Environmental Law and Justice — A Perspective on Three Decades of Practice and Some Possibilities for the Future

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The views which I express in this paper are largely those gained over 30 years of practice as a lawyer in the field now known as environmental law. The approach of the second millennium provides an opportunity to review the changes made both to the content and practice of environmental law over the past three decades, and to consider whether it may fairly be said that progress has been made. In view of my position as a Judge, I give the usual disclaimer that any views I express are not necessarily those which I would adopt in my judicial capacity.

I. INTRODUCTION

This paper examines the changes progressively made in environmental and resource management legislation, with particular reference to the degree of direction and control exercised by central and regional government. It considers the relevance of economic and social issues to environmental law and discusses the mechanisms available to reduce uncertainties in planning instruments and to ensure the attainment of the goals the legislation sets out to achieve.

A further theme of this paper is the significance of the role of public interest groups in the development and implementation of environmental law and some suggestions are offered as to how the current impediments to public participation in the adjudicative processes under the Resource Management Act 1991 may be removed or ameliorated as well as some proposals to reduce delay.

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II. THE EARLY PLANNING LEGISLATION

1. The Legislative Position in 1968

When the writer commenced practice in 1968 the expression "the environment" was not in common usage. "Resource management" had not been thought of. The emphasis was on "planning", a concept which had originated in the Town Planning Act 1926. That Act established a Town Planning Board which had the function of approving town and regional planning schemes after the hearing of objections. The general purpose of town planning schemes was stated to be the development of the city or borough to which it related "in such a way as will most effectively tend to promote its healthfulness, amenity, convenience and advancement".[1] Regional planning schemes related to rural areas and were seen as being complementary to town planning schemes for cities and boroughs and having the same general purposes.[2] A schedule to the Act set out the matters to be dealt with in town and regional planning schemes, including roading and other infrastructure, the reservation of land for recreational and other purposes, the preservation of objects of historical interest or natural beauty, and provision for amenities. Interestingly, such schemes were to make provision for buildings, including matters now known as bulk and location controls, but also extending to "character" and "harmony in design of façades".

2. The Town and Country Planning Act 1953

The provisions made in the 1926 Act for regional and town planning schemes were continued and elaborated in the 1953 Act. Regional planning schemes had the general purpose of "the conservation and economic development of the region ...".[3] This was to be achieved by the classification of land for best use and the co-ordination of public utilities and amenities. The Regional Planning Scheme was referred to as a guide to public and local authorities and others in relation to the conservation or development of the region. However, to the extent that public and local authorities dealt with matters of regional significance, they were obliged to adhere to the provisions of the Regional Planning Scheme. Elaborate provisions were made for the referral of a proposed regional planning scheme to the Ministry of Works for inclusion of any existing and proposed public works.[4] At that time, the 1953 Act (and subsequently the Town and Country Planning Act 1977) was administered by the Ministry of Works. Particularly during the 1960s and 1970s, the Ministry of Works was one of the largest and

1 Town Planning Act 1926, s 3(1).
2 Ibid, s 3(2).
3 Town and Country Planning Act 1953, s 3.
4 Ibid, s 10(2).

most powerful government departments, and was responsible for the undertaking of major public works throughout those periods. The department took a major role in the preparation and administration of planning schemes in order to ensure that proper provision was made for existing or proposed works.

District Schemes under the 1953 Act also focused on the development of the area to which the scheme related. The general development purpose was to be undertaken "in such a way as will most effectively tend to promote and safeguard the health, safety, and convenience, and the economic and general welfare of its inhabitants, and the amenities of every part of the area".[5]

Two points can be made. First, the generality of the language used, which has been a feature of planning legislation throughout its history, and continues into the Resource Management Act 1991. Second, relevantly to the present debate, the 1953 Act made no bones about referring to the economic and general welfare of the inhabitants of the district and the amenities thereof. To the writer's knowledge, the reference to economic matters has rarely, if ever, in the history of planning law in New Zealand, been construed so as to embrace the economic well-being of a particular individual or company or, for that matter, economic detriment to an individual inhabitant. Debate has almost invariably focused on the general economic welfare of the community. In particular, there has been a traditional reluctance in planning cases to protect existing retailers and investors from business competition, or to allow the legislation to be used as a cloak for licensing retail business.[6] Over the years, trade competitors have fought each other bitterly in planning cases. They have always done so, however, under the guise of promoting the general well-being and amenities of the community or whatever the applicable rubric may be in the relevant legislation.[7] While it is possible to legislate to prevent the adverse effects of trade competition being taken into account, it is doubtful that it will ever be possible to prevent trade competitors from opposing each other (at least ostensibly) upon grounds available in the relevant legislation. One only has to look at the oil industry. Before the abolition of licensing for motor spirits retailers, the oil companies traditionally opposed each other's applications for new licences. Once licensing was abolished, the battle-ground simply shifted to the Planning Tribunal and now to the Environment Court. [Editor's note: The issue of trade competition in the context of the resource management process is examined in detail in the article by Jonathon Cutler at p 67 of this issue of the *Journal.*]

