
PART 2:

THE PUBLIC VOICE AND CONSUMER BEHAVIOUR

Chapter 6

Public Participation in New Zealand's Regulatory Processes

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6.1 Introduction

Our part of this project considers the place of public participation in regulatory processes in New Zealand. In our Stage One chapter,¹ we examined the reasons for and against increasing public participation in regulation. Apart from a few brief references to the New Zealand experience (as well as to the experience of other countries), our analysis was mainly theoretical. We reviewed the relevant literature and identified what we thought were the main reasons for and against participation. Those reasons provided a framework for thinking about whether increased public participation is desirable in any particular regulatory decision making area, and led on to an identification of a range of possible participatory mechanisms.

The reasons for public participation included providing accountability, educational effects on the public, better substantive outcomes, increased compliance and increased democratic legitimacy of the regulatory decision. Increased opportunities for public participation may not be desirable if it is thought that regulatory decisions already have democratic legitimacy (obtained through other means, such as the ordinary political process), need to be made by subject-matter experts, or if the participatory process is too costly, and one that ordinary citizens are unlikely to engage with – leaving it to be captured by special interest groups. We emphasised that whether these reasons for or against public

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¹ Mark Bennett and Joel Colón-Ríos “Public Participation and Regulation” in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 21.

participation actually apply in any particular area of regulatory rule or decision making must be determined by close examination of that regulatory context, for the reasons will matter to a greater or lesser extent in different areas.

Identifying what reasons apply, and to what degree, allows governments and citizens to identify whether increased public participation is needed beyond ordinary processes of government decision making and law making. Equally as important, it allows the identification of which kind of participatory mechanism is best suited to respond to those reasons so as to produce successful regulatory regimes. To this end, our Stage One chapter identified a number of possible mechanisms of increased public participation, and examined the ways in which those mechanisms relate to the various reasons for and against public participation, by mapping their main features on three spectra. For example, we highlighted the way in which citizen juries can allow a broadly representative group to be selected from the community to gain further information about an issue and debate it in an informed way and make recommendations. Accordingly, citizen juries are a mechanism that responds to questions about citizen apathy, lack of expertise, special interest capture – and so may be useful when these reasons apply – but they are costly and time consuming, and may not achieve better decisions or increased legitimacy unless participants are really engaged and can convey their deliberations to the general public.² Whether these reasons are likely to apply, and thus whether citizen juries or some other participatory mechanism ought to be used in the regulatory decision, can only be determined by reference to the particular area and decision at stake.

In this chapter, our aim is to examine how the reasons for and against participation apply in two specific regulatory contexts. In so doing, we will identify key considerations or indicators that can be used by government to determine the level of participation that might be appropriate, and the types of mechanisms that might be used to facilitate public involvement, in light of the specific features of the regulatory area at issue. These key indicators relate back to common reasons for participation, and include: the aims of participation, the scope and scale of the decision, whether there has been prior political and community debate and public endorsement of the regulatory choice, whether there are significant needs to gain further information from participants, what kind of deliberation is desired and what kind of decision making power the public participants are to be accorded.

For this analysis, we focus on electricity regulation and environmental regulation under the Resource Management Act 1991. We have chosen these areas³ because they exhibit some features that seem to make an increase in public participation difficult or undesirable, but others that seem to make such an increase necessary. They also present different types of challenges (such as special interest capture and apathy) that markedly influence the types of participatory mechanisms that may be suitable. We have not only reviewed the literature in these areas, we have also

² For a discussion see Frank Fischer *Democracy and Expertise: Reorienting Policy Inquiry* (Oxford University Press, Oxford, 2009) at 96.

³ Consequently, in looking at these two areas, we do so from the perspective of democratic theory, and do not claim any particular expertise in the general regulatory framework at issue.

discussed the topic with regulatory decision makers in these and other areas, as well as with individuals from consumer-citizen groups who participate in regulatory decision making at present.

The chapter proceeds in the following way. After briefly introducing the regulatory area at issue, we ask the following questions:

- (1) What are the current opportunities for public participation provided by the present regulatory framework?
- (2) What are the particular reasons for and against participation that strongly apply to this area?
- (3) Taking into account these reasons, what mechanisms of public participation are suitable in this particular area and at what stages of the decision making process should they be used?

6.2 Participation in electricity regulation

Electricity was, before the 1980s, provided as a public service in New Zealand, but now many functions of electricity provision are carried out by private companies.⁴ Regulatory decisions concerning the structure of the electricity industry and its market and non-market elements are made by the government, Parliament through legislation, and independent regulatory bodies (the Electricity Authority and the Commerce Commission).

As electricity is one of the regulatory areas considered by the wider Regulatory Reform Project, the structure of the industry and the key regulatory institutions are only briefly discussed in the first section, before discussing the key regulatory concerns and the present regulatory framework. The section then sets out the present opportunities for public participation in regulatory decision making. Next, we turn to an initial analysis of the reasons that may be said to apply for and against increased public participation of various forms, and placing the main regulatory decisions on the spectra of participation we introduced in our Stage One chapter. Finally, we discuss the reasons for and against the use of two particular mechanisms: consumer advocacy groups and consumer panels (currently used in Australia and the United Kingdom).

6.2.1 *Present regulatory frameworks and kinds of regulatory concerns and decisions*

(a) *Industry structure*

The electricity industry is divided into generation, wholesaling, transmission (over the national grid), distribution (across local districts), and retailing to end-

⁴ For a discussion see Barry Barton "From Public Service to Market Commodity: Electricity and Gas Law in New Zealand" (1998) 16 J Energy & Nat Resources L 351. For a trenchant criticism of this shift see Jane Kelsey *The New Zealand Experiment: A World Model for Structural Adjustment* (2nd ed, Auckland University Press, Auckland, 1997) at 115–137.

consumers.⁵ Transmission is carried out by the state-owned enterprise, Transpower, and three of the five generator companies are presently also state-owned.⁶ Most generators are also vertically integrated with the retail market through owning retail companies known as gentailers.⁷ Distribution is carried out by geographically located lines businesses, which are almost all owned by consumer/community trusts or local government.⁸

(b) Regulatory concerns: monopoly power, competition and efficiency

The standard regulatory concern from an economic point of view is to ensure competition and efficiency in the market. The relationship between these economic concepts is complex, but basically competition between sellers increases efficiency in markets.⁹ The Commerce Commission has observed that:¹⁰

Economic efficiency is generally enhanced in markets that are competitive. Firms that are subject to competitive pressures from other firms that are supplying the market, or from the threat of new entry, have an incentive to meet the demands of their customers (allocative efficiency), at minimum cost (productive efficiency), as they would otherwise lose market share to more responsive and efficient competitors. Such firms also face an incentive to invest and innovate over time, in order to achieve and maintain a competitive advantage over their rivals (dynamic efficiency).

The electricity regulation literature often focuses on allocative efficiency, where resources are used to meet consumer demand, which is “maximised where price is

⁵ Alec Mladenovic “Network Industries: Electricity and Telecommunications” in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 339; Lewis Evans and Richard Meade *Alternating Currents or Counter-Revolution?: Contemporary Electricity Reform in New Zealand* (Victoria University Press, Wellington, 2005) at 21–22 and ch 3. See generally Electricity Authority “Electricity in New Zealand” (2011), available at <www.ea.govt.nz>.

⁶ Alec Mladenovic “Network Industries: Electricity and Telecommunications” in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 339. The government intends to sell large shares in these state-owned generators.

⁷ See the Commerce Commission’s use of this idea in press releases, for example, Commerce Commission “Commerce Commission finds that electricity companies have not breached the Commerce Act” (press release, 21 May 2009).

⁸ Alec Mladenovic “Network Industries: Electricity and Telecommunications” in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 339; Lewis Evans and Richard Meade *Alternating Currents or Counter-Revolution?: Contemporary Electricity Reform in New Zealand* (Victoria University Press, Wellington, 2005) at 85–88.

⁹ Anthony Ogus *Regulation: Legal Form and Economic Theory* (Hart Publishing, Oxford, 2004) at 22; Electricity Authority “Interpretation of the Authority’s statutory objective” (2011), available at <www.ea.govt.nz>. For a discussion of competition and efficiency see Bronwyn Howell “Politics and the Pursuit of Telecommunications Sector Efficiency in New Zealand” (2010) 6(2) J Comp L & Econ 253.

¹⁰ Commerce Commission “Final Report on whether the Resale Services should be omitted from sch 1 of the Telecommunications Act 2001 (or if not omitted, amended in some form)” (16 December 2010) at [153], available at <www.comcom.govt.nz>.

equal to marginal cost”.¹¹ Therefore, one of the major concerns in electricity regulation is that of natural monopoly, where it is economically efficient for a single firm to provide services or products to a market, giving the largest supplier a cost advantage over competitors and new entrants.¹² Indeed, utilities are often said to be the paradigmatic industry requiring regulation for this reason, because the costs of building the networks over which the utility service is distributed to consumers are very high, and there are economies of scale and scope that favour provision by large companies.¹³

Where competition is harmed by these features of the market, efficiency is also seen as suffering, as the Commerce Commission further explains:¹⁴

In the absence of effective competition, [a company] is likely to have an incentive to increase prices and maximise profits. The price increases will result in a loss of allocative efficiency (as some consumers will not purchase the product or service even though they value it more than the marginal cost of production). In the absence of competitive incentives to minimise costs and innovate, firms will generally also face less pressure to be productively and dynamically efficient.

There have been arguments in New Zealand that, without further regulation beyond the light hand, electricity distribution and wholesale markets may have excess profits.¹⁵ However, other economists challenge this with respect to the

¹¹ Commerce Commission “Final Report on whether the Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001 (or if not omitted, amended in some form)” (16 December 2010) at [150], available at <www.comcom.govt.nz>. See also Cento Veljanovski “Economic Approaches to Regulation” in Robert Baldwin, Martin Cave and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, Oxford, 2010) 17 at 20; Anthony Ogus *Regulation: Legal Form and Economic Theory* (Hart Publishing, Oxford, 2004) at 22; Lewis Evans and Richard Meade *Alternating Currents or Counter-Revolution?: Contemporary Electricity Reform in New Zealand* (Victoria University Press, Wellington, 2005) at 251.

¹² Anthony Ogus *Regulation: Legal Form and Economic Theory* (Hart Publishing, Oxford, 2004) at 30; Michel Kerf and Damien Geradin “Controlling Market Power in Telecommunications: Antitrust vs Sector-specific Regulation – An Assessment of the United States, New Zealand and Australian Experiences” (1999) 14 *Berkeley Tech LJ* 919 at 922–924; Alec Mladenovic “Network Industries: Electricity and Telecommunications” in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 339 at 340–341.

¹³ Cento Veljanovski “Economic Approaches to Regulation” in Robert Baldwin, Martin Cave, Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, Oxford, 2010) 17 at 29; Anthony Ogus *Regulation: Legal Form and Economic Theory* (Hart Publishing, Oxford, 2004) at 30–31.

¹⁴ Commerce Commission “Final Report on whether the Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001 (or if not omitted, amended in some form)” (16 December 2010) at [154], available at <www.comcom.govt.nz>.

¹⁵ See Barry Barton “Law and Regulation for Energy Networks in New Zealand” in Martha Roggenkamp and others (eds) *Energy Networks and the Law: Innovative Solutions in Changing Markets* (Oxford University Press, Oxford, 2012) 274. Barton cites Geoff Bertram and Dan Twaddle “Price-Cost Margins and Profit Rates in New Zealand Electricity Distribution Networks Since 1994: The Cost of Light Handed Regulation” (2005) 27(3) *J Regul Econ* 281 (distribution) and Frank Wolak *An Assessment of the Performance of the New Zealand Wholesale Electricity Market* (Report for the New Zealand Commerce

wholesale market.¹⁶ Whatever the right answer, it is clear that electricity regulation in New Zealand has the economic goal of regulating monopolies and attempting to mimic outcomes in competitive markets, so as to seek the highest possible level of economic efficiency.¹⁷

(c) *Regulatory concerns: consumer protection, universal service, fuel poverty and sustainability*

A minimum supply of electricity services is clearly essential to a decent life and full participation in modern New Zealand society, and this raises concerns about universal service – the requirement to ensure a minimum level of access at a certain cost and standard of supply, even if providing that service is not economically desirable.¹⁸ Regulation has historically been concerned with the pursuit of the universal service goal.¹⁹ This is reflected in the obligation on electricity distribution companies to maintain their connections to isolated customers even if this is economically unattractive.²⁰ It also relates to the prevention of disconnection.

Beyond these basic universal service concerns, the ideas of affordability and fuel poverty are more contested,²¹ because the definition of the minimum basic need that is necessary for a decent life and social participation in any particular society may be seen as subjective and not susceptible to economic analysis.²² These

Commission, 19 May 2009) (wholesale), available at <www.comcom.govt.nz>. Commerce Commission *Commerce Act 1986 s 27, s 30 and s 36 Electricity Investigation* (Investigation Report, 22 May 2009), available at <www.comcom.govt.nz>.

¹⁶ See Lewis Evans, Seamus Hogan and Peter Jackson “A Critique of Wolak’s Evaluation of the NZ Electricity Market: Introduction and Overview” (2012) 46(1) NZ Economic Papers 1.

¹⁷ Tony Prosser *The Regulatory Enterprise: Government, Regulation and Legitimacy* (Oxford University Press, Oxford, 2010) at 187. See also Lewis Evans and Richard Meade *Alternating Currents or Counter-Revolution?: Contemporary Electricity Reform in New Zealand* (Victoria University Press, Wellington, 2005); Alec Mladenovic “Network Industries: Electricity and Telecommunications” in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 339; Paul G Scott “Competition Law and Policy: Can a Generalist Law be an Effective Regulator?” (ch 5) in this volume.

¹⁸ Tony Prosser *The Law and Regulators* (Oxford University Press, Oxford, 1997) at 14 and 149.

¹⁹ Tony Prosser *The Law and Regulators* (Oxford University Press, Oxford, 1997) at 149.

²⁰ See Barry Barton “Law and Regulation for Energy Networks in New Zealand” in Martha Roggenkamp and others (eds) *Energy Networks and the Law: Innovative Solutions in Changing Markets* (Oxford University Press, Oxford, 2012) 274. See also Electricity Industry Act 2010, s 105.

²¹ Tony Prosser *The Regulatory Enterprise: Government, Regulation and Legitimacy* (Oxford University Press, Oxford, 2010) at 181; Philippa Howden-Chapman and others “Tackling cold housing and fuel poverty in New Zealand: A review of policies, research, and health impacts” (2012) 49 Energy Policy 134; and Kimberley O’Sullivan, Philippa Howden-Chapman and Geoff Fougere “Making the connection: The relationship between fuel poverty, electricity disconnection, and prepayment metering” (2011) 39 Energy Policy 733.

²² See, for example, Bronwyn Howell “Politics and the Pursuit of Telecommunications Sector Efficiency in New Zealand” (2010) 6(2) J Comp L & Econ 253 at 254: “as distributional objectives are highly subjective, it is very difficult to adjudge the ‘success’ of any distribution-motivated intervention. In contrast, efficiency is an objective measure that provides a useful benchmark for the economic assessment of law and policy-making performance ...”.

concerns must be discussed from a moral/political point of view, in terms of ideas such as distributive justice, human rights, and social solidarity.²³ In this vein, the United Kingdom energy regulator must “have regard to the interests of the disabled and chronically sick, of pensioners, of individuals with low incomes, and of those living in rural areas”.²⁴

There are also general consumer protection concerns in terms of retailers; for example, criticisms that the complexity of different tariff schemes and billing practices are confusing to consumers and prevent them from making rational economic decisions that would ensure competition in the retail market. This has recently been subject to educational campaigns with a website allowing consumers to work out whether they are on the best electricity plan for their needs.²⁵

Another significant concern is how to achieve a sustainable supply of electricity in light of the growing concern for the environment and increasing evidence of catastrophic climate change that will occur if carbon-intensive generation such as coal-fired plants is not phased out.²⁶

(d) Present regulatory framework

There are two main specific regulatory frameworks for electricity markets: regulation under the Commerce Act 1986 carried out by the Commerce Commission, and more general industry regulation of the electricity market under the Electricity Industry Act 2010 carried out by the Electricity Authority. The general energy strategy is dealt with by the Ministry of Economic Development, whereas policy relating to energy efficiency is under the ambit of the Energy Efficiency and Conservation Authority, and matters relating to retail electricity contracts are handled by the Ministry of Consumer Affairs.

(i) Electricity Authority

The Electricity Authority has the main responsibility for the regulation of New Zealand’s wholesale and retail electricity markets. Its objective is set out in section 15 of the Electricity Industry Act 2010, which states that “[t]he objective of the Authority is to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.”²⁷ As discussed below, the interpretation of this objective is crucial to the regulator’s understanding of its function and the considerations that are relevant to making

²³ See Tony Prosser *The Regulatory Enterprise: Government, Regulation and Legitimacy* (Oxford University Press, Oxford, 2010).

²⁴ Tony Prosser *The Regulatory Enterprise: Government, Regulation and Legitimacy* (Oxford University Press, Oxford, 2010) at 185; Electricity Act 1989 (UK), s 3A(3). See also Petra Butler “Rights and Regulation” in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 241.

²⁵ See <www.whatsmynumber.org.nz>. This is related to the Consumer NZ Powerswitch website <www.powerswitch.co.nz/powerswitch>.

²⁶ See Ministry of Economic Development *New Zealand Energy Strategy 2011–2021* (August 2011) at 8–9. See also the various reports by the Intergovernmental Panel on Climate Change, available at <www.ipcc.ch>.

²⁷ Electricity Industry Act 2010, s 15.

regulatory decisions that serve that purpose. Although there is room for different interpretive approaches to this objective, there has been a clear decision to limit the Electricity Authority's regulatory concerns compared with the more wide ranging aim that the previous regulator, the Electricity Commission, was charged with achieving: "to ensure that electricity is produced and delivered to all classes of consumers in an efficient, fair, reliable, and environmentally sustainable manner".²⁸ Key regulatory concerns relating to consumer protection²⁹ and energy efficiency are now dealt with by other agencies.³⁰

As the Electricity Authority is an Independent Crown Entity (ICE), the Minister of Energy does not have the power to direct the Electricity Authority on its functions and objectives except as set out in section 17, which provides that "[i]n performing its functions, the Authority must have regard to any statements of government policy concerning the electricity industry that are issued by the Minister".³¹ This independence contrasts with the previous regulator, the Electricity Commission, which was a Crown Agent and was thus required to give effect to government policy if the responsible minister directed it to do so.³²

One of the Electricity Authority's main functions is to develop, administer, and enforce compliance with the *Electricity Industry Participation Code* (EIPC), which is a regulatory code relating to the basic objectives of competition, efficiency, and reliability of supply.³³ The particular regulatory decisions made by the Electricity Authority are:

- (1) amendments to the *Code*;
- (2) decisions about grid reliability standards and transmission pricing methodology;³⁴
- (3) monitoring of competition, supply, and efficiency in the electricity market, including producing and publishing "wholesale and retail market reports and

²⁸ Barry Barton "Law and Regulation for Energy Networks in New Zealand" in Martha Roggenkamp and others (eds) *Energy Networks and the Law: Innovative Solutions in Changing Markets* (Oxford University Press, Oxford, 2012) 274 at 282. See Electricity Act 1992, s 172N(1)(a) (now repealed).

²⁹ Except for the function "to promote to consumers the benefits of comparing and switching retailers": Electricity Industry Act 2010, s 16(1)(i).

³⁰ See Electricity Authority "Interpretation of the Authority's statutory objective" (14 February 2011) at [A.60] which argues that "the Authority believes that policies to address externalities arising generally from industry and consumer activity that is broader than electricity industry-related activity do not fall within the scope of the Authority's functions".

³¹ Electricity Industry Act 2010, s 17.

³² Crown Entities Act 2004, s 103; see Barry Barton "Law and Regulation for Energy Networks in New Zealand" in Martha Roggenkamp and others (eds) *Energy Networks and the Law: Innovative Solutions in Changing Markets* (Oxford University Press, Oxford, 2012) 274 at 283–284.

³³ Electricity Industry Act 2010, s 32.

³⁴ Barry Barton "Law and Regulation for Energy Networks in New Zealand" in Martha Roggenkamp and others (eds) *Energy Networks and the Law: Innovative Solutions in Changing Markets* (Oxford University Press, Oxford, 2012) 274 at 285–286; Commerce Act 1986, s 54R; Electricity Authority *Electricity Industry Participation Code 2010* at [12.84], [12.91] and [12.95], available at <www.ea.govt.nz>.

statistics, information on system performance, a dataset that includes half-hourly metering data, bids and offers, prices, hydro inflows, lake levels, and half-hourly network configuration data”;³⁵

- (4) administering the vulnerable and medically dependent consumers’ guidelines and monitoring compliance;
- (5) undertaking market-facilitation measures such as providing education, information, guidelines and model arrangements;
- (6) promotion of consumer switching between retailers; and
- (7) establishing advisory groups and a Rulings Panel that considers allegations that a company has breached the *Code*, or disputes between industry participants and about certain Electricity Authority code decisions.³⁶

(ii) *Commerce Commission*

The Commerce Commission, also an Independent Crown Entity, has played a role in the regulation of electricity since 2001,³⁷ specifically in price and quality regulation of electricity distribution (except where the electricity distribution company is “consumer owned”).³⁸ It also makes decisions about price-quality control of electricity lines services.³⁹ It sets default price-quality paths that state maximum prices and the required quality of service, and these apply for a specified period, usually five years.⁴⁰ The Commission must also develop and publish the input methodologies it uses to calculate the levels of price control, for example the valuation of assets and cost of capital.⁴¹ A draft methodology is produced, and submissions and a conference held before the input methodology is finalised.

The Commerce Commission also makes determinations concerning how price regulation applies to particular companies, most importantly the application of the input methodologies noted above to lines companies in order to create their

³⁵ Electricity Authority “About us” (January 2012), available at <www.ea.govt.nz>.

³⁶ Electricity Industry Act 2010, ss 23–26 and 50–62.

³⁷ Commerce Amendment Act 2001, enacting Part 4A of the Commerce Act 1986. Later the Commerce Amendment Act 2008 created a new Part 4, replacing the previous Parts 4 and 4A. Barry Barton “Law and Regulation for Energy Networks in New Zealand” in Martha Roggenkamp and others (eds) *Energy Networks and the Law: Innovative Solutions in Changing Markets* (Oxford University Press, Oxford, 2012) 274 at 277.

³⁸ See Commerce Commission “Electricity Default Price-Quality Path” (September 2012), available at <www.comcom.govt.nz>. For consumer-owned EDBs see Commerce Act 1986, s 54D and Commerce Commission “Treatment of Consumer-Owned Electricity Distribution Businesses” (September 2012), available at <www.comcom.govt.nz>.

³⁹ Commerce Act 1986, ss 54E and 55B.

⁴⁰ Barry Barton “Law and Regulation for Energy Networks in New Zealand” in Martha Roggenkamp and others (eds) *Energy Networks and the Law: Innovative Solutions in Changing Markets* (Oxford University Press, Oxford, 2012) 274 at 280; “Commerce Act 1986, ss 54G, 55D. The details are provided in ss 53K–53ZB. The specific information about prices, rates of change in prices, and quality standards are stated in section 52P determinations: ss 53O–53P.”

⁴¹ Barry Barton “Law and Regulation for Energy Networks in New Zealand” in Martha Roggenkamp and others (eds) *Energy Networks and the Law: Innovative Solutions in Changing Markets* (Oxford University Press, Oxford, 2012) 274 at 280; see also Commerce Act 1986, ss 52T–52V.

individual price-quality path.⁴² These are known as “section 52P determinations”. After these determinations are set, the Commission monitors and enforces the price-quality path.⁴³

Additionally, the Commerce Commission regulates the costs Transpower can recover from investment in upgrading the national grid, by putting in place an input methodology for any proposals for capital expenditure.⁴⁴

6.2.2 Current opportunities for public participation

(a) Preliminary observations

We are primarily interested in the participation of “ordinary members of a political system”,⁴⁵ those who have an interest in the regulation of the industry as domestic, residential and small-business consumers. In focusing on these “ordinary citizens” we exclude major users because they have a special interest in electricity pricing and reliability, and have the financial and institutional means to participate effectively in the regulatory process; for example, through the Major Electricity Users Group coalition.

