

## Supplementary Paper: Environmental Governance

### The Transparency International New Zealand (TINZ) project: a report on New Zealand environmental governance

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This paper is a supplement to the TINZ 2013 National Integrity System Assessment. The analysis in this paper was drawn on in the public sector pillar of that report.

#### Preamble

*This paper makes professional judgments based on our collective experience in environmental policy and practice in New Zealand and abroad. That judgment is supported by evidence where possible but, given the constraints on and resources for this project, only minimal fresh collecting of evidence has been possible. We report concerns being articulated in or related to the environmental governance and policy domain (here focusing on the policies and actions of central and local government agencies), even where these concerns are not necessarily well documented or published. Moreover, while this report covers the main aspects of environmental governance in New Zealand, it makes no claim to comprehensiveness. This paper has benefited from comments made by Ministry for the Environment (MfE) officials, but they bear no responsibility for interpretations, omissions or errors made by the authors.*

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August update: After this paper was completed, the Minister for the Environment on 8 August 2013 announced that legislation would be introduced that would provide for a comprehensive synthesis [state of the environment] report covering all environmental domains' to be prepared and 'released every three years'. <http://www.beehive.govt.nz/release/govt-mandate-three-yearly-state-environment-reports> The Minister underlined its independence -

*[T]he Bill will provide that the Secretary for the Environment and the Government Statistician be mandated to produce regular environmental reporting, at arm's length from the government of the day. The role of the Government Statistician will give the public assurance that the information they receive is independent, accurate and free from political bias. The [Parliamentary] Commissioner [for the Environment] will have a legislative mandate to provide expert commentary and independent opinion on the quality of the underlying data and robustness of the analysis, as well as the substance of the report and any concerns it may raise.*

We welcome this development as a significant step forward in environmental reporting. A first best option would have been to give the role (and resources) to the Parliamentary Commissioner for the Environment (PCE) to undertake the data monitoring and analysis, as the Ministry cannot be fully independent of the Government; nevertheless, the involvement of the Government Statistician and the PCE will give independence and integrity to important aspects of the process. The comments in the text below (ss1.2 and 4) should be read in the light of this announcement.

This paper is structured in terms of the three themes of the Aarhus Convention, i.e. the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.<sup>6</sup> As its title suggests, the Convention provides a useful vehicle for discussing some of the main aspects of transparency in the environmental policy domain. Although the UN Economic Commission for Europe is the sponsoring agency, Aarhus is relevant to New Zealand because the Convention is open to all countries and its subject matter is in no way region-specific. Moreover, the Convention closely resembles a 1998 recommendation on environmental information of the OECD Council (recommendation C(98)67/FINAL)<sup>7</sup>, which also speaks to New Zealand.

The Aarhus Convention has three pillars:

- *Provision of and access to environmental information*, i.e. the right of everyone to receive environmental information held by public authorities. This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this may be affected by the state of the environment.
- *Public participation in environmental decision-making*, i.e. the right to participate in environmental decision-making. Public authorities are to enable the affected public<sup>8</sup> and environmental non-governmental organisations to comment on, for example, proposals for projects with environment effects, or

<sup>6</sup> <http://live.unece.org/env/pp/welcome.html> [accessed 21 March 2013]

<sup>7</sup> <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C%2898%2967/FINAL&docLanguage=En> [accessed 2 April 2013]

<sup>8</sup> The Convention defines the "public concerned" as the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law are deemed to have an interest.

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plans and programmes relating to the environment. These comments are to be taken into due account in decision-making, and information is to be provided on the final decisions made and the reasons for them.

- *Access to justice in environmental matters*, i.e. the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general.

It is assumed that the reader is broadly familiar with how environmental governance in New Zealand works. An outline is readily accessible in Peart (2009).<sup>9</sup>

## **1 Aarhus Theme 1 - Provision of and access to environmental information**

### *1.1 Legislation and processes*

Legislation which matters for access to environmental information includes:

- Environment Act 1986
- Official Information Act (OIA) 1982
- The Local Government Official Information and Meetings Act 1987 (applying to territorial authorities, regional councils, conservation boards, and other local authorities)
- Ombudsmen Act 1975
- Resource Management Act (RMA) 1991, including sections 27, 32, 3510 etc.
- Hazardous Substances and New Organisms Act 1996
- Waste Minimisation Act 2008.

The Environment Act established the Parliamentary Commissioner for the Environment (PCE) to:

- review the system of agencies and processes established by the Government to manage New Zealand's resources;
- investigate public sector environmental planning and management practices; and
- investigate any instances where the environment has been adversely affected, whether by public, private or other actors.

The PCE can also collect and disseminate information about the environment and make recommendations to the House of Representatives.<sup>11</sup> The brief as it stands in legislation does not include state of the environment reporting (see section 1.2). Recent work has included a plain English guide to water science intended to inform public debate, an independent assessment of the pest control poison 1080, and a

<sup>9</sup> Peart, R. (2009). Improving environmental governance: the role of an Environmental Protection Authority in New Zealand. Auckland Environmental Defence Society: section 3. See [http://www.edsconference.com/content/docs/2009\\_papers/EPA%20Policy%20Document%20Final.pdf](http://www.edsconference.com/content/docs/2009_papers/EPA%20Policy%20Document%20Final.pdf)

<sup>10</sup> The subheadings for these sections are as follows - s. 27 'Minister may require local authorities to supply information; s. 32 'Consideration of alternatives, benefits and costs'; and s. 35 'Duty to gather information, monitor and keep records'.

<sup>11</sup> <http://www.pce.parliament.nz/about-us/functions-and-powers/> [accessed 13 March 2013]

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submission to MfE's 2012 consultation document on the Emissions Trading Scheme. Most of the PCE's reports since 1997 are publicly accessible.<sup>12</sup>

An element of misuse by government agencies of the Official Information Act (OIA) was identified some time ago<sup>13</sup> and experience suggests this has affected environmental policy and practices of disclosure. Price has argued that failures in giving consideration to the public interest 'seriously compromise[s] the OIA's ability to fulfil its constitutional role'.<sup>14</sup> Given the responsibilities for the environment delegated to local authorities, a narrow view of the public interest presents a barrier to transparent and informed environmental governance.

Issues relating to the Canterbury earthquakes have resulted in a large increase in the workload of the Office of the Ombudsmen in relation to complaints, some of which have concerned the release of geotechnical information about residential land<sup>15</sup> (see also section 1.4 below). An additional concern is a growing trend of government agencies seeking exemption from the OIA.<sup>16</sup>

### 1.2 *State of the environment reporting*

The OECD's 2007 report on New Zealand's environmental performance recommended that New Zealand should 'strengthen monitoring of air and water quality, and waste generation and treatment, assuring baseline consistency of methods used at local level to facilitate data aggregation and periodic reporting of key environmental indicators at national level'. It also recommended that New Zealand 'expand availability of quantitative indicators and time series data related to environmental quality, assuring policy relevance and public access'. Our judgment is that improvement in the provision of such monitoring data has been variable since 2007.