5 Ibid, s 18.

6 *Bible College of New Zealand v Waitemata City Council* (1989) 13 NZTPA 393, 404–406; *Imrie Family Trust v Whangarei District Council* (1994) NZRMA 453, 462, and see generally, Williams, D. A. R. (ed), *Environmental and Resource Management Law in New Zealand* (2nd ed, 1997) para 3.36.

7 See, eg, *Quarantine Waste (NZ) Ltd v Waste Resources Ltd* [1994] NZRMA 529, 536 per Blanchard J (HC).

The 1953 Act made provision for the control of "objectionable elements", which included noise, smoke, smell, effluent, vibration, dust or other noxious effects, or danger or detraction from amenities, although not until an amendment of the Act in 1957.[8] Prior to that time, the legislative control of pollution was relatively limited. Such as there was tended to be provided for in public health legislation. For example, it was not until the passage of the Clean Air Act 1972 that there was comprehensive legislation dealing with the control of air pollution, and the first water pollution statute was not enacted until 1953,[9] later to be replaced by the Water and Soil Conservation Act 1967. Similarly, noise was not subject to separate statutory control until the passage of the Noise Control Act 1982. However, the Town and Country Planning Act 1977 continued the control of objectionable elements contained in the 1953 Act.[10] It also made specific provision for the imposition of noise limits in District Schemes and limits on noise were regularly imposed as conditions of consent for activities. The fact that specific controls on various forms of pollution were not introduced earlier reflects the relative lack of scientific knowledge of the environmental effects of pollution as well as the fact that the population and extent of development was reasonably small. It was the piece-meal treatment of environmental effects that was one of the motivating factors for the passage of the Resource Management Act.

The Town and Country Planning Appeal Board established under the 1953 Act was responsible for the conduct of appeals under the Act. The contribution made by the Chairmen and members of the Appeal Boards over the years should not be underestimated. Although the writer's appearances before the Appeal Board constituted under the 1953 Act were relatively limited, the contribution of Arnold Turner in particular has been considerable. The principled approach he adopted over many years was the forerunner for the substantial body of environmental law which has been established subsequently by the Planning Tribunal and now the Environment Court. In total, the body of law established by the various boards, tribunals and courts over the years represents an outstanding contribution to jurisprudence in the planning and resource management fields. In that respect, the major contribution made by Judge D. F. G. Sheppard as the Principal Environment Judge must also be acknowledged.

In 1973, the Town and Country Planning Act 1953 was amended to introduce for the first time an obligation to recognise and provide for matters of national importance in the preparation and implementation of regional and district schemes. These related to the preservation of the coastal environment, lakes and rivers, and their protection from unnecessary subdivision and development, the avoidance of encroachment of urban development on land having high value for food

8 Town and Country Planning Act 1953, s 34A.
9 Waters Pollution Act 1953.
10 Town and Country Planning Act 1977, s 77.

production, and the prevention of sporadic urban subdivision and development in rural areas.[11] Unlike the Town and Country Planning Act 1977, the matters of national importance were not expressed to override the general purposes of the Act.

3. Mining

Mining had long been treated as a separate regime, not subject to the controls of the Town and Country Planning Act 1953. This was confirmed by the Court of Appeal in 1978,[12] which held that the Mining Act 1971 was an exclusive code in respect of the use of land for mining purposes pursuant to licences granted under that Act, and was not subject to the land use control provisions of the Town and Country Planning Act. This position remained the case until statutory amendment in 1981. Prior to that time, under the Mining Act 1971, objections to applications for mining privileges were investigated by a District Court Judge, who made recommendations to the Minister of Mines (later the Minister of Energy).[13] As the principal purpose of the Mining Act was "to provide improved facilities for the development of mineral resources", it is not surprising that objections did not often result in the mining privilege being declined.