In the course of research it has become clear that in other jurisdictions consumer (or “citizen-consumer”)⁴⁶ advocacy groups – which may be seen as representing the public or the perspective of ordinary persons – are well-established mechanisms of participation, both in the ordinary political processes establishing the regulatory framework and in decisions within that framework. There is a question about whether such groups can be seen as a form of public participation at all, given that it is an organised interest group that is participating. As such groups accept, they lack the democratic legitimacy usually attributed to elected and representative institutions or entities.⁴⁷ However, we prefer the

⁴² Barry Barton “Law and Regulation for Energy Networks in New Zealand” in Martha Roggenkamp and others (eds) *Energy Networks and the Law: Innovative Solutions in Changing Markets* (Oxford University Press, Oxford, 2012) 274 at 280–281.

⁴³ Barry Barton “Law and Regulation for Energy Networks in New Zealand” in Martha Roggenkamp and others (eds) *Energy Networks and the Law: Innovative Solutions in Changing Markets* (Oxford University Press, Oxford, 2012) 274 at 281.

⁴⁴ Barry Barton “Law and Regulation for Energy Networks in New Zealand” in Martha Roggenkamp and others (eds) *Energy Networks and the Law: Innovative Solutions in Changing Markets* (Oxford University Press, Oxford, 2012) 274 at 285; Electricity Industry Act 2010, s 155; Commerce Act 1986, ss 54R, 54S.

⁴⁵ Marl Bennett and Joel Colón-Ríos “Public Participation and Regulation” in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 21 at 21, citing Jack H Nagel *Participation* (Prentice-Hall, New Jersey, 1987) at 1.

⁴⁶ For discussion of the idea of consumer and citizen interest see Ofcom *Citizens, Communications, and Convergence* (Discussion Paper, 11 July 2008) and Sonia Livingstone *What is the citizen’s interest in communication matters?: A response to Ofcom’s discussion paper, ‘Citizens, communications and convergence’* (5 October 2008); see also s 3(1) of the Communications Act 2003 (UK) for this distinction in law.

⁴⁷ House of Lords Constitution Committee *The Regulatory State: Ensuring its Accountability* (31 March 2004) at 23.

argument of Ayres and Braithwaite discussed in our Stage One chapter, according to which public interest/consumer advocacy groups have a role to play in representing the general public or consumer interest. We, therefore, can treat this as public participation – especially if there is evidence that these groups do consult with the public to form their account of the public interest.⁴⁸ Ayres and Braithwaite see “tripartism”, the empowerment of public interest groups, as a way of preventing regulatory capture, through giving information and decision making power to public interest groups.⁴⁹ They argue that:⁵⁰

In a regulatory culture characterised by consumer groups becoming politically active whenever major consumer interests are threatened, the mainstream players of the regulatory game may guard against such consumerist assault by being mindful of consumer interests.

As the Australian Productivity Commission has observed, “Consumers are diverse and the interests of different sub-groups of consumers will at times conflict. ... [S]ome regulatory measures designed to assist disadvantaged consumers may inadvertently harm other consumers” and that where such conflicts exist it will be “difficult to present a single consumer perspective on such issues”.⁵¹ For example, a person with a high income, a new energy-efficient house and appliances, and significant share ownership in an electricity gentailer might be said to have a different set of interests than a person with a low income and inefficient housing and appliances; or a rural consumer might have a different set of interests from an urban one. However, despite such differences, it may be that over most questions they share the fundamental concerns of low prices and reliable supply. When the existing regulatory framework is seen as not meeting these goals, for example, by allowing power companies to increase prices beyond what is necessary to provide economic incentives for investment in the industry and upgrades of infrastructure, domestic consumers are likely to have shared interests. The existence of these shared interests is crucial to the ability to regard consumer advocacy groups – as opposed to the direct participation of ordinary citizens – as a form of public participation.

⁴⁸ See Mark Bennett and Joel Colón-Ríos “Public Participation and Regulation” in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 21 at 46–47.

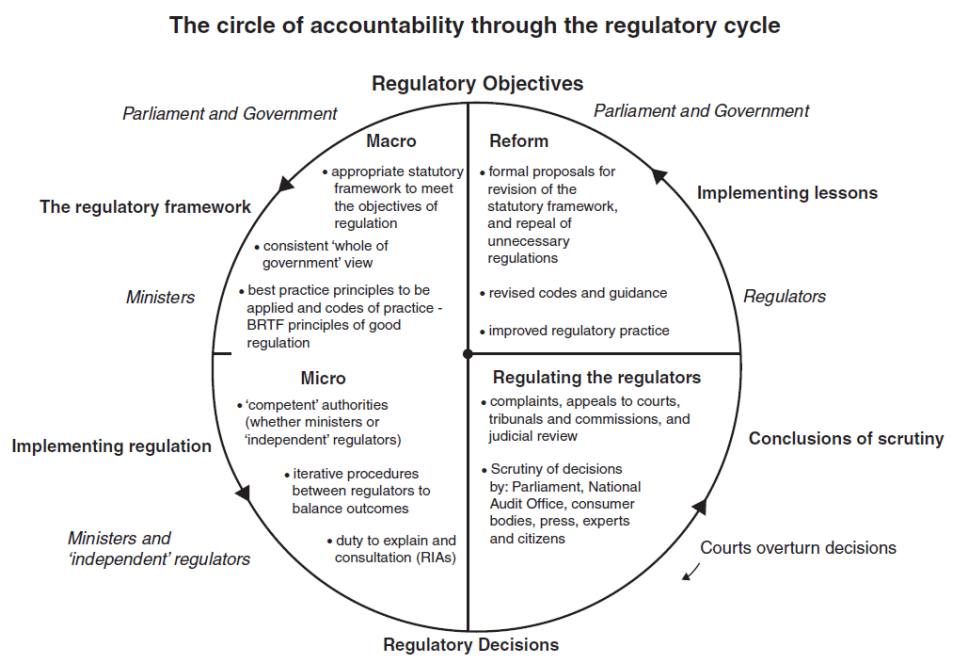
⁴⁹ Ian Ayres and John Braithwaite as cited in Bronwen Morgan and Karen Yeung *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, Cambridge, 2007) 57.

⁵⁰ Ian Ayres and John Braithwaite as cited in Bronwen Morgan and Karen Yeung *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, Cambridge, 2007) 57.

⁵¹ Australian Government Productivity Commission *Review of Australia’s Consumer Policy Framework* (Report 45(2), 30 April 2008) at 281, available at <www.pc.gov.au> as cited in Gordon Renouf and Polly Porteous *Making Energy Markets Work for Consumers: The Role of Consumer Advocacy* (Consumer Advocacy Panel, 2 February 2011) at 33, available at <www.advocacypanel.com.au/documents/AP396MakingEnergyMarketsWorkJune2011.pdf>.

Also, there are various stages of the regulatory cycle that the public can participate in. This is shown in the diagram below, from the House of Lords’ *The Regulatory State: Ensuring its Accountability* report.

Figure 6.1 The circle of accountability



Source: House of Lords *The Regulatory State: Ensuring its Accountability*⁵²

The diagram shows that participation can occur in Parliament and government through the legislative reform of existing statutory regulatory frameworks, in the form of the usual processes of governmental and legislative consultation and lobbying; for example, in select committees. Once the basic regulatory framework is in place, day-to-day decisions will be taken within that framework, by ministers or by regulators. These decisions – applying the objectives, duties, and powers that have been laid down by statute or government policy – may include other forms of public participation.

(b) Ordinary political and legislative process

The standard means of participating in decision making in New Zealand is through ordinary political, governmental and legislative processes. These are mainly public hearings of some sort, for example ministerial inquiries and select committees. In 2000 there was a major ministerial inquiry into the regulatory arrangements relating to transmission and distribution, and the wholesale and retail markets. Since then there have been regular ministerial electricity reviews, most recently in

⁵² House of Lords Constitution Committee *The Regulatory State: Ensuring its Accountability* (31 March 2004) vol 1 at 23, available at <www.publications.parliament.uk>.

2009. There are also wider governmental reviews of energy policy and strategy.⁵³ The industry specific frameworks for electricity regulation have been set up by legislation since the 1992 Energy Companies Act. The Parliamentary website contains the written submissions provided to select committees, which is a useful resource for determining the extent of public participation in the legislative process. In contrast, the relevant government websites omit such information – although, before a recent redesign, there was a large amount of archived information relating to earlier electricity market reviews. At the time of writing, there is not even any link to the submissions to recent ministerial reviews or policy/strategy consultation evidence, which is problematic from the perspective of public understanding of the development of the regulatory framework and decisions in this area.⁵⁴ Overall, we can generalise by saying that individuals and groups that represent consumer-citizen perspectives do participate in the ordinary political and legislative processes, but that their contributions are usually fewer, less comprehensive, and less supported by specialist/consultant evidence than submissions from major industry players and interest groups.

(c) *Electricity Authority*

Within the Electricity Authority, there are a number of participatory processes used in rule and decision making. It is evident that there is a significant culture of consultation: in addition to required consulting on proposed code amendments,⁵⁵ the Authority consults on an array of issues relevant to its regulatory aims.⁵⁶ It also provides a wealth of information relating to its consultation processes, with the Electricity Authority website containing a huge number of reports, consultation documents, legislation, regulation, and industry codes.⁵⁷ It publishes a weekly *Market Brief* newsletter that includes relevant market news, information, and current consultations;⁵⁸ and its publication *Electricity in New Zealand* provides a simple overview of the electricity industry, which is of great use for ordinary people to understand this complex market and its regulatory framework.⁵⁹

While the issues discussed in consultations are often complex, the consultation documents are accessible to the ordinary person.⁶⁰ The Electricity Authority regularly

⁵³ See, for example, Ministry of Economic Development *New Zealand Energy Strategy 2011–2021* (August 2011) and Ministry of Economic Development *Summary and analysis of submissions on the draft NZES and the draft NZEECS* (July 2011), both available from <www.med.govt.nz>.

⁵⁴ See Ministry of Business, Innovation and Employment “Energy strategies” <www.med.govt.nz/sectors-industries/energy/strategies>.

⁵⁵ Electricity Industry Act 2010, s 39.

⁵⁶ See Electricity Authority “Consultations”, available at <www.ea.govt.nz/our-work/consultations>.

⁵⁷ Electricity Authority <www.ea.govt.nz>.

⁵⁸ See Electricity Authority *Market Brief* <www.ea.govt.nz/about-us/news-events/market-briefs-media-releases>.

⁵⁹ See Electricity Authority *Electricity in New Zealand* <www.ea.govt.nz/about-us/publications/electricity-nz>.

⁶⁰ See Electricity Authority *Fifth Consultation – Part 10 Review – Proposed amendment to the Code* (Consultation Paper, September 2011), available at <www.ea.govt.nz>.

responds to arguments raised in submissions to consultations, as can be seen in one recent and on-going consultation project on smart metering.⁶¹ These consultations are mostly participated in by electricity market providers and major electricity users, but there is participation in more salient decisions by consumer interest groups such as Grey Power and the Domestic Energy Users' Network (DEUN).

The Authority has also set up a number of advisory groups, including the Retail Advisory Group, which focuses on the retail electricity market, including relationships between retailers and consumers. It includes representatives from industry participants such as Genesis Energy and Mighty River Power, alongside consumer representatives from Consumer NZ and DEUN.⁶² Appointments to the board and inquiries are intended to focus on the interests of residential electricity consumers. For example, David Russell, who was the chief executive for the Consumer's Institute for many years, was a member of the independent Electricity Technical Advisory Group that provided background papers to the 2009 Electricity Market Review, and he is also a member of the Electricity Commission's Retail Market Advisory Group.⁶³ Representatives from Grey Power and the DEUN sat on advisory groups, under the previous Electricity Commission,⁶⁴ which also consulted consumers through the use of consultation documents and public submissions.⁶⁵

(d) *Commerce Commission*

The participation of ordinary citizens in Commerce Commission's decision making is limited to general consultation and submission processes; in other words, as participants in the same processes that industry players are involved in, without any special representation or deliberate attempts to involve the consumer interest. A cursory survey of the decisions, relevant to the electricity industry, shows that consumer groups and ordinary individuals do not play a significant role in these processes, although they do sometimes contribute submissions. Grey Power, for example, provided a submission on the Commerce Commission's draft decision on the 2010–2015 default price-quality path decision.⁶⁶ This is a highly complex economic decision, as the relevant discussion and draft decision paper shows.⁶⁷ A review of the submissions to the consultation on this decision

⁶¹ Electricity Authority *Fifth Consultation – Part 10 Review – Proposed amendment to the Code* (Consultation Paper, September 2011), available at <www.ea.govt.nz>.

⁶² Retail Advisory Group *Chair's half-yearly report to the Electricity Authority Board* (12 January 2012) at 2–3, available at <www.ea.govt.nz>.

⁶³ Ministry of Business, Innovation and Employment "Background papers on the 2009 ministerial review" <www.med.govt.nz>.

⁶⁴ See Grey Power Federation "Submission to the Select Committee on the Electricity Industry Bill 2009" (February 2010), available at <www.parliament.nz>.

⁶⁵ See, for example, Retail Advisory Group *Retail customers in retailer default situations* (Discussion paper, 7 February 2011), available at <www.ea.govt.nz>.

⁶⁶ Grey Power Federation "Submission on the 2010-15 Default Price-Quality Path for Electricity Distribution, Draft Decisions Paper July 2011" (29 August 2011), available at <www.comcom.govt.nz>.

⁶⁷ See Commerce Commission *2010–2015 Electricity Distribution Default Price-Quality Path Refinements Discussion and Draft Decisions Paper* (13 August 2010), available at <www.comcom.govt.nz>.

shows that there is little non-industry participation; the Grey Power submission provided the only consumer group input. This contrasts with submissions at each stage of the process by the industry participants, often supported by external economic and strategic analysis.⁶⁸ Grey Power's submission argued that the Commerce Commission should engage further with consumer perspectives in making its decision.⁶⁹

... it is the network companies, not the consumers, who are expected to engage with the Commission on how much they are allowed to charge for their network services.
... The Act gives no initial opportunity for consumers to engage with the Commerce Commission on the allowable revenues. Their only opportunity is to make submissions on the draft decision. Here, Grey Power is making use of that opportunity.

From this brief survey, we can see that in comparison with the Electricity Authority, the Commerce Commission's avenues for public participation are much more limited, particularly in reference to the lack of advisory boards and consumer representation thereon. The obvious question to ask is: why this is the case? The question is difficult to answer. Is the decision making being undertaken by the Commerce Commission more technocratic (technically complex and politically uncontroversial), or more a case of rule application? Are Electricity Authority decisions seen as involving more value judgments requiring consumer-citizen input? These are questions that can only be answered by detailed reference to the reasons that apply to these regulatory decisions.

6.2.3 *Reasons for and against participation in electricity regulation*

(a) *Democratic legitimacy*

As noted in our first chapter, different views of democracy may be deployed to determine the extent and nature of participation that should exist in regulatory decision making.⁷⁰ Regulation of network industries is sometimes a salient political issue and a key electoral issue; for example, the current debate on the mixed-ownership model of partially privatising state-owned electricity companies. But generally, in recent years, the structure and objectives of the basic regulatory framework around electricity has not been high on the public's political radar. Also,

⁶⁸ See, for example, "NZIER Forecast of PPI and LCI, and Uncertainty of Forecast: A review of the Commerce Commission Draft Decisions Paper: Reset of Starting Prices, CPI Adjustment and Other Amendments" (Report to Powerco, 18 August 2011), available at <www.comcom.govt.nz>; and Castalia "Review of Draft Decision Paper for the 2010-15 Default Price-Quality Path for Electricity Distribution" (Report to Powerco, August 2011).

⁶⁹ Grey Power Federation "Submission on the 2010-15 Default Price-Quality Path for Electricity Distribution, Draft Decisions Paper July 2011" (29 August 2011) at 2, available at <www.comcom.govt.nz>.

⁷⁰ See Julia Black "Proceduralizing Regulation: Part I" (2000) 20(4) Oxford J Legal Stud 597 at 605–614 and Julia Black "Proceduralizing Regulation: Part II" (2001) 21(1) Oxford J Legal Stud 33 at 57–58; Tony Prosser *The Regulatory Enterprise: Government, Regulation and Legitimacy* (Oxford University Press, Oxford, 2010) at 9 and 17–18.

many of the developments in the regulation of electricity, for example, have been carried out in a fairly bipartisan manner, as the select committee, Parliamentary debates, and the final vote on the Commerce Amendment Act 2008 illustrate.⁷¹ National and Labour's agreement on the basic framework of the electricity market means that even where there is public concern and political party differences about aspects of the electricity system – such as is evident in the debate on the Electricity Industry Act 2010⁷² – in reality the range of options for change in the regulatory framework is limited. While there are suggestions in the literature that changes to regulation of network industries can be politically motivated and unrelated to accepted best practice,⁷³ this does not seem to be the case in recent years concerning the basic framework of regulation, where the differences between political parties are minor and relate to differences over economic and moral matters on which economists can reasonably disagree (as opposed, for example, to fundamentally different conceptions of the underlying premises of the basic regulatory framework).⁷⁴

Where there are differences, such as the current issue of partial privatisation, the argument that democratic legitimacy is satisfied by the election and the parliamentary process is contestable. Even where a political party has made clear its position on a particular issue in its electoral campaign, which clearly has some impact on how we regard the legitimacy of that choice, it is still true that voters vote for a mixed package of political positions and personalities.⁷⁵ In this vein, a newspaper editorial observed that:⁷⁶

The Prime Minister ... claims the election result was a mandate for this plan, despite several scientific polls that show between 65 and 75 per cent of New Zealanders were opposed to the sale plans. This is nonsense. The Government has the thinnest of majorities and John Key cannot know what proportion of National support was from

⁷¹ See also the debates concerning the Electricity Industry Reform Amendment Act 2008, in which National states that Labour has essentially stolen its policies – which shows how close the two major parties were on those issues: Electricity Industry Reform Amendment Bill – First Reading (11 December 2007) 644 NZPD 13981 and Electricity Industry Reform Amendment Bill – Second Reading, In Committee, Third Reading (2 September 2008) 649 NZPD 18552.

⁷² See, for example, *Hansard* on the Electricity Industry Bill – Second Reading (20 July 2010) 665 NZPD 12473.

⁷³ Bronwyn Howell "Politics and the Pursuit of Telecommunications Sector Efficiency in New Zealand" (2010) 6(2) J Comp L & Econ 253 at 274–275; see also Alec Mladenovic "Network Industries: Electricity and Telecommunications" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 339.

⁷⁴ As shown by the disagreement between Wolak and some New Zealand economists on overcharging in the New Zealand wholesale market: see Lewis Evans, Seamus Hogan and Peter Jackson "A Critique of Wolak's Evaluation of the NZ Electricity Market: Introduction and Overview" (2012) 46(1) New Zealand Economic Papers 1.

⁷⁵ See Mark Bennett and Joel Colón-Ríos "Public Participation and Regulation" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 21 at 38.

⁷⁶ Editorial "A long wait for cheaper power" *The Herald on Sunday* (New Zealand, 8 January 2012).

voters prepared to back the party despite rather than because of its asset-sales policy.

The “mix of personalities” and policies argument seems overstated in this case, where asset sales was a key electoral policy for National and a campaigning focus for Labour. Still, it might be said, as in the editorial above, that this important change in public ownership of an essential industry should be done with more than a thin majority in Parliament, and that democratic legitimacy would be supplemented by “the nature of the regulatory decision making process itself and the extent to which it permits proper deliberation”.⁷⁷

The cross-party agreement on the basic framework of electricity regulation means that political activism, lobbying, and participation in ordinary legislative and governmental decision making processes is often of very limited success, because the general consensus is for the market to work in a way close to the status quo. Submissions that seek to alter the basic framework of regulation – for example, those arguing that electricity is a public service that the state should provide, rather than a commodity for companies to make profits from⁷⁸ – will gain little traction. As the Ministry of Economic Development report on submissions to the Electricity Industry Bill select committee commented:⁷⁹

Grey Power/DEUN and Age Concern ... recommended a fundamental re-design of the electricity market, involving, inter alia, price control of electricity and some form of more centralised control such as a single buyer model. Options of this nature were ruled-out by the Government, and there is little doubt that a fundamental re-design of the market would be hugely disruptive and time-consuming.

So while processes of participation in electricity decision making can be said to be highly consultative, they are carried out within an existing regulatory framework that makes certain political arguments irrelevant to any decision. For example, there are certain perceived limitations of Electricity Authority consultations and consumer membership on advisory groups. Most significant is a perception that these avenues of consumer participation cannot solve problems related to the scope of the regulatory decisions that the regulator is given discretion to make: consumer interest representatives have stated that “every time they raised matters relating to ‘fair’ or ‘sustainable’,” those issues were identified as “out of scope”.⁸⁰ Of course, the response may be that such concerns were deliberately put beyond the scope of the Electricity Authority’s decision making power and mandate by section 15 of the Electricity Act 2010, which may be read to exclude such wider considerations. However, that can be debated: it might be argued that the

⁷⁷ Tony Prosser *The Regulatory Enterprise: Government, Regulation and Legitimacy* (Oxford University Press, Oxford, 2010) at 7.

⁷⁸ Grey Power Federation “Submission on the 2010-15 Default Price-Quality Path for Electricity Distribution, Draft Decisions Paper July 2011” (29 August 2011), available at <www.comcom.govt.nz>; Nelson Bays Community Law Service Inc “Electricity Industry Bill 2009” (12 February 2010).

⁷⁹ Ministry of Economic Development *Officials’ report on submissions to the Finance and Expenditure Committee* (16 April 2010) at 3.

⁸⁰ Grey Power Federation “Submission to the Select Committee on the Electricity Industry Bill 2009” (February 2010) at 3, available at <www.parliament.nz>.

regulator is interpreting its legislatively created discretion in a way that excludes those other considerations, rather than the legislative standard specifically excluding them. This perspective is clear in the DEUN's submissions to the Electricity Authority's draft interpretation of its objective.⁸¹ DEUN argued that the Electricity Authority is not giving effect to the legislative direction to promote the long-term benefit of consumers because its interpretation "excludes wealth transfers as a consideration in making decisions relating to the Code" and does not require a consideration of the impact of Code amendments on domestic consumers in particular.⁸² This reflected DEUN's view that domestic consumers subsidise the electricity use of large commercial consumers, because they pay more for the electricity they use.⁸³ The Grey Power submission argued that "The Electricity Authority interprets its objective as a mandate for industry self-regulation. Industry Participants create and revise the code, with only peripheral input from domestic consumers."⁸⁴

The Electricity Authority's response to these arguments was to reiterate its view that its statutory objective in section 15 – "promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers"⁸⁵ – requires it to consider consumers as a whole, rather than "calculating and then disclosing wealth transfers and externalities".⁸⁶ It adopts a "standard cost-benefit analysis when assessing net benefits to electricity consumers", which excludes consideration of wealth transfers between classes of consumers.⁸⁷ This, the Electricity Authority concludes, was what Parliament directed it to do. Further, this conclusion was based on extensive consultation in which almost every submitter – except of course DEUN and Grey Power – supported this interpretation, which was also affirmed in advice from external economic and legal experts.

The Electricity Authority's interpretation also accords with a standard theme in the regulation literature, which argues that it would be impossible for the Electricity Authority to make any *economic* decision about whether these wealth transfers are justified – this is an issue of distributive justice, a subjective question that should be answered by a democratic body.⁸⁸ This is consistent with the view that regulation

⁸¹ Domestic Energy Users' Network "Submission, Electricity Authority interpretation of Statutory Objective" (29 November 2010), available at <www.ea.govt.nz>.

⁸² Domestic Energy Users' Network "Submission: Electricity Authority interpretation of Statutory Objective" (29 November 2010) at 2, available at <www.ea.govt.nz>.

⁸³ Domestic Energy Users' Network "Deun Manifesto", available at <www.issues.co.nz/fairelectricity>.

⁸⁴ Domestic Energy Users' Network "Submission: Electricity Authority interpretation of Statutory Objective" (29 November 2010) at 3, available at <www.ea.govt.nz>.

