THE ADMINISTRATIVE STATE AND PARTICIPATORY DECISION-MAKING: EMPIRICAL INSIGHTS FROM THE NEW ENVIRONMENTAL GOVERNANCE

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INTRODUCTION

A quiet revolution is taking place in the ways in which citizens and governments are seeking to engage with complex social and environmental issues. Traditionally, at least in the wide range of circumstances where unconstrained markets proved insufficient to achieve socially desired outcomes, such issues have been addressed through top down government driven approaches.[1]

This top-down approach relied on legislatures and administrative agencies, which set and enforced broad based environmental and social targets, be it in the form of pollution standards in command and control regulation or overarching caps and taxes in market based approaches. But today, numerous "experiments" are taking place in Australia and internationally which seek to address environmental problems through mechanisms that supplement, and in some cases supplant, conventional top down decision-making regimes.[2] The aim of domestic lawmakers is to manage public problems through localized, participatory and deliberative governance processes.

These processes have come to be known as the "New Governance". The term "governance" is preferred to "law" or "regulation" because these new forms of social steering are not necessarily (although they may be) dependent on formal legal regulation or other government interventions to drive them.[3] The new governance literature is not derived from a single legal or socio-legal theory but rather stems from many diverse sources, as can be illustrated by the variety of terms that have been used to describe it.[4] Prominent amongst these are "experimentalism", "empowered

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[1] Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 342, 343; Graine De Búrca, "New Governance and Experimentalism: An Introduction" (2010) *Wis L Rev* 227; Neil Gunningham and Cameron Holley *Bringing the 'R' word back: regulation, environment protection and NRM* 3/2010 Occasional Paper of the Academy of the Social Sciences in Australia (2010) 1; Cameron Holley and Neil Gunningham, 'Natural Resources, New Governance and Legal Regulation: When Does Collaboration Work?' (2011) 24 *New Zealand Universities Law Review* 309; Michael Head, *Administrative Law: Context and Critique* (Federation Press, 2005) 214.

[2] Holley and Gunningham, above n 1.

[3] Ibid.

[4] Ibid.

participatory governance", "modular regulation", "collaborative environmental governance", "multilevel governance" and "regional collaboration".[5] But even though these ideas are diverse in their theoretical pedigree, they have significant commonalities, including an emphasis on collaboration, integration, knowledge generation, flexibility, decentralisation, and most importantly from the perspective of this article, participatory and deliberative styles of decision-making. Although there is no single new governance model per se, the term new governance is increasingly used to refer to legal and public policy approaches that encompass some or all of these principles.[6]

Across the globe, new governance has opened up various points of direct public input into many levels and stages of legal process, including legislation, promulgation of rules, implementation of policies and enforcement.[7] Examples of such initiatives are evident across diverse policy areas, including policing and public school reform,[8] work place/employment law[9] and heath care.[10] However it is the arena of environmental and natural resources law that has been at the forefront of these participatory and deliberative governance approaches.[11]

Going substantially beyond traditional mechanisms of citizen participation in environmental law (e.g. the court system, voting, public hearings and traditional "notice and comment" procedures), prominent illustrations of this growing trend internationally include the Glen Canyon Dam initiative in the United States, the Water Framework Directive in Europe, and regional water management in New Zealand.[12]

The participation of citizens and non-government stakeholders in these and other new environmental governance (NEG) endeavors have been examined by scholars from a number of a different perspectives (e.g. examining the extent of representation and inclusion of civil

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[5] David Hess, 'Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency' (2007) 17(3) *Business Ethics Quarterly* 453, 454. For discussion and references see Michael Lockwood et al, 'Governance Principles for Natural Resource Management' (2010) 23(10) *Society and Natural Resources* 986; Cameron Holley, 'Facilitating Monitoring, Subverting Self-Interest and Limiting Discretion: Learning from "New" Forms of Accountability in Practice' (2010) 35 *Columbia Journal of Environmental Law* 127.

[6] Bradley Karkkainen, 'New Governance' in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping' (2004) 89 *Minnesota Law Review* 471.

[7] Cameron Holley, 'Public Participation, Environmental Law and New Governance: Lessons for Designing Inclusive and Representative Participatory Processes' (2010) 27 *Environmental and Planning Law Journal* 360, 365.

[8] Archon Fung, *Empowered Participation Reinventing Urban Democracy* (Princeton University Press, 2004).

[9] Susan Sturm, 'Gender Equity Regimes and the Architecture of Learning' in Gráinne De Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, 2006) 323.

[10] Louise Trubek, 'New governance Practices in US Health Care, US and EU' in in Gráinne De Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, 2006) 245.

[11] Charles Sabel and William Simon, 'Minimalism and Experimentalism in the Administrative State' (2011) *10-238 Columbia Public Law Research Paper* 1, 31; Lobel, above n 1, 423.

[12] Holley and Gunningham, above n 1.

society).[13] However many of the primary concerns and debates in the literature to date relate to the issues of deliberative decision-making and power sharing.[14]

Many scholars and policy makers assert that actively engaging citizens and stakeholders in public decision-making can offer a path to an enriched democracy, increase support for specific policy measures, enhance legitimacy and achieve effective solutions for today's most pressing environmental challenges.[15] Others however counter that any potential gains from NEG's participatory decision-making approach will be undermined by traditionally more powerful actors, such as administrative agencies, who are unwilling to share their power and/or will dominate and distort the decision-making process to favour their own agendas.

In addition to these ongoing normative debates, an interrelated concern in the literature is exploring the implications of these participatory NEG developments for our understanding of the modern administrative state.[16] The participatory nature of new governance appears to blur the familiar sharp boundaries that separate the state from the institutions of civil society. This raises a range of questions about the role of the state and how law and governance ought to work. For example, to what extent can public administration functions be taken over by other actors? Can the state be effectively "decentred", becoming simply one of a number of actors involved in governance, but no longer privileged in terms of power and influence?[17] Or does the state retain crucial and distinctive roles, and if so what are they?

Legal scholars continue to debate these questions because our understanding of the nature and extent of participation in NEG in practice is still very limited.[18] To date, scholarship and research has tended to focus on single cases and/or limited institutional examples,[19] leading some to claim that new governance remains "elusive about [its] complex mechanics of local participation".[20]

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[13] See Holley, above n 7. For further on dimensions of participation see Ortwin Renn and Pia-Johanna Schweizer, 'Inclusive Risk Governance: Concepts and Application to Environmental Policy Making' (2009) 19 *Environmental Policy and Governance* 174, 176-180; Archon Fung, 'Varieties of Participation in Complex Governance' (2006) 66(1) *Public Administration Review* 66.

[14] Stijn Smismans, 'New Modes of Governance and the Participatory Myth' (2008) 31(5) *West European Politics* 874 at 876; Fung, above n 13; Joshua Cohen and Archon Fung, 'Radical Democracy' (2004) 10(4) *Swiss Journal Of Political Science* 23.

[15] Marleen van de Kerkhof, 'Making a Difference: On the Constraints of Consensus Building and the Relevance of Deliberation in Stakeholder Dialogues' (2006) 39 *Policy Sciences* 279.

[16] Sabel and Simon, above n 11; Michael Kirby, 'The Modern Administrative State: Reflections on India and Australia' (2010) 11 December *Central Administrative Tribunal Inaugural Rajiv Gandhi Lecture*, New Delhi, India; Jody Freeman, 'Collaborative Governance in the Administrative State' (1997) 45 *UCLA Law Review* 1; Bradley C Karkkainen, 'Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism' (2002) 21 *Virginia Environmental Law Journal* 189, 237-238. See generally Dwight Waldo, *The Administrative State: a Study of the Political Theory of American Public Administration* (Transaction Publishers, 1948).

[17] See generally Arthur Mol, 'Bringing the Environmental State Back In: Partnerships in Perspective' in P. Glasbergen, F. Biermann and A. Mol (eds) *Partnerships, Governance and Sustainable Development* (Edward Elgar Publishing, 2007).

[18] See e.g. Amy Cohen, 'Negotiation, Meet New Governance: Interests, Skills, and Selves' (2008) 33 *Law & Social Inquiry* 503; Smismans, above n 14; Charles Sabel and Willaim Simon, 'Epilogue: Accountability Without Sovereignty' in Gráinne De Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, 2006) 402-03;; B Koehler and T Koontz, 'Citizen Participation in Collaborative Watershed Partnerships' (2008) 41(2) *Environmental Management* 143, 151; Collaborative Democracy Network, 'A Call to Scholars and Teachers of Public Administration, Public Policy, Planning, Political Science, and Related Fields' (2006) 66(1) *Public Administration Review* 168,168-69; William Leach, 'Collaborative Public Management and Democracy: Evidence from Western Watershed Partnerships' (2006) 66(1) *Public Administration Review* 100.

[19] For some emerging studies, see G Kuehne and H Bjornlund, 'Frustration, Confusion And Uncertainty - Qualitative Responses From Namoi Valley Irrigators' (2006) *Water* 51; Mark Hamstead, Claudia Baldwin, Vanessa O'Keefe, *Water Allocation Planning in*

Based on interviews with 68 key government and non government stakeholders across three distinct NEG programs in Victoria, Queensland and New South Wales, this article seeks to shed light on the above issues by asking: how do citizens and non government stakeholders participate in NEG decision-making processes? And to what extent is true power sharing achieved?

Inevitably, as a single empirical study this article cannot address the full range of complex issues relevant to citizen participation in new forms of environmental governance. For example, although the study provides some important empirical insights into the processes and conditions under which meaningful participatory decision-making is possible, the study cannot offer definite conclusions on the extent to which these processes will inturn lead to desired environmental outcomes. Not only would such an examination require a lengthy longitudinal study, given that environmental outcomes often take decades to be secured and thus measured,[21] it would also require distinguishing between the long term impacts of participatory process relative to the multitude of other controls and processes in a given program.

Nor does the present study purport to engage directly with the question of whether common law rules of procedural fairness provide sufficient safeguards for the consultation of affected persons in the context of NEG. While the article touches upon some matters relevant to this issue throughout, considering procedural fairness principles would take the study well beyond the scope of its enquiry. The article's primary concern is to empirically evaluate new governance decision-making forums in practice. Procedural fairness issues would necessitate a much more specific and detailed consideration of statutory provisions in each program to determine if a duty of procedural fairness applies, the content of that duty, and/or whether the exercise of a power destroyed, defeated or prejudiced certain rights, interests or expectations.[22] Moreover, in at least some of the programs examined in this article, existing case law and commentary suggest that the prospects of applying such principles to new participatory decision-making approaches are limited at best.[23]

Australia – Current Practices and Lessons Learned (Australian Government, Waterlines #6, 2008) viii; Marcus Lane, Bruce Taylor and Cathy Robinson, 'Introduction: Contested Country – Regional Natural Resource Management in Australia' in Marcus Lane, Cathy Robinson and Bruce Taylor (eds), *Contested Country* (CSIRO, 2009) 1: P-L Tan et al, *Tools for water planning: lessons, gaps and adoption* (Australian Government, Waterlines #37, 2010); Susan Moore, 'Regional Delivery of Natural Resource Management in Australia: Is it Democratic and Does it Matter?' in R Eversole and J Martin (eds), *Participation and Governance in Regional Development* (Ashgate, 2005).

[20] Cohen, above n 18, 515-516.

[21] Thomas M Koontz and Craig W Thomas 'What Do We Know and Need to Know about the Environmental Outcomes of Collaborative Management' (2006) 66 *Public Administration Review* 111, 113–14.

[22] Harvey & Anor v Minister Administering the Water Management Act 2000 [2008] NSWLEC 165. See generally *Kioa v West* (1985) 159 CLR 550; *Minister for Immigration v Teoh* (1995) 183 CLR 273; *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 225 CLR 88; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 77 ALJR 699; *Bread Manufacturers of New South Wales v Evans* (181) 180 CLR 404.

[23] *Upper Namoi Water Users Association Inc & Ors v Minister for Natural Resources* [2003] NSWLEC 175; Alex Gardner, Richard Bartlett and Janice Gray, *Water Resources Law* (LexisNexis Butterworths, 2009) 319-324; See also *Water Management Act 2000* (NSW), s 47.

Finally, the article does not claim to consider the potential drawbacks of greater citizen and non-government stakeholder participation in governance. Instead, for present purposes, it is assumed that greater citizen influence in governance is desired by administrative agencies and governments and would be better for society. Given these constraints, and many others, clearly this research will not be the last word on the evolving subject of participatory decision-making in new governance.

Nevertheless, as a comparative analysis drawn from three different environmental governance programs across three different States, this empirical study goes beyond much of the existing research to provide substantial insights for NEG theory and policymakers as to when and how meaningful participatory decision-making can be achieved in practice. It addresses these concerns in four parts. First, it outlines the NEG literature and its approach to participatory decision-making. Second, it provides an overview of the policy context for the programs and their approach to managing surface or groundwater issues. The participatory goals of the programs are also examined as well as how they have been designed to achieve them. Third, it analyses how meaningful and effective the participatory decision-making approaches were in practice. The analysis sheds light on the internal dynamics of these decision-making processes, and reveals the ease with which administrative agencies and their officials come to dominate purportedly participatory decision-making processes. The paper explores the reasons behind this dominance and concludes by outlining the insights for policy and theory flowing from the findings regarding both designing meaningful decision-making processes in practice and understanding the role of the state in new forms of environmental governance.