There is no legislative requirement for regular and independent reporting on the overall state of the environment, and there is no requirement for consistency across local authorities. New Zealand is the only OECD country where reporting is not required by legislation. In fact, both the 1996 and 2007 OECD Environmental Performance Reviews of New Zealand criticised the country for its dearth of consistent environmental indicators and trend data at the national level. Such lack of data makes it impossible to set measurable high-level policy targets<sup>17</sup> and assess the effectiveness and cost-effectiveness of policies.<sup>18</sup>

The Government in 2011/12 consulted on a proposed environmental reporting bill, addressing the scarcity of consistent, independent environmental reporting in New

<sup>12</sup> <http://www.pce.parliament.nz/publications/all-publications/> [accessed 13 March 2013]

<sup>13</sup> Steven Price, *The Official Information Act 1982: A Window on Government or Curtains Drawn?* (Wellington: Victoria University of Wellington, 2006)

<sup>14</sup> Price, 2006: 50

<sup>15</sup> [http://www.ombudsman.parliament.nz/ckeditor\\_assets/attachments/136/ar\\_2011-12\\_-eqc\\_under\\_scrunity.pdf?1348707302](http://www.ombudsman.parliament.nz/ckeditor_assets/attachments/136/ar_2011-12_-eqc_under_scrunity.pdf?1348707302) [accessed 13 March 2013]

<sup>16</sup> [http://www.ombudsman.parliament.nz/ckeditor\\_assets/attachments/137/ar\\_2011-12\\_-avoiding\\_the\\_oia.pdf?1348707559](http://www.ombudsman.parliament.nz/ckeditor_assets/attachments/137/ar_2011-12_-avoiding_the_oia.pdf?1348707559) [accessed 13 March 2013]

<sup>17</sup> One of the very few exceptions would be New Zealand's GHG emissions reduction target, which can be tracked year-by-year thanks to a rigorous data collection and reporting system.

<sup>18</sup> A point undergirded by Principle 4 of the High Level Principles on Fiscal Transparency (promulgated by the Global Initiative on Fiscal Transparency), which states that governments should communicate the objectives they are pursuing and the outputs they are producing with the resources entrusted to them, and endeavour to assess and disclose the anticipated and actual social, economic and environmental outcomes.

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Zealand.<sup>19</sup> The main aspect of the discussion document for the proposed bill was the suggestion that the task of producing regular state of the environment reports be assigned to the PCE. This was a good idea, for such reports should be able to “speak truth to power”, something line ministries can never fully achieve. The environmental reporting bill is expected to be introduced in Parliament before the end of 2013. MfE is also preparing to expand reporting about the implementation of the RMA<sup>20</sup> and is working on a National Environmental Monitoring and Reporting Project on Water (NEMaR). Time will tell whether these initiatives will bear fruit and to what extent they will satisfy the standards set by the Aarhus Convention (e.g. to make sure that the information available is transparent through lists, registers, files, official support of public access to information, and the identification of points of contact). Moreover, the lack of a legislative mandate means the Government of the day may decide against providing full state of the environment (SOE) reports, as has happened recently.

However, the Minister’s decision in 2012 to no longer publish a comprehensive SOE report must be evaluated in the light of what other, comparable information the government makes available to the public. At the moment, the environmental report cards of 22 national indicators<sup>21</sup> are the main reporting activity (the technical reports with the underlying data are also published), some of which also are (or have been) used by other departments (e.g. Measuring New Zealand’s Progress indicators by Statistics NZ, the Social Report of the Ministry of Social Development, well-being indicators by the Treasury).<sup>22</sup> These are certainly useful as long as the information is timely (i.e. regularly updated) but this is not often the case. Also, reporting on what is happening in the environment – including effectiveness of policy – would require more indicators on environmental pressures (i.e. emissions to air, discharges to water, water abstraction, waste information<sup>23</sup>) than New Zealand presently has (also see comments on Pollution Release and Transfer Register (PRTR) below). Moreover, the analysis accompanying the report cards is too limited in scope for a good understanding of underlying trends.

The compilation of a comprehensive SOE report is quite costly, but the importance of monitoring environmental quality (to allow policy evaluation and underpin policy improvement) justifies the cost. Regular SOE reports force the consideration of trends over the longer term and consideration of the wider context and drivers (e.g. economic development, changes in consumption patterns, demography) beyond the report cards. The best examples of overseas SOE reports have mobilised expertise from many quarters (universities, research institutes, professional associations),

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<sup>19</sup> See the August 2011 Cabinet paper <http://www.mfe.govt.nz/publications/ser/measuring-up-environmental-reporting/cabinet-paper-11co1298-environmental-reporting-bill.pdf> and Cabinet minute at <http://www.mfe.govt.nz/publications/ser/measuring-up-environmental-reporting/cabinet-minute-environmental-reporting-bill.pdf>

<sup>20</sup> <http://www.mfe.govt.nz/rma/central/monitoring-review-project.html> [accessed 3 May 2013]

<sup>21</sup> Plans are afoot to raise the status of ten of the 22 indicators to “Tier 1 National Indicators.” However, the timetable for nine of these is no earlier than 2014/15 and in three cases 2016+ according to the Cabinet paper.

<sup>22</sup> <http://www.mfe.govt.nz/environmental-reporting/report-cards/> [accessed 21 March 2013]

<sup>23</sup> GHG emissions and, soon, also water abstractions are positive exceptions. Also, the proposed water reforms, if enacted, will in due time ensure the availability of better information about discharges into water.

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thereby involving a much wider body of knowledge and more integrated evaluation than is the case for the report cards.<sup>24</sup>

Regional and territorial authorities also carry out environmental monitoring, publish the results on their web sites, and occasionally publish SOE reports. Limited progress has so far been made on agreed indicators, measuring methods and reporting formats, with the result that aggregation of local data to obtain a national overview is currently only possible for some air quality data (e.g. concentrations of particulate matter, carbon monoxide in ambient air). However, the Resource Management Reform Bill 2012, now before the select committee, proposes to mandate central government to require local authorities to measure prescribed state-of-the-environment indicators, as well as the methods by which they do so.

### 1.3 *Other processes relevant to access to information*

In terms of processes other than SOE reporting, it is difficult to establish a clear picture of how New Zealand's provision of and access to environmental information is working in practice for stakeholders such as NGOs, business, and the public. However, some observations can be made:

- The MfE's RMA monitoring survey has found that there is a shortfall in consent monitoring, suggesting an information gap: in 2010/11 (the most recent data), only 68 per cent of consents that required monitoring were actually monitored,<sup>25</sup> and 28 per cent of *monitored* resource consents did not comply with their conditions.
- From a different angle, there is sometimes a perception that the information requirements associated with the operation of environmental legislation (e.g. the RMA) are unreasonable or onerous. Case study based research carried out by the PCE in 1998 found no evidence that this concern was well founded. Information requirements were appropriate for the majority of the consents considered.<sup>26</sup> Moreover, since this assessment MfE (in conjunction with other organisations) has provided improved information resources to explain, and ensure greater coherence in, the operation of the RMA and related legislation - including setting out what information is needed by members of the public in working through RMA processes.<sup>27</sup>
- To give an example of data quality in the water domain, there has been a gap in consistent water abstraction data. MfE has now begun to implement the Resource Management (Measurement and Reporting of Water Takes) Regulations 2010. These require significant water users to start measuring

<sup>24</sup> We note that the Minister for the Environment's Foreword to the Ministry for the Environment's Statement of Intent, 2012-15, signed April 2012, stated that "I aim to establish a national-level environmental monitoring and reporting system that will have credibility and integrity." (p.1). This has not been accomplished a year later.

<sup>25</sup> <http://www.mfe.govt.nz/publications/rma/annual-survey/2010-2011/key-facts-2010-11.pdf>

<sup>26</sup> Office of the Parliamentary Commissioner for the Environment. (1998). Information Needs of the RMA: a Review of the Information used for Discharge Permit Applications. Wellington: PCE [http://www.pce.parliament.nz/assets/Uploads/Reports/pdf/info\\_rma.pdf](http://www.pce.parliament.nz/assets/Uploads/Reports/pdf/info_rma.pdf).

