SUSTAINABLE MANAGEMENT, A SUSTAINABLE ETHIC?

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LEGISLATING FOR SUSTAINABILITY

New Zealand legislated for sustainability by enacting the *Resource Management Act* 1991 (**RMA**). The RMA received the Royal Assent on 22 July 1991 and came into force as law on 1 October 1991. It restated and reformed "the law relating to the use of land, air, and water",[1] and is the principal statute governing the New Zealand environment.[2]

Despite the rhetoric of sustainable management, environmental law and governance in New Zealand continue to grapple with persistent challenges in relation to protecting biodiversity on private land, maintaining freshwater quantity and quality, and recognising Maori interests in resource management. New strategies are however emerging for promoting environmental justice and using the law to advance sustainability. My paper will therefore explore these aspects of

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1 RMA, preamble.

2 Other statutes governing the New Zealand environment are listed in the schedules of the *Environment Act* 1986 and the *Conservation Act* 1987.

the New Zealand experiment in legislating for sustainable management.

Sustainable management

The statutory purpose of the RMA is "to promote the sustainable management of natural and physical resources".[3] "Sustainable management" is defined in s 5(2) of the RMA as meaning:

> … managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while-
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> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
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> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
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> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The words and phrases used in s 5(2) are defined in s 2(1) of the RMA, and further guidance about how the statutory purpose of sustainable management should be interpreted and applied is given in the remainder of the provisions in Part 2 of the RMA. For example, natural and physical resources are defined by s 2(1) of the RMA as including "land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced) and all structures".

The statutory purpose of sustainable management in s 5 is supplemented by "a set of hierarchical principles" in ss 6–8 of the RMA that are designed to give "guidance" on the meaning of sustainable

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[3] RMA, s 5(1).

management.[4] They provide a set of national policies designed *inter alia* to protect indigenous biodiversity, maintain freshwater quantity and quality, and recognise Maori interests in resource management.

A key component of the provisions in Part 2 of the RMA in relation to biodiversity is s 6(c) which requires all persons exercising functions and powers under the RMA to have particular regard to "the protection of significant indigenous vegetation and significant habitats of indigenous fauna". Relevant to freshwater management are the preservation of the natural character of lakes and rivers, maintaining and enhancing public access to and along lakes and rivers, and the relationship of Maori with ancestral waters.[5] Also relevant to freshwater management are the efficient use of natural and physical resources, maintaining and enhancing environmental quality, the finite characteristics of natural and physical resources, protecting the habitat of salmon and trout, the effects of climate change, and the benefits to be derived from renewable energy.[6] Recogition of Maori interests is provided for by the requirement to recognise and provide for "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga";[7] and by the requirement to have particular regard to "kaitiakitanga" which is defined as meaning:[8]

> … the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.

Palmer observed from the statutory language used in these provisions that they are designed to be "interpreted and applied as an integral

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4 Whiting, G *Environmental Law and the Expert Witness*, New Zealand Acoustics, Volume 23, Issue 3, p32.

5 RMA, s 6(a), (d), and (e).

6 RMA, s 7(a), (aa), (b), (f), (g), (h), (i), and (j).

7 RMA, s 6(e).

8 RMA, s 2(1).

part of achieving the overall statutory purpose defined by s 5".[9] Section 5 permeates the RMA and is given effect to by the preparation of a hierarchy of policy statements and plans, and when making decisions on resource consent applications. When exercising any of these functions, Government and local authorities are required to do so in a way that will achieve the statutory purpose of promoting sustainable management.[10]

Grinlinton also drew attention to the machinery provisions in the RMA that are designed to give effect to the statutory purpose of sustainable management. These provisions include the requirement for strategic environmental assessment under s 32 when preparing statutory planning instruments, and for assesment of environmental effects of all resource consent applications under Schedule 4; the requirement for integrated management in relation to statutory planning instruments in terms of both vertical and horizontal consistency, and in relation to resource consent applications by providing for all consents relating to a particular development proposal to be decided jointly by the relevant consent authorities; the provision made for public participation in decision-making via submissions, hearings and appeals in relation to all policy statements and plans, and in relation to all notified resource consent applications; and the "deliberative" role of the Environment Court in resolving environmental conflict.[11] Environmental governance is largely devolved to local authorities who, absent Government intervention by preparing national policy statements, have been left to administer the RMA in a policy vacuum.

The philosopical basis for New Zealand environmental law

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9 Palmer, K "Resource Management Act 1991" in Nolan et al, *Environmental and Resource Management Law*, Fourth edition (2011) at 126-127.

10 RMA, s 45, s 56, s 59, s 63, s 72, and s 104.

11 Grinlinton, D "Contemporary Environmental Law in New Zealand" in Bosselmann, K and Grinlinton, D *Environmental Law for a Sustainable Society (*2002), pp19-46.

The RMA has impeccable international antecedents.[12] For example, Whiting noted that:[13]

> The Act reflects many of the international community's concerns about the environment, expressed through international conferences from the Stockholm Conference in 1972 to the Rio Declaration in 1992, including such fundamental principles as:
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> - sustainablity;
> - intergenerational equity;
> - ecological diversity;
> - community wellbeing; and
> - recognition of indigenous rights.

Salmon also outlined the strong philosophical basis that underpins modern environmental and resource management law in New Zealand. He referred to traditional common-law approaches to environmental protection based on the law of nuisance, and observed that "what has been completely absent is the concept of mankind as an integral part of the world in which we live, of a relationship between all living things".[14] Building on the work of Sax in relation to an ecosystems approach to environmental and resource management law, Salmon considered that the "challenge for the legal system of the future" is to

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[12] See: Robinson, N "Origins and implications of "sustainable development" in international law", and Robinson, N "Challenges of change: Rethinking law for a global century" in Daya-Winterbottom, T (ed) *Frontiers of Resource Management Law* (2012) pp61-89 & pp479-526 respectively.

[13] Whiting, G *Environmental Law and the Expert Witness*, New Zealand Acoustics, Volume 23, Issue 3, p30.

[14] Salmon, P *President's Address*, Resource Management Law News, Issue 1/92, November 1992, p2. President's Address at the inaugural Resource Management Law Association of New Zealand (RMLA) dinner in October 1992.

be "creative" and "concerned with the functional integrity of the earth". He concluded that:[15]

> … there can hardly be a more important or responsible task than to ensure that our legal systems and the philosophies and controls that they enshrine are adequate to provide for this growing awareness of the interrelatedness between people and the earth on which we rely for survival.

The analogy of "spaceship Earth" featured in both the writings of Salmon and Williams . Salmon quoted from Sax's "common trust" or "ecosystem" approach that saw the Earth as "a spaceship in which we are all travelling", while Williams used the task of "designing the social and physical systems needed to make a 100-year journey through space" as a mechanism for casting "sustainability as a 'real life' thing". They are both powerful ways of describing our relationship with our planetary home in which we have a life interest,[16] and that as trustees we want to safeguard to ensure that future generations are provided for.[17] This analogy also captures the hope and enthusiasm that was prevalent as New Zealand embarked upon the task of reforming its principal environmental statutes relating to town and country planning, freshwater allocation and management, and clean air.[18]

Resource management law reform

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[15] Salmon, P *President's Address*, Resource Management Law News, Issue 1/92, November 1992, p2.

[16] Thatcher, M *Speech to Conservative Party Conference*, 14 October 1988:

> No generation has a freehold on this earth. All we have is a life tenancy—with a full repairing lease.

[17] Sax, J *The Law for a Liveable Planet*, International Conference on Environmental Law, Sydney, June 1989; quoting from Boulding, K "The Economics of the Coming Spaceship Earth" in Jarrett, H (ed) *Environmental Quality in a Growing Economy* (1966).

[18] Proposals to reform the statutes regulating the allocation of Crown minerals and the storage and use of hazardous substances and new organisms were split from reform process by, respectively, the Crown Minerals Act 1991 and the Hazardous Substances and New Organisms Act 1996.

The Resource Management Law Reform (**RMLR**) process took place against the background of wider state sector and local government reforms during the period 1984-1990.[19] Reference to "sustainable development" was to be included in the purpose of the new legislation, but the RMLR reform process acknowledged that conflicting objectives can be an inherent feature of environmental decision-making. As a result, the purpose statement in the new legislation was to be designed so as to provide "a general guide to everyone involved" in environmental decision-making processes.[20] However, the RMLR reform process found that drafting such general guidance was not a simple task. Suggested purpose statements included allocating resources to their most "valued" social use, a desire to use resources to achieve the "greatest economic and social benefits today" while having regard to the needs of future generations, and a methodology for taking "full and *balanced* account" of a wide range of matters.[21] Put simply, the RMLR reform process wanted to give effect to the Brundtland Report, while also "recognising the national interest" by including in the legislation what "are in effect a statement of national policies"; with the "primary function" of the new legislation being:[22]

> … to **limit** the adverse spillover effects of peoples activities, and to allocate Crown resources. (Emphasis added)

Legislative reform is a dynamic process, and the statutory purpose of the proposed legislation morphed from promoting "sustainable development", to promoting "sustainable management". The Review

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[19] See: Palmer, G *Unbridled Power* 2nd edition (1987); Kelsey, J *The New Zealand Experiment: A World Model for Structural Adjustment* (1996); Easton, B *The Commercialisation of New Zealand* (1997).