⁸⁵ Electricity Industry Act 2010, s 15.

⁸⁶ Electricity Authority *Interpretation of the Authority's statutory objective – Summary of submissions and the Authority's responses* (7 March 2011) at 4, available at <www.ea.govt.nz>.

⁸⁷ See Electricity Authority "Interpretation of the Authority's statutory objective" (14 February 2011) at [A.5]–[A.10], available at <www.ea.govt.nz>.

⁸⁸ Karen Yeung "The Regulatory State" in Robert Baldwin, Martin Cave, Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, Oxford, 2010) 64 at 77; House of Lords "Supplementary memorandum by Professor David Newbery, Cambridge

should focus on economic rationales such as competition and efficiency of the market, and other regulatory rationales should be dealt with by the government through the welfare system.⁸⁹ This does not mean that the Electricity Authority is not making decisions with a political impact – its economic analysis and decisions do have winners and losers⁹⁰ – but it can plausibly claim that its statutory mandate from Parliament is to make decisions in this way.

(b) *Technocracy*

Electricity may seem to be a prime candidate for a technocratic approach to regulation because: (i) it deals with both complex economics and technical matters; (ii) the objectives of the main regulator are defined in economic terms; and (iii) these objectives of competition and efficiency are seen as uniquely suitable for a means-end economic analysis.

The very concepts used in the economic analysis of network industries would go beyond the ordinary understanding of most people, let alone the complex ideas behind issues of pricing that go into determining whether the market is competitive.⁹¹ It has been said that “the technical complexity of the energy markets is the most important factor hampering a larger involvement of people lacking the needed expertise in the regulatory process.”⁹²

Further, the concern of citizen-consumers in this area seems to be primarily to achieve the best service at the lowest cost; these economic goals are uncontroversial, meaning that the main question is to figure out the most effective means to achieve them. Therefore, we might think that we can just leave electricity regulation to competition law to ensure that there is a competitive market (where possible), or to industry specific regulation where the particular features of the sector may make generic competition law insufficient.⁹³ A submitter to a recent House of Lords select committee on regulation argued that “effective market

University” (Select Committee on Regulators, 23 January 2007), available at <www.publications.parliament.uk>. See also Cento Veljanovski “Economic Approaches to Regulation” in Robert Baldwin, Martin Cave and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, Oxford, 2010) 17 at 23–24 and House of Lords “Examination of Witness” (Select Committee on Constitution, 12 February 2003) at [80].

⁸⁹ House of Lords “Supplementary memorandum by Professor David Newbery, Cambridge University” (Select Committee on Regulators, 23 January 2007), available at <www.publications.parliament.uk>; Cento Veljanovski “Economic Approaches to Regulation” in Robert Baldwin, Martin Cave and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, Oxford, 2010) 17 at 23–24.

⁹⁰ Karen Yeung “The Regulatory State” in Robert Baldwin, Martin Cave, Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, Oxford, 2010) 64 at 77–78.

⁹¹ For example, see Janice Hauge and David Sappington “Pricing in Network Industries” in Robert Baldwin, Martin Cave and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, Oxford, 2010) 462.

⁹² Giuseppe Bellantuono and Federico Boffa *Energy Regulation and Consumers’ Interests* (Regional Technical Centre of Research on European Consumption, July 2007) at 16, available at <www.eprints.biblio.unitn.it/1396/>.

⁹³ See Paul G Scott “Competition Law and Policy” in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 71.

competition generally promotes the public interest, it drives not just efficiency but also consumer benefits ... in general, I would say that a consumer-focused competition test is aligned very closely with the public interest”,⁹⁴ while another submitter – the utilities regulation expert Professor David Newbury – stated that “competition where possible is an ideal guarantor of the public interest”.⁹⁵

It is often argued that limiting a regulator to one or two key economic objectives is the only way to allow coherent regulation to occur, and to mitigate concerns about the discretionary power and exercises of judgment that the regulator must wield. As the House of Lords report observed, “where regulators are required to take account of wider issues, these objectives should be defined clearly and carefully by Government and Parliament”.⁹⁶ This links with the idea that the regulator should be taking a purely technocratic means-end approach in order to achieve the objectives that Parliament has set it; the democratically elected Parliament determines the objectives, and the regulator uses its expertise to achieve them. Where that goal is the maximisation of economic efficiency, it “provides a means by which the regulator’s decisions can be non-arbitrary; the technical expertise of the economic regulator becomes his or her source of legitimacy”.⁹⁷ This “means-end” instrumental rationality is said to allow the regulator to act according to the value judgments made by the legislator, by merely giving effect to the standards previously debated and agreed on, and set down in law.⁹⁸ By splitting off questions of economic efficiency and competition from other goals, we can leave the latter to governments to resolve. This also prevents “an incoherence where it becomes progressively harder for a regulator to defend what he is doing without contradiction”.⁹⁹

⁹⁴ House of Lords Select Committee on Regulators *UK Economic Regulators* (1st Report of Session 2006-07, Volume 1, 13 November 2007) at [5.58], available at <www.publications.parliament.uk/pa/ld/ldrgltrs.htm>.

⁹⁵ House of Lords Select Committee on Regulators *UK Economic Regulators* (1st Report of Session 2006-07, Volume 1, 13 November 2007) at [5.46], available at <www.publications.parliament.uk/pa/ld/ldrgltrs.htm>.

⁹⁶ House of Lords Select Committee on Regulators *UK Economic Regulators* (1st Report of Session 2006-07, Volume 1, 13 November 2007) at [5.46], available at <www.publications.parliament.uk/pa/ld/ldrgltrs.htm>.

⁹⁷ Tony Prosser *The Law and Regulators* (Oxford University Press, Oxford, 1997) at 11. Prosser returns to this idea at 16: “The implication is ... that one can separate out economic efficiency from other goals in terms of the existence of right answers to questions. Thus the economic reasoning employed is seen as non-arbitrary and permitting of rational answers, while social disputes are essentially arbitrary because the answers depend on value judgments on which reasonable people disagree. At best, governmental decisions on such social matters can reflect the aggregate preferences of an electorate; at worst, they reflect the undemocratic activities of lobbyists for special interest groups or the budget and bureau maximization of politicians and bureaucrats behaving as public choice theory would suggest. The argument is that if regulators depart from economic criteria they will become lost in a quagmire of subjective values in which they have no justification for exercising their choices.”

⁹⁸ Compare this with Henry Richardson *Democratic Autonomy* (Oxford University Press, Oxford, 2002) at 115.

⁹⁹ Tony Prosser *The Law and Regulators* (Oxford University Press, Oxford, 1997) at 11, quoting Christopher Foster *Privatization, Public Ownership and the Regulation of Natural Monopoly*

This view is contestable because, as the discussion above of the Electricity Authority's statutory objective shows, not all participants agree on the content of the value judgment written into law by Parliament. As Prosser argues "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", and his example is that "even decisions such as those relating to public utility price controls have major distributive implications".¹⁰⁰ Economic questions usually have a political effect, in that there are distributive consequences between groups. This is so even if a decision is based on consideration of an economic question – such as maximising allocative efficiency – rather than looking at the distributive effects. Ultimately, however, if it can be plausibly said that Parliament has mandated that the regulator use a certain economic analysis to make its decision, that is a political choice that Parliament has made that justifies the technocratic approach.

In addition, where there are different philosophies of how to ensure a competitive market – for example, more or less intrusive or interventionist – there may be a case for saying that political participation through elections is enough to secure the input legitimacy of the regulation. This is because the executive officials and bureaucrats that make regulatory decisions have been appointed by elected politicians that share the general values and interests of the population. This would again lessen the view that technocracy was a problem in need of solution through further public participation.

A different way of looking at technocracy is to say that it reveals the role of public participation in technically complex regulatory areas. The experts within the regulatory body or consultants hired to provide further analysis can present the regulator with the evidence about the particular issue, and identify the policy and political choices at stake. Public participation would then be used to debate and reveal different views about these value choices. This would get around the technocratic problem, but would require regulators to provide the evidence and analysis outlining the value choices at stake, or else further funding for consumer advocacy groups that allows them to provide it.

(c) *Special interests*

In lieu of some mechanism to get around the technocratic problem outlined above, it seems that only those who have the means to hire experts to present their case are able to adequately participate in public hearing-style regulatory decision making processes. This raises the spectre of special interest capture, as discussed in our Stage One chapter. It has been argued that the reason for the presence of consumer organisations in United Kingdom electricity regulation is that they are

(Blackwell, Oxford, 1992) at 7.

¹⁰⁰ Tony Prosser *The Regulatory Enterprise: Government, Regulation and Legitimacy* (Oxford University Press, Oxford, 2010) at 6–7; see also the similar view of Henry Richardson in *Democratic Autonomy* (Oxford University Press, Oxford, 2002) as referred in Mark Bennett and Joel Colón-Ríos "Public Participation and Regulation" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 21 at 49–50.

“essentially there to act as consumer advocates, to present the consumer case as strongly as possible, to make sure that it is not neglected in the pressure from industry which will no doubt be bombarding the Regulator with views and information”.¹⁰¹ It is obvious that network industry participants will take an interest in regulatory decision making processes. They have millions of dollars at stake, and they therefore have the incentive and means to pay for expert representation and research to aid their contributions to the process. In contrast, consumers are dispersed, often uninformed, and usually not well resourced.¹⁰²

This view is well represented in the literature. A representative of a United Kingdom consumer body argues that “[o]n the whole, industry is pretty effective at ensuring it gets its views across. They have both the community of interest and the resources to do so. The consumer interest is highly disparate, so we believe that it is sensible for regulators to ensure, first of all, that they have the consumer view.”¹⁰³ One study notes that in the context of United States public utility price-setting processes, “residential consumers in particular had to overcome collective action problems if they desired independent representation at all”.¹⁰⁴ In a similar vein, a 2005 KMPG report on consumer participation in Australian energy markets noted that a key feature of energy markets was an *imbalance* created by having a few large and sophisticated sellers but many buyers, for whom energy typically represents a small proportion of their expenditure”;¹⁰⁵ and a Consumer Focus report on consumer representation in regulatory decision making argues that “without independent, well informed and properly resourced consumer input into complex regulatory policy and decision making, regulators will find this difficult to achieve in the face of vigorous and well-resourced industry representations”.¹⁰⁶

This view is not just put forward by those who would benefit from the resourcing of consumer advocacy. The United Kingdom Department for Business, Innovation, and Skills has discussed consumer advocacy groups in a recent

¹⁰¹ House of Lords Select Committee “Examination of Witness” (Select Committee on Constitution, 26 February 2003) at [149] (Professor Tony Prosser), available at <www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/68/3022608.htm>.

¹⁰² Anthony Ogus *Regulation: Legal Form and Economic Theory* (Hart Publishing, Oxford, 2004) at 71–72; Australian Government Productivity Commission *Review of Australia’s Consumer Policy Framework* (Report 45(2), 30 April 2008) at 279–280.

¹⁰³ House of Lords Select Committee “Examination of Witness” (Select Committee on Constitution, 12 November 2003) at [1060] (Ms Deirdre Hutton, National Consumer Council), available at <www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/68/3111210.htm>.

¹⁰⁴ Guy Holburn and Richard Vanden Bergh “Consumer Capture of Regulatory Institutions: The Creation of Public Utility Consumer Advocates in the United States” (2006) 126 *Public Choice* 45 at 47

¹⁰⁵ KPMG *Review of Consumer Advocacy Requirements – Report for User Participation Working Group* (Ministerial Council on Energy, March 2005) at 8, as cited in Gordon Renouf and Polly Porteous *Making Energy Markets Work for Consumers: The Role of Consumer Advocacy* (Consumer Advocacy Panel, 2 February 2011) at 26, available at <www.advocacypanel.com.au/documents/AP396MakingEnergyMarketsWorkJune2011.pdf>

¹⁰⁶ Consumer Focus *Consumer representation for the 21st century: a ‘Regulated Industries Unit’* (June 2011) Annex at 2, available at <www.consumerfocus.org.uk>.

consultation document on *Empowering and Protecting Consumers* which stated that:¹⁰⁷

In regulated sectors, firms devote substantial resources to working with and influencing their regulator. If views from regulated firms were the only organised external input, there would be insufficient challenge to the regulatory relationship. A strong consumer voice is therefore needed to provide a different perspective to the regulator and a more rounded evidence base upon which to make decisions. There needs to be effective consumer engagement with regulators (for example through research), formal representation of consumers and their representatives in regulatory processes such as price control reviews and policy work that is independent of regulators in terms of both the choice of topic and the analysis.

If these observations are accurate then the implication is that the consumer interest will not be adequately considered in New Zealand. This is because in New Zealand, there is no well-resourced advocacy group capable of robust research into the electricity market, nor is there a formal representation of consumers in price control reviews, and the government and Parliament set up the policy work that determines what kind of regulatory framework is appropriate. Even in Australia, where funding is provided to consumer interest advocacy groups, a recent report on behalf of such groups argued that “government decision makers, including regulators, have made a number of significant decisions affecting consumers’ interests without the benefit of sufficient (or in some cases any) consumer advocate input”, and that further funding and coordination of advocacy, for example, a national peak energy advocacy body, is needed to address this situation.¹⁰⁸

The view that industry players will dominate processes of participation due to their intense interest is also evident in an Australian report concerning the use of merits review in the Australian Electricity Regulator’s five year distribution pricing decisions.¹⁰⁹ The report found that distribution companies “cherry-picked” the

¹⁰⁷ Department for Business Innovation & Skills “Empowering and Protecting Consumers: Consultation on institutional changes for provision of consumer information, advice, education, advocacy and enforcement” (June 2011) at [4.18], and see the similar points made at [4.32]: “Consumers in the sectors subject to economic regulation require particularly effective advocacy, representation and empowerment as these are generally sectors of particular importance to consumers and are typically characterised by large, often dominant firms. Because of the essential nature of the services provided in the regulated sectors, the decisions taken by businesses and regulators affect almost every domestic and business consumer across the country. Major investments in infrastructure are planned in these sectors over the next five to ten years with a considerable impact on energy and other utility bills. The cumulative impact on consumers of these plans must be understood and assessed in the context of wider pressures on consumers.” Available at <www.gov.uk>.

¹⁰⁸ Gordon Renouf and Polly Porteous *Making Energy Markets Work for Consumers: The Role of Consumer Advocacy* (Consumer Advocacy Panel, 2 February 2011) at [4.9], available at <www.advocacypanel.com.au>; see also Australian Government Productivity Commission *Review of Australia’s Consumer Policy Framework* (Report 45(2), 30 April 2008) at 279: “a number of consumer advocacy groups argued that they, or the consumer movement generally, lack sufficient resources to adequately represent consumer interests in policy forums.”

¹⁰⁹ May Mauseth Johnston *Barriers to Fair Network Prices: An analysis of consumer participation in the merits review of AER EDPR determinations* (Consumer Action Law

matters that disadvantaged them and appealed them on the merits, which meant that the worst outcome for the company was that the AER decision would be maintained (and not that the decision may be more favourable to consumers).¹¹⁰ The report noted that this contrasts with the merits review process of similar price determinations in England, where a completely new decision is made; this means that the new determination:¹¹¹

... may be more or less advantageous than [the energy regulator] Ofgem's proposal in some or all respects. In some cases it has indeed been less advantageous to the appealing company.

This mechanism prevents a distributor from 'cherry picking' – that is, accepting those aspects of a decision that it likes and appealing those aspects that it does not like. ... The inability to cherry pick and, the possibility of a worse outcome, can be expected to strengthen [the regulator's] hand in making price control proposals.

Perhaps more worrying, however, was that the consumer advocacy organisations most involved in the consultations on the original decisions were unable to effectively intervene in the merits review.¹¹² This was due to a number of factors: "the significant financial resources required to facilitate effective participation in the appeal process, such as legal representation, senior counsel and expert technical advice", the requirement that consumer representatives be granted leave to intervene, the criteria for consumer intervention, the risks of costs orders, and the lack of access to distributor and AER-held information.¹¹³ The formal possibility of achieving the standing to participate in appeals contrasts with the lack of a real ability for effective participation.¹¹⁴ Indeed, because the effective participation of

Centre and Consumer Utilities Advocacy Centre, August 2011), available at <www.accc.gov.au>; see also Dean Knight and Rayner Thwaites "Administrative Law through a Regulatory Lens: Situating Judicial Adjudication within a Wider Accountability Framework" (ch 14) in this volume.

¹¹⁰ May Mauseth Johnston *Barriers to Fair Network Prices: An analysis of consumer participation in the merits review of AER EDPR determinations* (Consumer Action Law Centre and Consumer Utilities Advocacy Centre, August 2011) at 8, available at <www.accc.gov.au>.

¹¹¹ May Mauseth Johnston *Barriers to Fair Network Prices: An analysis of consumer participation in the merits review of AER EDPR determinations* (Consumer Action Law Centre and Consumer Utilities Advocacy Centre, August 2011) at 30–31, available at <www.accc.gov.au>, quoting Bruce Mountain and Stephen Littlechild "Comparing electricity distribution network revenues and costs in New South Wales, Great Britain and Victoria" (2010) 38(10) *Energy Policy* 5770 at 5775.

¹¹² May Mauseth Johnston *Barriers to Fair Network Prices: An analysis of consumer participation in the merits review of AER EDPR determinations* (Consumer Action Law Centre and Consumer Utilities Advocacy Centre, August 2011) at 16–18, available at <www.accc.gov.au>.

¹¹³ May Mauseth Johnston *Barriers to Fair Network Prices: An analysis of consumer participation in the merits review of AER EDPR determinations* (Consumer Action Law Centre and Consumer Utilities Advocacy Centre, August 2011) at 8 and 51–61, available at www.accc.gov.au.

¹¹⁴ May Mauseth Johnston *Barriers to Fair Network Prices: An analysis of consumer participation in the merits review of AER EDPR determinations* (Consumer Action Law Centre and Consumer Utilities Advocacy Centre, August 2011) at 9, available at <www.accc.gov.au>.

consumer groups in merits review processes was so difficult to achieve, the report recommended doing away with merits reviews completely.¹¹⁵ The perceived problems with the merits review process continue today.¹¹⁶

This example illustrates how industry participants who have millions of dollars (and percentage points) of profits at stake have a high incentive to participate in regulatory decision making, and, even where there is a formal equality of access to the consultative and participatory processes, the consumer voice can be quiet or unheard.

The idea that industry representatives and companies play a greater role in ordinary processes of legislative and government decision making is borne out in an analysis of who participates in major regulatory decisions in New Zealand. Of the submitters to the Commerce Amendment Bill 2008 Select Committee there were no residential consumer submissions; there were, however, around 50 submissions from electricity companies, including a PriceWaterhouseCoopers submission on behalf of 20 ELD companies.¹¹⁷ Similarly, while there were more submissions from non-industry groups to the Electricity Industry Bill Select Committee, industry submissions made up the bulk of the material presented.¹¹⁸ Whether this translates to decisions more favourable to industry interests than other interests – is of course difficult to determine.

The view that industry participants unduly dominate regulatory decisions relating to electricity has been put forward in New Zealand by some consumer interest groups.¹¹⁹ DEUN argues that “Domestic consumers must have their own representatives” because the objectives of consumer benefit “needs to be defined by consumers themselves”; it also claims that “the lack of domestic consumer representation results in decisions which disadvantage” domestic consumers.¹²⁰ Grey Power has argued that the Commerce Commission line price decisions “gives no initial opportunity for consumers to engage with the Commerce Commission on the allowable revenues”.¹²¹ It has also been said that the government itself has a financial interest in the electricity market, through its ownership of many of the companies.¹²² In contrast, some power generators have argued that the Electricity

¹¹⁵ May Mauseth Johnston *Barriers to Fair Network Prices: An analysis of consumer participation in the merits review of AER EDPR determinations* (Consumer Action Law Centre and Consumer Utilities Advocacy Centre, August 2011) at 13, available at <www.accc.gov.au>.

¹¹⁶ Consumer Action Law Centre “Consumers the losers as competition tribunal sides with power companies – yet again” (Media release, 20 January 2012), available at <www.consumeraction.org.au>.

¹¹⁷ PricewaterhouseCoopers “Submission on the Commerce Amendment Bill” (9 May 2008).

¹¹⁸ See New Zealand Parliament “Select Committee: Committee documents”, available at <www.parliament.nz/en-NZ/PB/SC/Documents/Evidence/?Custom=00DBHOH_BILL9726_1>.

¹¹⁹ See Domestic Energy Users’ Network “Submission: TPAG Transmission Pricing Discussion Paper” (14 July 2011) at 1, available at <www.ea.govt.nz>.

¹²⁰ See Domestic Energy Users’ Network “Submission: TPAG Transmission Pricing Discussion Paper” (14 July 2011) at 2, available at <www.ea.govt.nz>.

¹²¹ Grey Power Federation “Submission on the 2010-15 Default Price-Quality Path for Electricity Distribution, Draft Decisions Paper July 2011” (29 August 2011) at 2, available at <www.comcom.govt.nz>.

¹²² Grant Bradley and Jacqui Smith “Report backs power price complaints” *The New Zealand Herald* (New Zealand, 22 May 2009) and James Weir and Greer McDonald “Cash cow utilities ‘creaming off profit’” *The Dominion Post* (New Zealand, 14 March 2009).

Authority's decisions do not allow for adequate price levels that would incentivise further investment.¹²³ This observation, if true, would suggest that the Authority is doing too much to protect consumers from price increases.

Of course, both of these perspectives would presumably be rejected by the Electricity Authority, because the decisions they make are intended to provide for the long-term benefit of all consumers, including questions of reliability of supply. The Authority's objective is focused on the benefit to consumers; in other words, like other competition and efficiency regulators, the Electricity Authority is required to uphold the consumer interest rather than industry interests.¹²⁴ Given this focus, it seems that it would be difficult to show that the regulator has been captured by industry to the detriment of consumers, and this may be a reason against setting up further consumer advocacy or participation. As a member of a United Kingdom regulator similarly noted:¹²⁵

It is absolutely the duty of regulators to ensure that customers are looked after, and it is a counterbalance to the monopoly elements of the industry. If you have a regulator who has that precise remit, then what is different about the consumer committee?

It might also be thought that if the regulator is supposed to be focused on looking out for the consumer interests, it should quickly become apparent to government and citizens if it is not doing this.

(d) Apathy (time poverty, lack of interest) and costs

It is obvious that more participatory decision making costs the regulator both in time and money; this must be factored into any decision on increased public participation. From the consumer-citizen's perspective, there are also time costs to participation that, combined with the high level of technical difficulty of the subject-matter, may lead to a rational apathy or indifference towards the regulatory decision in the face of opportunities to participate. Electricity regulation is an area that the public usually ignores unless there is some kind of salient *problem* with the sector so that greater interest and political pressure is brought to bear;¹²⁶ for example, some kind of crisis or a network collapse¹²⁷ such as the electricity shortages caused by droughts and low lake levels in 1992, 2001, 2003 and 2008 or the 2006 CBD and South Auckland blackout. Even where there is an

¹²³ "Power investment not worth it at these prices – Contact CEO" *The New Zealand Herald* (New Zealand, 6 March 2012).

¹²⁴ Cento Veljanovski "Economic Approaches to Regulation" in Robert Baldwin, Martin Cave and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, Oxford, 2010) 17 at 25–27.

¹²⁵ House of Lords Select Committee "Examination of Witness" (Select Committee on Constitution, 14 May 2003) at [424] (Memorandum by Clare Spottiswoode), available at <www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/68/3051404.htm>.

¹²⁶ Guy Holburn and Richard Vanden Bergh "Consumer Capture of Regulatory Institutions: The Creation of Public Utility Consumer Advocates in the United States" (2006) 126 *Public Choice* 45 at 49–50.

