One giant step – three problems with one-step decision-making

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Introduction

Since its enactment, the RMA has provided for alternative Board of Inquiry type decision making for "proposals of national significance". Until relatively recently the provisions could only be used at the Minister for the Environment's instigation ("call in"), which was rarely done. However, the provisions were overhauled in 2005 to enable applicants for significant proposals to request that they be dealt with through this alternative process. The model is clearly popular at present, as the "proposals of national significance" provisions have been extended, strengthened and the model has now been applied to politically important planning instruments, including for example the Proposed Auckland Unitary Plan, Canterbury Regional Policy Statement and Plans, and now the Christchurch Proposed District Plan.

This article asks questions about whether or not this approach is appropriate or desirable. It draws heavily on others' contributions to the RMJ over the last few years with respect to the many and varied proposed changes to resource management processes, and in particular the move away from a two-step process involving Council-level hearing and appeals to the Environment Court towards the use of one-step processes of specifically constituted Boards of Inquiry and Independent Hearings Panels whose decisions are only appealable to the High Court on points of law.

By way of broad summary, the three questions posed by this article are:

1) From a constitutional law perspective, should the most important aspects of decisions on proposals of national significance, and important planning instruments, be made by the independent judiciary as opposed to specifically appointed Boards or independent hearings panels?
2) Are these one-step processes sufficiently accessible to members of the public, such that they can meaningfully participate? And to what extent is that important?
3) Finally, are there, or are there likely to be, meaningful and realistic cost and time savings to participants in these one-step processes? Where does and should the balance lie between the various participants in terms of the cost of engagement?

Who should exercise judicial power?

Philosophy – separation of powers

Phillip A. Joseph describes judicial power as involving "*the power 'to decide', that is to make binding declarations of rights according to law, with controlled or circumscribed discretions in making findings of fact or of law."* (Joseph *Constitutional & Administrative Law in New Zealand* (3rd Edition 2007), 191.) The power to make binding determinations on applications for, and the submissions for and against, proposals of national significance are clearly within the category of "judicial power" on this definition. It is less clear, however, whether hearing and making recommendations in respect of planning documents by Boards of Inquiry and/or independent hearings panels would fall into this same category, or into some other alternative category like "policy making". This article does not explore that distinction in any detail.

In their piece "*Reform of the Environment Court – Does it make sense?*" (14 June 2013, available on the RMLA website), Martin Williams and Simon Berry refer to the basic principles that make up New Zealand's constitutional arrangements, as well as the international environmental law underpinnings to resource management decision making in New Zealand. They say that it is basic to New Zealand's constitution that the powers of Parliament, the Executive and the Courts (judicial power) are separated. The underpinnings of that principle were colourfully summarised by the French political philosopher Montesquieu as follows:

> *… there is no liberty if the judiciary power be not separated from the legislative and the executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression, …* (Montesquieu, quoted in Joseph 2007: 194.)

The references to liberty, violence and oppression indicate the author's higher-level concern about the structure of government, rather than whether or not a particular Court should have a particular role. However, the underlying principle is the same – if the same branch of government both executes policy and determines its legality, then that undermines the constitutional safeguards against the executive acting inconsistently with the law.

However, the principle of separation of powers is not absolute. The "executive" branch commonly exercises judicial or adjudicative functions. In fact, in many instances, that is the most cost-effective and efficient means of resolving disputes arising from government actions. "*Separation of powers arguments have little force as long as adjudicative bodies act fairly in accordance with the principles of justice.*" (Joseph 2007: 201). The processes followed by Boards of Inquiry and independent hearings panels set up under special legislation are designed to ensure that the principles of natural justice are followed. Accordingly, it cannot be said they are constitutionally abhorrent. The ability to take judicial review proceedings in respect of process failures, or to utilise limited appeal rights on points of law, provides the necessary checks and balances required to ensure that the principles of natural justice and rule of law are adhered to.