PARTICIPATORY DECISION-MAKING AND NEW GOVERNANCE

Traditionally, non-government participation in administrative and regulatory processes was viewed by many as a *threat* to the expertise and legitimacy of the administrative state. Expert agencies could be influenced by self-interest and thus prone to capture by private industry pressures.[24] Further, many feared participation by *too many* interest groups could lead to increased conflict and protracted processes, increasing costs and at worst resulting in paralysation and inefficiency.[25] However, in recent decades a myriad of interrelated trends and theories

[24] Lobel, above n 1, 373.

[25] David Markell and Tom Tyler, 'Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement' (2008) 57 Kansas Law Review 1, 2, 38. This issue remains a matter of debate within the literature. See, e.g. Alejandro E Camacho, 'Can Regulation Evolve? Lessons from a Study in Maladaptive Management' (2007/2008) 55 *University of California Law Review* 293, 320; Eric Orts and Cary Coglianese, 'Debate, Collaborative Environmental Law: Pro and Con' (2007) 156 *UPaLRev PENNumbra* 289, 297-298; Holley, above n 7.

implicitly or explicitly have embraced the idea that greater participation in public governance outweighs its associated problems.[26]

While these trends vary between countries and continents, at least seven have been particularly influential in western nations such as Australia.[27] The first is the shortcomings of centralised, top down government regulation[28] and the consequent shift by policy-makers toward more decentralised and participatory approaches to harness local knowledge and ownership.[29] Second, the last 15 years have seen an emphasis on community governance through political agendas that embrace neo-liberal[30] or third way reforms.[31] Third, participation and empowerment have become a central tenet of "good" environmental governance through the rise of concepts such as sustainable development[32] and ecosystem and adaptive management.[33]

A fourth factor has been the increasing call for a more "participatory democracy". This was most evident in the critique of tokenistic public participation policies of the 1960s and 1970s. [34]A fifth development has been the growth in popularity of civic engagement, which promotes local associational activity as being vital to effective democractic governance.[35] Central here have been

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[26] Megan Farrelly, 'Community Engagement in Natural Resource Management: Experiences from the Natural Heritage Trust Phase 2' in Marcus Lane, Cathy Robinson and Bruce Taylor (eds), *Contested Country* (CSIRO, 2009) 138; D Ostermeier, D Bidwell and S Schexnayder, 'Habitat Conservation Planning: Current Processes and Tomorrow's Challenges" (2000) 2 *Envtl Prac* 166, 170; Susan Moore and Susan Rockloff "Organizing Regionally for Natural Resource Management in Australia: Reflections on Agency and Government' (2006) 8(3) *Journal of Environmental Policy and Planning* 259, 260; Holley, above n 7.

[27] Holley, above n 7.

[28] See generally discussions of command and control approaches in Neil Gunningham, Peter Grabosky and Darren Sinclair, *Smart Regulation* (Clarendon Press, 1998).

[29] Marcus Lane, 'Decentralization or privatisation of environmental governance? Forest conflict and bioregional assessment in Australia' (2003) 19 *Journal of Rural Studies* 283, 284.

[30] M Beeson and A Firth, 'Neoliberalism as a Political Rationality: Australia Public Policy Since the 1980s' (1998) 34(3) *Journal Of Sociology* 215.

[31] Anthony Giddens, *The Third Way and Its Critics* (Polity Press, 2000) 5; Tim Reddel, 'Third Way Social Governance: Where is the State?' (2004) 39(2) *Australian Journal Of Social Issues* 129.

[32] World Commission on Environment and Development, *Our Common Future – The Report to the World Commission on Environment and Development* (Oxford University Press, 1987) (often referred to as the '*Brundtland Report*' after the Chair of the Commission, Gro Harlem Brundtland); United Nations Department of Economic and Social Affairs, *Earth Summit, Agenda 21 United Nations Programme of Action from Rio*, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3–14 June 1992 (UN, 1992); Council of Australian Governments (COAG), *Intergovernmental Agreement on the Environment* (Australian Government, 1992). See generally Brian Head, 'Participation or Co-Governance? Challenges for Regional Natural Resource Management' in Robyn Eversole and John Martin (eds), *Participation and Governance in Regional Development* (Ashgate, 2005); David Farrier, 'Factoring Biodiversity Conservation into Decision-Making Processes: The Role of the Precautionary Principle' in Ronnie Harding and Elizabeth Fisher (eds), *Perspectives on the Precautionary Principle* (Federation Press, 1999) 99.

[33] See Eugene Odum, *Fundamentals of Ecology,* (Saunders, 3rd ed, 1971); C S Holling (ed), *Adaptive Environmental Assessment and Management* (Wiley, 1978). Holling has since extended the concept in later works, including: Lance H Gunderson and C S Holling (eds), *Panarchy: Understanding Transformations in Human and Natural Systems* (Island Press, 2001. See also Kai N Lee, *Compass and Gyroscope* (Island Press, 1993); C J Walters, *Adaptive Management of Renewable Resources* (McMillan, 1986); Stephen Dovers, 'Processes and Institutions for Resource and Environmental Management: Why and How to Analyse?' in Stephen Dovers and Su Wild River (eds), *Managing Australia's Environment* (Federation Press, 2003) 4.

[34] Sherry Arnstein, 'A Ladder of Citizen Participation' (1969) 35 *American Institute of Planners* 216; Jane Mansbridge, *Beyond Adversary Democracy* (Chicago Press, 1980/1983); Jennifer Hamilton and Caitlin Wills-Toker "Reconceptualizing Dialogue in Environmental Public Participation' (2006) 34(4) *The Policy Studies Journal* 755 at 755.

[35] Marcus Lane, 'Decentralization or Privatisation of Environmental Governance? Forest Conflict and Bioregional Assessment in Australia" (2003) 19 *Journal of Rural Studies* 283, 285.

Alexis de Tocqueville's study of American society and politics and more recently Puntam, Coleman and others' ideas of social capital.[36]

Sixth has been the resurgence of an idea originating in Athenian times, namely deliberative democracy.[37] Modern deliberative democrats such as Habermas, Dryzek and Cohen have all offered various deliberative proposals[38] that critique competitive representation systems of governance and argue that a fuller realisation of democratic values can be achieved where citizens address public problems by reasoning together about how best to solve them.[39]

Interrelated with the rise of deliberative democracy is the seventh and final factor – the alternative dispute resolution movement (ADR). Critiquing the adversarial nature and lack of inclusive involvement in legislative and court processes, ADR advances a host of mediation and negotiation techniques as a means to increase the efficiency of public outcomes and the likelihood of compliance.[40]

Unsurprisingly, these seven interlinked, but distinct factors have given rise to a plethora of proposals that differ in scope, nature and extent of participatory decision-making in NEG.[41] For example, one of the earliest and widely discussed examples of NEG is negotiated rulemaking[42] in the United States. This approach involves representatives from interested groups participating in typically "once off" negotiation processes to try and arrive at unanimous consensus agreement on regulatory rules.[43]

In contrast, western United States and many States in Australia have seen an increasing trend in more "bottom up" and ongoing decision-making efforts that engage affected interests from a defined geographic region (e.g. catchment), bringing them together to deliberate, implement, and readjust environmental and natural resource management plans in an adaptive management

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[36] A. de Tocqueville A. de, *Democracy in America* (1835, 1840) Maier J (ed) trans. by G Lawrence (Anchor, 1969); R Putnam, R Leonardi and R Nanetti, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press, 1993); James Coleman, 'Social Capital in the Creation of Human Capital' (1988) 94 *American Journal of Sociology* S.95.

[37] Fung, above n 13, 66.

[38] John Dryzek, *Deliberative Democracy and Beyond* (Oxford University Pess, 2000); Jürgen Habermas, 'Toward a Theory of Communicative Competence' (1970) 13 *Inquiry* 360; Joshua Cohen, 'Deliberation and Democratic Legitimacy' in James Bohman and William Rehg (eds) *Essays on Reason and Politics: Deliberative Democracy* (MIT Press, 1997). See also Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 2000).

[39] Cohen and Fung, above n 14, 23-24.

[40] Roger Fisher, William Ury, Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (Houghton Mifflin Harcourt, 1991); Lawrence Susskind, Alejandro Camacho and Todd Schenk, 'Collaborative Planning and Adaptive Management in Glen Canyon: A Cautionary Tale' (2010) 35(1) *Columbia Journal of Environmental Law* 1; L Susskind, P Levy and J Thomas-Larmer, *Negotiating Environmental Agreements: How to Avoid Escalating Confrontation, Needless Costs, and Unnecessary Litigation* (Island Press, 2000); Rosemary O'Leary, Tina Nabatchi and Lisa B Bingham, 'Environmental Conflict Resolution' in R Durant, D Fiorino and R O'Leary (eds) *Environmental Governance Reconsidered* (MIT, Cambridge, Mass, 2004) 323, 338; Carole Menkel-Meadow "Getting to 'Let's Talk': Comments on Collaborative Environmental Dispute Resolution Processes" (2008) 8 *Nevada Law Journal* 835,850. See also advocacy coalition framework: Paul Sabatier and Hank Jenkins-Smith, *Policy Change and Learning: An Advocacy Coalition Approach* (Westview Press, 1993).

[41] See Lobel, above n 1, 371-376; Karkkainen, above n 6.

[42] Freeman, above n 16.

[43] Karkainen, above n 16.

fashion.[44] In these NEG experiments, decision rules may not necessarily require absolute unanimity but may settle for substantial consensus and wider community buy-in through consultation.[45] Finally, both negotiated rule making and catchment/watershed planning can be distinguished from a third and more ambitious process - the Open Method of Coordination in the European Union (OMC) – that devolves decision-making to individual EU countries, but has overarching reporting and surveillance requirements.[46]

Despite this diversity, a fundamental and common factor to most NEG approaches is the application of decision-making procedures that seek to achieve ideals of equality, openness and rational and fair debate.[47] The majority of these procedures[48] draw inspiration from either deliberative democracy ideals, such as Cohen's ideal deliberative procedure, or well-established negotiation and mediation methods, such as favoured by some civic republicans, or ADR theorists.[49] Although there are variations between these different forms of decision-making, they do share certain similarities,[50] such as a desire for open and honest communication, a requirement that all relevant information be made available and utilised, and that all parties give reasons and principles to reach a workable agreement that enjoys broad consensus support (rather than relying on coercion, bargaining or an imbalance of power or resources).[51]

The shared intention of these participatory NEG processes is to (i) enhance effectiveness by fostering greater disclosure of information and allowing alternative solutions to be considered more deeply; (ii) foster the political development of individuals through their engagement in governance; (iii) enhance autonomy by focusing on participation in determining the structure of law; and (iv) improve equity by allowing marginalised citizens or groups to participate more directly in decisions that affect their lives.[52]

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[44] See for example Paul Sabatier et al (eds), *Swimming Upstream* (MIT, 2005); Dewitt John, 'Civic Environmentalism' in R Durant, D Fiorino and R O'Leary (eds), *Environmental Governance Reconsidered* (MIT, 2004).

[45] William Leach, Neil Pelkey and Paul Sabatier, 'Stakeholder Partnerships as Collaborative Policymaking: Evaluation Criteria Applied to Watershed Management in California and Washington' (2002) 21(4) *Journal of Policy Analysis and Management* 645, 651.

[46] See David Trubek and Louise Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination' (2005) 11(3) *European Law Journal* 343, 344; Joanne Scott and Jane Holder, 'Law and New Environmental Governance in the European Union' in Gráinne De Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, 2006) 212; C Porte, "Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas" (2002) 8(1) European Law Journal 38.

[47] Hamilton and Wills-Toker, above n 34, 756; Z Trachtenberg & W Focht, 'Legitimacy and Watershed Collaborations: The Role of Public Participation' in P Sabatier et al (eds), *Swimming Upstream* (MIT, 2005).

[48] Some strands of new governance also draw on concepts from pragmatist thinking. See, for example, John Dewey, *The Public and its Problems* (Gateway Books, 1946).

[49] See generally references in above nn 38, 40.

[50] Procedures of negotiation and deliberation also typically emphasise a necessity of including representatives from all relevant stakeholders and/or perspectives; O'Leary, Nabatchi and Bingham, above n 40.

[51] Hamilton and Wills-Toker, above n 34, 758; Trachtenberg and Focht, above n 47, 62-64; A Craig and F Vanclay, 'Questioning the Potential of Deliberativeness to Achieve "Acceptable" Natural Resource Management Decisions' in R Eversole and J Martin (eds) *Participation and Governance in Regional Development* (Ashgate, 2005) 157-158.

