

# Dauids & Goliaths: Public Participation in the Planning Process

## Tony Hearn QC Memorial Lecture 2016

Hon Justice Stephen Kós<sup>1</sup>

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### A. Tony Hearn QC

[1] Tony Hearn was the first barrister at the planning bar to take silk. Thirty-five years ago, in 1981. Alas, he died in 2002. Alas again, I never met him. But I had of course often heard of him. He was renowned for an elephantine memory for planning law, authorities, facts and evidence. A memory he used to draw upon continuously because his eyesight had deteriorated to near-blindness.

[2] Despite this disability, his reputation as a cross-examiner — quiet, effective, almost surgical — was legendary. He was the Clifford Mortimer KC of this part of the world. Clifford Mortimer was an English divorce lawyer, a less cerebral and demanding branch of the law than planning, the documents-obsession of which is challenging to the visually impaired — and unimpaired. In his memoir, *Clinging to the Wreckage*, John Mortimer QC, the creator of *Rumpole*, talked about how his blind barrister father would insist on his mother reading his divorce briefs aloud to him on the train as they headed off on circuit. He had a penchant for making her repeat any particularly embarrassing particulars involving the co-respondent. Client confidentiality was at a different level in the 1930s.

[3] Tony Hearn, then, was a remarkable man: clever, courteous, humorous, incisive and scholarly. He was also a great mentor to younger practitioners, Peter Skelton tells me. It is a privilege to speak tonight in his memory.

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<sup>1</sup> Judge of the Court of Appeal of New Zealand. I express my appreciation to my clerk Duncan Ballinger for research on environmental defence schemes in Australia and Canada and Environment Court research officer Brooke Burnett for research on the role of amici in that Court. Thanks also to Environment Court Judge Jeff Smith, Professor Peter Skelton, Derek Nolan and Sarah Scott for their comments on ideas floated in this paper. Those ideas are more seaworthy as a result. Navigational responsibility however remains at all times with the skipper.

## **B. Nightmares**

[4] When I was a small child I was prone to a particular nightmare. It was that I had turned up at school still wearing my pyjamas. In my mother's defence (she being still with us at 95, and sensitive to slights regarding her children's upbringing) there was nothing wrong with my pyjamas. It was just that they were an unsuitable costume for the classroom.

[5] In more later years I have been prone to another nightmare. This one is that someone would ring me up and invite me to speak on resource management law, under the misapprehension that I know something about it.

[6] Another English writer and journalist, Auberon Waugh — son of Evelyn — was rung up one day and invited all expenses paid — and first class airfares at that — to speak at a conference in the Republic of Niger. The topic — breast-feeding — surprised him but happily he already had certain strong views on the subject. He spent some time researching it, eventually producing a considerable paper on the topic. He then travelled out to Niger. He was not a little dismayed, then, to be introduced to the audience as “Mr Auberon Waugh, the eminent English journalist, speaking to us today on the topic of press freedom.” Always important to check your topic.

## **C. Resource management**

[7] There are too few QCs like Tony Hearn who specialise pretty much full time in planning work. In Auckland there is only one now (one having retired and the other's practice having broadened considerably). There are none in Wellington, and one in Dunedin. But there are two in Christchurch, which perhaps reflects the lead Tony Hearn took 35 years ago.

[8] As a silk I was certainly not numbered among them. No one could have mistaken me for Tony Hearn, or attributed to me a learned — let alone scholarly or elephantine — knowledge of resource management law. It is true that I did a number of important (or at least challenging) resource management cases. And I suppose I got to know some resource

management law along the way. But it was all rather accidental. It was advocacy rather than specialist expertise which had me engaged.

[9] Apart from one case, my resource management cases were all for developers and infrastructure operators. So I acted for the Goliaths. The sole exception — which I'm reminded of every time I fly into Wellington — was stopping a wind farm being built at Baring Head, the stunning eastern entrance to Wellington Harbour. Ironically, my very last case at the bar before I became a Judge was in support of a 168 turbine wind farm for Contact Energy between Raglan and Port Waikato. By then mine was a Goliath-only practice.