Philosophy – judicial independence

Another important constitutional safeguard that goes along with the separation of powers, and which is the advantage of judicial decision making by Courts, is the principle of judicial independence. This includes both institutional independence, and individual independence, and includes "*legal guarantees of judicial tenure, financial security of judges and institutional independence of courts"*. (Joseph 2007: 773.) Arguably in the case of Boards of Inquiry and independent hearings panels, all three of these principles are undermined:

- Appointments are on a case-by-case basis, for the period required.
- Board and panel members are remunerated based on the time spent hearing and determining the matter.
- The resourcing and support for the Boards and panels are less clearly separated from the executive branch.

These issues are mitigated by the fact that Boards and panels are generally chaired by current, former or retired Environment Court or High Court judges whose tenure in the Court is either secured or ended, and whose financial security should already have been guaranteed. However, the same cannot necessarily be said for other Board or panel members, and part time judicial appointments are also not without their problems. The Law Commission in its review of the Judicature Act referred to the leading Australian and Canadian authorities on the point and made the following comments in the context of a discussion on part time and acting Judges (New Zealand Law Commission Issues Paper 29 *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* February 2012, para 3.71):

> *As a matter of fundamental principle, we incline to the view that judicial appointments in New Zealand should normally only be permanent. Resort should not be made to acting or temporary appointments merely to make up the numbers because of a failure of government to appoint sufficient permanent judges.*

Given the recent confirmation by central government that it does not intend to "fold" the Environment Court back into the District Court, the above principle begs the question why Boards of Inquiry and independent hearings panels are being increasingly utilised? Why not instead increase the size of, and resource available to, the Environment Court to enable it to deal with these matters on direct referral, as they are already doing in many cases? That might resolve the issue of judicial independence/separation of powers and would mean there is one final merits decision-maker for resource management matters. However, it would not allay concerns about public accessibility to a relatively informal process, which is dealt with in greater detail below.

The concerns set out above are particularly relevant because the types of decisions concerned are made under a complex legal framework that involves the balancing of competing values and interests – often in respect of politically and economically important projects driven by government entities. It is in the national interest that such decisions are as constitutionally robust as they can be.

Philosophy applied to Board of Inquiry and independent hearing panel processes

In light of the discussion above, it appears the relevant question is not whether Boards of Inquiry or independent hearings panels are unconstitutional *per se* but rather whether it is more constitutionally *desirable* that the permanent and independent Courts undertake such judicial decision making.

The Board of Inquiry and independent hearings panel processes that are currently popular contain a number of safeguards to ensure due process and natural justice, but they are not Courts, and by definition their powers are not as fully separated from those of the Government. In particular, the following things can be noted:

- Most projects utilising these one-step processes are either government projects, or planning processes of particular interest to the Government.

- The members of the Boards and independent hearing panels are one-off ministerial appointments (as opposed to full-time appointments until the relevant retirement age in the case of Environment Judges).
- The remuneration of Board or panel members is generally the responsibility of the government entity initiating the process, or in the case of planning processes the relevant Council initiator.

There is a risk that these processes might be criticised on the basis that members of Boards or panels might be motivated to determine the matter in a manner favoured by the Government that appointed it, because to do otherwise could undermine that member's chances of being appointed to a Board or panel again. In reality, there is no basis for criticism that Board or panel members themselves are "biased". Board and panel members invariably include acting or retired members of the independent judiciary and other experienced and highly skilled professionals who jealously guard their personal independence and impartiality. Objectively though, the process does not remove entirely the risk that such considerations might influence a Board or panel member's decision making.

A related point is the risk of real or perceived selection bias by the Ministers that appoint Board or panel members. Internal central government processes clearly mitigate against any conscious or unconscious bias towards particular persons or a specific result. However, the selection process can be contrasted with the appointment of the judiciary on the basis that Board and panel members are appointed for one specific project. In contrast, judges are appointed after a consideration of their qualities and suitability for judicial office without reference to any particular outcome. While there can be no suggestion that members are appointed in order to achieve a certain result, it is unavoidable that the particular project or process will be in the appointers' minds, even if only at the back of their minds, when making the relevant appointments. Appointments of acting or retired judges as chair of Boards or panels mitigates the risk of perceived selection bias, but a risk remains that appointments may reflect the expected outcome rather than the appointees' suitability for judicial office.