[20] Ministry for the Environment, *People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform* (December 1988), p19.

[21] Ministry for the Environment, *People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform* (December 1988), pp19-20.

[22] Ministry for the Environment, *People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform* (December 1988), p19.

Group on the saved Bill after the 1990 General Election concluded that:[23]

> Apart from the constraints on government policy, the review group considers that the concept of "sustainable management" is appropriate for adoption as the general purpose of the Bill. One disadvantage of adopting the term "sustainable development" is that the concept outlined in the Brundtland Commission's report "Our Common Future" embraces a very wide scope of matters including social inequities and global redistribution of wealth. It is inappropriate for legislation of this kind to include such goals.

Notwithstanding the difference in expression of the RMA statutory purpose, both the RMLR core group and the Ministry for the Environment separately expressed the view that it would not permit a local authority to relax environmental standards in order attract new industrial activities to locate in a particular area,[24] which may indicate that in so far as the common denominators between the definitions are concerned that, in practice, there may be little substantive difference between "sustainable development" and "sustainable management".

The Ministry also considered that giving effect to the "biophysical bottom line" set out in s 5(2)(a)–(c) of the RMA would be a "challenge", but noted that both Government and local authorities would "have a part to play" by preparing policy statements and plans.[25] In particular, the Ministry emphasized the hierarchy of policy statements and plans provided for under the RMA and their role in

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[23] Randerson et al, *Report of the Review Group on the Resource Management Bill* (February 1991), p6.

[24] See, respectively: Ministry for the Environment, *People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform* (December 1988), pp18-21; and Ministry for the Environment, *Resource Management Information Sheet Number Five: Sustainable management* (December 1991), p2.

[25] Ministry for the Environment, Resource Management Information Sheet Number Five, *Sustainable management* (December 1991), p2.

promoting the sustainable management of natural and physical resources, and stated:[26]

> Consequently, the Act places considerable importance on the preparation of these policies and plans.

The meaning and role of sustainable management

Upton, then Minister for the Environment, addressed the "meaning and role" of sustainable management. In particular, he focused on subparagraphs (a), (b), and (c) in s 5(2) of the RMA and expressed the strong view that they provide "non-negotiable" bottom lines that must be met in all cases. However, Upton was careful to qualify this statement in light of criticism from the Business Roundtable that suggested that the RMA "imposes a stern, green, straight-jacket on all economic activity". He stressed that s 5 "creates an ethic", that its implementation will be "a matter for social and political choice", and that it is not a "green juggernaut" that will "cause large social and economic dislocation" overnight.[27] Upton's paper provoked an intense philosophical debate about s 5.[28]

Grant noted the defining architectural features of the RMA: the holistic approach to all three environmental media, air, land, and water; the substantive implementation of s 5 via the requirements in s 32 and s 104 so as to give effect to the statutory purpose when preparing plans and making resource consent decisions; and the focus on the management of natural and physical resources, rather than

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[26] Ministry for the Environment, Resource Management Information Sheet Number Five, *Sustainable management* (December 1991), p2.

[27] Upton, S "The meaning and role of Section 5 of the Resource Management Act 1991" in Daya-Winterbottom, T (ed) *Frontiers of Resource Management Law* (2012), pp29-39.

[28] See: Grundy, KJ "In search of logic: s 5 of the Resource Management Act", *New Zealand Law Journal*, February 1995, pp40-44; Upton, S *Purpose and principle in the Resource Management Act*, The Stace Hammond Grace Lecture 1995, University of Waikato, 26 May 1995, pp1-21; Upton, S "In search of the truth", *Planning Quarterly*, March 1996, pp2-3; Pardy, B "Planning for serfdom: Resource management and the rule of law", *New Zealand Law Journal*, February 1997, pp69-72.

environmental protection in a more general sense.[29] Grant then considered the specific provisions in subparagraphs (a), (b) and (c) of s 5(2) of the RMA, and observed the importance of these provisions in providing an "ethical basis" for sustainable management. He agreed with Upton, that decision-makers are "legally obliged" to consider both parts of s 5(2) contemporaneously, i.e. they constrain the manner in which people and communities are enabled to provide for their own wellbeing; but he did not agree with Upton that these subparagraphs are a fixed, non-negotiable, bottom line. Instead, Grant considered that:[30]

> The true position seems to me to be that it is only at an abstract level that section 5 can be said to embody a single "ethic", and that it in fact captures a variety of different environmental values which are not necessarily in accord with each other. This means that, whilst discretionary power under the Act is not to be exercised in a vacuum, section 5 does not provide anything like a clear framework for decisions, and that trade-offs are indeed necessary when it comes to designing and implementing the necessary management strategies.

Grant identified four "complex, overlapping and competing" values in s 5, namely, enabling people and communities to provide for their wellbeing; the duty to have regard to the "reasonably foreseeable" needs of future generations; the intrinsic values ascribed to "environmental media and ecosystems"; and the duty to avoid, remedy or mitigate adverse effects on amenity values. He then considered the "intellectual" process in s 32 required to give effect to sustainable management via policy statements and plans, in particular, that planning instruments must be "necessary in achieving the purpose of the Act" and "the most appropriate means of exercising that function, having regard to its efficiency and effectiveness relative to other means". He agreed with Grundy that there is no "bias" in the RMA

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[29] Grant, M "Sustainable management: A sustainable ethic?", in Daya-Winterbottom, T (ed) *Frontiers of Resource Management Law* (2012), pp40-60.

[30] Grant, M "Sustainable management: A sustainable ethic?", in Daya-Winterbottom, T (ed) *Frontiers of Resource Management Law* (2012), p47.

"between individualism and communitarianism" but noted that s 32 "implies a strong bias against crude regulation". Specifically, Grant observed that:[31]

> Regulation is a tool available to decision-makers, and even with the development of more economically efficient means of securing desired outcomes, such as market based instruments, it is rare for them to be able to supplant command and control systems of regulation entirely.

He noted that the rigour of the s 32 analysis that underlies the plan preparation process is unlikely result in sustainable management being reduced to a "mealy mouthed manifesto" as feared by Upton. But Grant observed that the policy framework under the RMA "has high start up costs", that it "places a high premium on detailed and time consuming upfront specification" in plans "at the expense of flexible discretionary case-by-case decision making", which may impede the objective of promoting sustainable management.

Grant also noted that sustainable management implicitly underpins "economic growth", and that long-term strategies are required at national level to "measure progress" by reference to established "performance indicators". This requires broad stakeholder participation. He observed that:[32]

> Neither Governments nor markets are attuned to the long-term goals that sustainable management requires. Without these, sustainable management is a motherhood concept: to become operationally useful it needs to be more than just an expression of social values or political preferences.

Overall, Grant concluded that sustainable management operates as an environmental ethic "at a strategic level", that it includes a range of competing values that may not be reconciled in all cases, that "trade

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[31] Grant, M "Sustainable management: A sustainable ethic?", in Daya-Winterbottom, T (ed) *Frontiers of Resource Management Law* (2012), p55.

[32] Grant, M "Sustainable management: A sustainable ethic?", in Daya-Winterbottom, T (ed) *Frontiers of Resource Management Law* (2012), p57.

offs" will be required, and that "strong commitment" will be required to implement the concept.

Grundy found a strong philosophical argument for a moral or ethical basis for sustainable management. However, he found a stark contrast in practice arising from the almost exclusive "effects-based" emphasis placed on addressing externalities by Upton. This observation led Grundy to conclude that:[33]

> … by effectively denying the relevance of intergenerational equity and ecological sustainability in its interpretation of sustainable management, the neo-liberal approach threatens to emasculate the very concept of sustainability and render it devoid of any useful meaning as an intellectual construct, system of ethics, or as an object of public policy.

These papers illustrate the strong philosophical debate as to whether the extended definition of sustainable management in s 5(2) of the RMA should be read and interpreted in a conjunctive or disjunctive way. Semantic difficulty arose from the central position of the word "while", directly in between the liberal enabling theme and the list of environmental bottom lines in paragraphs (a) to (c). Did the section require balancing between the liberal and environmental themes, or were the environmental bottom lines absolute requirements that must be met in all cases?