[10] Back at Baring Head in the mid-1990s, and still among the Davids, I was instructed by the Hutt City Council to defend its earlier rejection of a 47-turbine wind farm proposal. I had recently beaten the Council in a judicial review about the design of an intersection. That was the only possible reason they could have chosen me to defend their Baring Head decision. My inexperience in the arcane field of resource management was soon apparent. As was the unfortunately weak basis of the Council's decision. We were having extraordinary difficulty assembling any credible experts to support us. Wind energy was new in New Zealand then, and it was widely lusted after. At that stage turbines were things of beauty that could do no wrong. But then a marvellous thing happened. The appellant made some footling procedural error. The Council — and its counsel — descended on this error like a host of enraged harpies. In part, in sheer desperation. The applicant-appellant became unnerved. The appeal was abandoned. On the strength of this forensic triumph my career in resource management took off.

[11] My next resource management case was rather more significant. After some useful work done on a Boxing Day train derailment, New Zealand Rail asked me to act for it to defend the fast ferries when the Marlborough District Council took enforcement action to try to slow the fast ferries down.

[12] The first moral of the fast ferries case — which I will come back to — is that you can win a case too well. Sometimes the best victory is the lesser one that leaves your opponents without the sour taste of a mouthful of warm seawater.

[13] The second moral — which I will also come back to — is that it would have been better for the operators if their opponents had been better resourced — so that a better decision had been made in the first place.

[14] These are the two themes I want to develop tonight. They come together in four propositions:

- (a) effective public participation in the planning process needs a greater equality of arms;
- (b) good decision-making depends on that;
- (c) given the current inequality of arms, publicly-funded assistance beyond the level available from the Environmental Legal Assistance Fund is probably needed; and
- (d) greater equality of arms is in everyone's interests — not least developers and infrastructure operators.

[15] In short, it produces better and more robust and enduring decisions. It is something I am only too acutely aware of now that I have become a Judge. Access to justice — and I mean effective access and effective justice — is a constant problem in a world in which people affected by complex legal issues increasingly have to appear on their own behalf.<sup>2</sup>

#### **D. Davids & Goliaths**

[16] The fast ferries litigation began in early 1995, just a couple of months after two operators — New Zealand Rail and a johnny-come-lately called Sea Shuttles — simultaneously began operating fast catamaran ferries across the Cook Strait. These travelled at up to 38 knots in open sea, somewhat less in Wellington Harbour and the Marlborough Sounds, and did the whole crossing in under two hours. Their conventional ferry

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<sup>2</sup> This is a subject I spoke about recently in another context: see Justice Stephen Kós “Civil Justice: Haves, Have-nots and What to Do About Them” (Arbitrators’ and Mediators’ Institute of New Zealand and International Academy of Mediators Conference, Queenstown, 3 March 2016), <<http://www.courtsofnz.govt.nz/from/speeches-and-papers>>.

counterparts plodded along at a steady 18 knots and did it in almost double the time — 3½ hours.

[17] The problem was that local residents — particularly in the Sounds — started to complain about the bow and stern waves of the fast ferries. Complaints included being no longer able to tether boats to jetties, dangerous high waves (a beach barbeque at Evans Bay was swamped — and the kettle barbeque was last seen floating out to sea), sea lettuce and rocks being thrown up on beaches, and major erosion of the inter-tidal zone and man-made structures like seawalls said to be occurring.

[18] Early on I was despatched to take a look on the ground — or water. The operations manager of the Interisland Line and I tethered our boat to a private jetty along Tory Channel and went for a walk along the beach. We saw rocks covered in algae now well up above the high tide mark. We watched a fast ferry pass by. Nothing dramatic. No evident waves. It passed beyond the headland and we thought little more of it. About three minutes later the tide suddenly seemed to be sucked downwards, followed immediately by a very large upward wave. We hurled ourselves along the beach to rescue the boat — which at one point seemed to rise above the jetty and only narrowly avoided being dumped down on it. At this point I started to have some doubts about the merits of defending these vessels.