<sup>27</sup> See Quality Planning website, designed mainly to help resource management practitioners, but useful also to the public: <http://www.qualityplanning.org.nz/>

and recording their water takes, providing the data to regional councils by July 2013.<sup>28</sup>

International figures<sup>29</sup> about the number of information requests received over time, and their acceptance or denial by public authorities, where available, often show significant public interest - but the importance of the right to know is not measured by such statistics alone. The use made of the right of access by NGOs, the press and other public media may be small when measured in terms of the number of requests, but is vital for the functioning of a healthy democracy.

#### 1.4 *Public authority compliance and enforcement activities*

A key aspect of public information about the administration of environmental laws is information about enforcement activities: how assiduous are public authorities in enforcing the laws and regulations they administer? In the United States, public access to information on enforcement was brought into the age of e-government in 2003, when the Environmental Protection Agency (EPA) initiated its web-based Enforcement and Compliance History Online (ECHO) system. ECHO reports provide easy-to-understand snapshots of a facility's environmental record, showing dates and types of violations, as well as the state or federal government's response. ECHO reports also contain demographic information from the National Census about the area close to the facility being examined.

In New Zealand, the biennial RMA Survey of Local Authorities presents some summary figures about local authority enforcement activities. Figures are broken down by type of authority (i.e. regional, unitary, territorial), but not by individual council, so we do not know how diligent each has been in enforcing the RMA. New Zealand is well behind best practice in this regard. The proposed RMA monitoring and review project mentioned above may improve the availability of such information in New Zealand.

#### 1.5 *"Right to know" issues, including earthquake related hazards*

The concept of 'right to know' relates to ensuring communities have knowledge about hazards that may affect them before they do so. In the United States the Emergency Planning and Community Right-to-know Act (EPCRA) primarily focuses on access to information about chemical hazards, to which the community may be at risk of being exposed, before any emergency eventuates.

New Zealand appears to be among the few developed countries that have yet to establish a Pollution Release and Transfer Register (PRTR). A PRTR allows the public to find out what potentially harmful releases and transfers from private and publicly owned enterprises take place near their home or anywhere else in their country. Initially conceived as a register of point sources of toxic substances (eg the U.S. Toxics Release Inventory), an increasing number of PRTRs abroad now include

<sup>28</sup> Ministry for the Environment. (2012). Statement of Intent 2012-15. Wellington: MfE <http://www.mfe.govt.nz/publications/about/soi/2012/soi-2012.pdf>

<sup>29</sup> The authors have been unable to find statistics about the number of requests made under the Official Information Act. The MfE annual 2011/12 report lists the percentage of OIA requests that have been processed in time, but does not give absolute numbers. The latest Ombudsman annual report presents the total number of *complaints* in regard to OIA requests across all ministries the Office has dealt with.

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non-toxic substances and diffuse sources of pollution (e.g., phosphorus and nitrogen from agriculture). PRTRs are now included in the Aarhus Convention under the 2003 Kiev Protocol.<sup>30</sup>

In New Zealand, Land Information Memoranda (LIMs) are required under the Local Government Official Information and Meetings Act 1987. A LIM is a comprehensive report that has all relevant information the Council knows about a property or section. A fee is payable to obtain a LIM, for example in Wellington City a residential property LIM costs \$NZ314 (USD 258).

A LIM includes any special feature of the land Council knows about – including, any downhill movement, gradual sinking or wearing away of any land, falling rock or earth, flooding of any type and possible contamination or hazardous substances.<sup>31</sup> Information included in LIM reports is dependent on what the local authority holds. For example, on the Kapiti Coast the Council has recently completed a coastal erosion hazard assessment (including possible coastal erosion from climate change-related sea level rise); and, on advice that it is legally bound to place the information in LIM reports as soon as it is received, has included information from the assessment in its LIM reports.<sup>32</sup> This has been controversial as affected property owners expect that the information in the LIM reports will reduce the value of their properties. The assessment itself, what information from such an assessment should be placed in the LIM reports, and whether any information should have been placed in LIM reports before further testing of the validity of the assessment, are all currently being contested by interested parties. It appears that the process to be followed in cases like this is as yet unclear.

As noted, practices elsewhere are variable. In the case of Christchurch there is evidence that some earthquake-affected properties were developed with Council knowledge in areas that were thought to be prone to liquefaction. A recent report reviewed Council processes, including evidence available in LIMs, and concluded that

*...there was no evidence found of the consideration of liquefaction or lateral spreading in the consideration of subdivision consents or in the setting of consent conditions.... The existing residential zoning over much of these areas created an expectation that the land was suitable for development to the plan specifications...<sup>33</sup>*

Moreover, as a legal firm put it:

*Resource Consents issued under the RMA for the development of land in some areas did not take into account identified liquefaction risks. Even post 2004, it is considered consents were being granted without any regard for this significant and by then well documented risk.... Not only was the information*

<sup>30</sup> The Kiev Protocol on Pollutant Release and Transfer Registers is a binding instrument requiring ratifying countries to keep inventories of pollutants. See <http://www.unece.org/env/pp/prtr.html>.

<sup>31</sup> <http://wellington.govt.nz/services/rates-and-property/property/reports/lim> [accessed 20 March 2013]

<sup>32</sup> <http://www.kapiticoast.govt.nz/Your-Council/News/2012/Coastal-property-owners-can-make-alterations-says-Council/> [accessed 20 March 2013]

<sup>33</sup> St Clair, M. and D. McMahon (2011). Canterbury Fact Finding Project Wellington, Hill Young Cooper and Resource Management Group: p.8

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*regarding identified risks non existent [in] the zoning and consent decision making with the development of these areas, but the risk of liquefaction was not clearly identified on Land Information Memorandum Reports...for the affected properties.<sup>34</sup>*

So, although the RMA requires Councils to undertake environmental monitoring, and take into account risks such as risks of liquefaction in an area, the variability across Councils as to what is monitored and what is considered, and how, is concerning. This issue has now been addressed by the 2012 MfE's Resource Management Act 1991 Principles Technical Advisory Group.<sup>35</sup>

A separate 'right to know' matter relates to the operation of the PCE as an environmental watchdog. A survey (reported by McNeill and Holland) of a wide group of stakeholders and environmental managers around New Zealand found that 'two-thirds of respondents agreed that it was important to have an independent national agency to both provide strategic environmental information advice, and to act as an environmental watchdog'. (p.7) This suggests both a perceived need for the PCE and an appreciation of the work that office does.

#### 1.6 *Are the functions of each tier of government made clear to the public?*

There appears to be limited public understanding of what environmental functions each tier of government carries out, and similarly limited awareness of local and regional decision makers' views.<sup>36</sup> A key question here is whether each tier is doing enough to make such information readily available to the public, and to raise awareness of the right of access to official information.

Most public authorities at the central and local level appear to do a reasonable job of allowing citizens to find out what information (in terms of policy reports, indicators and regional/local SOE reports) is available, but some could do more to raise awareness of what is going on. Some websites (e.g. MfE's) could be more legible and more up to date, but the information available is complex and keeping it up to date is costly. The wider question of what information (e.g. information about enforcement) *should* ideally be available but is not, is harder to address.