A further difficulty was that the grant of a prospecting licence carried with it the right to a mining licence so that objectors had obvious difficulties in advancing realistic objections to a mining licence at the prospecting stage. The effects of prospecting were relatively minor in relation to the potential effects of subsequent mining. These issues came to a head during the 1970s and early 1980s when the relatively high price of gold encouraged mining companies to investigate prospects throughout New Zealand and, in particular, on the Coromandel Peninsula. At that time, various environmental groups commenced a campaign against the adverse effects of mining in sensitive environments (especially by open cast methods) and lobbied for legislative amendment to bring mining within the purview of Town and Country Planning legislation.

Success in that respect did not come until the passage of the Mining Amendment Act 1981,[14] which provided for the inquiry into objections to mining privileges to be undertaken by the Planning Tribunal, which was obliged to have regard to a range of matters. These included whether the land should be used for mining operations, the economic, social and environmental effects of the grant of the mining privilege, and the matters specified in s 3(1) of the Town and Country Planning Act 1977 which was by then in force. The Planning Tribunal was required to report with recommendations to the Minister, who was obliged

11 Section 2B (inserted by the Town and Country Planning Amendment Act 1973).
12 *Stewart v Grey County Council* (1978) 2 NZLR 577.
13 Mining Act 1971, ss 126–130.
14 Mining Amendment Act 1981, s 32.

to act in accordance with the recommendations unless earlier deciding to decline the licence.

This represented a major step forward. The adverse environmental effects of mining operations could be properly investigated and determined by an independent body with appropriate expertise to assess such effects. To many, it was surprising that activities with the potential for large-scale adverse effects were not subjected to proper scrutiny much earlier.

It should be noted in passing that other mineral resources were subject to separate regimes; notably petroleum, coal, iron and steel, and atomic energy.[15] Nowadays, the exploration and development of Crown-owned minerals is governed by the Crown Minerals Act 1991 and the Resource Management Act 1991. Effectively, the ownership and regulatory interests are separated.

III. THE TOWN AND COUNTRY PLANNING ACT 1977

1. Purposes and Policies of the Act

The majority of the writer's practical experience in the planning field in the earlier years was under the regime of the Town and Country Planning Act 1977. It was a much more elaborate piece of legislation than the 1953 Act, running to some 178 sections. In stipulating the purposes of regional and district planning, much of the general phraseology established by the 1953 Act continued. However, there were three significant differences:

(a) Reference was introduced to the wise use and management of resources;
(b) The direction and control of development became a feature; and
(c) The general purposes of regional, district and maritime planning schemes became subject to the "matters of national importance" stipulated in the Act.[16]

The general purposes of planning schemes were stated to be: [17]

> ... the direction and control of the development, of a region, district, or area in such a way as will most effectively promote and safeguard the health, safety, convenience, and the economic, cultural, social, and general welfare of the people, and the amenities, of every part of the region, district or area.

Notably for the purposes of the current debate, economic and social matters remained relevant, although still being interpreted only in the general sense as has already been described. Significantly, the list of matters of national importance

15 The Petroleum Act 1937, the Coal Mines Act 1979, the Atomic Energy Act 1945, and the Iron and Steel Industry Act 1959.
16 Town and Country Planning Act 1977, s 3.
17 Ibid, s 4.

was substantially expanded beyond the matters incorporated four years earlier in the 1953 Act. In addition to the preservation of the coastal environment, lakes and rivers, land having high value for food production and the prevention of sporadic urban subdivision and development in rural areas, the 1977 Act included the conservation, protection and enhancement of the physical, cultural and social environment, the wise use and management of New Zealand's resources, and the relationship of the Maori people and their culture and traditions with their ancestral land.

Like the 1953 Act, the matters of national importance were to be recognised and provided for in the preparation, implementation and administration of regional, district and maritime schemes prepared under the later Act. The matters of national importance were of over-riding influence under the 1977 Act, their significance being authoritatively established by the Court of Appeal in *Environmental Defence Society v Mangonui County Council.*[18] Notable too was the legislative reference to the interests of Maori. Although short of the explicit Treaty reference that became a feature of subsequent legislation, this was an early recognition of the importance of Maori interests in the environmental field.

The degree of direction and control provided for by the 1977 Act is evident from an examination of the First and Second Schedules, which set out the matters to be dealt with in regional and district schemes. Regional Councils were obliged to make such provision as they considered appropriate to the circumstances and needs of the region. The matters to be dealt with included provision for social and economic opportunities appropriate to the employment, housing and welfare needs of the region; the development of the regional economy, including growth of and balance between primary and other industries; the preservation and development of the region's natural resources; the type and general location of development; public utilities, communications and transport requirements; and community and cultural facilities and amenities. The First Schedule also provided for the Scheme to indicate the scale, sequence, timing and relative priority of development for the region.