[19] In the end, however, history relates some inarguable facts:

- (a) the Council brought enforcement action against the operators to slow the ferries down;
- (b) the operators won: the Judge was persuaded that the environment was already highly modified, that the physical environmental effects were transitional and that a new equilibrium involving a remodified natural environment had probably been reached;<sup>3</sup>
- (c) as a matter of scientific fact that prediction proved wrong; the adverse environmental effects continued to occur; and

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<sup>3</sup> *Marlborough District Council v New Zealand Rail Ltd* [1995] NZRMA 357 (PT).

(d) by 2001 the fast ferries had gone, never to return.

[20] How did all this happen?

[21] The first reason is that the Council taking the enforcement action was itself split on the issue — seeing huge benefits in faster ferries too. That reflected the views of its electors — who were also split. (That split, it may be observed, extended to some of the residents supporting the enforcement action. My cross-examination of the first three elicited that they had travelled to the hearing in Wellington on a fast ferry.) The uncertain lie of the political landscape meant the Council was keen to back the winner. And as the defence mounted by the operators started to gain traction, the Council started to take a more neutral stance. My experience has been that political entities like councils make for unreliable bedfellows in litigation.

[22] Secondly, the public opposition from Save Our Sounds Inc — standing initially alongside the Council but more latterly having to lead the enforcement action process — was poorly funded. Its experts were no match for those called by the operators. They fared poorly under cross-examination. They had had limited opportunity to acquaint themselves with the affected environment, or to do any sort of testing of their own. As my lot were wont to say, sniffily, they had not even got their feet wet. Given the prodigious wave effects caused by the fast ferries, that was no mean achievement.

[23] Thirdly, (as I have said) the operators won too well. The scale of their essentially unqualified victory, and the fact that the scientific prediction underlying the decision to refuse enforcement orders proved over-optimistic, simply fuelled an unquenchable community thirst for correction. We spent the next six years trying to hold on to an advantage which, had it been less profound, might have been more defensible.

[24] Fourthly, no one had the heart (or money) to challenge the operators again on environmental grounds. The campaign switched to safety. In 2000 the Council imposed an 18 knot speed limit through the Sounds. Notionally safety-based, its purpose was schizophrenic. But challenges by TranzRail to the speed limit failed. Predictably, I failed to hang on to the victory I had pulled off in 1995. The fast ferries were now barely an hour faster than the conventional ferries, but the tickets cost twice as much — partly due to the

ruinous fuel costs of operation. The public stopped coming. The fastish ferries — fast now only in open waters — were discontinued.

[25] With the benefit of hindsight, it would have been in everyone's interests if the operators' case had been more rigorously examined at trial in 1995. And, fundamentally, that required opponents of the ferries to have access to stronger expert evidence. The outcome in that case was the direct consequence of a serious inequality of arms.

[26] Two subsequent cases — both before Boards of Inquiry — have reinforced these impressions.

[27] The first was Transpower's North Island Grid Upgrade Project — called in by the Minister in August 2007 on the basis that it was a project of national significance. A Board of Inquiry chaired by Environment Court Judge Shepherd heard evidence over seven months, between March and October 2008. I led for Transpower, with a supporting cast of five very capable members of Simpson Grierson's environmental law team.

[28] The project involved new transmission infrastructure between Taupo and South Auckland. It crossed nine territorial authorities. Each of these, it may be observed, had different ideas about the appropriate route. Had these ideas been implemented the route would have zigged and zagged with 90 degree changes of direction as each local authority boundary was met. As an opposing force, the Councils were not exactly coordinated. And of course none of them wanted to attend months and months of hearings. Only the applicant was resourced for that sort of endurance exercise.

[29] Our main opponent was a public interest group, led by a charismatic but polarising academic. It had obtained about \$15,000 funding assistance from the Environmental Legal Assistance Fund. That was a drop in the bucket of aid it needed. In the end it was a singularly ineffective opponent. It took a number of extreme positions that undercut its credibility. And ultimately it simply ran out of steam. I do not remember it calling any significant expert evidence.

