

BLACK CORAL FORESTS AND MARINE BIODIVERSITY

Trevor Daya-Winterbottom, Faculty of Law, University of Waikato

BACKGROUND

New Zealand has a strong social commitment to environmental protection. It has the 6th largest marine area, and a tradition of enacting world-leading legislation, e.g. the Marine Reserves Act 1971 (MRA), and the Resource Management Act 1991 (RMA). But despite this background New Zealand has struggled to halt the decline of indigenous biodiversity. Notwithstanding baseline state of the environment reporting since 1997, there has been political resistance to preparing national policy statements regarding indigenous biodiversity to assist with interpreting the law, and attempts to replace the MRA with modern up to date legislation have stalled since 2002.

This paper will therefore focus on the Fiordland coastal marine area, and the largest global submarine forest of black coral trees found in that area, as a mechanism for evaluating the effectiveness of New Zealand's marine protection laws. Generally, an empirical approach is used in the following sections to interrogate what environmental practice would look like if carried out in a sustainable way, what government entities and the private sector are doing to foster sustainable outcomes, and what should be done to promote sustainability. The overall thesis of the paper is that different evaluation approaches (constitutional, empirical, and governance) are useful in exposing any gaps between policy and practice within the legal system.

SUSTAINABLE MANAGEMENT

This section analyses New Zealand law and policy regarding the protection of the 12-nautical-mile coastal marine area. The overall thesis is that while the RMA provides a sophisticated framework for environmental regulation, in practice, the statute has a neutral effect on promoting sustainable management because it does not provide any informative guidance to decision-makers as to what sustainability means and because subsidiary policies and regulations are not fully in place to complete the legislative architecture envisaged by the statute. These issues are compounded within the coastal marine area because there is no clear statutory commitment to promoting sustainable management under other environmental law statutes, and because administration is split between a number of governmental entities.

New Zealand environmental law

The Minister for the Environment and the Parliamentary Commissioner for the Environment (PCE) are responsible for environmental policy. Absent any overarching policy statement regarding the New Zealand

environment, they exercise their policy functions primarily through participation in the legislative process. The New Zealand environment is governed by 34 statutes; and the implementation of environmental law is generally split between the Ministers for the Environment and Conservation, who are responsible for (inter alia) preparing national policy statements (NPS) and designating marine reserves, and local government (regional councils managing activities in the coastal marine area, and territorial authorities (city and district councils) managing land use). The Minister for Primary Industries is responsible for biosecurity, and has the power to recommend the approval, by the Governor-General, of a national direction for controlling invasive species.¹

The specialist Environment Court has limited jurisdiction in relation to the protection of marine biodiversity and is responsible for (inter alia) determining appeals under the RMA regarding activities within the coastal marine area, and civil enforcement within the 200-nautical-mile exclusive economic zone. It is for note that the Court does not exercise any supervisory jurisdiction under the majority of environmental law statutes, including, the MRA and the Biosecurity Act 1993.

The RMA is the principal environmental law statute governing the New Zealand environment. It reformed and restated the law regarding air, land, and water, and legislated for sustainability. The RMA controls the environmental effects of activities within (inter alia) the coastal marine area. It is a framework statute that was designed to be implemented by an elaborate framework of policy statements and plans. However, the responsible Ministers have a wide discretion regarding the desirability of preparing NPS to inform decision-making by local government. Sustainable management is defined broadly by s 5 of the RMA to enable people and communities to provide for their social, economic and cultural wellbeing on the one-hand; while on the other hand meeting the reasonably foreseeable needs of future generations, safeguarding the life-supporting capacity of environmental media, and avoiding adverse environmental effects. This broad definition of sustainability is supplemented by a series of non-exclusive examples of sustainable management, including, preserving the natural character of the coastal marine area,² protecting significant habitats of indigenous fauna (e.g. coral),³ and having particular regard to kaitiakitanga – the exercise of guardianship or stewardship by Maori regarding natural and physical resources.⁴

Generally, the courts have applied an “overall broad judgment”⁵ or “balanced judgment”⁶ approach when implementing sustainable

¹ Biosecurity Act 1993, s 9(1)(cb) and s 57.

² RMA, s 6(a).

³ RMA, s 6(c).

⁴ RMA, s 7(a).