The Second Schedule set out a similarly wide range of matters to be included in district schemes, such as provision for social, economic, spiritual and recreational opportunities, the control of subdivision and the design and arrangement of land uses and buildings. For the first time, planning legislation recognised a relationship between the use of land and water. The Second Schedule of the Act required this relationship to be provided for in District Schemes. Provision was also made for maritime planning schemes. Any such schemes were subject to the general purposes of the Act and the matters of national importance already mentioned. In addition, they were to include matters set out in the Third Schedule of the Act to the extent considered necessary or desirable.

18 [1989] 3 NZLR 257.

Relatively little use was made of these provisions, although Maritime Planning Schemes were implemented for the Waitemata and Manukau harbours in Auckland.

There was a further recognition of the need to co-ordinate land and water use planning by the obligation to have regard to the principles and objectives of the Soil Conservation and Rivers Control Act 1941 and the Water and Soil Conservation Act 1967 when preparing, implementing and administering planning schemes under the Act.[19]

The extent of central government control over regional planning schemes under the 1977 Act was even greater than that which existed under the prior legislation. Regional planning schemes required the approval of the Minister of Works and Development, who had power to direct that the proposed scheme be amended.[20] Once approved, the Crown and every local and public authority were obliged to adhere to the provisions of the scheme.[21]

2. Judicial Control — the Planning Tribunal

The 1977 Act established the Planning Tribunal as a Court of Record which continued the functions previously exercised by appeal boards under the 1953 Act.[22] These functions were primarily concerned with the disposal of appeals in relation to planning schemes under the Act, as well as appeals arising from the grant or refusal of consents to applications. In addition, the Planning Tribunal had responsibility for the conduct of inquiries into designations and requirements for public works.[23]

The features of the 1977 Act which are relevant for the purposes of this paper could be summarised as follows:

(a) The focus of the Act was on the wise use and management of resources and the direction and control of development;
(b) Central government retained a high degree of control over the direction of planning instruments under the Act principally through its power to approve regional schemes;
(c) Regional councils were obliged to make provision for the social opportunities relevant to employment, housing and welfare needs, as well as provision for the development of the regional economy;
(d) Regional councils were also obliged to make provision for the regional pattern and general form of urban and rural development, as well as public works and utilities;

19 Town and Country Planning Act 1977, s 4(3).
20 Ibid, s 15.
21 Ibid, s 17.
22 Ibid, s 128.
23 Ibid, Part VI.

(e) A range of matters of national importance was recognised as having overriding significance in planning schemes under the Act and in relation to the grant or refusal of applications for planning consents;
(f) There was a recognition of the interests of Maori; and
(g) There was some recognition of the need for co-ordination in the use of land and water.

IV. THE PROVENANCE OF THE RESOURCE MANAGEMENT ACT 1991 ("RMA")

It is not intended to address in detail the developments, both internationally and locally, which led to the introduction of the Resource Management Bill in 1989. The background is well covered by various texts and learned articles.[24] Nor is it necessary to elaborate upon the key themes of the new legislation which are:

(a) The sustainable management of natural and physical resources;
(b) The integrated management of resources; and
(c) The control of the adverse effects of activities on the environment.

The Full Court in *Batchelor v Tauranga District Council (No. 2)*[25] noted that the new legislation imposed "a significantly different regime for the regulation of land use by territorial local authorities" and adopted the view expressed by commentators[26] that:

> The Act moves away from the concept of direction and control of development, inherent in the 1977 Act, towards a more permissive system of management of resources, focused on control of the adverse effects of land use activities on the environment.

There can be no doubt that the RMA represented significant progress in the environmental field. For the first time a uniform and integrated approach was adopted, with the management of almost all resources, both natural and physical, being brought under a single statute with a common purpose and with a standard process to deal with most applications for resource consent. In the writer's view, it is important that the concept of a single umbrella statute with one guiding principle be maintained because the splitting off of aspects of the Act is likely to impair the holistic approach the RMA envisages. Proposals to remove or reduce subdivisional controls should be approached particularly carefully, given the vital influence the pattern of subdivision has always assumed in the development of

24 Summarised in Williams, supra note 6, paras 3.1–3.7.
25 [1993] 2 NZLR 84, 86.
26 Randerson, A. P., "The Exercise of Discretionary Powers under the Resource Management Act 1991" [1991] *NZ Recent Law Review* 444.

New Zealand and its significant potential to create adverse effects on the environment.