¹²⁷ Dorbit Rubinstein Reiss "Participation in Governance from a Comparative Perspective: Citizen Involvement in Telecommunications and Electricity in the United Kingdom, France and Sweden" (2009) 2 *J Disp Resol* 381 at 386.

obvious problem, the ordinary person would likely just rather have the government solve it than have any particular view of the means that should be used to achieve that end. Thus, it has been said that “[w]hen really pushed as to why the sector is so slow to involve the public, some energy sector practitioners respond that the public has no interest in participating in energy decisions – they just want the lights to come on”.¹²⁸ As Māori Party MP Tariana Turia pointed out in the second reading of the important Commerce Amendment Bill 2008, no submission to the consultation process was from an ordinary consumer.¹²⁹ She therefore suggested that:¹³⁰

... there needed to be some mechanism, other than submissions to the select committee, to get feedback from consumers, given their key role. Maybe focus groups of consumers should be considered as an important mechanism for gaining the thoughts of that group. A bill that ostensibly enables price and quality control for the purpose of improving outcomes for consumers should logically have sought the feedback of those people in the first instance. The bill would look quite different if it had consumers at the centre and if they had been guaranteed some kind of voice in the process. Failure to involve the people who are supposedly to benefit from the outcomes of competitive markets is a huge risk, which works to the benefit only of the corporations—the moneymakers—rather than the unsuspecting public.

Similarly, a member of a United Kingdom regulator has noted that:¹³¹

It is very difficult to get the general public involved. Most consultation papers are on technical detail that are of no interest to the general public. Usually the involvement comes through committed consumer groups such as energywatch and the Consumers Association [consumer advocacy groups].

Research in the United Kingdom has demonstrated a lack of understanding of how the electricity market is structured;¹³² it seems likely that this lack of understanding and interest is replicated in New Zealand for the bulk of the population. Again, this is the major additional cost – informing oneself of the issues – that exacerbates the general problem of lack of time and interest to participate.

(e) Accountability and educational effects

Increasing accountability seems an important reason to having further consumer participation in electricity decision making. The decisions made by the Electricity

¹²⁸ Davida Wood “Bridging the Governance Gap: Civil Society, Democratization and Electricity Sector Reform” (Arusha Conference “New Frontiers of Social Policy”, December 2005) at 18, available at <www.pdf.usaid.gov/pdf_docs/PNADO643.pdf>. See also Matthew Cotton and Patrick Devine-Wright “Making Electricity Networks ‘Visible’: Industry Actor Representations of ‘Publics’ and Public Engagement in Infrastructure Planning” (2012) 21(1) Public Understanding of Science 17.

¹²⁹ (2 September 2008) 649 NZPD 18313.

¹³⁰ (2 September 2008) 649 NZPD 18313.

¹³¹ House of Lords Select Committee “Examination of Witness” (Select Committee on Constitution, 14 May 2003) at [47] (Memorandum by Clare Spottiswoode), available at <www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/68/3051402.htm>.

¹³² Matthew Cotton and Patrick Devine-Wright “Making Electricity Networks ‘Visible’: Industry Actor Representation of ‘Publics’ and Public Engagement in Infrastructure Planning” (2012) 21(1) Public Understanding of Science 17.

Authority and Commerce Commission affect the way that the electricity market operates, and this affects consumers. There is already a high degree of openness in the Electricity Authority and Commerce Commission processes, through the release of consultation documents, the collation and publication of submissions, and the reasoned response to those submissions. However, given the reasons relating to technical complexity and general apathy in relation to regulatory decision making, it seems that having a consumer advocacy group representing domestic consumer interests and providing feedback to its engaged membership and to the public at large would increase the accountability of the regulator. Depending on the accessibility of the consumer advocacy group's communication through press releases, op-eds and website publications, this may increase the public's awareness of regulatory decisions being made and their effect on their interests. An example of what is possible is the Consumer Action Law Centre advocacy group, based in Victoria, Australia, which puts out a quarterly newsletter *On the Wires*, which notes regulatory developments in the electricity sector such as on-going consultations, price determinations, and other news and information.¹³³ Similarly, the United Kingdom consumer advocacy group Consumer Focus has a website on which a wealth of information on the electricity market and regulation of it is posted, including newsletters, reports, blog posts and other information.¹³⁴

As a result of this, there may also be an increase in the ordinary consumer-citizen's general knowledge and understanding of the regulatory issues. This would be the case where individuals are involved in putting together submissions based on their own or others' research (the "citizen-experts"). But the wider community might also gain further knowledge through the publicity of the issues and research that the advocacy group provides. This may in turn allow for groups of citizens with different perspectives to form competing advocacy groups. It would also likely increase individuals' acceptance of the regulatory decisions that have been made, so long as they agree that the governmental and regulatory assumptions and judgments are reasonable responses to trade-offs that must be made – as the United Kingdom regulatory participation forum suggested: "One observer from the Department of Energy and Climate Change commented that she wished other consumers could participate in similar opportunities to learn about the difficult trade-offs energy companies, regulators and Government have to make."¹³⁵ For example, the public might accept price increases if they think that the regulatory regime is not allowing for monopoly or market power, and those increases are necessary to secure stability and sustainability of supply. As Consumer Focus put these points:¹³⁶

¹³³ See Consumer Action Law Centre *On the Wire*, available at <www.consumeraction.org.au>; for a recent example see Consumer Action Law Centre *On the Wire* Edition 31 (Australia, March 2012).

¹³⁴ Consumer Focus "Consumer information: Energy", available at <www.consumerfocus.org.uk>.

¹³⁵ Consumer Focus "Who should pay for affordable, secure and sustainable energy?" (Consumer Focus Blog, 23 February 2012), available at <www.consumerfocus.org.uk>.

¹³⁶ Consumer Focus *Regulated industries and consumers* (Fresh thinking, March 2011) at 16, available at <www.consumerfocus.org.uk>.

If done properly, good consumer representation can make a major contribution to the quality of regulatory decision making, helping economic regulators focus their resources on the right issues and make the right kinds of intervention. It can help build public trust in regulatory regimes and the markets being regulated, and so help to promote growth across the economy as a whole and act as a shield against decision by media headline. This requires real commitment to a grounded, evidence-based approach, with the right working culture.

(f) *Quality of outcomes*

It is unclear whether the consideration of better outcomes counsels for more participation of ordinary citizens in electricity regulation, because of the reasons relating to technocracy noted above. The way that the various electricity markets work is not subject to the day-to-day knowledge of residential consumers – with the exception of the retail market of course. It is unlikely that further participation of ordinary citizens will add to the relevant information relating to the complex economic analysis involved in decisions relating to price controls and reliability of the transmission network. These reasons will be strong where the regulatory decision is within the existing framework of regulation and that framework requires a technocratic economic decision to be made.

However, there may be situations where what is being considered as a technocratic decision is actually contestable, because there may be an economic assumption or analysis that favours certain industry participants over residential consumers, and that decision is one that must be made one way or another within the existing regulatory framework. Here, participation of consumers may challenge the assumption and lead to either a changing of the analysis or better justification of the choice being made. As the United Kingdom consumer advocacy group Consumer Focus argues:¹³⁷

There needs to be some countervailing input that unapologetically favours the consumer interest, to give the regulator a wider range of perspectives and a more rounded evidence base on which to make decisions. This applies both to major strategic decisions and to more detailed matters such as individual licence or enforcement decisions. Such external challenge can improve the quality of regulation, by testing the robustness of the evidence and analysis underpinning decisions, providing different thinking and solutions, and raising new issues.

Yet this kind of participation is clearly limited to those with expertise in the complex analysis used in making the relevant decision. Again, consumer advocacy groups that have members who have developed that expertise, or who can engage external experts to provide such analysis, seem to have a good fit. The consumer-citizen interest in the decision can be put forward, highlighting any value judgments involved, and expert economic and technical evidence can also be introduced, whether produced by consultants or group members who have achieved the requisite level of understanding. This will ensure that the regulator has as many

¹³⁷ Consumer Focus *Regulated industries and consumers* (Fresh thinking, March 2011) at 14, available at <www.consumerfocus.org.uk>.

possible arguments and as much evidence as possible on the table, according to which it can make the best informed decision.

When we look to more general questions about the electricity industry – such as whether there should be a corporatisation and marketisation of this industry at all, whether there should be governmental ownership of certain businesses or privatisation (or some mixed model) and what the ultimate goals of the industry should be – there seems to be more scope for getting views from the wider community. These are basic framework questions that involve normative value judgments as well as analysis of economic effects of different options. While it is difficult to quantify how participation adds to better *outcomes*, this is another way of thinking about the democratic benefits of allowing and encouraging ordinary citizens to think about and debating these issues.

Finally, where the regulation concerns the behaviour of residential consumers, it is clearly of informational/outcome use to use participatory mechanisms to gain this information and to see how residential consumers perceive the problems with the market and the benefits of possible reforms.

6.2.4 Mechanisms for participation

(a) Initial observations

What do these above reasons about electricity regulatory decision making tell us about what kind of mechanism may be appropriate to increase ordinary citizen participation?

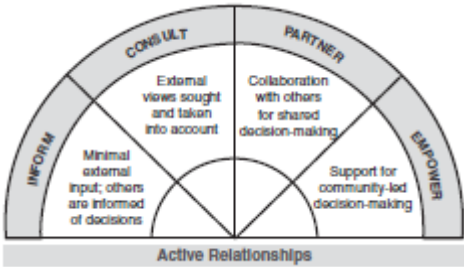
The features identified above suggest that there is a danger that only large industry players will have a voice and influence in electricity regulatory decision making, due to the technical complexity of the market, the view that economic questions of competition and efficiency are the main concerns to be dealt with, and the apathy that exists outside times of crisis. The main benefits of increased citizen participation seem to relate to democratic participation by affected individuals and groups, better outcomes that take consumer views and interests into account and add to the accountability of the decision makers to these viewpoints, and the educational benefits that may come from certain forms of consumer participation. The question is what kinds of mechanisms will deal with the problems and maximise the benefits.

As seen below, in terms of the general “level of participation” question noted in our earlier chapter,¹³⁸ participation in regulatory decisions concerning electricity will likely fall within the information and consultation categories, with limited scope for moving into direct involvement in making the decision. This is because the decisions being made are major policy decisions that affect the whole of the country’s electricity framework, or are decisions concerning the position of individual companies. In both cases it is appropriate for decision makers who have legitimacy from the electorate as a whole to make the ultimate decision, either as

¹³⁸ Mark Bennett and Joel Colón-Ríos “Public Participation and Regulation” in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 21 at 52.

government or Parliament, or as a regulator giving effect to statutory objectives and rules.

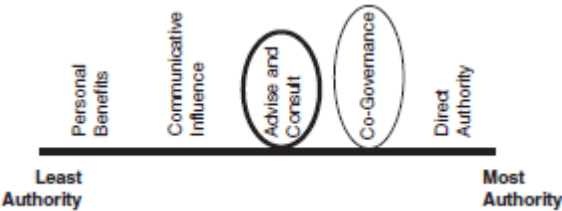
Figure 6.2: Levels of participation



Source¹³⁹

Looking at Fung’s more detailed spectra of participation, the spectrum of authority is appropriate given that the above points will likely be to advise and consult, and at its most extreme may be some kind of participation in co-governance (although this is much less likely). The key reasons for participation are to ensure that the ordinary electricity consumer’s voice is heard and that it plays a role in influencing the decision. Examples of “advise and consult” mechanisms include consumer advocacy groups outside of government and the regulator, and consumer panels or advisory boards within the regulator; the main example of co-governance would be specified consumer interest members on the board of regulators, or voting rights for consumer panels.¹⁴⁰

Figure 6.3: Spectrum of authority



Source: Archon Fung¹⁴¹

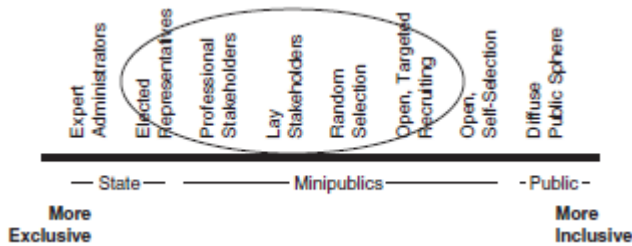
On the spectrum of inclusion, the difference is based on whether a cross-section of public opinion is required (that is, where what is sought is information about consumer-citizen views or behaviour), or whether an informed consumer-citizen interest perspective is wanted. In the former case, the inclusion will be random selection or targeted recruiting; in the latter, it will be consumer-citizen interest stakeholders or representatives.

¹³⁹ Office for the Community and Voluntary Sector “Levels of Participation” (2011) Good Practice Participate <www.goodpracticeparticipate.govt.nz>.

¹⁴⁰ For example, Consumer Focus’s vote on Ofgem’s decisions on certain code amendments: see Consumer Focus *Regulated Industries Unit Prospectus* (October 2011) at 20, available at <www.consumerfocus.org.uk>.

¹⁴¹ Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 PAR 66 at 69–70.

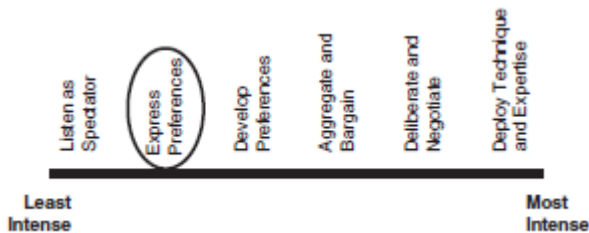
Figure 6.4: Spectrum of inclusion



Source: Archon Fung¹⁴²

Similarly, the spectrum of communication mode will be at the least intense end, probably the expression of preferences, where the reason for participation is informational only; whereas it will be at the intense end if consumer interest representatives are providing arguments and technical analysis.

Figure 6.5: Spectrum of communication



Source: Archon Fung¹⁴³

Given the reasons for participation identified above, it is probably the latter kinds of participation that are required to give the consumer-citizen perspective an effective role in the decision making process: there needs to be an articulation of consumer concerns and interests that can be effective in bringing technical arguments and information to bear on the decision, to challenge the arguments and information of industry participants, and to hold government and the regulator accountable for their decisions through engaging with and informing ordinary citizens.

The mechanisms that may be involved, given these reasons and comparing the consumer-citizen participation mechanisms that exist in the United Kingdom and Australia, are threefold. The first is focus groups or citizen advisory committees made up of ordinary citizens; this mechanism is essentially an information gathering exercise, and may overlap with general social science and market research analysis about consumer behaviour in the electricity market. An example of this in the United Kingdom is the Consumer First panels that Ofgem uses to gain consumer views on energy issues.¹⁴⁴ As such, it may be seen as a limited form of public participation, towards the least intense end of the spectrum of communication.

¹⁴² Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 PAR 66 at 68.

¹⁴³ Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 PAR 66 at 69.

¹⁴⁴ See Ofgem “Consumer Policy: Consumer First”, available at <www.ofgem.gov.uk/Sustainability>.

The other main kinds of mechanism to attempt to give consumer interests an effective voice in regulatory decision making are consumer advocacy groups. These were not identified in our original typology of public participation mechanisms. As noted above, they might even be regarded as not *public* participation at all because, rather than ordinary citizens themselves participating, representatives of certain groups attempt to influence regulatory decisions in what they believe is the general consumer-citizen interest. It is appropriate to discuss this group here because they figure large in both Australia and the United Kingdom's energy regulation landscape, and because they can be understood as public participation so long as they are accepted as putting forward an account of the general public's interest and they have some kind of means of engaging with the public to ensure that account is plausible. This is clearly how consumer advocacy groups regard their own activities giving consumers a stronger voice in policy decisions, and thereby increasing consumer participation in those decisions.

Another mechanism of public participation in the form of representing and advocating for the perceived consumer interest is consumer advisory panels or consumer interest board representatives within a regulator. These groups or boards are experts in the subject-matter of the regulatory decision, and seek to ensure that the interests of consumers – or perhaps a different view of those interests – are an important part of the regulatory decision.

The best way to see how these latter two mechanisms may work in practice is to look to existing versions of them in the United Kingdom and Australia.

(b) United Kingdom

In the United Kingdom, consumer advocacy groups and representation on regulatory boards and committees have existed for decades.¹⁴⁵ Internally, the main energy regulator, Ofgem, currently uses consumer panels and consumer advisory groups. In addition, there is an external peak consumer advocacy group – Consumer Focus.

(i) Consumer panels

Ofgem has in recent years used consumer panels — the Consumer First panels. These are composed of ordinary citizens selected from a variety of communities to discuss issues in the energy sector such as gas supply security,¹⁴⁶ smart metering and price controls. In the latest round of panel workshops, 110 participants were drawn from six locations around the United Kingdom. The aim of the research was to identify what information was needed to allow customers to make informed decisions, how people wanted to receive this communication, and how the information should be presented.¹⁴⁷ Panel members were recruited through face-

¹⁴⁵ Tony Prosser *The Law and Regulators* (Oxford University Press, Oxford, 1997) at 153–154.

¹⁴⁶ See Ofgem *Consumer First Panel Year 3: Report from the third set of workshops: Value of Lost Load* (May 2011), available at <www.ofgem.gov.uk>.

¹⁴⁷ Ipsos Mori Ofgem *Consumer First Panel Year 4: Findings from first workshops* (held in October and November 2011) (31 January 2012) at 1, available at <www.ofgem.gov.uk>.

to-face interaction on the street and at people's homes. The aim was to attempt to make the panels more representative of the general population by reference to a number of different social variables, such as gender, age, ethnicity, socio-economic status, housing tenure, disability, family and employment statuses and urban/rural location.¹⁴⁸ Ofgem uses these panels as "consumer research" to inform policy decisions and to make its consultations "more consumer focussed and friendly".¹⁴⁹

(ii) Consumer advisory groups

Another way that Ofgem has sought to ensure that it has gained consumer input into its decision making processes and to ensure that decisions are *fair* to consumers is to set up a Consumer Challenge Group (CCG). One such group, six people with expertise in the electricity industry and the interests of consumers, four with a domestic/residential consumer focus and two with a business consumer focus,¹⁵⁰ participated in the 2008–2009 Electricity Distribution Price Control Review. The CCG met with the Ofgem staff involved in the price control review nine times to provide feedback and suggestions on their decision making, as well as receiving briefings on other relevant Ofgem work, and meeting with the Distribution Price Control Committee and Distribution Network operators.¹⁵¹ Another consumer advisory group, made up of members of consumer and social concern organisations, advised Ofgem on consumer issues relating to smart metering.¹⁵² There is also a standing advisory group on sustainability and social issues, which includes political, academic and social interest group representatives.¹⁵³

(iii) Consumer focus

Consumer Focus is the main statutory consumer advocacy organisation in England, Wales and Scotland. It was created through the merger of a number of other consumer advocacy groups.¹⁵⁴ It is funded by a government department and by levies on the energy industry, with a £12.4 million budget for 2011–2012.¹⁵⁵ Its website states that it "aims to give people a stronger voice. We don't just draw attention to problems – we work with consumers and with a range of organisations to champion creative solutions that make a difference to consumers' lives."¹⁵⁶ To

¹⁴⁸ Ipsos Mori Ofgem *Consumer First Panel Year 4: Findings from first workshops* (held in October and November 2011) (31 January 2012) at 10, available at <www.ofgem.gov.uk>.

¹⁴⁹ See Ofgem "Consumer Policy: Consumer First", available at <www.ofgem.gov.uk>.

¹⁵⁰ Ofgem *Consumer First: The Ofgem Consumer Challenge Group* (March 2010) at 1, available at <www.ofgem.gov.uk>.

¹⁵¹ Ofgem *Consumer First: The Ofgem Consumer Challenge Group* (March 2010) at 2, available at <www.ofgem.gov.uk>.

¹⁵² Ofgem "Working with our stakeholders: Consumer Advisory Group", available at <www.ofgem.gov.uk>.

¹⁵³ Ofgem "Sustainability: Sustainable Development Advisory Group", available at <www.ofgem.gov.uk>.

¹⁵⁴ Consumer Focus "About Us: Background to Consumer Focus", available at <www.consumerfocus.org.uk>.

¹⁵⁵ Consumer Focus *Annual Plan: 2011-2012* (April 2011) at 19, available at <www.consumerfocus.org.uk>.

¹⁵⁶ Consumer Focus "About Us" <www.consumerfocus.org.uk>.

this end, it investigates consumer complaints, requests information from the regulator and service-providers, makes submissions on regulator and government decisions, and provides information to consumers about electricity sector issues. It also has voting rights on a number of committees involved in code amendment.¹⁵⁷ From 2014 Consumer Focus will be restructured into a Regulated Industries Unit.¹⁵⁸

(c) *Australia*

The Australian electricity market is complex. It comprises both national and jurisdictional regulation and markets, with consumer participation occurring at both levels. A comparatively large amount of consumer advocacy is undertaken by a wide variety of advocacy groups in Australia. These groups include specialised energy and general consumer advocacy groups, social welfare organisations, environmental protection organisations, university research centres and other interest groups.¹⁵⁹ Further, it is recognised that these groups need to be adequately funded if they are to be able to contribute effectively to government and consultation/decision making processes.¹⁶⁰ The Australian Treasury released an issues paper in 2009 noting that a key concern is to maintain the “sustainability of ongoing support for consumer advocacy and consumer policy-focused research over the medium to long term”.¹⁶¹ In Victoria, the government funds an independent consumer advocacy organisation, the Consumer Utilities Advocacy Centre, with the objective of representing energy and water consumers in policy making and regulatory processes.¹⁶²

(i) *Consumer advocacy panel*

The forerunner to the Consumer Advocacy Panel was the National Electricity Consumers Advocacy Panel, set up in 2001 with the aim of granting funds to domestic and business electricity representatives to engage in advocacy with regard to the

¹⁵⁷ Consumer Focus *Regulated Industries Unit Prospectus* (October 2011) at 20, available at <www.consumerfocus.org.uk>.

¹⁵⁸ Consumer Focus “About Us” <www.consumerfocus.org.uk>.

¹⁵⁹ Gordon Renouf and Polly Porteous *Making Energy Markets Work for Consumers: The Role of Consumer Advocacy* (Consumer Advocacy Panel, 2 February 2011) at 36–37, available at <www.advocacypanel.com.au/documents/AP396MakingEnergyMarketsWorkJune2011.pdf>.

¹⁶⁰ Australian Government Productivity Commission *Review of Australia’s Consumer Policy Framework* (Report 45(1), 30 April 2008) at 59, available at <www.pc.gov.au/_data/assets/pdf_file/0006/79170/consumer1.pdf>: “Australia’s many consumer advocacy bodies play an important role in ensuring that consumers’ views and needs are taken into account in the policy making process. ... [T]here would be a net benefit to the community from an increase in the currently low level of public funding for these advocacy functions.” See also Australian Government Productivity Commission *Review of Australia’s Consumer Policy Framework* (Report 45(2), 30 April 2008) at 274, available at <www.pc.gov.au/_data/assets/pdf_file/0008/79172/consumer2.pdf>.

¹⁶¹ Australian Government: The Treasury *Consumer voices: Sustaining advocacy and research in Australia’s new consumer policy framework* (Issues paper, 8 May 2009) at 2, available at <<http://archive.treasury.gov.au/contentitem.asp?ContentID=1532>>.

¹⁶² Consumer Utilities Advocacy Centre “About” <www.cuac.org.au/about>.

development of the national electricity market and the National Electricity Rules.¹⁶³ These rules apply everywhere except Western Australia and the Northern Territory. It was reconstituted as the Consumer Advocacy Panel in 2008, with an expanded responsibility to grant funding for both advocacy and research concerning the electricity and natural gas markets.¹⁶⁴ Its purpose is to “facilitate end-user advocacy in the national electricity and national gas markets so the views of all classes of end-user can impact on decision making on market policy and regulation”.¹⁶⁵ It encourages consumer organisations to apply for advocacy funding in relation to particular regulatory determinations, guideline developments and other consultations.¹⁶⁶ The provision of funding for a variety of different interest groups accords with the Productivity Commission’s view that a spectrum of consumer views should be represented.¹⁶⁷ In 2009–2010, it distributed around AUD 2.2 million dollars in around 40 grants ranging from a few thousand dollars to AUD 200,000, and covering activities such as submissions, meeting attendance, research reports, and participation in decision making and policy development.¹⁶⁸ One of the Consumer Advocacy Panel’s priority research areas in 2011–2012 was research concerning “[e]mpowering consumer engagement in network price determinations: providing advocacy organisations with the tools and information to effectively represent consumers’ interests in regulatory decisions.”¹⁶⁹

The perceived effectiveness of this means of encouraging consumer participation is high. Prominent advocacy organisations such as Consumer Utilities Advocacy Centre (CUAC) and the various Councils of Social Services are seen as bringing a distinct voice to the regulatory table, and helping to set the agenda.¹⁷⁰ A recent report titled *Making Energy Markets Work For Consumers* produced under the auspices of a number of consumer advocacy organisations and funded by Consumer Advocacy Panel grants, claims that consumer advocacy in Australian

¹⁶³ Consumer Advocacy Panel <www.advocacypanel.com.au>.