[52] Fung, above n 8, 10; John, above n 44, 247; Archon Fung and Erik Olin Wright, 'Thinking about Empowered Participatory Governance' in Archon Fung and Erik Olin Wright (eds), *Deepening Democracy* (Verso, 2003) 3, 26; Archon Fung, 'Survey Article: Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences' (2003) 11(3) *Journal of Political Philosophy*

There are however a number of challenges faced by such participatory governance processes. One primary concern is that meeting the demanding conditions of deliberation and negotiation in practice may be difficult, if not impossible, given the reality of imbalances in power and capacity between actors.[53] While there are legitimate concerns that higher socio-economic and special interest groups are likely to dominate, a more prevalent fear is that the government agencies entrusted to support and facilitate these participatory decision-making approaches will, intentionally or unintentionally, exercise their skills and position to dominate and override decisions.[54]

Agencies are typically accustomed to making and influencing public decisions.[55] Instead of being a neutral referee, agencies and their officers may accordingly develop and endorse agendas of their own.[56] Among other things, there is a significant risk that officers may dazzle the untrained or uninitiated and impose their preferences with little meaningful discussion.[57] Further, as Arnstein[58] and others argued long ago, supposedly participatory public forums can instead serve as spaces in which governments create the illusion of popular control, while "real" decision-making takes place in the back room or through other subtle uses of the levers of power.[59] These are important issues, given that modern NEG approaches claim to avoid such problems.

Participatory decision-making in NEG accordingly remains an area ripe for empirical research to examine the above concerns and debates, and explore the conditions under which administrative agencies and non-government stakeholders can achieve genuine participatory decision-making.[60]

PARTICIPATORY GOVERNANCE IN NEG POLICY CONTEXTS

Before examining how participatory decision-making in the three NEG programs played out in practice, it is necessary to understand the policy context in which they operate. This will

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338, 342; Trachtenberg and Focht, above n 47, 55; J Parkinson, 'Legitimacy Problems in Deliberative Democracy' (2003) 51 *Political Studies* 180, 182-183.

[53] Cohen J & Rogers J, "Power and Reason" in Archon Fung and Erik Olin Wright (eds), *Deepening Democracy* (Verso, 2003); Sturm, above n 9, 331.

[54] Brian Head, 'From Government to Governance: Explaining and Assessing New Approaches to NRM' in Marcus Lane, Cathy Robinson and Bruce Taylor (eds), *Contested Country* (CSIRO, 2009); Sturm, above n 9, 331; Karen Hussey and Stephen Dovers, *Managing Water for Australia – The Social and Institutional Challenges* (CSIRO, 2007).

[55] Rebecca Neaera Abers, "Reflections On What Makes Empowered Participatory Governance Happen" in Archon Fung and Erik Olin Wright (eds), *Deepening Democracy* (Verso, 2003) 200; Head, above n 32, 54-57.

[56] Marcus Lane, 'Decentralization or Privatization of Environmental Governance? Forest Conflict and Bioregional Assessment in Australia' (2003) 19 *Journal of Rural Studies* 283, 286.

[57] Fung, above n 8, 25.

[58] H Ross, M Buchy and W Proctor, 'Laying Down the Ladder: a Typology of Public Participation in Australian Natural Resource Management' (2002) 9 *Australian Journal of Environmental Management* 205; Arnstein, above n 34, 217.

[59] Abers, above n 55, 200.

[60] Cathy Robinson, Marcus Lane and Bruce Taylor, 'The Changing and Contested governance of Australia's Environmental Heritage' in Marcus Lane, Cathy Robinson and Bruce Taylor (eds), *Contested Country* (CSIRO, 2009) 245.

involve providing an overview of their respective aims and objectives. It is then demonstrated how all three share an aspiration for participatory decision-making. The section also discusses the associated procedural criteria for decision-making and outlines the relevant features of the programs' legal design. As we will see, there are both similarities and variations across the programs regarding their aspirations and decision-making approaches.

Overview of the Programs

Neighbourhood Environment Improvement Plans

The first and least complex of the three programs examined in this article is known as the Neighbourhood Environmental Improvement Plan (NEIP). This initiative commenced in 2001 and aimed to encourage the creation of multi-stakeholder collaborative groups to manage complex environmental problems such as diffuse source pollution of neighbourhood creeks.[61] According to the then Victorian Minister for Environment and Conservation there was a need for a more holistic, locally based approach to such problems, which the NEIP would provide. Thus the relevant second reading speech notes that the NEIP is:

> a statutory mechanism to enable those contributing to and those affected by local environmental problems to come together in a constructive forum. In this forum, the members of the local community, including residents, industry and local government, can agree on the environmental priority issues for the neighbourhood. They can then devise a plan to address their agreed environmental issues in a practical manner[62]

In practical terms, when an interested group of non government stakeholders decides to engage in the NEIP process, they must first identify a government "sponsor" such as a local government to take on formal responsibility for submitting plans to the responsible agency – Environmental Protection Authority Victoria (VEPA). With the sponsors help, the group consults with the neighbourhood community, and then develops and submits a proposal for a NEIP to the VEPA. If approved by the VEPA, the group is then to develop a plan of action, containing environmental objectives and actions for the neighbourhood. Parties, including the sponsor and VEPA, also commit to perform certain actions and activities to achieve the agreed objectives. If the VEPA approves the plan, the group is then responsible for implementation, using either external funding or their own resources.[63]

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[61] This article does not seek to provide a detailed overview of the NEIP and its legislative design. Such an analysis can be found in Neil Gunningham, Cameron Holley and Clifford Shearing 'Neighbourhood Environment Improvement Plans: Community Empowerment, Voluntary Collaboration and Legislative Design' (2007) 24(2) *Environmental and Planning Law Journal* 125.

[62] Victoria, Legislative Assembly, *Debates*, "Environment Protection (Liveable Neighbourhoods) Bill 2000 (Vic) 2nd Reading" (Hon S Garbutt, 2 November 2000), 1,459.

[63] For further see *Environment Protection Act 1970* (Vic) ss 19AD-19AK; Gunningham, Holley and Shearing, above n 61.

Regional Natural Resource Management in Queensland

The second program is concerned with the growing trend in Australia towards regional natural resource management (RNRM). The history of RNRM is well-known and so can be briefly described. Its antecedents emerged during the late 1980s and 1990s and included the National Landcare Program,[64] State-based Integrated Catchment Management programs[65] and the Commonwealth's competitive grants scheme known as the Natural Heritage Trust.[66] Despite some successes, numerous reviews pointed to substantial shortcomings with these respective endeavours.[67]

In response, the Commonwealth developed a more strategic approach to NRM between 2000 and 2008.[68] This was overseen by the Natural Resource Management Ministerial Council and occurred via two key programs: the National Action Plan for Salinity and Water Quality (NAP) in 2000/2001, followed by a revised second phase of the Natural Heritage Trust program (NHT2) in 2001/2002.[69] A primary emphasis of these programs was regional place-based NRM solutions[70] linked to nationally agreed goals, including preventing, stabilising and reversing salinity; improving water quality for human use and the environment; biodiversity conservation and sustainable use of natural resources.[71] RNRM arrangements were subject to individually negotiated Bilateral Agreements between the Commonwealth and the States/Territories, with some supported by State level legislation, with the remainder taking a non-statutory path (including the article's case study which is taken from Queensland).[72] Under these arrangements, almost $3 billion of investment was delivered via 56 community/stakeholder regional bodies who developed and implemented a plan to manage and protect each region's natural resources.

Fourteen of the 56 regions were demarcated in Queensland. Bilateral agreements between the Queensland government and the Commonwealth established joint NHT2/NAP arrangements

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[64] Allan Curtis, 'The Landcare Experience' in Stephen Dovers and Su Wild River (eds), *Managing Australia's Environment* (Federation Press, 2003) 442.

[65] Sarah Ewing, 'Catchment Management Arrangements' in Stephen Dovers and Su Wild River (eds), *Managing Australia's Environment* (Federation Press, 2003) 393, 408.

[66] *Natural Heritage Trust Act 1997* (Cth); Kate Crowley, 'Effective Environmental Federalism? Australia's Natural Heritage Trust' (2001) 3 *Journal of Environmental Policy and Planning* 255.

[67] ANAO, *Commonwealth Natural Resource Management and Environment Programs* (Australian Government, Audit Report No 36, 1996–97); ANAO, *Performance Information for Commonwealth Financial Assistance under the Natural Heritage Trust* (Australian Government, Audit Report No 43, 2000–01).

[68] National Natural Resource Management Taskforce (NNRMTF) *Managing Natural Resources in Australia for a Sustainable Future* (Dept. Agriculture, Fisheries and Forestry, Canberra, 1999).

[69] Commonwealth of Australia, *Our Vital Resources: A National Action Plan for Salinity and Water Quality* (Council of Australian Governments, Canberra, 2000). Natural Resource Management Ministerial Council, *Framework for the Extension of the Natural Heritage Trust* (NRMMC, Canberra, 2002).

[70] Investment under the Natural Heritage Trust also occurred at national/state and local levels. Natural Resource Management Ministerial Council, above n 69.

[71] Ibid; Cwth, NSW, Vic, Qld, WA, SA, Tas, NT, and ACT, *Intergovernmental Agreeement on a National Action Plan for Salinity and Water Quality* (Australian Government, Canberra, 2001) cl 5.

[72] Lane, Taylor and Robinson, above n 19, 6; L Robins and S Dovers, 'Community-based NRM boards of management: are they up to the task?' (2007) 14 *Australasian Journal of Environmental Management* 111, 113.

where each of these regions established a community (that is non-statutory) multi-stakeholder collaborative body. The body was to comprise a majority of community representatives, as well as relevant stakeholders such as local government.[73]

These bodies were required to be incorporated and to consult and work in partnership with their regional community to develop and implement regional NRM planning documents.[74] As with regional bodies in other States, these documents identified regional priorities and targets that accorded with nationally determined standards and matters for target (e.g. soil condition) and contributed to national outcomes (e.g. the impact of salinity on land and water resources is minimised, avoided or reduced).[75] These plans were to be approved by a multiagency Joint Steering Committee and Ministers.

By June 2007, over half of the administered funds allocated to the NHT2 and NAP had been spent through the RNRM bodies across Australia.[76] However, following audits, various national evaluations,[77] and a change of federal government, the delivery of NHT2, NAP and other Commonwealth NRM programs were integrated into a new program known as Caring for our Country (CFOC) in 2008. This program seeks to provide a broader range of opportunities for participation in RNRM by implementing a competitive grants program open to a wider range of stakeholders beyond regional bodies. Even so, Caring for Our Country still sees regional bodies as playing an essential role in delivering national environmental priorities.[78] Notably, this article's research largely focuses on participatory decision-making by regional bodies under the older NHT2 and NAP programs. However given the continued reliance on these bodies in Australian NRM, the findings still have significant relevance for ongoing RNRM arrangements.

Water Planning in New South Wales

The final program – water planning in NSW – emerged as a part of wider water reforms in

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[73] Commonwealth of Australia and the State of Queensland, *Bilateral Agreement Between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust* (Canberra, 2004) cls 67, 68(b) ('*Queensland NHT2 Bilateral*'); Commonwealth of Australia and State of Queensland, *An Agreement Between the Commonwealth of Australia and the State of Queensland for the Implementation of the Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality* (Canberra, 2001) cl 7.1 ('*Queensland NAP Bilateral*').

[74] *Queensland NHT2 Bilateral,* above n 73, cl 69; *Queensland NAP Bilateral,* above n 73, cls 7, 8, 12.

[75] Department of Environment and Heritage (DEH), *National Natural Resource Management Monitoring and Evaluation Framework* (Natural Resource Management Ministerial Council, Canberra, 2003); DEH, *National Framework for Natural Resource Management Standards and Targets* (Natural Resource Management Ministerial Council, Canberra, 2003).

[76] ANAO, above 67, 14, 19.

[77] Ibid; ANAO, *The Administration of the National Action Plan for Salinity and Water Quality* (Australian Government, Canberra, Audit Report No.17, 2004–05). For national evaluations see Commonwealth Government, *Publications and Resources* <http://nrm.gov.au/publications/index.html>.

[78] *Transitional Arrangement and Financial Agreement between the Australian Government and the State of Queensland for Implementation of Caring for our Country* (Cth, Qld), ss 7.1, 7.4. For a recent review of Caring for Our Country see Rural and Regional Affairs and Transport References Committee, *The Senate, Natural Resource Management and Conservation Challenges* (Australian Government, 2009).

Australia. After decades of over allocation of water,[79] the 1990s saw Australian governments implement a series of market based reforms aimed at achieving efficient and sustainable use of water resources. Key domestic reports and policy developments included the Burton Report,[80] the Hilmer Report,[81] the Report of the Working Group on Water Resources and Policy of the Council of Australia Governments (hereinafter COAG), [82] and the more recent National Water Initiative.[83]

Following these developments, the Commonwealth paid billions of dollars to the States under the National Competition Policy to induce the wholesale reform of Australia's water industry.[84] Key elements of these reforms have included recognising water for environmental purposes, separating land and water rights, vesting water rights with individual users, allowing markets and trade to resolve water use conflicts and create efficiency gains, and most importantly from the article's perspective, a planning based system for managing surface and groundwater resources.[85]

This planning based system underpins the water market mechanism by, *inter alia*, establishing the framework for water sharing, allocating entitlements to water, as well as describing environmental and public benefit outcomes.[86] These plans (known as Water Sharing Plans or WSP in NSW) are also given legislative force – largely to ensure security of private and public interests in water resources.[87]

It is important to note that the water planning process effectively "front loads" participatory decision-making during the development of the water sharing plan itself. In contrast to NEIP and RNRM where groups of stakeholders are engaged in ongoing decision making during both plan development and implementation, the policy parameters inherent in a market based water-trading scheme provide limited scope for participation beyond the initial water planning stage.