⁵ *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (NZEnvC) at 94.

management. Implicitly, this approach allows trade-offs to be made. However, more recently the Supreme Court was given the opportunity to reconsider the approach to implementing s 5 of the RMA in *Environmental Defence Society v The New Zealand King Salmon Company Ltd* concerning proposed marine farming activities, and whether trade-offs are implicit when implementing s 5 or whether sustainable management provides for non-negotiable environmental bottom lines. The Supreme Court found that s 5 “was not intended to be an operative provision”, but “sets out the RMA’s overall objective”.⁷ The Court observed that subsidiary policy statements and plans (e.g. NPS) are designed to “flesh out” the purpose and principles in ss 5, 6 and 7 of the RMA in an increasingly detailed manner, and may contain specific provisions that are not “open-textured” which should not be subject to a “balanced judgment” reinterpretation.⁸ However, the impact of *King Salmon* will ultimately depend on the quality of policy statements and plans and the language used by the drafters of these subsidiary instruments. It nevertheless marks a radical departure from the overall broad judgment approach which leaves the question of weight entirely to the decision-maker.

Separately, in the related *Sustain our Sounds* decision pertaining to the same marine farming proposal, the Supreme Court set out the first principled approach to settling the law regarding the application of the precautionary principle under the RMA, based on international sources and the writings of leading publicists.⁹

Notwithstanding the tradition of enacting world-leading legislation, the trend since the enactment of the RMA following the intensive Resource Management Law Reform process in 1988-1991 has moved away from comprehensive law reform, and the focus is now exclusively centred on reforming sectoral legislation (e.g. Fisheries Act 1996) and special purpose legislation designed to address discrete issues (e.g. Fiordland (Te Moana o Atawhenua) Marine Management Act 2005). However, despite this trend, the RMA remains the principal statute governing the

⁶ *Watercare Services Ltd v Minhinnick* [1998] NZRMA 113 (NZCA) at 124-125.

⁷ *Environmental Defence Society v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at paragraph [151].

⁸ *Environmental Defence Society v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at paragraph [151].

⁹ *Sustain Our Sounds Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 40 at paragraph [109], n 208 IUCN Guidelines for applying the precautionary principle to biodiversity conservation and natural resource management (2007); Philippe Sands and Jacqueline Peel *Principles of International Environmental Law* (3rd ed, Cambridge University Press, Cambridge, 2012); Nicolas de Sadeleer *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, Oxford, 2002); and at paragraph [122], n 238 Cass R Sunstein *Laws of Fear – Beyond the Precautionary Principle* (Cambridge University Press, Cambridge, 2005).

New Zealand environment, but regardless of its primary role it is clear that the RMA was not designed to be a "one-stop-shop".¹⁰

Marine reserves

The MRA provides for marine reserves to be declared within the coastal marine area, by the Governor-General by Order in Council, after the application, consultation, notification and objection process in s 5 has been complied with.

Marine reserves are required to be preserved in their natural state, marine life is required to be protected and preserved, the value of the reserve as the natural habitat for marine life is required to be maintained, and, subject to meeting these objectives, full and free public access is required to be provided. Fishing is prohibited within marine reserves except for scientific purposes.

To date 44 marine reserves have been declared since 1971 covering more than 7% of the coastal marine area. However, the majority of the area covered by marine reserves (99%) lies around the uninhabited sub-tropical Kermadec Islands and the sub-antarctic Auckland Islands.

Fiordland coastal marine area

The Fiordland coastal marine area is protected by a sequence of 10 abutting marine reserves that include more than 10,000ha of inner fiord marine habitat. The 10 marine reserves cover an area from Milford Sound to Preservation Inlet at the southern tip of the South Island, with the landward boundary of the marine reserves being the Fiordland National Park and the seaward boundary being the 12-nautical-mile limit of the coastal marine area. They protect a wide range of unique habitats for sponges, lampshells and fish, and contain the largest global submarine forest of black coral trees (some more than 300 years old) that supports a population of rare brittlestars.

Black coral forests

Black coral (*Antipathes fiordensis*) forests are found at relatively shallow depths (5m-35m) in the Fiordland marine area. It grows more slowly than coral species in tropical waters, achieving a height of 30cm in approximately 50 years. Black coral can be adversely affected by natural hazards such as landslides from the steep mountainous terrain abutting fiords, phytoplankton blooms that "smother" the coral, and predation from invasive species such as sea squirts (ascidians). In some fiords (e.g. Deep Water Basin) the damming and diversion of rivers entering the fiord as a consequence of terrestrial development has decreased the replacement of bottom layer water, which reduces

