Zealand jurisprudence which incorporates tikanga Māori; reasoning approaches centred on sustainability in decision-making which focus on the future and the obligation not to unfairly disadvantage future generations by over-exploitation of natural resources and irreversible environmental impacts from human activity; managing the challenges of significant global environmental risks; and the need for reflexive and sophisticated approaches, in the face of uncertainty when developing policy and planning instruments which are justiciable."

To be able to address and consider all of these elements, the Environment Court Judge must have diverse knowledge and expertise. They can be aided by special advisors with specialist expertise who can elucidate complicated technical or scientific information.[62] However, the public can also offer their knowledge, expertise and reflections on their interactions with the particular environment. The Court has unique processes to facilitate and encourage public participation. The approach is more informal than other courts. The Court has broad standing to enable as many people into the process as possible. Members of the Court have the ability to travel on circuit to hear matters as close as possible to the location of the problems. to make sure it provides access to public participation.[63] The power of de novo review shapes the Court's influence in resource management decisions and distinguishes it from other courts and tribunals. It must incorporate the public's views to understand the polycentricity and complexity of the problem at hand. It cannot defer the decision, because a court must always reach a resolution no matter how controversial or difficult a case may be.

4 Adjudicating polycentric issues

The wide jurisdiction of the Environment Court allows adjudication of polycentric issues, contrary to Lon Fuller's theory that polycentric decisions should not be adjudicated. [64] Fuller posited that these problems should be resolved by managerial authority, exercising executive

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[61] Royden Sommerville 'Environmental Law in New Zealand: a book review' (2015) 19 NZJEL at 335.

[62] RMA, above n 2, s 259.

[63] Ministry of Justice 'About the Environment Court' (2017) <www.environmentcourt.govt.nz>.

[64] Fuller, above n 10. Fuller argued that polycentric issues are so dynamic that tensions in the broader issue will change with the resolution of each individual facet.

action, which would be more appropriate.[65] This point was asserted by the court in *North Shore City Council v Body Corporate 18859* [2010] 3 NZLR 486:[66]

> Generally speaking, courts are confined to determining the specific issues that particular proceedings raise, certainly where private law claims are made. They are unable to undertake a holistic or comprehensive assessment of the underlying problem, much less to impose a comprehensive solution on all involved.

The limits on polycentric adjudication are controversial. Melvin Eisenberg challenged Fuller's position by suggesting that polycentric issues can be adjudicated, but that there ought to be an increased emphasis on consultative processes, where affected persons are given the opportunity to express their views.[67] A consultative process aligns more with inquisitorial court process, which has been used in recent times in New Zealand resource management decision-making.[68]

The consultative process is one element of the essential principle of public participation. Given the myriad of disciplines that are traversed and the people that are affected in a resource management decision, it is essential that a decision maker has access to all of this information to aid their decision. Adjudication of environmental problems requires a unique approach to be applied. Chief Justice Brian Preston described this as intuitive synthesis, where there is a weighting of and balancing of all of the relevant matters.[69] In order to ensure that this intuitive synthesis does not appear to be arbitrary, a decision maker will utilise the environmental principles to ground their decision.

E Conclusion

The environment is a resource used by humans for all of humankind. The utilisation and interaction of the environment by humans can lead to environmental problems. Environmental problems are inherently complex. The polycentricity of these problems stems from a diverse range of factors operating at any one time. Each element is interconnected to one another, which means that resolution of each factor cannot be considered in isolation because of the change in effect that may have on the whole problem. To understand all of the facets of an environmental problem, a decision-maker must be gather as much information as possible,

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[65] Above.

[66] *North Shore City Council v Body Corporate 18859* [2010] 3 NZLR 486 at [212].

[67] Melvin Eisenberg, "Participation, responsiveness, and the consultative process: an essay for Lon Fuller" (1978) 92 Harvard Law Review 410 at 413.

[68] Both Independent Hearing Panels in the Auckland Unitary Plan and Christchurch Replacement District Plan utilised inquisitorial mechanisms, in order to ensure they had as much information available to them in the decision-making process.

[69] *Bulga*, above n 12 at [41].

including information about the interaction of people with their environment. As problems that often concern common property and affect many people, environmental problems require collective action for their resolution. There must be engagement and cooperation to achieve a common purpose.

Resolution of environmental problems is difficult. Instead of leaving resources to be managed freely by people, we have used legislation as the main form of regulation. The RMA is framed broadly so to enable a decision maker to consider all elements of a problem and to include people within that decision. The institutional bodies tasked with resolving environmental problems are also established to facilitate public participation. Local authorities provide a critical pathway for participation by their presence within the community. Traditionally, the Environment Court has had a wide and relatively unrestricted power, allowing it to reconsider cases from a broad class of people.

Public participation is essential in environmental problem solving. Participation can enhance the problem-solving outcome, leading to more robust, quality decisions that incorporate the views of the community. Chapter 2 will consider how the form of participation can also have a significant effect on fulfilling this fundamental principle.

Chapter II: Public Participation

Public participation is a core element to environmental problem solving. Public participation requires people who are affected by a decision to be involved in the process used to make that decision. Identifying all those affected by an environmental problem is difficult because of the ubiquitous nature of these problems. Subsequently, a comprehensive approach to participation is necessary. Public participation is broadly comprised of access to information, public participation in the decision-making process and access to justice. Participation will only be effective if these three principles are included in problem-solving processes. In more detail, the three pillars are:[70]

1. Access to information: all relevant information must be easily accessible to the public, so that they can participate in a meaningful way. Provision and access to information is the responsibility of the decision-maker.
2. Participation in decision-making processes: the public must be informed early in the process of their right to participate and the timeline for engagement. The provision of information is insufficient to satisfy the broader pursuit of public participation alone.
3. Access to justice: the public shall have a right to recourse to administrative or judicial procedures to dispute outcomes that affect them.

All pillars must be included in environmental problem-solving processes. Barry Barton argues that access to information and access to justice are ancillary to public participation for a number of reasons.[71] He argues that access to information is essential to enabling action to take place in the first instance, but it does not in and of itself affect decisions.[72] Further, access to justice is fundamental to a rights-based legal framework, but in the context of participation in resource management decisions, it is supplementary because it enables enforcement of legal rights.[73] It is not the main pathway to engagement in an environmental decision.

Despite Barton's argument it is critical to appreciate that engagement in public participation is strengthened by access to information and access to justice. Participation can only be meaningful if a person understands the factors that are operating in a decision.[74] It will help a person contribute to and potentially provide new information to a decision-maker. New information can only be given by the public, if they appreciate what is in the existing pool of information. Access to justice is critical to ensuring that due process has been followed and

[70] Sumudu A. Atapattu *Emerging Principles of International Environmental Law* (Transnational Publishers Inc, New York, 2006) at 353-358.
[71] Above n 40 at 79.
[72] Above.
[73] Above.
[74] Felicity Millner 'Access to Environmental Justice' (2011) Deakin Law Review 16(1) 189 at 196.

that all relevant factors have been considered and addressed in the outcome of a decision. As well as providing a pathway to justice, the justice offered must appreciate a potential imbalance in resources between participating parties.[75]

A What makes good public participation?