Given that important environmental merits decisions can significantly affect private rights, there seem to be good arguments that they should be made by the judiciary rather than purpose-appointed Boards of Inquiry or independent hearings panels. The traditional approach more easily and transparently achieves the institutional separation of powers that defines such a judiciary in our legal system, and reduces any risk of real or perceived bias on the part of the members or the persons appointing them.

Public participation in resource management processes

In the August 2013 edition of the Resource Management Journal, Bronwyn Carruthers and Simon Pilkinton wrote extensively on the issue of public participation in resource management processes in their article "*Eroding the founding principles of the Resource Management Act 1991*". Their article traces the principle of public participation as it developed in the 1970s and 1980s culminating in the 1992 *Rio Declaration*, through development of the RMA and subsequent caselaw dealing with who is able to participate in processes under the act.

They go on to describe the dual important purposes of public participation in resource management processes, the process purpose and the substantive purpose. The process purpose is to ensure democratic legitimacy of decisions by ensuring the involvement of members of the public in decisions about the environment that affect them. That in turn leads to a greater degree of public confidence in those decisions. The substantive purpose is to ensure that decision makers are as informed as possible about the competing interests and perspectives which must be reconciled in the resource management context. They say:

> *"To make better prospective decisions, decision-makers must have a comprehensive informational backdrop. Public participation serves the substantive purpose by bringing disparate interests together to give a more complete informational backdrop."* (Carruthers B and Pilkinton S *Eroding the founding principles of the Resource Management Act 1991*, RMJ August 2013, 19.)

Arguably, Board of Inquiry and independent hearings panel processes enable all of the above, because generally members of the public have open standing to be involved in those processes. The process itself is not as "accessible" as the current Council level process for a number of reasons, however.

Council level hearings of submissions on planning documents or in respect of large infrastructure projects are expressly required to be "without unnecessary formality" (s39 RMA). The very purpose of informality of such hearings is to *encourage* public participation in these important processes to ensure that the process and substantive purposes of public participation are able to be achieved. Accordingly, no person other than the chairperson or members of the hearing body are able to question a witness, and cross-examination is expressly not allowed. Members of the public are therefore free to attend, speak their minds and impart whatever information they may have to assist the hearing body, without fear of being dragged over the coals by counsel or pulled up on some procedural nicety. The trade off with informality, of course, is that there is a reduced level of "rigour", as the evidence is

not as thoroughly and comprehensively tested. That is the role of the Environment Court, where issues of particular concern to individuals are subject of appeals on the merits.

The two-step process of Council decision and Environment Court appeal enables public participation in particularly important resource management decisions through a relatively informal process thus lending democratic legitimacy to those decisions while ensuring those issues that need it are subject of independent and expert consideration by the Court. The experience noted by many members of the resource management community in the context of ongoing RMA reforms is that many such members of the public are happy to have had their say, and have had their views and evidence taken into account, at the Council level such that very few such people lodge notices of appeal to the Environment Court.

The change to a one-step process for many resource management processes is necessarily more formal and legalistic for all concerned because the opportunity for informal input has been so greatly reduced. The informality of traditional Council-level processes would not bring the level of "rigour" required to enable the proper testing of evidence and fulfill the principles of natural justice (*audi alteram partem* – hear the other side). However, the more strict procedural requirements and exposure to processes such as cross-examination mean that many members of the public simply do not have the appetite to get involved in these processes even if they have the time and resource to be involved. Mechanisms like the "friend of submitter" can assist with some procedural aspects, however during the hearing proper submitters may be required to operate without any assistance. While the "standing" of members of the public to be heard in respect of important government projects, or significant planning documents, remains unchanged, it is the nature of the process itself that excludes many.