¹⁰ Ken Tremaine "RMA – Is it still a one-stop shop?", paper presented at the Resource Management Law Association of New Zealand 4th Annual Conference, 3-5 October 1996, Auckland.

mixing with surface water layers and contributes to phytoplankton blooms and in turn results in depleted nutrient levels in winter. The combination of these effects has devastated the black coral forest in Deep Water Basin.¹¹ Sea squirts are becoming prevalent in New Zealand waters. Typically, they grow on fouling material present on the hulls of marine vessels, and they are introduced into new marine areas via maritime transport as result of the movement of commercial tourism and private leisure vessels.¹²

Fiordland (Te Moana o Atawhenua) Marine Management Act 2005

The Fiordland (Te Moana o Atawhenua) Marine Management Act 2005 provides an additional layer of statutory protection for these unique habitats by establishing the Fiordland (Te Moana o Atawhenua) Marine Area, and an additional eight new marine reserves under the Marine Reserves Act 1971. A moratorium was imposed on the creation of additional marine reserves for a period of up to 7 years, depending on the conclusions of the first ministerial review of the effectiveness of the management of the area.

The statute also established the Fiordland Marine Guardians as a statutory advisory body responsible for facilitating and promoting the integrated management of the area; and making recommendations to the relevant ministries, departments, and local authorities responsible for managing the area to ensure that effective management methods are deployed to address any potential adverse effects on the area. The relevant management agencies include the Department of Conservation, the Ministry for the Environment, the Ministry for Primary Industries, and the regional council, Environment.¹³

The Guardians also have powers to monitor the state of the marine environment in the area, plan for compliance with and enforcement of the management regime for the area, and share any information obtained about the state of the marine environment of the area with the relevant central and local government agencies.¹⁴

WHAT GOVERNMENTAL ENTITIES AND THE PRIVATE SECTOR ARE DOING TO FOSTER SUSTAINABLE MANAGEMENT

This section analyses what governmental entities and the private sector are doing to foster sustainable management in the coastal marine area. Primarily, it focuses on governmental entities, but as noted above the Fiordland experience is driven by a collaborative

¹¹ Paul Sirota *The effects of commercial sea-surface activity in Milford Sound: An initial scoping and information gathering report* (Environment Southland, 2006) 8-10.

¹² Ministry for Primary Industries, Pests & Diseases: www.biosecurity.govt.nz (accessed 14 December 2015).

¹³ Fiordland (Te Moana o Atawhenua) Marine Management Act 2005, s 13.

¹⁴ Fiordland (Te Moana o Atawhenua) Marine Management Act 2005, s 13.

approach between commercial and recreational fishing interests, government agencies, and Maori.

Halting biodiversity decline

Despite ratifying the *Convention on Biological Diversity* 1992 in September 1993, New Zealand's subsequent commitment to giving effect to the convention in domestic law has been slow. In the lead up to the *Earth Summit* in Johannesburg in 2002, the non-statutory *New Zealand Biodiversity Strategy* was prepared by the Department of Conservation and the Ministry for the Environment in 2000 to take up the "challenge" of halting the decline in indigenous biodiversity. However, there were no proposals to give legal effect to the convention under the RMA, the principal statute governing the New Zealand environment.

The strategy draws attention to the geographical extent of New Zealand's marine environment, the diverse range of species found in these waters, and the difficulty in evaluating the state of marine biodiversity due to "very limited information".¹⁵ In particular, the Strategy found that:

New Zealand's coastal and marine environment is managed by several different agencies, often for competing economic, social and environmental purposes ... Management of the marine environment over the last century has largely focused on sustaining fisheries for use, rather than protecting marine biodiversity for its own sake.¹⁶

The Strategy also noted that the New Zealand marine environment is "vulnerable" to invasive pest species that are transported either via ballast water or attached to the hulls of vessels.¹⁷ As a result, the Strategy called for agreement on clear national policy objectives, and better definition of agency responsibilities – particularly, in relation to marine biosecurity risks.¹⁸

The commitment to halting the decline in indigenous biodiversity has been tracked through a series of state of the environment (SOE) reports. The first SOE report published in 1997 recorded the decline in indigenous biodiversity, and the second report published in 2007 recorded the continuing decline in indigenous biodiversity despite measures taken since 1997 under existing legislation. These reports were the largest "stocktakes" of trends regarding air, land, water, and biodiversity in relation to the New Zealand environment.

¹⁵ Department of Conservation and Ministry for the Environment *The New Zealand Biodiversity Strategy: Our Chance to Turn the Tide* (Department of Conservation and Ministry for the Environment, Wellington, 2000), 55-57.