¹⁶⁴ Consumer Advocacy Panel <www.advocacypanel.com.au>.

¹⁶⁵ Customer Advocacy Panel “Strategic Plan 2010-2013” (March 2012) at 1, available at <www.advocacypanel.com.au>.

¹⁶⁶ See, for example, Customer Advocacy Panel *CAPTions* (Issue 5, November 2011), available at <www.advocacypanel.com.au>.

¹⁶⁷ Australian Government Productivity Commission *Review of Australia’s Consumer Policy Framework* (Report 45(2), 30 April 2008) at 280–282, available at <www.pc.gov.au/_data/assets/pdf_file/0008/79172/consumer2.pdf>.

¹⁶⁸ The Allen Consulting Group *Evaluation of 2009-10 Consumer Advocacy Panel grants* (Report to the Consumer Advocacy Panel, May 2011) at 1–2, available at <www.advocacypanel.com.au>.

¹⁶⁹ Customer Advocacy Panel “Invitation to Submit Research Grant Applications” (Research Grants Round 2011/12, March 2012) at 1, available at <www.advocacypanel.com.au/documents/InvitationtosubmitresearchgrantapplicationsNov2011.pdf>.

¹⁷⁰ For examples of recent work of the CUAC and the Queensland Council of Social Services, see Consumer Utilities Advocacy Centre *Improving energy market competition through consumer participation* (CUAC, December 2011), available at <www.cuac.org.au>; and Queensland Council of Social Service and Etrog Consulting “Submission by the Queensland Council of Social Service (QCOSS) on the Queensland Competition Authority (QCA) Draft Determination: Regulated Retail Electricity Prices 2012-13” (12 April 2012), available at <www.qcoss.org.au>.

energy markets has a significant influence on regulatory decision making by government, regulators and industry.¹⁷¹ It quotes a “senior regulator” as saying that “despite resource limitations ... energy is a relatively strong area of consumer advocacy at present, primarily due to the skill, knowledge, commitment and connectedness of current advocates”.¹⁷² Another academic research report on consumer participation in Victorian regulatory decisions notes a number of energy decisions where consumer advocacy has made an impact on regulatory decisions.¹⁷³

In addition, the Consumer Advocacy Panel’s own commissioned evaluation of the effectiveness and outcomes of funded advocacy by an external consultancy found that most of the work by consumer interest groups was well received by ministers, government officials, and regulators.¹⁷⁴ In particular, it singled out the Tasmanian Council of Social Services (TasCOSS) as having developed expertise in consumer energy issues that made its contributions a key part of the regulatory decision making process.¹⁷⁵

TasCOSS is now recognised as an important component of the energy policy development community in Tasmania. As Tasmania is a small state, it does not have the benefits of scale that larger jurisdictions enjoy. Consequently, the expertise that resides in TasCOSS is particularly important, as without it, there would be a significant gap in knowledge that extends beyond well known issues and concerns affecting vulnerable consumers, and into more technical and specialised areas of knowledge. ... [H]igh quality advocacy [is] being undertaken efficiently on behalf of vulnerable and disadvantaged energy consumers [by TasCOSS]. The nature of consumer energy related issues in Tasmania is such that there is clearly an ongoing need for this advocacy as TasCOSS has the expertise to continue to provide this advocacy.

Similarly, a recent regulatory draft decision made a number of references to the Queensland Council of Social Services (QCOSS) submission, showing that the analysis provided by the relevant expert consultant was recognised as relevant and had to be taken into account in the decision.¹⁷⁶

¹⁷¹ Gordon Renouf and Polly Porteous *Making Energy Markets Work for Consumers: The Role of Consumer Advocacy* (Consumer Advocacy Panel, 2 February 2011) at 7, available at <www.advocacypanel.com.au/documents/AP396MakingEnergyMarketsWorkJune2011.pdf>.

¹⁷² Gordon Renouf and Polly Porteous *Making Energy Markets Work for Consumers: The Role of Consumer Advocacy* (Consumer Advocacy Panel, 2 February 2011) at 45, available at <www.advocacypanel.com.au/documents/AP396MakingEnergyMarketsWorkJune2011.pdf>.

¹⁷³ Liz Curran *Making the Legal System More Responsive to Community: A Report on the Impact of Victorian Community Legal Centre Law Reform Initiatives* (West Heidelberg Community Legal Service Incorporated, Victoria, 2007) at 45.

¹⁷⁴ The Allen Consulting Group *Evaluation of 2009-10 Consumer Advocacy Panel grants* (Report to the Consumer Advocacy Panel, May 2011) at viii, available at <www.advocacypanel.com.au>.

¹⁷⁵ The Allen Consulting Group *Evaluation of 2009-10 Consumer Advocacy Panel grants* (Report to the Consumer Advocacy Panel, May 2011) at 29 and 32, available at <www.advocacypanel.com.au>.

¹⁷⁶ See Queensland Competition Authority *Draft Determination: Regulated Retail Electricity Prices 2012–13* (March 2012), available at <www.qca.org.au/electricity-retail/NEP/NEP1213/draftDec.php>, referring to Queensland Council of Social Service and Etrog Consulting “Submission by the Queensland Council of Social Service (QCOSS) on the Queensland Competition Authority (QCA) Draft Determination: Regulated Retail Electricity

Consumer interest advocacy is therefore seen as an effective and essential part of regulatory processes in energy. Even where an advocacy project did not determine the regulatory decision's final form, it may still have the beneficial outcome of "putting forward a consumer perspective [which] may have a 'cumulative effect on decision-makers' which over time would result in policy outcomes favourable to consumers".¹⁷⁷ Where research outputs are written in clear language, they may also help inform consumers of issues relating to the regulatory framework.¹⁷⁸

However, there are still questions about whether this mechanism is adequate to ensure that the consumer voice is heard by government and the regulator. There are problems relating to the pace of change in the market that makes it hard for consumers to understand it.¹⁷⁹ The report notes that:¹⁸⁰

Energy consumer advocates must consider a diverse range of issues that involve complex technical, economic, financial and political problems. The structure and design of the energy market is rapidly evolving and is subject to competing demands from different industry sectors and State, Territory and Commonwealth governments. Energy policy often has political sensitivity, and is significantly affected by other priority areas of public policy, including access to essential services, social inclusion, environment policy generally and climate policy in particular.

The report notes that over two and a half years, from 2008 to 2010, there were at least 337 consumer advocacy submissions to 178 formal consultation processes undertaken by industry regulators, the Ministerial Council on Energy, and other governmental processes.¹⁸¹ It also notes the existence of a range of informal consultative interactions between consumer advocacy groups and industry, regulators, government, and consumers.¹⁸² This includes proactive advocacy, meaning the identification of consumer issues and interests in the energy industry and attempting to put them on the agendas of industry and regulatory decision

Prices 2012–13" (12 April 2012).

¹⁷⁷ Gordon Renouf and Polly Porteous *Making Energy Markets Work for Consumers: The Role of Consumer Advocacy* (Consumer Advocacy Panel, 2 February 2011) at 64, available at <www.advocacypanel.com.au/documents/AP396MakingEnergyMarketsWorkJune2011.pdf>.

¹⁷⁸ See, for example, Luke Berry and David Prins *Rural and Regional Energy Issues: A Qualitative Survey of Rural and Regional Councils in New South Wales and Queensland* (Engineroom Infrastructure Consulting and Etrog Consulting, January 2012), available at <www.advocacypanel.com.au>.

¹⁷⁹ Gordon Renouf and Polly Porteous *Making Energy Markets Work for Consumers: The Role of Consumer Advocacy* (Consumer Advocacy Panel, 2 February 2011) at 7–8, available at <www.advocacypanel.com.au/documents/AP396MakingEnergyMarketsWorkJune2011.pdf>.

¹⁸⁰ Gordon Renouf and Polly Porteous *Making Energy Markets Work for Consumers: The Role of Consumer Advocacy* (Consumer Advocacy Panel, 2 February 2011) at 8, available at <www.advocacypanel.com.au/documents/AP396MakingEnergyMarketsWorkJune2011.pdf>.

¹⁸¹ Gordon Renouf and Polly Porteous *Making Energy Markets Work for Consumers: The Role of Consumer Advocacy* (Consumer Advocacy Panel, 2 February 2011) at 9, available at <www.advocacypanel.com.au/documents/AP396MakingEnergyMarketsWorkJune2011.pdf>.

¹⁸² Gordon Renouf and Polly Porteous *Making Energy Markets Work for Consumers: The Role of Consumer Advocacy* (Consumer Advocacy Panel, 2 February 2011) at 9, available at <www.advocacypanel.com.au/documents/AP396MakingEnergyMarketsWorkJune2011.pdf>.

makers, both in government and the regulator.¹⁸³ The capability to participate fully in these processes requires much human energy and resources, especially where consultation documents and draft determinations require submissions in a short time (for example, less than two weeks for a recent Queensland prices decision).¹⁸⁴

The strengths of consumer advocacy in energy regulation are in the experience, expertise and skills of the employees of advocacy organisations, the collaboration between advocates, and the links with consumer experiences and issues.¹⁸⁵ In contrast, the weaknesses identified were lack of adequate coordination and national voice, a lack of access to technical expertise and research, directing resources towards narrow issues defined by the regulators or government, and a lack of focus on the overall regulatory framework;¹⁸⁶ but the most significant and commonly perceived weakness is the lack of the resources required to engage in adequate consumer advocacy – despite the existing funding arrangements.¹⁸⁷ QCOSS, a peak body for over 600 community organisations in Queensland, has argued that despite the “abundance of consultation procedures” in the National Electricity Rules process, the scope for consultation is limited to “the detailed technical inputs” in the price determination process.¹⁸⁸ While they acknowledge that this technical focus is mandated by the decision that the AER is required to make, the limited scope means that QCOSS argues that there are “very few ‘levers’ in the process for participation by consumer or environmental organisations especially in relation to the impact on various classes of consumers”.¹⁸⁹ It argues that the rules are:¹⁹⁰

¹⁸³ Gordon Renouf and Polly Porteous *Making Energy Markets Work for Consumers: The Role of Consumer Advocacy* (Consumer Advocacy Panel, 2 February 2011) at 9, available at <www.advocacypanel.com.au/documents/AP396MakingEnergyMarketsWorkJune2011.pdf>.

¹⁸⁴ Queensland Competition Authority “Notified Electricity Prices 2012-13: Draft Determination”, available at <www.qca.org.au/electricity-retail>. I am grateful to David Prins of Etrog Consulting for this example.

¹⁸⁵ Gordon Renouf and Polly Porteous *Making Energy Markets Work for Consumers: The Role of Consumer Advocacy* (Consumer Advocacy Panel, 2 February 2011) at 10, available at <www.advocacypanel.com.au/documents/AP396MakingEnergyMarketsWorkJune2011.pdf>.

¹⁸⁶ Gordon Renouf and Polly Porteous *Making Energy Markets Work for Consumers: The Role of Consumer Advocacy* (Consumer Advocacy Panel, 2 February 2011) at 10, available at <www.advocacypanel.com.au/documents/AP396MakingEnergyMarketsWorkJune2011.pdf>. See also The Allen Consulting Group *Evaluation of 2009-10 Consumer Advocacy Panel grants* (Report to the Consumer Advocacy Panel, May 2011) at 8, available at <www.advocacypanel.com.au>: “projects were most successful where they could leverage a high level of specific and relevant consultant expertise that would not be available from within the advocacy organisation.”.

¹⁸⁷ Gordon Renouf and Polly Porteous *Making Energy Markets Work for Consumers: The Role of Consumer Advocacy* (Consumer Advocacy Panel, 2 February 2011) at 11, available at <www.advocacypanel.com.au/documents/AP396MakingEnergyMarketsWorkJune2011.pdf>.

¹⁸⁸ Queensland Council of Social Service (QCOSS) “Submission on the AER Draft Decision: Queensland Distribution Determination Process 2010–2015” (February 2010) at 3, available at <www.aer.gov.au>.

¹⁸⁹ Queensland Council of Social Service (QCOSS) “Submission on the AER Draft Decision: Queensland Distribution Determination Process 2010–2015” (February 2010) at 3, available at <www.aer.gov.au>.

¹⁹⁰ Queensland Council of Social Service (QCOSS) “Submission on the AER Draft Decision:

... rigidly focused on the inputs to the price determination process, with virtually no scope for the AER (or any other body) to have regard to the overall reasonableness of the outcomes, particularly as they relate to achieving social or environmental policy objectives.

Importantly, there is no scope for consultation on the overall outcomes of the regulatory process and the impacts on consumers, or scope to feed these consumer impacts into the decision making process.

However, this view might be contested by those who see advocacy groups as helping to set the agenda of regulation.

6.2.5 *Conclusion*

This section has set out the reasons for and against increased public participation in regulatory rule and decision making in the electricity industry context. Our conclusion is that, on balance, there should be increased participation. The mechanism identified – funding of consumer interest groups – draws on both the reasons for and against participation and the examples of such existing mechanisms in the United Kingdom and Australia. It is suggested that such funding would allow consumer interest groups to participate in the decision making process of the Electricity Authority in a way that: increases the information and value perspectives available to the Authority by allowing consumer advocates to become informed or to commission independent research; allows for the consumer interest groups to develop educational materials for the use of ordinary consumers; and ensures that domestic consumer interests are represented.

The advantage of looking to comparative mechanisms in other similar jurisdictions is borne out by this case study. A mechanism that was not identified in our Stage One chapter – consumer advocacy funding – is an important way of increasing consumer-citizen interest participation in Australia and the United Kingdom and seems appropriate in New Zealand when we look at the reasons that apply here. Indeed, the DEUN has argued for support for consultation along the lines of the consumer advocacy funding model seen in Australia. It argues that “[d]omestic consumers should be helped to educate more of its potential representatives so they can take part constructively in all advisory groups” and that “[d]omestic consumers should have access to economic advisors who fully understand their perspective and interests.”¹⁹¹ Similarly, Grey Power’s respective submission argued that:¹⁹²

The placement of small consumer representatives on Advisory Committees is only a first step, because the work of the Committees is framed in an “economic” language and to terms of reference that have little meaning to them. At present, capacity-building is essential to enable domestic consumers to represent their own interests.

Queensland Distribution Determination Process 2010–2015” (February 2010) at 3 (emphasis omitted), available at <www.aer.gov.au>.

¹⁹¹ Domestic Energy Users’ Network “Submission, Electricity Authority interpretation of Statutory Objective” (29 November 2010) at 2, available at <www.ea.govt.nz>.

¹⁹² Grey Power Federation “Submission: Electricity Authority interpretation of Statutory Objective” (28 November 2010) at 3, available at <www.ea.govt.nz>.

In this sense, there is clearly a view among the relevant consumer interest groups that they should be better funded to ensure their participation in regulatory decision making.

We could go further and argue that the New Zealand situation is one where the funding of consumer advocacy groups is especially suited. Because of our relatively small size, consumer advocacy groups do not have the critical mass of expertise or funding that is necessary to contribute adequately to existing regulatory consultations. In large countries such as the United States, consumer groups such as Public Citizen can draw funding and support from a large membership base, which allows them to contribute to national regulatory debates.¹⁹³ In Australia and the United Kingdom, industry and government contribute millions of dollars to consumer advocacy groups every year, funding expert advice and analysis and allowing the groups to fund capability-building research and networks. This sort of funding may not be available from our relatively small industry, but even a few hundred thousand dollars in contestable funding would markedly change things. This seems especially so given that lobbying and consultant use by interested companies and industry groups does not exist on the extreme level as in the United States, which would allow consumer groups to have a relatively loud voice if adequately resourced. It is likely that the groups such as Consumer NZ that already participate to some degree would be more effective if they had access to further funding.

6.3 Environmental regulation and the Resource Management Act 1991

6.3.1 *Present regulatory frameworks and kinds of regulatory concerns and decisions*

By environmental regulation, we mean any rule that seeks to balance competing demands on natural resources.¹⁹⁴ In New Zealand, the main legal framework for the regulation of environmental use is the Resource Management Act 1991 (the RMA). The purpose of the Act is that of promoting the sustainable management of the country's natural and physical resources.¹⁹⁵ The Act defines "sustainable management" as "managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety", while at the same time:¹⁹⁶

- (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;

¹⁹³ See Public Citizen "About Us" <www.citizen.org>.

¹⁹⁴ See Timothy Swanson "Economic Growth and Environmental Regulation: A Discussion of International Experiences" (Paper Prepared for ADB Workshop in Beijing on "A Macro-Environmental Strategy for China", 19–20 October 2008) at 4.

¹⁹⁵ Resource Management Act 1991, s 5(1).

¹⁹⁶ Resource Management Act 1991, s 5(2).

- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Specific functions under the Act are divided among the central government, regional councils and territorial authorities.¹⁹⁷ The Ministers of the Environment and Conservation are responsible for the functions of the central government. The Minister of the Environment, for instance, has the power to issue national environmental standards through the making of regulations, the power to recommend the promulgation of national policy statements with a binding effect at regional and territorial levels and a “call-in power” for applications or proposals of national significance.¹⁹⁸ The Minister of Conservation is responsible, among other things, for the coastal marine area, the approval of regional coastal plans and for deciding applications for permits for any restricted coastal activity.¹⁹⁹ Regional councils’ responsibilities include water quality, biodiversity conservation, allocating natural resources and preparing policies on the integrated management of resources and on the “regionally significant effects of the use, development or protection of land”.²⁰⁰ The responsibilities of territorial authorities include the control of natural hazards and of “the effects of the use, development and protection of land (and surface of lakes and rivers), and the control of subdivision and noise”.²⁰¹

Section 59 of the RMA requires regional councils to adopt regional policy statements that provide “an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region”. Moreover, pursuant to section 63(1) of the RMA, regional councils are required to prepare regional plans to assist them to carry out their functions and responsibilities. These plans contain policies and rules about land use, air quality and other resource management issues. Plans “must state the objectives for the region, policies to implement the objectives, and the rules [if any] to implement the policies”.²⁰² They should also “state the issues to be addressed, methods for implementation, reasons for adopting policies and methods, environmental results expected, monitoring procedures, cross boundary issues, information required on consent applications, and other necessary

¹⁹⁷ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 106.

¹⁹⁸ See Resource Management Act 1991, ss 24, 25, 28 and 140–150. Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 106.

¹⁹⁹ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 106; Resource Management Act 1991, s 28.

²⁰⁰ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 106. They also have responsibilities for the control of issues related to water, geothermal energy, the discharge of contaminants into land, air and water, and catchment functions.

²⁰¹ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 106.

²⁰² Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 193.

information”.²⁰³ Section 68(3) establishes that, in making a rule,²⁰⁴ “the regional council shall have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect”.²⁰⁵ These rules (which may describe activities as permitted, controlled, restricted discretionary, discretionary, non-complying or prohibited)²⁰⁶ have the force and effect of a regulation under the RMA, although in case of inconsistency the regulation prevails.²⁰⁷ In order to carry out its functions, territorial authorities are also required to prepare district plans by section 72 of the RMA (subject to similar rules and procedures as those that apply to regional plans).²⁰⁸

Resource consent applications, mentioned above, are required when a particular activity is not described as a permitted activity by the Act, a regulation, a regional or district plan (or proposed plan).²⁰⁹ According to Schedule 4 to the RMA, a person applying for resource consent must provide “an assessment of environmental effects in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment”.²¹⁰ The consent authority may, at any reasonable time before the hearing (or before the decision to grant or refuse the application if there is no hearing), request the applicant to provide further information.²¹¹ Applications for resource consents must be publicly notified by the consent authority in certain situations (to be discussed below). Section 104 states that when considering an application for a resource consent and any submissions received, the consent authority must (subject to the purposes and principles of the Act) have regard to:²¹²

- (a) any actual and potential effects on the environment of allowing the activity; and
- (b) any relevant provisions of
 - (i) a national environmental standard:
 - (ii) other regulations:
 - (iii) a national policy statement:
 - (iv) a New Zealand coastal policy statement:

²⁰³ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 193; Resource Management Act 1991, ss 66–67.

²⁰⁴ In *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189 (CA), the Court of Appeal considered the extent of this power and determined that a regional council may make rules for the purpose of carrying out any of its regulatory functions. See Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 194.

²⁰⁵ Resource Management Act 1991, s 68(3).

²⁰⁶ Resource Management Act 1991, s 77(A).

²⁰⁷ Resource Management Act 1991, s 68(2).

²⁰⁸ Resource Management Act 1991, ss 72–73. In order to achieve consistency, the RMA establishes that district plans must give effect to national, coastal and regional policy statements.

²⁰⁹ Resource Management Act 1991, s 87.

²¹⁰ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 278.

²¹¹ Resource Management Act 1991, s 92(1).

²¹² Resource Management Act 1991, s 104(1).

- (v) a regional policy statement or proposed regional policy statement;
- (vi) a plan or proposed plan; and
- (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

6.3.2 ***Current opportunities for public participation under the RMA***

Looking at different jurisdictions it is hard not to conclude that public participation (at least some form of it) in environmental regulation has become more the rule than the exception.²¹³ For instance, it has been pointed out that “[p]ublic participation requirements have been embedded in virtually every important piece of environmental legislation in the United States and Canada since 1970s.”²¹⁴ Moreover, the Aarhus Convention,²¹⁵ which requires governments “to ensure public participation and access to information in all environmental decision making”, has been signed by more than 35 European countries.²¹⁶ There has also been a movement, in South Asia and China, towards different forms of public participation in the regulation of the environment.²¹⁷ New Zealand is no exception, and Nolan maintains that the RMA provides “the public a wide scope for involvement”.²¹⁸ The opportunities for popular participation provided by the RMA operate both in the preparation of planning documents and in the consideration of resource consent applications, and mainly take place through which in our Stage One chapter we identified as “mechanisms for public consultation”.²¹⁹

²¹³ For a brief history of the development of public participation approaches in environmental law see Benjamin Richardson and Jona Razzaque “Public Participation in Environmental Decision-Making” in Benjamin Richardson and Stepan Wood (eds) *Environmental Law for Sustainability: a reader* (Hart Publishing, Oxford, 2006) 165 at 168.

²¹⁴ James Creighton *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement* (Jossey-Bass, San Francisco, 2005) at 1, as cited in Thomas Dietz and Paul C Stern *Public Participation in Environmental Assessment and Decision Making* (National Academies Press, Washington (DC), 2008) at 10.

²¹⁵ The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted 25 June 1998 at the Fourth Ministerial Conference in the “Environment for Europe” process).

²¹⁶ James Creighton *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement* (Jossey-Bass, San Francisco, 2005) at 1, as cited in Thomas Dietz and Paul C Stern *Public Participation in Environmental Assessment and Decision Making* (The National Academies Press, Washington (DC), 2008) at 10.

²¹⁷ See Yuhong Zhao “Public Participation in China’s EIA Regime: Rhetoric or Reality” (2010) 22(1) JEL 89; Qun Du “Public Participation and the Challenges of Environmental Justice in China” in Jonas Ebbesson and Phoebe Okowa (eds) *Environmental Law and Justice in Context* (Cambridge University Press, Cambridge, 2009) 139; Jona Razzaque “Participatory Rights in Natural Resource Management: The Role of Communities in South Asia” in Jonas Ebbesson and Phoebe Okowa (eds) *Environmental Law and Justice in Context* (Cambridge University Press, Cambridge, 2009) 117.

²¹⁸ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 1139. For a criticism of some of these processes see Ian Williams “RMA Participation Pitfalls” (2006) 1 NZLJ 25.

