**ENVIRONMENTAL LAW & REGULATION CONFERENCE**

**KEYNOTE ADDRESS BY JUDGE M HARLAND**

## *Introduction*

[1] In a recent paper, David Sheppard, a former Principal Environment Judge said (and I agree), that the arrangements for safeguarding the environment are always under review. That is because they involve finding a position in the tension between supporting economic activity (which enables the social and economic wellbeing of society to be met) and restoring, protecting and enhancing the environment. Trying to reconcile these sometimes conflicting objectives and values is the daily bread of the Environment Court – no more or less than undertaking the weighing and balancing requirement contained in s5 of the Resource Management Act 1991 ("**the RMA**").

[2] I want to talk today about change in this field, with a particular focus on how it appears from a Judge's perspective. Although many of you will be familiar with our role in deciding matters – largely resulting from hearing contested evidence and issuing judgments – it is important you know that we do more than just speak through our decisions. We hear and listen to many views from people, both expert and lay,

representing different perspectives on the varied issues that come to us for determination and we are, I think, in a unique position because we are not constrained by any political, financial or policy imperatives.

[3] I think change is a good thing when it seeks to improve that which is not working as it should. The trouble is whether something is working or not often depends on your viewpoint, and in particular what you want to achieve through a given process. In other words those who want change are often those unhappy with an outcome that does not meet their expectations. Whilst it would be unprincipled to invoke change to appease a squeaky wheel, it is also necessary to listen very carefully, and to analyse very thoroughly expressed areas of discontent.

[4] One of the significant drivers of change at the moment is the argument that we need to improve our economic performance. Resource management matters in their widest sense can be seen as an impediment to timely economic development. These tensions are nothing new, although at this time they are more sharply in relief due to the state of the international economy.

[5] As a Judge, I am not permitted constitutionally to enter this debate, but I can offer you some thoughts about the Court's role in trying

to address these tensions. This will be the focus of this address. But it also needs to be said that there are some very important decisions to be made at a political level that have the potential to significantly impact on the environment. It is hoped that these decisions will be made after considerable informed debate following input and genuine consultation with all communities of interest.

[6] I now turn to the Environment Court's and Environment Judges' roles in determining environmental disputes. It seems to me that, generally speaking, the push for change to the regulatory environment arises from complaints that resource management matters cost too much, take too long to resolve or do not accord with a desired outcome. The Court is very familiar with all of these complaints. All Courts are. No person or entity ever wants a dispute to end up in Court. But the reality is that the legitimacy of our system of democracy depends on there being an independent process to decide those disputes that are unable to be resolved by agreement.

[7] There are things we can all do to try and reduce the cost and timeliness of matters once they get within "the judicial system." I intend to begin by briefly outlining the role of the Court, before moving on to provide you with some feedback on the impact of the 2009 Amendment

Act on the work of the Court, with specific reference to Boards of Inquiry and direct referral procedures, and then to offer you some thoughts about how the issues of cost and timeliness might be partially addressed to further improve the experience of those who find themselves involved in such a process.

***The role of the Court***

[8] In the same paper to which I have already referred, David Sheppard highlighted the trend towards partially privatising the resolution of environmental issues. By way of contrast, he outlined that the traditional scheme allows for major environmental issues to be resolved by a specialist multi-disciplinary court. That system relies on a centuries-old tradition of strongly defended independence and impartiality of professional, tenured Judges and of decision-making based on evidence and reason, of public process, and of publication of full reasons for decisions. The process is transparent and evidence- based. It is independent of business, government (be that national, regional or local government) and private interests.

[9] There is a powerful constitutional argument that independence involves not only separation of interest, but requires all economic drivers

to be excluded. That is why the system of judicial tenure arose (i.e. Judges that are paid independently of the party seeking to have them determine a case), to prevent a decision-maker being consciously or otherwise concerned that the content of their decision might affect their future income.