[30] This troubled Transpower's legal team. The most dangerous state of affairs for a major infrastructure consent applicant is an absence of effective opposition. The risk is that

the Board of Inquiry then feels a need to fill the vacuum, and starts to pitch away from the project. We felt that risk profoundly in Hamilton, at the hearing centre in Claudelands Showgrounds, with its permanent sickening smell of gas heaters, that winter of 2008.

[31] Our best opponent was an individual, a retired nuclear physicist from England who now lived in the Hunua Ranges. I think his name was Dr Wilkinson. He was highly intelligent, and asked our witnesses some unsettlingly good questions. But he had no litigation experience. He spoiled his impact by asking his questions in an irritating way. The questions were sometimes overlong or compounded, sometimes argumentative. After discussing it with my team, I went over to him during a break and offered to train him in cross-examination. “Why would you help me?” he asked, sensibly alert to a trap. I explained that he was our best opponent, that we wanted our case to be tested properly, and preferred if the main testing came from our opponents and not the Board itself. He thought about that for a moment, saw the sense in it, and said “OK, train me”. I spent the lunch hour talking him through advocacy techniques and he was relaunched on the Board that afternoon. Given his intelligence, he was at once more effective. But even he ran out of puff over the ensuing months, and eventually stopped coming.

[32] The outcome in that case was a very solid win for Transpower.<sup>4</sup> But I doubt the objectors felt they had had a fair crack of the whip. It was (or felt like) an essentially adversarial contest in which they were constantly out-manoeuvred and outgunned.

[33] The second Board of Inquiry was my last case at the bar before I joined the High Court. This was the Hauāuru mā Raki wind farm, a 168 turbine wind farm between Raglan and Port Waikato. Again I led a team of five fine environmental lawyers, this time drawn from Chancery Green and Buddle Findlay.

[34] It was a fitting end to my advocacy career. Having argued cases in the Privy Council and the Supreme Court, and in Courts across the Pacific, my last case was conducted in the Town Hall at Tuakau, in South Auckland.

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<sup>4</sup> Report of the Board of Inquiry — Upper North Island Grid Upgrade Proposal (September 2009), available at [www.nfe.govt.nz/call-in-transpower/board-of-inquiry/index.html](http://www.nfe.govt.nz/call-in-transpower/board-of-inquiry/index.html)

[35] The local fire station was an annex of the Town Hall. This caused occasional disruption. One day there was a loud bang from down the street. Soon the fire siren sounded, and we broke until it finished, gathering outside to watch what later turned out to be a P-lab burning merrily. On another occasion the atmosphere in the hearing became a little overheated, and the fire alarms went off. The EPA staff, now attired in smart fire wardens' jerkins, ushered us out. We stood outside watching the volunteer fire fighters arrive. They jumped in the fire engine, turned on the siren and drove all of 15 metres to park up in front of the Town Hall.

[36] In many ways Hauāuru mā Raki was a good example of public participation in the planning process. Certainly it seemed to me that the public were more effectively engaged in the process, and more effective in their participation. There were of course exceptions. One submitter at Raglan made an impassioned submission on endangerment of the Hector's Dolphin — only then to discover (under cross-examination) that the project was wholly land-based, had no offshore turbines, and would not be troubling Hector and his pod one iota. Always important to check your application.

[37] The main reason this hearing worked better was that the project was far smaller — even though it was the largest wind farm yet mooted in the country. As a result the hearing was shorter — six weeks in all. It was manageable. The Department of Conservation, though they drove us mad at the time, put up a good fight on risks to avifauna. That encouraged other participants. The Board of Inquiry itself was exceptionally vigorous in its questioning of the applicant's witnesses. If at times we felt it went too far, the final result (confirming all 168 turbines) disproved that concern.<sup>5</sup> But the submitters certainly thought the applicant had been given a good working over at the time.

[38] I turn now to means available of achieving greater equality of arms, enabling more effective public participation in the planning process.