The quality of public participation is contextualised by the unique nuances of the problem and the scope and impact of the decision to be made.[76] Public participation standards will not be the same for all planning decisions, and although often outlined by the RMA, may be at the discretion of the decision-maker. Under the RMA, the decision-maker may be the local authority, the Environment Court or the Minister for the Environment. The International Association for Public Participation ("IAP") identifies a spectrum of engagement to evaluate participation.[77] The degree of participation will be determined by three factors: the goal of public engagement, the promise made to the public and the techniques used to achieve participation.[78] At the lower end of the spectrum is an obligation to 'inform' or 'consult', and at the other end of the spectrum is the obligation to 'collaborate' and 'empower', buffered by an obligation to 'involve'.[79]

The minimal obligation of public participation is to inform. It enables the public to be provided with the appropriate information to understand a problem and the solutions pursued.[80] A decision-maker promises the public that they will be informed. The obligation on the decision maker is to simply make the information available.

Second on the spectrum is the obligation to consult. The goal of this obligation is to obtain public feedback on analysis, alternatives and, where appropriate, decisions.[81] As well as keeping the public informed, the decision-maker must acknowledge the public's views and clearly engage those views when making a decision, even if it does not affect the outcome.[82]

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[75] Justice Stephen Kós 'Public Participation in Environmental Adjudication: Some Further Reflections' (paper presented to the Environmental Adjudication Symposium, Auckland, 11 April 2017) at [10]-[12].

[76] Mark S. Reed "Stakeholder participation for environmental management: A literature review" (2008) 141(10) Biological Conservation 2417, at 2420.

[77] International Association for Public Participation 'IAP2 Spectrum of Public Participation' (2007) <www.IAP2.org>.

[78] International Association for Public Participation 'Planning for effect public participation' (International Association for Public Participation, Denver, 2006).

[79] International Association for Public Participation, above n 77.

[80] Above.

[81] Above.

[82] Above.

There are limits to this consultation as identified in *Wellington International Airport v Air NZ* [1993] 1 NZLR 671.[83] The Court asserted that consultation does not equate to negotiation.

Public participation that seeks to involve the public in a decision is in the middle of the spectrum. It requires a decision-maker to work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.[84] Involving the public ensures that any issues raised are reflected in the solution or decision made. At the higher end of the spectrum is the obligation to collaborate with the public. The goal is to partner with the public throughout the decision-making process, to develop alternatives and identify preferred outcomes.[85] Advice and recommendations provided by the public are incorporated into the decision as much as possible, which means that the decision-maker and public must have shared vision of the outcome.[86] The strongest level of participation is when a decision maker empowers the public. The decision is effectively delegated to the public.[87] The decision maker promises that they will implement the decision that the public makes.

It is incredibly important to ensure the level of engagement is appropriate and respectful of the public. Any participatory processes must be well thought through and effective, otherwise the whole problem-solving process may be perceived negatively. A negative perception could have the effect of deterring people from participating in a process in the future.[88]

B Barriers and trade-offs for public participation

The ability to achieve good public participation in a decision-making process requires a lot of time and ample resourcing. Time and cost have both been used as arguments to limit participation.[89] In the context of environmental problems, it is prudent to try and resolve the problem promptly before the situation changes, which can justify an interest in reducing delays in the process. Prior to the amendments of the RMA in 2009, the Minister had described the resource management decision-making process as "cumbersome, costly and time-

[83] *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671.

[84] International Association for Public Participation, above n 77.

[85] Above.

[86] Mariska Wouters, Ned Hardie-Boys and Carla Wilson 'Evaluating public input in National Park Management Plan reviews: Facilitators and barriers to meaningful participation in statutory processes' (Department of Conservation, Wellington, 2008) at 16.

[87] International Association for Public Participation, above n 77.

[88] Wouters, Hardie-Boys and Wilson, above n 86 at 17.

[89] Ministry for the Environment 'Improving our Resource Management System: A Discussion Document' (Ministry for the Environment, Wellington, 2013).

consuming".[90] A proposed reduction in participation to decrease time and costs must be considered against the notion that participation adds significant value to environmental problem solving.[91] Alongside efficiency, there are other factors that have been identified as challenging participation. Access to information and the lack of public awareness of RMA processes were identified by the Parliamentary Commissioner for the Environment.[92] If people are unaware of the information and processes, they often did not understand the necessity to be involved in the problem solving process as early as possible.[93] A lack of resources for participation, e.g. in the form of experts and case funding, was and still is, identified as a major barrier in public participation.[94] The nature of statutory procedure, including the time available and the adversarial nature of hearings, are often perceived as hostile to participation.

C Conclusion

Despite being challenged by barriers of time and cost, public participation is a necessity to resolving environmental problems. Participation comprises of access to information, participation in the process and access to justice. Each broad element of participation gives effect to the rights of people who are affected by an environmental problem. People have a right to be heard in the decisions that impact them, but they also help the decision-making process by providing insights into local knowledge and interactions within and with an environment. They can only genuinely contribute if they have all the relevant information before them. A better outcome in the decision will be achieved if it is the product of a comprehensive process that incorporates participatory processes.

The IAG spectrum demonstrates that participation can take many forms, which will reflect the context of the decision. The form that participation does take will have a subsequent impact on the quality of the decision for those affected by the decision. It is difficult to standardise public participation to apply in all settings. Instead public participation should respond to the context in a particular problem. It should not be rationalised against the cost of participation.

[90] Above.

[91] Derek Nolan, Bal Matheson, James Gardiner-Hopkins and Bronwyn Carruthers 'A better approach to improving the RMA plan process' (2012) RMTP 63 at 70.

[92] Parliamentary Commissioner for the Environment, above n 45 at A22-A37.

[93] Above.

[94] Kós J, above n 75 at [10] - [12].

Chapter III: Plan making under the RMA

I have considered the broader necessity of public participation in environmental problem solving, however the focus now moves to participation in a particular aspect of the RMA, plan making. Plan making, like all environmental problem solving requires a decision maker to consider complex environmental problems and relationships. A plan will outline the community goals and aspirations regarding how an area best be managed.[95] A plan establishes the rules which regulate the activities that a person can undertake in relation to their private property and the common property resources. Plan making is a process that necessitates public participation. It permeates every facet of society. Plans outline where people can live, work and play. A plan influences the health, safety, welfare and social interactions of people by regulating the activities of people in relation to their environment.[96] Given the impact of plans on people, people must be included into the plan making process. Inclusion allows people to share their knowledge and interactions within and with their environment.

In the last ten years, public participation in the plan-making process under the RMA has been reduced. Avenues for public participation have decreased and the procedure around participating has been altered discreetly but with significant effects. Prior to 2009, there were significantly less barriers to public participation and considerable pathways to participate. The process prior to 2009 will provide a point of reference to identify where participatory processes have changed in plan making for the Auckland Unitary Plan process and the plan-making amendments under the Resource Legislation Amendment Act 2017.

Broadly, the normal, Schedule 1 planning process prior to 2009 was as follows.[97] The local authority prepared their policy statement or plan.[98] The local authority publicly notified the proposal alongside a s 32 evaluation report.[99] Under cls 6 and 7 the local authority could receive submissions from any person. The submissions had to be summarised by the local authority in a report which was then subject to further submissions from any person.[100] The local authority had to hold a hearing on submissions on the proposed policy statement or plan, if at least one submitter signals that they would like to be heard.[101] Following the hearing process, the local

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[95] See Patrick McAuslan *The Ideologies of Planning* (Pergamon Press, Oxford, 1980) at 1-7 and the introduction of Kenneth Palmer *Planning and Development Law in New Zealand (Vol 1)* (The Law Book Company Limited, Melbourne, 1984) for discussions on the foundations of planning.