[10] The independence of the judiciary from the legislative and executive arms of government is fundamental to the constitutional balance enshrined under the Constitution Act 1886, and to the principle of legality that underlies it, and to the rights and freedoms recognised by the New Zealand Bill of Rights Act 1990. Constitutional conventions prevent the executive directing the judiciary or criticising Judges..Parliament directs the judiciary only by legislation. The independence of the judiciary imposes reciprocal obligations upon Judges to respect the proper role of parliament and the executive. Judges are independent in the performance of the judicial function, not only from the other branches of government, but from each other. This means that judicial decision-making is the responsibility of the individual Judge and sometimes quite properly (but sometimes forgotten by the community), Judges disagree with one another. The doctrine of separation of powers is a finely balanced series of conventions that protects our system of government from corruption.

***Competing values***

[11] All cases which come before the Environment Court are important to the parties that appear before it. Bearing in mind that cases which reach the Environment Court are the tip of the iceberg, and bearing in mind that approximately 82% of these cases settle before reaching a hearing, it is reasonable and important to acknowledge that those cases which the Court decides, are those few cases which involve issues of such difficulty that they have been unable to be settled using the many alternative dispute resolution methods available to assist parties reach a position of compromise.

[12] Environmental law, whilst often involving private interests, is fundamentally public law. In this area there are often competing value judgments, economic interests, and social objectives, which are difficult to reconcile. As well there are often conflicting local, regional and sometimes national and international interests and objectives. It should not, therefore, be surprising that the issues before the Court are often hotly contested. It is a fundamental truth that the Court's decision will always disappoint one if not many parties. It is particularly important against this backdrop for the Court to remain unswayed by partisan interests, public clamour or fear of criticism.

[13] I heard Justice Kate O'Regan, a former member of the Constitutional Court of South Africa speak recently and she made the very wise observation that "*Constitutional democracies are always contested and noisy*." Arguably this system of governance is advantageous because active public involvement is likely to improve the quality of decision-making, the disadvantage is that everything takes much longer and costs much more to resolve than a more autocratic system of decision-making.

[14] For my own part I am of the view that it is healthy and desirable for decisions about the sustainable management of our natural and physical resources to be influenced by a variety of opinions. I have not observed the involvement of the public in any case I have been involved in to be an impediment. I have found people to be respectful, focussed and by-in-large helpful. Much depends, however, on how the information from laypeople is marshalled – a topic I will say more about shortly.

[15] Apart from economic (I include farming, commercial and industrial interests under this heading) and government interests, the involvement of iwi in resource management matters provides a dynamic set of values that is unique to the New Zealand context. I have come to understand that the Maori world view incorporates the concept of

"tangata in the whenua," and brings with it the additional value of intergenerational environmental sustainability (and possibility intergenerational equity as well.) It will be interesting to observe how the Maori view of environmental use and management develops as the economic wealth of iwi improves.

***Legislative reform – the 2009 Amendment Act***

[16] I now turn to very briefly comment on the introduction of the call in and direct referral procedures provided for in the 2009 Amendment Act.

*Boards of Inquiry*

[17] There have been five completed applications heard by a Board of Inquiry under the call in procedures under section 6AA of the Resource Management Act. All have been determined by the Minister for the Environment to be matters of national importance and all have been chaired by an Environment Judge, but the chairperson can also be a retired or former Environment Judge or a retired High Court Judge. The applications are managed by the Environment Protection Agency, not the Court.

[18] The applications have comprised the following subject matter:

| | **Boards of Inquiry** |
|---|---|
| **1** | Hauāuru ma raki Wind Farm (Waikato Wind Farm)<br><br>Contact Wind Limited and Contact Energy Limited's application to build a 180-turbine wind farm on the west coast of the North Island.<br><br>Final report released 13 May 2011 |
| **2** | Tauhara II Geothermal Development Project in Taupo<br><br>Contact Energy Limited's application for resource consents for the proposed Tauhara II Geothermal Development Project in Taupo<br><br>Final report and decision issued on 10 December 2010 |
| **3** | Mighty River Power Ltd applications to construct, maintain and operate a wind farm in the Turitea Reserve |
| **4** | Waterview Connection proposal<br><br>NZTA's applications for the proposed State Highway 20 and State Highway 16 motorway connection at Waterview, Auckland |
| **5** | Men's prison at Wiri proposal<br><br>Minister of Correction's proposal for alterations to a Designation to provide for a men's prison at Wiri |

