
PART 1:
CERTAINTY,
LEGITIMACY AND THE
RULE OF LAW

Chapter 2

Public Participation and Regulation

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2.1 Introduction

Given the complexity and scale of emerging governance challenges, governments cannot hope to design effective policy responses, nor to strengthen legitimacy and trust, without the input, ideas and insights of as wide a variety of citizens' voices as possible.¹

This chapter analyses the place of participation in the making and application of regulation. The broad concerns that are implicated in this question are democratic legitimacy and good regulatory outcomes, and it is often argued that more participation than presently exists in many areas is necessary to secure these aims. The idea of participation is not easy to define. Generally speaking, "to participate" in a certain activity means to share or to take part in it.² In the context of public decision-making, one might understand public participation as referring to "actions through which ordinary members of a political system influence or attempt to influence outcomes."³ "Regulation" has been defined by Julia Black as "the sustained and focused attempt to alter

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¹ Organisation for Economic Co-operation and Development (OECD) *Focus on Citizens: Public Engagement for Better Policy and Services* (OECD Publishing, Paris, 2009) at 24.

² Jack H Nagel *Participation* (Prentice-Hall, New Jersey, 1987) at 1.

³ Jack H Nagel *Participation* (Prentice-Hall, New Jersey, 1987) at 1. The "Public Participation Guide", prepared by the Canadian Environmental Assessment Agency, defines public participation as "any process that involves public input in decision making. It involves the process or activity of informing the public and inviting them to have input into the decisions that affect them. The focus of public participation is usually to share information with, and gather input from, members of the public who may have an interest in a proposed project".

the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour modification”.⁴ This is a definition which shifts away from an exclusive focus on “command and control” rule-making and state intervention in industry.

In addition, the goals of regulation have expanded from their core of intervention in industry to prevent market failures to embrace other social goals such as the provision of basic social entitlements or the protection of the environment or human health and safety.⁵ This means that the kind of regulatory decisions being made will be based on different considerations, depending on whether the goal of regulation is to correct market failure (a primarily “technical economic question”) or basic social provision (a primarily “political question”), and this will probably have implications for the level of public participation that should be involved in these decisions.⁶ However, these categories can sometimes become blurred, and it may be that “there is no clear dividing line in regulatory practice between economic decisions which can be resolved through expertise and social decisions based on value judgments”.⁷

From these apparently uncontroversial definitions of participation and regulation, a number of issues quickly emerge. The phrase “ordinary members of a political system” certainly excludes government officials, but when one talks about public participation in the context of regulatory decision- and rule-making, not all members of the political community are generally entitled to participate. There are important “what?” and “who?” questions: the kind of participation that might render regulatory decisions legitimate will depend on the specific decision-makers and the decisions they are making. The question is how to determine what kind of participation is appropriate in the circumstances. There are some initial distinctions that seem fairly clear. One factor is whether the decision is a localised, particular decision affecting a few individuals or a small community of interest, or a general, widely-applicable decision that has an effect on life in an entire region or country. In the former situation the appropriate participation level will likely be intense participation by a small number of directly affected individuals, as well as the wider local community in so far as the decision will affect them. The participation in, and transparency of, the process will be of a high level for those directly affected, but will be at a low or non-existent level for those not affected. In contrast,

⁴ Julia Black “Critical Reflections on Regulation” (2002) 27 *Australian Journal of Legal Philosophy* 1 at 25–26.

⁵ Tony Prosser *The Regulatory Enterprise: Government, Regulation, and Legitimacy* (Oxford University Press, New York, 2010) at 1-3. See also Petra Butler “Rights and Regulation” in this volume (ch 9).

⁶ Tony Prosser *The Regulatory Enterprise: Government, Regulation, and Legitimacy* (Oxford University Press, New York, 2010) at 6.

⁷ Tony Prosser *The Regulatory Enterprise: Government, Regulation, and Legitimacy* (Oxford University Press, New York, 2010) at 6.

where the regulatory decision or rule affects people of a region or country generally, there will usually be a lesser level of participation from a wider spectrum of affected participants. The idea of participants influencing or deciding outcomes also raises many issues that go to the core of all discussions about participation and democracy. For example, does participation require that participants have a decision-making role, or only the ability to be consulted or to express their opinions to an entity that has been granted decision-making power?

Exploring the question of what kind of participation should be utilised in the making of regulations requires having a close look at the ways in which different kinds of legitimacy relate to different policy and regulatory contexts. A full analysis would also seek to establish what types of decisions should be taken by the most participatory procedures possible (in order to be considered legitimate), and what kind of decisions, as a result of their subject matter or limited scope of application, do not require such levels of public involvement. It would also seek to evaluate the effectiveness of different instances of participation and to analyse whether the perceived benefits or disadvantages are borne out in practice; for “[c]ompared to our extensive and increasingly sophisticated knowledge of formal political institutions, understanding these new forms of citizen engagement is still in its infancy”.⁸ The answers to questions of appropriate participation will need to be based on research that does exist and on new studies as they are completed, if they are to be credible.

The objective of this chapter is to examine the general benefits and disadvantages of an increase of public participation in the making of regulations, the way in which different forms of participation might be put into practice by specific mechanisms, and how the desirability of an increase of public involvement might be affected by the need to privilege certain forms of “expertise” in some regulatory contexts. It is only then when we will be in a position to draw out the implications of these ideas for our unique economic and social environment in New Zealand. The question is to what degree these reasons operate in particular regulatory areas, and, more generally, to what degree they operate in a small, centralised nation-state such as New Zealand, in the context of increasing Trans-Tasman and broader international coordination and cooperation.⁹

⁸ Mark E Warren “Citizen Participation and Democratic Deficit: Considerations from the Perspective of Democratic Theory” in Joan DeBardleben and Jon Pammett (eds) *Activating the Citizen* (Palgrave MacMillan, Basingstoke (UK), 2009) at 35. On the difficulty of such evaluations, see Paul Burton “Conceptual, Theoretical, and Practical Issues in Measuring the Benefits of Public Participation” (2009) 15 *Evaluation* 263. See also Kathleen E Halvorsen “Assessing the Effects of Public Participation” (2003) 63 *PAR* 535 and e-government “Evaluate – The Full Story” www.e.govt.nz (last accessed 7 August 2011).

⁹ See Chris Nixon and John Yeabsley “Australia New Zealand Therapeutic Products Authority. Lessons from the Deep End of Trans-Tasman Integration” (ch 17); Susy Frankel and Meredith Kolsky-Lewis “Trade Agreements and Regulatory Autonomy: The Effect on

One important issue in New Zealand is participation of Māori groups in governmental decision-making. The Treaty of Waitangi creates an obligation to consult with Māori on decisions that will significantly affect their interests as part of the general duties of active protection and partnership.¹⁰ The legality and morality of this obligation is generally accepted by central and local government. The duty of consultation of indigenous peoples where their interests are involved also exists in Canada and other jurisdictions.¹¹ This chapter does not examine the obligation to consult Māori groups in any further detail. The obligation to consult Māori will need to be factored in alongside the more general reasons for participation. There may be some tensions between these specific obligations and the more general obligations of participation in certain circumstances, and the discussion developed below will help in working out how to resolve any such tensions.

The chapter is structured as follows. The first section explores in greater detail the relationship between input and output legitimacy to participation and democracy. The second and third sections consider some of the possible reasons for and against increased public participation in the making of regulation. In the following section we discuss the main kinds of mechanisms through which participation can be achieved. It is important to remember that any actual participatory decision-making process might integrate different mechanisms or aspects of them, to a greater or lesser degree, depending on how much participation is sought or demanded, and how the different mechanisms match up with the reasons for and against participation in the particular area. A “one size fits all” approach will not work. Again, we are interested in what kinds of decisions are made, and “by whom”, in particular regulatory regimes.

2.2 Regulatory legitimacy and participation

Although there is no consensus about what participation exactly requires from particular decision-making processes, most proponents of an increase in public participation in different areas of policy making operate under the assumption that “society is plural, differentiated, that there is no monopoly on knowledge, or even no single vantage point from which the whole can be

National Interests” (ch 15); and Susy Frankel and Megan Richardson “Trans-Tasman Intellectual Property Coordination” in this volume (ch 18).

¹⁰ *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140 (CA); *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA); *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576 (CA); *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA).

¹¹ See, for example, in Canada *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73. We are indebted to Eddie Clark for this reference.

observed”.¹² In such circumstances legitimacy is often seen as dependent on whether those regulated can see themselves as having played a meaningful role in the making of the rules that affect them.¹³ Roughly put, the idea is that those affected by regulatory decisions should have the opportunity to influence those decisions, “in proportion to their stake in the outcome”.¹⁴ This derives from the basic idea of democratic self-government, with a focus on participatory ideals.

Institutionally, this view points towards an increase of citizen involvement and deliberation in the making of regulations and other types of rules.¹⁵ This is especially so where the power to make regulations is delegated by the government to independent (or relatively independent) decision-makers and institutions, since these bodies have not been directly authorised by the electorate to engage in the adoption of rules and policies. In New Zealand, the traditional Westminster institutions of indirect democracy (where members of Parliament and the Executive are directly elected by the people) are in many instances sufficient to defend the legitimacy of regulatory decisions made by elected officials. This legitimacy may be strained if decision-making power is delegated to unelected officials or regulatory institutions. Furthermore, the legitimacy of the authority of ordinary legislatures has also been put into question by proponents of an increase in public participation, who argue that there is a “democratic deficit between the electoral process and the implementation of policies by state administrators, and perhaps above all, the emergence of a more sophisticated and demanding citizenry”.¹⁶ Such critics

¹² Julia Black “Proceduralizing Regulation: Part I” (2000) 20 *Oxford Journal of Legal Studies* 597 at 599.

¹³ As Burton writes, “[i]t is claimed also that the political legitimacy of specific decisions increases as more people are party to those decisions and that the legitimacy of the overall system of decision-making or government is enhanced – as more people participate they are drawn into accepting the operating principles or rules of that decision-making system and hence bolster its legitimacy”. See Paul Burton “Conceptual, Theoretical, and Practical Issues in Measuring the Benefits of Public Participation” (2009) 15 *Evaluation* 263 at 267.

¹⁴ Mark E Warren “Citizen Participation and Democratic Deficit: Considerations from the Perspective of Democratic Theory” in Joan DeBardeleben and Jon Pammett (eds) *Activating the Citizen* (Palgrave Macmillan, Basingstoke (UK), 2009) at 17.

¹⁵ There are many conceptions of the democratic ideal, and each of those conceptions has different approaches to public participation and deliberation. In this chapter, we follow the lead of most proponents of an increase of public participation in regulation-making and assume a view of participation strongly influenced by the theory of deliberative democracy. For a general discussion of deliberative democracy, see Amy Gutmann and Dennis Thompson *Why Deliberative Democracy* (Princeton University Press, New Jersey, 2004). See also Jürgen Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, Cambridge, 1996).

¹⁶ Graham P Martin ““Ordinary People Only”: Knowledge, Representativeness, and the Publics of Public Participation in Healthcare” (2008) 30 *Sociology of Health and Illness* 35 at 35. For other discussions of the ways in which ordinary electoral processes are characterised by a democratic deficit, see Mark E Warren “Citizen Participation and Democratic Deficit: Considerations from the Perspective of Democratic Theory” in Joan DeBardeleben and Jon

argue, for example, that electoral systems only represent people as residents of particular geographical areas (as opposed to representing their interests as members of a particular class or group), that low participation rates in regular elections erode the “representativeness” of legislatures in important ways, that traditional representative institutions have failed to solve the problems they are supposed to (such as unemployment, poverty, environmental degradation, housing, and so on), and that some government policies tend to be responsive “not to votes or other clearly democratic inputs, but rather to those who control productive resources”.¹⁷

In fact, political scientists have noted a general trend of dissatisfaction with politics, distrust of government, and decreasing voter turnout in a number of established parliamentary democracies.¹⁸ As a recent New Zealand report on engagement in government noted, “[m]any citizens feel disengaged from the processes of government, with some communities particularly marginalised.¹⁹ The OECD report *Citizens as Partners* observes that “[s]everal driving forces have led OECD countries to focus on strengthening their relations with citizens, including the steady erosion of voter turnout in elections, falling membership in political parties and surveys showing declining confidence in key public institutions.²⁰ There seems to be a “widespread belief that above and beyond the occasional opportunity to vote for national, regional and local governments, citizens should be allowed and indeed encouraged to participate more directly in decisions that affect them”.²¹ Defenders of traditional representative (or indirect) democracy might nevertheless claim that in virtue of being elected and being subject to regular elections, ordinary representative institutions at the very least enjoy a reasonable level of democratic control and accountability. In New Zealand they can also point to still high rates of electoral participation in national elections – with a turnout of just under 80 per cent in 2008.²² Nevertheless, as suggested above, when elected officials delegate their

Pammett (eds) *Activating the Citizen* (Palgrave MacMillan, Basingstoke (UK), 2009) at 23-27; Patrick Bishop and Glyn Davis “Mapping Public Participation in Policy Choices” (2002) 61 *AJPA* 14.

¹⁷ Mark E Warren “Citizen Participation and Democratic Deficit: Considerations from the Perspective of Democratic Theory” in Joan DeBardeleben and Jon Pammett (eds) *Activating the Citizen* (Palgrave MacMillan, Basingstoke (UK), 2009) at 25.

¹⁸ Joshua Cohen and Charles Sabel “Directly-Deliberative Polyarchy” (1997) 3 *European Law Journal* 313 at 314.

¹⁹ Building Better Government Engagement Reference Group “From Talk to Action Government Engagement with Citizens and Communities” (2009) Office for the Community and Voluntary Sector www.ocvs.govt.nz (last accessed 7 August 2011).

²⁰ Organisation for Economic Co-operation and Development *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* (OECD Publishing, Paris, 2001) at 11.

²¹ Paul Burton “Conceptual, Theoretical, and Practical Issues in Measuring the Benefits of Public Participation” (2009) 15 *Evaluation* 263 at 263.

²² Elections New Zealand “2008 Election Official Results” available at www.elections.org.nz (last accessed 7 August 2011). From 1911, levels have been between 79.9 per cent and as

regulation-making powers to other entities, this defence loses some of its force. Moreover, to the extent that the body or institution making regulatory decisions affecting the general population is less accountable to (or more distant from) elected representatives, the problem becomes more salient since it is harder to justify the legitimacy of the regulator. In such cases, it is often argued, more direct mechanisms of participation are an appropriate and necessary complement to indirect democracy.²³

Legitimacy, as understood in the “regulation and governance” policy making and academic literature, is not only about *input*, that is, who is entitled to participate in the relevant decision-making process judged from the perspective of democratic political fairness,²⁴ but also about *output*, about the quality of the decisions made by the regulator in terms of achieving the various goals of regulation. Output legitimacy is functional in nature; it points towards a regulator’s capacity to act in the interest of the general public.²⁵ In that respect, it is concerned with the quality of outcomes rather than with process-based considerations. The relationship between input and output legitimacy is a dynamic and complex one. For example, certain regulatory decisions might involve highly technical issues and, in those cases, *output* legitimacy might acquire a greater importance. People affected by the regulation might be more concerned about the quality of the decision (that is, about making a decision that is free from avoidable technical errors) than about having a say in it. For example, telecommunications regulation may

high as 93.7 per cent, reaching over 90 per cent in around one-third of elections, and over 85 per cent in around two-thirds of elections at www.elections.org.nz/elections/resultsdata/elections-dates-turnout.html.

²³ Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 *Public Administration Review* 66.