#### 1.7 *Transparency and private entities - voluntary frameworks for eco-labelling and auditing*

Large firms in the private sector have in the past 15 years or so recognised their public environmental and social accountability by publishing, along with their financial reports, triple bottom line, environmental, or sustainability reports. The quality of these reports is variable, and the success of New Zealand corporate lobbying in the late 1990s to resist mandatory reporting set the scene for today's *laissez faire* approach.<sup>37</sup>

<sup>34</sup> Burrowes and Co (2011). Client Newsletter December 2011. Christchurch: p.1

<sup>35</sup> <http://www.mfe.govt.nz/publications/rma/tag-rma-section6-7/tag-rma-section6-7.pdf>

<sup>36</sup> McNeill, G. and J. Holland (2007). How Low Can You Go? Perceptions of New Zealand's Multi-Layer Environmental Governance. New Zealand Planning Institute Conference. Palmerston North: Figure 3.

<sup>37</sup> Gray, R. and M. Milne, Sustainability reporting: who's kidding whom? Chartered Accountants Journal of New Zealand, 2002. 81(6): p. 66-70; see p.2.

In 2012, the report *Vision 2050* released by the NZ Sustainable Business Council, noted that:

*...there seems to be reluctance amongst New Zealand corporates to recognise the environmental and social externalities of their operations – even in their stakeholder reporting. New Zealand business lags behind the rest of the world in this regard.<sup>38</sup>*

The *Vision 2050* report also noted that only 27 of the top 100 New Zealand businesses prepared a sustainability report in 2011 (p.41). However, reporting is gradually improving, not least due to the guidelines developed by the Global Reporting Initiative.<sup>39</sup> Of the 43 members of the NZ Sustainable Business Council, 18 published an annual sustainability report in 2011.<sup>40</sup> Similar efforts exist with regard to sustainable supply chains.

Ecolabels of various kinds are another example of private sector or NGO involvement in increasing the transparency of economic activities, at least where they are independently audited. Audit arrangements vary with the type of label.<sup>41</sup> NGO efforts like the Forest and Bird Best Fish Guide to sustainable seafood<sup>42</sup> and the Forest Stewardship Council label in the wood and paper sector are examples, although they are not immune from criticism or dissent.<sup>43</sup> Participation by New Zealand firms in the UN Global Compact<sup>44</sup> is minimal: just two entities (ANZ Bank and the Fair Trade Association of Australia and New Zealand) have signed up to the Compact's ten principles of human rights, labour, environment and anti-corruption.

### 1.8 Conclusions on Aarhus theme 1

To conclude on the key issues under Aarhus theme 1, four main points can be made:

- there are clear deficiencies in relation to SOE reporting, and a pollutant 'right to know' register would be desirable;
- the office of the PCE is working well (although issues of under-resourcing are noted below under Aarhus theme 3);
- in terms of the public right to know, recent events such as the Christchurch earthquakes have revealed some important problems around how Councils use and make available information on risks (such as erosion or geotechnical hazards) affecting the suitability of land for development, and other uses, and the appropriate use of LIMs; and

<sup>38</sup> Sustainable Business Council. (2012). *Vision 2050 - The Report: Business as Usual is Not an Option*. Auckland: SBC

<sup>39</sup> <https://www.globalreporting.org/resource/library/G3.1-Sustainability-Reporting-Guidelines.pdf> [accessed 3 May 2013]

<sup>40</sup> <http://www.sbc.org.nz/resources-and-tools/reports/nz-sustainability-reports> [accessed 3 April 2013]

<sup>41</sup> [www.nzte.govt.nz/develop-knowledge-expertise/sustainability-guide-for-exporters/pages/credibility-certification-ecolabels.aspx](http://www.nzte.govt.nz/develop-knowledge-expertise/sustainability-guide-for-exporters/pages/credibility-certification-ecolabels.aspx)

<sup>42</sup> <http://www.forestandbird.org.nz/what-we-do/publications/the-best-fish-guide> [accessed 30 April 2013]

<sup>43</sup> <http://www.forestandbird.org.nz/files/file/Forest%20and%20Bird%20BFG%20Criteria%20for%20Ecological%20Ran> kings(3).pdf [accessed 30 April 2013]; see, e.g., p.2's discussion of MSC certification.

<sup>44</sup> <http://www.unglobalcompact.org/> [accessed 3 May 2013]

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- in terms of private entities, sustainability reporting in New Zealand lags behind international good practice.

## 2 Aarhus Theme 2 - The right to participate in environmental decision-making

The *OECD Handbook on Information, Consultation and Public Participation in Policy Making* summarises generally accepted good practice principles for involving citizens in decision-making. It also provides some sound reasons for these principles.<sup>45</sup> In summary, it suggests that participation improves policy and its implementation, enhances trust between government and the public by increasing openness, lends more legitimacy to decision-making, and creates the conditions for a stronger democracy by improving citizen engagement.<sup>46</sup> The Aarhus Convention reflects these broad principles in its articles. Public participation is, therefore, a cornerstone of accountable and transparent environmental governance. We place some weight here on accountability as a counterpart of effective participation.

The RMA 1991 is the centrepiece of environmental governance in New Zealand and was the result of one of the most extensive law reform processes in the 1980s. It repealed some 60 statutes and involved unprecedented consultation. In many respects it is a compromise between two dominant groups of lobbyists – environmentalists and what was then termed the ‘New Right’. It is beyond the scope of this discussion to address the overall design of and practice under the RMA, but three general comments can be made:

- adversarial practices as they have developed under the RMA are often problematic in terms of engendering wider community participation;
- it is important that the ‘national interest’ (e.g. the collective interest in increasing renewable electricity generation) be understood at the regional/territorial level and ways of ensuring this need further development and implementation, in consultation with local government, and without overriding local participation and interests; and
- fragmented but significant changes to the RMA as are currently proposed are generally not helpful in moving towards a more participative or collaborative environmental governance framework.

The original Act provided for public involvement in decisions in several ways. Although amendments since have whittled away some of these opportunities, the broad statutory framework remains for a degree of public involvement in policy and plan making, as well as at the project level.

### 2.1 The RMA - plan and policy making

<sup>45</sup> Organisation for Economic Co-operation and Development, *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy Making* (Paris: OECD, 2001)

<sup>46</sup> OECD, 2001: 18

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The RMA provides for consultation on plan making at both the local and regional levels, as well as at the national level. At the national level, the Act prescribes the process through which National Policy Statements and Environmental Standards (key high level elements of the RMA management framework) are drafted and includes statutory requirements for consultation. Similarly, at local and regional levels, plans that regulate local land use, discharges to air and water, transport and hazards management have prescribed drafting processes that allow the public to formally submit on plans in at least two different phases. The idea here is that robust policy and plan making that involves the public will provide for better policy and policy documents. In theory, it will facilitate implementation by engendering a level of public endorsement in the final regulatory documents and rules, which then obviates the need for extensive public involvement at the project stage.

The MfE has a valuable practice of publishing summaries of public submissions received during consultation processes for national level policy under the RMA. This is not a common practice in other countries, as far as the authors are aware, and MfE should be commended for it.