[19] There are two current applications:

| | **Boards of Inquiry** |
|---|---|
| **6** | Transmission Gully – September 2010<br><br>Proposal to build a 27km inland alternative to State Highway 1 that will run between Linden (Wellington City) and MacKay's Crossing (Kapiti Coast District) |
| **7** | New Zealand King Salmon – October 2011<br><br>Proposal from the New Zealand King Salmon Co. Limited for two plan change requests to the Marlborough Sounds Resource Management Plan and applications for resource consents for salmon farms and salmon farming at nine sites in the Marlborough Sounds. |

| | |
|---|---|

[20] There are challenges involved in this new procedure from a decision-makers perspective, the most significant of which is the time frame. This requires the Board's final report to be issued within nine months from the date of notification, unless an extension of time has been granted by the Minister. Because of this time constraint there is no opportunity for learning "on the job". The reports are large pieces of work and the Boards typically comprise members most of whom have not worked together before, with the result that the subtle but significant differences between judicial and political processes and evidence-based decision making may not be appreciated.

[21] The statutory time limit has been the subject of complaint by submitters in the BOI's determined to date. There is a perception that the process is fundamentally unfair to submitters, both substantively and procedurally. There are challenges involved in meeting complaints such as these from a practical perspective.

[22] Teething problems are to be expected in any new process, but it will be interesting for others to reflect over time about the overall effectiveness of BOI's, particularly their cost effectiveness, and whether or not they are seen as robust, independent, and fair processes.

*Direct referrals*

[23] Another new procedure introduced under the 2009 Amendment Act was the ability to directly refer applications to the Environment Court, thereby avoiding a first instance hearing before a Council. To date the Environment Court has received 11 direct referrals – seven in the North Island and four in the South Island – typically concerning large projects. They can be summarised as follows:

| | **DIRECT REFERRALS** |
|---|---|
| **1** | Progressive Enterprises Ltd |
| **2** | Mahia Beach Wastewater Scheme |
| **3** | Winstone Aggregates (Three Kings Quarry) |
| **4** | Mainpower NZ Ltd (Mt Cass Windfarm) |
| **5** | Lyttleton Port (Coal Terminal expansion) |
| **6** | Queenstown Airport (Airport expansion) |
| **7** | Road Metals NZ Ltd (Quarry) |
| **8** | Meridian Energy (Hurunui Windfarms) |
| **9** | Progressive Enterprises Ltd (Hobsonville Development (Comprehensive Development Plan) |
| **10** | Progressive Enterprises Ltd (Resource consent) |
| **11** | Brookby Quarries |

[24] There have not been enough of these cases to express any view at all about the process itself, although with the ability of parties to cross-examine; some of the hearings are likely to be lengthy.

*Issues common to both new procedures*

[25] Common to both processes is the difficult question of how to streamline the hearings, and to avoid traversing material that is irrelevant to the legal issues in contention. This arises particularly where people are unrepresented and are understandably unfamiliar with how to present evidence and what it should cover.

[26] All of the Judges involved in cases where there are a number of self-represented parties have been greatly assisted by the appointment of a "Friend of Submitters," but which it is intended should more appropriately be named a "Procedural Advisor". These advisors have been carefully selected to ensure that they have a necessary skill-base to advise on matters of evidence (relevance, presentation etc), have significant experience in how the Court works, and have an understanding of, and credibility in, the region where the project is proposed. In other words they have local knowledge and "street credibility" because of who they are.

[27] A critical issue is who pays for such an advisor. In the BOI's determined to date, all of the applicants have agreed to fund the position, but there are applicants in some direct referrals who (as is their right) have decided not to. The risk of not having such a person is that hearings are prolonged with diversions being required into matters of admissibility of evidence and other issues of process and natural justice.

[28] The Acting Principal Environment Judge and Ministry for the Environment are working together on suggested amendments to the Resource Management Act to streamline and clarify the procedures involved in these new processes.