Cost implications

Other commentators have also written on the cost implications of these new one-step processes. The justification for the drive towards these new processes supposedly includes both the time and cost associated with the status quo, presumably on the part of the applicants/promulgators of projects or planning documents concerned. However, many practitioners are sceptical of the supposed cost savings associated with these processes. (See eg, Minhinnick D and McConachy A *"Fast track" processes: Do they really work?* RMJ November 2013.) The experience so far has been that the procedural robustness that is the strength of these processes can lead to lengthy, relatively formal hearings. While the Environment Court brings the same (or arguably greater) level of rigour, it must only deal

with those particularly problematic issues that are both appealed and not settled through private negotiations or court-assisted mediation. Boards of Inquiry and independent hearings panels can also reduce the scope of issues that come before them through mediation or other alternative dispute resolution. However, the issues they must address one way or the other encompass the entirety of the project or planning instrument. There are often hundreds and sometimes many thousands (in the case of the Proposed Auckland Unitary Plan for example) of submissions or submission points which require decisions.

The volume of material that must be produced, and considered by the boards or panels is intimidating. Even well resourced submitters can struggle with the amount of time and resources required. If, for whatever reason, the information provided by the applicant at the outset is insufficient, that will create more work for all participants at the "back end" of the process.

In the case of the Board of Inquiry hearing into NZTA's Waterview connection, for example, Judge Newhook remarked that "*In all, the applications and supporting materials were contained in 43 substantial ring-binder folders.*" Essentially, the Board was required to provide Environment Court-level scrutiny of that whole application. That does not include the submissions, Council reports or the additional material including evidence produced by the applicant, Council and submitters for the hearing.

For lay-persons, or represented persons with a more limited scope of interest, properly digesting and understanding large volumes of technical material is hugely costly and time-consuming. Filtering out the material of particular relevance to inform a submission may be a significant part of the overall commitment. Formulating documents in a form necessary realistically to provide meaningful input and potentially influence the process is similarly onerous. A much lighter touch can be taken to a council-level hearing.

Submitters who seek to have a meaningful role in the hearing process are invariably dragged into a legalistic process and the time and costs involved can escalate quickly, and exponentially. Expert witnesses they engage may be required to attend multiple days of expert conferencing, despite the submitter having only a narrow interest in the overall project. Counsel can sometimes be required to attend many more hearing days than would otherwise have been required. In short, the processes are often too challenging for most members of the public unless professionals (particularly legal or planning professionals) are willing to give their time at greatly reduced rates or *pro bono*. Some costs that previously were borne by applicants for significant projects are essentially shifted to members of the public and/or

members of the professions that assist them. On its face, that appears inconsistent with the public participatory purpose of the RMA.

Conclusion

From the author's perspective, the answers to the questions posed at the start of this article are:

1) Important social, economic and environmental values are involved in major resource-use decisions such as major infrastructure projects or the formulation of important planning instruments. Accordingly, the most constitutionally appropriate and desirable approach is for these processes to use the traditional two-step approach, rather than Board of Inquiry or independent hearings panel processes.

2) The processes themselves are increasingly challenging for the public who generally cannot afford to fund the full-blown "case" that is required for meaningful participation. The experience has been that these processes are too challenging for all but a sophisticated and well-resourced few, or where professionals give their time on a pro bono basis or at a reduced rate. Accordingly, while public participation is enabled in reality it is actually discouraged. That is arguably inconsistent with one of the underlying principles of the RMA.

3) It is questionable whether Board of Inquiry and independent hearing panel processes deliver real benefits to the protagonists of those processes. The only obvious benefit is in terms of end-to-end time involved. The costs, in terms of pure monetary costs to the participants, the loss of meaningful public participation and hence democratic legitimacy of decision making, and the potential criticisms of the lack of proper separation of powers between the executive and judiciary may well outweigh those benefits.