However, there are a number of issues with the system in practice:

- The process relies on submissions within specified timeframes, based on prescribed notification processes. Whether all those interested and/or affected are aware of the plan making process, and their right to submit, will depend on how well the Council promotes active engagement.
- Submissions tend to favour those who are comfortable with the written word. Moreover, submitting on large planning documents requires the ability to navigate through the draft documents, synthesise the material and then make arguments in response. The process is therefore not widely accessible.
- Nevertheless, Councils can adopt wider participatory approaches and tools that are appropriate to the groups targeted for engagement. Many Councils have adopted such measures. However, such approaches require a specific skill set and resources, which many local authorities may not have, or may prefer to direct elsewhere.
- Finally, the plan-making process has become arduous and expensive. Plans are supposed to be drafted every 10 years under the Act, which would mean councils should be drafting 3rd generation plans now. However, because the first generation plans took so long to finally come fully into effect, some plans are still first generation. Some remained 'Proposed Plans' with sections that have been subject to Environment Court hearings and have remained highly contested. Several local authorities are only now preparing their second generation Plans. The question then is how responsive to change are these planning tools. Moreover, if public participation is undertaken at the plan drafting stage (with a much lesser emphasis on the project stage) and yet drafting only occurs every 15-20 years, then there is a significant gap in the process.

## 2.2 RMA project level – notification

The original Act provided for two types of process for resource consent approval – notified and non-notified. In principle, non-notified consent processes were for projects that had no more than minor effects and where parties affected (e.g. neighbours, *tangata whenua*) had given their consent for the project to progress. In contrast, the notified consent process was for projects with more than minor effects, and/or where not all directly affected parties had consented. In addition, some activities (e.g. those categorised as non-complying in the local authority plan) were automatically notified. Anyone has standing to submit on the process and, once they have submitted, they can then be a party to any subsequent court hearings. In 2003, a third type of process was introduced via an amendment to the RMA, called limited notification. New provisions limited the standing of the public so that where the effects of the activity were ‘no more than minor’, and not everyone directly affected had given their approval of the project, then those people identified as directly affected could make a formal submission.

In 2010-2011, 94% of consents were non-notified.<sup>47</sup> While this number will include a significant proportion of small scale projects (such as house extensions and alterations), there is anecdotal evidence to suggest that larger projects with adverse environmental effects sometimes slip through as a non-notified process when they have more significant effects. There are perhaps two reasons for this.

First, there is huge variability in how notification decisions are made across Councils. In the MfE’s *Survey of Local Authorities 2010-2011*, 68% of Authorities had guides or internal checklists to assist in making decisions on notification consistently, and 53% had guides for identifying affected parties.<sup>48</sup> Greater consistency and further research are required to determine how notification decisions are being made for larger projects with significant effects.

Secondly, in the 1990s, it was suggested that there was a common practice of developers to, in effect, ‘buy’ consents. Where full notification could be avoided if the approval of those directly affected could be obtained, it is in the developers’ interests to gain that approval by whatever means works. According to research in 1995 by Gleeson, it became common practice to offer financial reward for approval, saving developers’ time and money by avoiding the full notification process, and reducing the risk of legal challenges.<sup>49</sup> While this ‘commodification’ of resource consents is legal,<sup>50</sup> it may also result in environmental justice issues: given varying abilities to pay, and concentrations of locally unwanted land uses (LULUs), where developers seek out areas where groups are in greater financial need and so will be more likely to give approval in exchange for financial incentives. Again, there appears to be little research in the last ten years looking into notification practices and their wider spatial effects.

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<sup>47</sup> Ministry for the Environment, *Resource Management Act: Survey of Local Authorities 2010/2011* (Wellington: Ministry for the Environment, 2011), p. 14

<sup>48</sup> Ministry for the Environment, 2011

<sup>49</sup> Brendan J Gleeson, ‘The commodification of resource consents in New Zealand’, *New Zealand Geographer*, 51(1), 1995.

<sup>50</sup> Gleeson, 1995.

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There are problems with the nature and quality of information available to the public to allow them to be fully informed in order to make submissions. The full application is publicly available, including any technical reports that support it. Inevitably, that information will be framed in such a way as to support the application as it is provided by the applicant. In large projects, it is left to the submitters to seek out further information to support their submissions. In a recent case (the Escarpment Mine on the West Coast), local and national level NGOs struggled to gain access to information from the Department of Conservation (DoC) on the ecological effects of the proposal.<sup>51</sup> The groups twice applied successfully under the OIA, but were unsuccessful the third time because the financial recompense DoC sought for the release of the work was prohibitive.<sup>52</sup> Moreover, although DoC made a written submission, it declined to be heard, which meant there was no possibility to inquire further into its evidence at the hearing.

NGOs that are poorly resourced are at a significant disadvantage in a system that relies on technical expertise and scientific evidence to support claims. This is doubly so for individuals. So, while the RMA provides scope for public involvement, in practice that involvement may be quite limited and is variable across Councils and projects.

### 2.3 RMA project level – assessment of environment effects

With every application for a resource consent under the RMA, the applicant must submit an Assessment of Environmental Effects (AEE). ‘Good practice’ guidelines provided in relation to the AEE encourage further scope for developers to consult. However, in practice the guidelines may not be well utilised. Initially modelled on Environmental Impact Assessments (EIAs), the AEE requires applicants to consider all effects of the project. Consistent with EIA good practice,<sup>53</sup> the AEE also recommends appropriate consultation with affected parties. However, the quality of AEEs is variable, and there is no incentive for developers to consult beyond the minimum requirements in the Act, even though this may save time and money later in terms of future appeals. A Council can request further information on a consent application and that may include assessing the views of those affected.

### 2.4 RMA - Treaty principles

The RMA requires that the Principles of the Treaty of Waitangi are taken into account in decisions made under it. In practice, this has meant that decision-makers understand there is at minimum<sup>54</sup> a duty to consult local *tangata whenua* (people of the land) who may be affected by a specific project, plan or policy. Again practice across Councils is variable. In some regions, *tangata whenua* have established a specific body which assesses all consent applications to determine whether they should be consulted further, and will help initiate that process (e.g. Kai Tahu ki Otago). Other local authorities have *iwi* (tribe) liaison officers on the payroll. Practices

<sup>51</sup> Lillian Fougère, *Democracy in the face of disagreement: environmental opposition to Escarpment Mine on the Denniston Plateau*, Master’s thesis (Wellington: Victoria University of Wellington, 2013).

<sup>52</sup> Organisations subject to OIA requests are, under the Act, allowed to charge a ‘reasonable’ fee for releasing information. In this case the charge was in excess of \$1,000 (USD 822), costed as the time put into putting the information together: Fougère, L. 2013; op.cit.

<sup>53</sup> See <http://www.iaia.org/>

<sup>54</sup> See <http://www.waitangi-tribunal.govt.nz/treaty/principles.asp>

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have generally improved over the last 10 years as relationships and expectations of how consultation should proceed between Treaty partners have developed.

In addition, as collaborative management approaches such as that of the Land and Water Forum have been experimented with in recent years, Māori have been seen as necessary participants and their concerns have been given substantial attention, and seen as vital for the legitimacy of the process and outcome.<sup>55</sup> For example, the third Forum report notes:

*[I]wi should be enabled to participate throughout the freshwater objective - and limit-setting process both as Treaty Partner and also as stakeholders and [the Second Report] made specific recommendations about how this would be done at each stage of the model it put forward. (p. 7)*

The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 has highlighted the possibilities for co-management arrangements within the RMA that rest on an equal relationship between the Crown and *iwi*.<sup>56</sup> A number of authors<sup>57</sup> have identified the continuing need to empower Māori communities to cultivate effective participation in environmental decision making, while also recognising the challenges presented by an environmental management system that is predominantly based on Western, or Eurocentric, principles and values.<sup>58</sup>

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<sup>55</sup> Land and Water Forum (2012). Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water. Wellington, LWF.