²⁴ Input legitimacy is thus generally based on normative criteria: the ideals of self-determination and self-government mandate that individuals and groups should only be affected by rules created by themselves. Gabrielle Abels “Citizen Involvement in Public Policy-Making: Does it Improve Democratic Legitimacy and Accountability? The Case of PTA” (2007) 13 *Interdisciplinary Information Sciences* 103 at 106. See also Organisation for Economic Co-operation and Development (OECD) *Focus on Citizens: Public Engagement for Better Policy and Services* (OECD Publishing, Paris, 2009) at 22-23, distinguishing between “democratic performance” (“the degree to which government decision-making processes live up to democratic principles”) and “policy performance” (the “ability to deliver tangible positive outcomes for society”). See also Fritz Scharpf *Governing in Europe: Effective and Democratic?* (Oxford University Press, Oxford, 1999); Gabrielle Abels “Citizen Involvement in Public Policy-Making: Does it Improve Democratic Legitimacy and Accountability? The Case of PTA” (2007) 13 *Interdisciplinary Information Sciences* 103 at 105. For a critical discussion of output legitimacy in the context of the EU’s legitimacy see Richard Bellamy “Democracy without democracy? Can the EU’s democratic “outputs” be separated from the democratic “inputs” provided by competitive parties and majority rule?” (2010) 17 *JEPP* 2.

²⁵ Gabrielle Abels “Citizen Involvement in Public-Policy Making: Does it Improve Democratic Legitimacy and Accountability? The Case of PTA” (2007) 13 *Interdisciplinary Information Sciences* 103 at 105.

involve technological and economic analysis that would take much study to properly understand, and people's primary concern is that cost is minimised and service reliable.²⁶

There might, however, be other issues, more clearly political or ideological in nature, in which the degree of citizen *input* in the decision-making process will become much more important than a concern with the "quality" of the decision (instead of "good" or "bad" decisions, there are only different approaches to a set of policy questions). There can also be cases in which a particular set of regulations only affect a limited group of people, and where the questions of input and output legitimacy acquire a different meaning. To begin with, in those cases it might not be appropriate to speak about "citizen" or "public" participation, but about participation by stakeholders (understood as those directly affected by a regulation). Here, input legitimacy would be acquired through a process that gives all stakeholders (not only "elite stakeholders")²⁷ the opportunity to influence the relevant decisions. Moreover, there might be cases in which the "stakeholders" and the "experts" are the same individuals or groups, and in which the distinction between input and output legitimacy is blurred. Input and output legitimacy are also connected in important ways. For example, a regulator's decision will tend to advance the public good only if it is made in a way that considers the interests of different citizens and groups (and that supposes some degree of political inclusion in the decision-making process that would allow the regulator to become aware of those interests). Input legitimacy may also have an important effect on outcomes; political inclusion, it is frequently argued, "allows achieving a better quality of the output such as enhanced acceptance and compliance".²⁸ While not the only criteria for the legitimacy of a regulator, the opportunities for public participation provided by a regulation-making process can thus have an important effect on the perceived legitimacy of the regulator and on the social acceptance of its decisions.

2.3 Reasons for public participation

In this section we will discuss five main perceived advantages of an increase of public participation that are found in discussions of participation in regulation:

- (a) increasing a regulator's accountability and checking its decisions;
- (b) the educational effects of participation (both for the public and the administration);

²⁶ See Alec Mladenovic "Networked Industry Case Studies: Electricity and Telecommunications" in this volume (ch 13).

²⁷ Archon Fung "Varieties of Participation in Complex Governance" (2006) 66 *PAR* 66 at 66.

²⁸ Gabrielle Abels "Citizen Involvement in Public-Policy Making: Does it Improve Democratic Legitimacy and Accountability? The Case of PTA" (2007) 13 *Interdisciplinary Information Sciences* 103 at 106.

- (c) potential positive effects on the quality of outcomes;
- (d) increasing compliance; and
- (e) democratic justifications for public participation.

2.3.1 ***Increasing a regulator's accountability and checking its decisions***

Accountability essentially means that there will be some means of holding the decision-maker responsible for its decision. There are different conceptions of "accountability". Some authors define it in terms of control: "an agent is accountable to a principal if the principal can exercise control over the agent and delegation is not accountable if the principal is unable to exercise control".²⁹ Some conceptions of accountability understand it as only requiring "a formal ex post assessment of decisions or actions of political institutions (a form of "performance auditing") along the criteria of openness and scrutiny".³⁰ Contemporary formulations of the concept, however, tend to be based on the idea that to be meaningful, accountability must go beyond the ability to obtain information from the policy maker, and "include debate, the possibility of questions by the account-holders (the accountability forum) and answers by the accountors (usually a public institution) and, finally, judgments on the performance of the accountors".³¹ When considered in a regulatory or policy-making context, the concept has been expanded to include things such as: "'responsiveness' by governments to demands made on them by citizens; 'control' over institutions through the checks and balances of political systems; and 'dialogue', and public discussions between citizens".³² In these expansive formulations, accountability overlaps considerably with general democratic reasons for participation (as discussed below).

A regulator who is generally accountable to those who are affected by the regulations it creates is more likely to be perceived as legitimate: legitimacy and accountability are closely related concepts. But accountability can also allow individuals and groups to act as a check on the activities and decisions of a regulator. In that respect, accountability is connected in important ways to the opportunities for public participation provided by a regulation-making process. For example, in the absence of participation, regulators might

²⁹ Arthur Lupia "Delegation and its Perils" in Kaare Strom, Wolfgang Muller, and Torbjorn Bergam (eds) *Delegation and Accountability in Parliamentary Democracies* (Oxford University Press, New York, 2003) 33 at 35.

³⁰ Gabrielle Abels "Citizen Involvement in Public-Policy Making: Does it Improve Democratic Legitimacy and Accountability? The Case of PTA" (2007) 13 *Interdisciplinary Information Sciences* 103 at 106.

³¹ Gabrielle Abels "Citizen Involvement in Public-Policy Making: Does it Improve Democratic Legitimacy and Accountability? The Case of PTA" (2007) 13 *Interdisciplinary Information Sciences* 103 at 106.

³² Richard Mulgan "Accountability: An Ever Expanding Concept?" (2000) 78 *Public Administration* 555.

become unresponsive to the needs and interests of those they seek to regulate. As Abels suggests, “different forms of public involvement are considered new forms of ... informal ... public accountability”.³³ By being able to ask questions (and having the right to be provided with answers) and requiring regulators to provide reasons for their decisions, individuals and groups exert different forms of checks and controls over regulation-making bodies. Moreover, to the extent that opportunities for public participation go beyond the ability to be provided with reasons and information, and those affected by regulations are actually allowed to take an active role in the decision-making process, the ability of the public to act as a check on the regulator might be said to increase even more.

2.3.2 The educational effects of participation

There are various educational benefits associated with public participation. For example, participants in a decision-making process learn how the system works and develop skills that allow them to influence and affect regulatory decisions more effectively, and “develop a more complete understanding of [their] own real interests”.³⁴ Proponents of public participation also argue that participation has the effect of creating informed citizens, allowing them to “become citizen-experts, understanding technically difficult situations”.³⁵ These approaches to participation also tend to stress the idea that there are different kinds of knowledge and expertise, that there is a need to adopt “a wider concept of policy-relevant expertise and knowledge”,³⁶ and that knowledge based on “the viewpoints of groups at the margins of the dominant culture”³⁷ is often neglected by traditional decision-makers. Participation can therefore allow citizens to develop their unique viewpoints in the process, leading “to revised understandings of the participants’ capacities and resources, leading in turn to new conceptualisations of their individual and collective self-interest”.³⁸

³³ Gabrielle Abels “Citizen Involvement in Public-Policy Making: Does it Improve Democratic Legitimacy and Accountability? The Case of PTA” (2007) 13 *Interdisciplinary Information Sciences* 103 at 107.

³⁴ Paul Burton “Conceptual, Theoretical, and Practical Issues in Measuring the Benefits of Public Participation” (2009) 15 *Evaluation* 263 at 266.

³⁵ Renée A Irvin and John Stansbury “Citizen Participation in Decision Making: Is it Worth the Effort?” (2004) 64 *PAR* 55 at 56.

³⁶ Gabrielle Abels “Citizen Involvement in Public-Policy Making: Does it Improve Democratic Legitimacy and Accountability? The Case of PTA” (2007) 13 *Interdisciplinary Information Sciences* 103 at 106.

³⁷ Frank Fischer *Democracy and Expertise: Reorienting Policy Inquiry* (Oxford University Press, Oxford, 2009) at 79.

³⁸ Peter Barach and Aryeh Botwinick *Power and Empowerment: A Radical Theory of Participatory Democracy* (Temple University Press, Philadelphia, 1992) at 29.

It is also often maintained that by interacting with other citizens and groups, participants contribute and exchange different forms of knowledge, educating themselves as well as other participants about different views and alternative approaches to common problems.³⁹ In other words, “community grows out of participation”.⁴⁰ Some authors stress the relationships between participation and citizens’ “self-development”, suggesting that through engaging in deliberation and interaction with others, participants gain a new sense of personal identity and an augmented understanding of the relationship between their interests and those of the community. Moreover, in providing individuals the opportunity to share power with others, participation not only increases individuals’ awareness of their power as citizens, but also of the power of the group or community of which they are part.⁴¹ Public participation, it is said, results in “an enhanced sense of one’s own individual worth and an intensified identification with one’s community”.⁴² By participating in the activity of government, “citizens are able to express and realise themselves, gain a sense of political efficacy or empowerment, and may achieve social recognition of their values”.⁴³

The educational effects of participation might also have an impact on outcomes. If more people are allowed to participate in a decision-making process and if, by participating, they gain a “sophisticated technical and social understanding” of the relevant issues and of the ways different solutions might impact their own communities or different sectors of society, it is likely that the quality of the substantive outcomes will be improved.⁴⁴ Finally, the educational effects of public participation extend to the regulatory decision-makers because, by being exposed to the views of interested citizens and groups, it becomes easier for them to explain the reasons behind policies which might at first sight appear unpopular to the electorate.⁴⁵ By having regular contact with ordinary citizens and other groups, they learn what kinds of policies tend to be unpopular and are therefore in a position to adopt policies that are more consistent with citizens’ conscious preferences.

³⁹ Iseult Honohan *Civic Republicanism* (Routledge, London, 2002) at 216-217.

⁴⁰ Benjamin Barber *Strong Democracy: Participatory Politics for a New Age* (University of California Press, California, 2003) at 448; Paul Burton “Conceptual, Theoretical, and Practical Issues in Measuring the Benefits of Public Participation” (2009) 15 *Evaluation* 263 at 266.

⁴¹ Peter Barach and Aryeh Botwinick *Power and Empowerment: A Radical Theory of Participatory Democracy* (Temple University Press, Philadelphia, 1992) at 30.

⁴² Jack H Nagel *Participation* (Prentice-Hall, New Jersey, 1987) at 14.

⁴³ Iseult Honohan *Civic Republicanism* (Routledge, London, 2002) at 217.

⁴⁴ Renée A Irvin and John Stansbury “Citizen Participation in Decision Making: Is it Worth the Effort?” (2004) 64 *PAR* 55 at 56.

⁴⁵ Renée A Irvin and John Stansbury “Citizen Participation in Decision Making: Is it Worth the Effort?” (2004) 64 *PAR* 55 at 56; Caroline Mullen, David Hughes, and Peter Vincent-Jones “The Democratic Potential of Public Participation: Healthcare Governance in England” (2011) 20 *Social and Legal Studies* 21 at 27.

2.3.3 Quality of outcomes

As suggested above, proponents of participation believe that an increase in citizen involvement in regulation-making processes has positive effects on substantive outcomes. Participation, they maintain, contributes “to the quality of decision-making because it will give the government the information necessary” to make better decisions, and also contributes to “the systemic identification of problems and their causes, and to the consideration and assessment of alternative strategic options”.⁴⁶ The OECD report, *Focus on Citizens: Public Engagement for Better Policy and Services*, observes that “[m]aking policy in a more open and inclusive way can contribute to raising the quality of policy outcomes and ensure the better use of public funds, by designing policy measures on the basis of better knowledge of citizens’ evolving needs”.⁴⁷ Similarly, the New Zealand Treasury’s *Regulatory Impact Analysis Handbook* identifies “better information, contributing to better quality regulatory proposals” as a benefit of consultation.⁴⁸ It goes on to observe that:⁴⁹

Stakeholders often have better access to empirical information on the size of [the] problem as well as day-to-day experience with the nature of the real issues. In addition, stakeholders’ practical experience can help identify potential unintended effects that policy makers have not considered. Stakeholders may also suggest more practical solutions to achieve the policy objectives.

Yet the implications of this observation for participation depend on whether the term “stakeholders” refers only to the industry participants carrying out the economic activity, or also includes the general public.⁵⁰ Proponents of an increase in public participation would favour a broad conception of “stakeholder”, which would include everyone affected by the regulation at issue. For example, in the context of public safety and the environment, it has been argued that “citizens may possess essential local knowledge” and “may be able to frame problems and priorities in ways that ... more closely match their values, needs, and preferences.”⁵¹ The idea is that in order to achieve

⁴⁶ Frans Coenen “Introduction” in Frans HJM Coenen *Public Participation and Better Environmental Decisions: The Promise and Limits of Participatory Process for the Quality of Environmentally Related Decision-making* (Springer, New York, 2008) 1 at 2.

⁴⁷ Organisation for Economic Co-operation and Development (OECD) *Focus on Citizens: Public Engagement for Better Policy and Services* (OECD Publishing, Paris, 2009) at 23.

⁴⁸ The Treasury *Regulatory Impact Analysis Handbook* (2009) at 20: available at www.treasury.govt.nz/publications/guidance/regulatory/impactanalysis (last accessed 14 September 2011).

⁴⁹ The Treasury *Regulatory Impact Analysis Handbook* (2009) at 20.

⁵⁰ Tony Prosser “Theorising Utility Regulation” (1999) 62 *Modern Law Review* 196 at 206-209.

⁵¹ Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 *PAR* 66 at 73. See discussion in Kate Tokeley “Consumer Law and Paternalism: a Framework for Policy Decision-Making” in this volume (ch 10).

“better” decisions, a regulator should involve those regulated in the identification of needs, in the analysis of problems, and in the decision-making process itself.⁵² From a cost-benefit analysis perspective, it has been argued that “the involvement of more people and the incorporation of their views may well mean that decisions take longer to make, but it is claimed that they will be the better for it and that any short-term costs will be offset by longer term benefits”.⁵³

The argument behind this claim is that as more information becomes available, a decision-maker is in a better position to consider a broader range of possible alternatives. A participatory process, in which different groups and individuals are able to provide relevant information that is not necessarily available to the regulator, and that also allows that information to be examined among different groups of people with different perspectives and knowledge, is seen as likely to increase the probability of good substantive outcomes.⁵⁴

2.3.4 Increasing compliance

The New Zealand Treasury’s *Regulatory Impact Analysis Handbook* observes that benefits of consultation include “increased public buy-in/acceptance as stakeholders are more likely to accept a proposal they have been involved in developing, and improved understanding and increased compliance (therefore improved regulatory effectiveness)”.⁵⁵ As a recent OECD report puts it, “[m]aking people part of the process of prioritising and deliberation helps them to understand the stakes of reform and can help ensure that the

⁵² Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 PAR 66 at 73. See also Steven P Croley *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton University Press, Princeton, 2008) at 135: “the currency of administrative decision making is information, not votes or potential campaign contributions. That is, in rulemaking and other administrative procedures, agencies depend upon information to do whatever they aim to do. Those with the most information, with the most credible and verifiable information, will have a greater opportunity to influence administrative decision makers. Relatedly, it is those with the strongest arguments about regulatory alternatives – that is, who can most convincingly marshal information about the consequences of regulatory alternatives – again will tend to command more attention by administrators than will those with weaker argument.”

⁵³ Paul Burton “Conceptual, Theoretical, and Practical Issues in Measuring the Benefits of Public Participation” (2009) 15 Evaluation 263 at 267. See also the United Kingdom White Paper *Local Government: Strong Leadership Quality Public Services* (Cm 5237 2001).