Overall broad judgment

The debate was resolved by the Environment Court in *North Shore City Council v Auckland Regional Council*[34] where the Court was required to evaluate conflicting considerations regarding the urbanisation of the Okura Estuary, north of Auckland, in the context district plan zoning:[35]

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[33] Grundy, KJ "Sustainable management: A sustainable ethic?", RMLA 3rd Annual Conference 1995, p9.

[34] [1997] NZRMA 59.

[35] [1997] NZRMA 59 at 94.

> Application of s 5 … involves consideration of both main elements of s 5. The method calls for consideration of the aspects in which the proposal would represent management of natural and physical resources in a way or at a rate which enables people and communities to provide for their social, economic and cultural wellbeing, health and safety. It also requires consideration of the respects in which it would not meet the goals described in paras (a), (b) and (c).
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> The method of applying s 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the Act has a single purpose … Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.

The Court of Appeal subsequently adopted a similar view in *Watercare Services Ltd v Minhinnick* regarding an enforcement notice appeal, where the Court held that while the principles in ss 6-8 of the RMA called for close and careful consideration, they may not be determinative of the substantive outcome. There is therefore no in-built bias in the RMA toward any particular principle. As a result, Maori interests under s 6(e) of the RMA did not, in that case, prevail over other matters. Tipping J stated:[36]

> The Court must weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole. Such Maori dimension as arises will be important but not decisive even if the subject matter is seen as involving Maori issues. Those issues will usually, as here, intersect with other issues such as health and safety: compare s 5(2) and its definition of sustainable management. Cultural wellbeing, while one of the aspects of section 5(2), is accompanied by social and economic wellbeing. While the Maori dimension, whether arising under s 6(e) or otherwise, calls for close and careful consideration, other matters may in the end be found to be more cogent when the Court, as the representative of New Zealand society as a whole, decides whether the subject matter is offensive or

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[36] [1998] NZRMA 113 at 124-125 per Tipping J.

> objectionable under s 314. In the end a balanced judgment has to be made.

The decisions in *North Shore* and *Minhinnick* show that the courts will adopt an overall "broad" or "balanced" judgment approach to sustainable management when "conflicting" or "competing" considerations are in issue. There are strong parallels between these decisions and the reasoning articulated by Grant.

Implementing sustainable development

When considering the concept of sustainable development Bosselmann noted that it includes:[37]

> … ethical, philosophical and political perspectives, but it cannot be defined with absolute certainty. Just as society has no single idea of "justice" allowing for straightforward enforcement of justice, we cannot rely on a single idea of sustainbility. Both justice and sustainability are ethical concepts for which we have no uniform definitions.

Subsequently, when examining the implementation of sustainable development in domestic law Bosselmann questioned whether the concept could be thought of "as a guiding principle for law-making". While noting the legislative attempt in New Zealand, he considered that it may be impossible to fully capture the concept of sustainable development in a single policy or statute, and concluded that "major structural reforms" are required "in the areas of policy design, administration, business management, production and consumption, education and public awareness" at a national level to implement sustainable development. Focusing specifically on the definition of

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[37] Bosselmann, K "The Concept of Sustainable Development" in Bosselmann, K and Grinlinton, D (Editors) *Environmental Law for a Sustainable Society* (2002), p92.

sustainable management in s 5(2) of the RMA, Bosselmann observed that:[38]

> Some elements of this definition reflect principles of [sustainable development] as they have emerged in international law. For example, the objective to manage resources in a way or at a rate that enables people and communities to meet their various needs is an expression of the principle of intragenerational justice. Further, the principle of intergenerational justice [see: s 5(2)(a)] appears in international "soft law" (*Rio Declaration, Agenda 21*) as well as in various environmental treaties.

When considering the statutory purpose of the RMA Palmer also noted that:[39]

> The overarching purpose of sustainable management has proved difficult to define and apply. However, as an ideal and ethic, it has encapsulated a progressive awareness and description of the essential characteristics of environmental law. The Act provides a pragmatic model for other countries to assess in common pursuit of intergenerational environmental equity and justice.

Grinlinton pursed the "difficulty" posed by the definition of sustainable management further and found that it is divided into "two main elements":[40]

> First, a "management" function, which anticipates both utilisation and protection of resources qualified by the overall objective of enabling people and communities to provide for their social and economic needs, and for their health, safety and cultural values. Clearly, a balancing exercise is required of authorities and decision-makers in exercising

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[38] Bosselmann, K "A Legal Framework for Sustainable Development" in Bosselmann, K and Grinlinton, D (Editors) *Environmental Law for a Sustainable Society* (2002), p157.

[39] Palmer, K "Origins and Guiding Ideas of Environmental Law" in Bosselmann, K and Grinlinton, D (Editors) *Environmental Law for a Sustainable Society* (2002), p17.

[40] Grinlinton, D "Contemporary Environmental Law in New Zealand" in Bosselmann, K and Grinlinton, D (Editors) *Environmental Law for a Sustainable Society* (2002), pp26-27.

> policy-making, planning or consent-granting powers. This "management" function is qualified by a strong " ecological" function, incorporating a responsibility to sustain the potential of resources to meet the needs of future generations (intergenerational equity), to safeguard the present life-supporting capacity of the biosphere; and to avoid, remedy or mitigate adverse effects on the environment.

He also drew attention to the shift from "balancing" competing considerations to making a more "neutral", "overall broad judgment", when resolving environmental conflict; and noted the function of the principles in ss 6 and 7 of the RMA "that define and elaborate the sustainable management purpose" by reference to "a set of guidelines reflecting current government policy".[41]

Similar to Grinlinton, Bosselmann observed that s 5 of the RMA includes two principal themes: a "management function" and an "ecological function".[42] He found that the management function was "neutral" in terms prioritising the range of values catalogued in the definition of sustainable management, but found that the "distributive" or allocative function that permeates s 5(2) of the RMA was consistent with an "ecocentric" approach to resource management. He also found that the link between these concepts could be grammatically confusing, and noted that:[43]

> … crucial for … interpretation is the proper meaning of the little word "while" between management and ecological functions and the proper linking of the remaining sections (6 to 8). There has been a lot of debate whether "while" introduces the ecological functions as being superior or as being subordinate to the management functions. The former is referred to as "ecological bottom-lines", the latter as an "overall judgment approach".

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[41] Grinlinton, D "Contemporary Environmental Law in New Zealand" in Bosselmann, K and Grinlinton, D (Editors) *Environmental Law for a Sustainable Society* (2002), pp26-27.

[42] Bosselmann, K "Ecological Justice and Law" in Richardson, B and Wood, S *Environmetnal Law for Sustainability* (2006), pp157-158.

[43] Bosselmann, K "Ecological Justice and Law" in Richardson, B and Wood, S *Environmetnal Law for Sustainability* (2006), pp157-158.

He concluded that the "grammatically correct interpretation" suggested that the management functions in s 5(2) should be implemented "in an ecologically sound way as defined in paragraphs (a) to (c)".[44]

Salmon also drew attention to the insight made by Bosselmann "that just as justice is a concept towards which our laws aspire, and which our laws seek to embrace, so too sustainable development is a concept that should inform law making".[45] Salmon observed that:[46]

> It is not really possible to pass a law ensuring sustainable development, just as it is not possible to pass a law ensuring justice. Both are ethical concepts. The importance of justice for all and equality before the law is not just a norm of our legal system, it is a norm of the ethical construct which binds us together as a society. But it is not self-evident. It is a concept which in its present form has been developed over many centuries, until just in the latter part of the last century it became accepted as part of international law and a right for every citizen on this planet.
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> But justice is given effect to by a multitude of individual laws. It informs law making. So too with sustainable development. The concept has achieved a large measure of international acceptance. It is an ethic of society, just as is justice. It too should inform the legislative process and the relationship of human beings and organisations with each other.

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[44] Bosselmann, K "Ecological Justice and Law" in Richardson, B and Wood, S *Environmetnal Law for Sustainability* (2006), p158.

[45] Salmon, P "Sustainable development in New Zealand" in *Justice and the environment – The Salmon Lectures* (T Daya-Winterbottom (ed), 2007) at 19–29. Inaugural Salmon Lecture 2002.

[46] Salmon, P "Sustainable development in New Zealand" in *Justice and the environment – The Salmon Lectures* (T Daya-Winterbottom (ed), 2007) at 25.