## **E. The Environmental Legal Assistance Fund**

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<sup>5</sup> Final Report and Decision of the Board of Inquiry into the Hauāuru mā Raki Wind Farm and Infrastructure Connection to Grid (May 2011) available at <http://www.mfe.govt.nz/rma/proposals-national-significance/historic-call-ins/hauauru-ma-raki-waikato-wind-farm-proposal>.

[39] The Environmental Legal Assistance Fund was introduced by the minority Labour Government after the 1999 election. But its progenitor was the Green Party, which insisted upon it as a price for supporting Labour.<sup>6</sup>

[40] The fund is available to reimburse not-for-profit organisations for the costs of legal representation and expert witnesses in Environment Court and Board of Inquiry hearings. It is not available for assistance at council hearings, higher court appeals or for costs incurred before an application for funding is lodged.<sup>7</sup> And it is not available to individuals.

[41] Applications are assessed by an independent advisory panel, which makes a recommendation to the Director of Human Resources, Legal and Procedure at the Ministry, under delegated authority from the Minister for the Environment. The independent advisory panel currently consists of persons with legal, local government, planning, architecture and Māori cultural expertise.

[42] The total budget for the fund is \$600,000 (excluding GST). This is about \$0.14 per head of population.<sup>8</sup> The maximum grant per group per application for any one case is \$50,000 (excluding GST).

[43] For the 2011–2014 financial years, the average amount allocated was \$596,000 — just shy of the total budget. 63% of applications were approved. In 2014/15 the amount spent by the fund was \$443,841.

[44] It is not for a sitting Judge to comment on an occasion like this on the adequacy of such executive provision. But I can safely state the obvious at least: sums of this order will have limited effect in achieving any sort of equality of arms. Especially when, in a major infrastructure project, applicant legal and expert witness hearing costs can easily reach \$2–3 million. And that is excluding the cost of the application and assessment of environmental effects.

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<sup>6</sup> Labour in combination with the Alliance was two seats short of a Parliamentary majority. The Greens had seven seats.

<sup>7</sup> Ministry for the Environment *About the Environmental Legal Assistance Fund* (reviewed by the Ministry on 28 July 2015), available at <<http://www.mfe.govt.nz/more/funding/environmental-legal-assistance-fund/about-fund>>.

<sup>8</sup> New Zealand's population is about 4.4 million.

[45] That said, the Principal Environment Court Judge, Judge Newhook, has sung the praises of the fund. He has seen significant advantages from its assistance — particularly in helping objectors coalesce into manageable units with better counsel and experts.<sup>9</sup>

**F. A different approach: Australia (and Canada)**

[46] Each state and territory in Australia has an Environmental Defender’s Office. Two Canadian provinces also do so. This is a non-governmental community law centre, consisting of a small team of solicitors and scientists that take on public interest environmental cases and make submissions on law reform. The offices receive some pro bono support from lawyers and scientists.

[47] The Australian offices source their incomes mostly from government grants and private donations, and spend most of their income on salaries. The Canadian offices source most of their funds from the Law Foundation, which earns the interest on all lawyers’ trust fund balances. I have tabulated the incomes for the states/provinces I have found data for.

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<sup>9</sup> Environment Judge Newhook “Paper for delivery to Environmental Legal Assistance Fund Annual Workshop” (July 2015) at [15].

<u>State/Province</u>	<u>Financial year of data</u>	<u>Income in NZ\$</u>	<u>Population</u>	<u>Income in NZ\$ per head of population</u>
New South Wales <sup>10</sup>	2015	\$2,500,000	7,500,000	\$0.33
Western Australia <sup>11</sup>	2014	\$540,000	2,500,000	\$0.22
South Australia <sup>12</sup>	2015	\$220,000	1,600,000	\$0.14
Victoria <sup>13</sup>	2013	\$780,000	5,800,000	\$0.13
Tasmania <sup>14</sup>	2015	\$320,000	500,000	\$0.64
ACT <sup>15</sup>	2014	\$150,000	390,000	\$0.38
Ontario <sup>16</sup>	2015	\$1,700,000	13,600,000	\$0.13
British Columbia <sup>17</sup>	2015	\$2,00,000	4,600,000	\$0.43

[48] The Australian Federal Government stopped funding all of the Environmental Defenders' Offices in 2013. The offices previously obtained 80 to 90 per cent of their funding from Federal Government. The offices in New South Wales, Queensland and Victoria still obtain some grants through state government.<sup>18</sup> The rest rely on private donations.