This is because WSPs' establish fixed water allocations that progressively decline in a predetermined manner over nearly an eleven-year period. Aside from periodic reviews of the water sharing plan itself,[88] ongoing adjustments at the level of individual irrigators are left to market forces through the mechanism of water trading. In order to maintain the integrity of this system, the only requirement is for the effective monitoring and enforcement of annual water allocations and the administration of trading. Again, this provides no obvious avenue for

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[79] Garner, Bartlett and Gray, above n 23, 274-280, 299.
[80] J. Burton, 'Review of Reform in the Water Industry', *Background Paper* No 28, volume 2 1998.
[81] Fredrick Hilmer, Mark Rayner and Geoffry Taperell, *National Competition Policy Review* (Australian Government, 1993).
[82] COAG. (1994) *Communiqué, Attachment A, Water Reform*, Australian Government, Canberra.
[83] Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania and the Australian Capital Territory and the Northern Territory, *Intergovernmental Agreement on a National Water Initiative* (Australian Government, 2006) ('*National Water Initiative Agreement*').
[84] Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford, 2009) 149.
[85] Garner, Bartlett and Gray, above n 23.
[86] *National Water Initiative Agreement*, above n 83, cl 37.
[87] Ibid, cl 36. Garner, Bartlett and Gray, above n 23, 295-296.
[88] *Water Management Act 2000* (NSW) s 44. *National Water Initiative Agreement*, above n 83, cl 40.

participatory democracy.

While States and Territories have various forms of water resource plans,[89] the focus in this article is NSW and their groundwater sharing plans under the *Water Management Act 2000* (NSW). Under this legislation the primary authority for water resource management is vested in the Minister responsible for the administration of the water resource legislation.[90] However in practice, the *Water Management Act 2000* is administered by the NSW Office of Water (NOW), whose core business includes developing statutory water sharing plans which set the rules for sharing water between users, and between users and the environment.[91] These water sharing plans are to be developed at the regional or management level (otherwise known as water management areas)[92] by either a multistakeholder water management committee or pursuant to the powers of the Minister.[93]

Most NSW water sharing plans (WSP) take the form of "Minister's Plans" (discussed below) rather than as a result of the formal committee process. This was largely due to the pace of water reform and the need for urgent management of highly stressed water resources.[94]

Where plans are to be made by multistakeholder committees[95] they must follow a number of procedures, including ensuring consistency with relevant State Water Management Outcomes Plan,[96] and meeting a range of other decision-making and consultation requirements detailed below.[97] The committee must also consider socio economic impacts of the intended plan, as well as provisions of relevant Catchment Management Plans.[98]

Once drafted, the plan must subsequently be approved by the Minister[99] and meet a number of requirements, including containing a vision statement, objectives, strategies for reaching those objectives, performance indicators, environmental water rules, a bulk access regime for water

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[89] For further see Garner, Bartlett and Gray, above n 23, 297-247.
[90] Ibid, 108.
[91] *Water Management Act 2000* (NSW) s 389. See al <http://www.water.nsw.gov.au/About-Us/default.aspx>.
[92] *Water Management Act 2000* (NSW) ss 11, 15.
[93]There is provision for a state plan known as the State Water Management Outcomes Plan. This was a statutory document under section 6 of the *Water Management Act 2000* that set the overarching policy, targets and strategic outcomes for the development, conservation, management and control of NSW water sources. The Plan needed to be consistent with government policy in relation to the environmental objectives for water quality and river flow. This expired in 2007. Resolution on a method for review/replacement is under consideration. http://www.nwc.gov.au/www/html/1332-state-water-management-outcomes-plan.asp. Garner, Bartlett and Gray, above n 23, 308.
[94] Garner, Bartlett and Gray, above n 23; Rosemary Lyster et al, *Environmental and Planning Law in New South Wales* (Federation Press, 2nd Ed., 2009).
[95] The body must include at least representative of catchment management authorities, the Department, a person nominated by the Minister for Climate Change and the Environment, and at least two representatives for environmental protection groups, water user groups, Aboriginal persons, local councils and such other persons as are appointed to represent such interests as the Minister considers require representation. *Water Management Act 2000* (NSW) s 13.
[96] *Water Management Act 2000* (NSW) s 6. The State Water Management Outcomes Plan expired in 2007. Resolution on a method for review/replacement is under consideration <http://www.nwc.gov.au/www/html/1332-state-water-management-outcomes-plan.asp>.
[97] *Water Management Act 2000* (NSW) s 36.
[98] *Water Management Act 2000* (NSW) s 18.
[99] *Water Management Act 2000* (NSW) s 37.

extraction and access licence dealing rules for the area or water source.[100] Once approved a second stage of public notice is required, prior to the final approval of the plan by the Minister.[101]

The far more common form of plan to date has been the Minister's Plan, which occurs as a result of two separate powers. One of these is that if the management committee fails to prepare a draft management plan in accordance with its terms of reference, the Minister can choose to make a Minister's Plan.[102] Alternatively the Minister is empowered to make a plan to deal with matters not dealt with in an existing plan, or for any part of the State that is not within a water management area or does not have a management plan that is in force.[103]

The procedures for making a Minister's Plan are more flexible than the committee route, and need only in "general terms" deal with any matters that a management plan is required to deal with (as discussed above) and procedures relating to notification and public exhibition.[104] In making the plan, the Minister has the power to set up advisory or other committees for the purposes of the *Water Management Act 2000*, and as we will see below, this was used in lieu of the more formal committee route.[105] The Minister may also confer water management functions (such as assisting in plan preparation and consultation) on Catchment Management Authorities when producing a plan.[106] Once the plan is developed, the Minister is responsible for giving approval to the plan.[107]

Once a WSP is produced by either the Ministerial or committee process, it is implemented via a market system and subject to periodic review.[108] The *Water Management Act 2000* also gives an express right to challenge the validity of the plan in the Land and Environment Court.[109]

Aspirations for participatory decision-making

Although differing in their specifics, the programs all share a number of general ideals, not least a focus on participatory decision-making in environmental governance. In the RNRM case,

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[100] *Water Management Act 2000* (NSW) s 20(1).
[101] *Water Management Act 2000* (NSW) ss 38-41.
[102] *Water Management Act 2000* (NSW) ss 15(3), 50. Prior to a number of challenges in the Land and Environment Court and NSW Court of Appeal, this section noted that minister could make a plan pursuant to the same statutory procedures and a management plan made by a committee.
[103] *Water Management Act 2000* (NSW) s 50.
[104] *Water Management Act 2000* (NSW) s 50. However, note that: 'Section 50 of the WM Act, as originally enacted in 2000 required Minister's plans to deal with the same matters as a plan made under Part 3, in particular the form of a management plan (vision statement, objectives, strategies and performance indicators) and the establishment of rules for the sharing of water between environmental and consumptive uses. However, in 2002 (shortly before the gazettal of the first round of management plans) s.50 of the WM Act was amended to require the Minister to deal with these matters only "in general terms". Further, in 2004, s.50 was further amended to exempt Minister's plans from complying with certain requirements relating to public consultation about the making of such plans'. See Ilona Millar, 'Testing the Waters: Legal Challenges to Water Sharing Plans in NSW', *Water Law in Western Australia Conference*, July 2005, 9.
[105] *Water Management Act 2000* (NSW) ss 387, 388.
[106] *Water Management Act 2000* (NSW) s 389A.
[107] *Water Management Act 2000* (NSW) 50.
[108] *Water Management Act 2000* (NSW) ss 42, 44.
[109] *Water Management Act 2000* (NSW) s 47.

for example, aspirations of community participation and partnerships involving multiple actors are readily identifiable in the rhetoric of prominent Australian political figures,[110] national program guidelines and other policy documents.[111] To illustrate, one Bilateral Agreement between the Federal and Queensland governments notes:

> The active involvement and participation of rural and regional communities is the cornerstone of this Plan…we seek to enable communities to take responsibility for planning and implementing natural resource management strategies, in partnership with all levels of government, that meet their priorities for sustainable development and ongoing viability.[112]

Closely related to the growth in appeals to participatory approaches in Victoria over the last three decades,[113] the NEIP has also been described as "a means of grass roots empowerment",[114] as a tool that "involves the participation of a broad range of people in the neighbourhood".[115]

Like the other programs, water planning in NSW similarly aspires to engage communities in surface and groundwater decision-making processes. This too was evident in widespread political rhetoric and policy both at the Commonwealth and NSW level. At the Commonwealth level, for example, the recent National Water Initiative notes that "water planning is an important mechanism to assist governments and the community to determine water management and allocation decisions to meet productive, environmental and social objectives" and that water planning processes are to include "consultation with stakeholders including those within or downstream of the plan area".[116]

So too the *Water Management Act 2000* crucially notes that an object of the Act is "to recognise the role of the community, as a partner with government, in resolving issues relating to the management of water sources".[117] Furthermore, although WSPs were ultimately made as Minister's Plans (as discussed further below), the planning process had initially been driven and

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[110] As the former Prime Minister John Howard stated in 2000, RNRM's intention was focused squarely around community involvement in decision-making: 'the states and communities will develop plans to restore the natural environment in each area and then communities will be funded to do the work... importantly it seeks to marshal everybody in the community'. Howard J The Hon "Transcript Of The Prime Minister The Hon John Howard MP, Press Conference On Natural Resource Management Parliament House, Canberra", 10 October 2000.

[111] National guidelines point to an intention for RNRM program to assist regions to "become self sufficient in managing their natural resources in the longer term"; *Queensland NHT2 Bilateral*, above n 73, 57, 62.

[112] *Queensland NAP Bilateral*, above n 73, 2.

[113] See generally J Wiseman, 'Local Heroes? Learning from Recent Community Strengthening Initiatives in Victoria' (2006) 65(2) *Australian Journal Of Public Administration* 95, 96. See also Victorian Government, Growing Victoria Together (2000, 2005) p 2; VEPA, *Corporate Plan* 2002-2003 (Publication 848, VEPA, 2002) 1, 6, 41. VEPA, *Corporate Plan* 2004-2005, (Publication 913, VEPA, 2003) 7.

[114] B Robinson, 'A New Policy Paradigm for Environment Protection' (2004) 38 *Clean Air & Environmental Quality* 33, 35.

[115] VEPA, *Neighbourhood Environment Improvement Plans – Developing a Voluntary Proposal* (Publication 846, VEPA, 2002) 8.

[116] *National Water Initiative Agreement*, above n 83, cl 36, schedule E, cl 6; See generally Jonathon Howard 'Do stakeholder committees produce fair policy outcomes?' in A *Wilson, et al (2007) Proceedings of the 5th Australian Stream Management Conference. Australian rivers: making a difference,* Charles Sturt University, Thurgoona, New South Wales.

[117] *Water Management Act 2000* (NSW) s 3(d).

animated by a vision of community empowerment and public consultation. As the then NSW Minister for Land and Water Conservation pointed out in 2001, shortly after the introduction of the *Water Management Act 2000*:

> The strength of the new legislation is the community and government partnership that has been developed to deliver locally driven solutions. Thirty water management committees have been established across New South Wales to prepare 38 draft water sharing plans….The committees comprise representatives of water user groups, environmental interests, local government, Aboriginal interests and government agencies. They have the responsibility for developing draft water sharing plans for the State's priority catchments and groundwater systems. The committees have consulted widely with the river communities and they have been actively engaging the wider community.[118]

The other major avenue involving participation in the WSP program was the implementation of a structural adjustment package under the Achieving Sustainable Groundwater Entitlements (ASGE) program.[119] Established to help ground water users across the Murray Darling Basin in NSW manage the reduction in their entitlements under the water reforms, the ASGE contained a component of joint funding from NSW and Commonwealth Governments to compensate irrigators (the Namoi area from which this article's case study is drawn received over 50% of the funds under the ASGE). Advice on the operation of this program was provided to governments by a Groundwater Adjustment Advisory Committee, which included representatives of the NSW Irrigators' Council, chairs of the six Catchment Management Authorities, and senior representatives from the NSW and Australian governments.[120]

Designing participatory decision-making: technical advice, funding and accountability

These broad participatory aspirations of the programs are underpinned by procedural criteria for decision-making.[121] For example, the design of the NEIP encourages collaborative groups to follow processes of "negotiation" and "mediation" to try and reach a "consensus" on decisions.[122]

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[118] John Aquilina, 'Water Management Act 2000', 06/12/2001, *Legislative Assembly, Hansard*, 19830. Even following repeated deferrals in the planning process, discussed below, the vision of engagement remained strong: "the New South Wales Government has deferred the commencement of ground water sharing plans for the upper and lower Namoi, the lower Gwydir, the lower Macquarie, the lower Lachlan, and the lower Murrumbidgee systems until 1 July 2006. The deferred commencement of these plans will allow time for the catchment management authorities, in collaboration with local government, to consult with local communities" Ian MacDonald, 'Water Sharing Plans', 16/11/2005, *Legislative Council, Hansard*, 19728.