[96] Kenneth Palmer *Planning and Development Law in New Zealand (Vol 1)* (The Law Book Company Limited, Melbourne, 1984) at 6.

[97] RMA, above n 2, sch 1.

[98] Above, sch 1 cl 2.

[99] Above, sch 1 cl 5.

[100] Above, sch 1 cls 6 and 7.

[101] Above, sch 1 cl 8C.

authority were required to give public notice of the revised (if appropriate) policy statement or plan.[102] If there were no appeals of the proposal then the policy statement or plan became operative under cl 20, 20 days after being publicly notified. Many elements of the Schedule 1 process remain unchanged in 2017.

A Access to information

Public notification was the main point of access for plan information. The proposed plan or policy would be made available for the public to view.[103] Notification included notice of where this information could be accessed and the process for participating in the process. Disclosure of sensitive information could be limited by the local authority under the RMA.[104] Notification may now be limited in certain situations, as I will explain in Chapter V. Prior to 2009, the decisions made by the local authorities on submissions were publicly notified. This has since been confined to notice being served on submitters, requiring authorities and anyone who requests it.[105]

B Participation in the process

Consultation, submissions and being party to or giving evidence at hearings are the three main forms of participation in plan-making process. Although these participation elements remain in planning, the form in which they are included is different.

Consultation has been largely unaffected. Under Schedule 1 the local authority is not obliged to consult all people affected by the plan change or policy statement. However, the local authority, as decision maker, must consult: the Minister for the Environment, other relevant ministers, additional local authorities who may be affected, the tangata whenua and the coastal management board of the area.[106] Consultation requires the decision maker to provide parties with the relevant information.[107] The decision maker should enter meetings with these parties with an open mind and take account of what they say before a decision is made.[108] It is an onerous standard which ensures the views of these people and their authorities are represented.

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[102] Above, sch 1 cl 11.

[103] Above, sch 1.

[104] Above, s 42. Sensitive information is information that may be offensive to tikanga Māori or information that is a trade secret or could prejudice a commercial position.

[105] Above, sch 1 cl 11.

[106] Above, sch 1 cl 3.

[107] *Wellington International Airport Ltd*, above n 83.

[108] Above.

Submissions have changed since pre-2009. Submissions were welcomed by any person in the prescribed time period; 40 working days for new plans or policy statements and 20 working days for plan changes or variations to policy statements.[109] The local authority then had to produce a summary of these initial submissions, and allow for further submissions to be made within 20 days of the notification of the summary report.[110] Further submissions were allowed to be made by any person under the previous cl 8.[111] Now, further submissions are not welcomed by any person:[112] they are confined to persons who represent the public interest, persons who have a greater interest than the public or the local authority itself.[113]

A person could speak to their submission in the hearing process in front of a local authority committee. The hearing process is outlined in ss 39 to 42A of the RMA. The hearing process has been subject to some changes since 2009. Within the hearing process the hearing panel retain the discretion on a number of procedural matters in the hearing. It is also their duty to notify these processes. Hearings are supposed to "avoid unnecessary formality", with a view to making the setting as welcoming as possible.[114] Pre-2009, the hearing panel did not have the discretion to allow the questioning of witnesses by anyone other than the hearing body or cross examination of witnesses.[115] To aid the hearing process, the panel could request further information from presenting parties, or commission a consultant to report on a matter that needed further information.[116]

C Access to justice

The appeals process has changed since pre-2009. Before then, de novo appeals could be made by submitters, and to the Environment Court only on issues that are raised in their submissions.[117] Appeals could also be brought by s 273 parties or s 274(1)(d) parties.[118] There was no limitation on appeals from trade competitors.[119]

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[109] Above, sch 1 cl 3.

[110] Above, sch 1 cl 7.

[111] Resource Management Act (pre-2009) – sch 1 cl 8. Schedule 1 clause 8: replaced, on 1 October 2009, by section 149(8) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

[112] RMA n 2, sch 1 cl 8.

[113] Above.

[114] Above, s 39(2)(a).

[115] Above, s 39. Although this remains for the Schedule 1 planning process, it was varied for the AUP process, and the Collaborative Planning process.

[116] Above, s 41C.

[117] Above, sch 1 cl 14.

[118] Section 273 parties are those who succeed parties to proceedings and s 274(1)(d) parties are those who have an interest in the proceedings greater than the public generally. Those with an interest may include neighbours, other resource users, iwi authorities and environment interest groups.

[119] Above n 2, s 308C now provides a limitation on trade competitors from becoming parties under s 274.

De novo appeals are retained by the Environment Court but able to be used in fewer instances. In a de novo appeal the Environment Court assumes the role of decision-maker and reconsiders the problem again. It hears a case afresh, can call for new evidence and make a new decision on the merits. It is not confined to legality review, instead the Court give its own decision in place of the local authority's.[120] There is a greater prospect of a decision changing if it is subject to a de novo appeal. As a decision maker under the RMA, the Court must consider statute and policy considerations to ensure they achieve the sustainable management purpose. De novo appeals are relatively unique in New Zealand law and public participation is essential to the process because it aims to arm the Court with all relevant information.[121]

An appeal from an Environment Court decision remains confined to points of law. Appeals on a plan making decision may be also made on points of law to the High Court, but only if earlier appeal rights to the Environment Court are exhausted.

D Changes to participation in the RMA between 2009 and 2017

Prior to 2009, the RMA evinced strong principles of public participation. Information was widely available, there were clear processes that people could engage into inform the process and there were strong mechanisms for appealing a decision. The amendment in 2009 changed the trajectory of the RMA, narrowing participation. It restricted who could make further submissions, it allowed a local authority to give grouped decisions on submissions and removed the right to withdrawal of a whole plan.[122] Two further significant amendments to the RMA followed in 2013 and 2017 and they have further narrowed participation.[123]
Notably, there have been restrictions to the availability of information, the right to share one's views of an environmental problem and limited access to justice. A special process was used to develop the Auckland Unitary plan in 2013, with participation being restricted significantly. Elements of the process have been incorporated into the later amendments to the general plan making process. Chapter IV will examine participation in the Auckland Unitary Plan process and identify the areas where participation has been limited. Chapter V will then look at the 2017 Amendments to the RMA, identifying areas of the AUP process that have been adopted, and the other amendments that limit participation.

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[120] David Sheppard "The What, Why and How of Resource Management Appeals" (1996) 1 BRMB 194 at 196.
[121] Ceri Warnock and Ole Windahal Pedersen "Environmental Adjudication: mapping the spectrum and identifying the fulcrum" (forthcoming, 2017) and *Canterbury Regional Council v Applefields* [2003] NZRMA 508.
[122] Above n 3.
[123] Resource Management Amendment Act 2013 and Resource Legislation Amendment Act 2017.