<sup>10</sup> Environmental Defender's Office New South Wales "Annual Report" (2015), <[http://www.edonsw.org.au/annual\\_reports](http://www.edonsw.org.au/annual_reports)>.

<sup>11</sup> Environmental Defender's Office Western Australia "Annual Report" (2014) <<http://www.edowa.org.au/assets/Who-We-Are/Annual-Reports/Annual-Report-2014.pdf>>.

<sup>12</sup> Environmental Defender's Office (SA) Inc "Annual Report" (2015), <[http://www.edosa.org.au/about\\_us](http://www.edosa.org.au/about_us)>.

<sup>13</sup> Environmental Justice Australia "Annual Report" (2013), <[https://envirojustice.org.au/.../annual\\_reports/edo\\_annual\\_rept\\_12-13.pdf](https://envirojustice.org.au/.../annual_reports/edo_annual_rept_12-13.pdf)>.

<sup>14</sup> Environmental Defender's Office Tasmania "Annual Report" (2015), <<http://www.edotas.org.au/edo-tas-annual-report-2014-2015/>>.

<sup>15</sup> Environmental Defender's Office Australian Capital Territory "Annual Report" (2014), <[http://www.edoact.org.au/annual\\_reports](http://www.edoact.org.au/annual_reports)>.

<sup>16</sup> Canadian Environmental Law Association "Annual Report" (2015), <<http://www.cela.ca/collections/other/celas-annual-reports>>.

<sup>17</sup> West Coast Environmental Law "Financial Review" (2015), <<http://wcel.org/financial-review>>.

<sup>18</sup> Christine Trenorden "Environmental legal aid slashed when Australia needs it most" (12 March 2014) The Conversation <<http://theconversation.com/environmental-legal-aid-slashed-when-australia-needs-it-most-23988>>.

## **F. Counsel assisting**

[49] Neither the Environment Court nor Boards of Inquiry are covered by the Inquiries Act 2013. That Act concerns Royal Commissions, and public and government Inquiries established under s 6 of Act. It provides expressly, in s 13, for counsel assisting: an Inquiry may request the Solicitor-General appoint counsel assisting after considering the purpose of the Act, and what must be done to ensure the Inquiry is carried out “effectively, efficiently and fairly”.

[50] The appointment of counsel assisting in major hearings, particularly projects of national significance called into Boards of Inquiry, should be encouraged. There seems no doubt that Boards of Inquiry have the power to take that step in regulating their own processes. And if a project is one of national significance, is controversial, and if good decision-making is dependent on a robust evaluative process, why would a Board of Inquiry not take that step?

[51] At the moment the appointment of counsel assisting Boards of Inquiry is erratic. Some do, and some do not. The Basin Bridge proposal Board of Inquiry in Wellington appointed counsel assisting. Its memorandum on inquiry procedures provided:<sup>19</sup>

The Board may appoint a lawyer to assist the Board. The Board may request the legal advice to assist on specific issues before, during or after the hearing, by way of producing memoranda, cross-examining the witnesses, attending the hearing and making representations, or such other functions as the Board considers appropriate.

[52] The Wellington Northern Corridor Roads of National Significance Board of Inquiry also appointed counsel assisting. But their involvement was on an as-required rather than continuous basis. They are the two instances I am aware of. No such counsel were appointed to assist the two Boards of Inquiry I was involved in.

[53] The appointment of counsel assisting on a regular and continuous basis would greatly assist members of the public participating in a complex planning process. It would ensure greater equality of arms. Counsel assisting are in a position to ask questions that need to be asked, and which could not effectively be asked by members of the public. They would

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<sup>19</sup> Available at [http://www.epa.govt.nz/Publications/Board%20Memorandum%20No.06%20-%20Inquiry%20Procedures%20\(Issue%202\)%20\(27%20September%202013\).pdf](http://www.epa.govt.nz/Publications/Board%20Memorandum%20No.06%20-%20Inquiry%20Procedures%20(Issue%202)%20(27%20September%202013).pdf)

ensure that the applicant's proposal is properly and robustly tested. Importantly, they allow the Board not to be dragged down into the fray, which is a real risk when a forensic vacuum emerges.