⁵⁴ Frans Coenen “Introduction” in Frans HJM Coenen *Public Participation and Better Environmental Decisions: The Promise and Limits of Participatory Process for the Quality of Environmentally Related Decision-making* (Springer, New York, 2008) 1 at 5. For a philosophical discussion of the relationship between democracy and good outcomes, see David Estlund *Democratic Authority: A Philosophical Framework* (Princeton University Press, Princeton, 2008).

⁵⁵ *The Treasury Regulatory Impact Analysis Handbook* (2009) at 20.

decisions reached are perceived as legitimate, even if they do not agree with them”.⁵⁶ The idea of acceptance of regulatory decisions one does not agree with is important, for these are the decisions the implications of which are most likely to be resisted or circumvented.

The question of who actually has “access to the policy process and who can influence policy-making”⁵⁷ is not only important in terms of promoting regulatory legitimacy, but also as a way of motivating compliance from those affected by the regulations. Regardless of the reasons on which a regulator’s legitimacy might rest (which could include, but are not necessarily limited to, the opportunities for public involvement it provides), it is commonly argued that legitimacy plays an important role in motivating compliance with a regulator’s decisions.⁵⁸ From a theoretical standpoint, being a legitimate regulator (that is, being perceived as having the right to govern) creates a correlative moral duty on those the regulations affect to obey them. However, at a more practical level, some scholars maintain that when the decisions of a regulator rest on consideration of various viewpoints and interests, levels of compliance are more likely to increase.⁵⁹

It is often argued that decisions taken on the basis of participation are “implemented in a smoother, less costly fashion”, as those subject to regulation tend to cooperate actively in its implementation.⁶⁰ In the context of sustainable fisheries management, there are a number of empirical studies suggesting that the traditional model under which compliance with regulations is understood is based “on a calculation of the economic gain to be

⁵⁶ Organisation for Economic Co-operation and Development (OECD) *Focus on Citizens: Public Engagement for Better Policy and Services* (OECD Publishing, Paris, 2009) at 23.

⁵⁷ Gabrielle Abels “Citizen Involvement in Public-Policy Making: Does it Improve Democratic Legitimacy and Accountability? The Case of PTA” (2007) 13 *Interdisciplinary Information Sciences* 103 at 105.

⁵⁸ See, for example, *The Treasury Regulatory Impact Analysis Handbook* (2009); Organisation for Economic Co-operation and Development (OECD) *Focus on Citizens: Public Engagement for Better Policy and Services* (OECD Publishing, Paris, 2009); and Mark C Suchman “Managing Legitimacy: Strategic and Institutional Approaches” (1995) 20 *Academy of Management Review* 571.

⁵⁹ See Margaret Levi and Audrey Sacks *Legitimizing Beliefs: Concepts and Indicators* (Arobarometer, Cape Town, 2007); Tom Tyler, *Why People Obey the Law* (Princeton University Press, Princeton, 1990); Gabrielle Abels “Citizen Involvement in Public-Policy Making: Does it Improve Democratic Legitimacy and Accountability? The Case of PTA” (2007) 13 *Interdisciplinary Information Sciences* 103 at 106; Renate Mayntz “Legitimacy and Compliance in Transnational Governance” (2010) Max Planck Institute for the Study of Societies www.mpifg.de (last accessed 10 August 2011); Fritz W Scharpf “Reflections on Multilevel Legitimacy” (2007) Max Planck Institute for the Study of Societies www.mpifg.de (last accessed 10 August 2011); Shaun Goldfinch, Robin Gauld and Peter Herbison “The Participation Divide? Political Participation, Trust in Government, and E-government in Australia and New Zealand” (2009) 68 *AJPA* 333 at 334.

⁶⁰ Renée A Irvin and John Stansbury “Citizen Participation in Decision Making: Is it Worth the Effort?” (2004) 64 *PAR* 55 at 57.

obtained from bypassing the regulation compared to the likelihood of detection and the severity of the sanctions”⁶¹ fails to successfully explain compliance and non-compliance among fishers. In a study about compliance in the Galápagos Marine Reserve, Viteri and Chávez concluded that boat-owner’s decisions to conform to or violate regulations cannot be explained only in terms of deterrence, “but also by variables related to the perception of boat owners with respect to the legitimacy of the regulations, the level of membership within the community, and fishermen’s participation in their organisations”.⁶² In that respect, although it is possible to rule on the basis of coercive power only, the limited character of state resources to guarantee compliance means that the perception of legitimate regulatory decision-making will make “governance easier and more effective”.⁶³

2.3.5 Democratic justifications

In discussing possible advantages of public involvement in regulation-making processes, the previous sections mostly referred to various instrumental benefits of participation. Thus, for example, it was argued that participation can have a positive effect on compliance, that it might make regulations more accountable to citizens and groups, that it might lead to informed citizens, and that it can improve the quality of outcomes. Yet democratic theorists sometimes see participation as a value in itself; participating in a decision-making process that will regulate important areas of one’s life is seen as intrinsically valuable. This perspective is increasingly being applied to questions of regulation-making.⁶⁴

Under this view, public participation represents “an important manifestation of the principle that all citizens in a democracy are in some respects equal”, and capable of making “a worthwhile contribution through participating in civil society or civil affairs”.⁶⁵ Most conceptions of deliberative

⁶¹ Jesper Raakjaer Nielsen “An Analytical Framework for Studying: Compliance and Legitimacy in Fisheries Management” (2003) 27 *Marine Policy* 425 at 425.

⁶² César Viteri and Carlos Chávez “Legitimacy, Local Participation, and Compliance in the Galápagos Marine Reserve” (2007) 50 *Ocean and Coastal Management* 253 at 271. Similar observations have been made in a New Zealand context. See Marl L Soboil and Anthony Craig “Self governance in New Zealand’s developmental fisheries: Deep-sea crab” in Ralph E Townsend, Ross Shotton and Hirotsugu Uchida (eds) *Case studies in fisheries self-governance* (Food and Agriculture Organisation of the United Nations, Rome, 2008) 269.

⁶³ Tom Tyler “Psychological Perspectives on Legitimacy and Legitimation” (2006) 57 *Annual Review of Psychology* 375 at 377. See also Margaret Levi and Audrey Sacks *Legitimizing Beliefs: Concepts and Indicators* (Arobarometer, Cape Town, 2007); Tom Tyler *Why People Obey the Law* (Princeton University Press, Princeton, 1990).

⁶⁴ See Steven P Croley *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton University Press, Princeton, 2008) and Henry Richardson *Democratic Autonomy* (Oxford University Press, Oxford, 2002).

⁶⁵ Paul Burton “Conceptual, Theoretical, and Practical Issues in Measuring the Benefits of Public Participation” (2009) 15 *Evaluation* 263 at 265.

democracy rest on similar ideas. Deliberative democrats argue that respect for autonomous persons is not merely about allowing people to express their preferences and predetermined interests, but also about “influencing each other through the publicly valued use of reasoned argument, evidence, evaluation and persuasion that enlists reasons in its cause”.⁶⁶ They therefore reject the view that democracy is about aggregating preferences, and insist that it is about citizens collectively developing their views through rational persuasion. Here, decision-making that results from the exchange of arguments is seen as the “most justifiable form of *political* power because it is the most consistent with respecting the autonomy of persons”.⁶⁷ Deliberative democratic justifications for public participation are in this way connected to the basic principles of self-determination and self-government, and while their immediate effects on individuals and regulators are less obvious than the instrumental benefits considered above, they occupy an important place in theoretical discussions about democracy and public participation.⁶⁸ Voting in elections every three years is not in itself sufficient to deliver on deliberative democratic ideals.

A further problem that may arise in regulatory decision and rule-making from the perspective of democratic self-government exists in situations where these decisions are delegated to “external” institutions outside the ordinary political governmental and legislative institutions.⁶⁹ This is often done through framework legislation setting up and empowering these regulatory institutions, allowing them to make certain kinds of decisions in the service of generally specified aims and principles, and insulating them to some degree from political control and influence. The problem that then arises is one of discretion:⁷⁰

Insofar as statutes do not effectively dictate agency actions, individual autonomy is vulnerable to the imposition of sanctions at the unruly will of executive officials, major questions of social and economic policy are determined by officials who are not formally accountable to the electorate,

⁶⁶ Amy Gutmann “Democracy” in Robert E Goodin and Philip Pettit (eds) *A Companion to Contemporary Political Philosophy* (Blackwell, Malden, MA, 2005) 411 at 417.

⁶⁷ Amy Gutmann “Democracy” in Robert E Goodin and Philip Pettit (eds) *A Companion to Contemporary Political Philosophy* (Blackwell, Malden, MA, 2005) 411 at 417. See also Michael Walzer, *Spheres of Justice* (Basic Books, New York, 1983) at 304; John Parkinson *Deliberating in the Real World – Problems of Legitimacy in Deliberative Democracy* (Oxford University Press, Oxford, 2006).

⁶⁸ For a general discussion, see David Held *Models of Democracy* (Stanford University Press, California, 2006) at 209-216.

⁶⁹ Jody Freeman “Collaborative Governance in the Administrative State” (1997) 45 *UCLA Law Review* 1 at 8-19.

⁷⁰ Richard Stewart “The Reformation of American Administrative Law” (1975) 88 *Harv L Rev* 1667 at 1676. For a comprehensive discussion, see Henry Richardson *Democratic Autonomy* (Oxford University Press, Oxford, 2002).

and both the checking and validating functions of the traditional model are impaired.

Because these kinds of decision-makers are often not directly accountable through the institutions of Westminster constitutional democracy (while there is usually still some Ministerial influence, there is often little actual control except for the possibility of legislative changes), it is more difficult to see their decisions as validated from the perspective of input legitimacy. Of course, their decisions may be better from the perspective of output legitimacy, for freedom from political interference, the ability to develop policy long term beyond the usual electoral cycle, and greater transparency than executive decision-making, are key reasons for creating independent regulators.⁷¹ But despite this there is a continuing search for forms of participation beyond voting that would legitimate such regulatory decisions from the perspective of democratic government.⁷²

2.4 Reasons against participation

In this section we discuss five of the key reasons that may militate against increased participation in regulatory decisions and rule-making. These are that:

- (a) it is unnecessary to secure regulatory legitimacy;
- (b) it is too costly and time-consuming;
- (c) citizens are not interested in participating;
- (d) it might be captured by special interests; and
- (e) decisions should be in the hands of experts.

2.4.1 *Unnecessary to secure regulatory legitimacy*

It might be argued that increased participation in regulatory processes is not needed to ensure the legitimacy of the resulting regulation, because the regulation is legitimated through ordinary governmental and law-making processes. In other words, ordinary governmental processes secure the required level of input legitimacy. A survey of governmental representatives from OECD governments found that only 17 per cent saw participation in decisions as improving governmental legitimacy.⁷³ Further, it may be that

⁷¹ Mark Thatcher and Alec Stone Sweet "Theory and Practice of Delegation to Non-Majoritarian Institutions" (2002) 25 W Eur Pol 1.

⁷² Jody Freeman "Collaborative Governance in the Administrative State" (1997) 45 UCLA Law Review 1 at 27-28; Edward L Rubin "Getting Past Democracy" (2001) 149 U Pa L Rev 711 at 728.

⁷³ Organisation for Economic Co-operation and Development (OECD) *Focus on Citizens: Public Engagement for Better Policy and Services* (OECD Publishing, Paris, 2009) at 27.

New Zealand's small size means that both government and citizens perceive a closeness that does not exist in larger states. This argument is often made in general against an increase in popular participation in politics; the present level of participation is seen as sufficient to legitimate the results of decision and law-making processes. In the context of regulation this can be a valid point where the main policy substance of the regulation is created by legislatures, and where there has been direct discussion of the regulatory questions during electoral campaigns.

However, unless the regulatory approaches or values that are being implemented have been the subject of debate in the election campaign, it cannot be said that one approach to the regulatory question was chosen over another by voters. As law and regulation scholar Stephen Croley observes, "voters vote for political candidates with very little information about those candidates' positions on regulatory issues, and must moreover vote for a mixed package of such policies at once."⁷⁴ Likewise, Tony Prosser states that "where regulatory decisions are clearly social in nature and are taken by government, there is no direct electoral legitimacy for any particular solution to them. Elections form the basis for selection of personalities and of broad approaches to social issues whereas regulatory decisions are much more specific and unpredictable."⁷⁵ If this is the case, the standard legitimation of the power of the government to rule and legislate in key policy areas cannot simply be carried over to relatively obscure regulatory decisions that have not been the subject of political debate.

Similar questions of democratic legitimacy arise where relatively independent regulators are given discretion to achieve vaguely stated aims or principles through the creation of rules or determinations; there is a question as to how far the usual channels of legitimation can run.⁷⁶ Prosser explains these reservations about democratic legitimacy:⁷⁷

Once we accept that regulatory decisions involve values, and values which are often conflicting, we have to find other sources for their legitimation. One way of claiming such legitimation would be to say that the role of the regulator is to implement the mandate given to it by Parliament. This is also too simplistic. The whole point of establishing a regulator is to give it discretion based on its own expertise. The extent of such discretion may vary ... The discretion may be limited largely to matters of implementation, or may involve substantial freedom to determine matters of policy[.] ... [I]n either case, regulation is best thought of not as the application of rules laid

⁷⁴ Steven P Croley *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton University Press, Princeton, 2008) at 21.

⁷⁵ Tony Prosser *The Regulatory Enterprise: Government, Regulation, and Legitimacy* (Oxford University Press, New York, 2010) at 7.

⁷⁶ Tony Prosser *The Regulatory Enterprise: Government, Regulation, and Legitimacy* (Oxford University Press, New York, 2010) at 8.

⁷⁷ Tony Prosser *The Regulatory Enterprise: Government, Regulation, and Legitimacy* (Oxford University Press, New York, 2010) at 8.

down by a principal for the regulatory agent to enforce, but as a part of a regulatory enterprise which will involve collaboration between different levels of government, including the regulator.

In addition, ordinary means of democratic legitimation have been waning in persuasiveness in established democracies in the last few decades, with voter turnout and party participation and identification declining.⁷⁸ Socio-economic inequalities that affect political equality and certain electoral systems may exacerbate the limitations of the ordinary channels of democratic legitimation.⁷⁹ Therefore, “[p]ublic sector decision-makers increasingly find the [legitimacy] granted to them by election, appointment, or expertise insufficient for their decision-making and governance responsibilities.”⁸⁰ In this situation, it becomes harder to say that further public participation in regulatory decision- and rule-making is not necessary to make those decisions legitimate.

2.4.2 Costs – money and time

Participation at any level of intensity involves some costs. It costs money for information to be created and disseminated, for consultation processes to be conducted, and for participation structures to be established and maintained. Indeed, the OECD’s *Focus on Citizens* report found that, according to governments, the provision of resources and time for citizen participation were the most significant challenges to implementing participatory decision-making; the main costs were identified as communication and logistics along with the time of government officials.⁸¹ Governments reported that communication and knowledge-transfer were being devoted to participation, but human resources and money to support participation were not.⁸² In

⁷⁸ Mark E Warren “Citizen Participation and Democratic Deficit: Considerations from the Perspective of Democratic Theory” in Joan DeBardeleben and Jon Pammett (eds) *Activating the Citizen* (Palgrave MacMillan, Basingstoke (UK), 2009) at 22; citing Mark N Franklin et al *Voter Turnout and the Dynamics of Electoral Competition in Established Democracies Since 1945* (Cambridge University Press, Cambridge, 2004). See also Andrew McVey and Jack Vowles “Virtuous Circle or Cul de Sac? Social Capital and Political Participation in New Zealand” (2005) 57 *Political Science* 5.

⁷⁹ Larry M Bartels *Unequal Democracy: The Political Economy of the New Gilded Age* (Princeton University Press, Princeton, 2008); Mark E Warren “Citizen Participation and Democratic Deficit: Considerations from the Perspective of Democratic Theory” in Joan DeBardeleben and Jon Pammett (eds) *Activating the Citizen* (Palgrave MacMillan, Basingstoke (UK), 2009) at 25.