1. "Prescriptive" vs "Permissive" Approaches to Resource Management

The RMA was developed in a climate of extensive social and economic reforms in New Zealand. Deregulation and free market reforms were the prevailing philosophy. Indeed, the Treasury view during the lead-up to the enactment of the RMA was that there should be the least possible interference with the market. While there was a recognition by the Review Group which considered the Bill of the hidden economic costs of a "command and control" economy, it was also accepted that there remained a need for "positive planning" where appropriate and necessary. It was noted that a *laissez-faire* approach, with the lack of certainty that would undoubtedly result, was not favoured by industry and resource users. These themes are best summarised in the following passage from the Review Group's report: [27]

> 3.6 The importance of reducing reliance on the generally prescriptive pattern of controls affecting land use in particular, has been emphasised to the review group in a number of submissions. Such submissions suggested that rigid controls have placed an unnecessary straitjacket on the ability to pursue legitimate development interests while failing to secure desired environmental outcomes. The cost of such controls is not commonly appreciated and understood and the review group considers that a more analytical approach is required in assessing the costs and benefits of rule making and other methods of achieving desired outcomes.
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> 3.7 It is pleasing to note that there is no real argument concerning the need to secure a high standard of environmental outcomes. It was significant that, although conservation and environmental groups stressed the importance of environmental protection, there was also widespread acceptance by industry and resource users of the need to comply with high environmental standards. A frequent theme expressed to the review group was the need for certainty in the environmental standards required to be met so that appropriate investment decisions could be made in the light of that knowledge.
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> 3.8 The review group endorses the Bill's approach of securing a high standard of environmental outcomes while encouraging the use of alternative methods to achieve those goals. To some extent, this will require a shift in approach by administrators in central, regional and local government and the review group proposes that the Bill will contain specific measures to encourage the consideration of alternative approaches. This will not avoid the making of rules. Plainly, they will still be required in a number of fields and the Bill makes adequate

27 Ministry for the Environment, *Report of the Review Group on the Resource Management Bill* (11 February 1991) 7.

> provision for them. However, the use of other instruments (including economic instruments) either as alternatives or in combination with rules may well achieve outcomes in a more efficient way than in the past. The review group is satisfied that sufficient authority exists under the Bill for positive planning where it is appropriate and necessary.

There is no doubt that Part II of the RMA is expressed in a broad and general way. As noted in *New Zealand Rail Ltd v Marlborough District Council*:[28]

> This part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the Act.

It is important to appreciate that the RMA adopts an enabling rather than prescriptive approach. In doing so, it uses broad language, just as its predecessors did in the planning legislation of 1926, 1953, and 1977. There are, however, a number of important differences from the previous legislation. The move away from direction and control of development and towards the control of effects on the environment has already been noted. However, there was also a deliberate stepping back by central government in its involvement with the implementation and administration of the legislation. In particular, Ministerial control over the contents of regional schemes by the approval process under the 1977 Act was abandoned. While the Crown may appear as a party in the process of preparation of regional policy statements, regional plans and district plans, it no longer has the power to direct and amend. While matters of national importance continue to be provided for in s 6 of the RMA, their relative importance in guiding decision-makers was diminished by making them subject to the overriding purpose of the Act as defined in s 5.

The principal powers retained by central government are the making of national policy statements, the call-in procedures for projects of national significance, and the making of regulations prescribing environmental standards. In addition, the Minister of Conservation assumes substantial control over the coastal environment through the preparation of New Zealand Coastal policy statements and the approval of regional coastal plans.

It was always contemplated that nationally adopted policies and standards would be promulgated to provide the necessary degree of certainty, especially through the use of national policy statements and regulations on issues such as

28 [1994] NZRMA 70, 86, Greig J.

minimum standards for discharge to air and water. The government had also clearly signalled its desire to make use of economic instruments, and provision was made for that to occur.

It is significant, however, that no regulations prescribing national environmental standards have been promulgated, although some guidelines have been issued by the Ministry relating to water and air quality standards. To the writer's knowledge, no national policy statements have been issued other than the obligatory *New Zealand Coastal Policy Statement*. Nor have economic instruments been developed as contemplated. The use of national policy statements with regard, for example, to the protection of areas of significant indigenous vegetation, may have pre-empted some of the difficulties which have been encountered by territorial local authorities in some parts of the country. To some extent, these difficulties may also have been eliminated or ameliorated by the adoption of adequate consultation procedures as envisaged by the RMA. Those procedures are designed to enable a consensus to develop before a policy statement or plan is formally notified. It is gratifying that there is currently in contemplation a national policy statement on areas of significant indigenous vegetation and habitat. This will give valuable assistance to local authorities, which are sometimes short of the resources and expertise essential to give proper effect to the Act.