¹⁶ *ibid*, 58.

¹⁷ *ibid*, 63.

¹⁸ *ibid*, 65-66.

The 2007 SOE report focused primarily on fisheries and recreational swimming when reviewing trends in relation to the coastal marine area. While the report noted the threats posed by introduced species via shipping activity e.g sea squirts, the primary concern articulated in the report pertained to potential adverse effects on aquaculture industry rather than the natural environment. Significantly, the report noted that more than 140 introduced species had been "recorded" since 1998.¹⁹ In particular, the report noted the success of "local initiatives" such as the Fiordland Marine Guardians in achieving intergrated management, while acknowledging that the driving force for establishment of the Guardians was founded in consensus between commercial and recreational fishers and Maori about how fishing rights should be exercised in the area.²⁰ Finally, the report noted continued need to "focus on biosecurity", with increased marine travel being identified as one of the "pressures" on the marine environment as a result of introduced pest species.²¹

Separately, there is no specific New Zealand legislation providing for access to environmental information, and access to environmental information is governed by the general law subject to the Ombudsmens oversight, namely, the Official Information Act 1985 and the Local Government Official Information and Meetings Act 1987.

Notwithstanding this, the government decided to discontinue the SOE report series in 2012 and to focus instead on reporting basic data regarding 22 core indicators. The Environmental Monitoring Act 2015 has implemented this new focus. The decision to abandon SOE reporting was criticised by the PCE because basic data will not in future be compiled, analysed or compared. Submissions on the Bill during its passage through Parliament also criticised provisions removing general access to information rights and Ombudsmen supervision in relation to the basic underlying monitoring data.

NPS on indigenous biodiversity

The proposed NPS on indigenous biodiversity was gazetted in December 2010. During the period of January-May 2011 a total of 426 submissions were received by the Minister for the Environment. It is notable that the Minister could have referred the proposed NPS to an independent Board of Inquiry that would have given submitters the opportunity to be heard in person before the Board at a formal hearing, but he chose not to do so in this case. The process has been stalled since the close of submissions in May 2011 while public servants prepared recommendations, however, in September 2015 the Minister announced the intention to make the NPS operative during 2016.

¹⁹ Ministry for the Environment *Environment New Zealand 2007* (Ministry for the Environment, Wellington, 2007), 317.

²⁰ *ibid*, 324.

²¹ *ibid*, 341.

Notwithstanding the renewed commitment to make the proposed NPS on indigenous biodiversity operative, it is for note that the NPS does not include any specific targets and will not have direct legal effect. Instead, the proposed NPS relies on local government (regional councils and territorial authorities) to implement the NPS by preparing changes to their regional and district plans. Current estimates available from the Ministry for the Environment suggest that the plan change process takes an average of 7 years to complete. As a result, implementing the NPS is unlikely to occur quickly.

Review of the Marine Reserves Act

A review of the MRA was launched by the Department of Conservation in September 2000. This resulted in the Marine Reserves Bill 2002 (224-1) being introduced into Parliament in June 2002. Subsequently, the review did not gain any real traction, and the Bill was finally discharged in February 2013 without advancing to its second reading.

In particular, the consultation process for declaring new marine reserves under the MRA has been protracted as a result of debates about protection and use, focused almost exclusively on the fishing prohibition. As noted above, this has resulted in trade offs with most marine reserves being located away from population centres, and located around remote off-shore islands. It is therefore unlikely that New Zealand will be able to comply with Aichi Biodiversity Target 11 in terms of conserving an “ecologically representative and well connected system of protected areas” covering 10% of its coastal marine area by 2020.

Both the current MRA and the proposed Marine Reserves Bill 2002 have been criticised by the Environmental Defence Society (EDS) as being inadequate for achieving the objective of preserving New Zealand’s unique marine areas in their natural state. Instead, the Society has proposed that a wider approach should be adopted regarding marine protected areas as an integral component of an oceans policy, based on marine spatial planning techniques.²²

In line with the renewed commitment to make the proposed NPS on indigenous biodiversity operative, the Minister for the Environment also announced (in September 2015) the intention to introduce a new Marine Reserves Bill into Parliament in 2016. But it is uncertain whether the proposed Bill will address any of these issues.