[119] See:<http://www.water.nsw.gov.au/Water-management/Water-sharing-plans/Plans-commenced/plans_commenced_adjust/default.aspx>.

[120] Ibid.

[121] While the procedural requirements discussed here are far from the only structural representation available, it has the considerable virtue of highlighting a central concern in the NEG literature while facilitating discussion of case-specific arrangements.

[122] VEPA, above n 115, p 5.

[122] VEPA, n 35, p 4-6.

In the RNRM case, collaborative regional bodies are required to be incorporated, which means their decision-making will typically be governed by their own constitution.[123] This is likely to involve some form of discussion and deliberation, underpinned by agreement through voting. Even so, the RNRM program emphasises broadly cooperative decision-making processes, particularly during regional community decision-making and consultation, that are to involve "facilitated negotiation" and "negotiations with community, industry, private sector and philanthropic organisations".[124]

Similarly in water planning in NSW all members of management committees are required to "strive for consensus in reaching decisions". While a decision ultimately has effect if it is supported by a majority of those present, any decision to submit a draft management plan to the Minister must be unanimous.[125] In preparing a draft management plan, committees are required to provide specified information (e.g. general aims and objectives of the plan) to a range of stakeholders within the water management area, including local councils, catchment management authorities, and holders of an access licence.[126] This is followed by at least 40 days of public exhibition and a call for submissions about the draft plan.[127]

An important question is whether and how the programs were designed so as to reduce the risks of decision-making being dominated by powerful actors.[128] Certainly, each of the programs seeks to offset power imbalances created by differences in technical knowledge and skills between non-government actors.[129] They do so by establishing government support (e.g. office assistance[130] and in RNRM, devolved government funding[131]) to assist non-governmental representatives to gain scientific, legal or other technical information.

Nonetheless there were many ways in which government actors could unreasonably dominate or influence the decision-making process. For example, the VEPA, RNRM Joint Steering Committee and NOW/Minister are not bound by any agreement or plan delivered through the

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[123] *Queensland NHT2 Bilateral*, above n 73, cl 68; *Queensland NAP Bilateral*, above n 73, cl 7.1.
[124] In addition, the RNRM case refers to decision-making and discussions during plan development as involving "effective participation by all key stakeholders" guided by principles of "fairness [and] equity of opportunity for involvement"; Cth and Qld, *Guidelines for Community Engagement by RNRM bodies* (Cth/Qld, 2004) p 4-6. For similar observations see Head, above n 32; L Pero, 'From Governance Rhetoric to Practical Reality: Making Community-Based Natural Resource Management Decision-Making Work' (2005) 1 *Griffith Journal of the Environment* 1, 5-6.
[125] *Water Management Act 2000* (NSW), schedule 6, cls 10, 12. Such unanimity and consensus need only arise from a quorum (a majority of committee members).
[126] *Water Management Act 2000* (NSW) s 36.
[127] *Water Management Act 2000* (NSW) s 38.
[128] Sturm, above n 9, 331.
[129] Freeman, above n 16, 32.
[130] See for example, VEPA, above n 115, 9; *Queensland NHT2 Bilateral*, above n 73, cl 101; *Water Management Act 2000* (NSW) s 389A(1)(a).
[131] *Queensland NHT2 Bilateral*, above n 73, cl 95; *Queensland NAP Bilateral*, above n 73, cl 24.2.

collaborative process. Instead they retain an ultimate veto and the capacity to add conditions.[132] Further, the government in the water planning program can bypass the collaborative process altogether and make their own Minister's Plan (leaving it to the Minister's discretion as to whether to appoint an advisory or other committee).[133] NOW's role in overseeing the development of this Minister's Plan, even where an advisory committee is appointed, effectively gives this agency a "privileged" position and more powerful "voice" in the planning process than any other organisation. The same can be said about requirements in the NEIP program for a sponsoring government body to submit proposals and plans to the VEPA, effectively granting the sponsor greater control over the final plan.[134] While all these powers may be vital for issues such as accountability, they also enabled government actors to exercise control over key decision-making stages. These provisions placed government bodies in a privileged position from which they had the potential to unreasonably dominate non-governmental actors. In this sense, there is significant disconnect between aspirations of empowerment and partnership and a legal design that is *not* specifically based on such principle.[135]

While it is hard to dispute the need for government oversight of public decision-making (vital as it is to securing public accountability) the outright veto power evident in these cases operates to give government actors an opportunity to exercise ultimate control over all key decision-making stages. Secure in the knowledge that they will have the "final say", government officers who are otherwise entrusted to assist stakeholders in decision-making process, may equally use their position and knowledge of technical or regulatory issues to ignore, marginalise or dominate non government actors in ongoing negotiations.

Whether key government officials use such opportunities to advance their agencies interests', and/or substitute their decision for participatory groups, is one amongst a number of broader questions with regard to the operation of participatory decision-making in practice that will be examined in the next section.[136]

FINDINGS – PARTICIPATORY DECISION-MAKING IN PRACTICE

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[132] Note that in the case of a WSP developed by a management committee, such changes can only occur in consultation with said committee. *Water Management Act 2000* (NSW) s 40, 50; *Environmental Protection Act 1970* (Vic) s 19AH(2); ; *Queensland NHT2 Bilateral*, above n 73, cls 69, 71, 80-81, 89; *Queensland NAP Bilateral*, above n 73, cl 7 and 12.

[133] *Water Management Act 2000* (NSW) s 50.

[134] *Environmental Protection Act 1970* (Vic) ss 19AH, and 19AI.

[135] Even when a veto is exercised, the NEIP and RNRM programs still require that other stakeholders 'sign off' on their plans to confirm that they 'support' targets and actions proposed in the plan and/or agree to fulfil their own commitments. This is not the case for Minister Plans. Although in management committee route the minister must consult with the committee as noted above. See *Environment Protection Act 1970* (Vic) ss 19AH(1), 19AI(3)(j); *Queensland NHT2 Bilateral*, above n 73, attachment E, p 62-63. *Water Management Act 2000* (NSW) ss 40, 50.

[136] J Defilippis, R Fisher and E Shragge, 'Neither Romance Nor Regulation: Reevaluating Community' (2006) 30(3) *International Journal of Urban and Regional Research* 673, 684.

Three programs were chosen to examine whether, and to what extent, participatory decision-making was meaningful and effective. In assessing meaningful and effective participatory decision-making processes, the article drew on 68 respondents' opinions[137] and documentary evidence regarding the extent to which non governmental stakeholders participating in decision-making were able to do so effectively, and as "rough equals" to reach a feasible agreement that enjoyed broad consensus support.[138]

The investigation of these matters proceeds in three parts,[139] each addressing the experiences of NEIP, RNRM[140] and WSP cases respectively. In each case the key questions asked were: what is the nature of the decision-making process and to what extent was domination by powerful interests avoided? As with most social research, the ethical and confidentiality requirements of the study require the article to preserve the anonymity of specific interviewees, save for a general description of their stakeholder category.

Decision-making in NEIP

The NEIP study evaluated decision making across three collaborative NEIP bodies that were established to address a highly degraded urban creek, a sustainable township and a polluted rural creek/water supply. The primary objective in each case was to form a multi-stakeholder collaborative body to develop a plan to guide policy implementation. These plans were to set targets and identify actions to manage their neighbourhood environmental issues.

To develop these plans, local government and VEPA officers brought together local actors from the three "neighbourhoods" (of approximately 20 square kilometers each) to form a collaborative decision-making body. Across the three cases, these bodies consisted of between one to four industry collaborators, five to thirteen government collaborators, three to six

[137] Interviewees were selected to capture some of the main forms of diversity across the types of stakeholders involved in the programs, including regional bodies, farmers, citizens, federal, state and local governments and non government bodies. Twenty six interviews were conducted in NEIP. These interviewees came from three NEIP collaborative groups that were selected because, inter alia, they were the most 'information rich' examples of a NEIP in practice (that is, all had agreed to a plan and begun implementation). In RNRM, thirty interviewees were drawn from a single regional body in Queensland. Again this case study was selected because it was information rich, being one of the largest of the 14 regions in Queensland, facing some of the most pressing natural resource problems within the state, and receiving significantly higher levels of governmental funding than many other regions. Finally, in an ongoing study into WSP in NSW, 12 interviews have been conducted in Zone 1 in the Namoi. This study forms a part of a broader research project into groundwater governance, and the Namoi region was selected because it has the highest level of groundwater development in NSW and one of the highest levels of groundwater extraction in the Murray Darling Basin. See: <http://www.clw.csiro.au/publications/waterforahealthycountry/mdbsy/pdf/Namoi-FactSheet.pdf>.

[138] Sturm, above n 9, 327.

[139] Consistent with the cases' intentions, negotiation and decision-making was an ongoing process that took many years. The findings below are accordingly based on respondents' comments and generalisations regarding the general flavour of these various decision-making processes, rather than specific analysis of the formal procedure of decision-making at any one forum or meeting.

[140] The NEIP and RNRM research were conducted as a part of a broader empirical based research project concerned with exploring collaborative approaches to environmental governance. The project was conducted between 2004 and 2008. It asked the question: 'Under what conditions can we achieve "good" collaborative governance?'. To answer this question, it examined a range of defining characteristics of 'collaborative environmental governance', including collaboration, participation, deliberation, accountability and learning and adaption. This article reinterrogates the data collected on deliberative decision-making in light of the more recent case study data collected in the WSP case in 2010. For more, see Cameron Holley, Neil Gunningham and Clifford Shearing, *New Environmental Governance* (Earthscan, forthcoming, November 2011).

nongovernment groups, and two to 18 residents.[141] These bodies were responsible for consulting with the neighborhood community by holding meetings, multiple public workshops and conducting surveys and ultimately formally reaching agreement on and implementing their neighbourhood plans.[142]

The findings revealed that the NEIP program not only facilitated negotiation between the various interested parties in each case, but that substantial consensus agreement was reached on a range of important issues. However decisions were undermined by flaws in the NEIP's legal design, resulting in government domination of the deliberative process.

Although government and non-government actors were often at the same negotiation table, for heuristic purposes, the discussion below focuses first on the negotiation process between non-government actors, before turning to consider the more problematic interaction between non-government and government actors.

According to those involved in the decision-making forums, although their decision-making processes had occasionally involved some conflict/self interested bargaining,[143] most had been characterised predominantly by non-adversarial problem solving, negotiation and/or mediation. Negotiators who had been hired by VEPA or local government sponsors, had reportedly done an effective job in facilitating community discussion, encouraging "lots of talking over the issues",[144] and "significant negotiations" between non-government stakeholders.[145] The available data suggests that there was relatively little strategic game playing based on preconceived positions and that in large part negotiations involved discussion, reasoning, shared information and a willingness to compromise to "agree on something".[146] As one respondent reflected on the various negotiations and meetings that occurred to develop their plan:

> all of us now understand a bit more about where everyone else is…they'd say 'Let's think about this, what do people want to see? Let's see if we can do that'…they sat down around the table and up on the whiteboard, talking through the issues, they narrowed it and said what do you think.[147]

While questions are raised about the genuineness of consensus agreement below, parties reportedly used a decision rule based primarily on reaching "substantial" consensus among

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[141] For further see Holley, above n 7.
[142] Around 100 and 200 people engaged in consultation in NEIP case studies 1 and 2 respectively. However these numbers were relatively low compared to the populations of 11,000 and 10,000 people in the neighborhoods. In NEIP case study 3, a population of only 100 people in the area ensured engagement was very robust.
[143] For example one government agency in NEIP pointed out: "our involvement was very much managing the expectations of the various stakeholders so it's consistent with what we would be doing into the future", Interview 214, Government.
[144] Interview 212, Local Resident.
[145] Interview 213, Government.
[146] Interview 235, EPA; C Thomas, "Habitat Conservation Planning" in Archon Fung and Erik Olin Wright (eds), *Deepening Democracy* (Verso, 2003) 159.
[147] Interview 211, EPA.

stakeholders.[148] This process generally avoided the VEPA exercising its veto over the plan directly, but as one respondent explained: "when I say consensus, you still might get the odd dissenting voice".[149] It was found that even dissatisfied actors,[150] such as those who thought more could have been achieved on a certain issue, were willing to support the ultimate plan based on a promise of action over the longer term (i.e. a number of plans). For example, while budget limitations had prevented one agency from undertaking infrastructure works desired by some parties to restore the flow of the creek under a 5 year NEIP plan, the agencies reportedly reached an agreement on long term commitments to complete these works over a far longer time frame. As one respondent put it "we're prepared to be patient".[151]

After two to three years of such negotiation, parties agreed to a final plan containing objectives, targets and actions that focused on a wide range of complex[152] and important issues associated with the local environmental problems.[153] They also commonly agreed to important actions and goals such as improving creek water quality by specified and substantial reductions in grey water entering the stormwater system without treatment; improving baseline water quality through education, infrastructure and audit programs; and improving town sustainability by making it plastic bag free (subsequently reducing pollution in local creeks and oceans).