2. Integrating Resource Management Functions of Local Authorities

Further difficulties have arisen as a result of changes to the functions of regional councils, particularly in the larger areas such as Auckland. Rightly, in the writer's view, there has been a separation of the regulatory functions of regional councils from their service delivery functions. For example, responsibility for the provision of infrastructure has been transferred from the Auckland Regional Council to other bodies. Nevertheless, the management of natural and physical resources and the control of adverse effects of activities on the environment is practically impossible without the proper co-ordination and planning of infrastructure, road transport issues and the provision of vital services such as water and sewerage. Consideration of these issues on an integrated basis is essential if proper provision is to be made for the social, economic and cultural well-being of people and communities as well as their health and safety. The ability of regional councils to plan for such matters in a positive manner was confirmed by the Court of Appeal in *Auckland Regional Council v North Shore City Council*,[29] which involved the ability of a regional council to include provisions establishing metropolitan urban limits in a regional policy statement.

In Auckland, the progressive reduction of the powers of regional councils in recent years saw the development of a group known as the Regional Growth

29 [1995] 3 NZLR 18; [1995] NZRMA 424.

Forum, consisting of the Mayors of the territorial local authorities within the Auckland region. This forum had no, or at least doubtful, legal authority but was formed out of concern that the important issue of urban growth in Auckland was not capable of being adequately addressed in a co-ordinated way under the existing regime of statutory bodies and legislation. In particular, although mechanisms existed for the integration of policy statements and plans under the RMA with regional land transport strategies prepared under the relevant transport legislation,[30] there was no clear basis for the integration of a broader regional growth strategy with infrastructure requirements, transport issues, and the regional policy statement. It is gratifying to note that the Local Government Amendment Act 1998 has established these linkages for the Auckland region. In particular, the Auckland Regional Council is required to establish a Regional Growth Forum, which is given statutory authority, and the Auckland Regional Council is obliged to prepare and adopt a "regional growth strategy". Any such strategy must not be inconsistent with any regional policy statement for the time being in force, and may be amended from time to time.[31] There is a transfer of infrastructure assets from the Auckland Regional Services Trust to Infrastructure Auckland, a new body established by the Act. Grants made by Infrastructure Auckland for infrastructure projects may not be inconsistent with the Auckland Regional Land Transport Strategy, the Auckland Regional Growth Strategy, or any regional policy statement.[32]

The provisions of the 1998 Amendment Act are an acknowledgement of the self-evident proposition that the proper management of the natural and physical resources of a region such as Auckland requires positive planning and co-ordination of relevant agencies to ensure that adverse effects will be adequately controlled. They also demonstrate that the economic and social impacts of the development of the region are an integral part of the management of those resources. The legislative changes also implicitly accept that the management of resources cannot be left solely or even mainly to market forces. While it is proper to acknowledge the importance of market forces and the desirability of avoiding undue restraint or over-regulation, the simple fact is that the development of the region cannot proceed without a process of management which ensures that it does so in an orderly and co-ordinated manner. A developer contemplating urban subdivision must know where such subdivision is permitted and whether and when the essential services and infrastructure will be provided in that location. Similarly, those bodies responsible for the provision of infrastructure need to

30 Initially under s 29 of the Transit New Zealand Act 1989, and later under s 29F of the Land Transport Act 1993. In terms of s 29F(3) a regional land transport strategy shall not be inconsistent with a regional policy statement or plan under the RMA.

31 Local Government Act 1974, s 37SG and 37SE (inserted by s 7 Local Government Amendment Act 1998).

32 Ibid, s 707ZZZA(1)(c) (inserted by s 8 Local Government Amendment Act 1998).

plan, usually with very substantial lead times. The cost of providing, say, a new motorway or a new trunk sewer connection is massive, with major social and economic impacts. Such facilities cannot be provided overnight and require careful and detailed planning to ensure that services are provided in a practical, sensible and timely way. Similarly, with the planning of any new major shopping facility or other important public facility. It is not a matter of local government dictating the location of these developments. It is a matter of the management of a process which involves input from those responsible for the provision of the facilities as well as from those who would be affected by them.

The writer has focused on the Auckland region because it is the one with which he has the greatest familiarity. It also has the largest size and complexity of all the regions. Nevertheless, the matters which have been mentioned apply equally to the country as a whole and the needs are likely to be the same in other locations, even if on a smaller scale.