Fiordland marine reserves

Despite the novel approach to management of the Fiordland coastal marine area, EDS has criticised the current statutory arrangements, highlighting the lack of any defined conservation values, the

²² Kate Mulcahy, Raewyn Peart, and Abbie Bull *Safeguarding Our Oceans: Strengthening marine protection in New Zealand* (Environmental Defence Society, Auckland, 2012), 137-140.

dominance of existing commercial fishing use rights, and the effectiveness of the management tools. For example, commercial fishers acknowledge the degradation of the fishery and they are now unable to catch more than 70% of their full quota. Additionally, the marine reserve areas are small and do not include fiord entrances or the outer coast, and the full range of habitat protection and scientific baseline evidence has not been achieved.²³

The Ministerial review that reported in 2010 concluded that to determine the effectiveness of the Guardians in achieving preservation, protection, and sustainable management of the marine environment and biological diversity of the area, monitoring results would need to be evaluated to assess whether there had been any improvement. While a monitoring plan is in place, the review found that insufficient research and monitoring information was available to draw any conclusions.

Subsequently, the series of annual reports prepared by the Fiordland Marine Guardians during the period 2013-2015 provide a snapshot of how New Zealand environmental law is currently being implemented to protect the "fragile and unique" Fiordland marine environment, which is recognised as "an international treasure".²⁴ In relation to the issues identified by Paul Sirota in his report for the regional council, Environment Southland,²⁵ the reports prepared by the Guardians focus on invasive marine species. For example, they note the voluntary action taken by the Ministry for Primary Industries regarding vessel inspections since 2010 that remains ongoing:

Moored vessels in Bluff and at Stewart Island that are known to travel to the FMA are inspected on a monthly basis for the presence of marine pests. Antifoul condition and the level of general marine growth on vessel hulls are recorded during these inspections. Any marine pests found on vessel hulls and niche areas are removed by divers at the time. When a marine pest is detected, vessel owners are informed and advised of what action to take before their next visit to fiordland to ensure their vessel is clean and free of marine pests.²⁶

However, notwithstanding this achievement, the most recent annual marine surveillance report prepared for the Ministry for Primary Industries notes that sea squirt (ascidian) samples were collected in Bluff during the period May 2014 to April 2015, and the samples were

²³ *ibid*, 289.

²⁴ Ministry for Primary industries www.mpi.govt.nz (accessed 2 January 2016).

²⁵ n 11 above.

²⁶ Fiordland Marine Guardians *Fiordland Marine Guardians: Annual Report for the year ended 30 June 2013* (Fiordland Marine Guardians, Invercargill, 2013), 21; Fiordland Marine Guardians *Fiordland Marine Guardians: Annual Report for the year ended 30 June 2014* (Fiordland Marine Guardians, Invercargill, 2014), 23; Fiordland Marine Guardians *Fiordland Marine Guardians: Annual Report for the year ended 30 June 2015* (Fiordland Marine Guardians, Invercargill, 2015), 23.

identified as “poorly understood species” in New Zealand.²⁷ The surveys carried out jointly by scientists from the Ministry and the National Institute for Water and Atmospheric Research surveyed a variety of potential habitats for marine invasive species “including marina pontoons, pilings, moorings, jetties and vessel berths”.²⁸

SUSTAINABLE FUTURES

What should the various governmental entities and private sector parties be doing to foster sustainable management within New Zealand’s coastal marine area? Various approaches to evaluating the effectiveness of environmental law have been developed by environmental law scholars, primarily in Australia, the United Kingdom, and USA, including, Elizabeth Fisher’s administrative-constitutional approach, Donna Craig and Paul Martin’s applied approach to implementation, Chris McGrath’s causal approach to evaluating linkages between environmental law and environmental outcomes, and the IUCN’s natural resources governance framework. This section will draw conclusions from these approaches in relation to New Zealand environmental law that could have comparative value for other jurisdictions where environmental protection relies on a mix of law, policy and practice for its ultimate success.

Constitutional approaches

Elizabeth Fisher’s administrative-constitutional approach requires framework statutes to be interpreted in a similar way to constitutional provisions.²⁹

The New Zealand “policy machine” comprises “a sequence of closely inter-related and inter-dependent processes” designed to produce progressively better outcomes by identifying issues, defining objectives or anticipated outcomes, policy development, implementation, and monitoring.³⁰ Despite this commitment to the policy cycle there has been a general failure to implement framework statutes by preparing NPS. For example, the general theory advanced by Geoffrey Palmer (the architect of the RMA) that superior court decisions would quickly fill the gap was unrealistic. He noted, when considering the meaning of sustainable management, that enactment of the RMA was not met with “the usual flood of litigation that often marks the initial implementation of new legislation”, and observed that:

²⁷ Tim Riding, Chris Woods, Serena Wilkens, and Graeme Inglis “Marine and Freshwater: Marine surveillance annual report” Surveillance 42 (3) 2015 (Ministry for Primary Industries, Wellington, 2015), 59.