<sup>56</sup> See <http://www.waikatoregion.govt.nz/PageFiles/15805/JMAs/2276497%20Tainui.pdf>

<sup>57</sup> See, for instance, G. Tipa, 'Exploring indigenous understandings of river dynamics and river flows: a case from New Zealand', *Environmental Communication*, 3, 1 2009

<sup>58</sup> For instance, in April 2013 the Minister of Conservation approved a 475ha marine reserve in Akaroa Harbour, despite opposition from the local *iwi* who advocated the use of protection tools developed and used by Māori. See <http://www.stuff.co.nz/the-press/news/canterbury/8549006/Couples-20-year-battle-for-Akaroa-reserve>

## 2.5 Recent RMA developments

In early 2013 the Government released a discussion document titled 'Improving our resource management system' which proposes significant changes to the RMA 1991.<sup>59</sup> Of particular relevance to this report are the proposals to constrain public participation and access to justice. Should the reforms progress as detailed in the discussion paper, Ministers will have the power to amend Council plans potentially without public consultation, limit the ability of the public to submit on publicly notified applications, limit appeal rights, and transfer responsibility for nationally important issues to a new Crown entity.<sup>60</sup>

The 2013 discussion document represents a decisive shift away from the Government's recent efforts to build more collaborative decision-making processes, and would result in placing some elements of environmental decision-making beyond public access.<sup>61</sup> The suggestions in the discussion document would seriously impair transparency and accountability within environmental governance. The chairman of the Environmental Defence Society has stated that the proposals indicate a 'move away from good governance'.<sup>62</sup> In addition, the public was given only a month to submit on the paper.

However, the discussion paper does address the need for greater meaningful engagement with Māori in environmental governance. Within the Aotearoa New Zealand context, there is a need to address the tensions between a 'right to participate paradigm, and the place of *tangata whenua* in environmental governance.<sup>63</sup> The contradictions between viewing Māori as one of many stakeholders to be engaged and participate in the same way, and viewing them as people with *mana whenua* (traditional authority over land), requires ongoing reflection. It is positive that the government is engaging in some way with it, although there is much work to be done.<sup>64</sup>

## 2.6 Other legislation: the CMA, climate change legislation and the ECan Act

The Crown Minerals Act (CMA) has no provisions for public involvement in its permitting processes – any person can apply for a permit to mine, and permits are granted as the Minister of Energy sees fit. Although many mining or mineral extraction operations require resource consents under the RMA as well, the nature of decision-making under the CMA is not participatory or particularly transparent. Amendments made to the CMA in April 2013 included provisions that make it an offence for activists to come within 500 metres of vessels involved in oil exploration, and that are granted a 'non-interference zone'. These provisions come in the wake of

<sup>59</sup> Ministry for the Environment, *Improving Our Resource Management System: A Discussion Document*, (Wellington: Ministry for the Environment, 2013)

<sup>60</sup> The concerns of Local Government New Zealand are set out in: LGNZ. (2013). Submission in the matter of the discussion document: 'Improving our resource management system'. Wellington: Local Government New Zealand, e.g. paragraph 92; <http://www.lgnz.co.nz/assets/Uploads/Improving-our-Resource-Management-System-2Apr2013.pdf>. [accessed July 2013]

<sup>61</sup> <http://www.stuff.co.nz/business/opinion-analysis/8400307/Oram-A-naked-power-grab> [accessed 13 March 2013]

<sup>62</sup> [www.eds.org.nz/content/documents/pressreleases/130309%20Presentation%20to%20Bluegreens%20Conference%202013.pdf](http://www.eds.org.nz/content/documents/pressreleases/130309%20Presentation%20to%20Bluegreens%20Conference%202013.pdf) [accessed 13 March 2013]

<sup>63</sup> Brad Coombes, 'Postcolonial conservation and kiekie harvests at Morere New Zealand - abstracting indigenous knowledge from Indigenous polities', *Geographical Research*, 45 2007.

<sup>64</sup> Coombes 2007

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2011 protests by *iwi* and NGOs against oil exploration in the Bay of Plenty region, and are contrary to international law protecting peaceful protest.<sup>65</sup> Furthermore, it is likely that constraining the right to participate through peaceful protest runs against the Bill of Rights, a pillar of New Zealand's partially unwritten constitution, and is not in the interests of inclusive environmental governance.

Consultation on climate change policy and legislation has varied over time, with a marked recent trend to disengagement on the part of the government. A recent instance is the important bill in 2012 which amended and weakened the Emissions Trading Scheme (ETS). The Climate Change Response (Emissions Trading and Other Matters) Amendment Bill was introduced on 23 August 2012, but the public was given only until 10 September 2012 to make submissions. This short submission period was inappropriate given the significance of the changes to the ETS and, as *Ora Taiao* argued in their submission, it suggested 'indifference to true consideration'.<sup>66</sup>

Perhaps the most alarming recent incursion into transparency in environmental governance has been the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (the ECan Act). The ECan Act was passed under urgency, representative of a growing trend to bypass many of the opportunities for public involvement in legislative development.<sup>67</sup> One provision of the ECan Act removed elected regional councillors and replaced them with commissioners, initially for a term of three and a half years. This term was recently extended for a further three years. The absence of regional body elections is a serious incursion into the public's ability to hold the regional body to account.

In addition, section 31 of the ECan Act empowers the Minister for the Environment to suspend specified provisions of the RMA in Canterbury.<sup>68</sup> This provision raises questions about the willingness of central government to encroach on the role of local authorities in environmental management issues.

## 2.7 Conclusions on Aarhus theme 2

To conclude on issues under Aarhus theme 2, key points are:

- It is important for RMA processes that Councils promote active engagement, and shorten lags in planning processes which tend to reduce perceived responsiveness and may reduce participation.
- There are some concerns about notification and consenting practices; e.g. some larger projects can slip through the consent process as non-notified. Greater consistency of processes may assist. NGOs are at a significant disadvantage in a system that relies on technical expertise and scientific evidence to support claims.

<sup>65</sup> See [http://www.nzherald.co.nz/politics/news/article.cfm?c\\_id=280&objectid=10876284](http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10876284)

<sup>66</sup> <http://www.orataiao.org.nz/OraTaiao+submissions> [accessed 30 April 2013]

<sup>67</sup> Philip Joseph, 'Environment Canterbury legislation', *New Zealand Law Journal*, June 2010

<sup>68</sup> Joseph, 2010 and <http://www.stuff.co.nz/the-press/opinion/3729741/ECan-Act-staggering-use-of-legislative-power> [accessed 13 March 2013]

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- While Māori involvement is improving, there is a continuing need to empower Māori communities to participate and to recognise Māori perspectives on environmental management.
- It is important that the national interest is articulated and understood at the regional or local level. Nevertheless, there are widespread concerns about current RMA 'reform' proposals; including a concern that local communities could be (further) disempowered, and that the changes could reduce public participation.
- The ECan Act and recent amendments to the CMA are retrogressive in respect to public participation in environmental governance.

### 3 Aarhus Theme 3 - Access to justice

Access to justice involves the right of review of public decisions that have been made without respecting the right of access to information or the right to participate in environmental decision-making.