When measuring performance under the RMA in the lead up to the Rio+10 Earth Summit in Johannesburg in 2002, Church, then Chief Executive of the Ministry for the Environment, observed that:[47]

> What matters most is that we define, and work towards, all of the ingredients of good process, relevant to all decision makers and find ways of measuring performance.
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> This might, at last, allow us to move on from our fixation with process, to what matters most of all – how we address the gap between New Zealand's clean and green image and reality, and reduce the current risks to our health, our environment, and our future economic prosperity.

Arguably, New Zealand remains locked in the same debate about process. In the intervening period since Rio+10 the global environmental debate has continued to generate new ideas, for example, the publication of *Wild Law* by Cormac Cullinan in 2002 has been taken up enthusiastically in comparable jurisdictions but has not gained any real traction in New Zealand.[48] As a result, the ongoing RMA reform programme has not been influenced by matters of high principle.

Difficulties in practice

Bosselmann returned to the question of ecological justice as a guide for environmental law, and noted that while the RMA continues to be "hailed as one of the world's most advanced" statutes, the reality may

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[47] Church, D *Councils, commissioners and courts: who should make resource management decisions* RMLA 7th Annual Conference1999, p14.

[48] For example: UKELA, *Wild Law: Is there any evidence of Earth Jurisprudence in existing law and practice? An international research project* (2009). *Wiild Law* has also been enthusiastically taken up by the Environmental Law Association of South Africa, and by the National Environmental Law Association of Australia.

be somewhat different and commented that "this may be true for its ambition rather than its current operation".[49]

Dovers and Connor when considering a principled approach to "policy and institutional change" observed that the RMA was "the world's most significant example of national-scale legislative, organisational and policy reform driven by sustainability concerns".[50] They noted the investment made in high quality debate during the RMLR process, but expressed considerable concern about the implementation of the statute and found that:[51]

> … the RMA's provisions for ongoing discussion and policy development through the preparation of national policy statements were largely neglected. Instead, debate over policy values was left largely to the courts. There are other spaces in the framework for ongoing debate at the regional and local levels, but those discussions are generally uninformed because of the failure to use the higher level opportunities to articulate sustainability values. The result of the neglect of this element of the sustainability puzzle is widespread discontent with the framework. There is a tendency to blame either the drafting of the Act as ambiguous or a lack of initiative by local government, but rather the discontent stems from the lack of elaboration of agreed national values in policy statements, and the empty core of the system where discourse over values could have continued.

They also noted the paradox between the "top-down approach" implicit in the RMA hierarchy of policy statements and plans and the failure of

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[49] Bosselmann, K "Ecological Justice and Law" in Richardson, B and Wood, S *Environmetnal Law for Sustainability* (2006), p156.

[50] Dovers S and Connor, R "Institutions and Policy Change for Sustainability" in Richardson, B and Wood, S *Environmetnal Law for Sustainability* (2006), p39.

[51] Dovers S and Connor, R "Institutions and Policy Change for Sustainability" in Richardson, B and Wood, S *Environmetnal Law for Sustainability* (2006), p40.

Government to provide national guidance about "sustainability values", and observed that this had:[52]

> … required those implementing the policy and planning system at the local level to reinvent the wheel many times and left the public confused and disappointed.

Dovers and Connor also noted that the "most interesting lesson" from s 5 of the RMA had been the manner in which the section was used as a vehilce for ongoing debate about "what sustainability means", but they observed that this framework had provided the catalyst for litigation, and they concluded that contestability was "inevitable" given the "multiple values" included in s 5 and the resulting "uncertainty" about the meaning and effect of sustainable management.[53]

Williams subsequently observed that the RMA "has largely operated as a mitigation of effects instrument" and that it has had little impact on changing the rate or way in which resources are used; that a "rich mix of policy instruments" including regulation and economic instruments is required; and that "over-reliance on voluntary programmes" should be avoided. In particular, he noted that:[54]

> New Zealand appears to have become seduced into thinking that much of the needed action can be initiated and sustained by voluntary programmes.

Williams also commented on the need for "leadership" and "consensus" in promoting sustainability. For example, he cited the success in building "urban infrastructure" in Curitiba, Brazil, using a local

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[52] Dovers S and Connor, R "Institutions and Policy Change for Sustainability" in Richardson, B and Wood, S *Environmetnal Law for Sustainability* (2006), p44.

[53] Dovers S and Connor, R "Institutions and Policy Change for Sustainability" in Richardson, B and Wood, S *Environmetnal Law for Sustainability* (2006), pp46-47.

[54] Williams, JM "Sustainability: the "language" for the 21st century" in Daya-Winterbottom, T (ed) *The Salmon Lectures – Justice and the Environment* 2nd Edition (2012), p11.

authority trading enterprise as the foundation for "an urban planning institute"; and the partnership between the State of Western Australia and Murdoch University in establishing a policy institute focused on sustainability and technology, that has provided the catalyst for expanding Perth's urban transit system. He also noted the complete absence of such initiatives in New Zealand, and commented on the need for "clear planning hierarchies" and science-based "robust systems thinking" to underpin sustainable decision-making. This led Williams to conclude that while policy statements and plans could fill this vacuum, the "reality" was that "they do not", and he observed that:[55]

> This means that competing interpretations of sustainability have to be fought out at all consents that go to a council hearing or the Environment Court.

Fogarty in contrast, drew a distinction between rules and standards, noting that standards can result in "reasonable argument as to the application of the standard" that needs to be resolved in context. Fogarty classified the RMA as "a statute with multiple personality disorder" because sustainable management requires consideration of a "pot-pourri" of conflicting values rather than a single guiding ethic. The factual context, and the cascading provisions of the relevant statutory planning instruments will drive arriving at an overall judgment:

> The principle answer to the question of how to reconcile the multiple values in the RMA is to follow the process for policy statements, plans and consents. I do not think the values included in ss 5-8 are reconcilable, so that respect should be accorded by the judiciary to the selection of appropriate values by the decision-makers in the cascading decision process. In this sense the RMA is unusual as Parliament has

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[55] Williams, JM "Sustainability: the "language" for the 21st century" in Daya-Winterbottom, T (ed) *The Salmon Lectures – Justice and the Environment* 2nd Edition (2012), p22.

> delegated to the consent authorities and the Environment Court some of the selection of values, for each region or district.[56]

Whiting noted the difficulties that have occurred in RMA practice, when he observed that:[57]

> At the time of the Act's inception, it was considered to be at the cutting edge of environmental law legislation. Compared with many countries today, it probably still is. However, we must not be complacent. It would not be right to say that all is well with environmental law in New Zealand. Clearly it is not – if success is reflected in the criticisms of the Act – and, as you know, they abound.

Similarly, Bosselmann also noted the "difficulties that have occurred in practice" and referred to the RMA reform programme that commenced in 1998, and has subsequently continued unabated.[58] While he found that "the RMA is by no means value-free", he noted the ecocentric approach contained in s 5(2) and concluded that "ecocentrism clearly defines the ecological functions, thereby helping us to understand that environmental justice is, essentially, justice for those who cannot speak for themselves".[59] In that sense, the RMA gives the environment "standing", a theme that Bosselmann constructed from the RMA definitions of "kaitiakitanga" and "the ethic of stewardship".[60]

Maori interests in resource management

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[56] Fogarty, J "Giving Effect to Values in Statutes" in *Law, Liberty and Legislation* (2008) LexisNexis, p21.

[57] Whiting, G *Environmental Law and the Expert Witness*, New Zealand Acoustics, Volume 23, Issue 3, p30.

[58] Bosselmann, K "Ecological Justice and Law" in Richardson, B and Wood, S *Environmetnal Law for Sustainability* (2006), p158.

[59] Bosselmann, K "Ecological Justice and Law" in Richardson, B and Wood, S *Environmetnal Law for Sustainability* (2006), p158.

[60] Bosselmann, K "Ecological Justice and Law" in Richardson, B and Wood, S *Environmetnal Law for Sustainability* (2006), p158. See also: Stone, C *Should Trees Have Standing? Law, Morality, and the Environment* Third Edition (2010); and RMA, s 7(a) and s 7(aa).

While Kapua noted that the RMA offered the prospect of greater participation in decision-making for Maori as a result of the recognition of Maori interests in resource management under ss 6(e), 7(a) and 8 of the RMA, the reality however has been different for Maori. For example, she drew attention to the disconnection between Maori interests in resource management and practice under the RMA on a number of different levels, including: the vexed issue of consultation where Maori expectation under the RMA sought a substantive as opposed to a precedural opportunity to engage in statutory processes; the dichotomy between evidence and perception regarding the reciept of Maori evidence about the effect of proposed activities on their spiritual and cultural traditions; and the disconnection between ownership and resource management issues in decision-making by regional councils. However, Kapua also drew attention to mechanisms under the RMA for the transfer of power to Maori authorities under s 33 and the provision for Maori Land Court Judges to sit as Judges of the Environment Court in appropriate cases, and offered the hope that the future may be different.[61] She concluded that:[62]

> The mechanisms allowing for expertise and analysis have not been employed. And the reality is that these provisions are here to stay – they are an integral part of our processes, and politically there could not be a removal of them without serious consequences in respect of the development of our domestic and international obligations.