²⁸ *ibid*, 56.

²⁹ Elizabeth Fisher “Towards environmental constitutionalism: A different vision of the Resource Management Act 1991?” [2015] Resource Management Theory & Practice, 63.

³⁰ State Services Commission www.ssc.govt.nz (accessed 2 January 2016).

Once an appropriate case reaches the New Zealand Court of Appeal, it can confidently be predicted that a suitably progressive yet workable approach will be taken to the Act.³¹

The RMA has a strong foundation, built on environmental principles. For example, as noted above the purpose of the RMA expressly enacts statutory commitments to achieving sustainability, avoiding adverse environmental effects, protecting biodiversity, and giving effect to indigenous guardianship approaches to managing resources (kaitiakitanga) through an ethic of stewardship. But the failure to complete the administrative architecture by preparing NPS, and reliance on a common law, bottom-up, approach to develop policy via litigation has resulted in dissatisfaction with the speed of implementation. As a consequence, 17 statutory amendments to the RMA have been introduced since 1993 in an attempt to produce better outcomes.

Implementation and statutory reform have been hindered by poor monitoring and the resulting data gaps noted above. This issue is, however, endemic across the New Zealand policy machine. For example, Shamubeel Eaqub highlighted general problems with evaluating law and policy in New Zealand due to poor monitoring and review:

My senior colleagues who have first-hand experience of government often echo two sentiments. First, it is easy to make policy, but it is very hard to make good policy. Second, it is easy to make legislation, but it is very hard to remove legislation. So it is essential to ensure that any new policies are well thought out, not just for the obvious reasons, but so as to avoid their unintended consequences. Once a policy is in place, we must review and refine them to learn from our past mistakes and make improvements where we can. Review and refinement of existing policies is rare in New Zealand. We are failing to learn from our own actions and often don't even know if there are winning (or losing) strategies already tried and tested elsewhere.³²

Geoffrey Palmer also drew attention to the phenomenon of "hyperlexis" and observed that "New Zealand passes too many laws and it passes them too quickly".³³ This problem is compounded by the unicameral nature of the New Zealand parliament, and the use of "urgency" to bypass normal parliamentary procedure to pass law quickly. For example, Claudia Geiringer found that during the period 1987-2010 the House of Representatives went into urgency on 230 occasions, and

³¹ Geoffrey Palmer "The Making of the Resource Management Act" in *Environment: The International Challenge* (Victoria University Press, 1995), 169 and 173.

³² Shamubeel Eaqub *Growing Apart: Regional Prosperity in New Zealand* (Bridget Williams Books, Wellington, 2014), 84.

³³ Geoffrey Palmer *Unbridled Power* (2nd ed, Oxford University Press, Auckland, 1987), 139.

that approximately 50% of legislation enacted during this period was “accorded” urgency at some stage during its passage into law.³⁴

Arguably, the combination of these phenomena present real problems with reliance on constitutional approaches to implementing environmental law in New Zealand against the backdrop of its unwritten Westminster style constitution and unicameral parliament with few checks and balances on the quality of legislation.

However, Ludwig Krämer expressed concern from a comparative European perspective about the “value” of environmental directives that simply “outline general rules, framework provisions and basic requirements”, and he was “doubtful” that such directives are “really capable of contributing to a high level of environmental protection”.³⁵ This insight indicates that current approaches to NPS are unlikely to be effective in practice, or fill the constitutional lacuna left by the framework provisions of the RMA.

Empirical approaches

Both Donna Craig and Paul Martin, and Chris McGrath have adopted empirical approaches to evaluating environmental law. Craig and Martin focus on defining statutory purpose and assessing its “real-world effects”.³⁶ Whereas, McGrath considers whether environmental law drives anticipated outcomes.³⁷ Similarly, John Dernbach and James May explore the objective question of what environmental practice would look like if carried out in a sustainable way.³⁸ They pursue this question by analysing current law and policy and considering what government entities and the private sector are doing to foster sustainable outcomes, before asking what they should be doing to promote sustainability.