Not only were there commitments to extensive actions and goals but also the decision-making orientation had reportedly increased the likelihood of implementation[154] and assisted parties to improve their understanding and agreement to create a new shared agenda. As one respondent put it:

> Well the fact that you can get to a point where most of these players that were often fighting with each other through the process…actually agree on something, signed on to it, I mean that's brilliant. That's brilliant[155]

However, while these are all positive achievements, the findings suggested that the NEIP decision-making process was largely dominated by the VEPA and plan sponsor.

Government officers tended to dominate the negotiation and decision-making process in ways that marginalised discussion by non-governmental interests, promoted government programs,

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[148] A small handful of decisions were also made by agreement among a sub set of parties such as between a coordinator and officer who conducted a consultation process.
[149] Interview 224, EPA.
[150] "Sometimes there's no consensus on things", Interview 227, Local Resident.
[151] Interview 215, Government.
[152] "It was a complex problem and I guess in summary that's why the NEIP for us was so good….we've got a plan which has both some short term, medium and long term goals…we've brought partners together and we've all moved forward", Interview 213, Government.
[153] Indeed in NEIP case study 2 some respondents believed the NEIP aimed extremely high: "my honest observation of the NEIP is it aims too high. The projects that they want to achieve are so big", Interview 223, Industry.
[154] "What's relevant is that there's consensus around what's in it. That's all that matters…to make it happen". Interview 224, EPA.
[155] Interview 235, EPA.

and/or simply overrode decisions without discussion. This not only undermined the genuineness of negotiation and participatory aspirations, but also potentially undermined the effectiveness of actions to improve environmental conditions.[156]

Indeed, although it is important to acknowledge that the NEIP program did not provide any additional funding for parties to take new actions, a range of respondents suggested government parties had used their position to limit their commitments on some key issues – effectively committing to business as usual:

> In some sense aspects of the NEIP, the approved plan, were written in a way that people just said what they were already doing or slightly improved, so they weren't over committing[157]

Echoing the reservations of some NEG authors, this domination by key government agencies arose from two overlapping sources. First, the technical knowledge and skills of government officers who participated in the process often overwhelmed the large majority of non-governmental stakeholders in decision-making. Asked to reflect on the decision-making, consultation and plan writing process, non-governmental stakeholders described it as "mainly a place of agencies",[158] "experts"[159] and "people who were used to doing that sort of thing as part of their job".[160] The result was that "it all became a bit high brow"[161] for non-governmental respondents, who, while they could express their point of view, felt that they couldn't "direct" the decision-making and instead were "sitting back and watching the process".[162]

Second, on all accounts the VEPA and local government used their privileged position in NEIP institutional design to "drive"[163] the NEIP planning and proposal process and dominate issues or "push the community into something they didn't necessarily want".[164] As one officer commented: "it was driven by myself, [VEPA and another local government officer]… and all of the meetings and all the agendas and topics were really driven by us".[165]

This theme of government domination will be further explored in relation to the RNRM case, where it was similarly a major issue.

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[156] "There's no central source of funding … that meant that they committed to a lot less than they would've committed to…that money wasn't there so they couldn't agree to anything where they didn't have it", Interview 212, Environmental Group.
[157] Interview 213, Government.
[158] Interview 221, Local Resident.
[159] Government agencies confirmed as much: "[The community] saw us as being the experts and we had the ideas…I think they had difficulty seeing how they could make a contribution", Interview 231, Government.
[160] Interview 227, Local Resident.
[161] Interview 227, Local Resident.
[162] Interview 221, Local Resident.
[163] They "chaired and ran the meetings and really drove the agenda", Interview 231, Government.
[164] For example officers conducting consultation process reportedly "got [the community's] opinion on things rather than active participation. It was more that traditional, let's just give people a whole heap of objectives and get a feel for what they think of it." Interview 211, EPA. The result was that "solutions [were] coming by the coordinator rather than the community", Interview 237, EPA.
[165] Interview 221, Government.

Decision-making in RNRM

As with the NEIP program, RNRM revealed some mixed results. One the one hand it achieved significant success in fostering negotiation and feasible consensus agreements to support implementation and resulted in significant targets being reached across a full range of important issues. Yet, many respondents felt that government unfairly utilised its veto, undermining some benefits of consensus decision-making and making aspects of negotiation tokenistic, devolving responsibility but not power to the regional level.

The RNRM study examined the experience of one regional body in northern Queensland. Initially government officers facilitated existing NRM groups and interested members of the community (approximately 190,000 people) to come together and form a collaborative regional body. These stakeholders included a broad mix of individuals from five subregional community-based collaborative groups, two science interests, two indigenous interests, two local government members, and four non-voting government advisors.

In contrast to the NEIP cases, however, RNRM was not solely about this relatively defined and contained group of stakeholders consulting and deliberating to agree on a plan.[166] Rather, because the RNRM region was much larger (approximately 133,000 square kilometres), the region was divided into 5 subregions with a multiplicity of sub regional, regional, and other decision-making forums being carried out to reportedly "work towards consensus"[167]. The various workshops, forums and discussions conducted over a number of years all involved some degree of conflict between actors, however, in general these processes were described positively by respondents as involving "negotiating with property owners",[168] "negotiation between community sectors, stakeholders and individuals"[169] and producing "negotiated solutions" among different sectors in the region.[170]

In particular, respondents noted the important role that facilitators played in assisting productive discussion, and making parties comfortable in the process:

> ...there were difficulties in bringing in people to open up, to feel comfortable that ideas that they really didn't like were coming through. I think there were one or two instances where people didn't want to be part of it anymore because they felt threatened too

[166] Of course, NEIP also involved multiple consultation forums, however this was typically carried out by members of a single collaborative group and their coordinator (as opposed to different subregional groups, technical teams, and a regional body all reaching their own agreements on multiple issues).
[167] Total population in the region was approximately 200,000 people.
[168] Interview 341, Regional Body; Interview 327, Government.
[169] Burdekin Dry Tropics NRM (BDTNRM), *Burdekin Dry Tropics Natural Resource Management Plan 2005–2010* (BDTNRM, 2005) 197.
[170] Interview 331, Science.

> much, but again the facilitator was a very wise choice to make. [He/she] was somebody who could bring those people back in pretty non-threateningly and get them back on board.[171]

Ultimately, such facilitation (often combined with significant technical information and support) ensured non-government parties were able to negotiate and reach agreed positions on overarching regional targets:

> the meeting that happened I reckon sorted this out, well no meeting actually formalized it… industry said 'yeah we are willing to admit that there are things that can be improved', so we got away from 'you are wrong and you are wrong' situation to one of well 'what can we do'?[172]

From a regional body perspective these processes had involved "decision-making that promoted mutual education" and "increased knowledge of [natural] resource issues".[173] Respondents reported these forums had collectively contributed to them reaching some form of broad regional "consensus" agreement that had increased the chances of implementation from regional and local stakeholders who had signed onto the plan:

> It's their plans, their targets …we sat there and we work-shopped the growers with the work…it creates ownership if the plan sits there and these targets if they know they helped write them they understand why we are achieving or why we are driving for targets, and they can achieve them, then they are more likely to actually engage in it [174]

Despite this, some respondents felt the fact that a consensual decision could be, and was, trumped by the Joint Steering Committee's exercise of its veto, undermined the process. In defence of the possibility of a veto one government official had this to say: "from our point of view, we said 'No. From a government point of view, as the funder of the groups, you've got to address these issues'".[175]

Certainly there were redeeming features of government exercising their veto. According to some stakeholders, the veto ensured regional plans had not undermined wider state legislative instruments.[176] Others also reported that the government veto had ensured the regional plan set

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[171] Interview 348, Regional Body.
[172] Interview 331, Science.
[173] As one respondent explained, a key part of this mutual education and increased knowledge had been decision-making processes that sought to find agreement between "science" and local knowledge of key stakeholders: "science is not going to solve our problems, what we need is on ground people to have an input' you know…[so we] set up a subcommittee of rural people who if the science had a bright idea they'd run it past us to see what we thought about it", Interview 342, Regional Stakeholder; BDTNRM, above 169, 49.
[174] Interview 311, Industry Body.
[175] Interview 323, Government.
[176] "The plan would say . . . 'change the Vegetation Management Act', and we'd say 'why did you waste the ink—that is not a decision that is appropriate to this group", Ibid.

targets and committed to actions for the issues that were important, rather than simply creating tradeoffs between agricultural and environmental interests.[177] Indeed the Joint Steering Committee's use of its veto, informed by the regional decision-making processes, resulted in an approved plan for action on natural resource management that reportedly contained some ambitious targets on important priorities for the region and nationally. These included soil issues (e.g. by 2024, achieve a 10% improvement in soil health in extensive and intensive agricultural areas) to biodiversity issues (e.g. by 2015, ensure 90% of all threatened flora and fauna species in the region will be represented in conservation reserves or under voluntary conservation agreements) to coastal and marine issues (by 2025, connectivity between and within fresh water and marine ecosystems will be restored).[178]

In contrast to the NEIP, there were also very few concerns of government officers using their technical knowledge and skills to dominate this target setting process, most likely because the regional body had been supported by governments to conduct research and to form a technical advisory panel (including biophysical and socio-economic science from a range of academic, research institutions, government and non-government organisations) to assist them in their decision-making.[179]

Nevertheless, respondents suggested that there were also downsides to the government's veto over the plan. First, the veto had the potential to undermine the sense of agreement and ownership that resulted from working towards a consensus and this in turn tended to reduce commitment to implementation. For example, one respondent, stating a commonly held view, reported how he felt disempowered by the government's intervention and veto: "Your opinion is irrelevant basically or that's the way it seems".[180]

Second, respondents saw the veto as undermining RNRM's claim to involving fair and equitable decision-making processes. There was evidence that government's veto had been used to override decisions made by regional groups without providing them with any reasoning, opportunity for fair negotiation or cooperative discussion. As one respondent put it:

> some of the [plans and targets] have been really good but then it gets down to the point that these targets are written, and its something the group and the community agrees with, it goes to the JSC and the they say that's not good enough, crosses it out, rewrites it, signs the plan off and sends it back.[181]

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[177] "If we were to hold a meeting here of local community people in the region and you go in with a blank sheet of paper, I don't think that is all together helpful. You end up with such compromise… it is lowest common denominator outcome…that means no outcome quite often. So you need to have some broader policy guidance as to how that might be applied", Interview 328, Government.
[178] BDTNRM, above n 169.
[179] BDTNRM, above n 169, 12, 185-190, 196.
[180] Interview 242, Regional Stakeholder.
[181] Interview 311, Industry Body.

This raises a broader issue, the relationship between responsibility and power. Notwithstanding the rhetoric of devolved responsibility and decision-making, the regional bodies in practice appear to have had only limited autonomy, as the above quote exemplifies. Thus not for the first time in environmental governance approaches, expectations on the part of civil society organisations that their power and influence would substantially increase have fallen substantially short of the reality. Certainly there is a perception amongst those regional bodies themselves that power is not shared equitably and, specifically, that government agencies retain control.[182]

The issue of power is important but often underplayed in the literature by proponents of new governance approaches who underestimate the routine *denial of power* to the community. It is against this backdrop of unequal power that the article turns to consider WSP in NSW.

Water Planning in NSW

The final and arguably the most complex program examined in the article involved a case study into Zone 1 of the Namoi valley in the Murray Darling Basin. The majority of the Namoi Valley is subject to the *Water Sharing Plan for the Upper and Lower Namoi Groundwater Sources 2003* (the Plan). The Plan encompasses twelve of the thirteen upper zones and the entire lower zone of the Namoi.[183] The Plan came into force on 1 November 2006, and will terminate on 30 June 2017.

Zone 1 of the Upper Namoi Valley was dominated by smaller irrigators. Other major stakeholders engaged in the WSP consultation process were NOW, the Namoi Catchment Authority (CMA), a number of local councils and other property holders who did not actively use the groundwater. Before outlining the views of stakeholders on the decision making process, a brief outline of the complex and somewhat arduous participatory democracy history and arrangements is provided below.

The consultation process began a decade ago with the release of a socio-economic study into the region, followed by some initial consultation meetings in each zone of the Namoi Valley (approximately 42,000 square kilometres in total)[184] along with a series of related technical studies. With the new *Water Management Act* in place in 2000, a groundwater management committee was established to cover the Namoi region. The Committee included representatives from all the major stakeholder groups highlighted above, and other relevant department and

[182] See also: J Whelan and P Oliver, 'Regional Community-Based Planning: The Challenge of Participatory Environmental Governance' (2005) 12 *Australasian Journal of Environmental Management* 126, 129.
[183] The remaining zone will be covered by the *Water Sharing Plan for the Peel Valley Regulated, Unregulated, Alluvial and Fractured Rock Water Sources 2010* (NSW).
[184] Approximately 100000 people live in the Namoi region.

fishing bodies, and had responsibility for developing the draft WSP, which it released in 2002.[185]

Up to this point there was little direct consultation with stakeholders outside of the Committee process, the exception being regular annual meetings between NOW and zone committees comprising irrigator representatives.