²¹⁹ Consultation mechanisms are directed at obtaining “information and opinions from the

In terms of the preparation of planning documents, the process may be briefly summarised as follows. Clause 3 of Schedule 1 to the RMA establishes that in the preparation of policy statements or plans, local authorities must consult with other local authorities who may be affected, and through iwi authorities, with the tangata whenua that may be affected, with the Minister of the Environment and any other Ministers of the Crown who may be affected, and with any customary marine title group in the area.²²⁰

In preparing a policy or planning document, local authorities must “take into account” any relevant iwi management plan.²²¹ The idea is that iwi “can have their vision for environmental management expressed in the key planning documents governing the use, development, and protection of natural and physical resources in their rohe”.²²² There is no specific provision in the RMA delineating the manner in which this management plan is to be prepared. It has been suggested that the quality of the iwi management plans “depends on iwi having the resources to get legal and technical advice ... and [engaging] in RMA processes”.²²³ The proposed policy or plan is then publicly notified and a call for submissions is issued under Schedule 1, clause 5. The local authority must then publicly notify a summary of the submissions.²²⁴ Schedule 1, clause 8 gives the opportunity to make further submissions to:

- (a) any person representing a relevant aspect of the public interest;
- (b) any person that has an interest in the proposed policy statement or plan greater than the interest that the general public has; and
- (c) the local authority itself.

Clause 8 also establishes that a “further submission must be limited to a matter in support of, or in opposition to, the relevant submission made” under clause 6.

Local authorities must then hold a hearing, and give at least 10 working days’ notice of the date, time and place of the hearing to those persons making submissions and who request to be heard.²²⁵ In conducting the public hearings, the

public, with parties affected by particular regulations to have 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”: Mark Bennett and Joel Colón-Ríos “Public Participation and Regulation” in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 21 at 52.

²²⁰ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 148.

²²¹ For a discussion see Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Te Taumata Tuarua, Volume 1, 2011).

²²² Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Te Taumata Tuarua, Volume 1, 2011) at 254.

²²³ Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Te Taumata Tuarua, Volume 1, 2011) at 253.

²²⁴ Resource Management Act 1991, sch 1, cl 7.

²²⁵ Resource Management Act 1991, sch 1, cl 8B.

local authority is required to establish procedural rules that are considered appropriate and fair for the circumstances. Moreover, the RMA establishes that every person who has “made a submission and stated that they wished to be heard at the hearing, may speak (either personally or through a representative) and call evidence”.²²⁶ If no one requests to be heard, the local authority “shall consider the submissions”, but is not required to hold a hearing.²²⁷ The Act states that local authorities “must give a decision on the provisions and matters raised in submissions, whether or not a hearing is held”, and that the decision must include “the reasons for accepting or rejecting the submissions”.²²⁸ In complying with that requirement, the local authority “may address the submissions by grouping them according to — (i) the provisions of the proposed statement or plan to which they relate; or (ii) the matters to which they relate ...”.²²⁹ The decision of the local authority must be given “no later than 2 years after notifying the proposed policy statement or plan”,²³⁰ and the decision must also be publicly notified (and those who made submissions must be served with the public notice and “a statement of the time within which an appeal may be lodged by the person”).²³¹

Any person who has made a submission (written or electronic)²³² on a proposed policy statement or plan may present an appeal (on the matters specified in the submission and as long as the objective of the appeal is not the withdrawal of the policy statement or plan as a whole).²³³ Appeals are heard by the Environment Court, which “shall hold a public hearing into any provision or matter referred to it”.²³⁴ Section 274 of the RMA allows some members of the public to become parties to the proceedings (generally, persons who have an interest in the proceedings “that is greater than the interest that the general public has”, and persons who have made submissions to the local authority on the subject of the proceedings). Section 293(1) grants the Environment Court power to direct the local authority to:

- (a) prepare changes to the proposed policy statement or plan to address any matters identified by the court:
- (b) consult the parties and other persons that the court directs about the changes:
[and]
- (c) submit the changes to the court for confirmation.

In complying with the directions of the Environment Court, the local authority cannot use the procedures established in Schedule 1 (that is, the consultation and submission process).²³⁵

²²⁶ Resource Management Act 1991, s 40(1).

²²⁷ Resource Management Act 1991, sch 1, cl 8C.

²²⁸ Resource Management Act 1991, sch 1, cl 10(1) and (2).

²²⁹ Resource Management Act 1991, sch 1, cl 10(2)(a).

²³⁰ Resource Management Act 1991, sch 1, cl 10(4)(a).

²³¹ Resource Management Act 1991, sch 1, cl 11.

²³² Resource Management Act 1991, s 2.

²³³ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 1139; Resource Management Act 1991, sch 1, cl 14.

²³⁴ Resource Management Act 1991, sch 1, cl 15.

²³⁵ Resource Management Act 1991, sch 1, cl 15.

Once a planning document has become operative, the RMA allows any person to request a change (if the local authority proposes the change itself, it must use the normal procedures established in Part 1 of the Act discussed above).²³⁶ The local authority may adopt the request as if it were a proposed policy statement or plan made by the local authority itself, and in those cases it must use the normal procedure of public notification, submissions and hearings.²³⁷ It could also treat it as a resource consent application and use the procedures contained in Part 6 of the RMA (discussed below), or determine to accept the request in whole or in part and publicly notify it according to the time frames set out in the Act.²³⁸ The local authority may reject the request if it considers it frivolous or vexatious, if it has been considered within the last two years, if it is determined not to be in accordance with sound resource management practice, would make the planning document inconsistent, or if the planning document has been operative for less than two years.²³⁹

In terms of resource consent applications, the opportunities for public participation are more restricted. A consent authority must publicly notify an application²⁴⁰ only if one of the following conditions is met:²⁴¹

- (a) if it is decided that “the activity will have or is likely to have adverse effects on the environment that are more than minor”;
- (b) if the applicant requests public notification; or
- (c) if “a rule or national environmental standard requires public notification of the application”.

Section 95A(4) also establishes that “a consent authority may publicly notify an application if it decides that special circumstances exist in relation to the application”. When an application needs to be publicly notified, notice must be published in a newspaper that circulates in the area likely to be affected by the proposed activity, and notice must also be given on every person who may be adversely affected by the granting of the application, every person who owns or occupies land to which the application relates, the relevant regional council or territorial authority, any iwi authorities, local authorities, persons or bodies that the consent authority considers should have notice of the application, and any holder of a customary rights order who might be affected by the grant of a resource consent.²⁴²

²³⁶ Resource Management Act 1991, sch 1, cl 21(4).

²³⁷ Resource Management Act 1991, sch 1, cl 25(2).

²³⁸ Resource Management Act 1991, sch 1, cl 26.

²³⁹ Resource Management Act 1991, sch 1, cl 25(4).

²⁴⁰ Resource Management Act 1991, ss 87C–87I (as part of the 2009 amendments) provides applicants with the opportunity to request the consent authority for an application to be directly determined by the Environment Court.

²⁴¹ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 281.

²⁴² Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 281–282. In some cases notice must also be given to the Minister of Conservation, the Minister of Fisheries and the relevant Fish and Game Council, or the New Zealand Historic Places Trust.

In cases in which an application is publicly notified, any person may make a submission to the consent authority (with some exceptions applicable to trade competitors).²⁴³ After the submissions are received, the consent authority may invite or require the applicant and any person who has made a submission to attend a meeting (pre-hearing meeting) for the purpose of clarifying a matter or issue or facilitating the resolution of a matter or issue.²⁴⁴ Section 99(4) establishes that a person “who is a member, delegate, or officer of the authority, and who has the power to make the decision on the application that is the subject of the meeting, may attend and participate” in a pre-hearing meeting if:

- (a) the authority is satisfied that its member, delegate, or officer should be able to attend and participate; and
- (b) all the persons at the meeting agree.

The hearings are normally held within 25 working days of the closing date for submissions. When the application is publicly notified, 10 working days’ notice must be given to the applicant and all submitters (except to those who have advised that they do not wish to be heard) before the hearing takes place.²⁴⁵ Any person who has made a submission on a resource consent application may appeal to the Environment Court.²⁴⁶ As in the case of appeals on planning documents,²⁴⁷ appeals are held on a de novo basis; however, a 2005 amendment requires the Environment Court to have regard to the decision that is the subject of the appeal or inquiry.²⁴⁸

The RMA gives important strike-out powers to the consent authority (and to local authorities during hearings for planning documents): the authority may direct a submitter not to present the whole or part of a submission if it is determined to be irrelevant or not in dispute, frivolous, vexatious, that discloses no reasonable or relevant case, or would be an abuse of the process if fully heard.²⁴⁹ If the consent authority decides to exercise its strike-out powers, it must give reasons and the submitter may object and present a subsequent

²⁴³ Resource Management Act 1991, s 96(1)–(2).

²⁴⁴ Resource Management Act 1991, ss 99(1)–(2). The Marine and Coastal Area (Takutai Moana) Act 2011 restricts local authorities’ ability to grant resource consents for certain activities “affecting the exercise of customary rights”, see Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Te Taumata Tuarua, Volume 1, 2011) at 256.

²⁴⁵ Resource Management Act 1991, s 101(3).

²⁴⁶ Resource Management Act 1991, s 120.

²⁴⁷ In the context of planning documents it has been stated that “the Court is constrained by the reasonable scope of the proposed policies and rules, and the submissions. The Court is primarily a judicial body with appellate jurisdiction. It is not a planning authority with executive functions. It must consider whether any amendment goes beyond what is reasonably and fairly raised in the proposals and the submissions”: Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 227.

²⁴⁸ Resource Management Act 1991, s 290A.

²⁴⁹ Resource Management Act 1991, s 41C(7); Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 292. For a brief discussion see Ian Williams “RMA participation pitfalls” [2006] 1 NZLJ 25. See also *Lee v Bay of Plenty Regional Council* NZEnvC Tauranga A121/2005, 18 July 2005.

appeal to the Environment Court.²⁵⁰ For those applications not notified because they are determined to involve only minor effects on the environment, “only affected persons” need to be given notice and have therefore the right to make submissions (and participate in the hearings). In this respect, a lot depends on who is considered to be an “affected person” for the purposes of the Act. Section 95E(1) states that a consent authority “must decide that a person is an affected person, in relation to an activity, if the activity’s adverse effects on the person are minor or more than minor (but are not less than minor).” Nolan maintains that in determining who is an affected person, “a broad or liberal approach ought to be taken, given the principle that affected persons should be able to participate in matters which affect them”.²⁵¹

6.3.3 Public participation in environmental regulation – reasons for and against

The questions we address in this section are: In the particular context of environmental regulation, is an increase of public participation desirable?; for example, through new or reformed mechanisms for participatory decision making. Or, if, to the contrary: are the existing mechanisms of public participation sufficient to address the demands that democratic principles might place on regulation making? By asking such questions, our aim is not to reach final conclusions or correct answers about the levels of public participation appropriate in this context (for example, the preparation of policy and plan documents and applications for resource consents under the RMA), but to identify some of the issues that should be taken into consideration. In order to provide tentative answers, we consider the special reasons for and against participation in the specific context of environmental regulation.

Environmental regulation exhibits certain features that render the question of how much public participation is necessary or desirable particularly difficult. These features must be considered, not only within the objective of securing legitimacy, but also within the more general goal of achieving quality outcomes, as stressed in *Discount Brands v Westfield (New Zealand) Ltd*.²⁵²

The purposes of [the] public participatory processes [in the RMA] are twofold – first, to recognise and protect as appropriate the particular rights and interests of those affected and more general public interests and, secondly, to enhance the quality of the decision making.

²⁵⁰ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 292.

²⁵¹ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 286. See also *Quarantine Waste (NZ) Ltd v Waste Resources Ltd* [1994] NZRMA 529 (HC); *Discount Brands v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597, [2005] NZRMA 337, and the discussion in Sarah Nolan “Affected Persons under the Resource Management Act 1991” (2007) 13(1) Canterbury L Rev 121. More generally see Robert Goodin “Enfranchising All Affected Interests, and Its Alternatives” (2007) 35(1) *Philosophy & Public Affairs* 40.

²⁵² *Discount Brands v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597, [2005] NZRMA 337 at [46].

First, one must begin by recognising that environmental issues are “complex, laden with scientific and technical detail”, and frequently demand a level of technical expertise which ordinary citizens do not possess.²⁵³ Scientific and technical expertise, thus, plays a fundamental role in a sound environmental policy. While this points towards privileging technical knowledge over public input, decisions about the environment at the same time “present very complex choices about interests and values, so that the choices are political, social, cultural, and economic”.²⁵⁴

In other words, delegating too much power to experts might lead a regulator to overlook issues and objectives that are critical to some groups and individuals.²⁵⁵ Moreover, there is a significant amount of literature about the ways in which “local knowledge” might serve as “a corrective to a scientific or technical analysis that misrepresented the local context in which it was being applied”.²⁵⁶ According to Dietz and Stern, in order to be fully informed and make the best possible decisions, it is necessary to find ways of linking “scientists with members of the public who possess needed information in ways that enhance the quality of information available while preserving the integrity of the scientific method”.²⁵⁷ Environmental decision making processes should also integrate science and public deliberation “to ensure that the science is judged to be decision relevant and credible by the range of parties interested in or affected by the decisions”.²⁵⁸ For example, even if a scientific analysis is able to accurately identify a particular risk, the acceptable level of risk (for a specific community or society) is a political, not a scientific, question.²⁵⁹

²⁵³ Thomas Dietz and Paul C Stern *Public Participation in Environmental Assessment and Decision Making* (National Academies Press, Washington (DC), 2008) at 7.

²⁵⁴ Thomas Dietz and Paul C Stern *Public Participation in Environmental Assessment and Decision Making* (National Academies Press, Washington (DC), 2008) at 7–8.

²⁵⁵ Thomas Dietz and Paul C Stern *Public Participation in Environmental Assessment and Decision Making* (National Academies Press, Washington (DC), 2008) at 8.

²⁵⁶ Thomas Dietz and Paul C Stern *Public Participation in Environmental Assessment and Decision Making* (National Academies Press, Washington (DC), 2008) at 50. For examples of how public involvement have been fundamental in scientific analysis of environmental issues see Brian Wynne “Sheepfarming after Chernobyl: A Case Study in Communicating Scientific Information” (1989) 31(2) *Environment* 10–15 and 33–39; Phil Brown and Edwin Mikkelsen *No Safe Place: Toxic Waste, Leukemia, and Community Action* (University of California Press, Los Angeles, 1990). More generally see Konrad Ginther and others (eds) *Sustainable Development and Good Governance* (Martinus Nijhoff, London, 1995).

²⁵⁷ Thomas Dietz and Paul C Stern *Public Participation in Environmental Assessment and Decision Making* (National Academies Press, Washington (DC), 2008) at 56.

²⁵⁸ Garry D Brewer and Paul C Stern (eds) *Decision Making for the Environment: Social and Behavioral Science Research Priorities* (National Academies Press, Washington (DC), 2005) at 2; see also Martin Welp, Bernd Kasemir and Carlo C Jaeger “Citizens’ Voices in Environmental Policy: The Contribution of Integrated Assessment Focus Groups to Accountable Decision-Making” in Frans Coenen (ed) *Public Participation and Better Environmental Decisions: The Promise and Limits of Participatory Processes for the Quality of Environmentally Related Decision-making* (Springer Netherlands, Dordrecht, 2008) 21.

²⁵⁹ Benjamin Richardson and Jona Razzaque “Public Participation in Environmental Decision-Making” in Benjamin Richardson and Stepan Wood (eds) *Environmental Law for Sustainability: a reader* (Hart Publishing, Oxford, 2006) 165 at 171; Paul Slovic *The Perception of Risk* (Earthscan, Oxford, 2000).

Naturally, there is a sense in which environmental regulation depends on expert knowledge: experts are frequently the ones who identify particular environmental problems in the first place.²⁶⁰ The best example is stratospheric ozone depletion, identified by a small number of experts, and then communicated to the wider public.²⁶¹

This notwithstanding, and in contrast with the relatively precise fields of physics and engineering, “[e]nvironmental decisions usually involve a great deal of uncertainty about facts.”²⁶² Since environmental science deals with systems that are “complex, adaptive, and fraught with indeterminacies”, it is thus unable to anticipate the exact consequences of different decisions.²⁶³ The above does not necessarily mean that environmental regulators must defer to people’s values. To begin with, when it comes to values, disagreement is inevitable. Moreover, values may conflict with what appears to be sound environmental science and can also be uncertain.²⁶⁴ As Dietz has argued, even leaving aside the general problem of aggregating individual values,²⁶⁵ some environmental problems create uncertainty in the very values of individuals. That is to say, some environmental issues, such as questions related to genetically modified plants, force people to consider issues that are highly removed from their daily life, and they are thus not able to reach a position just by appealing to what they normally see as right or wrong.²⁶⁶

Second, although it has been suggested that “[o]pening decision making processes can reduce the risk of agency ‘capture’ by their industry clientele”,²⁶⁷ the problem of special interest capture is particularly relevant in the context of participation in environmental regulation. “Public participation requires both standing, (ie the right to

²⁶⁰ Sally Eden “Public Participation in Environmental Policy: Considering Scientific, Counter-Scientific and Non-Scientific Contributions” (1996) 5(3) *Public Understanding of Science* 183 at 187.

²⁶¹ Sally Eden “Public Participation in Environmental Policy: Considering Scientific, Counter-Scientific and Non-Scientific Contributions” (1996) 5(3) *Public Understanding of Science* 183 at 187.

²⁶² Thomas Dietz “What is a Good Decision? Criteria for Environmental Decision-Making” (2003) 10(1) *Human Ecology Review* 33 at 34. See also Committee on Research Opportunities and Priorities for EPA and others *Building a Foundation for Sound Environmental Decisions* (National Academies Press, Washington (DC), 1997) at 9.

²⁶³ Thomas Dietz “What is a Good Decision? Criteria for Environmental Decision-Making” (2003) 10(1) *Human Ecology Review* 33 at 34. See also Committee on Risk Characterization, National Research Council *Understanding Risk: Informing Decisions in a Democratic Society* (National Academies Press, Washington (DC), 2005).

²⁶⁴ Thomas Dietz “What is a Good Decision? Criteria for Environmental Decision-Making” (2003) 10(1) *Human Ecology Review* 33 at 35.

²⁶⁵ On this point the classic work is Kenneth Arrow *Social Choice and Individual Values* (John Wiley and Sons, New York, 1951).

²⁶⁶ Thomas Dietz “What is a Good Decision? Criteria for Environmental Decision-Making” (2003) 10(1) *Human Ecology Review* 33 at 35.

²⁶⁷ Benjamin Richardson and Jona Razzaque “Public Participation in Environmental Decision-Making” in Benjamin Richardson and Stepan Wood (eds) *Environmental Law for Sustainability: a reader* (Hart Publishing, Oxford, 2006) 165 at 172; Michael Levine and Jennifer Forrence “Regulatory Capture, Public Interest and the Public Agenda: Toward a Synthesis” (1990) 6 *Journal of Law, Economics, and Organisation* 167.

participate), and resources, (ie time, money, information and advice).”²⁶⁸ That means that even if all citizens (as in the case of policy and planning documents and publicly notified resource consent applications under the RMA) have the right to participate in a public hearing, they might not be able to meaningfully exercise that right in the absence of sufficient resources. Conversely, the right to public participation allows well funded groups to influence decision making processes, even if far from representing the *public interest* they represent corporate or other private interests. For example, in the context of the RMA, it has been argued that there are important imbalances of power between corporate organisations and individuals, and this results in a disparity of access to expert knowledge and other information necessary to effectively influence the decision making process.²⁶⁹

Third, the possibility of special interest capture is not only a matter of resources, but it is related to the problem of apathy; that is, the frequent lack of interest of the public in taking part in environmental decision making and the resulting dominance of the participatory process by a few groups or individuals. In our Stage One chapter we discussed some of the literature around the problem of apathy, present not only in the context of environmental regulation, but in political decision making in general.²⁷⁰ In the specific context of the RMA, apathy is linked to the lack of awareness of the available mechanisms of public participation and might also have institutional causes. As early as 1996, a report prepared by the Parliamentary Commission for the Environment stated that one of the main barriers to public participation identified by submitters (who responded to a discussion document), was “the public’s lack of awareness of RMA procedures and failure to recognise the importance of becoming involved as early as possible in the planning process” (whether this is still true is unclear, but it suggests that apathy, more than simply being a result of a lack of interest, might

²⁶⁸ Office of the Parliamentary Commissioner for the Environment *Public Participation under the Resource Management Act 1991: The Management of Conflict* (December, 1996) at 70–71, available at <www.pce.parliament.nz>.

²⁶⁹ For example, decisions of the Environment Court can be greatly influenced by experts: “From the statistical analyses of the Environmental Court decisions, the influence of experts on the outcomes of cases they are involved in is quite clear. Individual and public interest groups have a much greater chance of convincing the court of their argument and consequently winning if they have experts presenting evidence. Both the simple and complex statistics show the same result – the likelihood of losing is far greater for the part with fewer experts. And it is not only a matter of experts but of approximately matching the number of experts appearing for the opposition. Having one expert on a topic up against a bank of experts on the other side only slightly lessens the odds.”: Ong Su-Wuen “A Question of Fairness: The Influence of Experts at the Environment Court and the Difficulties Gaining Access to Them” (Research paper submitted to Victoria University of Wellington in partial fulfillment of the requirements for the Degree of Master of Public Policy) (Victoria University of Wellington, Wellington, 2000), as quoted in David Young *Values as Law: The History and Efficacy of the Resource Management Act* (Institute of Policy Studies, Wellington, 2001) at 77; Office of the Parliamentary Commissioner for the Environment *Public Participation under the Resource Management Act 1991: The Management of Conflict* (December, 1996) at 2, available at <www.pce.parliament.nz>.

²⁷⁰ See Mark Bennett and Joel Colón-Ríos “Public Participation and Regulation” in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 21.

have other underlying causes).²⁷¹ This last problem (that is, the importance of public involvement in the planning stage) will be considered in the next section.

Fourth, the fact that the solution to many environmental problems depends on changes in the behaviour of ordinary citizens, not just governments and corporations, may make public involvement an important part of any attempt to increase compliance.²⁷² The activities of individuals and groups “have major environmental consequences in the aggregate”, and as such “considerable environmental improvement can in principle result from change in their behaviour”.²⁷³ In these instances, in which the goal of environmental regulation is to change the behaviour of individuals and households, an increase of public participation might be desirable. As we noted in our Stage One chapter, there are important correlations between compliance levels and public involvement in the making of the particular regulations. It has been shown, for example, that one of the motivations for complying with environmental regulation “comes from regulated entities’ combined sense of moral duty and agreement with the importance of a given regulation”.²⁷⁴ Such “normative commitment”²⁷⁵ might partly emerge from the participation of those regulated in the making of the relevant regulations.

Fifth, there is the question of accountability. Public involvement is commonly seen by regulation theorists as a means of increasing the accountability of the regulator by giving citizens the ability to act as a check on its decisions.²⁷⁶ As noted by Sarah Nolan when commenting on the New Zealand Supreme Court’s decision in *Discount Brands v Westfield (New Zealand) Ltd*:²⁷⁷

Resource management and environmental law essentially regulate [the] private rights [of absolute use and enjoyment in one’s own property] in the public interest ... [p]ublic participation can act as a constraint on the excesses of regulation by central and local government, and can help to ensure that the rights of property owners are recognised and are not unjustifiably restricted.²⁷⁸

In other words, participation in environmental regulation might limit the power of public authorities, and this control might result in better outcomes and more

²⁷¹ Office of the Parliamentary Commissioner for the Environment *Public Participation under the Resource Management Act 1991: The Management of Conflict* (December, 1996) at 1, available at <www.pce.parliament.nz>.

²⁷² See Sally Eden “Public Participation in Environmental Policy: Considering Scientific, Counter-Scientific and Non-Scientific Contributions” (1996) 5(3) *Public Understanding of Science* 183.

²⁷³ Garry D Brewer and Paul C Stern (eds) *Decision Making for the Environment: Social and Behavioral Science Research Priorities for Environmental Decision Making* (National Academies Press, Washington (DC), 2005) at 5.

²⁷⁴ Søren C Winter and Peter J May “Motivation for Compliance with Environmental Regulations” (2001) 20(4) *Journal of Policy Analysis and Management* 675 at 677.

²⁷⁵ Søren C Winter and Peter J May “Motivation for Compliance with Environmental Regulations” (2001) 20(4) *Journal of Policy Analysis and Management* 675 at 677.