⁸⁰ Mark E Warren “Citizen Participation and Democratic Deficit: Considerations from the Perspective of Democratic Theory” in Joan DeBardeleben and Jon Pammett (eds) *Activating the Citizen* (Palgrave MacMillan, Basingstoke (UK), 2009) at 28.

⁸¹ Organisation for Economic Co-operation and Development (OECD) *Focus on Citizens: Public Engagement for Better Policy and Services* (OECD Publishing, Paris, 2009) at 35 and 42.

⁸² Organisation for Economic Co-operation and Development (OECD) *Focus on Citizens: Public Engagement for Better Policy and Services* (OECD Publishing, Paris, 2009) at 37.

addition to monetary costs, participation also costs time on the part of the regulator and the individuals involved,⁸³ and this time-cost includes the loss of the ability to make rapid decisions that may be necessary in a particular area.⁸⁴ In fact, almost half of governments responding to the aforementioned OECD study reported delays in decision-making as an important risk for government.⁸⁵ As Irvin and Stansbury observe:⁸⁶

[T]he low end of the per-decision cost of citizen-participation groups is arguably more expensive than the decision making of a single agency administrator, even if the citizen participants' time costs are ignored. A single administrator, technically trained and politically astute enough to recognize the probable consequences of his or her decision, may come to the same decision that the community group chose—and it may take him or her one month of work, one day, or even just one hour of consideration.

These problems of time-cost are exacerbated when participants do not think the time they spent participating resulted in any significant difference to the regulatory outcome. The Treasury also observes that “[p]oorly designed consultation can be time-consuming (both for stakeholders and officials) and fail to improve the policy design. Over-consulting stakeholders creates a risk of consultation fatigue where stakeholders are disinclined to be involved in future consultation processes.”⁸⁷ One British study of participation in government suggests that lack of time was not a factor in discouraging citizens from participating in formal democratic processes such as voting.⁸⁸ However, given the fairly light time pressure that voting requires, it is likely that more time-intensive alternative forms of participation may be seen as too demanding on people’s time, “especially if they cannot be assured that their involvement will make a difference”.⁸⁹ Depending on the kind of decision and decision-maker, participation may therefore be vastly more costly than less

⁸³ Steven P Croley *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton University Press, Princeton, 2008) at 21.

⁸⁴ Richard Stewart “The Reformation of American Administrative Law” (1975) 88 Harv L Rev 1667 at 1797; Renée A Irvin and John Stansbury “Citizen Participation in Decision Making: Is it Worth the Effort?” (2004) 64 PAR 55 at 58.

⁸⁵ Organisation for Economic Co-operation and Development (OECD) *Focus on Citizens: Public Engagement for Better Policy and Services* (OECD Publishing, Paris, 2009) at 43.

⁸⁶ Renée A Irvin and John Stansbury “Citizen Participation in Decision Making: Is it Worth the Effort?” (2004) 64 PAR 55 at 58.

⁸⁷ The Treasury *Regulatory Impact Analysis Handbook* (2009) at 20; Organisation for Economic Co-operation and Development (OECD) *Focus on Citizens: Public Engagement for Better Policy and Services* (OECD Publishing, Paris, 2009) at 43 noting the concern of “consultation fatigue”.

⁸⁸ Power “Power to the People: The Report of Power: An Independent Inquiry into Britain’s Democracy” (2006) Power.org at 69-71 www.powerinquiry.org (last accessed 8 August 2011).

⁸⁹ Julia Abelson and others “Deliberations about Deliberative Methods” (2003) 57 *Social Science and Medicine* 239 at 248.

participatory alternatives. Another effect of cost may be that increased formal procedures for participation might be used by organised groups who have greater resources to fund, and greater interest in, participation.⁹⁰ For the individual citizen, weighing up whether to participate or not may result in the conclusion that “the costs of registering or even of formulating regulatory preferences far exceed the benefits”.⁹¹

2.4.3 Apathy

This issue of costs is related to the suggestion that ordinary members of the public generally do not desire to participate more in regulatory decisions: “Citizens have limited capacities and motivations for participation”.⁹² Research from Scotland has found that half of respondents either did not care about what representative political decision-makers were doing or were happy to “let them get on with their job”.⁹³ Citizens may trust decision-makers to make the right decisions, so that in many areas of government “citizens may simply decide that public officials share their interests, and will uphold the trust placed in them by the public”;⁹⁴ people may figure that the government has been elected to make such decisions, or to appoint the right people to do so, and that they are happy to leave it to them.⁹⁵ People may also just be too busy with the rest of their lives to spend more time participating in public life.⁹⁶ The subject of the regulatory decision may be technical and seemingly irrelevant to the person’s everyday life, and the person may see the costs associated with informing himself or herself and participating as far greater than any possible benefits derived from this. In New Zealand, the election of members of district health boards may reflect a situation where public apathy calls

⁹⁰ Richard Stewart “The Reformation of American Administrative Law” (1975) 88 Harv L Rev 1667 at 1772: “Increased procedural formalities may work to the disadvantage of public interest groups by exhausting their limited resources and providing organized interests a basis for delaying agency enforcement actions”.

⁹¹ Steven P Croley *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton University Press, Princeton, 2008) at 21.

⁹² Ian Ayres and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York, 1992) at 83.

⁹³ Steven Hope and Susan King *Public Attitudes to Participation* (Scottish Executive, Edinburgh, 2005) at 5.

⁹⁴ Mark E Warren “Citizen Participation and Democratic Deficit: Considerations from the Perspective of Democratic Theory” in Joan DeBardeleben and Jon Pammett (eds) *Activating the Citizen* (Palgrave MacMillan, Basingstoke (UK), 2009) at 21.

⁹⁵ See John R Hibbing and Elizabeth Theiss-Morse *Stealth Democracy: Americans’ Beliefs about How Government Should Work* (Cambridge University Press, Cambridge, 2002).

⁹⁶ William E Scheuerman “Business and Citizenship” (2005) 72 *Social Research* 447.

democratic participation into question.⁹⁷ The dynamic of apathy, time pressure, and trust of officials is analysed by Mark Warren:⁹⁸

No citizen can attend to, let alone master, every decision that affects them. Nor, given the range of possible activities and satisfactions in today's societies, should we expect citizens to choose attentiveness to politics ... over competing forms of engagement: family, friends, occupations, hobbies, recreation, and entertainment. ... From an economic perspective, the political resources any citizen is able to marshal will be scarce. A good democracy should enable citizens to optimize their political resources. Ideally, citizens should be able to focus their lowest cost resource – voting – on choosing representatives who will fight most of their battles and protect most of their interests. ... In many areas of government ... citizens may simply decide that public officials share their interests[.] ... Under these circumstances, citizens would be able to allocate their high-cost political resources to the few areas where political conflict exists – where they have reason to mistrust government or its representatives – and where the investment of knowledge, time, and attentiveness may make a difference.

Furthermore, participation in more than a few regulatory decisions would create an unbearable “information overload” where the amount and complexity of the information that is available to those seeking to make a decision is beyond the “cognitive and attentive capacities of the average citizen”.⁹⁹ Irvin and Stansbury suggest that “working out policy decisions and implementation details over a protracted series of meetings is an activity that most citizens prefer to avoid”.¹⁰⁰ This would support the view above, that normal governmental processes secure the required level of input legitimacy. These kinds of arguments are less likely where a person does see a large potential impact of a decision on his or her life, and therefore a larger possible pay-off in participating. This may, however, present its own difficulties, as discussed in the next section.

It is possible that the apathy critique of participation is overstated. A British report on participation in government rejected the idea of an apathetic citizenry, pointing out high levels of civic participation in civil society groups

⁹⁷ Jean Drage *A Balancing Act: Decision-making and Representation in New Zealand's Local Government* (Institute of Policy Studies, Wellington, 2008) at 12.

⁹⁸ Mark E Warren “Citizen Participation and Democratic Deficit: Considerations from the Perspective of Democratic Theory” in Joan DeBardeleben and Jon Pammett (eds) *Activating the Citizen* (Palgrave MacMillan, Basingstoke (UK), 2009) at 21.

⁹⁹ Oren Perez “Complexity, Information Overload, and Online Deliberation” (2009) 5 *I/S: A Journal of Law and Policy* 43 at 55. See also Ian Ayres and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York, 1992) at 83.

¹⁰⁰ Renée A Irvin and John Stansbury “Citizen Participation in Decision Making: Is it Worth the Effort?” (2004) 64 *PAR* 55 at 58. See also Eva Lovbrand, Roger Pielke Jr, and Silke Beck “A Democracy Paradox in Studies of Science and Technology” (2010) 36 *Science, Technology, and Human Values* 474.

and actions.¹⁰¹ The Power Inquiry argued instead that disengagement with politics is better explained by reasons such as lack of influence on decision-making and lack of knowledge about politics.¹⁰² Its own experiment in participatory budgeting with the Borough of Harrow resulted in the observation that “if people feel that a process may genuinely give them some influence, or at least mean that those in power will have to take account of their views, they are far more likely to get involved”.¹⁰³

2.4.4 Special interest capture and participatory inequalities

The idea of special interest capture of policy and legal decisions features prominently in critiques of participation in regulatory decision-making. The search for a way of increasing participation by a broad and relatively representative spectrum of different social interests, rather than domination by concentrations of special interests, is a consistent theme in the regulation literature.¹⁰⁴ The concern is “the risk of ‘capture’ of these more open policy making processes by highly motivated and self-selected individuals and groups”, which was considered by many OECD governments as an important risk of increased participation in decision-making.¹⁰⁵ The standard account of special interest capture argues that:¹⁰⁶

¹⁰¹ Power “Power to the People: The Report of Power: An Independent Inquiry into Britain’s Democracy” (2006) Power.org at 41–44 and 57–60: www.powerinquiry.org (last accessed 8 August 2011).

¹⁰² Power “Power to the People: The Report of Power: An Independent Inquiry into Britain’s Democracy” (2006) Power.org at ch 3 www.powerinquiry.org (last accessed 8 August 2011).

¹⁰³ Power “Power to the People: The Report of Power: An Independent Inquiry into Britain’s Democracy” (2006) Power.org at 107 www.powerinquiry.org (last accessed 8 August 2011). See also the reflections on perceived influence and motivation to participate in Janet Newman and others “Public Participation and Collaborative Governance” (2004) 33 *Journal of Social Policy* 203 at 213–217.

¹⁰⁴ Steven P Croley *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton University Press, Princeton, 2008) at ch 2 and 3; Richard Stewart “The Reformation of American Administrative Law” (1975) 88 *Harv L Rev* 1667 at 1681–1688 and 1713–1715; Cass R Sunstein “Interest Groups in American Public Law” (1985–6) 38 *Stan L Rev* 29 at 65; Cass R Sunstein *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, Cambridge, 1990) at 101–102; Ian Ayres and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York, 1992) at 54–60; Gene Rowe and Lynn J Frewer “Public Participation Methods: A Framework for Evaluation” (2000) 25 *Science, Technology, and Human Values* 3 at 12.

¹⁰⁵ Organisation for Economic Co-operation and Development (OECD) *Focus on Citizens: Public Engagement for Better Policy and Services* (OECD Publishing, Paris, 2009) at 43.

¹⁰⁶ Steven P Croley *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton University Press, Princeton, 2008) at 21–22.

... regulatory markets work on the whole to the advantage of organised groups with narrow interests. Interest groups with the most at stake in a particular regulatory decision, who spend the most to buy that decision, typically see their demands for regulation met[.] ... In the process, ordinary citizens lose, though they rarely perceive their loss in any particular case. Nor is the end result purely distributional. The regulatory goods that organised groups obtain often come at a high social cost; concentrated group gains usually “fall far short of the damage to the rest of the community”.

If this view is correct, participation will largely be dominated by people who have the capability and time to participate: well-organised and resourced pressure groups or businesses that represent a set of “special” interests that may be divergent from other interests in society.¹⁰⁷ This is a problem from both the perspectives of input and output legitimacy, because the unequal participation in the regulatory decision-making process (input illegitimacy) may have a negative causal effect on the ultimate content of the regulation (output illegitimacy). If those who participate are not representative of the community or “public” as a whole, it is likely that their participation will skew the decision towards their own special interests and away from the decision that may have been made if all interests had been represented. From the perspective of “pluralism” or “corporatism”, the bargaining between special interests can be seen as resulting in the public interest being advanced.¹⁰⁸ Yet this will only be plausible if all interests are participating in the process; if certain interests are excluded, or overly influential, then the pluralist defence is less convincing. This is of course a vast generalisation based on assumptions about strategic behaviour, and it should be used as a hypothesis with which to approach the analysis of actual regulatory regimes.

In one discussion of the Resource Management Act 1991 regulatory decision-making scheme, it was argued that “[i]nstitutional and corporate stakeholders, rather than average community residents, are best positioned to partake effectively in this public participatory process to establish accepted community standards. Understandably, these stakeholders tend to act in their own strategic interests”.¹⁰⁹ Whether this pattern actually plays out in other areas should be examined when deciding what kind of participation mechanism is suitable for a given situation.

¹⁰⁷ Renée A Irvin and John Stansbury “Citizen Participation in Decision Making: Is it Worth the Effort?” (2004) 64 PAR 55 at 59; Lawrence Pratchett “New Fashions in Public Participation: Towards Greater Democracy” (1999) 52 Parl Aff 616 at 628-631.

¹⁰⁸ Steven P Croley *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton University Press, Princeton, 2008) at 53–57; Carolyn Hendriks “Institutions of Deliberative Democratic Processes and Interest Groups: Roles, Tensions and Incentives” (2002) 61 AJPA 64.

¹⁰⁹ Michael Gunder and Clare Mouat “Symbolic Violence and Victimization in Planning Processes: A Reconnoitre of the New Zealand Resource Management Act” (2002) 1 *Planning Theory* 124 at 128.

Another important and related concern is that people drawn from certain socio-economic groupings will participate more or less than those from other sectors.¹¹⁰ It is generally thought that those who participate in regulatory decisions often come from the better off socio-economic groups in society.¹¹¹ In this respect, some scholars argue, the fact that decision-makers tend to neglect “the viewpoints of groups at the margins of the dominant culture”¹¹² becomes particularly relevant. One recent study of Australia and New Zealand found that participation in politics and government across a wide range of avenues was higher amongst people who are “richer, better educated, and of European ethnicity”, and also, in some circumstances, males.¹¹³ There is therefore a concern that participation in policy and regulatory decisions may not achieve the ideal of “hearing the voices of all citizens”.¹¹⁴ It has been observed that:¹¹⁵

For people living in poverty, subject to discrimination and exclusion from mainstream society, the experience of entering a participatory space can be extremely intimidating. How they talk and what they talk about may be perceived by professionals as scarcely coherent or relevant; their participation may be viewed by the powerful as chaotic, disruptive, and unproductive.

¹¹⁰ Greg Power “House Rules” in Stella Creasy (ed) *Participation Nation: Reconnecting Citizens to the Public Realm* (Involve, London, 2007) 63 at 66-67. See also Lawrence Pratchett “New Fashions in Public Participation: Towards Greater Democracy” (1999) 52 *Parl Aff* 616 at 629: “In a society that inevitably has social and economic inequalities, attempts to extend political participation beyond the relatively undemanding activity of voting for political representatives is likely to face substantial problems in ensuring political equality; indeed, there is a very real danger that initiatives may reinforce existing political inequalities rather than overcome them.”