***Cost of accessing the Court***

[29] Without a doubt, cases taken to the Environment Court are expensive. The Environment Court is charged with the responsibility of conducting its proceedings in a manner that is "*fair and efficient*" and it is always mindful of cost considerations. It is a fundamental right in a democracy to have access to justice. The cost of engaging in the Environment Court can potentially lead to denying some access to justice.

[30] Whilst this is a huge topic within its own right, I want to offer some suggestions about ways in which costs can be saved, by a more

proactive and analytical approach to the preparation of cases that come before the Environment Court for hearing. I make no apology for the fact that my views have been highly influenced by my background in the District Court, where the volume of work and the scarcity of hearing time requires this to occur. These views are however shared by my judicial colleagues in the Environment Court.

[31] For court proceedings, the key to cost saving is a more focussed approach to the presentation of cases. Case management techniques currently being used are designed to assist this by focussing the parties on the issues in contention and cooperating about putting the matters not in dispute before the Court in a way that avoids repetition.

[32] There are however some specific remarks I wish to make about two topics; first, the topic of expert evidence, and second, the topic of plan change appeals.

*Expert evidence*

[33] Inevitably, cases that come before the Environment Court involve competing issues of fact and opinion. Most cases are heavily weighted with expert evidence. It is important to remember that cases in any Court (and the Environment Court is no exception) are not determined solely by

expert evidence. Anyone sitting in any Court where disputed expert evidence features strongly will realise the wisdom of this approach, because the very fact that experts disagree means that such evidence is not clear-cut and certain.

[34] I am a strong believer in the wisdom of a judicial approach to decision-making in such circumstances. I intellectually appreciated, but did not fully understand until I became a Judge, how a case looks overall when one does not have a vested interest in the outcome (including a need to secure further work streams), and how every case has a much wider perspective that the parties present, that is often invisible to them, because naturally enough, they have their own desired outcome.

[35] The ability to give an opinion on a particular topic as an expert in Court is a privilege. Generally speaking lay people are not permitted to express opinions in Court. This is because it can easily be said that no one opinion is better than another. Experts are the exception, and are permitted to express opinions which arise from facts that require interpretation due to the particular expertise of the expert. Sometimes experts, in interpreting the facts upon which to base their opinion, fail to give adequate reasons for that opinion or allow matters of value judgment to enter into their opinions. Given that the Court is always required to

weigh the various expert opinions before it, it is extremely important that experts' reasoning is clear and robust.

[36] What I have observed, however, in this Court, is that rather a lot of what purports to be expert evidence, is in fact not, and sometimes it strays significantly from what is an issue to be determined in the proceeding – so that its relevance is marginal. The result is that we receive evidence that is not sufficiently focussed, and is at times repetitive. Sometime it covers matters which are not in dispute, which distracts the Court from its task.

[37] It is fundamentally the responsibility of lawyers to ensure that any evidence filed in support of a case is relevant, does not unnecessarily duplicate matters already dealt with and complies with the rules of evidence, bearing in mind that there is more latitude in the Environment Court to receive otherwise inadmissible evidence.

*Plan change appeals*

[38] Sometimes the Court is criticised for purportedly making policy in the context of plan change appeals. Whenever I hear this I am saddened, because such a view misunderstands the role of the Court at a very fundamental level. The Court never makes policy; it reviews what is

proposed against the applicable legal provisions, and makes its decision on the basis of the evidence it receives. This in fact is part of its constitutional role. The Courts have always been seen to be necessary to provide a check on administrative decision-making.

[39] Plan change appeals are typically complex, multi-layered pieces of litigation. As those of you who have worked in that area know, they can be time consuming to resolve, and can require sophisticated case management to progress them. The approach the Court has taken for some time now is to divide appeals into topics, so that appeals in relation to the same topic can be heard more efficiently, because plan change appeals sometimes involve jurisdictional as well as thematic and site specific issues.