²⁷⁶ See, for example, Neil Gunningham, Peter Grabosky and Darren Sinclair *Smart Regulation: Designing Environmental Policy* (Oxford University Press, New York, 1998) at 96 and 256.

²⁷⁷ *Discount Brands v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597, [2005] NZRMA 337.

²⁷⁸ Sarah Nolan “Affected Persons under the Resource Management Act 1991” (2007) 13(1) *Canterbury L Rev* 121 at 122.

reasoned decision making.²⁷⁹ The question of accountability is thus also connected with that of transparency, and with the idea that environmental “[d]ecision-makers must make their reasoning understandable and public, including the reasons why they have rejected the views of an interested party”.²⁸⁰ Moreover, the increase in accountability has also been linked by some authors to the acceptability of environmental decisions and, consequently, to a decrease in litigation.²⁸¹

Finally, there is the question of time and cost to governments and developers; there are also costs to participants, and these will be considered in the next section. In the context of environmental regulation, it has been suggested that “[t]he main criticism of public participation is that it is expensive, obstructive and prolongs the decision making process and hence postpones development”.²⁸² In fact, environmental law frequently prioritises speed in decision making and reduces the opportunity for public participation when this may make the decision making “too slow or cumbersome”.²⁸³ The prospect of litigation is also an important factor in terms of prompt decision making, and a reduction in litigation would go a long way in shortening many environmental decision making processes. Given the importance of time and cost considerations, it is not surprising that the purpose of the 2009 amendments to the RMA, the Resource Management (Simplifying and Streamlining) Amendment Act 2009, was described as “reducing the costs, reducing the delays, and reducing the uncertainties of the Act without compromising its underlying environmental integrity”.²⁸⁴

These amendments (whose content is reflected in the preceding description of the RMA and its mechanisms of public participation) had the effect of reducing the number of cases in which resource consent applications are to be publicly notified, as well as the types of persons with standing in the Environment Court.²⁸⁵ In contrast with the approach reflected in the 2009 amendments, some authors argue that even though public participation slows environmental decision making, one of its underlying rationales is the production of “socially acceptable environmental results” and therefore an increase in compliance and a decrease in litigation.²⁸⁶

²⁷⁹ See Ian Ayres and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York, 1992).

²⁸⁰ See Elizabeth Toomey “The Theoretical Underpinnings of Resource Management Act Participation” in New Zealand Law Society *Resource Management Act: Strategic engagement under the RMA – public and clients* (New Zealand Law Society, July 2011) 57 at 71.

²⁸¹ See David Wirth “Public Participation in International Processes: Environmental Case Studies at the National and International Levels” (1996) 7(1) *Colo J Int’l Envtl L & Pol’y* 1.

²⁸² Jukka Similä, Aino Inkinen and Jonathan Tritter “Public Participation by Appeal—Insights from Empirical Evaluation in Finland” (2008) 20(3) *JEL* 391 at 397.

²⁸³ Elizabeth A Kirk and Kirsty L Blackstock “Enhanced Decision Making: Balancing Public Participation against ‘Better Regulation’ in British Environmental Permitting Regimes” (2011) 23(1) *JEL* 97 at 100.

²⁸⁴ (8 September 2009) 657 NZPD 6133 (comment by Minister of the Environment at the Bill’s second reading).

²⁸⁵ For a discussion see Elizabeth Toomey “The Theoretical Underpinnings of Resource Management Act Participation” in New Zealand Law Society *Resource Management Act: Strategic engagement under the RMA – public and clients* (New Zealand Law Society, July 2011) 57 at 68.

²⁸⁶ Benjamin Richardson and Jona Razzaque “Public Participation in Environmental Decision-Making” in Benjamin Richardson and Stepan Wood (eds) *Environmental Law for Sustainability: a reader*

Moreover, it can be argued that participation in environmental policy might reduce *error costs*, as members of the public might have information that otherwise would not be accessible to the decision maker.²⁸⁷

6.3.4 Evaluation of existing mechanisms; proposed mechanisms

As suggested earlier, and as can be seen in the diagram below, the opportunities for public participation in the preparation of policy and plan documents, and in resource consent applications, can be generally described as taking place through the mechanism of public consultation. That is to say, participants are allowed to express their views in a public hearing, to have their opinions and interests considered by a decision maker, and in some cases to obtain evidence and information from it. Accordingly, the content of policy and plan documents or decisions about resource consent applications might be improved in important ways, and *might* end up reflecting the views and preferences of those that participate in the submission and hearing process. These processes might also have some positive effects in citizens, as they might gain a sense of environmental responsibility and civic duty by having the opportunity to voice their views (and listen to the views of other citizens) about the use of the country’s natural resources in a public venue, and learn about the environmental issues faced by their society (which might result in some behaviour change).²⁸⁸ Nevertheless, as can be observed below, decision making remains exclusively with the official regulator, and participants’ ability to influence the process, particularly those participants which lack economic resources and access to experts, is relatively limited.

Figure 6.6: Spectrum of authority: preparation of planning documents and resource consent applications under the RMA



Source: Archon Fung²⁸⁹

In this section, we examine whether the already existing mechanisms are suitable to deal with the special reasons for and against public participation in

(Hart Publishing, Oxford, 2006) 165 at 179; William Tilleman “Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community” (1995) 33 Colum J Transnat’l L 337.

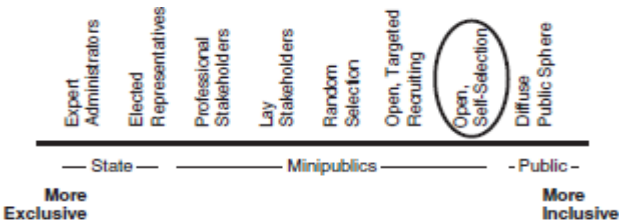
²⁸⁷ Sarah Nolan “Affected Persons under the Resource Management Act 1991” (2007) 13(1) Canterbury L Rev 121 at 123.

²⁸⁸ See John Ronald Engel *The Faith of Democratic Ecological Citizenship* (The Hastings Centre Report 28(6), November 1998) s 31; Frans Coenen “Introduction” in Frans Coenen (ed) *Public Participation and Better Environmental Decisions: The Promise and Limits of Participatory Processes for the Quality of Environmentally Related Decision-making* (Springer Netherlands, Dordrecht, 2008) 1 at 2.

²⁸⁹ Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 PAR 66 at 69–70.

environmental regulation. We begin by considering the available mechanisms for public involvement in the preparation of planning documents. The Local Government and Environment Committee, in its Select Committee Report, noted that “the most important time for public participation is at the plan development stage”.²⁹⁰ Similarly, in 2000, the Ministry for the Environment published a report that stated that iwi management plans (mentioned earlier), may help iwi “get out of the situation of continually reacting to resource consent applications or environmental problems that affect land and resources within their rohe”.²⁹¹ Nevertheless, it has also been shown that “the public tend only to become involved in decision making when they understand the impact of the issue on their lives, which tend to be at the operational stage rather than at strategic planning stages”, and it is thus not surprising that public participation in the preparation of planning documents is not generally as high as it could (or should) be.²⁹² One of the main problems operating here can be identified as one of apathy: ordinary people will not normally be interested in taking part in a public hearing unless they feel directly affected by the decisions at issue. This, of course, opens the way for the possibility of special interest capture, as privately oriented groups and organisations might be in a better position to appreciate the importance of planning documents, and also are more likely to have the time and resources to effectively participate in the consultation process. To deal with these problems, one must look at the selection process that applies in the context of public hearings. As shown below, the selection process for a clause 8B (Schedule 1) public hearing is highly inclusive, and could be categorised as open, with the qualification that participants must make a written submission and ask to be heard in order to be eligible.

Figure 6.7: Mode of selection – clause 8B (Schedule 1) public hearings



²⁹⁰ Elizabeth Toomey “The Theoretical Underpinnings of Resource Management Act Participation” in New Zealand Law Society *Resource Management Act: Strategic Engagement under the RMA – Public and Clients* (New Zealand Law Society, July 2011) 57 at 70.

²⁹¹ See Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Te Taumata Tuarua, Volume 1, 2011) at 254.

²⁹² Elizabeth A Kirk and Kirsty L Blackstock “Enhanced Decision Making: Balancing Public Participation against ‘Better Regulation’ in British Environmental Permitting Regimes” (2011) 23(1) JEL 97 at 100. One respondent to a discussion document prepared by the Parliamentary Commissioner for the Environment stated that the public “generally only become involved when an issue directly affects them – usually at the consent level and often when the activity concerned is permitted or controlled under the plan”: Office of the Parliamentary Commissioner for the Environment *Public Participation under the Resource Management Act 1991: The Management of Conflict* (December, 1996) at A22, available at <www.pce.parliament.nz/>.

As noted earlier, in terms of public participation, such a selection process might be counter-productive, as it favours the participation of those driven primarily by private interests and with the means of taking part in it (not only as regards access to information and technical expertise, but also to the ability to spend time working on a written submission, being away from work, and attending public hearings). Therefore, it seems that the main mechanism of public participation available in the context of the preparation of policy statements or plans, while open to everyone, could be improved in important ways. An alternative mode of selection, which would not radically alter the functioning of a public hearing, would be for a number of lay participants to be randomly selected from the relevant population (for example, national/regional or territorial in the case of district plans – where this mechanism could also be used). These citizens, whose number could range from 10 to 20, would form a citizen's jury.²⁹⁴ The idea would be for them to sit in on the public hearing, and then meet a number of times as a separate group, to deliberate about the proposed plan (and about the submissions presented at the hearing), and issue a set of recommendations (to which the local authority must respond by giving their reasons for the decision (this would add an important degree of transparency to the process).

This mechanism – a supplement to, rather than a replacement of, the existing submission and public hearing process²⁹⁵ – would at least have some impact on the problem of apathy and special interest capture, which would normally suggest that an increase in opportunities for public participation might be unnecessary or undesirable. It would provide the opportunity to participate in the preparation of planning documents to citizens that would not have otherwise be interested in the process. Moreover, since they would be selected randomly, their views are likely to more or less reflect the views present among society at large. As noted earlier, however, many environmental issues, including questions about the use of natural resources, involve technical questions and require giving a special role to experts. A citizen jury would be normally composed of lay citizens who would likely lack the necessary technical and scientific knowledge to form informed opinions on different issues. This is why they should be given access to different sources of

²⁹³ Archon Fung "Varieties of Participation in Complex Governance" (2006) 66 PAR 66 at 68.

²⁹⁴ For a discussion of the general characteristics of a citizen jury see Mark Bennett and Joel Colón-Ríos "Public Participation and Regulation" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 21 at 62. Citizen Juries have in fact been used with success in different areas of environmental regulation. See Brendan Flynn "Planning Cells and Citizen Juries in Environmental Policy: Deliberation and Its Limits" in Frans Coenen (ed) *Public Participation and Better Environmental Decisions: The Promise and Limits of Participatory Processes for the Quality of Environmentally Related Decision-making* (Springer Netherlands, Dordrecht, 2008) 57.

²⁹⁵ Citizen juries could also be convened in those cases in which a local authority proposes a change to the planning documents, or when the local authority adopts the request as if it were a proposed policy statement or plan made by the local authority itself (according to sch 1, cls 21–25 of the Resource Management Act 1991, in both of these cases the local authority must use the normal Schedule 1 public hearings procedures).

information, including the opportunity to listen to and question experts. Since they would have the opportunity to deliberate before presenting a recommendation, participants would be able to consider the views of experts in light of their own experiences and values.

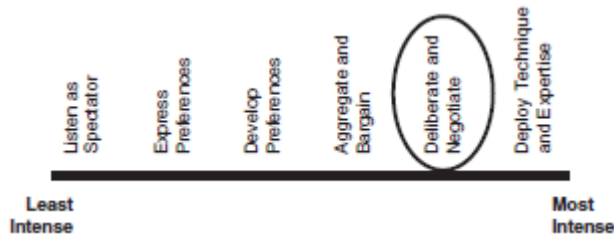
The major drawback of this mechanism (and of citizen juries in general), is that of time and cost (that is, jurors are usually paid for their participation and they would usually meet more than once).²⁹⁶ The question of whether its direct potential benefits (more acceptable and higher quality outcomes, an increase of the public interest in environmental issues and an increase in regulatory accountability) outweigh those costs is a difficult one, but it should be considered together with the general goal of achieving regulatory legitimacy. In terms of the spectrum of authority (represented in Figure 6.2 above), the citizen jury should still be a mechanism of public consultation, in the sense that the final authority to make decisions lies with the regulator and not with the citizen jury or the general public.²⁹⁷ However, to the extent that it involves deliberation among its members, the citizen jury (unlike the traditional public hearing not supplemented by it), would not only allow participants to express their preferences, but also to develop them (through the discussion with experts and other citizens). It must be noted, however, that even though there are no provisions in the RMA requiring deliberation among participants in a public hearing or for direct dialogue among parties, “holding a hearing does not preclude informal communication between parties to resolve the conflict”.²⁹⁸ Nevertheless, in terms of formal requirements of deliberation and dialogue, the public hearing supplemented by a citizen jury would amount to a somewhat more intense mode of communication.

²⁹⁶ Brendan Flynn “Planning Cells and Citizen Juries in Environmental Policy: Deliberation and Its Limits” in Frans Coenen (ed) *Public Participation and Better Environmental Decisions: The Promise and Limits of Participatory Processes for the Quality of Environmentally Related Decision-making* (Springer Netherlands, Dordrecht, 2008) 57 at 58. Flynn estimated the total cost of a citizen jury as ranging between £12,000 and £400,000.

²⁹⁷ An exception could be made in highly exceptional cases, for example, a situation in which a particular proposal, such as a plan change, is determined to have national significance and the Minister of the Environment decides to exercise its call-in power. In this case, instead of the processes established by s 140 of the RMA (decision made by the Environment Court or by a Board of Inquiry) a citizen jury of randomly selected citizens from around the country could be convened and, in some cases, it might even be appropriate to put a particularly controversial proposal through referendum. In fact, s 142(3) of the RMA establishes that “[i]n deciding whether a matter is, or is part of, a proposal of national significance, the Minister may have regard to— (a) any relevant factor, including whether the matter— (i) has aroused widespread public concern or interest regarding its actual or likely effect on the environment (including the global environment)...”. In cases in which this has been the determining factor as to whether a matter is of national significance, participatory opportunities would become particularly relevant. A similar approach could be relevant in the case of the preparation of national policy statements, which according to ss 46–50 of the RMA, also involve a submission and public hearing process similar to the one used in the context of the adoption of planning documents.

²⁹⁸ Office of the Parliamentary Commissioner for the Environment *Public Participation under the Resource Management Act 1991: The Management of Conflict* (December, 1996) at 3, available at <www.pce.parliament.nz/>.

Figure 6.8: Spectrum of communication: public hearing supplemented by a citizen jury



Source: Archon Fung²⁹⁹

There are of course much more modest proposals that could improve public participation in the making of planning documents.³⁰⁰ For example, it has been suggested that planning documents could be made much shorter and less complex, a change that is likely to make participation more accessible to citizens and facilitate, rather than hinder, public scrutiny of proposed planning documents (even if the traditional submission and public hearing process is kept intact).³⁰¹ Moreover, the 2009 amendments limited the right to make further submissions under clause 8 to persons who could show an interest “greater than the public generally”. This change, by limiting the number of persons that may make further submissions and are, therefore, able to request to be heard at a public hearing, affect in negative ways the participatory rights under the RMA.³⁰² In terms of appeal rights, the 2009 amendments abolished the ability to present appeals that challenge entire plans or policy statements, and also removed the ability of a “person representing a relevant aspect of the public interest to become a party to proceedings before the Environment Court”. At present, only the Attorney-General can represent the public interest.³⁰³ While litigation might not be the most appropriate means for public involvement, and while a reason for having wide opportunities to public participation is to increase the acceptability of decisions and therefore reduce the prospects of litigation, in the absence of more participatory opportunities, this change also negatively impacts the ability of the public to take part in environmental regulation making and to challenge the decisions of the relevant authorities.

²⁹⁹ Archon Fung “Varieties of Participation in Complex Governance” (2006) 66 PAR 66 at 69.

³⁰⁰ See generally Jan Crawford “More Effective Policy and Plans” in *Beyond the RMA – An in-depth exploration of the Resource Management Act 1991* (Environmental Defence Society, 2007).

³⁰¹ Benjamin Richardson and Jona Razzaque “Public Participation in Environmental Decision-Making” in Benjamin Richardson and Stepan Wood (eds) *Environmental Law for Sustainability: a reader* (Hart Publishing, Oxford, 2006) 165 at 193. Office of the Parliamentary Commissioner for the Environment *Public Participation under the Resource Management Act 1991: The Management of Conflict* (December, 1996) at 14, available at <www.pce.parliament.nz/>.

³⁰² Elizabeth Toomey “The Theoretical Underpinnings of Resource Management Act Participation” in New Zealand Law Society *Resource Management Act: Strategic engagement under the RMA – public and clients* (New Zealand Law Society, July 2011) 57 at 67.

³⁰³ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 1145; Resource Management Act 1991, s 274(1) and sch 1, cl 14(2).

Turning our attention to the existing participatory processes in resource consent applications, we begin by examining public notification. The RMA provides the local authority with the ability of dealing with some applications in a non-notified basis (and according to the select committee report from the Local Government and Environment Committee “approximately 95 per cent of resource consents are processed without public notification”),³⁰⁴ and consequently gives the local authority the right to determine the amount of public involvement. The 2009 amendments removed “the presumption that applications must be notified, unless for a controlled activity or where adverse effects were minor”,³⁰⁵ and replaced it with section 95A, which gives the local authority the discretion not to notify subject to certain provisions (mentioned earlier). When the local authority decides not to notify an application, no person has standing to challenge that decision in the Environment Court. While there have been many attempts to bring judicial review proceedings against the consent authority, the High Court has been unwilling to overturn decisions not to notify unless, according to general principles of judicial review, it is satisfied that the consent authority acted unreasonably, irrationally, took irrelevant matters into account or failed to take relevant matters into account.³⁰⁶

As noted above, the purpose of the amendments made by the Resource Management (Simplifying and Streamlining) Amendment Act 2009 was directly connected to the issues of time and cost, as exemplified in the statement by the Minister of the Environment during the Bill’s second reading:³⁰⁷

We want to consign to history the notion that it takes longer to get a resource consent for a piece of infrastructure than it takes to actually build it. ... The Government wants to give council officials much more discretion when the effects of a resource consent are minor. We want to simplify the decision making, but we also want to hold the councils to account for processing consents in a timely way.

From the perspective of public participation, this creates a number of problems. First, when an application is not notified, “groups or individuals who see themselves as acting ‘in the public interest,’ but who are not directly affected by a proposal, are prevented from participating”³⁰⁸ in the hearing, from making submissions, or from

³⁰⁴ Elizabeth Toomey “The Theoretical Underpinnings of Resource Management Act Participation” in New Zealand Law Society *Resource Management Act: Strategic engagement under the RMA – public and clients* (New Zealand Law Society, July 2011) 57 at 68.

³⁰⁵ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 281.

³⁰⁶ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 287. For example, in *Urban Auckland Society for the Protection of Auckland City and Waterfront Inc v Auckland City Council* [2005] NZRMA 155 (HC), it was decided that the decision not to notify was unreasonable as the council had failed to pay proper attention to the design and size of a tower block and thus “lacked full information from which to make a fully reasoned decision as to the potential effects of the development”. Sarah Nolan “Affected Persons under the Resource Management Act 1991” (2007) 13(1) *Canterbury L Rev* 121 at 130.

³⁰⁷ (8 September 2009) 657 NZPD 6133 (comment by Minister of the Environment at the Bill’s second reading).

³⁰⁸ Office of the Parliamentary Commissioner for the Environment *Public Participation under the*

challenging the determination of the consent authority in the Environment Court. Second, there might be reasonable disagreements as to what counts as an activity that will have “adverse effects on the environment that are more than minor” (that is, the principal criterion that the consent authority is required to apply to determine whether the application must be publicly notified). Put differently, the public might have special insights as to what types of hazards are presented by an application and “may help identify potential impacts of the proposal”,³⁰⁹ but the Act allows that decision to be made by the consent authority without public involvement.

Since requiring all resource consent applications to be publicly notified would have clear adverse effects in terms of time and cost,³¹⁰ one way of dealing with this problem is to design a mechanism that gives the public the final decision as to whether an application should be notified.³¹¹ This could be done through allowing a citizen or group of citizens (who or which would understand that a particular proposal will have more than minor effects on the environment but would not fall under the “affected person” category) to collect signatures, which, when presented to the consent authority, would create a legal duty to publicly notify a resource consent application. Once the public notification takes place, the submission and hearing process would operate as in any other case. Such a mechanism could be seen as giving citizens a degree of “direct authority” over one aspect of resource management. It would create, as Sarah Nolan has suggested, a “form of wider notification in situations where the public interest in an application is high”,³¹² but where the consent authority does not believe the application would have more than minor adverse effects in the environment. To a certain extent, this mechanism could function without any formal amendment of the RMA, as section 95A allows a consent authority to “publicly notify an application if it decides that *special circumstances* exist in relation to the application” (emphasis added). It would require, however, that the “special circumstances” include “circumstances in which the consent authority considers that there is a high level of public interest in the application which justifies it being publicly notified”.³¹³

Resource Management Act 1991: The Management of Conflict (December, 1996) at 26, available at <www.pce.parliament.nz/>.

³⁰⁹ Benjamin Richardson and Jona Razzaque “Public Participation in Environmental Decision-Making” in Benjamin Richardson and Stepan Wood (eds) *Environmental Law for Sustainability: a reader* (Hart Publishing, Oxford, 2006) 165 at 179.

³¹⁰ In fact, the Supreme Court in *Westfield (NZ) Ltd v North Shore City Council* [2005] NZSC 17 at [167] expressed that it could be “quite inappropriate” in terms of common sense and practicality to notify all applications. See Sarah Nolan “Affected Persons under the Resource Management Act 1991” (2007) 13(1) *Canterbury L Rev* 121 at 127.

³¹¹ Section 77D of the RMA allows a local authority to include in plans Rules specifying activities for which consent applications must be notified or are precluded from being notified. In that respect, the possibility of public involvement in the creation of plan proposals is highly relevant to the problem of public notification.

³¹² Sarah Nolan “Affected Persons under the Resource Management Act 1991” (2007) 13(1) *Canterbury L Rev* 121 at 150.

³¹³ Sarah Nolan “Affected Persons under the Resource Management Act 1991” (2007) 13(1) *Canterbury L Rev* 121 at 150.

Beyond developing alternative participatory mechanisms, certain aspects of the RMA may adversely affect the interest and the ability of public participation in resource consent applications, as well as in the preparation of planning documents. On the one hand, there is the problem of cost to participants themselves. As Richardson and Razzaque have noted, costs to participants include “gaining access to information, preparing submissions, attending hearings and litigating”.³¹⁴ An Environmental Legal Aid Fund was made available in 2000 to provide access to the Environment Court (even though it is only available to non-profit groups and not to individuals);³¹⁵ but the costs related to participating in public hearings and making submissions puts formally available mechanisms out of the scope of many citizens. On the other hand, there is the risk of costs awards against unsuccessful parties, which might serve as a deterrent for an individual or groups to challenge the decisions of the local authorities in the Environment Court.³¹⁶ Costs can be awarded, for example, in circumstances in which “an argument was advanced without substance” or for frivolous or vexatious proceedings.³¹⁷

6.3.5 Conclusion

This section has discussed the reasons for and against increased public participation in environmental regulation, focusing on the RMA. Given the inevitability of the political character of many environmental decisions, and even though there are different mechanisms of public participation available (which can be generally described as public consultation mechanisms) both in the context of resource consent applications and the development of planning documents, we suggest that there is room for creating new opportunities and more intense forms of participation. In terms of the development of planning documents, our discussion has focused on citizen juries composed of randomly selected citizens, as it is a mechanism that will partly deal with the problem of apathy and special interest capture. Rather than replacing the existing submission and public hearing processes, we maintain that this mechanism should be complementary to those processes. In terms of resource consent applications, we suggest that the current criteria for determining which applications are to be publicly notified might negatively affect the ability of certain groups to participate in the process, and deprive the regulator of insights that might not be otherwise available. We suggest that a way of dealing with this problem would be a mechanism that gives a number of citizens the power to require the local authority to publicly notify a resource consent application.