Chapter IV: Auckland Unitary Plan

The Auckland Unitary Plan (*"AUP"*) was developed through a unique process outlined in the Local Government (Auckland Transitional Provisions) Act 2010 (*"LGATPA"*).[124] The plan developed through this process replaced the Auckland Regional Policy Statement, four regional plans and seven district plans.[125] It was decided that because the colossal task of replacing all this framework could take up to 10 years under the regular RMA Schedule 1 provisions, a special streamlined process would be engaged.[126] The AUP process spanned approximately 4 years. The process also enabled a coherent approach to planning with a clear direction for the management of Auckland. In hindsight, the process signalled the trial of a new planning process, which has been incorporated in general planning processes.[127]

With a population of 1 million people, covering almost 500,000 Ha, Auckland is a complex space with many communities with different values, wants and needs in their city plan.[128] The majority of the plan became operative on the 15 November 2016. A small number of appeals remain on different parts of the plan. Elements of the existing Schedule 1 process were incorporated into the AUP process, however the introduction of an Independent Hearing Panel (*"IHP"*) facilitated a large part of the process. Following an 11-week consultation plan, the Auckland Council prepared and notified a 6971-page proposed regional policy statement and plan on the 30 September 2013. Submissions were welcomed for a limited time period and submitters could opt to appear in a hearing in front of the IHP to speak to their submissions. Following the extensive hearing period, the IHP made recommendations to the Auckland Council. The Council had 20 days to decide the plan.[129] They could decide whether to adopt or reject the recommendations of the IHP. The plan was subject to limited appeal.

The role of the IHP was to provide recommendations on the proposed AUP as a whole, and therefore the best outcome for the whole plan was prioritised over individual needs.[130] The IHP were able to make a number of process rules, as with general planning authorities. In particular, the same obligation to establish a procedure that "avoids unnecessary formality" was operating.[131] Additionally, the panel needed to establish a procedure that was "fair and

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[124] Local Government (Auckland Transitional Provisions) Act 2010 ("LGATPA").

[125] Ministry of Environment "Resource Management Amendment Act 2013: Fact sheet 4: Auckland Unitary Plan" (Ministry for the Environment, August 2013).

[126] Above.

[127] A number of aspects of the new planning processes under the Resource Legislation Amendment Act 2017 are developed from the AUP process.

[128] Auckland Council *Proposed Auckland Unitary Plan* (Auckland Council, September 2013).

[129] LGATPA, above n 124, s 148.

[130] Judge David Kirkpatrick and Judge John Hassan 'Effective Lawyering in the new planning paradigm' (paper presented to the CLE: Environment Law Intensive, November 2016) at [18].

[131] LGATPA, above n 124, s 136.

reasonable".[132] However, the IHP were subject to very tight timeframes and that influenced how the process was managed.

A Access to information

The element of accessibility to information is not confined to physical acquisition of information, but extends to understanding the information as well.[133] The proposed AUP was available to read at the Council service centres, community libraries, local board offices and online. There was no obligation to provide every person with notice, however, notice of designations and heritage orders had to be given to the owners and occupiers of land.[134] Although the Plan was perhaps distributed as practicably as possible, understanding and engaging the plan information was difficult for lay people.[135] Difficulties met in understanding the plan could have prevented further engagement in the plan making process.

1 Engaging with the plan

The practicalities of the engaging with the plan were exacerbated by the nature of the plan content. The proposed plan was just under 7000 pages long. The online version could be accessed in a written form, but was also accessible in an interactive map. The map allowed easy viewing of the plan, but it still required consultation of a legend and then the relevant sections of the plan to determine what the different layers mean. The map was best used to understand the rules an individual property was subject to.

The nature of the written proposed plan was very difficult to engage with. It had a 7 parts and multiple chapters and sections within those chapters. The sheer content in the plan was overwhelming, which although expected for a region of Auckland's size, made it incredibly difficult to engage with. It also made it difficult to appreciate the effects of all changes to an area. In order to best appreciate the difficulty in engaging with the material in the plan, I will use a hypothetical example.

Louise and Daniel, teacher and plumber, are looking at the proposed AUP, because they are looking at purchasing a number of sections in the Devonport peninsula area, on Regent Street.

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[132] Above.

[133] Above n 70.

[134] LGATPA, above n 124 s 123(4) and s 123(5).

[135] A lay person, or lay people, refers to members of the public who are using plans for the first time or on a very infrequent basis.

The sites have existing houses, but Louise and Daniel are interested in demolishing the existing townhouse and building two dwellings or a bed and breakfast, on the site, with the possibility of building a multi dwelling. However, before they proceed with the purchase, they want to know what constraints the proposed AUP will have on their development plans. In particular they want to know what constraints there are to development on the site, and in addition what development could happen in the surrounding Devonport community.

Firstly, Louise and Daniel would need to work out which zone, precinct and overlay the proposed sites are subject to. In consulting the map, Louise and Daniel see that on Regent Street there are three zoning types; single house, mixed housing suburban and mixed housing urban. Each zone has a variation of what can done in the area. Louise and Daniel are most interested in a mixed housing suburban site. The development rules for mixed housing suburban are set out in Part 3, Chapter I: 1 Residential zones.[136] They did not really know which part of the plan to consult, so they scrolled through the website until they found the correct section. The plan is presented through tables and bulk text.

In this section, there is a significant list of rules for activities that can be undertaken in that space, including building height, height in relation to boundary, the yard size, the building length, the coverage of a site, the landscaping and the outlook. Beyond this Louise and Daniel need to look to Part 3, Chapter I: 7 Development controls, within which the detailed rules of mixed housing suburban are set out covering 22 further topics in detail. These rules in these areas are relatively more prescriptive than their accompanying objectives and policies, however Louise and Daniel are still uncertain how they apply. Depending on their complete vision for development, there may be more considerations which are also outlined in this part of the plan.

The site with mixed housing suburban is also situated within the areas that are subject to the Volcanic Viewshafts, Pre-1944 Building Demolition Control and airspace restriction overlays. Information on these overlays can be found in different sections within Part 3, Chapter J: Overlay rules.[137] The Volcanic Viewshafts overlay places further restricts height development over the site. The Pre-1944 Building Demolition Control overlay makes total or substantial demolition of the existing building a restricted discretionary activity. This would be a significant barrier to the proposed development that Louise and Daniel are envisioning.

If Louise and Daniel want to understand how the rest of the Devonport area will be affected by the plan changes they will need to look at the overall layering on the map, and then read up about each of those zones as well. It could become a very demanding task.

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[136] Proposed Auckland Unitary Plan, above n 128 in Part 3, Chapter I: 1 Residential zones.

[137] Above in Part 3, Chapter J: Overlay rules.

Louise and Daniel will also have to overcome is the legal and jargon heavy nature of planning documentation, which will make the above steps significantly harder. For example, there are a number of references to the RMA and other jargon, that are not supported by explanatory text, jeopardising engagement. If we consider Louise and Daniel again, but perhaps with a different situation. They have chosen a site closer to the estuary on Kawerau Street in Devonport. They want to know constraints are on their development, which is subject to a coastal inundation overlay. The general rule for Auckland wide development is: [138]

> 2. Controls
> 2.1 **Permitted activities** - development in coastal areas
>
> 1. **Finished floor levels** for new **dwellings and habitable rooms** within coastal inundation areas must be at least 500mm above the **mapped 1 per cent AEP storm tide inundation plus 1 metre projected sea level rise** but with the following exceptions that is not required to meet this control:
>
> a. minor additions of less than $25m^2$ to existing buildings.
>
> 2. All new buildings in coastal inundation areas must be designed to ensure that **structural integrity** will be maintained during a **1 per cent ARI storm tide event** taking account of the **100 year sea level rise figure.**
>
> 2.2 **Restricted discretionary** activities
>
> 1. All consent applications for **restricted discretionary** activities must include a report by a suitably qualified engineer that confirms that the land on which the activity is located is not subject to the following:
>
> a. coastal erosion or inundation over a 100 year timeframe; or
>
> b. **land instability.**
>
> (*Emphasis added)*

I have emphasised parts of this section that I believe would not be easy for a lay person to understand. Many of these terms are defined within the plan, however depending on how you access the plan, you may have to cross reference them by consulting the glossary. Cross referencing in a plan makes interpreting a plan slower and more difficult. For example, to find the definition of the AEP, the abbreviations within the definitions section must be found first. The definition for Annual Exceedance Probability:[139]

> The probability of exceeding a given storm discharge or flood level within a period of one year.