These approaches are useful in exposing the distinction between policy and practice, that is graphically illustrated by the New Zealand experience where principles are enshrined in legislation but prove difficult to implement in practice. For example, the New Zealand

³⁴ Claudia Geiringer, Polly Higbee, and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process* (Victoria University Press, Wellington, 2011), 1.

³⁵ Ludwig Krämer *EC Environmental Law* (5th edn Sweet & Maxwell, London, 2003), 52.

³⁶ Donna Craig and Paul Martin “Accelerating the evolution of environmental law through continuous learning from applied experience” in Paul Martin and Amanda Kennedy (eds) *Implementing Environmental Law* (Edward Elgar Publishing, Cheltenham, 2015), 27.

³⁷ Chris McGrath *Does environmental law work? How to evaluate the effectiveness of an environmental legal system* (Lambert Academic Publishing, Saarbrücken, 2010).

³⁸ John Dernbach and James May (eds) *Shale Gas and the Future of Energy: Law and Policy for Sustainability* (Edward Elgar Publishing, Cheltenham, 2016) (forthcoming).

experience with protecting marine biodiversity demonstrates that replacing existing statutes to provide new purpose based law has been delayed by inertia, that vested (fishing) interests can dilute guardianship ethics, and that lack of sufficiently robust monitoring and research data will make empirical analysis difficult. Overall, the questioning approach used by these scholars is useful in exposing these issues, while the findings (from the New Zealand experience regarding marine biodiversity) demonstrates a pragmatic, bottom up, approach where the law (arguably) does not “drive” anticipated outcomes.

Governance approaches

The IUCN’s natural resources governance framework requires a two-step approach to the identification of relevant legal principles, and evaluation of their implementation.³⁹ When evaluating implementation this approach focuses on four key questions: has the approach been adequately reflected in formal legal arrangements; has sufficient administrative and other government action been taken to implement the principle; have the implementation actions resulted in patterns of behaviour consistent with the governance aims of the principle; and do the biophysical and social outcomes demonstrate implementation and achievement of the purposes of the principle.

As noted above, the purpose of the RMA expressly enacts statutory commitments to achieving sustainability, avoiding adverse environmental effects, protecting biodiversity, and giving effect to indigenous guardianship approaches to managing resources. These principles are implemented in part in relation to the Fiordland marine areas through the voluntary action led by the Ministry for Primary Industries regarding vessel inspections to control the spread of invasive species (e.g. sea squirts) that could adversely affect the submarine black coral forests. These patterns of behaviour are consistent with these governance principles, and to date this outcome has been achieved.

However, the integrated approach found in the Fiordland marine area is the product of informal governance arrangements put in place by the relevant management agencies (e.g. baseline research by Environment Southland to determine potential adverse effects on the black coral forests, and the lead role assumed by the Ministry for Primary Industries regarding pest management in the marine area), whereas under the *Pest Management National Plan of Action* the Department of Conservation would normally have the lead intervention and decision-making role for pest management in marine reserves together with the responsibility for bringing together other parties “with the necessary

³⁹ Paul Martin, Ben Boer, and Lydia Slobodian (eds) *Framework for Assessing and Improving Law for Sustainability: A Legal Component of a Natural Resource Governance Framework* (IUCN, Bonn, 2015), 15-17.

powers, functions and resources" to ensure that marine reserves are managed "to protect values of specific places".⁴⁰

Notwithstanding the relative success in preventing the spread of sea squirts into the Fiordland marine area, the Guardians' annual reports are silent about any action taken to avoid, remedy or mitigate potential adverse effects on the black coral forests from terrestrial landslides or phytoplankton blooms caused by damming and diverting rivers entering the fiords. The failure to produce monitoring and research data hampers the assessment of environmental outcomes, and is (regretably) a consistent theme across biodiversity management generally in New Zealand. Similarly, the degree of integration achieved by the relevant management agencies within the Fiordland marine area is a specific by-product of the Fiordland (Te Moana o Atawhenua) Marine Management Act 2005. While integrated management is a relevant consideration under s 30 and s 31 of the RMA in terms of the devolved administration of the RMA to local authorities; the concept is not developed further in the statute beyond its limited use in describing the functions, powers and duties of local authorities – and is a specific lacuna in relation to the wider corpus of New Zealand environmental law. Generally, since the enactment of the RMA in 1991, the fragmentation of environmental law as a result of special purpose legislation is a particular problem in relation to the development of a coherent body of environmental law. Arguably, despite its relative success, the Fiordland (Te Moana o Atawhenua) Marine Management Act 2005 is a symptom of this trend.