³¹⁴ Benjamin Richardson and Jona Razzaque “Public Participation in Environmental Decision-Making” in Benjamin Richardson and Stepan Wood (eds) *Environmental Law for Sustainability: a reader* (Hart Publishing, Oxford, 2006) 165 at 193.

³¹⁵ Ministry for the Environment “Funding sources: Environmental Legal Assistance Fund”, available at <www.mfe.govt.nz>.

³¹⁶ See Ian Williams “RMA Participation Pitfalls” [2006] 1 NZLJ 25; Resource Management Act 1991, s 285.

³¹⁷ Derek Nolan *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) at 1164–1166.

6.4 Key considerations for determining appropriate public participation in regulatory decision-making

What have we learned about public participation from looking at these specific areas of regulation in the above case studies? In this section we present some general conclusions on what these examples tell us about the reasons for and mechanisms of participation, and suggest some key considerations that regulators may use to determine whether and how to provide for increased public participation in their decisions. Of course, all mechanisms by which increased public participation is secured carry costs of time and money. Regulators will have to factor these costs into the decision whether increased participation is desirable. However, many of the reasons for and benefits of participation – especially legitimacy, accountability and democracy – are not easily valued in dollar terms. Different views can be taken about the contribution of public participation to these values, and this will be reflected in the choices different governments make about what mechanisms of participation to use.

With this in mind, we turn to the factors that government and regulators should consider in determining whether to use mechanisms of increased public participation. The ultimate consideration from which all other considerations will flow is why increased public participation is desired in the first place. This is, in effect, a question of problem definition. The reasons why participation is desired are among those we identified in our Stage One chapter and identified in the case studies in this chapter. While there will always be a mix of reasons for engaging in participation, these should be reflected on and specified because they are important factors in determining the most appropriate mechanism of participation for those purposes.

6.4.1 *Increasing legitimacy*

We argued in our first chapter that democratic legitimacy is threatened by a lack of public participation in regulatory decision making, especially where: (a) the decision is politically controversial and there has not been significant public debate on the issue; (b) there is apathy amongst the general population on the particular decision due to time costs and difficulties of gaining the requisite understanding to comment; (c) the decision is not directly made by the elected government or by the legislature; and (d) the decision affects human rights or is otherwise a fundamental change of a long standing policy.³¹⁸ In the latter two cases, it seems clear that the value judgments at stake, including the decision to limit rights, should be made according to deliberative and democratically validated procedures; they should usually be made by the legislature, with the benefit of a high degree of public participation.

³¹⁸ See Petra Butler “Rights and Regulation” in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 241.

A greater degree of public participation in the case of the two former considerations must be fleshed out, however, as may be seen below. Not surprisingly, the problem of *legitimising* regulatory decisions will vary greatly from context to context. In highly technocratic areas, such as electricity, the question of democratic legitimacy will not normally arise unless there is a major negative impact on consumers. In areas such as the environment, in which many decisions involve obvious policy choices, securing legitimacy would be a more overarching concern.

(a) *Political controversy/debate*

With respect to political controversy, the consideration cuts a number of ways. If the regulatory decision is controversial and is subject to much public debate in an election year, less public participation may be required because the public has affirmed a particular decision at the polls. However, this may not determine the issue, for claims of a mandate to take a particular decision based on election results can be challenged where public opinion polls show resistance to that particular decision.³¹⁹ The Asset Sales debate is a case in point, with a majority of New Zealanders opposing sales of electricity generation companies, but not enough to prevent them from voting for National.³²⁰

Further, a policy that is a key electoral issue will have usually been well planned and thought through by the government, and in all likelihood will be carried out with only minor changes for political reasons, rendering certain forms of public participation politically pointless and only of negative consequence for the government. If this is the case, the government may seek to “ram through” changes as quickly as possible. Alternatively, the government may instead seek to gain buy-in and legitimacy for the policy through public participation in its implementation, or may wish to refine their proposals and prevent unintended consequences.

The Trans-Pacific Partnership (TPP) negotiations are an example of a policy that has not been debated significantly in the political realm. The TPP was not a very prominent part of the National Government’s election platform.³²¹ While New Zealanders support the TPP in principle, they have little knowledge of its content or the significant impact it might have on the price of consumer and medical goods.³²² The detailed negotiations of the TPP are in secret, as is usual, although there is some stakeholder participation in negotiation rounds,³²³ and there has been some

³¹⁹ Compare “Asset sales legislation ‘mandate’ approval – Joyce” *National Business Review* (New Zealand, 14 June 2012) and Michael Cummings “Asset sales; you asked for it” *Manawatu Standard* (New Zealand, 21 June 2012) with Jane Clifton “Does National have a mandate to sell assets?” *New Zealand Listener* (New Zealand, 17 March 2012).

³²⁰ See Tracy Watkins “Key battle lines drawn in early political poll” (New Zealand, 30 July 2012) <www.stuff.co.nz>.

³²¹ See the brief mention in their policy briefing: *National Trade: Building a Stronger Economy* (Policy 2011).

³²² Jason Krupp “Kiwis supportive but ignorant of TPP” (New Zealand, 5 October 2012) <www.stuff.co.nz>.

³²³ Ministry of Foreign Affairs and Trade “Trans-Pacific Strategic Economic Partnership Agreement: TPP Talk” (14 September 2012), available at <www.mfat.govt.nz>.

consultation.³²⁴ Some general consumer interest groups have been formed to combat these proposed elements of the agreement.³²⁵ There is also a group comprised of general consumer interest and technology/information interest groups – in partnership with international public interest groups – that has formed to challenge proposed changes to copyright and patent law and Internet regulation.³²⁶ Whether the New Zealand Government carries out changes to our laws that will be deeply unpopular among the majority of the population (such as, for example, a ban on parallel importing, a prohibition on jailbreaking phones and circumventing regional protection measures, changes to Pharmac drug purchasing,³²⁷ or investment arbitration attacking health measures³²⁸) will likely depend on the trade-offs on offer – primarily between increased agricultural access and increased intellectual property protections – and whether they can be sold to the public.

From another perspective, we might think that the presence of broad coalitions of experienced public interest groups, and the relative simplicity of the issues, means that funding of consumer advocates is less necessary. Given the major and politically controversial changes to our policies and laws that would be required by the treaty proposed by the United States, perhaps the government should seek public input into the options on the table in the TPP through the sort of consultation associated with domestic law making; that is, something akin to a ministerial inquiry or select committee. Depending on how one weighs the relevant reasons for participation, this might be supplemented by other forms of participation.

(b) Apathy and special interest domination

Apathy about the particular regulatory decision, and the related danger of domination by special interests is another reason identified in our first chapter and in the case studies above.³²⁹ This is especially the case where a decision does not impact individuals directly or significantly – at least as perceived by those individuals – which our cases studies suggest will be the case in many electricity and environmental regulatory decisions. This is despite the clear and cumulatively large economic and environmental effects these decisions have on all citizen-consumers and the significant interest and resources that particular companies and groups have in the decision. Most people affected are simply unaware of the regulatory

³²⁴ See Ministry of Foreign Affairs and Trade “Trans-Pacific Partnership (TPP) Negotiations: Submissions summary” (August 2009), available at www.mfat.govt.nz.

³²⁵ For example “It’s Our Future” www.itsourfuture.org.nz.

³²⁶ See “A Fair Deal” www.fairdeal.net.nz.

³²⁷ See Jane Kelsey (ed) *No ordinary deal: unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books, Wellington, 2010) at chs 10 and 11. See also Susy Frankel, Meredith Kolsky Lewis, Chris Nixon and John Yeabsley “The Web of Trade Agreements and Alliances and Impacts on Regulatory Autonomy” (ch 2) in this volume.

³²⁸ See Jane Kelsey (ed) *No ordinary deal: unmasking the Trans-Pacific Partnership Free Trade Agreement* (Bridget Williams Books, Wellington, 2010) at ch 15.

³²⁹ See fns 261–263 above and related discussion.

decisions being made, and would be reluctant to devote any time to understanding the issues and participating in the process.

This suggests that regulators engaging in increased public participation should consider how participants of broadly representative cross-sections of the community can be included, or how individuals or groups that can plausibly be seen as representing the various consumer and citizen interests can be enabled to participate. In addition, participation should be evaluated in terms of how well resourced consumer-citizen participants or representatives are in comparison to other interest groups. Public hearings with self-selecting participants are usually inadequate on these counts, and should be supplemented by consumer advocate funding, encouragement of marginalised group and individual participation, and/or the use of more representative participatory mechanisms.

Where the regulatory decision is not directly made by the elected central or local government or the legislature, the need for public participation is heightened from the perspective of democratic legitimacy. This is especially so where the regulatory aim or objective is defined broadly or ambiguously, as is the case with section 15 of the Electricity Act 2010 and section 5 of the RMA. Further, the electricity example shows that this is especially the case where controversial political decisions with distributional long term industry consequences are being made. More generally, it may be inappropriate for unelected decision makers to be given broad discretion to create or interpret the regulatory objectives, even if it is done according to robust participatory processes, because it involves value judgments that need democratic validation. In the RMA context, for example, this makes increased public participation in the preparation of regional and district planning documents even more important.

6.4.2 *Gaining information and mustering dispersed expertise and experience*

Increased public participation may be desirable if there is a need to elicit further information related to making the regulatory decision, as noted in our previous chapter. Decision makers will have to consider who is likely to have the information wanted, or perhaps other unforeseen but relevant information or experiences.

If the information is highly technical, such as market data and economic analysis concerning the operation of the electricity industry or engineering or technical information in the RMA context, the mechanism of participation should be calibrated so to encourage those with such specialist knowledge and understanding to participate. This is especially the case where there is broad public agreement on the values and principles that must be achieved (the ends), but disagreement on the means to achieve them. However, it should be remembered that different means have subtle implications on what ends are actually achieved – as was evident in the electricity³³⁰ context – and it is therefore important that those experts participating keep in mind the interests of consumers. Such experts will be able to identify areas that are and are not determined by purely instrumental

³³⁰ See fn 99 above and related discussion.

analysis of the best means to an agreed end, but involve a shifting of the ultimate end achieved, or where there is a clear value judgment that must be answered – such as the degree of risk aversion in the environmental context.³³¹ Moreover, especially in the RMA context, there may be information to be obtained from citizens (for example, information about particular environment problems in a small community), that would not otherwise be readily available to regulators.

In many cases where a more technocratic, expert-based approach is warranted, a public hearing consultation process may be sufficient to gain the information and opinions desired by the regulator. However, as argued above in both of the case studies, care should be taken to ensure that this process does not effectively exclude representatives of different consumer-citizen interests through the high costs associated with developing or paying for the expertise necessary to adequately participate. The funding of consumer interest groups for these purposes, as discussed in the electricity case study, seems fitting, because the expert analysis and collection of evidence can contribute to the decision makers' sophisticated analysis of the question. Another option used in the electricity context is the use of advisory boards on which consumer representatives sit; again this relies on such consumer advocates being part of organisations that are funded enough to develop experience and expertise in the area.

Where the information relevant to the decision is essentially the values and moral views within the community concerning the issues at stake – such as distributional issues in electricity, and the valuation of the environment in the RMA context – there is less need to engage experts, and participation can focus on engaging the general public. In this case the issue is whether the aim is to get the most comprehensive range of responses possible (submissions, hearings, opinion surveys) or whether the decision maker wants informed responses reflected and deliberated on (deliberative poll, citizen jury) or representative of the community and inclusive of marginalised groups (focus groups, citizen panels).

6.4.3 *Providing accountability, informing the public and increasing compliance*

The case studies show that these reasons can apply to greater and lesser extents. Taking compliance first, in the electricity industry, the market is monitored closely and it would be very difficult to evade the rules, because this would be easily detected. In contrast, the environmental situation relies on individuals complying with rules, in many cases with only minimal dangers of detection and punishment. In the latter case, and not the former, including people in decision making and informing them of the reasons behind the decisions may be important to encourage compliance.

The accountability reason is important in areas where the regulator has discretion to make decisions about the balancing of values and ends; participation can allow the public or consumer-citizen representatives to examine what decisions are being made by the regulator, especially if the regulator is required to hold open

³³¹ See generally [6.2.4] above.

public hearings and publish reasons for its decisions. The way that the regulator interprets its objective or uses its discretion to achieve it can then be passed on by those who participate in the decision making process to other citizen-consumers – aiding the educational effects of participation.

6.4.4 Scope and scale of the decision

(a) Scope of effects on individuals and the community

The scope and scale of the particular regulatory decision have implications for the degree of public participation that is desirable. Is the decision one that affects the whole of the community in some significant degree? Or does the decision only affect a geographically localised set of people, or a few industry participants rather than the community at large? These considerations will obviously impact on what groups or representatives of individuals should be involved in participatory mechanisms.

This consideration is clear in terms of many resource consent applications under the RMA (for which there are only a small pool of affected parties), but beyond these highly local decisions about the use of a plot of land, often what seems to be a decision that only affects a few individuals or companies actually impacts on the community at large, even if that impact is small when it is distributed to each member of the wider community. The effect of the environmental decision concerning irrigation of the Mackenzie Basin may seem to directly affect only the farmers, but others will point to the wider effects on a fragile ecological environment and tourism.³³² Pricing decisions in electricity may seem to the ordinary New Zealander to be an arcane matter of concern only to the industry participants, but they directly affect the price and reliability of electricity provision, and create wealth transfers between different classes of economic actor.

It is useful to venture some further observations about how this key indicator may apply to another area. Consumer law reform clearly affects the commercial interactions of the majority of New Zealanders in some way, as people go about buying and selling commodities in their daily lives. What rights and obligations are placed on them is clearly of importance to both justice in individual transactions and overall economic efficiency – including by ensuring adequate information in transactions and also with respect to safety.³³³ Regulation of consumer law should also be sensitive to recurring problems or issues that arise in the course of particular kinds of situations, so as to remove injustices or inefficiencies. So the regulatory issue is one of extremely wide scope of interest, but with particular areas that might affect different kinds of companies or consumers particularly.

(b) Scale of decision

Another question under this heading is what the scale of the decision is in terms of the kind of decision being made. Is it a major revision to the regulatory framework

³³² Compare Donald Aubrey “Mackenzie Basin modification benefits every New Zealander” *The Press* (New Zealand, 6 April 2011) and Matthew Littlewood “Mackenzie Basin is an ‘outstanding’ landscape” *The Press* (New Zealand, 14 December 2011).

³³³ Consumer Affairs *Consumer Law Reform: A Discussion Document* (June 2010).

in the area, meant to stay in place for many years as the context for more routine regulatory decision making? Or is it an example of this routine decision making, including applying the rules and/or principles of the regulatory framework to a particular situation? In thinking about the kinds of regulatory decisions that may be made we should look back to the diagram above (Figure 6.1).³³⁴ There is a “macro” level of choosing the appropriate statutory framework to achieve the goals of regulation, including the choice of those goals; this is regulatory decision making by the government and Parliament. There is the implementation of the regulation within the statutory framework, which may include the exercise of discretion or interpretive powers by ministers or independent regulators, and can even include the drafting of tertiary legislation³³⁵ such as rules or codes.

This can be seen in our environmental example in terms of the difference between the creation of the RMA itself, the creation of regional and district plans, and then the application of those plans in particular situations. One way of thinking about the above is to distinguish between: (i) decisions of broad scope, perhaps putting in place the general value framework that must be applied; and (ii) the actual application of that framework. Within the electricity regulation context, we see general decisions about the economic and social objectives of regulation being put in place through statutory frameworks, and then independent regulators making decisions within those frameworks, including the creation and revision of the market participation code and application of that code, price-quality control determinations, and the initial interpretation of statutory objectives.

These are quite different regulatory decisions to which the reasons for and against increased public participation apply to lesser or greater degrees – and requiring different mechanisms of participation. The creation of a new regulatory framework is likely to occur only where there is at least some popular political interest in the issue, and because of the relatively long standing nature of this regulatory decision – the setting up or revision of a framework statute – and the likely national scope there should be a high level of public participation to ensure that the decision is seen as legitimate, reflective of the public interest (understood here as the appropriate balancing of different interests in the community), and that the framework is the best means to achieve the desired regulatory outcomes. Thus, the creation of the RMA, and the proposed amendments to that regime,³³⁶ seem to be decisions that involve economic and other values that influence our enjoyment and use of the natural and built environment on a national scale. We have suggested that in the creation of more localised RMA planning documents (and that in addition to public hearings), citizen juries might be added in order to ensure that different views about the relevant values at stake are taken into account – as a corrective to the usual lack

³³⁴ See Figure 6.1 above from House of Lords Constitution Committee *The Regulatory State: Ensuring its Accountability* (31 March 2004) at 23.

³³⁵ Tertiary legislation may be regarded as rules made through “delegate law-making power to somebody other than the Governor-General in Council”: John Burrows “Legislation: Primary, Secondary, and Tertiary” (2011) 42 VUWLJ 65 at 70.

³³⁶ Ministry for the Environment “RMA reviews and amendments: Resource Management Reform Phase II”, available at www.mfe.govt.nz/rma.

of general public involvement with such processes. A similar set of reasons applies to the amendment of the RMA framework itself, albeit there may be more public interest in such an important legislative change.

Where the decision is a quasi-adjudicative one (particularised rule-application) within the wider regulatory framework, the relevant question is: who are the affected parties of that decision? And are they able to adequately participate or have their interests represented in the decision making procedure, taking into account what reasons for and against participation seem to apply? It might be argued that application of pre-existing rules or standards requires less generalised public participation as the relevant values have already been announced in the framework that is being applied; this will depend on how much discretion to make value judgments is given by that framework of rules to the decision maker. Time and cost will be another important factor. Where decisions reflect a choice among competing values, however, the various reasons for increased public participation will likely have significant weight.

Another distinction that is important to the appropriate level of public participation is between different types of review mechanism for regulatory decision making.³³⁷ Where the regulatory decision is the review of an earlier decision, or effectively the application of a rule such as a decision not to notify a resource consent application under the RMA, it seems appropriate to give standing only to those directly or indirectly affected by the decision to a significant extent (even though, as noted in our discussion of the RMA, in cases in which there are reasonable disagreements as to who is affected by a decision, wider public participation may be appropriate).

6.4.5 *What kind of deliberation and decision-making power is desired?*

The previous indicators looked back to the underlying reasons why government should engage in increased public participation in regulatory decision making. The present indicator encourages regulators to consider directly what kinds of deliberation and decision making power are desired – in terms of the analysis used in our Stage One chapter, what are the desired points on the spectrum of communication and authority. The regulator may have already decided, according to an intuitive sense of the reasons at play or from an understanding of the political reality constraining their process, that, for example, public participation will not encompass any significant level of authority or decision making power. This clearly rules out direct democracy or binding decisions by advisory boards or citizen juries. The question then would be whether the opportunity for public participation is actually just an informational service to the public, or whether the participation will be allowed to have some kind of influence in the decision.

Turning to the question of communication or deliberation, the regulator should consider the relevant reasons for participation: if there is a question of democratic

³³⁷ Dean Knight and Rayner Thwaites “Administrative Law Through a Regulatory Lens: Situating Judicial Adjudication Within a Wider Accountability Framework” (ch 14) in this volume.

legitimacy and better quality outcomes through a thorough examination of the issues as a result of reason giving and argumentation, the mechanism for participation should be calibrated towards the more deliberative end of the spectrum of communication.³³⁸ Depending on how much time is given for presentations and questioning (and the presence of opportunities for interaction among submitters), public hearings may be quite deliberative mechanisms (towards the middle of the spectrum); however, if a more in-depth and informed debate is required, citizen juries or citizens advisory committees may be required. These are of course relatively expensive, and they will likely be reserved for discussions of fundamental changes to the regulatory framework, or important decisions within the framework such as the interpretation of the statutory objective of the Electricity Authority or the creation of planning documents in the RMA context. However, if the regulatory decision is a fundamental change that is part of a government's policy manifesto, such as National's mixed ownership model for state-owned electricity companies, it is likely that the government will eschew such participation mechanisms unless it is fairly confident that the outcomes will be favourable to its objectives.

6.4.6 Conclusion: improving ordinary governmental and legislative processes

We conclude that in many areas of regulatory decision making there should be increased public participation, because the reasons for this will often outweigh the reasons against. While government and regulators will often face time, cost and political pressure not to engage with the public, there should be a presumption in favour of consultation and hearings to inform the decision makers about relevant evidence and public views on the value judgments at stake. Depending on the strength of the reasons at play in the particular case, consumer advisory boards, consumer advocacy funding and citizens juries are other mechanisms that are often used in comparable jurisdictions and should be considered as options that may allow for *better regulation* from both input (democracy, legitimacy) and output (outcomes) perspectives. The above case studies give a suggested analysis for two regulatory areas; they are not a definitive view, but our own attempt at seeing how the reasons play out in the area and what mechanisms may be appropriate in light of this.

The other point that should be emphasised is that ordinary governmental and legislative processes may also be improved from the perspective of public participation. The policy and legislative decisions are usually the most important ways that the framework of regulatory decision making is created; and as the framework sets the institutions, procedures and objective/standards that subsequent regulatory decisions are made, the creation of this framework should occur by a process that engages as much public participation as possible, if it is to produce democratically legitimate results. While one view would be that any

³³⁸ See Mark Bennett and Joel Colón-Ríos "Public Participation and Regulation" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 21.

legislation Parliament passes is legitimate, there is another increasingly popular view that major changes to our socio-economic or political structure are only legitimate if there is more than a bare majority of support. This view has become more popular under MMP, where the political parties that form the government and can pass legislation will usually not individually gain a majority of the electoral vote. While they, of course, must find a majority in Parliament to legislate, there are clearly perceptions in a relatively evenly divided political landscape (that is, where the left and right blocs command only just over 50 per cent of votes at elections and support in Parliament) that further public participation is necessary from the perspective of democratic legitimacy.

While it is still central to our political orthodoxy that a simple majority in Parliament gives unlimited power to alter the law and thereby mandate almost any political action, major changes to important regulatory frameworks should be done according to processes that are as participatory as possible, for both democratic and outcome focussed reasons. Changes to the basic framework of electricity and resource management regulation would be examples of this. The select committee and ministerial review processes around electricity have been fairly good on this count, and it is telling that more than 3,500 submissions were received even before the Resource Management Bill was introduced to Parliament.³³⁹

However, it is important to reflect on how select committee and ministerial processes, which are so crucial to legitimating the regulatory framework and ensuring good outcomes, can be strengthened. Some suggestions may include:

- increased time for oral submissions, especially from representative groups;
- consultation documents written in simple language and with clear explanation of major issues and perceived options;
- the use of participation mechanisms to determine public support and citizen perspectives concerning various options: focus groups, citizen panels, opinion and deliberative polling, citizen juries;
- the provision of funding for public interest/consumer advocacy groups that would generate their own processes of education and deliberation, and would bring informed perspectives to the hearing; and
- requiring, at least with respect to certain issues, select committees to travel to different regions of the country to facilitate oral submissions of a wider range of citizens.

The previous chapter's theoretical view³⁴⁰ and the current chapter's case studies demonstrate our view that increased public participation in regulatory decision making would have benefits from the perspective of better regulatory outcomes, increased legitimacy, accountability, compliance and the development of a more informed and engaged citizenry. Governments and regulators should aim to increase the level of public participation that informs and influences their decisions, and should do this in a way that avoids or mitigates the reasons against public

³³⁹ David Young *Values as Law: The History and Efficacy of the Resource Management Act* (Institute of Policy Studies, Wellington, 2001) at 3.

³⁴⁰ Mark Bennett and Joel Colón-Ríos "Public Participation and Regulation" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 21.

participation: special interest capture, technocracy and apathy or indifference to the regulatory decision. We have suggested that the commonly used mechanism of public hearings is a useful one, but that it may need to be supplemented by other mechanisms such as citizen juries, consumer-citizen advocate/representative funding, and citizen advisory committees. These mechanisms are those which we believe will match up with the reasons for participation in many concrete circumstances, as we suggest is demonstrated in our electricity and RMA case studies.