Kapua therefore raised a number of critical issues worthy of debate regarding the future administration of the RMA. For example, Salmon observed previously that "traditional Maori wisdom takes a different

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[61] Kapua, P "Review of the Role of Maori under the Resource Management Act 1991" in Daya-Winterbottom, T (ed) *The Salmon Lectures – Justice and the Environment* 1st Edition (2007), pp17-18 and 122-139.

[62] Kapua, P "Review of the Role of Maori under the Resource Management Act 1991" in Daya-Winterbottom, T (ed) *The Salmon Lectures – Justice and the Environment* 1st Edition (2007), p138.

[world] view and one that is significant in terms of sustainable development".[63]

Rights based approaches

Sheppard considered the principles of the RMA,[64] and found that the sustainable management of natural and physical resources is a "fundamental" principle of the RMA, but also noted that "other features of the Act may be discerned as being sufficiently fundamental to be regarded as principles also". In particular, he observed that:[65]

> It is apparent that the legislators contemplated that resource management decisions should be just. Administrative justice calls for those affected by such decisions to have the opportunity to be heard. In addition the Act provides that anyone else who chooses may make submissions which, in turn, give them a right to be heard. It provides that hearings are to be open and in public, and it may be inferred from sections 32 and 104 that decisions are to be principled and reasoned; and that the interests of those affected are to be considered, implying some "proportionality". It is my case that those features are so clear in the provisions of the Act about the practice of resource management decision-making that they amount to a principle of the Act that resource management decisions are reached in accordance with administrative justice.

Subsequently, Shelton observed that human rights and the environment differ from other legal approaches to resource management because they emphasise "each individual's right to a certain quality of environment", and found that human rights law has

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63 Salmon, P "Sustainable Development in New Zealand" in Daya-Winterbottom, T (ed) *The Salmon Lectures – Justice and the Environment* 1st Edition (2007), pp16 and 20.

64 Sheppard, D "The Resource Management Act – from principles to practice" in Daya-Winterbottom, T (ed) *Frontiers of Resource Management Law*, pp225-235 below. The paper by Judge Sheppard, then Principal Environment Judge, was originally presented at the RMLA 1st Annual Conference 1993.

65 Sheppard, D "The Resource Management Act – from principles to practice" in Daya-Winterbottom, T (ed) *Frontiers of Resource Management Law*, p225 below.

distinct advantages in relation to environmental protection, namely, that human rights are "maximum claims on society" and clearly distinguishable from "mere policy choice"; and that constitutional guarantees will normally override other conflicting laws. Balanced against these "compelling" advantages she also noted some disadvantages of a human rights approach to environmental protection, such as the anthropocentric focus on civil and political rights.[66] Shelton, however, noted that "a rights based approach" may radically affect how currently intractable issues are resolved, and she concluded that environmental rights must "include substantive … standards" in order to be effective and observed that:[67]

> Human rights exist to promote and protect human wellbeing, to allow the full development of each person and the maximization of the person's goals and interests, individually and in community with others. This cannot occur without safe environmental milieu, ie air, water, and soil. Pollution destroys life and health and thus not only destroys the environment, but infringes human rights as well.

More recently, Whata examined "the language of rights" in the context of special legislation designed to address the civil emergency resulting from the Canterbury earthquakes, and the "crisis" regarding freshwater allocation in the Canterbury region due to the absence on an operative regional plan to guide decision-making in relation to resource consent applications.[68] He noted that:[69]

> The problem … is that the ascendency of value or ethic speak in the last 20 or so years of RMA jurisprudence has come at an apparent price of

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[66] Shelton, D "Human rights and the environment" in Daya-Winterbottom, T (ed) *The Salmon Lectures – Justice and the Environment* 2nd Edition (2012), pp5-7 and 34-59.

[67] Shelton, D "Human rights and the environment" in Daya-Winterbottom, T (ed) *The Salmon Lectures – Justice and the Environment* 2nd Edition (2012), p47.

[68] Whata, C *Environmental Rights in a Time of Crisis: The Canterbury Experience*, 11th Annual Salmon Lecture, 25 October 2012.

[69] Whata, C *Environmental Rights in a Time of Crisis: The Canterbury Experience*, 11th Annual Salmon Lecture, 25 October 2012, para [8].

> rights speak. This has diminished the capacity to assert environmental rights per se as fundamental to the human condition, worthy of protection and enforceable. Conversely, the absence of clear treatment of environmental rights has meant that the full implications of legislative changes to the RMA have largely (until very recently) gone unchallenged in the face of laudable, outcome driven, executive policy.

Whata identified "three kinds of environmental rights", namely, international environmental rights, e.g. the right to a clean environment, sustainable development, and the right to participate in environmental decision-making; property rights, e.g. quiet enjoyment and non-derogation from grant; and cultural rights, e.g. kaitiakitanga.[70] He noted strong arguments for the proposition that s 5 of the RMA incorporates international environmental norms,[71] and noted that the duty in s 7(a) of the RMA to have regard to kaitiakitanga infers that the exercise of guardianship arises independent of statute law as a customary environmental right.[72] In particular, Whata noted the developing jurisprudence in relation to the reception of customary rights as part of the common law following the Court of Appeal decision in *Takamore v Clarke*.[73] In relation to property rights, Whata noted the tension caused by the deliberate policy choice found in the RMA against compenation for adverse planning decisions, but observed that the RMA provides "a mechanism for mediating between competing environmental ethics, values, rights

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[70] Whata, C *Environmental Rights in a Time of Crisis: The Canterbury Experience*, 11th Annual Salmon Lecture, 25 October 2012, para [20].

[71] Whata, C *Environmental Rights in a Time of Crisis: The Canterbury Experience*, 11th Annual Salmon Lecture, 25 October 2012, paras [22] – [36].

[72] Whata, C *Environmental Rights in a Time of Crisis: The Canterbury Experience*, 11th Annual Salmon Lecture, 25 October 2012, para [57].

[73] [2011] NZCA 587.

and interests … attached to the right to sustainable development".[74] Overall, he concluded that:[75]

> … in my view executive decision-making affecting the environment inevitably engages underlying environmental rights … For my part these rights are properly categorised as environmental rights at public law. They are not actionable per se, but are engaged when public law powers derogate from them in an appreciable way. They are an aspect of the rule of law.

The rhetoric of sustainable management

Arguably, sustainable management under the RMA has not captured the hope and enthusiasm of both academics and lawyers articulated during the reform process that created the statute. It is clear from the writings of Bosselmann and Salmon, and other commentators, that an ethical approach to sustainability was desired; but it is equally clear from the RMLR process that there was a strong likelihood that articulating sustainability would prove to be difficult in practice, and that the RMA would focus more narrowly on limiting adverse environmental effects.

The focus on limiting adverse effects has, as noted by Grant, made trade-offs inevitable given that s 5 of the RMA does not provide a clear framework for decision-making. Grundy argued that this narrow approach renders sustainable management devoid of any useful meaning, while Grinlinton observed that the overall broad judgment used by the courts for mediating their way through Part 2 of the RMA is neutral and avoids the need to balance competing considerations. Against this background it is not surprising that Maori interests in resource management have not been recognised in substantive decisions.

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[74] Whata, C *Environmental Rights in a Time of Crisis: The Canterbury Experience*, 11th Annual Salmon Lecture, 25 October 2012, para [42].

[75] Whata, C *Environmental Rights in a Time of Crisis: The Canterbury Experience*, 11th Annual Salmon Lecture, 25 October 2012, para [85].

At a strategic level Williams noted that the failure to prepare national policy statements has left a policy vacuum. While it was possible that local authorities could have provided leadership in this area, in practice the vacuum has not been filled by local authority policy statements and plans; and this has resulted in a "bottom up" approach, noted by Fogarty, where sustainable management is defined by local authority policy statements and plans rather than by the guiding principles in s 5 of the RMA. This is a significant failure given the conclusion by Grant that sustainable management only works as a guiding ethic at a strategic level.

More recently, Shelton and Whata acknowledged that the focus on rights based approaches to sustainable management could produce different substantive outcomes, but the focus on process observed by Church has to date prevented this from occuring.

New strategies are however emerging for promoting environmental justice and using the law to advance sustainability. These new and emerging strategies will be explored next.