#### 3.1 *Right to appeal*

The primary ways in which decisions can be challenged is through appeal to the Environment Court, established under the RMA, or through judicial review. The MfE's RMA monitoring survey found that in the 2010/11 year, 1 per cent of resource consent decisions were appealed.<sup>69</sup> Judicial review challenges can only be made on the grounds that a public authority made a decision that they did not have the power to make, or that they considered or failed to consider information that they otherwise should have and thereby made the wrong decision. Judicial review proceedings are costly, requiring legal representation and can take some time. Anyone who has submitted on a decision made under the RMA (plan making or resource consent processes) can appeal the decision to the Environment Court. Again, Environment Court hearings are costly, and time consuming. There is some support for NGOs and not-for-profit groups through the Environmental Legal Assistance Fund (ELA Fund).<sup>70</sup>

The ELA Fund provides not-for-profit groups with financial assistance to advocate for an environmental issue of high public interest in resource management cases at the Environment Court, higher Courts, and at boards of inquiry constituted under the 'call in' provisions of sections 142 and 147 of the RMA. Before a group can apply to the Fund it must already be engaged in the proceedings in specified ways. If an application is approved, the Fund pays costs (up to specified amounts) for the specified legal counsel and expert witnesses. The maximum assistance available per application is \$NZ40,000 (~USD 33,000) excluding goods and services tax. Not-for-profit groups may include environmental, community, *iwi* and *hapu* (sub-tribe) groups. In general, it is expected that groups are incorporated or a Trust. The Fund is not available to individuals.

The Fund is well-patronised which suggests that it is of significant value to the groups that receive funding from it. Over the period July 2011 – October 2012 more

<sup>69</sup> <http://www.mfe.govt.nz/publications/rma/annual-survey/2010-2011/key-facts-2010-11.pdf> [accessed 3 May 2013]

<sup>70</sup> <http://www.mfe.govt.nz/withyou/funding/ela.html> [accessed 19 March 2013]

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than 60 applications were accepted - of these, 45 were approved and 19 were declined. About 40 per cent of the applications approved were from *iwi* or *hapu* groups. Other recipients were community groups, local environmental groups and established national environmental NGOs. In 2011/12 \$NZ800,000 (~USD 658,000) was appropriated for the Fund; the data from recent years<sup>71</sup> suggest that the Fund is more or less fully subscribed.

Despite increasing access to the Environment Court through the ELA Fund, earlier reforms to the RMA may have constrained access. The Resource Management (Simplifying and Streamlining) Amendment Act 2009 reinstated the power of the Environment Court to award security for costs – the party whom the Court finds in favour of can seek legal costs from the other party. The Court can also award damages against a party participating in proceedings for trade competition reasons. This amendment was intended to avoid anti-competitive and vexatious objections being appealed through the Courts. While there is little information on the effect of these reforms to date, the Environment Institute of Australia and New Zealand cautioned that the changes may make the public more reluctant to participate in planning and resource consenting processes as the risks of doing so have increased.<sup>72</sup>

Of greater concern is the way in which the ECan Act (see above) has reduced access to the Environment Court in relation to water management in Canterbury. There is no right of appeal on decisions made in relation to regional plans or water conservation orders. A public law expert argues that constraining access to the Environment Court in Canterbury ‘denies the equal protection of the law, and is constitutionally repugnant’.<sup>73</sup>

### 3.2 *Are central and local government agencies held accountable (with appropriate implementation and reporting of remedies)?*

There are arguably four main ways in which central and local government agencies are held accountable when shortfalls and deficiencies in environmental governance are identified. The first is by private action against an agency in the Environment Court - for example if a local authority was considered to be failing to adhere to the provisions of its district or regional plan, or if private persons or organisations considered a local authority was not effectively carrying out the duties and responsibilities that it has under environmental legislation. Such situations are rare. Nevertheless, Councils are encouraged to monitor complaints, whether those complaints relate to the Council itself or other parties, consent conditions, or other matters. The Quality Planning website, implicitly noting a lack of integration in current monitoring and reporting, states:

*The majority of councils in New Zealand keep a register of complaints (as reported in the RMA Survey of Local Authorities, by the Ministry for the Environment). Complaints monitoring can help fill gaps in knowledge and information about the quality of the environment and community attitudes.*

<sup>71</sup> <http://www.mfe.govt.nz/publications/about/annual-report/2011-2012/page3.html> [accessed 19 March 2013]

<sup>72</sup> [http://www.eianz.org/sitebuilder/publications/knowledge/asset/files/62/eianz\\_nz\\_chapter\\_newsletter\\_feb\\_2009.pdf](http://www.eianz.org/sitebuilder/publications/knowledge/asset/files/62/eianz_nz_chapter_newsletter_feb_2009.pdf) [accessed 20 March 2013]

<sup>73</sup> Joseph, 2010

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*Over time it may be possible to use complaints monitoring to help develop trend data and add value to state of the environment reporting. This relies on having an integrated approach to monitoring and reporting within councils and with other agencies.<sup>74</sup>*

A second way is by private action (such as judicial review, mentioned above) in some other court if private persons or organisations consider that an agency is not effectively carrying out the duties and responsibilities that it has under the law - for example, the Department of Conservation under the Conservation Act, or the Ministry for Primary Industry under the Fisheries Act, or MfE/Ministry of Business, Innovation and Employment (MBIE), under the Climate Change Response Act or the Ozone Layer Protection Act, or MfE under the Environment Act.

An example of this is the current action by the West Coast Environmental Network in the Supreme Court in which they argue that 'West Coast Regional Council and Buller District Council should have had regard to climate change when New Zealand coal is burnt overseas...'<sup>75</sup> This is contested, as under the Kyoto Protocol a country was required to take responsibility for only those emissions that occurred within its territory; so it could be argued that the failure in environmental governance was a failure of the Kyoto Protocol and not one that New Zealand central or local government could be held accountable for. On the other hand, it could be argued that the requirements of the Kyoto Protocol were the minimum, not the maximum, that New Zealand should do to help reduce the build-up of GHGs in the atmosphere. And, in addition to compliance with the Kyoto Protocol, New Zealand should take into account the impact of emissions from its exports of fossil fuels. The New Zealand Government recently stated that it will not be party to any extension of the Kyoto Protocol beyond 2012, but it can be argued that the Kyoto Protocol has no bearing on what New Zealand's actions to reduce GHG emissions in 2013 and beyond should be. In short, the current legal action asserts that failing to take account of GHG emissions from New Zealand's exports of fossil fuels could be argued to be a deficiency in New Zealand environmental governance for which local authorities should be held accountable.

The third way is by an inquiry by the relevant Parliamentary Select Committee(s), for example the Local Government and Environment Select Committee. These are often superficial examinations, such as those of the financial activities of agencies such as the Energy Efficiency and Conservation Authority (EECA), in February/March 2013, or the Committee's consideration of petitions.<sup>76</sup>

The fourth means is by public opinion and the accountability (through the three-yearly election process) of the politicians who are responsible for the environmental governance system and for environmental management.

### 3.3 Accountability through audit and review

<sup>74</sup> <http://www.qualityplanning.org.nz/index.php/monitor/resource-consents-and-compliance> [accessed 3 May 2013]

<sup>75</sup> <http://www.stuff.co.nz/dominion-post/news/8414893/Overseas-coal-rules-don-t-apply-lawyer> [accessed 21 March 2013]

<sup>76</sup> [http://www.parliament.nz/NR/rdonlyres/6DE0E14F-B256-4757-82E7-C9F87CD859CC/266275/DBSCH\\_SCR\\_5781\\_201112financialreviewoftheEnergyEff.pdf](http://www.parliament.nz/NR/rdonlyres/6DE0E14F-B256-4757-82E7-C9F87CD859CC/266275/DBSCH_SCR_5781_201112financialreviewoftheEnergyEff.pdf) [accessed 21 March 2013] and [http://www.parliament.nz/NR/rdonlyres/2D1B565E-138A-4ED7-91C4-37E537D497AD/265201/DBSCH\\_SCR\\_5768\\_Petition201112ofFionaKidmanand314ot.pdf](http://www.parliament.nz/NR/rdonlyres/2D1B565E-138A-4ED7-91C4-37E537D497AD/265201/DBSCH_SCR_5768_Petition201112ofFionaKidmanand314ot.pdf) [accessed 21 March 2013]

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Appropriate access to justice also requires that decisions are transparent, that the processes under which they are made are legal, just and fair, and that the information on which they rest is available (Aarhus Theme 1). This requires regular review or audit of decisions and decision-making processes.