[138] Above in Part 3 – Regional and District Rules – Chapter H: Auckland-wide rules – 4 Natural Resources – 4.11 Natural Hazards – 14 Coastal Inundation.
[139] Above in Part 4: Definitions.

> For example, a 1 per cent AEP flood plain is the area that would be inundated in a storm event of a scale that has a 1 per cent or greater probability of occurring in one year.
>
> Equivalent average return intervals (ARI) are:
> 1 per cent AEP = 100 year ARI
> 2 per cent AEP = 50 year ARI
> 10 per cent AEP = 10 year ARI
> 20 per cent AEP = 5 year ARI
> 50 per cent AEP = 2 year ARI

In order to understand the AEP, you also have to understand the ARI, which is found through further consultation of the definitions section. It is the Average Recurrence Interval. Furthermore, finding out the ARI requires consultation of other council documentation. Effectively, interpreting one clause in the plan can require a person to have to follow a trail of information to get their answer. It makes accessing information within a plan challenging and slow.

The difficulty of planning documentation for lay people has been highlighted in a recent report commissioned by the Ministry for the Environment.[140] The issues recognised in the AUP are not unique to that situation, they are present in many other planning documents. The report concluded that plans are inherently complex and legally and technically framed. The size, format, structure and language of plans exacerbates the difficulty faced by people who engage in the plan.[141] The report concludes was that lay persons would not follow their instinct on plan content without the consulting a technical expert.[142] Engagement in planning documents is arguably too difficult to decode for lay people without legal support. And this difficulty would have been exacerbated by the tight timeframes.

B Participation in the process

The initial consultation stage of the AUP was beneficial in getting people involved and aware of the major changes that would occur as a result of the plan reform. This involved 249 public meetings, and over 21,000 pieces of written feedback.[143] However it was an initial process, and given the major change the AUP would be to the previous planning documentation, it would

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[140] Ministry for the Environment 'Research of RMA Plan-User Experience' (Ministry for the Environment, 2017).
[141] Above at 4-6.
[142] Above.
[143] Auckland Council 'A timeline of the Auckland Unitary Plan' (2016) <www.ourauckland.aucklandcouncil.govt.nz>.

be difficult for people to understand what form the plan may take. Engagement in the preliminary consultation stage should not be a substitute to participation in the plan making process. It is difficult to ascertain how much of the information sourced in the informal consultation process would have been included and used in the formal AUP process.

1 Making submissions

The nature of the information in the planning documentation made it difficult to engage with. Submissions on the proposed AUP were required within 60 days of notification. To consider the complexity of the 6971-page in this time period in any great detail would be beyond the scope of most people. Any person could make a submission unless they were submitting for the reason of trade competition.[144] Submissions were made using official documentation, requiring a person to articulate their views, based on the complicated planning documentation. The act of writing a submission was not overly complicated, however it did require people to communicate the planning provision or provisions that they were concerned with, and express why they were concerned with that provision. That is not a straightforward exercise. Although 9400 submissions were received in this initial period, this is a fraction of Auckland's population.

The council then made a summary of these submissions, and invited further submissions for another 30 days. Schedule 1 limitations applied to further submissions, with them only being welcomed by a person representing the public interest, a person with a greater interest than the public interest or the local authority itself.[145] The summary was 3943-pages long and included the main points from each submission in table form.[146] The information in these tables was technically framed and required cross referencing back to the proposed plan and the original submissions. The difficulty identified in accessing information also applies here. The original submissions were accessible on the Council website, which provided more information to further submitters. Some of these submissions were upwards of 100 pages and full of expert evidence, once again making it difficult to read and evaluate the content of these submissions. A further 3800 submissions were made following this report.[147]

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[144] RMA, Above n 2, sch 1 cl 6.

[145] Above sch 1 cl 8.

[146] Auckland Council *Proposed Auckland Unitary Plan: Summary of Decisions Requested* (Auckland Council, June 2014).

[147] Auckland Council 'Submissions and further submissions to the Proposed Auckland Unitary Plan' (2017) <www.aucklandcouncil.govt.nz>.

2 Hearing process

Hearings were centred around the 70 identified topics with 58 hearing sessions held.[148] The hearing procedure was outlined by the IHP in a document available online.[149] Each person who indicated they would like to speak to their submission would be given 10 working days' notice of the hearing time and place.[150] The nature of the hearing process was outlined in ss 128 to 141 LGATPA. However, the IHP had discretion regarding procedure, they could set time limits on the provision of evidence[151], permit cross examination, determine how submissions are presented and outline time limits on the presentation of evidence. Each submitter had 10 minutes to speak to their submission, unless they had prearranged for a longer time slot.[152] The IHP could ask questions of clarification where appropriate as part of the inquisitorial role they had taken on. The panel undertook an obligation to inform a submitter of any queries that they may have with their point of view.[153] This was particularly important to enable the IHP to consider issues beyond the artificially separated hearing topic. This separation neglects the inherent connectivity of environmental problems.

In some cases, a pre-hearing meeting was used as a mechanism to try and resolve disputes prior to the more formal hearing setting, and to reduce time in the actual hearing.[154] It also provided a less formal setting for engagement. Mediation was also used. Both processes result in joint memoranda which could be strongly influential, however not decisive in the IHP setting, because the IHP must determine a planning outcome as a whole.[155] Participants in this process may have felt disheartened that it did not affect the planning outcome immediately and could have preferred to have direct engagement with the IHP. If a submitter did not attend a pre-hearing meeting, the IHP could prevent that person, or party from being heard at the actual hearing.[156] Therefore, there was pressure on a person to attend these in addition to a hearing. If you had submitted on many topics, you could be invited to attend many pre-hearings and hearings.

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[148] Kirkpatrick and Hassan JJ, above n 130 at [51].

[149] Auckland Unitary Plan Independent Hearing Panel 'Auckland Unitary Plan Hearing Procedures' (2015) <www.aupihp.govt.nz>.

[150] Above at [66].

[151] LGATPA, above n 124, s 140.

[152] Auckland Unitary Plan Independent Hearing Panel, above n 149 at [99]-[100].

[153] Kirkpatrick and Hassan JJ, above n 130 at [30].

[154] Auckland Unitary Plan Independent Hearing Panel, above n 149 at [32]-[39].

[155] Kirkpatrick and Hassan JJ, above n 130 at [18].

[156] LGATPA, above n 124, s 132.

Despite attempts to make the process a more informal situation, a hearing is inherently formal, a fact noted in the hearing procedure fact sheet.[157] Cross-examination and questioning of witnesses was available to the panel.[158] Questioning and cross examination are formal, and would require a clear process to be followed. The process, which lay people are unfamiliar with, could make them feel uncomfortable in participating in the hearing.

3 Practicalities of the hearing process

Throughout the hearing process, the IHP could allow for the submission of additional information or evidence where appropriate. Admission of additional evidence and hearing of this information could make it impossible for lay people to interpret and challenge information that was presented to them at late notice. For example, given the pressure on the IHP to hear a lot of issues in a relatively short period of time, within the scope of one hearing topic, they would put short time constraints on these issues, so they were discussed while the issue was still relevant. The nature and quantum of that information would have made it unreasonable for a lay person to understand and form a view on.