¹¹¹ Renée A Irvin and John Stansbury “Citizen Participation in Decision Making: Is it Worth the Effort?” (2004) 64 *PAR* 55 at 59; Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 *PAR* 66 at 67; Mark E Warren “Citizen Participation and Democratic Deficit: Considerations from the Perspective of Democratic Theory” in Joan DeBardeleben and Jon Pammett (eds) *Activating the Citizen* (Palgrave MacMillan, Basingstoke (UK), 2009) at 29; Eric Uslaner and Mitchell Brown “Inequality, Trust, and Civil Engagement” (2005) 33 *American Politics Research* 868; Paul Harris “Intimacy in New Zealand Politics: A Sceptical Analysis” (1995) 47 *Political Science* 1; Ellie Brodie and others “Understanding Participation: A Literature Review” (2009) *Pathways through Participation* at 21–33 www.pathwaysthroughparticipation.org.uk (last accessed 8 August 2011).

¹¹² Frank Fischer *Democracy and Expertise: Reorienting Policy Inquiry* (Oxford University Press, Oxford, 2009) at 79.

¹¹³ Shaun Goldfinch, Robin Gauld, and Peter Herbison “The Participation Divide? Political Participation, Trust in Government, and E-government in Australia and New Zealand” (2009) 68 *AJPA* 333 at 345–346.

¹¹⁴ Organisation for Economic Co-operation and Development (OECD) *Focus on Citizens: Public Engagement for Better Policy and Services* (OECD Publishing, Paris, 2009) at 23. See also the discussion at 46–55.

¹¹⁵ Andrea Cornwall and Vera Schattan Coelho *Spaces for Change? The Politics of Participation in Democratic Arenas* (Zedbooks Ltd, London, 2007) at 13.

This constitutes a problem from the perspective of “representativeness” of the participants, for it is harder to say that all or at least most interests are being represented in the participatory mechanism.¹¹⁶ Unfortunately, all modes of public participation are self-selecting to some extent, because even the most statistically robust attempt to randomly sample the population will be frustrated by certain sections of the community who are reluctant to participate.¹¹⁷

The increased participation of ordinary citizens in the regulatory decision- and rule-making process is often seen as the antidote to special interest dominance. Stephen Croley has argued that the “notice and comment” procedures for administrative regulation-making in American public law, discussed briefly below, are often effective in promoting broad-based public participation that mitigates the problem of special interest capture.¹¹⁸ As noted above, however, such participation seems utopian given costs and apathy, and greater opportunities for participation may be seen as just furthering the opportunities for special interest capture. One way to mitigate the force of both apathy and special interest capture exists where there are people who participate and can plausibly be seen as representing other interest groups, and who therefore act as agents of at least some of the other interests in society.¹¹⁹ As Ayres and Braithwaite argue:¹²⁰

¹¹⁶ See Marian Barnes and others “Constituting the Public in Public Participation” (2003) 81 *Public Administration* 379; Graham P Martin “‘Ordinary People Only’: Knowledge, Representativeness, and the Publics of Public Participation in Healthcare” (2008) 30 *Sociology of Health and Illness* 35; Mark Brown “Citizen Panels and the Concept of Representation” (2006) 14 *Journal of Political Philosophy* 203; Gene Rowe and Lynn J Frewer “Public Participation Methods: A Framework for Evaluation” (2000) 25 *Science, Technology, and Human Values* 3 at 12–13; Lawrence Pratchett “New Fashions in Public Participation: Towards Greater Democracy” (1999) 52 *Parl Aff* 616 at 630–631; John Parkinson *Deliberating in the Real World: Problems of Democracy in Deliberative Democracy* (Oxford University Press, Oxford, 2006) at ch 4. Warren notes that “participatory venues are replete with representative claims by individuals and groups, on behalf of any number of interests, identities, and ideals. These representative claims are usually untested ... because we have little grasp of what representation means outside of the formal institutions of electoral representation” Mark E Warren “Citizen Participation and Democratic Deficit: Considerations from the Perspective of Democratic Theory” in Joan DeBardeleben and Jon Pammett (eds) *Activating the Citizen* (Palgrave MacMillan, Basingstoke (UK), 2009) at 29 .

¹¹⁷ Lawrence Pratchett “New Fashions in Public Participation: Towards Greater Democracy” (1999) 52 *Parl Aff* 616 at 623.

¹¹⁸ Steven P Croley *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton University Press, Princeton, 2008) at 283.

¹¹⁹ John Parkinson *Deliberating in the Real World: Problems of Democracy in Deliberative Democracy* (Oxford University Press, Oxford, 2006) at 84–89.

¹²⁰ Ian Ayres and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York, 1992) at 83.

We reject the utopianism of a democracy where all citizens actively participate in decisions regarding the running of their workplace, the administration of their children's schools, the planning of neighbourhoods in which they live ... However, opportunities should be available for citizens to participate actively in these and all other important spheres. ... [A]ll that is then required is for *enough* people to absorb the information made available and take up the opportunities for participation to supply countervailing regulatory power and to render that power contestable. These demands, we hypothesize, are minimal enough to be realistic, particularly when the state motivates political engagement by empowerment and the provision of tangible resources for [public interest groups]. Consider the case of the elected worker health and safety representative who participates in regulatory negotiations, the results of which are reported on workplace notice boards. Will many workers be interested in taking a turn as the health and safety representative? No. Will many workers read the inspection report pinned to the notice board? No. However, will someone be interested in being the health and safety representative? Generally, yes, at least in high risk workplaces.

The same might be said of the consumer and “public interest” pressure groups that formed in the 1970s in the United States, who were consciously aiming to represent the “public interest” (understood as the general interests of most citizens in the particular regulatory area) in political life.¹²¹ In this way, it is argued that even if most people do not take the opportunity to participate, if there are representatives who do participate and who are responsive and accountable to those whose interests they claim to represent, one may negate this critique.

2.4.5 *Technocratic critique*

The technocratic critique of participation points to the barriers to and costs of wider participation in regulatory rule-making. In essence, it points out that because of the complexity of the situations being regulated, and the lack of sophistication and knowledge of those non-experts who would like to participate, such participation would have a negative effect on the eventual rules or decisions – it will decrease the output legitimacy of the regulation. This is what Martin Shapiro calls the issue of “democracy versus technocracy”.¹²² Shapiro states that:¹²³

¹²¹ Steven P Croley *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton University Press, Princeton, 2008) at 123; Richard Stewart “The Reformation of American Administrative Law” (1975) 88 Harv L Rev at 1667 at 1763–1770.

¹²² Martin Shapiro “‘Deliberative’, ‘Independent’ Technocracy v Democratic Politics: Will the Globe Echo the EU?” (2004-2005) 68 *Law and Contemporary Problems* 341 at 342. A related point is that regulating inchoate technologies may be undesirable. See Daniel Gervais “The Regulation of Inchoate Technologies” (2010) 47 Hous L R 665. See discussion in Susy Frankel and Megan Richardson “Trans-Tasman Intellectual Property Coordination” in this volume (ch 18).

Precisely because what is being regulated is technologically complex and rapidly changing, regulators must have high technical skills themselves. One cannot regulate what one does not understand. It has become widely recognized, however, that by virtue of the very specialisation of knowledge required for the achievement of high technological skills, experts are themselves special interest groups whose perspectives and self-interests render them non-representative of the demos as a whole. There is an inevitable tension between democratic control of public policy, including regulatory policy, and regulation by experts.

Another commentator, Frank Fischer, makes a similar point:¹²⁴

Given the technical and social complexity of most contemporary policy issues, a significant degree of competence is required of citizens and their politicians to participate meaningfully in policy discussions. If they are unable to understand and make intelligent judgments on the issues, as many would argue, this poses a worrisome problem. Putting democratic rhetoric aside, it would suggest the need to rethink the meaning and applicability of democracy in contemporary times. It is scarcely a new question, but it is all the more pressing in an “age of expertise”.

The creation of regulatory regimes governing highly complex economic activities seems to be something beyond the understanding and concern of the ordinary citizen, given the complexity, extreme specialisation and fragmentation of the relevant knowledge needed.¹²⁵ Most people simply do not have the economic and technological knowledge required to understand, for example, regulation of the electricity or telecommunications industries or general principles of competition.¹²⁶ A number of commentators have observed that technological complexity “now virtually makes democracy and participation impossible in anything but a restricted form”.¹²⁷ This critique may also be linked with the point above about “information overload”, as it is arguable that because of these social realities of the modern world, the average citizen is quite happy to leave these decisions to experts and to rely on “intermediaries” to alert them to any unacceptable decisions.¹²⁸

¹²³ Martin Shapiro “‘Deliberative’, ‘Independent’ Technocracy v Democratic Politics: Will the Globe Echo the EU?” (2004-2005) 68 LCP 341 at 342–343.

¹²⁴ Frank Fischer *Democracy and Expertise: Reorienting Policy Inquiry* (Oxford University Press, Oxford, 2009) at 1.

¹²⁵ On complexity, see John S Dryzek *Discursive Democracy: Politics, Policy, and Political Science* (Cambridge University Press, Cambridge, 1990) at ch 2.

¹²⁶ See Paul G Scott “Competition Law and Policy” in this volume (ch 3). See also Alec Mladenovic “Networked Industry Case Studies: Electricity and Telecommunications” in this volume (ch 13).

¹²⁷ Frank Fischer *Democracy and Expertise: Reorienting Policy Inquiry* (Oxford University Press, Oxford, 2009) at 54.

¹²⁸ Oren Perez “Complexity, Information Overload, and Online Deliberation” (2009) 5 I/S: *A Journal of Law and Policy* 43 at 59–61.

If this assumption is correct, then a strong argument may be mounted that regulation should be left to economic and technological experts. On this view, public participation in regulatory decisions is not necessary for the legitimacy of regulation. This is commonly allied with the previously mentioned claims that more participation is simply not wanted by most people, because they are uninterested in these matters, that they have little time to spend on participation, that they would prefer that their elected representative or their appointees make the decisions, and that participation has huge financial costs.¹²⁹ As a result of the public's lack of economic and technological knowledge, public participation may put pressure on the regulator to create rules or make decisions that are contrary to the basic goals of regulation.¹³⁰ In this way, input legitimacy through public participation may endanger output legitimacy through hindering the achievement of economically-efficient and effective public interest goals.¹³¹ In contrast, decision-makers who are chosen on the basis of expertise and who operate within regulatory institutions that have robust processes may be seen as better placed to make decisions that benefit the general population. Such technocratic perspectives may also draw on more general criticisms of democratic politics and law-making.

Technocracy is also often justified by what Henry Richardson calls "agency instrumentalism", an idea that is related to the discussion above concerning the legitimization of democratically-elected legislatures and executive governments contrasted with the legitimacy of relatively independent regulatory decision-makers.¹³² Agency instrumentalism legitimises expert decision-making by regulatory agencies and decision-makers through the ordinary Westminster democratic processes of legislative enactment and executive government. The basic idea is that the legislature is meant to set down the ends of regulation, and the regulatory agency is meant to select the most efficient means to those ends.¹³³ This is based on the assumption that technical (economic and scientific) experts can make judgments about means in an "impartial" and non-evaluative way, leaving it to the legislature to make any necessary value judgments in the course of specifying the ends of regulation.¹³⁴ The democratic legitimacy of regulation stems from the value judgments of the legislature, mandated and affirmed by regular elections.

¹²⁹ Frank Fischer *Democracy and Expertise: Reorienting Policy Inquiry* (Oxford University Press, Oxford, 2009) at 55.

¹³⁰ Gene Rowe and Lynn J Frewer "Public Participation Methods: A Framework for Evaluation" (2000) 25 *Science, Technology, and Human Values* 3 at 5.

¹³¹ See Gabrielle Abels "Citizen Involvement in Public-Policy Making: Does it Improve Democratic Legitimacy and Accountability? The Case of PTA" (2007) 13 *Interdisciplinary Information Sciences* 103 at 105-106 on input and output legitimacy.

¹³² Henry Richardson *Democratic Autonomy* (Oxford University Press, Oxford, 2002) at ch 8.

¹³³ Henry Richardson *Democratic Autonomy* (Oxford University Press, Oxford, 2002) at 115. Richard Stewart "The Reformation of American Administrative Law" (1975) 88 *Harv L Rev* 1667 at 1677-1678.

¹³⁴ Henry Richardson *Democratic Autonomy* (Oxford University Press, Oxford, 2002) at 115.

There are moral or social questions that must be answered through normative/evaluative argument, but once they are answered we can call in the experts to translate those answers into regulatory rules and decisions.

Under this view, regulators only exercise instrumental means-end reasoning; as Fischer puts it, “[i]f asked, the policy analysts typically say that [making value judgments] is the job of the politician. They are only providing technical information as an input for decision-makers.”¹³⁵ Richardson rejects agency instrumentalism, because two conditions under which it would be plausible are not usually fulfilled in the real world. These conditions are: “(1) the end must be relatively clear and definite; and (2) there must not be significant disagreement relevant to selecting certain means as the easiest or best ones in the circumstances.”¹³⁶ In the real world of politics out of which regulations originate, ends are often left vague, and the selection of the best means is often controversial.¹³⁷ Experts can disagree on technical questions about instrumental means to specified ends.¹³⁸

Moreover, one might argue that this critique of participation may be mitigated by seeking a middle way between technocracy and naive public participation which would look for means of ensuring that expert knowledge and understanding is taken up by citizens making value judgments.¹³⁹ Fischer claims that “[a] strong case can be made that the general citizenry, or at least a significant portion of it, is more capable of making informed, intelligent assessments about public issues” than the technocratic critique of participation would suggest, and that what seems to be apathy or disinterest in participation may actually stem from the lack of opportunities for participation.¹⁴⁰ This is borne out by some empirical studies. For example, a study of citizen contributions to regulation-making concluded that the bulk of the participation in United States Administrative Procedure Act procedures

¹³⁵ Frank Fischer *Democracy and Expertise: Reorienting Policy Inquiry* (Oxford University Press, Oxford, 2009) at 135.

¹³⁶ Henry Richardson *Democratic Autonomy* (Oxford University Press, Oxford, 2002) at 116.

¹³⁷ Henry Richardson *Democratic Autonomy* (Oxford University Press, Oxford, 2002) at 116.

¹³⁸ Gabrielle Abels “Citizen Involvement in Public-Policy Making: Does it Improve Democratic Legitimacy and Accountability? The Case of PTA” (2007) 13 *Interdisciplinary Information Sciences* 103 at 104.

¹³⁹ Frank Fischer *Democracy and Expertise: Reorienting Policy Inquiry* (Oxford University Press, Oxford, 2009) at 87 and on, 131–134 and ch 5. For example, through the use of educational processes such as citizen juries and forums, lack of knowledge may be overcome. In these situations, experts can come together with non-experts to provide knowledge and analysis, and competing expert perspectives, which will allow a more informed value judgment to be made by the non-experts.

¹⁴⁰ Frank Fischer *Democracy and Expertise: Reorienting Policy Inquiry* (Oxford University Press, Oxford, 2009) at 57-59.

comes from citizens rather than organised stakeholders, and that many submissions make relevant points that rule-makers take into account.¹⁴¹

2.5 Mechanisms of public participation

There are many ways of increasing public participation in regulation-making processes, and because it is arguable that “there is no canonical form or institution of direct public participation in contemporary democratic contexts ... one important task is to understand the feasible and useful varieties of participation”.¹⁴² Complex decision-making processes might proceed through a number of participatory mechanisms.¹⁴³ For example, one council-run participatory consultation process in New Zealand began with a small panel of a few people, expanded out into a number of focus groups, and then culminated in a wide-ranging survey.¹⁴⁴ In this section, we will consider some of the mechanisms proposed in the literature, many of which have been implemented in different jurisdictions.¹⁴⁵

2.5.1 Types of mechanism

Before describing these mechanisms, it is useful to divide them according to the types of public participation for which they allow. There are a number of ways of drawing these broad categories.¹⁴⁶ One typology identifies five broad categories of participation: information provision (fact sheets and websites), consultation (public meetings, focus groups, surveys), direct public involvement (workshops and deliberative polling), collaboration (advisory committees and participatory decision-making), and empowerment (citizen juries, referenda and delegation of decision-making).¹⁴⁷ This general approach

¹⁴¹ Mariano-Florentino Cuellar “Rethinking Regulatory Democracy” (2005) 57 Admin L Rev 411 at 414.