The PCE performs a vital function in auditing government practices to ensure a degree of accountability in environmental decision-making. As noted in relation to Aarhus Theme 1 above, the PCE is an independent agency, reporting to Parliament rather than the Executive, with the authority and responsibility to review environmental governance in an in-depth way. The 'purpose of the Commissioner is to independently assess the capability, performance and effectiveness of the New Zealand system of environmental administration'.<sup>77</sup> The PCE was established in 1987, and in the 26 years since then the PCE has conducted and published many reviews of different aspects of environmental governance, with its work generally regarded as being soundly-based, authoritative, timely and useful (as well as independent). While it has not engaged in a comprehensive review of the overall structure and performance of environmental administration, it has not been afraid to speak out on important environmental policy issues. For example, it recently warned the Government that an emissions trading scheme policy change proposed (and subsequently adopted) by Government would make its policy response on climate change 'a farce'.<sup>78</sup>

The extent of the PCE's work is limited primarily by its level of funding which is decided annually by Parliament. Funding for 2011-12 was \$2.6 million (USD 2.14 million)<sup>79</sup> and this is a minimal level for real effectiveness. It was reported recently that the PCE has sought a significant increase in funding (in light of the anticipated, but unrealised, expansion of the office's function to include comprehensive environmental reporting), but this was declined.<sup>80</sup> The role of the Commissioner is indispensable in contributing, and responding, to deliberation about environmental management:

*[M]uch of the work of the Commissioner is debated in the public domain, within the parliamentary process and through the media. All recommendations, and arguments presented to support them, are made in a very transparent manner, providing its own accountability for the quality of recommendations.<sup>81</sup>*

The Office of the Auditor-General (OAG) is another independent agency with the authority and responsibility to review environmental management in an in-depth way. Parliament seeks independent assurance that public sector organisations are operating, and accounting for their performance, in accordance with Parliament's intentions. There is also a need for independent assurance of local government. Local authorities are accountable to the public for the activities they fund through

<sup>77</sup> [http://www.pce.parliament.nz/assets/Uploads/Reports/pdf/soi\\_04.pdf](http://www.pce.parliament.nz/assets/Uploads/Reports/pdf/soi_04.pdf) [accessed 21 March 2013]

<sup>78</sup> <http://www.pce.parliament.nz/assets/Uploads/PCE-Submission-on-the-Climate-Change-Amendment-Bill.pdf> [accessed on 21 March 2013]

<sup>79</sup> <http://www.pce.parliament.nz/assets/Uploads/PCE-Annual-Report-2012web.pdf> [accessed 21 March 2013]

<sup>80</sup> See <http://www.stuff.co.nz/dominion-post/news/7119747/Absolutely-urgent-need-to-monitor-environment> [accessed 21 March 2013]

<sup>81</sup> Parliamentary Commissioner for the Environment, *Statement of Intent 2012-2015*, (Wellington: PCE, 2012)

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locally raised revenue. As an Officer of Parliament, the Auditor-General provides this independent assurance to both Parliament and the public through the reporting requirements set out under the Public Audit Act 2001 and other statutory requirements.<sup>82</sup> The OAG's Performance Audit Group undertakes performance audits (non-financial audits) under section 16 of the Public Audit Act 2001, and these are tabled in Parliament by the Speaker.<sup>83</sup> Section 16 provides that the Auditor-General may examine, inter alia, whether public entities are carrying out their activities 'effectively and efficiently', and complying with their statutory obligations.

The OAG has audited a number of areas of environmental management and performance,<sup>84</sup> including some audits of local government environmental management carried out jointly with the PCE. At times, like the PCE's reports, the OAG's conclusions have been critical of local government performance in environmental management. For example:

*My audit shows that we have reason to be concerned about freshwater quality in some parts of the country, particularly in lowland areas that are mainly used for farming... Based on my detailed audit findings and analysis of scientific monitoring data, I conclude that Waikato Regional Council and Environment Southland are not adequately managing the causes of non-point source discharges in their regions.... Both councils are trying to tackle the challenges of non-point source discharges and their cumulative effects, and there are some signs of improvement, but there is still significant work to be done.<sup>85</sup>*

The OAG's work provides a valuable supplement to the PCE's work, which is not funded adequately to cover the range of matters that the OAG is able to look at. Nevertheless, it is clear that the reporting by the OAG is sometimes ignored. For example, in a report on emissions mitigation by local authorities the OAG commented as follows, highlighting a trend in the 'wrong' direction:

*A plan to reduce emissions needs targets and measures to assess and report progress. In 2010/11, we noted that 13 local authorities had targets for reducing emissions (in 2009/10, 18 had such targets) and that reporting practices vary.<sup>86</sup>*

### 3.4 Conclusions on Aarhus Theme 3

To conclude on issues under Aarhus Theme 3, key points are:

- The ELA fund is well utilised and valuable.

<sup>82</sup> <http://www.oag.govt.nz/about-us/cag-role> [accessed 21 March 2013]

<sup>83</sup> <http://www.oag.govt.nz/about-us/our-structure/performance-audit-group> [accessed 21 March 2013]

<sup>84</sup> <http://www.oag.govt.nz/reports/environment> [accessed 21 March 2013]

<sup>85</sup> <http://www.oag.govt.nz/2011/freshwater> [accessed 21 March 2013]

<sup>86</sup> <http://www.oag.govt.nz/2012/local-govt/part7.htm> [accessed 21 March 2013]

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- 2009 amendments to the RMA make it more difficult, and thus may be making the public more reluctant, to participate in RMA processes, including appeals.
- The ECan Act has clearly reduced access to the Environment Court in relation to water management in Canterbury.
- The PCE performs an essential watchdog role that is critical to accountability, but it is meagrely funded. The OAG provides a valuable supplement to the PCE's work.

#### **4 Conclusions**

In many respects, environmental governance in New Zealand is sophisticated, and in a few respects exemplary, by international standards. Its positives, including institutions such as the Office of the Parliamentary Commissioner for the Environment and the Office of the Auditor General, and the quality of legislation such as the RMA, are important and the merits of these institutions are vigorously defended by an informed constituency when brought into question.

Nevertheless, there are weaknesses and worrying trends in the quality and transparency of environmental governance in New Zealand, in certain mechanisms for gathering and providing information, in public participation and in the delivery of environmental justice. Current concerns relate to practices under the Official Information Act; the lack of systematic and integrated state of the environment reporting; the role of central government vis à vis local government in particular instances, especially in Canterbury; and significant changes currently proposed to the RMA. Recent changes to the RMA and to climate change legislation have been or are being made without a consultation process proportionate to the importance of such changes.

On the other hand, there are some 'points of light' relating to investment in a number of environmental statistics, an Environmental Reporting bill in prospect, and instances of collaborative engagement in co-management of resources. How some of these matters develop remains to be seen, but it is safe to say that many of those conscious about the quality and transparency of environmental governance in New Zealand are concerned about current shortfalls and generally apprehensive about trends.