Another practicality in the hearing process, was that the majority of hearings were conducted in the Central Business District in Auckland. The site was chosen because most plan topics were not site specific, and there are public transport mechanisms to get people into Auckland Central. The Auckland super city covers an expansive area, and therefore it means that this central location may have discouraged people from actually attending the hearing and participating in the process. For example, if you wanted to submit on a provision that affected the Awhitu Peninsula, you would have to make the 1 and a half hour, 100-kilometre drive to speak to a submission in person. It is likely that to attend a hearing, a submitter would have to take time off work, so participation was expensive as well as practically challenging. If these people also lived a significant distance from the hearing location, they would be probably deterred from attending a hearing. Ultimately, the processes in place discouraged active participation in the planning process.

4 Risks of restricting participation

The reality of restricting participation in the plan making process can lead to illegitimate decisions that the public can feel disheartened by. An example of uninformed decision-making

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[157] Auckland Unitary Plan Independent Hearing Panel 'Fact Sheet 5 – Attending a Hearing' (2015) <www.aupihp.govt.nz> at 2.

[158] LGATPA, above n 124, s 136(3).

in the AUP process was when the Council tried to make an out of scope decision.[159] The decision would have the effect to make a significantly larger part of Auckland subject to more intensive housing development. The proposal by the Auckland Council was to have 17 per cent of the city fall into the "Mixed Housing Urban" zone which permits a variety of housing types, up to three storeys in height.[160] The initial plan proposal had these at 11 per cent. Despite the decision to up-zone being within the power of the Council, it neglected the public view of this development. The public view was eventually incorporated into the decision, moving it along the spectrum of IAG public participation.[161]

C Access to justice

Objection and appeal rights were hugely limited in the AUP process, compared to the pre-2009 standard. There were limited objection rights in the IHP setting. A submitter could object if their submissions were declined, however, any objections for other grounds (like IHP process) were limited.[162] The main mechanism for justice in the AUP process was through the appeals process, once the Auckland Council made decisions on IHP recommendations.

Following the decisions of the Council on the IHP recommendations, submitters had 20 days to appeal the decisions.[163] The scope of appeal was significantly reduced compared to the pre-2009 standard. Submitters could appeal to the Environment Court where the Council did not accept a recommendation of the IHP, however, they could not appeal any accepted recommendations.[164] A person who had been unduly prejudiced by a recommendation accepted by the council that is beyond the scope of submissions could also appeal to the Environment Court.[165] A person could appeal to the High Court on a question of law, for a recommendation accepted by the Council. There were specific appeal rights for designations or heritage order decisions.

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[159] Alice Parmiter 'Auckland residents concerned over proposed zoning changes in Unitary Plan' (2016) <www.stuff.co.nz>.

[160] Maria Slade 'Auckland special meeting on contentious 'upzoning' could create chaos' (2016) <www.stuff.co.nz>.

[161] Maria Slade 'Auckland Council abandons controversial Unitary Plan zoning proposals' (2016) <www.stuff.co.nz>.

[162] LGATPA, above n 122, s 154.

[163] Above, s 123(7) and s 123(8).

[164] Above, s 156(1).

[165] Above, s 156(3).

The appeals process has been a topic of criticism for practitioners working on the AUP.[166] In particular, without appeal, there are concerns that a planning process will produce a plan that is of poor quality and will not endure.[167] Appeals processes add value to a plan, and arguably there is too much emphasis on reducing time in the planning process.[168] Prior to the AUP, the average planning process would take 8.2 years from start to finish, the AUP took just under four years.[169] It could also be subject to further costs and general dissatisfaction later in planning considerations. A poor-quality plan could mean that there will be more applications to change the plan via the private plan change process outlined in Schedule 1 part 2, which is not favourable to the Council, or stakeholders affected. Dissatisfaction in the plan could only become clear at the resource consent stage when it is too late for changes to be made.[170] The dissatisfaction could undermine the public perception of the planning process overall. Furthermore, it has been argued that it is inconsistent that there are wide appeal rights in the consenting process, but that there are limits of appeal in the plan-making process.[171]

A further concern of the limited appeal rights reflects on the jurisdiction of the Council in considering the IHP recommendations. The Council had the ability to depart from the IHP recommendations, if they provided reasons for doing so. The IHP undertook a comprehensive process in pursuit of determining the best plan for Auckland. It was a rigorous process. The ability of the Council to reject the IHP recommendations undermines the fundamental duty of a decision-maker.[172] That is that a decision is reasonable, fair and based on probative evidence.[173] Arguably, if the Council would like to adopt a different decision they should only be able to, if they rehear all of the facts and decide the matter afresh.[174]

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[166] Derek Nolan, Bal Matheson, James Gardiner-Hopkins and Bronwyn Carruthers 'A better approach to improving the RMA plan process' (2012) RMTP 63, Bronwyn Carruthers and Simon Pilkington 'Eroding the founding principles of the Resource Management Act 1991' (2013) 8 RMLJ 17, Richard Brabant 'The Proposed Auckland Unitary Plan hearing process – a template for the future?' (2016) 4 BRMB 123,

[167] Nolan, Matheson, Gardiner-Hopkins and Carruthers, above n 91 at 70.

[168] Above.

[169] Kirkpatrick and Hassan JJ, above n 130 at [50].

[170] Nolan, Matheson, Gardiner-Hopkins and Carruthers, above n 91 at 70.

[171] Above at 72.

[172] Derek Nolan, Bal Matheson, James Gardiner-Hopkins and Bronwyn Carruthers 'An appeal to retain due process and to focus on quality plans' (2012) 9 BRMB 157 at 158.

[173] Above.

[174] Above.

D Conclusion

Aptly summarised by Judge Kirkpatrick and Judge Hassan, on their experiences in the AUP process and the Christchurch Replacement District Plan:[175]

> The usual decision-maker's dilemma is that everyone wants something quick, cheap and good, but anyone can only ever choose two of those.

The AUP process was unique and tackled an issue that had never been previously encountered. The process was undertaken in an incredibly short period of time to provide a planning outcome and concentrate the resources. However, the expense of this process was erosion of public participation. A reduction in timing to consider and respond to a hugely complex plan undermines even the most minimal level of IAG public participation, to inform the affected. Furthermore, the hearing process was undermined by its formalistic nature, and the hostile processes used. The final degradation of public participation is in the form of the limited route of appeal, which undermines the credibility of a decision. It does not allow dissatisfaction to be remedied. The AUP process, as I will demonstrate, has since been incorporated in the most recent reforms to the RMA.

[175] Kirkpatrick and Hassan JJ, above n 130 at [63].

Chapter V: Resource Legislation Amendment Act 2017

The process used in creating AUP paved the way for wider reforms to the plan making process. The majority of these changes were made through the Resource Legislation Amendment Act 2017 (*"RLAA"*). The normal Schedule 1 planning process has been changed alongside the introduction of two new plan-making processes: collaborative plan-making and streamlined plan-making. Each variation demonstrates the further erosion of public participation under the RMA.

A Changes to Schedule 1 Plan Making

The purpose of these changes, is once again, to provide a more efficient and less costly exercise.[176] Amongst a few other adjustments, limited notification of plan changes is now available to councils. The benefits of a limited notification process reduction in hearing times, costs, and the impact of appeal later in the process. Limited notification is only allowed when all persons directly affected by the proposed plan change can be identified.[177] There have been no new changes to the appeals part of the normal plan making process.