THE POLITICS OF BIODIVERSITY

The policy statement and plan preparation process under the RMA has been plagued by a debate as to whether "private property rights override or influence the power to regulate".[76] For example, Far North District Council adopted a prescriptive approach in the proposed district plan notified in 1996 that sought to identify significant natural areas on planning maps together with rules designed to assess the adverse effects of actvities. Overall, 38% of the district contained significant natural vegetation. Under half of these areas (17% of the district) were located on private land. Submissions made about the proposed Far North district plan focused on rules governing the use and development of significant natural areas on private land. Land owners

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[76] Berry, S and Vella, J *Planning Controls and Property Rights – Striking the Balance* (July 2010) RMLA Roadshow 2010.

were concerned about a change in approach from voluntary to regulatory methods, the failure of the territorial authority to consult before notifying the plan, and the quality of data used to prepare the planning maps that resulted in mismatched map boundaries. The failure to address these concerns ultimatley led to the proposed plan being withdrawn in 1998. Ericksen drew attention to the level of misinformation that prevailed among submitters, and noted that a "few strong-minded individuals with political aspirations took advantage of the situation".[77] The philosophical nature of this discourse was captured by Godden and Peel when they commented:[78]

> Underlying property law is the notion that, if something is designated as property, then property owners have a legal right to use and control that object – whether land or natural resources – largely without restriction. There is a famous property law dictum that states that a man has sole, despotic dominion over his property (a dictum which recalls the religious terminology of the Judeo-Christian Bible). Even though there has been qualification to these views regarding the absolute legal control over land and resources that property ownership confers, a powerful association is retained in the popular mind between property and use at will.

The authors of Hinde McMorland & Sim also noted the gradual change in social attitudes regarding the extent of land owner's rights during the 20th century. For example:[79]

> The common law assumes the complete liberty of the landowner to use his land as he wishes, subject only to the law of nuisance … But the

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[77] Ericksen, N, Berke, P, Crawford, J and Dixon, J *Planning for Sustainability: New Zealand under the RMA* (2003) International Global Change Institute, University of Waikato.

[78] Godden, L and Peel, J *Environmental Law: Scientific, Policy and Regulatory Dimensions* (2010), p20. See also: Stein, LA *Principles of Planning Law* (2008), p12, where he noted that "There are two propositions regarding the impact of planning on property rights that are of equal persuasion. The first that planning is fundamentally an intrusion on property rights and the second, contrary to the first, is that planning is for the benefit of the communty as a whole and private rights must be subjugated."

[79] Hinde McMorland & Sim *Land Law in New Zealand* (2003) Volume 1, p112.

> fundamental assumption of modern statute law is that the landowner holds his land for the public good. It may be subject to all kinds of control; it may be taken from him altogether in a host of cases where the public needs it for other purposes.

In particular, they noted the "far-reaching restrictions" that can be imposed on the use and development of land under the RMA by rules in district plans and the civil and criminal sanctions that can arise where unauthorised activities such as vegetation clearance or tree felling occur.

Property rights and regulation

Kirkpatrick likewise concluded that property "is a key concept in planning".[80] Based on Waldron he found that property ownership comprises a "bundle of rights" that can be distinguished between "possession or management" rights on the one the hand, and "income, capital and transfer" rights on the other hand.[81] He noted that the catalyst for the property rights debate in New Zealand is the question of whether the RMA "requires or permits" the allocation of natural and physical resources.[82] Kirkpatrick stated:[83]

> My own view is that any practicable model of effects control must have regard to and be responsive to allocation or exchange issues, even to

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[80] Kirkpatrick, D *Property Rights – Do You Have Any?* RMLA 4th Annual Conference 1996, p1.

[81] Kirkpatrick, D *Property Rights – Do You Have Any?* RMLA 4th Annual Conference 1996, pp2-3. He noted that private property rights include the following incidents: "the right to possession of a thing"; "the right to use a thing"; "the right to manage a thing (i.e. its use by others)"; "the right to income derived from other's use of a thing"; "the right to capital value of a thing"; "the right to security against expropriation of a thing"; "the power to sell, give or bequest a thing"; "lack of of any term on the possession of these rights in respect of a thing"; "the duty to refrain from using the thing in a way that harms others"; "the potential liability that judgments may be executed against the thing"; and "the expectation that any rights which others may have in the thing will revert on termination of those rights".

[82] Kirkpatrick, D *Property Rights – Do You Have Any?* RMLA 4th Annual Conference 1996, p3.

[83] Kirkpatrick, D *Property Rights – Do You Have Any?* RMLA 4th Annual Conference 1996, pp3-4.

> the extent of regulating the market for resources either to avoid, remedy or mitigate certain effects or to redress any exchange imbalances ("market failure") on a policy basis. The lack of a coherent legislative approach to effects control and allocation of resources simply results in an incomplete and often misguided method of planning.

He also drew attention to the historical development of common law property rights and their statutory protection, subject to lawful interferance "by due process of the law";[84] and compared these limitations with indefeasibility of title under modern New Zealand law and the acceptance by the courts that indefeasibility does not "prevail" over statute law.[85] As a result the law provides for the taking of property under the *Public Works Act* 1981 subject to payment of compensation, and allows restrictions on the use of land under s 9 the RMA without payment of compensation. For example, under s 85 of the RMA the Environment Court has limited power to direct the relevant local authority to modify, delete or replace plan provisions that place "an unfair and ureasonable burden on any person having an interest in the land".[86]

Kirpatrick emphasised the "conflict" inherent in statutory regulation with property rights and suggested that this could not be reconciled "without proper regard for the implications on income and exchange rights".[87] For example, he drew attention to the unintended effect of general tree protection rules where owners fell trees before they reach a size that would afford them protection under the rules. He observed:[88]

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[84] Kirkpatrick, D *Property Rights – Do You Have Any?* RMLA 4th Annual Conference 1996, pp4-5.

[85] Kirkpatrick, D *Property Rights – Do You Have Any?* RMLA 4th Annual Conference 1996, pp4-5.

[86] Kirkpatrick, D *Property Rights – Do You Have Any?* RMLA 4th Annual Conference 1996, pp5-8.

[87] Kirkpatrick, D *Property Rights – Do You Have Any?* RMLA 4th Annual Conference 1996, p9.

[88] Kirkpatrick, D *Property Rights – Do You Have Any?* RMLA 4th Annual Conference 1996, p18.

> The result is a peculiar form of market failure where behaviour turns spiteful. The landowner does not necessarily want the trees removed: he or she simply wishes to avoid having to obtain resource consent, possibly on a notified basis. The objective of the rules is thus defeated before they even apply and nobody gains the benefit of achieving those objectives. Most importantly, for this discussion, the private landowner suffers interference with his or her property rights without any corresponding benefit to anyone.

From a historical perspective Joseph essayed the development of property rights. Without determining the philosophical dichotomy noted by Godden and Peel, he stated:[89]

> The protection of property rights is constitutional in character. The bundle of rights that constitutes property ownership is, I contend, indispensible to liberty, industry and economic advancement.

Joseph based his argument on the liberal philosophy of Locke and the concepts of eminent domain, statutory takings and just compensation developed under the United States constitution. While he notes that eminent domain does not form part of New Zealand law because "the prerogative of the Crown had already fallen into abeyance in the United Kingdom as at 1840" before the colony was established,[90] Joseph considers that s 85 of the RMA "recognises but excludes the concept of regulatory taking".[91] He argues that views expressed by Federated Farmers and property rights groups who consider that land use controls are "overused" in the absence of any statutory rights to compensation indicate that "society must strike a balance between property rights and environmental values".[92] Joseph observed:[93]

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[89] Joseph, P *Property rights and environmental regulation* RMLA 9th Annual Conference 2001, p3.

[90] Joseph, P *Property rights and environmental regulation* RMLA 9th Annual Conference 2001, p7.

[91] Joseph, P *Property rights and environmental regulation* RMLA 9th Annual Conference 2001, p11.

[92] Joseph, P *Property rights and environmental regulation* RMLA 9th Annual Conference 2001, pp10-11 and 15.

> The legal and policy issues are considerable. However, there still remains a fundamental difference of view over whether the burden of environmental regulation should fall with the community or the landowner. The justification of a compensatory takings regime depends on where the burden is seen to fall. Whereas many environmentalists argue that the burden is inherent in the concept of property ownership (and therefore lies with the landowner), public choice theory suggests the community should bear the burden and compensate for loss or diminution of property rights.

He concluded that:[94]

> The property rights debate will intensify, as the demand for productive land increases and the threat to environmental systems mounts … The biggest challenge facing environmental lawyers is to devise a suitable scheme that will achieve its object, without inflating unwarranted claims or imposing excessive compliance costs.