[40] The Court's experience is that many plan change appeals are assisted by mediation which has the benefit of narrowing down the issues in contention, if not resolving topics completely. In the future, however, and in response to the suggestion that some such appeals have taken too long to resolve, the Court will be more closely managing these appeals, and will be less tolerant towards requests for adjournments to negotiate. In particular, once parties and issues have been identified, facilitated dispute resolution (i.e. mediation) will commence forthwith, rather than

councils being given extended periods to endeavour first to negotiate solutions with other parties.

[41] The hearings of plan change appeals can also be a moving feast, but the feedback we get from everyone including some in local government, is that the plans which result are much better drafted and more workable documents than those that had been notified.

[42] I leave you with these thoughts in relation to plan change appeals:

[a] In matters relating to the formulation of policy documents, the key would seem to be more effective consultation before documents are notified. The Court often hears complaints about a lack of effective consultation, and not all of these complaints can be easily dismissed as being the domain of the disaffected few;

[b] The drafting of plans needs attention. I have been thinking for a while that an independent drafting body, such as the parliamentary draftsperson, could save a lot of cost and time. If it were to work, it would need to be independent and develop an expertise that endured. For this reason I would

not favour the task being undertaken by independent consultants.

[43] It should be recognised that despite the matters to which I have referred, it can properly be anticipated that the next generation of plans will be much better as a result of what has been learnt thus far. As regional and national policy statements develop, this too will also assist to provide direction.

[44] For these reasons, it would be foolish to assume that the future experience in this area will repeat the past.

***Time delays***

[45] Although I have covered this topic in part, there are several further observations that can be made. I have already referred to more active case management in the context of plan change appeals, but in all cases it deals with, the Court is very mindful of the need to manage cases expeditiously once they have been filed.

[46] To this end, the Court uses conferencing to move matters at an appropriate pace and telephone conferencing is routine. Other uses of technology are being explored and would be welcomed by the Court. The

Waterview Board of Inquiry was fortunate to have IPads provided, thereby obviating the need for replicating about 70 volumes of evidence contained in Eastlight folders. Considerable time (and cost) was saved as a result, by Judge Newhook's estimate, many hearing days.

[47] The Judges all work hard to try to deliver timely decisions after a hearing. It is, however, more challenging to work with a Court of three (or sometimes four) than it is to work with one. The Court has moved to using commissioners whose expertise matches the needs of the case, and depending on the cases that are ready to be heard, some areas of expertise can be more in demand than others. The commissioners work very hard in other areas of the Court's business as well – conducting mediations and caucusing experts. From time to time this can create competing demands on their time. All I can say is that we do our best, and are mindful of the need to continue to improve wherever possible.

***Thoughts for the future***

[48] It will be obvious to you from my remarks that whilst regulatory response may occur in the future, it is not in my view the only response to the issues I have identified.

[49] In this regard I want to lay down a challenge. Can I suggest that at all levels of resource management practice; advocates, experts or drafters of planning instruments make it a goal to draft clear and understandable documents, free as far as possible from jargon, acronyms, inconsistencies and repetition. Some of the language used has become so removed from the understanding of average people that it has become obtuse and invites challenge.

[50] At a fundamental level resource management is about the rules and responsibilities that apply to activities affecting the use of land, air and water. For people to have confidence in any system they need to understand it. Understanding is partly about cognition and partly about the expression of ideas. I favour the view that the responsibility for understanding rests with the person expressing the idea rather than the receiver of it.

[51] As to the competing interests involved in this area representing a myriad of values that often seem to be completely at odds with one another - I can simply say **that is the world we inhabit.**

[52] I would like to end by thanking you for the work you do. It is difficult, but important. I would like to think that rather than dispensing

with what has worked well in the past, we move forward with maturity and respect for each other's role and skills, accepting that in this area nothing is straight-forward, but that we can all be clearer about what is in issue.

[53] Let us not forget that we are all privileged to be part of such a dynamic field of endeavour. Not only are the problems which present themselves interesting, but they require a multi-disciplinary approach. It is inspiring to be surrounded and hear about the outcomes and predictions resulting from top level research, advances and developments in technology, and the intellectual debates about the way in which these problems can be avoided, remedied or mitigated.