[54] It is a more controversial matter whether counsel assisting should be able to call evidence of their own. Perhaps in response to evidence from the applicant. It is routine, of course, in inquiries governed by the Inquiries Act 2013 that counsel assisting call evidence. But those Inquiries are not dealing with specific proposals advocated for by a party calling evidence of its own. I leave that issue hanging for now. But I do say that equality of arms is not just about legal representation. It is not just about cross-examination, or close questioning by the Board itself. It is also about a robust exchange of expert opinions by expert witnesses.

[55] Counsel assisting are in my view a better alternative in major hearings than some of the other alternatives that are commonly employed. Three come to mind:

- (a) “friends of submitters”: usually a planner helping guide submitters through technicalities. They have been used in the current Independent Hearings Panel for the Christchurch Replacement District Plan, and by the Waterview Motorway Board of Inquiry;
- (b) “process advisors”: appointed by the Environment Court to perform a similar role. These people may be planners or lawyers, or both,<sup>20</sup> and
- (c) amici curiae: or “friends of Court”, legal counsel appointed in a number of cases by the Environment Court, often where there is weak counter-representation and a significant legal issue has arisen. Their use is most prevalent in declaratory proceedings rather than major consent application hearings.

[56] While they serve a useful function, the more limited participation of amici, friends of submitters and process advisors does not offer the force that vigorous cross-examination from counsel assisting can do. They do not help fill the forensic vacuum where submitters are

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<sup>20</sup> Judge Newhook, above n 9, at [23].

weakly represented. I think applicants should welcome the involvement of counsel assisting, because outcomes will be more robust.

## **G. Conclusions**

[57] By now my thesis tonight will be plain to you: good environmental decision-making requires robust evaluative processes. That requires at least some equality of arms between participants. This is of particular importance where major projects are involved. Especially projects of national significance called in before a Board of Inquiry. It must be doubtful whether reliance by submitters on assistance from the Environmental Legal Assistance Fund will achieve any real equality of arms, although as far as it goes it is unquestionably a real help. I am also doubtful that part-time counsel assisting, or friends of submitters or process advisers are an adequate response. My thesis tonight is that real consideration must be given to the appointment of effective and continuous counsel assisting, tasked with testing evidence (for both applicants and submitters) where the testing process otherwise may be inadequate.

[58] I want to finish by telling you about a submitter from my last hearing, the Hauāuru mā Raki wind farm Board hearing. He was a delightful bantam cock of a fellow, a beef farmer called Richard Smith. There were some turbines to be sited adjacent to his boundary. He was pretty cross about one of them, and came along himself to tell the Board that. He began to become interested in the hearing process. In the second week, rather tentatively, he started to ask a few questions. These went quite well. As they say, there's nothing like a little applause to encourage an actor. He became a vigorous participant, cross-examining quite well. He was a good example of what an intelligent layman can do in a hearing. Certainly the Board encouraged him, and that was all to the good. And he and I got on like a P lab on fire.

[59] He was plainly a bright man. Scruffy, as a farmer is entitled to be. A jumper with holes and old corduroys. A slight odour of calves. But on the day he was to deliver his closing argument — a Friday — he appeared quite magically in a smart suit. “Good morning Richard”, I said as I walked in. “Did you hire the suit for the occasion?”

[60] When he got up to address the Board, even the Judge said how nice he looked. “Thank you Your Honour”, he said, “but I have to complain about what Mr Kós said about

my suit. He said I'd hired it for the day, and that's just not true. I've hired it for the whole weekend."

[61] There are many Mr Richard Smiths appearing daily in Council and Environment Court hearings around the country. It is one of the real virtues of the process. The planning process would not work without this sort of substantial public participation. But they need more of a helping hand.