¹⁴² Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 PAR 66 at 66.

¹⁴³ Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 PAR 66 at 67.

¹⁴⁴ Christine Cheyne and Margie Comrie “Involving Citizens in Local Government” in Jean Drage (ed) *Empowering Communities* (Victoria University Press, Wellington, 2002) 156 at 166.

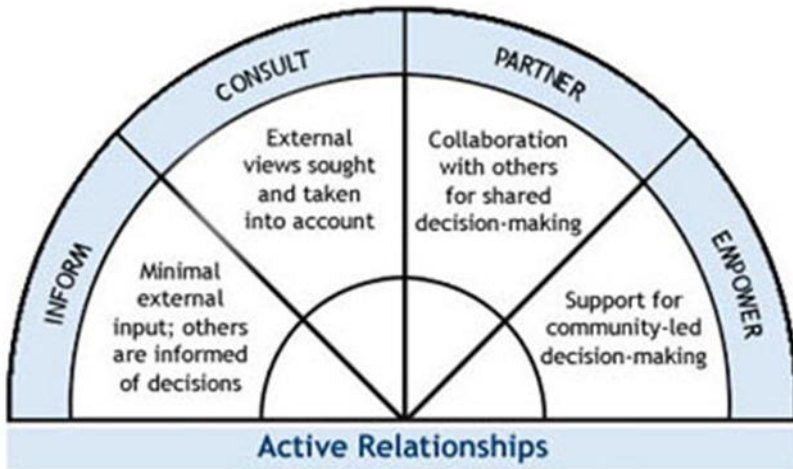
¹⁴⁵ For a good overview see Gene Rowe and Lynn J Frewer “Public Participation Methods: A Framework for Evaluation” (2000) 25 *Science, Technology, and Human Values* 3 at 8-9.

¹⁴⁶ Another example is Organisation for Economic Co-operation and Development *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* (OECD Publishing, Paris, 2001) at 23. For a comprehensive discussion of the different ways of categorising participation in the literature, see Ellie Brodie and others “Understanding Participation: A Literature Review” (2009) *Pathways through Participation* at ch 3 www.pathwaysthroughparticipation.org.uk (last accessed 8 August 2011).

¹⁴⁷ Organisation for Economic Co-operation and Development *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* (OECD

is also reflected in the following diagram used in New Zealand public policy discussions:

Figure 1: Levels of participation



Source¹⁴⁸

While information and consultation can be relatively easily defined, the other categories are difficult to clearly distinguish. *Information* provision by the government is not really participation in decision-making; it is more a precondition for this.¹⁴⁹ *Consultation* involves an attempt by the decision-maker to gain information and opinions from the public, with parties affected by particular regulations given the opportunity to express their point of view about the content of the rules that are being considered by a regulator. By so doing, parties may influence the content of the regulations that are ultimately adopted by someone else enjoying exclusive decision-making power. *Partnership* or *Direct Involvement* are modes of participation characterised by an attempt to go beyond mere public consultation. These mechanisms attempt to create a space in which there is an exchange of information and arguments among all participants in the regulation-making process (that is, an exchange between the affected parties, and between the affected parties and the decision-maker). They generally do not give the public a right to determine the content of the proposed regulation: the final decision-making power remains with the regulator. These processes are thus “viewed in terms of their

Publishing, Paris, 2001) at 17 citing the International Association of Public Participation’s categories.

¹⁴⁸ Office for the Community and Voluntary Sector “Levels of Participation” (2011) Good Practice Participate www.goodpracticeparticipate.govt.nz (last accessed 9 August 2011).

¹⁴⁹ Patrick Bishop and Glyn Davis “Mapping Public Participation in Policy Choices” (2002) 61 AJPA 14 at 20.

advisory capacity to policy development, rather than as a means to replace existing decision-making processes or representative forms of government”.¹⁵⁰ Mandating a high degree of involvement from the public in the form of deliberation and debate, these types of mechanisms are generally associated with deliberative conceptions of democracy (as opposed to traditional theories of participatory democracy which would focus on the ability of the public to determine the outcome of the process).¹⁵¹

The previous types of mechanisms allow for different degrees of public participation in the production of regulations, but do not provide the public with the ability to participate directly in the decision-making process. At most, they give participants the right to influence the decision-maker through the exchange of arguments and information, but their views and recommendations are not binding. As noted below, these forms of participation are the predominant modes used for general regulatory policy decision-making in the New Zealand context, where select committee processes that focus on legislative regulatory decision-making and special governmental inquiries and reviews are usually limited to information and consultation in written submissions and public hearings. From certain conceptions of democracy, which hold the ability to actually affect the result of a decision-making process as an essential component of a meaningful exercise of public participation, this would be seen as an unacceptable situation.¹⁵² There are different ways of allowing the public to play an actual role in a decision-making process and of giving a final say on the content of a regulation (whether this is a desirable alternative in all, or even in some, regulation-making processes is a different question). *Delegation* or *Control* or *Empowerment* mechanisms give participants a role in the decision-making process itself; that is, the regulator’s decision-making capacity is somehow limited (or determined) by the preferences and opinions of the citizens and groups participating in the process.

2.5.2 Spectrums of participation

While creating such a typology in which to place particular mechanisms may help to clarify commonalities between them, perhaps a more useful strategy is to analyse where a particular mechanism of participation sits on a spectrum, as Archon Fung’s influential approach does. Fung’s spectrums are: the scope of participation in terms of which people get to participate; mode of communication and decision in terms of the information provided and the

¹⁵⁰ Carolyn Hendriks “Institutions of Deliberative Democratic Processes and Interest Groups: Roles, Tensions and Incentives” (2002) 61 *AJPA* 64 at 64.

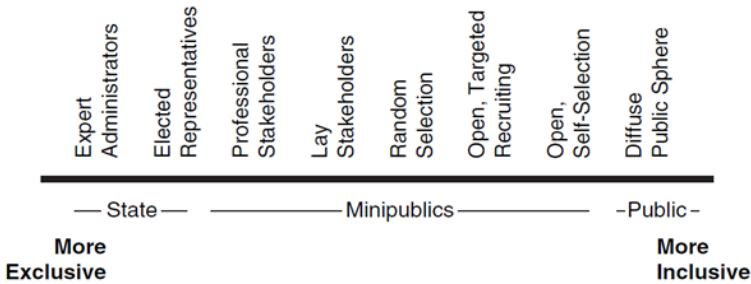
¹⁵¹ For a classical example, see Sherry R Arnstein “A Ladder of Citizen Participation” (1969) 35 *Journal of the American Institute of Planners* 216.

¹⁵² Sherry R Arnstein “A Ladder of Citizen Participation” (1969) 35 *Journal of the American Institute of Planners* 216.

kind of discussion integrated into the process; and the extent of authority in terms of how the results of the participation are used in the final decision.¹⁵³ Setting out the various features of participation mechanisms is useful in showing “the numerous and potentially competing goals for public participation processes and ... the trade-offs inherent in designing ... processes that, in emphasising a particular goal, may sacrifice another”.¹⁵⁴ For example, a highly inclusive mechanism that allows all citizens to potentially present their views is unlikely to be one that also provides for intense participation.

With scope of participation, the question is how inclusive or exclusive the participatory process is; with expert administrators and elected representatives towards the exclusive end, some kind of more expansive selection of a wider set of participants towards the middle, and the potential for anyone to participate at the inclusive end. This can be seen in the following diagram.

Figure 2: Spectrum of inclusion



Source¹⁵⁵

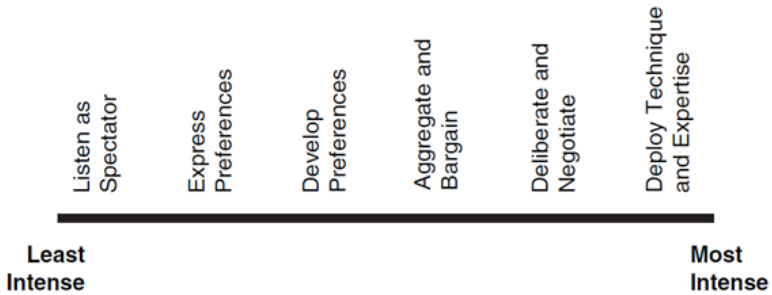
With the mode of communication, the question is how intense the actual engagement of a participant in the process is; with mere listening and expressing preferences at the least intense end, developing preferences and bargaining towards the middle, and deliberation and expert analysis at the most intense end of the spectrum.

¹⁵³ Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 PAR 66 at 66. See also Julia Abelson and others “Deliberations about Deliberative Methods” (2003) 57 Social Science and Medicine 239 at 243-245, setting out a similar set of ways of “evaluating” or analysing a deliberative participation method.

¹⁵⁴ Julia Abelson and others “Deliberations about Deliberative Methods” (2003) 57 Social Science and Medicine 239 at 245.

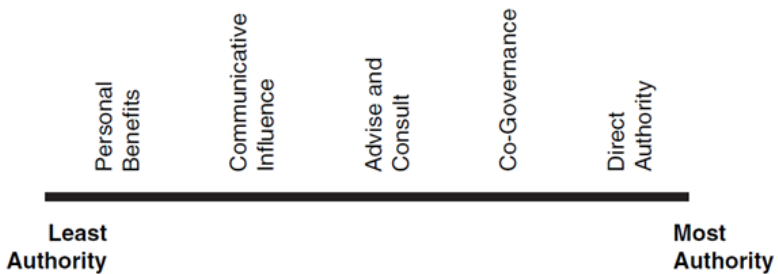
¹⁵⁵ Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 PAR 66 at 68.

Figure 3: Spectrum of communication

Source¹⁵⁶

The spectrum of authority charts how much decision-making power will be given to participants. The least authority end of the spectrum identifies personal benefits from participation, that is, no actual impact on the decision. This is followed by some kind of influence due to the power of one's arguments. More authority comes from the ability to be specifically advised or consulted. Towards the most authority end of the spectrum, co-governance is where plans of action are jointly developed between citizens and government, and direct authority exists where the actual decision is made by citizens through some participatory mechanism.

Figure 4: Spectrum of authority

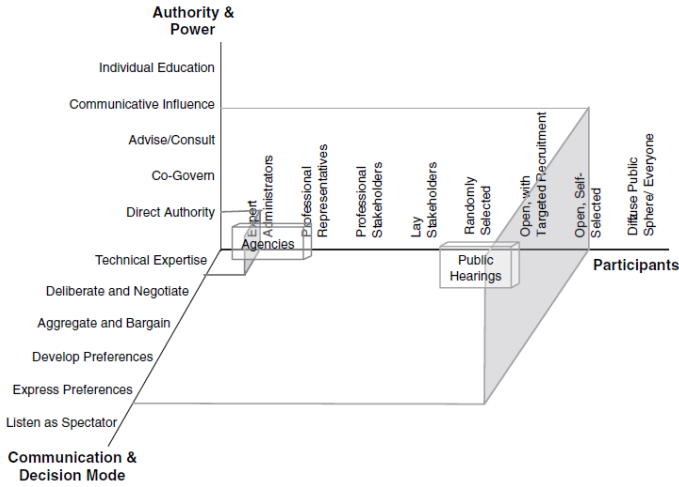
Source¹⁵⁷

¹⁵⁶ Archon Fung "Varieties of Participation in Complex Governance" (2006) 66 PAR 66 at 69.

¹⁵⁷ Archon Fung "Varieties of Participation in Complex Governance" (2006) 66 PAR 66 at 69-70.

Once one has analysed a particular mechanism in terms of each spectrum, one can visualise where it sits in relation to other mechanisms on another diagram called the “democracy cube”.¹⁵⁸ This diagram may be useful to decision-makers when they are deciding what kind of mechanism is appropriate for the decision being made.

Figure 5: Democracy cube



Source¹⁵⁹

2.6 Mechanisms

2.6.1 Public hearings

In a *public hearing* members of the public voice their opinions (and are sometimes allowed to require information and evidence from the decision-maker), but their views are not binding on the regulator. Public hearings are a kind of consultation, and usually involve information and policy documents that frame the issue and ask questions about what people think the decision should be. These processes might also have some positive effects in citizens, as they might gain a sense of civic duty and of membership of a particular community by having the opportunity to voice their views (and to listen to the views of other citizens) in a public venue.¹⁶⁰ However, as typical of

¹⁵⁸ Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 PAR 66 at 71.

¹⁵⁹ Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 PAR 66 at 71.

¹⁶⁰ In addition, s 40(1) of the Resource Management Act establishes that all persons who have “made a submission and stated that they wished to be heard at the hearing, may speak

mechanisms of public consultation, in these and “most public hearings ... officials commit to no more than receiving the testimony of participants and considering their views in their own subsequent deliberations”.¹⁶¹ That is to say, public hearings are not directed at translating the “views or preferences of participants into a collective view or decision”.¹⁶²

Public hearings are already a very important mechanism within New Zealand government and law-making. Parliamentary Select Committees scrutinise both executive government activities and bills passing through the House of Representatives.¹⁶³ Select Committees play an important role in seeking and receiving written submissions from a number of participants, including the general public, businesses, industry groups, political interest groups, and other organisations. Committees will advertise for submissions on the bill or matter for inquiry, and will sometimes write to groups with an interest or to experts in the field to invite submissions.¹⁶⁴ Proceedings relating to the hearing of evidence are usually in public, and written submissions are usually released to the public. If the topic being considered is of great public interest, there may be thousands of written submissions; however, due to time pressure not all of those wishing to make an oral submission have a right to be heard, and the committee may determine how many people it hears and for how long they can appear.¹⁶⁵ Public hearings of a similar sort may also be conducted as part of ministerial inquiries, for example as happened in the inquiries into the telecommunications and electricity industries.¹⁶⁶ They are also used in the context of environmental regulation.

For example, under the Resource Management Act, participants are allowed to express their views about a policy in a public hearing, to have their opinions and interests considered by the decision-maker, and to obtain evidence and information from it. By so doing, the content of the policy and plan documents might be improved in important ways, and may end up reflecting some of the views and preferences of those who participate in the submission process. A variant on public hearings are *notice and comment* procedures. In the United States administrative rule-making proceeds

(either personally or through a representative) and call evidence”. In that sense, it also incorporates some aspects of information and reason giving mechanisms.

¹⁶¹ Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 PAR 66 at 68.

¹⁶² Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 PAR 66 at 68.

¹⁶³ See Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand’s Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004) at 169-175 and 197-198 and David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005) at ch 21-24,

¹⁶⁴ David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005) at ch 23.

¹⁶⁵ David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005) at ch 23.

¹⁶⁶ Ministry of Economic Development “Ministerial Inquiry into the Electricity Industry” www.med.govt.nz (last accessed 9 August 2011).

according to a procedure labelled “notice and comment”, pursuant to the Administrative Procedure Act 1946. When regulatory agencies implement framework legislation through the promulgation of rules, they must give notice of the proposed rule and allow for written and oral comment.¹⁶⁷ When the agency has promulgated its final rule, it must also publish a general statement that explains its decision, in light of the evidence and the comments it received.¹⁶⁸ There are a variety of other procedures that regulate different kinds of regulatory decisions.

To summarise the benefits and disadvantages, public hearings are usually inexpensive and simple to organise, especially in comparison with some other forms of participation.¹⁶⁹ They allow people to give their perspectives on an issue and sometimes to enter into discussion. They are, therefore, a way of getting a significant amount of written and oral material encapsulating the views of the public on a regulatory matter before the decision-makers. In that respect, when placed in the democracy cube, public hearings would give *self-selected* citizens the opportunity to *express preferences*, and are only a *communicative influence* in terms of authority. Public hearings usually operate on the assumption that all those interested in the decision will turn up and make their voices heard. However, this assumption is very likely to be incorrect; public hearings are often seen as a mechanism that will be subject to *special interest capture*, given that they are dominated by those especially interested in the issue and who have the ability and resources to participate.¹⁷⁰ They are often held during working hours, and require people to clearly present information and arguments in written and oral form, both of which may dissuade certain sectors from participating. The exception to this will be high-profile issues and decisions which greatly affect people’s interests, especially those categories of people who usually do not show up.¹⁷¹ It may therefore be necessary to solicit the involvement of people who would not otherwise participate, or seek the contributions of representatives of various interests. If this is not done, the danger of special interest capture or exclusion is high.