CONCLUSION

The New Zealand experience in protecting marine biodiversity demonstrates the gap between policy and practice, where strong legislative statements (e.g. the commitment to sustainable management and mechanisms for designating marine reserves) are weakened by incomplete implementation of framework statutes, the lack of reliable environment monitoring data, the fragmentation of environmental law as a result of enacting special purpose legislation, and the lack of formal integration mechanisms both across the corpus of environmental law statutes generally and between administrative agencies. Applying a variety of evaluation approaches is useful in exposing the nature and extent of any implementation gaps, and in pragmatically driven common law systems demonstrates that anticipated environmental outcomes are not always driven by the law – as illustrated by the relative success of the collaborative administrative arrangements adopted in relation to the Fiordland marine area.

⁴⁰ Ministry of Agriculture and Forestry *MAF Biosecurity New Zealand Pest Management National Plan of Action* (Ministry of Agriculture and Forestry, Wellington, 2011), 17.

References

Department of Conservation and Ministry for the Environment *The New Zealand Biodiversity Strategy: Our Chance to Turn the Tide* (Department of Conservation and Ministry for the Environment, Wellington, 2000)

Donna Craig and Paul Martin "Accelerating the evolution of environmental law through continuous learning from applied experience" in Paul Martin and Amanda Kennedy (eds) *Implementing Environmental Law* (Edward Elgar Publishing, Cheltenham, 2015)

John Dernbach and James May (eds) *Shale Gas and the Future of Energy: Law and Policy for Sustainability* (Edward Elgar Publishing, Cheltenham, 2016)

Shamubeel Eaquad *Growing Apart: Regional Prosperity in New Zealand* (Bridget Williams Books, Wellington, 2014)

Fiordland Marine Guardians *Fiordland Marine Guardians: Annual Report for the year ended 30 June 2013* (Fiordland Marine Guardians, Invercargill, 2013)

Fiordland Marine Guardians *Fiordland Marine Guardians: Annual Report for the year ended 30 June 2014* (Fiordland Marine Guardians, Invercargill, 2014)

Fiordland Marine Guardians *Fiordland Marine Guardians: Annual Report for the year ended 30 June 2015* (Fiordland Marine Guardians, Invercargill, 2015)

Elizabeth Fisher "Towards environmental constitutionalism: A different vision of the Resource Management Act 1991?" [2015] *Resource Management Theory & Practice*, 63

Claudia Geiringer, Polly Higbee, and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process* (Victoria University Press, Wellington, 2011)

Ludwig Krämer *EC Environmental Law* (5th edn Sweet & Maxwell, London, 2003)

Paul Martin, Ben Boer, and Lydia Slobodian (eds) *Framework for Assessing and Improving Law for Sustainability: A Legal Component of a Natural Resource Governance Framework* (IUCN, Bonn, 2015)

Chris McGrath *Does environmental law work? How to evaluate the effectiveness of an environmental legal system* (Lambert Academic Publishing, Saarbrücken, 2010)

Ministry of Agriculture and Forestry *MAF Biosecurity New Zealand Pest Management National Plan of Action* (Ministry of Agriculture and Forestry, Wellington, 2011)

Ministry for the Environment *Environment New Zealand 2007* (Ministry for the Environment, Wellington, 2007)

IUCN Academy of Environmental Law 13th Colloquium Atma Jaya Catholic University
Jakarta Indonesia 7-12 September 2015

Kate Mulcahy, Raewyn Peart, and Abbie Bull *Safeguarding Our Oceans: Strengthening marine protection in New Zealand* (Environmental Defence Society, Auckland, 2012)

Geoffrey Palmer *Unbridled Power* (2nd ed, Oxford University Press, Auckland, 1987)

Geoffrey Palmer "The Making of the Resource Management Act" in *Environment: The International Challenge* (Victoria University Press, 1995)

Tim Riding, Chris Woods, Serena Wilkens, and Graeme Inglis "Marine and Freshwater: Marine surveillance annual report" *Surveillance* 42 (3) 2015 (Ministry for Primary Industries, Wellington, 2015)

Paul Sirota *The effects of commercial sea-surface activity in Milford Sound: An initial scoping and information gathering report* (Environment Southland, 2006)

Ken Tremaine "RMA – Is it still a one-stop shop?", paper presented at the Resource Management Law Association of New Zealand 4th Annual Conference, 3-5 October 1996, Auckland