1 Access to information

Limited notification is a direct challenge to the minimum level of participation proposed by the IAG, to inform. Limited notification means that notification of a change only needs to be served on iwi, the relevant local agencies and all directly affected parties.[178] Chief Justice Sian Elias highlighted the nature of making a narrow classification for "directly affected" parties and the risks in doing so in *Discount Brands v North Shore City Council* [2005] 2 NZLR 597:[179]

> Many of the principles of natural justice are based on the hard experience that assumptions that cases are open and shut are often disappointed when opposing views are heard. Additional care is required in the circumstances of the Act itself with its policies of public participation and principles of open decision-making, opportunity for reconsideration of the merits of a decision by the Environment Court (effectively excluded by a decision not to notify)…

[176] Ministry for the Environment 'Resource Legislation Amendment Act 2017 Fact Sheet No. 5 – A new optional streamlined plan making process' (Ministry for the Environment, April 2017).
[177] RMA, above n 2, sch 1 cl 5A.
[178] Above, sch 1 cl 5A(3), (8).
[179] *Discount Brands v North Shore City Council* [2005] 2 NZLR 597 at [27] per Elias CJ.

Restricting public participation is inconsistent with general policy of the Act and the process for determining who is affected, should not be undertaken in a "vacuum".[180] The decision of the local authority not to publicly notify the plan changes must be considered in reflection of negative ramifications it will have.

Beyond this, the amendment only requires a local authority to make the proposed plan changes available within the community library.[181] Availability of a plan change on the website may be enough. The obligation is on the people to be informed. The physical access to the plan will be a barrier alone, and if the plan takes a complex form, like that of the AUP, then people will struggle to access the information.

2 Participation in the process

There are two issues with participating in the process: limitations to the class of participants and limitations on time to participate.

Participation through submissions on a limited notification proposal are confined to those who were notified.[182] The main way a person will be notified is if they are a 'directly affected' person.[183] Per the majority in *Discount Brands Ltd*, "directly affected" persons would only be those who had property rights and interests[184], including landowners and occupiers. This is a very limited class that artificially confines environmental problems to a spatial area. It does not appreciate the broad scope of the effects of environmental problems. To exclude people from the decision-making process can limit the information provided to the decision maker and undermine the credibility of the decision made.

If limited notification is used, then submissions are only invited for 20 working days. Depending on the form the plan takes, the sheer volume and complexity of the plan information could be unreasonable to process and give feedback on in such a short period of time.

B Collaborative Plan Making

The collaborative plan making (*"CPM"*) process is intended to provide the community with a process to participate at the front end of the planning process to add value earlier in the

[180] Above at [25].
[181] RMA, above sch 1 cl 5A(9).
[182] Above, sch 1 cl 6A.
[183] Above, sch 1 cl 5A.
[184] *Discount Brands*, above n 175.

decision-making process.[185] There are a number of aspirations for the CPM. It will try to resolve difficult issues and to develop solutions to complex problems in the collaboration process.[186] It is also intended that with the process sitting in the collaborate part of the IAG spectrum, that community values will reflect community values better, reducing litigation and delays later on.[187] The process is predicted to be time consuming and to require a number of resources. Once the process is initiated, the local authority is committed to it.

Local authorities must consider a number of factors when deciding whether to use the process: the scale and significance of the resource management decisions, impact of the decisions on people, whether the council has capacity for a process, designations or heritage orders within the decision, whether people in the community will be able and willing to participate, whether issues of national significance will arise and any specific iwi considerations that are required.[188] Under the CPM process, the local authority establishes a collaborative community group to provide consensus recommendations, which must be "given effect to" in the proposed regional planning statement or plan.[189] The collaborative group requires at least one iwi representative, at least one local authority representative, one person from the customary marine group if appropriate and any representatives of requiring authorities or heritage protection authorities.[190]

Submissions are taken and handled in the same manner as under Schedule 1. The hearing process is undertaken by an appointed review panel who make recommendations to the local authority. This is similar to the IHP used in the AUP process. The local authority then makes decisions on whether they should accept or decline the recommendations.

1 Access to information

Public notification is required when the council opt to use the CPM, when they appoint the collaborative group and their terms of reference are required.[191] The process of the collaborative group to collect the views and perspectives of the community is self-determined.[192] They can determine how much information is shared with the community and the form that this information will take. They have the ability to position themselves on the

[185] Ministry for the Environment 'Resource Legislation Amendment Act 2017 Fact Sheet No. 6 – A new optional collaborative plan making process' (Ministry for the Environment, April 2017).
[186] Above.
[187] Above.
[188] RMA, above n 2, sch 1 cl 37.
[189] Above, sch 1 cl 46(2)(a).
[190] Above, sch 1 cl 40.
[191] Above, sch 1 cls 39-41.
[192] Above, sch 1 cl 43(3).

IAG spectrum at the highest level of public participation. However, that will be affected by the number of resources given to the process, which may be a significant barrier. If a limited amount of information is made available, and the form of the planning information is difficult to access, collaboration will have a negative impact on inclusion and engagement of people, where it could be having the most impact. There is the risk that people could be shut out of the process by a poor collaboration process. The consensus report of the collaborative group must be publicly notified, which enables people to consider both the views of the collaborative group and the proposal of the council side by side.[193]

The second element of access to information is notification. The proposed plan which adopts the consensus report finding, is notified to the public. There is a risk that the proposed plan will take on a form that is heavily jargoned and difficult to read, hindering engagement.

2 Participation in the process

The collaborative group has the capacity to determine how the community engages in the pre-proposal process. The collaborative group is supposed to represent the views of diverse community needs and interests but the representation mechanism used for involving people poses a real risk of undermining meaningful involvement in a process.[194] There is a risk of regulatory capture, that some groups or sectors may be better represented in the process, and that power inequalities may influence the direction of the plan in a way that favours them more.[195] It may prevent information from getting to the decision maker, and subsequently results in a poorer decision. It may also undermine the legitimacy of the decision within the community.

Submissions face the same challenges as the normal plan making process, with people having to interpret and give feedback on complex plans in a limited time period. The hearing process is overseen by a review panel who give recommendations to the council.[196] The review panel assume the same powers and duties of the local authority when they carry out a hearing under the RMA, with a few exceptions.[197] Notably, cross examination and questioning of witness are not excluded from their duties and powers.[198] Questioning and cross examination introduces the issues of formality and engagement that were raised in the AUP process. The nature of a

[193] Above, sch 1 cl 45.
[194] Jordyn Landers and Roslyn Day-Cleavin 'Eroding or enhancing public participation' (2017) 1 Planning Quarterly 12 at 17.
[195] Above.
[196] RMA above n 2, sch 1 cl 69.
[197] Above, sch 1 cl 70.
[198] Above, sch 1 cl 70(1)(a).

formal hearing can discourage participation within a process that needs engagement in order to inform the decision to the greatest extent.

3 Access to justice

Since the collaborative group are not an elected body like the overarching local authority, there are limited ways in which the community can hold them to account. The process and the outcomes of the collaborative group can be reviewed by the Ombudsmen or formally reviewed through judicial review[199], but there is no informal review process that can respond quickly to the process of the collaborative group unless this is included in the terms of reference. This is a weakness to the collaborative group process. There are no objection rights in the hearing process, which is unlike the AUP process. This means that issues with the hearing process cannot be challenged and remedied before a decision is made. If there is unease with the process being undertaken, the public may not feel like they have been listened to, which would undermine the legitimacy of the decision.