¹⁶⁷ See Stephen Breyer, Richard Stewart, Cass Sunstein, Adrian Vermeule and Michael Herz *Administrative Law and Regulatory Policy: Problems, Text, and Cases* (6th ed, Aspen Publishers, New York, 2006).

¹⁶⁸ Steven P Croley *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton University Press, Princeton, 2008) at 82.

¹⁶⁹ Gene Rowe and Lynn J Frewer “Public Participation Methods: A Framework for Evaluation” (2000) 25 *Science, Technology, and Human Values* 3 at 18.

¹⁷⁰ Graham Smith *Beyond the Ballot: 57 Democratic Innovations from Around the World* (Power Inquiry Report, Short Run Press, Exeter, 2005) at 28.

¹⁷¹ Julia Abelson and others “Deliberations about Deliberative Methods” (2003) 57 *Social Science and Medicine* 239 at 248; Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 *PAR* 66 at 67 and 72.

2.6.2 Public opinion surveys and citizen panels

Another example of a public consultation mechanism is the *public opinion survey* or *poll*, which usually involves asking a set of questions to a representative segment of the population (which would be affected by the proposed regulation). Where a smaller sample of the population (say 1,000 people) is surveyed more intensively this is often called a *citizens' panel*.¹⁷² Therefore the scope of participation is towards the inclusive end of the spectrum. These surveys may be carried out in person, through the post, or via telephone or email, and if done properly can provide “standardised information from a statistically representative sample of the affected population” that may avoid the self-selection or inclusion biases that often accompany public meetings or other forms of participation.¹⁷³ Through this mechanism regulators may collect valuable information that might (or might not) have an impact on the rules they adopt. In the United States, for example, George Gallup saw polling as “a serious instrument of democratic reform”¹⁷⁴ that would allow citizens to express their opinions to politicians and hear the opinions of other citizens.

Polls are based on random sampling and seek to capture the opinions of the entire target population. If the relevant data on gender, age, ethnicity, socio-economic status and geographical location is collected, it will be possible to get a good picture of differences in opinions between these categories; if a standardised set of questions is used over successive surveys, a picture of changes and trends can be gained.¹⁷⁵ They may even in some cases be cheaper than public hearings, and are clearly cheaper than mechanisms such as citizens' juries or referenda.¹⁷⁶ However, they do have limitations as they cannot in themselves ensure that people have and understand the information that may be necessary to have an informed opinion on a regulatory issue, and the way questions are asked can influence the responses given.¹⁷⁷ The typical respondent to a survey may not have even thought before of the issue being asked about, and thus would not have been provided with the opportunity to inform himself or herself about it. Put in a different way, traditional opinion polls are non-deliberative in nature, and they will tend to

¹⁷² Lawrence Pratchett “New Fashions in Public Participation: Towards Greater Democracy” (1999) 52 *Parl Aff* 616 at 621.

¹⁷³ Graham Smith *Beyond the Ballot: 57 Democratic Innovations from Around the World* (Power Inquiry Report, Short Run Press, Exeter, 2005) at 28.

¹⁷⁴ James S Fishkin and Robert C Luskin “Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion” (2005) 40 *Acta Politica* 284 at 286.

¹⁷⁵ Lawrence Pratchett “New Fashions in Public Participation: Towards Greater Democracy” (1999) 52 *Parl Aff* 616 at 622.

¹⁷⁶ Lawrence Pratchett “New Fashions in Public Participation: Towards Greater Democracy” (1999) 52 *Parl Aff* 616 at 622.

¹⁷⁷ Graham Smith *Beyond the Ballot: 57 Democratic Innovations from Around the World* (Power Inquiry Report, Short Run Press, Exeter, 2005) at 28.

only provide the views of disengaged and uninformed citizens.¹⁷⁸ They are therefore low on the communication and decision mode spectrum, and are also not useful if the aim is to actually make a reasoned decision, rather than to gather information about people's views.¹⁷⁹ They will, therefore usually only be useful for the communicative influence on the authority spectrum.

2.6.3 Deliberative polls

In response to the aforementioned limitation of informed and reasoned preferences in surveys, some scholars, led by James S Fishkin, have developed the concept of "Deliberative Polling".¹⁸⁰ The scope of participation is like traditional opinion polls in that deliberative polling is based on the random selection of participants so that, on average, the sample should resemble the target population. Like surveys, this mechanism may be particularly useful in contexts in which the problem of self-selection and special interest capture is particularly salient. The process begins by an initial baseline poll in which the participants (which normally range from 200 to 400 persons) answer questions on the relevant issue(s). After this poll, they gather in a single place for a limited period of time (usually a weekend) to discuss the issues and are distributed information (pre-examined by experts and academics to ensure that it presents different alternatives in neutral ways). They then meet in small groups to discuss the issues and to develop questions that they will later ask to experts and political leaders. Parts of these events might be televised. At the end of the weekend they are polled a second time. The results of this poll, it is argued, represent the conclusions the entire public would reach if it had the opportunity of engaging in a collective deliberative exercise.¹⁸¹

This mechanism has been used in different contexts, and some examples include: two deliberative polls conducted in Australia (one in 1999 before the referendum on the change from monarchy to a republic and another in 2001 on reconciliation with the Aboriginals); one in Denmark in 2000 before the referendum on the Euro; and several deliberative polls in the United Kingdom on topics such as crime and punishment, membership in the European Union, and the monarchy.¹⁸² There are many perceived benefits of this mechanism. Since participants are exposed to information and have access to experts, deliberative polling might be "especially suitable for issues where the public

¹⁷⁸ Gene Rowe and Lynn J Frewer "Public Participation Methods: A Framework for Evaluation" (2000) 25 *Science, Technology, and Human Values* 3 at 21.

¹⁷⁹ Julia Abelson and others "Deliberations about Deliberative Methods" (2003) 57 *Social Science and Medicine* 239 at 247.

¹⁸⁰ James S Fishkin *The Voice of the People: Public Opinion and Democracy* (Yale University Press, New Haven, 1997).

¹⁸¹ James S Fishkin and Robert C Luskin "Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion" (2005) 40 *Acta Politica* 284 at 287-288.

¹⁸² The Center for Deliberative Democracy "Deliberative Polling: Toward a Better informed Democracy" www.cdd.stanford.edu/polls/docs/summary/ (last accessed 9 August 2011).

may have little knowledge or information or where the public have failed to confront the trade-offs applying to public policy".¹⁸³ Proponents of deliberative polling, as a way of showing the potential of this mechanism, emphasise that each time a deliberative poll has been conducted, "there were dramatic, statistically significant changes in views".¹⁸⁴ That is to say, after being exposed to information, having the opportunity to ask questions to experts, and to deliberate as a group, participants in deliberative polls frequently changed their views (as revealed by the final poll at the end of the process).¹⁸⁵ This mechanism, therefore, falls near the mid-point of the communication spectrum, so there is a reasonable level of information and rationality involved in citizens' views. There will, however, be higher organisational and information-provision costs than with surveys.

2.6.4 Focus groups and citizen advisory committees

Other mechanisms of public consultation include *focus groups* (usually five to 12 persons), and *citizen advisory committees* (which consist of representatives of different interest or community groups). A focus group is usually a one-off discussion of a topic, whereas advisory committees meet a number of times. These mechanisms are like surveys in that they seek a relatively representative cross-section of society to participate, and there are usually attempts to include marginalised social groups.¹⁸⁶ The scope of participation is again towards the middle of that spectrum; like surveys and deliberative polls, in terms of authority these mechanisms are primarily of an influential or consultative character and their objective is to gain a better understanding of the views and preferences of particular segments of society. They are more like surveys on the mode of communication spectrum, as their aim is usually information-gathering, rather than complex discussion. For these reasons, they are sometimes criticised by proponents of participation as only involving a low-level form of citizen involvement, where the true participants in the process are those entitled to make final decisions or those experts and politicians whose particular opinions carry special weight.¹⁸⁷ As expressed by

¹⁸³ The Center for Deliberative Democracy "Deliberative Polling: Toward a Better informed Democracy" www.cdd.stanford.edu/polls/docs/summary/ (last accessed 9 August 2011).

¹⁸⁴ The Center for Deliberative Democracy "Deliberative Polling: Toward a Better informed Democracy" www.cdd.stanford.edu/polls/docs/summary/ (last accessed 9 August 2011).

¹⁸⁵ The Center for Deliberative Democracy "Deliberative Polling: Toward a Better informed Democracy" www.cdd.stanford.edu/polls/docs/summary/ (last accessed 9 August 2011).

¹⁸⁶ Graham Smith *Beyond the Ballot: 57 Democratic Innovations from Around the World* (Power Inquiry Report, Short Run Press, Exeter, 2005) at 33.

¹⁸⁷ Gene Rowe and Lynn J Frewer "Public Participation Methods: A Framework for Evaluation" (2000) 25 *Science, Technology, and Human Values* 3; Graham Smith *Beyond the Ballot: 57 Democratic Innovations from Around the World* (Power Inquiry Report, Short Run Press, Exeter, 2005) at 33–34; Julia Abelson and others "Deliberations about Deliberative Methods" (2003) 57 *Social Science and Medicine* 239 at 247.

Rowe and Frewer, one of the main complaints regarding these kinds of mechanisms is that “they have often been perceived as ineffectual, simply being used to legitimate decisions or to give an appearance of consultation without there being any intent of acting on recommendations”.¹⁸⁸

They are suitable where there is no desire to have citizens make a decision themselves, but where the decision-maker seeks information and opinions from people who usually don’t participate in ordinary political processes.¹⁸⁹ They may therefore be useful where there is a concern about the representativeness of the development of a regulatory decision that will affect all sectors of society, and where the concern is to get information about needs, interests, and opinions. As an example, focus groups have been used in the Rotorua District Council’s youth consultation project in order to assess the needs of local people between 10-25 years old. The 32 focus groups were held over a two-month period, with each group including about a dozen young people.¹⁹⁰

2.6.5 Citizen juries

A citizen jury usually operates in the following way. A group of around 20-100 citizens (often randomly selected from the population or from a segment of the population) is brought together to deliberate on a particular policy issue (normally for a period of three to ten days).¹⁹¹ The aim is to allow ordinary people to hear evidence and to then make recommendations about a decision or policy, and there is usually no actual power of decision.¹⁹² One major benefit of citizen juries is that they “provide an opportunity for individuals to gain detailed knowledge of a particular policy area and allow alternative perspectives to be developed”.¹⁹³ When composed of randomly selected citizens, citizen juries, unlike traditional public hearings and like surveys and deliberative polls, avoid the problem of “self-selection” (that is, usually certain groups or financially well-off individuals volunteer to

¹⁸⁸ Gene Rowe and Lynn J Frewer “Public Participation Methods: A Framework for Evaluation” (2000) 25 *Science, Technology, and Human Values* 3 at 14-15.

¹⁸⁹ Lawrence Pratchett “New Fashions in Public Participation: Towards Greater Democracy” (1999) 52 *Parl Aff* 616 at 625.

¹⁹⁰ Christine Cheyne and Margie Comrie “Involving Citizens in Local Government” in Jean Drage (ed) *Empowering Communities* (Victoria University Press, Wellington, 2002) 156 at 166.

¹⁹¹ Lawrence Pratchett “New Fashions in Public Participation: Towards Greater Democracy” (1999) 52 *Parl Aff* 616 at 623. For a more general and theoretical discussion on citizen juries, see James S Fishkin *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford University Press, Oxford, 2009).

¹⁹² Lawrence Pratchett “New Fashions in Public Participation: Towards Greater Democracy” (1999) 52 *Parl Aff* 616 at 623-624.

¹⁹³ Lawrence Pratchett “New Fashions in Public Participation: Towards Greater Democracy” (1999) 52 *Parl Aff* 616 at 624.

participate, resulting in only a few voices and interests being heard).¹⁹⁴ The random selection of participants puts it to the middle of the scope of participation spectrum, but this is seen as a major benefit from the point of view of representativeness and political equality, as every person has an equal chance of participating and if the sample is large enough it can be relatively representative on various measures.¹⁹⁵ Through the deliberative process, juries hear from academics, experts, bureaucrats and interest groups and then develop a set of recommendations. Deliberations are normally moderated by a non-member of the jury, and the document that contains the recommendations is then submitted to the regulation-making body and/or disseminated to the public.

In 2008, a citizen jury examining the administration of the electoral system in New Zealand was proposed, but not ultimately used due to a change in government.¹⁹⁶ A completed example of this mechanism is that in 1996 the Wellington City Council used a citizens' jury to help decide on the future of the ownership of the council-owned power company, Capital Power. During the 1980s and 1990s the commercialisation and privatisation agenda was powerful, and in 1994 the Council sold 49 per cent of its shareholding in Capital Power without consultation, prompting a backlash.¹⁹⁷ In response to another proposal for a merger of the company, the Council convened a citizen jury of 14 people from a pool of 100 randomly selected people who had previously participated in market research; this pool was selected to be representative of age, gender and locality.¹⁹⁸ Advertisements for submissions to the jury were made, and its proceedings were extensively covered in local news media. The jury decided that the power company was a valuable

¹⁹⁴ Graham P Martin "Ordinary People Only": Knowledge, Representativeness, and the Publics of Public Participation in Healthcare" (2008) 30 *Sociology of Health and Illness* 35. While it is frequently argued that random selection does not guarantee an "accurate" form of representation (in the sense of representing the views and preferences of the population), from the perspective of deliberative democracy this might be a problem. That is to say, in a successful deliberative process the views of participants are supposed to change as a result of their interaction with others.

¹⁹⁵ Matthew Bostwick "Twelve Angry Citizens: Can Citizens' Juries Improve Local Democracy in New Zealand?" 50(2) (1999) *Pol Sci* 236 at 240-242.

¹⁹⁶ Green Party "Greens Win Citizens' Jury" (2007) www.greens.org.nz (last accessed 9 August 2011) and Simon Power "Government Disbands EFA Expert Panel" (2008) www.beehive.govt.nz (last accessed 9 August 2011). Elections New Zealand also has a discussion of citizens juries on its website: <http://www.elections.org.nz/study/education-centre/concepts/representative-democracy/mps-may-seek-public-opinion.html#gen2> (last accessed 17 September 2011).

¹⁹⁷ Christine Cheyne and Margie Comrie "Involving Citizens in Local Government" in Jean Drage (ed) *Empowering Communities* (Victoria University Press, Wellington, 2002) 156 at 172.

¹⁹⁸ Christine Cheyne and Margie Comrie "Involving Citizens in Local Government" in Jean Drage (ed) *Empowering Communities* (Victoria University Press, Wellington, 2002) 156 at 173.

strategic asset and opposed the sale by a 12-2 vote, but the council voted on a motion to support the sale.¹⁹⁹ Again there was a major backlash, with many believing that the council's decision had already been made up, and some councillors expressing reservations about the cost of the citizen jury and whether the decision was a suitable one for this kind of input.²⁰⁰ Others councillors were concerned about the extent of the citizens' knowledge and the small number participating.²⁰¹

Citizen juries may be useful in getting a recommendation from a relatively representative group of ordinary citizens where there is a special danger of non-representativeness or special interest capture for a significant regulatory decision – not an “everyday” kind of participation. They may therefore be used where there is a significant issue of moral/political judgment about which the general public want to have their say. Abelson and others argue that this mechanism is primarily suitable “only for substantive issues where there are clearly available options” and information.²⁰² They will also be suitable where the issue is a highly technical one that is hard for ordinary citizens to understand without further study and instruction. Evidence suggests that “citizens take their role seriously and are willing and able to deliberate on often complex and controversial issues”.²⁰³ In this sense, they would be high in the communication spectrum, and somewhere between “deliberation and negotiation” and “technical expertise”. It is also argued that a key benefit of the “ordinariness” of the participants and the intensity of their participation is that new ideas that are not circulating within the relatively closed world of regulatory networks may be brought to light; they are a “means of challenging the collective wisdom of traditional policy communities by introducing the views of ‘lay’ people”.²⁰⁴

Criticisms of citizen juries tend to stress the fact that their discussions are closed to outsiders, that recommendations are sometimes written by the

¹⁹⁹ Christine Cheyne and Margie Comrie “Involving Citizens in Local Government” in Jean Drage (ed) *Empowering Communities* (Victoria University Press, Wellington, 2002) 156 at 173.