Barton provided a powerful counterpoint to Joseph.[95] He contended that Joseph's argument was flawed because the New Zealand constitution "does not contain any protection of property rights",[96] that the US constitution is only persuasive authority in cases where it does "not conflict with New Zealand law",[97] that political theory merely asserts that regulation does not accord with liberal philosophy,[98] that regulation is not "an uprecedented intrusion on the rights of property owners" as historical examples demonstrate the use of regulation in

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[93] Joseph, P *Property rights and environmental regulation* RMLA Annual Conference 2001, p13.

[94] Joseph, P *Property rights and environmental regulation* RMLA 9th Annual Conference 2001, p15.

[95] Barton, B *The legitimacy of regulation* RMLA 10th Annual Conference 2002.

[96] Barton, B *The legitimacy of regulation* RMLA 10th Annual Conference 2002, p4.

[97] Barton, B *The legitimacy of regulation* RMLA 10th Annual Conference 2002, p5.

[98] Barton, B *The legitimacy of regulation* RMLA 10th Annual Conference 2002, pp10-12. For example, Barton argued that there is much reliance on the theologically based philosophy of Blackstone and his theory of "despotic dominion" that allows the owner to exclude all others from using his or her land, including the air space above and the ground below: see, p10.

the past (e.g. royal forests),[99] and that a "simplified view" of property rights was used.[100]

He proposed an alternative analysis based on the concept of parliamentary sovereignty and the legislative safeguards contained in the RMA. These included the requirement for analysis of the efficiency and effectiveness of proposed plan provisions under s 32 of the RMA, the power for the Environment Court to direct a local authority to delete plan provisions under s 85(3) of the RMA that would otherwise "render land incapable of reasonable use", and the provision in Schedule 1 of the RMA for submission, hearing and appeal rights.[101] Overall, Barton's thesis was that "planning and land-use regulation have a proper place in the scheme of things".[102] However, this did not mean that "all regulation is good" or that "individual owners must shoulder unreasonable burdens".[103] He concluded:[104]

> Where land has special importance, public money should be used more to pursue public aims … Compensation or relief from a rule should be available in some cases".

Ratnapala also developed a constitutional approach to environmental law in response to Barton's views on property rights and resource management in New Zealand. Based on US constitutional provisions, the regulatory takings doctrine, econimic theory and liberal political philosophy, Ratnapala emphasised the "constitutional importance of compensation". The principles in ss 6 and 7 of the RMA requiring all

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[99] Barton, B *The legitimacy of regulation* RMLA 10th Annual Conference 2002, p12.

[100] Barton, B *The legitimacy of regulation* RMLA 10th Annual Conference 2002, p13.

[101] Barton, B *The legitimacy of regulation* RMLA 10th Annual Conference 2002, p27.

[102] Barton, B *The legitimacy of regulation* RMLA 10th Annual Conference 2002, pp1 and 29.

[103] Barton, B *The legitimacy of regulation* RMLA 10th Annual Conference 2002, pp28-29.

[104] Barton, B *The legitimacy of regulation* RMLA 10th Annual Conference 2002, p29.

persons to have regard to the protection of biodiversity and ecosystems came under specific criticism. They were cited by Ratnapala as "departures" from the constitutional principle in favour of compensation. He argued that nuisance is the sole exception from a common law presumption in favour of compensation for takings, and criticised planning and resource management statutes that "as a general rule, fail to provide compensation for the loss of property value that results from the restriction on land use".[105]

Ratnapala concluded with an overall critique of the RMA as a "departure from the rule of law" and an exercise in "virtually unconstrained discretionary power".[106] In particular, the purpose and principles in Part 2 of the RMA came under specific criticism because they invite "subjective and utopian judgments to be made on what is to be preserved and in what form to preserve it". He stated:[107]

> The RMA sets out a truly amazing smorgasbord of legislative purposes in sections 5, 6, 7 and 8 … These provisions are striking in two respects. First, they expand rather than constrain legislative discretion … Second, the purposes of the Act stretch well beyond sustainable management …

However, the arguments by Joseph and Ratnapala have not found traction with the courts. For example, in *West Coast Regional Council v Royal Forest and Bird Protection Society of New Zealand* the High Court observed:[108]

> The RMA is not considered by this Court as a drastic erosion of the rights of property owners, and so to be construed restrictively to protect their rights. That judicial perspective has gone. The RMA operates to minimise adverse effects. It can be seen as a reform, by extension, of

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[105] Ratnapala, S *Environmentalism versus Constitutionalism: a contest without winners* (2006) New Zealand Business Roundtable, pp16-17.

[106] Ratnapala, S *Environmentalism versus Constitutionalism: a contest without winners* (2006) New Zealand Business Roundtable, pp32-33.

[107] Ratnapala, S *Environmentalism versus Constitutionalism: a contest without winners* (2006) New Zealand Business Roundtable, p31.

[108] Unreported: 16 June 2009, Chisholm and Fogarty JJ, High Court Chritchurch, CIV-2006-409-000673.

> the common law. The common law had various tort remedies preventing or remedying adverse externality effects on neighbouring properties. Thereby the common law for centuries has restricted and still restricts use of private property. See the common law against: all manner of nuisance, for example, from dust; escape of dangerous things; preventing loss of support of land; and diversion and pollution of water.

Similarly, in *Waitakere City Council v Estate Homes Ltd* the Supreme Court found no difficulty in arriving at the conclusion that eminent domain and takings doctrine do not form part of New Zealand law. The Court stated:[109]

> New Zealand law provides no general statutory protection for property rights equivalent to that given by the eminent domain doctrine under the Fifth Amendment to the United States Constitution, under which taking of property without compensation is unconstitutional and prohibited. The New Zealand Bill of Rights Act 1990 does not protect interests in property from expropriation.

These findings are not surprising in context of the common law foundation of New Zealand law.

Voluntary methods for protecting significant indigenous vegetation

Biodiversity on private land is protected via open space covenants under s 22 of the *Queen Elizabeth the Second National Trust Act* 1977. Establishment of the Trust was driven by farmers seeking "to protect

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[109] [2007] 2 NZLR 149. See also: *Falkner v Gisborne District Council* [1995] NZRMA 462 at 477 where the High Court held "The [Resource Management Act 1991] prescribes a comprehensive, interrelated system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources. The whole thrust of the regime is the regulation and control of the use of land … There is nothing ambiguous or equivocal about this. It is a necessary implication of such a regime that common law property rights pertaining to the use of land … are subject to it."

open space on private land". It provides a voluntary method that works in the following way:[110]

> A covenant is generally requested by landowners and registered against the title of the land in perpetuity. The values of each covenant are identified in the covenant document. Each registered covenant is monitored every two years to ensure the land is managed in accordance with the covenant document. More than 95 per cent of covenant owners meet or exceed covenanting requirements with a resulting increase in biodiversity and sustainablity of land resources.

Latest statistics (June 2009) reveal that 3,189 registered covenants have been entered into, that 524 covenants have been approved and were awaiting registration, that the total land area subject to registered and approved covenants is 109,948 ha, that the average covenant area is 29.6 ha in size, and that the largest covenant area is 6,564 ha. The Waikato region has the largest land area (16,855 ha) subject to registered and approved covenants. The average covenant area in the region is 63.7 ha in size.[111]

There has been a significant increase in the number of open space covenants registered since 1977, particularly in relation to lowland forest. For example, 124 covenants were registered during the period 1977-1986, 595 covenants were registered during the period 1987-1996, and 820 covenants were registered during the period 1997-2007. As a result the total number of registered covenants regarding lowland forest in 2007 was 1,539, providing legal protection for a total land area of 34,963 ha.[112] Other voluntary methods for protecting significant indigenous vegetation on private land include Nga Whenua Rahui, a contestable fund established in 1991 to promote vouluntary

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[110] Ministry for the Environment *New Zealand Environment 2007* (December 2007), p375.

[111] Source: QE II Trust.

[112] Ministry for the Environment *New Zealand Environment 2007* (December 2007), p376. See: Table 12.7.

conservation of native vegetation on Maori land.[113] The relative success in the uptake of voluntary methods led the Ministry for the Environment to observe:[114]

> Conservation efforts on private land have … increased significantly. In 2004, a total of 146,280 hectares were registered as formally protected private land. By June 2006, the QE II Trust and Nga Whenua Rahui protected a total of 221,473 hectares – an increase of 51.4 per cent over this two-year period.

Protecting indigenous forest on private land

Loss of native land cover remains a persistant challenge. But notwithstanding the overall loss of 16,500 ha during the period 1996-2001 through conversion to other uses, the Ministry noted:[115]

> Since 1997, the clearance of native forests has reduced to low levels as a result of sectoral initiatives and stronger legislation, such as the New Zealand Forest Accord 1991 and the amendments to the Forests Act 1949, the latter of which stopped the clear-felling of native forest. However, other types of New Zealand native land cover, such as broadleaved native hardwoods, manuka and kanuka, and tall tussock grassland, continue to be modified.