The draft WSP was scheduled to begin operation in 2003 and was to be made under section 50 of the *Water Management Act 2000* as a "Minister's Plan". As originally enacted, the *Water Management Act 2000* provided that Minister's Plans were to deal with the same matters as a plan made by a management committee.[186] However, between 2002 and 2004, section 50 of the Act was amended to require the Minister to deal with these matters only "in general terms" and to exempt Minister's Plans from complying with certain requirements relating to public consultation.[187]

As discussed further below, these changes represented one of the first controversies of the implementation of the NSW participatory decision-making process, leading to legal challenges to the original plans.[188] However following the appointment of a new Minister, a review of the draft WSP was undertaken. This engaged representatives from peak irrigation bodies, and addressed in particular the issue of uniform and proportional reductions versus allocation based (at least partially) on "history of use". In order to execute this policy the implementation of six groundwater plans was deferred so that the department could establish accurate information on the historical rates of extraction for all licensees.[189] At this point there was limited consultation beyond the peak bodies.

Subsequently, a new revised WSP was completed in 2005, and was scheduled to commence in 2006. In the interim, another far more comprehensive round of consultation was undertaken with the assistance of the Committee. In contrast to the prior Committee process, the Namoi CMA, as opposed to NOW, had carriage of this round of consultation (although the latter did participate). The purported reason for this was to provide "independence" to the consultation process and avoid any perceived shortcomings of earlier consultations. In terms of impact, the CMA consultation process amended approximately a third of the clauses in the draft WSP. The Minister approved the WSP, with the weighting of allocations favouring active users over inactive users.

Whilst there were some disagreements over the mechanics of the consultation process, there were also key differences and disputes over its nature and outcomes. These differing perceptions

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[185] Although this committee largely carried out all the tasks and functions of a management committee that could have been the Water Management Act 2000 (NSW) as we will see below, the management committee did not have the final say in relation to the content of the WSP. For further discussion on these issues see Millar, above n 104.
[186] Ibid.
[187] Ibid.
[188] Ibid.
[189] Gardner, Bartlett and Gray, above n 23, 320.

are fundamental to determining the success of participatory democracy in this instance, and reveal ongoing unresolved disputes between the different actors. Although there was and remains, some tension regarding entitlement reductions between "active" and "inactive" water users,[190] of fundamental relevance and major concern to this article were disputes between government and non-government stakeholders. The experiences of Zone 1 reveal six key areas of contention.

First, those who were involved in the drafting of the initial WSP reportedly felt that they had been misled as to their role in the plan making process.[191] This significant discontent with the process was attributed to the operation of the Minister's Plan provisions and their subsequent amendments (discussed above).[192] This discontent manifested itself in a number of court challenges,[193] including the *Upper Namoi Water Users Association Inc & Ors v Minister for Natural Resources* in 2003 (*Upper Namoi*).[194] It was argued in this case, inter alia, that the decision to make a Minister's Plan involved a breach of procedural fairness. As the water users saw it, there was a legitimate expectation that the plan would be prepared by a management committee and be made as a management plan rather than a Minister's Plan.[195] As the irrigators argued, their views and recommendations (particularly in relation to socio-economic implications of the plans) were ignored and not followed, which resulted in unfairness to their interests.[196]

However, these substantive arguments on procedural fairness were left unresolved, as the Court's decision addressed only issues of practice and procedure.[197] Subsequent cases such as *Harvey & Anor v Minister Administering the Water Management Act 2000* (*Harvey*)[198] have since considered whether the Minister owed a duty of procedural fairness (in this case in relation to amending the Lower Murrumbidgee Groundwater Sources Water Sharing Plan).

In *Harvey* the court rejected the existence of the duty, in part on the grounds that the exercise of power to amend a plan does not involve an impact on individuals in the requisite direct and immediate sense necessary to establish procedural fairness (as any amendment to the plan will

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[190] Note that there was, and remains, some tension between 'active' and 'inactive' (commonly referred to as sleeper) groundwater users. Although the overall allocations under the WSP are weighted towards active users, in a region that has experienced a 95% reduction in its overall allocation, active irrigators express considerable resentment towards inactive users – the nub of their concern is that they are sitting on valuable allocations that could be better put to productive use. Inactive users, on the other hand, fear that a loss of their licences would reduce their property values. As the CMA (Interview 410) noted, "It is easy for sleepers to be up in arms about being compensated". It is perhaps not surprising, then, to date, no permanent trades have taken place in Zone 1 between active and inactive users (however, this argument does not apply to temporary trades, and, yet, here too, limited if any trading has occurred – a possible explanation for this is that, up until now, at least, supplementary licences have reduced the motivation to trade).

[191] Millar, above n 104.

[192] Ibid; Hussey and Dovers, above n 54.

[193] See also *Murrumbidgee Groundwater Preservation Association Inc v the Minister for Natural Resources* (2004) NSWLEC & on appeal [2005] NSWCA. Here it was argued that the minister failed to follow the standard statutory procedures in order to avoid the standard consultation procedures, and that the minister's plans were invalid because they were made for an extraneous purpose – a purpose outside the scope of the statute. It was held that there was no evidence to support the argument because the minister had still appointed consultative committees. See generally Millar, above n 104; Hussey and Dovers, above n 54.

[194] [2003] NSWLEC 175.

[195] Gardner, Bartlett and Gray, above n 23, 319.

[196] Millar, above n 104.

[197] Gardner, Bartlett and Gray, above n 23, 319

[198] [2008] NSWLEC 165.

necessarily impact on all people with an interest in the water source as a class even though the impact might be different).[199] Further, the court pointed out that even though the department had consulted widely with potentially affected people, it could not give rise to a duty of procedural fairness by the invocation of legitimate expectations, as there was no duty to be found from the interpretation of the legislation.[200]

Commentary on these and other unsuccessful challenges to WSPs across NSW suggests that there are few prospects of finding a common law duty of procedural fairness applying to standard WSP procedures.[201] Moreover, what the cases, particularly *Upper Namoi* demonstrably revealed was a belief that the participatory process had been trumped by the government, marginalising their input and failing to provide irrigators and the committee with the expected level of control over the result.[202]

Second, given such discontent, it comes as little surprise that Zone 1 irrigators and NOW disagree as to the nature and content of the consultation process that led to final water cutbacks in the WSP. In particular, the irrigators' reported that they were deceived by NOW as to a proposal for variable annual groundwater allocations that reflected annual aquifer recharge in Zone 1. The underlying rationale of the irrigators' case is that, unlike much of the Namoi valley, the very rapid recharge in Zone 1 should be reflected in their annual allocations. Zone 1 is uniquely characterised by a highly porous alluvial aquifer system surrounded by hills resulting in very rapid aquifer recharge: "recharge happens very quickly in this zone".[203] In support of this, the irrigators pointed to a visibly flowing Quirindi Creek, with its highly porous gravel base, as tangible evidence of a full aquifer (in effect, they argue that the creek is the top of the aquifer).

Putting the technical merits of their argument to one side, the irrigators believe they were given a firm undertaking by NOW to seriously consider their proposal to put seasonally variable targets into effect: "they said they would look at it".[204] In contrast, the NOW claims that no such undertaking was given, nor did they receive any written proposals to that effect from the irrigators. These different interpretations emerged from a decision-making and consultation process that saw significant mistrust and disconnection between NOW and the irrigators. One irrigator was of the view that "the [proposal] fell over because farmers were not respected by NOW, and were not trusted to manage the groundwater".[205] Whilst not agreeing with the irrigators interpretation of events, even NOW acknowledged that shortcomings in the consultation

[199] Gardner, Bartlett and Gray, above n 23, 322.
[200] Ibid.
[201] Gardner, Bartlett and Gray, above n 23, 323.
[202] Kuehne and Bjornlund, above n 19, 53.
[203] Interview 407, Farmer.
[204] Interview 401, Farmer.
[205] Interview 403, Farmer.

process for Zone 1 irrigators (discussed further below) had contributed to these fundamental divisions.

A third area of contention related to another key feature of Zone 1, namely the inclusion of a township, Quirindi, in the Zone's water allocation process. In particular, there was a need to accommodate town water consumption (which is dependent on the same groundwater aquifer) within the overall Zone allocation. Inevitably, town water supply accords a higher priority than that of irrigators. Competing demands for groundwater generated considerable tension between the township and irrigators during the consultation process. As one irrigator described it "we don't get any support from the town".[206] This was exacerbated by the decision to allocate approximately 80% of the overall sustainable diversion limit to Quirindi, even though this was estimated to be substantially greater than the historical annual consumption of the town (an excess in the order of 700 ML per annum). In a zero sum game, this greatly increased the subsequent reductions imposed on irrigators. Consequently, irrigators in Zone 1 have had to contend with reductions of 95% (which are amongst the largest in the Murray Darling Basin). The local government decided to allow irrigators access to a portion of unused town water supplies at a price, which further contributed to the tension (with few water purchases taking place). More recently there has been a lessening of tensions with the township agreeing to a permanent additional water allocation to irrigators - this is as a consequence of having gained access to additional supplies from a dam external to Zone 1.

The fourth and a fundamental area of contention was the role assumed by the CMA in the negotiation process in the lead up to the WSP zone allocations. On all accounts, the process was very time consuming but had successfully involved many peak groups and in the later stages many farmers. Even so, smaller irrigators and local farmers believe they ultimately had little say (let alone an opportunity to contribute to a consensus agreement) in a decision-making process that was dominated by large, downstream cotton irrigators and governments. Even NOW acknowledged shortcomings in the consultation process for Zone 1 irrigators, particularly in earlier stages: "There wasn't a lot of consultation at local level with irrigators. … I don't know how up to date they were on what was happening and the decisions being made above them. They were out of the loop really. Government and peak irrigators were the main groups really throughout the entire process".[207]

Even when local farmers were engaged by the CMA in the latter stages of the process, there were reportedly significant weaknesses in the CMA's capacity to facilitate meaningful

[206] Interview 404, Farmer.
[207] Interview 412, Government.

negotiation. In particular, the CMA was seen as essentially impotent during the consultation process, with little tangible improvement, from the perspective of irrigators, in the process or final allocations. Interestingly, on this view at least, there appears to be a degree of confluence between irrigators and the NOW, with one irrigator noting, for example, that "CMA stands for couldn't manage anything"[208] and the NOW stating "The CMAs were brought in to make it independent looking. The department was blamed for a lot of what happened (the method of reduction – who was to take the cuts, would it be everyone equal or would it be less entitlement reduction for active users). So by leaving the department out, it did result in better consultation in some places, but in others it didn't".[209]

In their defence, the CMA argued they were placed in a no-win situation: "If you compare it to the regional planning process, well obviously that process was much more consultative. It was a much broader process, but the issue you are dealing with is easier to sell, you are not looking at balance sheet losses you know like in WSP. Everybody knew there were real losses to come so consultation was always going to be less democratic because the outcome was already a given".[210]

The fifth area of contention related to the technical information used by governments. Certainly the matters being decided, such as water allocations and impacts on specific areas and people, were understandably technical. As one respondent put it "I guess by its nature, complicated was necessary".[211] However according to the respondents, this complexity (and an associated lack of support and assistance) effectively precluded many local irrigators (who lacked high level science or technical capacities) from understanding and accordingly inputting into the decision-making process. As one government respondent explained:

> Another issue was the complexity of the model – because of this complexity, some irrigators never really got it…You know you will always have people at one end of the room who are switched on, and then you will have others who enjoy farming but not following up issues and reading things. In hindsight some of the presentations could have been simpler. [212]

Sixth, and finally, the irrigators unanimously considered the compensation payments under the ASGE scheme to be woefully inadequate (these payments were in the order of $80,000 to $100,000 per farm, which, they argue, is vastly outweighed by the undermining of the future productive capacity of their farms).

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[208] Interview 403, Farmer.
[209] Interview 412, Government.
[210] Interview 410, Government.
[211] Ibid.
[212] Interview 411, Government.

In summary, the above perceptions have conspired to produce an enduring legacy of mistrust and resentment on the part of irrigators towards NOW in particular, and to a lesser extent, the CMA, local government and other actors.[213] As a result, it is difficult not to question the degree of participatory decision-making achieved when the major affected group views the consultation process, and its outcomes, as fundamentally flawed.

DISCUSSION AND CONCLUSIONS

This article has examined the NEG aspiration of participatory decision-making. As an empirical project, this article has provided a series of "snapshots" of various innovative NEG decision-making processes over a limited period of time. Even in the short period since the fieldwork was completed, events have moved on and changes have been made by policy makers and agencies in the way these programs operate.[214] The value of empirical studies such as these however lie not in understanding the specifics of individual programs – which almost invariably shift over time – but rather in identifying the wider lessons that can be taken from them. Indeed, as indicated earlier, participatory decision-making is an under-researched but important issue for a new wave of environmental governance initiatives.

The above analysis revealed that governments and agencies often stymied opportunities for those who participated (and even those who were consulted) to input into decisions. Of course, such complaints about supposedly participatory processes are hardly new in environmental law and governance.[215] However what the findings suggest is that claims about NEG going substantially beyond previous forms of community involvement to deepen democracy are over inflated. Despite embracing bold visions of more empowered and participatory processes, governments and agencies in all three of the programs continued to dominate decision-making. Even more worrying is the fact that these ostensibly participatory processes can be counterproductive to a thriving democracy – producing negativity, distrust and demoralised stakeholders and citizens.[216] Such was the case for WSP, where the level of disenchantment amongst irrigators has led them to effectively abandon ongoing consultations with the government.