²⁰⁰ Christine Cheyne and Margie Comrie “Involving Citizens in Local Government” in Jean Drage (ed) *Empowering Communities* (Victoria University Press, Wellington, 2002) 156 at 173.

²⁰¹ Christine Cheyne and Margie Comrie “Involving Citizens in Local Government” in Jean Drage (ed) *Empowering Communities* (Victoria University Press, Wellington, 2002) 156 at 174.

²⁰² Julia Abelson and others “Deliberations about Deliberative Methods” (2003) 57 *Social Science and Medicine* 239 at 247.

²⁰³ Graham Smith *Beyond the Ballot: 57 Democratic Innovations from Around the World* (Power Inquiry Report, Short Run Press, Exeter, 2005) at 41. See also Julia Abelson and others “Deliberations about Deliberative Methods” (2003) 57 *Social Science and Medicine* 239 at 246.

²⁰⁴ Lawrence Pratchett “New Fashions in Public Participation: Towards Greater Democracy” (1999) 52 *Parl Aff* 616 at 625.

moderator of the project, that their members are not democratically elected, and that their recommendations are not binding.²⁰⁵ There are also questions about expert witness selection and the ability of laypeople to “critically appraise the information presented”.²⁰⁶ Because of the significant time devoted to participation, there will likely still be problems of representativeness;²⁰⁷ there are also concerns that differences in resources and presentation skills may cause problems in achieving relative equality of voice, even among those who turn up.²⁰⁸ They are also relatively exclusive in that only a small number of people can participate, resulting in only a few voices and interests being heard.²⁰⁹ There may also be backlash if citizens’ decisions are not seen to carry weight in decision-makers’ reasoning and final decision, which may happen if the public input role in the decision is not explained.²¹⁰

2.6.6 Direct democracy: referenda

The most well-known mechanism of participatory decision-making is the *referendum*. A referendum might be held at a national or local level, and its result is normally binding (and therefore very high in the authority/power spectrum). The most common criticism of referenda, particularly applicable in a regulation-making context, is that while they give every vote equal influence over a particular result; they do it regardless of the knowledge and access to information that the voters have about the issues at hand. That is to say, they are low on the communication spectrum, because the mechanism does not require any deliberation or reason/information giving. However, nothing prevents the combination of the referendum with other mechanisms of public participation that tend to diminish the concerns with citizens’ lack of expertise and information. For example, at an initial stage of a decision-making process a citizen jury might deliberate about a particular policy issue, disseminate the

²⁰⁵ See, for example, Frank Fischer *Democracy and Expertise: Reorienting Policy Inquiry* (Oxford University Press, Oxford, 2009) at 92–93.

²⁰⁶ Julia Abelson and others “Deliberations about Deliberative Methods” (2003) 57 *Social Science and Medicine* 239 at 246.

²⁰⁷ Lawrence Pratchett “New Fashions in Public Participation: Towards Greater Democracy” (1999) 52 *Parl Aff* 616 at 624.

²⁰⁸ Christine Cheyne and Margie Comrie “Involving Citizens in Local Government” in Jean Drage (ed) *Empowering Communities* (Victoria University Press, Wellington, 2002) 156 at 177.

²⁰⁹ Julia Abelson and others “Deliberations about Deliberative Methods” (2003) 57 *Social Science and Medicine* 239 at 245.

²¹⁰ Jean Drage *A Balancing Act: Decision-making and Representation in New Zealand’s Local Government* (Institute of Policy Studies, Wellington, 2008) at 14–15; Christine Cheyne and Margie Comrie “Involving Citizens in Local Government” in Jean Drage (ed) *Empowering Communities* (Victoria University Press, Wellington, 2002) 156 at 173–174; Julia Abelson and others “Deliberations about Deliberative Methods” (2003) 57 *Social Science and Medicine* 239 at 247.

contents of its recommendations to the wider population, and then hold a public-wide referendum of the changes proposed by the citizen jury (such a process was used in British Columbia and Ontario in the context of electoral reform, where the recommendations of a Citizen Assembly were put to a popular vote).²¹¹

Referenda have been widely used at the local government level in New Zealand, especially in areas such as liquor licensing and local government amalgamation.²¹² Referenda are unlikely to become a very significant form of public participation in regulation-making. At the national level, their use should be reserved for fundamental changes in regulatory policy, rather than more minor changes: for example the kind of fundamental economic and regulatory changes implemented under the Fourth Labour Government, which replaced a highly controlled Keynesian policy framework with one of the most deregulated economies in the world.²¹³ They can only really be used to indicate general support or opposition to a defined proposal.

2.6.7 Self-regulation and co-regulation

There are two other key forms of participation that we will discuss here. Neither look primarily to public participation in terms of the inclusion of “ordinary people” within the regulation-making process. Instead, they look to those whom the regulations are going to most directly affect in terms of constraining or enabling economic action. The co-regulation model sees key industry stakeholders creating regulations in cooperation with the government, whereas the self-regulation model leaves regulation to the industry itself. These forms of regulation are addressed in a burgeoning literature that analyses the development of the “post-regulatory state”.²¹⁴ One of the key justifications for allowing businesses, industries and professions to make their own rules is the “difficulty for regulators in gaining

²¹¹ Frank Fischer *Democracy and Expertise: Reorienting Policy Inquiry* (Oxford University Press, Oxford, 2009) at 96. Another, less “participatory”, option would be to make the recommendations of the citizen jury binding on the regulator.

²¹² Margaret Cousins “Capturing the Citizen’s Voice” in Jean Drage (ed) *Empowering Communities* (Victoria University Press, Wellington, 2002) 187 at 189–190.

²¹³ Jane Kelsey *The New Zealand Experiment: A World Model for Structural Adjustment* (Auckland University Press, Auckland, 1995); Patrick Massey *New Zealand: Market Liberalization in a Developed Economy* (Macmillan, Basingstoke (UK), 1995).

²¹⁴ Ian Ayres and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York, 1992); Colin Scott “Regulation in the age of governance: the rise of the post-regulatory state” in Jacinta Jordan and David Levi-Faur (eds) *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar, Cheltenham, 2004) 145; Julia Black “Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World” (2001) 54 *Current Legal Problems* 103.

knowledge and understanding of the systems they are regulating: law is a blunt tool for intervening in other complex systems and cultures”.²¹⁵

The key benefit of restricting participation to key “stakeholders” is to secure more “output” legitimacy through drawing on the expertise of those directly involved.²¹⁶ Self-regulation is increasingly seen as a key aspect of “better regulation” in the OECD, often as a second-best to goals of de-regulation or “less regulation”.²¹⁷ It was promoted by the United Kingdom’s Better Regulation Task Force as an alternative to state regulation,²¹⁸ and was legislated for in the Communication Act 2003 (UK), requiring the telecommunications regulator to have regard to the “desirability of promoting and facilitating the development and use of effective forms of self-regulation”.²¹⁹ The basic idea is that the particular profession, economic actor or industry regulates its own conduct, through codes of conduct or rules, and enforces those norms itself²²⁰ “without formal oversight from government”.²²¹ Beyond this, there are different levels of state involvement that might be characterised as consistent with self-regulation, for example where the government mandates or approves independently-created regulation, where it threatens to regulate, or where it simply does not concern itself with the regulation of the particular area.²²² An example in New Zealand is the regulation of the legal profession, which began as self-regulating and later took on aspects of co-regulation with the Lawyers and Conveyancers Act 2006.

Co-regulation is another mechanism of regulation that involves industry or economic actors, but it is distinguished from self-regulation by significant government involvement. Bartle and Vaas observe that many regulatory areas

²¹⁵ Tony Prosser “Self-regulation, Co-regulation and the Audio-Visual Media Services Directive” (2008) 31 *Journal of Consumer Policy* 99 at 100.

²¹⁶ Andreas Follesdal “The Legitimacy Challenges for New Modes of Governance: Trustworthy Responsiveness” (2011) 46 *Government and Opposition* 81 at 82 and 84.

²¹⁷ Ian Bartle and Peter Vass “Self-Regulation Within the Regulatory State: Towards a New Regulatory Paradigm?” (2007) 85 *Public Administration* 885.

²¹⁸ United Kingdom Better Regulation Task Force *Imaginative Thinking for Better Regulation* (Better Regulation Task Force, London, 2003) at 41–46; Ian Bartle and Peter Vass “Self-Regulation Within The Regulatory State: Towards A New Regulatory Paradigm?” (2007) 85 *Pub Admin* 885 at 890.

²¹⁹ Section 3(4)(c); cited in Ian Bartle and Peter Vass “Self-Regulation Within The Regulatory State: Towards A New Regulatory Paradigm?” (2007) 85 *Pub Admin* 885 at 891.

²²⁰ United Kingdom Better Regulation Task Force *Imaginative Thinking for Better Regulation* (Better Regulation Task Force, London, 2003) at 41-44; Ian Bartle and Peter Vass “Self-Regulation Within the Regulatory State: Towards a New Regulatory Paradigm?” (2007) 85 *Pub Admin* 885 at 888.

²²¹ Ofcom “Identifying appropriate regulatory solutions: principles for analysing self and co-regulation” (2008) at 8: www.ofcom.org.uk (last accessed 9 August 2011).

²²² Ian Bartle and Peter Vass “Self-Regulation Within the Regulatory State: Towards a New Regulatory Paradigm?” (2007) 85 *Pub Admin* 885 at 889.

that are thought of as self-regulation are really better characterised as co-regulation.²²³

Many of the new forms of self-regulation thus involve close and nuanced relationships between the state and the regulated organisations and self regulatory bodies and few if any can be described as voluntary in the sense of there being no role for the state. The state's role is crucial because it has legislated for and actively promoted self-regulation and many new self-regulatory schemes derive from state regulation. The state often plays an explicit facilitating role which might involve active promotion, support and oversight. Alternatively, the state's role might be limited to such action as the commissioning of studies or tacit monitoring, but even these actions can have a significant impact on the nature of the regime. Often implicit within the tacit monitoring is a threat of the introduction of state-led regulation if the industry does not make significant changes. "Voluntary" action of self-regulators, though important, is conditioned and constrained by action (often implicit) of the state.

Self-regulation and co-regulation can be seen as highly participatory in terms of the participation of the "affected industry", especially in the case of self-regulation, because private economic actors are choosing how they wish to behave.²²⁴ It also recognises the complexity of the area being regulated by allowing those intimately involved to share their experience and understanding of how things work, in other words "accessing knowledge necessary for successful regulation".²²⁵

These mechanisms, however, may be criticised from the perspective of "public" participation, because both the elected representatives and the general public themselves have taken a step back from the creation of the regulatory framework. This brings in the threat of "special interest capture" noted above; "self-regulation is the natural end point of private interest driven regulatory capture: the regulator is not only captured by the regulated but 'becomes' the regulated".²²⁶ The danger is the potential for conflicts of interest

²²³ Ian Bartle and Peter Vass "Self-Regulation Within the Regulatory State: Towards a New Regulatory Paradigm?" (2007) 85 *Pub Admin* 885 at 895.

²²⁴ Tony Prosser "Self-regulation, Co-regulation, and the Audio-Visual Media Services Directive" 31 *Journal of Consumer Policy* 99 at 102.

²²⁵ Tony Prosser "Self-regulation, Co-regulation, and the Audio-Visual Media Services Directive" 31 *Journal of Consumer Policy* 99 at 103.

²²⁶ Ian Bartle and Peter Vass "Self-Regulation Within the Regulatory State: Towards a New Regulatory Paradigm?" (2007) 85 *Pub Admin* 885 at 902; Tony Prosser "Self-regulation, Co-regulation, and the Audio-Visual Media Services Directive" 31 *Journal of Consumer Policy* 99 at 103: such a regime is often seen as replacing the public interest with the self-interest of participants" so that "it represents an abandonment of the legitimate interests of the state in acting as a guarantor of the public interest and the interests of under-represented groups" Similarly, the United Kingdom Better Regulation Task Force report noted that self-regulation "may be subject to undue influence by large companies": United Kingdom Better Regulation Task Force *Imaginative Thinking for Better Regulation* (Better Regulation Task Force, London, 2003) at 46.

or collusion on the part of the self-regulators, a phenomenon that is often observed in the case of self-regulating professions.²²⁷ These forms of “participation” in regulation-making should therefore be strictly scrutinised to ensure that the fundamental goals of regulation are being achieved, including giving the general public increased information about the making and content of such regulation.²²⁸ The independent telecommunications regulator in the United Kingdom – Ofcom – has analysed self- and co-regulation in order to determine when these mechanisms are appropriate for a regulatory task.²²⁹ It found that:²³⁰

[S]elf-regulation is most likely to work where the following conditions are present: industry collectively has an interest in solving the issue; industry is able to establish clear objectives for a potential scheme; and the likely industry solution matches the legitimate needs of citizens and consumers. It is unlikely to be appropriate where the following conditions are found: there are incentives for individual companies not to participate; or there are incentives for participating companies not to comply with agreed codes.

2.7 Conclusion

This chapter examined the question of what kind of participation is required for the legitimacy of regulatory decisions. We discussed a number of reasons for and against an increase in participation and considered a variety of mechanisms through which regulation-making processes could be made more inclusive. One preliminary observation is that the choice of mechanism will depend on what the decision-makers are seeking. If the objective is increasing input legitimacy, the mechanism should be one that avoids special interest capture and participatory inequalities by ensuring a wide range of citizens can participate and that those who participate are representative of the wider community, for example, through surveys. However, if the scope of participation is high, it is likely that the intensity of the participation will be lower, with fewer opportunities for deliberation and exchange of information.

Given that many regulators are more concerned with output legitimacy, they would likely prefer participation by a limited pool of stakeholders who can

²²⁷ Christine Parker *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge University Press, Cambridge, 2002) at ch 6; Ian Bartle and Peter Vass “Self-Regulation Within the Regulatory State: Towards a New Regulatory Paradigm?” (2007) 85 *Pub Admin* 885 at 896-898.

²²⁸ Ian Bartle and Peter Vass “Self-Regulation Within the Regulatory State: Towards a New Regulatory Paradigm?” (2007) 85 *Pub Admin* 885 at 898.

²²⁹ Ofcom “Identifying appropriate regulatory solutions: principles for analysing self and co-regulation” (2008) www.ofcom.org.uk (last accessed 9 August 2011).

²³⁰ Ofcom “Identifying appropriate regulatory solutions: principles for analysing self and co-regulation” (2008) at 2-3 www.ofcom.org.uk (last accessed 9 August 2011).

identify key issues and possible unintended consequences for proposed courses of action – this is where co-regulation may be attractive. If the concern is to get a mix of input and output legitimacy, regulators should consider mechanisms that combine a degree of representativeness with high levels of deliberation and education of participants, for example, citizen juries. These observations are only tentative. It remains to be seen how appropriate they are in the New Zealand governmental and regulatory context. In the next stage of the project, we will examine the degree to which the reasons for and against participation apply in a variety of specific areas of regulation in New Zealand (for example, resource management, telecommunications and fisheries). In so doing, we will analyse what effect the context of a small, centralised nation-state has on those reasons.