There is a proposal currently to amend the definition of environment in the RMA to exclude reference to social and economic matters. It is important that very careful consideration should be given to this question, bearing in mind the complex and inextricable links between the management of natural and physical resources as contemplated by s 5, RMA, and the economic and social well-being of the community. Regard must also be had to the prospect of a serious loss of economic efficiency if there were any undue impediment to the ability of regional councils and territorial local authorities to manage resources in a way which will enable them to fulfil the purposes of the Act. Just as there may be a hidden cost in over-regulation, so there is a cost in uncertainty and the delays which that state of affairs necessarily entails. Based on the views widely expressed at the time the Resource Management Bill was under consideration, resource users appear to prefer certainty so that they can organise their affairs accordingly. Further, regard should also be had to the manner in which adverse economic effects have been dealt with by the Environment Court as already described and as further elaborated in other extra-judicial writings.[33]

V. ENVIRONMENTAL JUSTICE — PARTICIPATORY DEMOCRACY

It is not intended to address this subject at great length in this forum because it has been the subject of an excellent series of papers only last year.[34] It is useful, however, to examine briefly the historical importance of public interest groups

33 Williams, supra note 6, paras 3.33–3.36.

34 Conference on *Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law and Policy*, 5–7 March 1998, The University of Auckland.

in the development of environmental law in this country, and the significance of public participation in the adjudicative processes.

Throughout the 1970s and 1980s, organisations such as the Environmental Defence Society and the Royal Forest and Bird Protection Society, and a host of other public interest groups, have made a major contribution to the development of environmental law. Others have since continued their public interest involvement in hearings on significant environmental issues, although, perhaps, to a lesser extent than previously. In part, this may be due to the now widespread recognition of the importance of protecting the natural environment, but it is also due in part to the increasing costs and complexities of becoming involved in such hearings. Well-documented costs awards have been made against public interest groups and despite all the suggestions which have been made by various parties over the years, the costs regime remains substantially as it has always been. It is time for change in this area.[35]

One of the earliest reported cases involving the Environmental Defence Society was its Supreme Court action against the Agricultural Chemicals Board[36] in relation to the use of the chemical 2,4,5-T. The Society sought an order compelling the Board to take effective action under the Agricultural Chemicals Act 1959 in respect of the sale and use of this product. The action failed because Justice Haslam found that the Society lacked the necessary standing. While not canvassing the issue of standing to any great extent, it is worth noting that the open standing positions of the RMA are both desirable and necessary. Furthermore, the High Court is unlikely, in the general run of cases today, to deny standing on judicial review to a meritorious applicant unless there are clear grounds to suppose that the applicant is a mere busy-body with no clear connection with or interest in the subject matter of the proceedings.

Later in the 1970s, the Environmental Defence Society and others were actively involved in proceedings under the Water and Soil Conservation Act 1967, including litigation over the Huntly Power Station.[37] This involvement continued in the 1980s with significant litigation over geothermal energy[38] and a landmark decision of the Court of Appeal on the interpretation of s 3 of the Town and Country Planning Act 1977 relating to the coastal environment.[39]

35 For discussion of some of the problems of achieving full public participation see: Salmon, Justice Peter, "Access to Environmental Justice" (1998) 2 *NZJEL* 1, and Grinlinton, D. P., "Access to Environmental Justice in New Zealand" [1999] *Acta Juridica* 80.

36 [1973] 2 NZLR 758.

37 *Mahuta and Environmental Defence Society v National Water and Soil Conservation Authority* [1973] 5 NZTPA 73.

38 *Keam v Minister of Works and Development* [1992] 1 NZLR 78.

39 *Environmental Defence Society v Mangonui County Council* [1989] 3 NZLR 257.

Other parties as well as the Environmental Defence Society were also involved in major environmental issues during the 1980s, including the litigation over the Clutha Dam,[40] and the important decision of the Court of Appeal relating to the proposed national water conservation order for the Rakaia River.[41] Reference should also be made to the series of cases over the Aramoana aluminium smelter project which arose in the early 1980s. Again, the Environmental Defence Society was actively involved in that litigation, which involved the validity of an Order in Council made under the National Development Act 1979.[42]

Other groups have also contributed significantly to the development of the interests of Maori in relation to environmental issues. These have included an important decision of the High Court in relation to spiritual, cultural and traditional relationships of Maori with natural water under the Water and Soil Conservation Act 1967.[43] This was a precursor to the more explicit references to Maori interests in s 3 of the Town and Country Planning Act 1977 and ss 6, 7 and 8 of the RMA. The issue of the relationship of Maori to their ancestral land in terms of s 3 of the Town and Country Planning Act 1977 was also clarified in proceedings in the High Court in 1987,[44] which was later approved by the Court of Appeal in *Environmental Defence Society Inc. v Mangonui County Council.*[45]

This brief survey underscores the point made by Elias J in *Murray v Whakatane District Council* [46] that:

> The requirements of notice and the wide rights of public participation conferred as a result are based upon a statutory judgment that decisions about resource management are best made if informed by a participative process in which matters of legitimate concern under the Act can be ventilated.