However, it does not necessarily follow that the three programs were undemocratic in their processes, entirely lacking in significant participation, or wholly subject to the whim of the most

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[213] See generally Kuehne and Bjornlund, above n 19.

[214] The NEIP, for example, has been put on hold while an evaluation and review is conducted. In NSW, new Macro Water Sharing Plans are being developed in NSW: <http://www.water.nsw.gov.au/Water-management/Water-sharing-plans/Water-sharing/default.aspx>. Finally, in RNRM there has been a shift from the regionally focused NHT2 and NAP to the more centralized approach of Caring for our Country, see Rural and Regional Affairs and Transport References Committee, above n 78.

[215] Arnstein, above n 34.

[216] Abers, above n 55, 200; Sturm, above n 9, 331; Fung and Wright, above n 52, 33.

powerful.[217] In particular, there were examples of successful negotiation processes that allowed parties to share ideas, develop mutual agendas and produce effective plans in regard to a range of environmental and natural resource problems.[218] Arguably, this was less so in the case of WSP, where irrigators remained fundamentally dissatisfied with the process that was followed. Not surprisingly, "the failure to consult appropriately has further damaged an already strained relationship between licence holders and the government".[219]

It is also important to note that participatory criteria are *normative ideals* that may never be fully realised in practice. As such, attention should focus on how far short of the ideal various approaches were, and why this was the case, rather than their failure to meet the ideal *per se*. In this context, the findings raise questions about how far the mechanisms and conditions for enhancing meaningful participatory decision-making might be reshaped so as to further contribute to achieving the democratic aspirations of NEG. Some suggestions for "reshaping" these conditions are outlined below.

All three cases found evidence to suggest that governmental agencies may intentionally or inadvertently dominate decision-making processes. It is important to remember that the above findings revealed examples of more than the state simply enforcing "regulatory bottom lines". Rather, community expectations of increased power and influence were largely unmet due to imbalances in skills and capacities and/or agencies' opportunities to control decision-making afforded by the legal framework.[220] How far governments are willing or even capable of assuming the supportive and empowering role expected of them by collaborative experiments is an open and pressing question.[221]

One particular problem appears to exist at the level of agency officials. In both the NEIP and regional NRM case studies, officials in government agencies which have previously taken on a direct regulatory or other hierarchical role, were often resistant to, or at the very least, found it difficult to change their practices so as to support deliberative processes and horizontal structures of decision-making. And in the case of the WSP case study, government officials rejected outright irrigators overtures for an alternative groundwater management approach to be considered. Many state agencies were established and operated for many years within a context in which they saw themselves as monopolising governance. The case studies suggested that forms of NEG present those agencies with significant challenges.

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[217] M Lubell et al, 'Conclusions and Recommendations' in P Sabatier et al (eds), *Swimming Upstream: Collaborative Approaches To Watershed Management* (MIT, 2005) 282.
[218] Sturm, above n 9, 331.
[219] Kuehne and Bjornlund, above n 19, 54.
[220] Camacho, above n 25; Whelan and Oliver, above n 182, 133.
[221] Defilippis, Fisher and Shragge, above n 136, 684; Abers, above n 55, 200-201.

In both NEIP and RNRM the shift from "old" to "new" mentalities proved problematic with the result that a vision of empowerment, facilitation and open engagement has fallen short at the implementation stage. Notwithstanding the broad ambitions of those who conceived it, the legislation and policy which ultimately brought NEIP and RNRM into being was clearly drafted by administrative officials who appear to have been substantially embedded in "old governance" mentalities, and sought to harness civil society partners largely on those bureaucrats own terms and subject to the government's whim. Certainly in the present study, power was at times exercised by agencies and governments to undermine genuine input of non-governmental stakeholders in decision-making and ensure limited extra commitments.[222] This was common where government had a veto power over decisions.

In the case of the WSP, it was evident that the relevant government agency was deeply reluctant to engage in new modes of participatory democracy, despite engaging in lengthy consultation processes. Returning to the policy intentions of participatory decision-making processes outlined above illuminates the extent to which the WSP consultations, arguably the least successful of the three case programs, fell short of the ideal. These intentions were: (i) enhance effectiveness by fostering greater disclosure of information and allowing alternative solutions to be considered more deeply – demonstrably not achieved with a failure by NOW to seriously consider alternatives of top down market based groundwater allocations; (ii) foster the political development of individuals through their engagement in governance – again, the opportunities for meaningful participation by irrigators in groundwater governance appeared minimal at best, nor have the CMA engaged in this process either; (iii) enhance autonomy by focusing on participation in determining the structure of law – the parameters of the legal arrangements were established and controlled tightly by government agencies, the only exception being a greater application of history of use over across the board reductions; and (iv) improve equity by allowing marginalised citizens or groups to participate more directly in decisions that affect their lives – from the perspective of irrigators, the reverse has happened, with the consultation process increasing the marginalisation of irrigators, at the same time as increasing mistrust and ill-feelings.

Evidence from new governance experiments elsewhere suggests that these conclusions from the programs are not atypical. On the contrary, the broader literature on collaborative environmental partnerships suggests that they frequently fail to live up to their promise to

[222] Head, above n 32, 148 -149; S Paton et al, 'Regional Natural Resource Management: Is It Sustainable' (2004) 11 *Australasian Journal of Environmental Management* 259, 263; Whelan and Oliver, above n 182, 133.

"work", because in implementation and design, actors and arrangements hang onto conventional ideas of state governance, frustrating a fundamental shift to "real" environmental partnerships.[223]

Similarly, although the US Endangered Species Act's Habitat Conservation Plan program is sometimes viewed as a successful example of new governance experimentation, recent studies have shown how this regulatory experiment is also failing. Again, this failure is attributed to the agency charged with administering HCPs having never taken its participatory goals seriously, largely because of its legal design and resistance at the level of "on ground" agents.[224]

Of course, agencies are often endowed with control and veto powers for vital accountability purposes. However from the perspective of this article, alternative institutional designs and mechanisms for ensuring the necessary degree of accountability may be needed if government is to be disabused of the notion that it simply knows best (as in RNRM and WSP) or to otherwise avoid tendencies for it to indirectly exploit its "trump card" (as in NEIP) and thus allow non governmental actors to achieve more meaningful input into decision-making.[225]

The experiences of the cases collectively suggest that as NEG continues its transition from experimentation to consolidation, it will be fundamentally important to develop new legal designs and institutional mechanisms to ensure that administrative agencies become effective overseers and facilitators of participatory decision-making. Agencies are better equipped to deliver new governance when there is clarity as to what is required of them.

Accordingly, there is a need for legislation and guidelines to include more specific requirements regarding the structuring of NEG experiments. There is particular value in specifying with greater precision matters such as how non-government stakeholders should be involved in public decision-making and what they should be consulted about.[226] Doing so can provide greater certainty and demonstrate a government's commitment to informing and involving the community. [227] Further, it means that basic community engagement standards are hard to ignore (e.g. due to political pressure) thus contributing to good governance. As we saw in WSP, the removal of such provisions via the amended Minister's Plans process produced less than effective participation and high levels of community resentment.[228]

The challenge of course will be to provide necessary legislative structure without seeking to micro-manage the precise means by which outcomes are to be achieved at the local level. Overly

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[223] Mol, above n 17.
[224] Camacho, above n 25.
[225] P-L Tan et al, above n 19, 11.
[226] Hamstead, Baldwin, O'Keefe, above n 19, 158.
[227] Ibid.
[228] Ibid.

prescriptive and rigid requirements are not helpful in adapting to different circumstances and needs.[229]

The findings also suggest the importance of designing other mechanisms canvassed in the literature to enhance the meaningful input of non-governmental stakeholders. For example, provision of education and training in deliberation and problem solving may improve both government and non-government actors' adherence to ideals of negotiation.[230] Funding and technical support may also play an important role in mitigating the over-influence of government officers.[231] As the experience of "civic environmentalism" in the United States also suggests, opportunities for non-governmental actors to input into decision-making may be more likely to arise under conditions where decision-making is centred around a more "independent" person who represents no particular substantive interest (as opposed to a local government sponsor whose stake in the issues that were being dealt with led them to dominate NEIP decision-making).[232]

Beyond these recommendations, the findings also have relevance for broad theory and understandings about the modern administrative state. Many authors have suggested that NEG participatory processes increasingly blur the traditional line between the state and civil society.[233] In particular, the state no longer is the exclusive actor, top down command is no longer the only means of achieving action, nor indeed is decision-making any longer entirely centralised. What then to make of this shift? Is it a "withering away" – public administrative bodies becoming one of many actors involved in governance but no longer privileged in terms of power and influence?[234] Or does the state retain certain unique roles and if so what are they? These questions will be explored below, while cautioning that the answers are necessarily provisional, given the limitations of the article's case-study approach.

There was little evidence that the shift evident in NEG "threatens" the authority of the state, "hollows it out"[235] or amounts to effective deregulation.[236] Rather the state has remained "strong" and continues to play two unique roles.

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[229] Ibid, 178.
[230] Fung, above n 8, 26.
[231] Ibid, 25.
[232] D John and M Mlay, 'Community-Based Environmental Protection: Encouraging Civic Environmentalism' in K Sexton et al (eds), *Better Environmental Decisions Strategies for Governments, Businesses and Communities* (Island Press, 1999) 360; John, above n 44, 234.
[233] Karkkainen, above n 16, 237-238.
[234] Mol, above n 17.
[235] Rhodes R, *Understanding Governance*, *Policy Networks, Governance, Reflexivity and Accountability* (Open University Press, 1997).
[236] T Lowi, 'Frontyard Propaganda' (1999) October/November *Boston Review* 19.

First, agencies and policymakers played a central role in steering and setting overarching frameworks, albeit to varying degrees of specificity, that defined the nature of participation and negotiation.

The second role performed by the state involved providing public accountability and compliance across the cases, having "the final say" over decisions. As we saw in the NEIP, RNRM and WSP programs, it was in this second role that the state most visibly flexed its muscles. Of course, it is possible that the state will not always be "strong" enough in other areas of NEG (which were not considered in detail in this article). For example, as others have argued, the state will often provide insufficient resources to NEG, which inturn stymies environmental achievements.[237]

Even so, the above understanding of the state generally confirms the implicit or explicit claims in many NEG theories that the state remains "active" in new governance.[238] However, in a rush to embrace more participatory approaches, what many of these theories – particularly the more normative and idealised treatments such as strands of experimentalism,[239] collaborative governance[240] and others[241] – have overlooked is that an "active" state can very often be a "controlling" state.

In broad terms, the above theories often have an implicit assumption or idealised hope that the state will work to support new governance and achieve a more participatory approach to problem solving by devolving both decision-making power and responsibility for implementation. Yet as the article demonstrated, despite rhetoric of devolved responsibility and participatory decision-making, the state has often denied power and limited autonomy, effectively undermining NEG's participatory aspirations.

Given this, the above NEG theories may be better served if they were able to merge an understanding of the importance of not de-responsibilising the state, with an understanding of the *threat* of "state" power,[242] particularly given that wider trends in governance have often been revealed to involve participatory, deliberative and community empowerment in name only.

To conclude, this article has identified and elaborated the challenges that new governance experiments confront in pursuing the ideal of participatory decision-making. Necessarily, these conclusions are limited to the extent the findings focused on certain programs. While the comparative analysis of multiple programs has allowed this article to reflect on a significant

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[237] Cameron Holley 'Aging Gracefully? Examining the Conditions for Sustaining Successful Collaboration in Environmental Law and Governance' (2009) 26 *Environmental and Planning Law Journal* 457.
[238] Lobel, n 5 at 502; Fung and Wright, n 15.
[239] Fung and Wright, above n 57.
[240] Freeman, above n 16, 31-33.
[241] J Freeman and D Farber, 'Modular Environmental Regulation' (2005) 54 *Duke Law Journal* 795, 895, 901.
[242] Defilippis, Fisher and Shragge, above n 136, 684-685.

variance in collaborative designs and contexts, research into other manifestations and experiments is still vital to test and confirm what the findings and implications drawn here hold for other collaborative institutions and contexts. The article also has not looked at the difficult issue of who is represented in NEG nor how this impacts on decision-making.[243] This area deserves high attention, with particular focus given to the representation of environmental interest groups who can often be underrepresented in NEG.[244]

Ultimately, the insights offered here may serve to move normative debate forward on the issue of participatory decision-making. In particular both policy designers and scholars may now have a clearer picture not only of the limits and difficulties associated with participatory decision-making in environmental governance, but also of the circumstances in which participatory approaches can better be pursued in the future.

[243] Holley, above n 7.
[244] Archon Fung and Erik Olin Wright, 'Countervailing Power in Empowered Participatory Governance' in Archon Fung and Erik Olin Wright (eds), *Deepening Democracy* (Verso, 2003).