Appeal rights are limited to those who make a submission on the plan.[200] A de novo appeal is only allowed where the council's decision is inconsistent with the review panel's recommendations.[201] They are only allowed to the Environment Court on points of law where the council's decision is consistent with the review panel's recommendations.[202] As in the AUP process, this is a significant degradation of the appeal rights that were available under the RMA pre-2009. Judicial review of the local authority is available in all circumstances.

C Streamlined Plan Making

The streamlined plan-making (*"SPM"*) process allows a local authority to tailor the plan making process on application to the Minister for the Environment. It is a framework planning pathway which enables a council to try and provide an efficient process to effect results quickly. The local authority must propose their intended planning process to the Minister. If accepted, the unique process replaces the normal Schedule 1 plan making process.

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[199] As a committee of the local authority per RMA sch 1 cl 40(9), the collaborative group may be subject to the Local Government Official Information and Meetings Act 1987, introducing investigations of the Ombudsman and judicial review if appropriate.

[200] RMA, above n 2, sch 1 cl 60(2).

[201] Above, sch 1 cl 60(1).

[202] Above, sch 1 cl 61.

The Minister oversees the whole plan making process, and must accept the decisions of the local authority. At the Bill stage, the process was envisaged as being used in special circumstances, however these circumstances are drafted very widely in the final legislation and can apply to many situations. The criteria for opting into the SPM are implementation needed for national direction, public policy requires it urgently, the community needs, and it is necessary to combine several plans, or there is another expeditious process that needs it.[203] Effectively the streamlined plan making process undermines the devolved planning process, and instates the central government as the driver of plan making.

The SPM process is intended to increase flexibility and supposed to speed up decision-making. The Ministry for the Environment have suggested that this is only made possible by shortening public participation opportunities that are mandatory in the process.[204] The schedule requires that the following are provided for at a minimum: notification and a s 32 report, an opportunity for submissions and a report showing how those submissions have been considered. The process can include other aspects if they are relevant to the problem faced.

It is likely that this unique planning process may be appropriate in technical changes or in changes that are implementing national policy where public participation will have less of an impact at changing the outcome.[205]

1 Access to information

Information is made available through the minimum requirements of notification. The Minister can decide whether there is full public notification, or if there is limited notification, however these are subject to the normal Schedule 1 cls 5 and 5A requirements.[206] If all people are notified then information will have a better engagement in the process. If notification is limited then the process is undermined by deprivation of information and introduces legitimacy issues, as I have noted in Chapter 3. The nature of the information also poses a risk to the participation of the public in the plan making process.

2 Participation in the process

The overall impression of the streamlined planning process is that there are reduced opportunities to participate in the process, and that can undermine perceived credibility of the

[203] Above, s 80C.
[204] Ministry for the Environment 'Planning tracks comparison' (Ministry for the Environment, 2017).
[205] Landers and Day-Cleavin, above n 194 at 18.
[206] RMA, above n 2, sch 1 cl 78(4)(b).

process within the community. The process transfers significant power to central government and unconstrained discretion to the Minister. Paired with large limitations on effective participation, the process is not best practice.[207] Submissions are the only surety of participation in the streamlined process, and this has ramifications on the perception of the overall process to a community.[208] Despite submissions being mandatory, their inclusion in the process is not outlined with a mandatory time frame, so there is the potential for short time frames to negative effects on the participation of people. There is the same potential for the same problems faced in the AUP process. Additionally, the process does not oblige consultation of affected parties.

The most significant decrease in participation is that the hearing process is not mandatory in SPM. Hearings offer an opportunity for information articulated in submissions to be tried and tested. Inquiry in resource management decisions is essential in understanding the depth of the complexity operating. It is particularly important for examining the nuances of evidence advocating for a unique interaction between people and the environment. The significant decrease in participatory processes undermines the value placed on participation as a 'check and balance' under the RMA when engaging authorities in decision-making.

3 Access to justice

There are no appeal rights to the public in the SPM process. The only accountability is provided by judicial review of decisions made by the council or by the Ministry for the Environment. There is much less prospect for a successful challenge of a decision for judicial review, than for de novo appeal, which ultimately undermines public participation.[209]

D Conclusion

Public participation has been eroding since 2009. Public participation is a critical principle in the RMA and to undermine this principle goes against the spirit of the Act. The 2017 amendments of the RMA contribute to a further erosion to pathways for public participation.

The introduction of limited notification to the Schedule 1 process may lock people out of the decision-making process, inappropriately. It artificially requires the local authority to define a

[207] Resource Management Law Association of New Zealand "Submission on the Resource Legislation Amendment Bill" (2016).

[208] Landers and Day-Cleavin above n 194 at 17.

[209] Warnock and Pedersen, above n 120 at 652-653. Here, the authors highlight UK case law suggests judicial review has limited ability to substantively review a decision.

narrow class of people to be affected by an environmental problem. The task of identifying a class of people affected is difficult, and introduces great risk if it is incorrect.

The CPM process has introduced a number of concerns, particularly those that were raised in the AUP process. The discretion afforded to the collaborative group may undermine the engagement of the public in the process. The ability to restrict information in many ways, also seriously undermines any participation of the public.

The SPM indicates a devolvement of decision-making in plan making back to the central government. The SPM has the ability to be used widely, and undermines public participation. The wide discretion of the Minister within the process also raises concern as to the recourse afforded to an individual in protecting their rights, or pursuing their public interest.

Final Remarks

At the core of this dissertation is a deep concern for the effects of restricting the public from participating in plan making decisions. Planning has a ubiquitous effect. It has a profound effect on the daily lives of people. It dictates where people live, work and play. Plans must consider the interactions of people with the natural and the non-natural features of the environment. They must give effect to the community vision for an area. The decision maker must identify and carefully manage the polycentricity of the problems before them. The depth and complexity of such a problem will only be understood if a decision maker is armed with all relevant information. Decision makers cannot access this without the public participating in the decision-making process.

In the last ten years, the plan making process in New Zealand has changed. Although participation is still available in all the plan making processes I have considered, the true effectiveness of these provisions for good public participation are questionable. The erosion of public participation has a substantive effect on the decision-making process, and the people who will be affected by that decision. Public participation comprises of three key aspects: access to information, participation in process and access to justice.

Access to information necessitates both physical access to information but also the understanding of this information. The nature of planning documentation is challenging. The jargoned and complex manner in which this information is presented is one of the biggest barriers to engagement. Importantly, information is a gateway to the rest of the participation processes. A person cannot engage in a decision if they do not know what the decision-maker is considering in the first place. Participation in the process must appreciate the practicalities of people engaging in the decision-making process. Time pressures and formal processes are likely to have a chilling effect on public engagement. Accessibility to participation in the process must be a key consideration when establishing a plan making process. Participation through representative democracy alone may be considered inadequate in resource management plan making. Access to justice has been narrowed by the AUP and the 2017 amendments to the RMA. The pathways to appeal have been limited and these have a significant effect on satisfaction and participation in decision making. The power of de novo appeal needs to be protected in environmental problem solving for this best facilitates participation.

All three aspects of participation are essential, one cannot supplement the others, which must be remembered when resourcing a plan making process. Participation adds value and creates more robust and durable planning solutions. It is critical that public participation is not further eroded. Public participation must not become tokenistic, it is fundamental to environmental problem solving.

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