The Court of Appeal has recently endorsed the public and participatory nature of the resource consent process in *Bayley v Manukau City Council* in the context of an important decision about the power to dispense with public notification under s 94 of the RMA.[47]

The writer has expressed the same view in *McAlpine v North Shore City Council.*[48] So has the Environment Court in *Peninsula Watchdog Inc v Coeur Gold New Zealand Ltd.*[49]

40 *Gilmore v National Water and Soil Conservation Authority* [1982] 8 NZTPA 298.
41 *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc.* [1988] 1 NZLR 78.
42 *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No. 3)* [1981] 1 NZLR 216.
43 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188.
44 *Royal Forest and Bird Protection Society v Habgood* [1987] 12 NZTPA 76.
45 [1989] 3 NZLR 257.
46 [1999] 3 NZLR 276, 309; [1997] NZRMA 433, 467.
47 [1999] 1 NZLR 568, 575; [1998] NZRMA 513, 521.
48 [1999] NZRMA 530, 536.
49 Environment Court, A 26/95, 4 April 1995, Judge Sheppard.

If it is accepted that public participation in the resource management process is important for purposes such as testing development proposals, taking enforcement action where appropriate, and helping to inform the process of preparing policy statements and plans under the RMA, then it is necessary to ensure that any barriers or impediments to such involvement be removed or reduced. At the same time, however, those interests must be balanced against the need to ensure that the process can proceed with relative efficiency so that meritorious proposals are not unduly delayed.

There are a number of improvements to which serious consideration should now be given. Chief amongst these are the following:

(a) There could be a presumption that costs should not ordinarily be awarded against public interest submitters unless there has been a lack of good faith, the submissions are frivolous or vexatious, the hearing has been unreasonably delayed, or other sound reason exists for an award of costs.
(b) In the case of an appeal relating to an application for a resource consent, the Environment Court could be given a discretion to declare that the proposal is of such significance that an applicant should meet the reasonable costs of submitters in opposition. (The writer raised this point in a paper delivered in 1997[50] and it was mentioned by Salmon J in the course of his paper given to the Environmental Law Conference in March 1998.[51])
(c) The Environment Court could be given a discretion to grant leave to leap-frog the preliminary hearing before the relevant consent authority and move directly to the Environment Court. Such an application could be made upon the application of the applicant, submitters, or the consent authority. The Environment Court would have the power to give directions upon such matters as defining the issues and the representation of the parties to avoid undue prolixity.
(d) In order to assist in the hearing of inquiries in relation to proposed policy statements and plans under the RMA, the greater use of independent commissioners could be considered if the workload imposed on the Environment Court Judges becomes unduly burdensome.

It is appreciated that some, if not all, of these proposals will require amending legislation, and some may involve further government funding. However, if, as appears to be the case, New Zealanders require a high standard of environmental protection, that can only be achieved at a cost, given the scientific complexities involved. We, as a community, must be prepared to accept that cost if we are to realise the desired goal. Legislation can only provide the framework and the mechanisms. It is up to us to make it work.

50 To the Auckland Branch of the New Zealand Planning Institute, 5 November 1997.
51 Salmon, supra note 35, at 12–13.

VI. CONCLUSION

A review of the history of environmental legislation in New Zealand demonstrates that there has indeed been significant and beneficial progress in developing law capable of responding to the complexities of modern society in a way which will sustain our resources for future generations.

The RMA was an ambitious undertaking, breaking new ground, and it was inevitable that it would attract criticism in some quarters. It was always contemplated that the sweeping and complex changes which the new Act brought would mean fine-tuning was required. The writer fully accepts the ongoing need for amendments to the Act to ensure it fulfils its mission, but notes that the government has said that it is not intended to amend the fundamental goals of the legislation.

This paper has endeavoured to make it clear that the RMA is primarily an enabling statute and that the involvement of central government under the procedures identified, together with the provision of adequate resources for regional and territorial local authorities, is essential to ensure the Act achieves its purpose and is workable. It is hoped that these few comments will be of some assistance to those contemplating the current round of amendments.