The *New Zealand Forest Accord* 1991 established consensus between representatives from the forestry industry, owners, and conservation groups on the need to enhance the conservation of native forests, and provided the catalyst for enactment of the *Forests Amendment Act* 1993 (**FAA**).[116] The FAA inserted new provisions in the *Forests Act* 1949 designed to "promote the sustainable management of indigenous

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[113] Ministry for the Environment *New Zealand Environment 2007* (December 2007), p372. Other voluntary conservation initiatives noted by the Ministry include the Landcare Trust, and the Karori Wildlife Sanctuary in Wellington.

[114] Ministry for the Environment *New Zealand Environment 2007* (December 2007), p402.

[115] Ministry for the Environment *New Zealand Environment 2007* (December 2007), p401.

[116] Nolan, D et al *Environmental and Resource Management Law* (2005), p381.

forest land".[117] Section 2(1) of the *Forests Act* 1949 (as amended) defines "sustainable forest management" as:

> The management of an area of indigenous forest land in a way that maintains the ability of the forest growing on that land to continue to provide a full range of products and amenities in perpetuity while retaining the forest's natural values.

The statutory purpose of sustainable forest management is given effect to by the provisions in Part IIIA of the *Forests Act* 1949 which generally prohibit the export and milling of indigenous timber unless a sustainable forest management plan has been approved by the Minister of Agriculture and Forestry.[118] Gilman reviewed all sustainable forest management plans registered in relation to indigenous forest land in the North Island.[119] His findings provide a sobering contrast to the conclusions in the 2007 state of the environment report. For example, he found that the majority of plans provided for cutting cycles that were "much less than the normal longevity" of the species harvested, and that this would "substantially change the future age structure and composition of the forests" by reducing maximum tree ages by "approximately 175-418" years. For example, implementing these cutting cycles would reduce the "normal longevity of rimu" by 20 to 85%. Gilman also found that monitoring methodologies were not designed to monitor biodiversity in an appropriate way, that surveys were not carried out by appropriately qualified experts, and that no details were specified regarding the pest management strategies to be adopted to protect the subject land from wild animals and pests.[120] Significantly, he found that only 2 out of 10 registered plans then in place included "areas set aside from logging", and that in both cases the area set aside was less than 6% of the indigenous forest area

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[117] Forests Act 1949, Part IIIA and s 67B.

[118] Forests Act 1949, ss 67C and 67D.

[119] Gilman, L *A report for the Minister of Forests on the management of Indigenous Forests on private land* (2003), p3.

[120] Gilman, L *A report for the Minister of Forests on the management of Indigenous Forests on private land* (2003), p4.

covered by the plan.[121] Gilman considered that the failure to set aside areas from logging arose because the requirement for set aside is permissive and not mandatory.

Future directions

The proposed NPS on Indigenous Biodiversity was gazetted in December 2010. During the period of January–May 2011 a total of 426 submissions were receivied by the Ministry 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 the Minister chose not to do so in this case. Ministry officials have been given the task of preparing a report and recommendations on the NPS for the Minister to consider, and the Government has indicated that it wishes to consider the Waitangi Tribunal report regarding Maori property rights regarding indigenous flora and fauna (WAI 262) before finalising the NPS. The WAI 262 report was released on 2 July 2012 but no further information is available from the Government as to when the NPS is now likely to be finalised.

The proposed NPS focuses on the protection of biodiversity on private land and will be given effect to by local authorities, primarily by district plan rules. Significantly, the NPS preamble stresses that the success of the NPS:[122]

> … is reliant on the goodwill and sympathetic management of the many private landowners on whose properties indigenous species and ecosystems remain. That needs to be remembered in the way we manage for biodiversity under the Act.

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[121] Gilman, L *A report for the Minister of Forests on the management of Indigenous Forests on private land* (2003), p4.

[122] Proposed National Policy Statement on Indigenous Biodiversity, p2.

Overall, while seeking to halt the decline in indigenous biodiversity, the proposed NPS adopts a conservative approach to land use zoning, and signals in relation to vegetation cover that territorial authorities should consider protecting only those "land environments … that have 20 per cent or less remaining indigenous vegetation cover".[123] The proposed NPS also relies on biodiversity offsets as part of the suite of policies designed to influence future district plan preparation, notwithstanding the differing legal and scientific opinions about the likely success of such methods.[124]

New and emerging strategies

The experience of voluntary approaches to protecting biodiversity on private land has therefore been mixed. While the increased uptake of open space covenants has been successful in doubling the land area subject to covenants, the experience with protecting indigenous forest on private land has not been effective and the permissive approach to the set aside of indigenous forest areas from logging was cited by Gilman as the primary reason why sustainable forest management has not been achieved in New Zealand. In contrast to the relative success of open space covenants, regulatory approaches by district plan rules have suffered from a multiplicitity of different approaches adopted by territorial authorities. This outcome is not surprising as a result of the

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[123] Proposed National Policy Statement on Indigenous Biodiversity, Policy 4(d), p6.

[124] See: Proposed National Policy Statement on Indigenous Biodiversity, Policy 5, p4; and Schedule 2, pp11-13. Policy 5 applies an unambiguous cascade that requires adverse environmental effects to be avoided, remedied, mitigated, or offset; and explicity recognises that "there are limits too what can be offset because some vegetation or habitat and associated ecosystems, is vulnerable or irreplaceable". Schedule 2 sets out the principles to be applied when considering a biodiversity offset, namely: no net loss, additional conservation outcomes, adherence to the mitigation hierarchy, limits to what can be offset, landscape context, long-term outcomes, and transparency. These principles are similar to the "desiderata" considered by the Environment Court in *JF Investments v Queenstown Lakes District Council* (C48/2006). For legal and scientific commentary on biodiversity offsets, see respectively: Chistensen, M *Biodiversity offsets – a suggested way forward* [2009] RM Theory & Practice 156; Walker, S *The promises and perils of biodiversity trading* [2010] RM Theory & Practice 149.

policy vacuum at national level and the absence until recently of any national policy instruments. Where territorial authorities have chosen to adopt innovative methods, the political process inherent in local government decision-making at plan hearings has provided fruitful ground for astute submitters to pursue "property rights" arguments that are not based on empirical evidence or decided legal authority.

However, the rights based approach to resource management advocated by Shelton and Whata could provide a more fruitful approach to the property rights debate. Godden and Peel critically observed the "powerful association" that is "retained in the popular mind" about the nature of property rights, but refocusing the debate by recognising property rights as legitimate environmental rights and using the RMA as a "mechanism" for mediating between competing "environmental ethics, values, rights and interests" may provide an escape from this legal quagmire. Whereas, ignoring property rights as noted by Kirkpatrick is unlikely to provide an enduring solution, particularly in light of the allocative function of s 5 noted by Bosselmann and its potential to adversely affect exchange rights noted by Kenderdine. Additionally, there is a clear need for effective national guidance if the overall objective of halting the decline of indigenous biodiversity is to be achieved, and it is unlikely that the voluntary approach in the current draft NPS or the streamlined process used to prepare it are fit for purpose.

A FRESH START FOR FRESHWATER

The allocation of freshwater was not regarded as problematic until competition between agricultural and hydro generation interests collided in the Waitaki catchment of the South Island in 2003. Subsequently, there has been consdierable litigation about priority to freshwater between competing applications for the same resource, i.e. which application should be decided first.[125] But there has been no

[125] See: *Aoraki Water Trust v Meridian Energy Ltd* [2005] NZRMA 251; *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZRMA 200; *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609; Robinson, T *What's in an*

appetite to develop discretionary criteria to guide substantive decision-making, and as a result freshwater allocation is governed by "traffic rules" focused on a first in, first served approach.[126]

The National Government, announced a new agenda for fresh water reform in June 2009. Components of the reform agenda included, marrying "successful economic and environmental policies" in a "new paradigm", a "collaborative approach to environmental governance", greater leadership from central government, a clearer focus on "more specific goals", and effective involvement by Maori in the policy debate.[127] This signaled a policy shift away from the *Sustainable*

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allocation March 2005 RMJ 21; Sax, J *Our precious water resources: learning from the past, securing the future* [2009] RM Theory & Practice 31. The first in, first served approach was originally adopted by the Court of Appeal in *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 in relation to competing mussel farm applications in the coastal marine area of the Marlborough Sounds.

[126] While leave to appeal to the New Zealand Supreme Court was granted in both *Ngai Tahu* and *Synlait*, the appeals were resolved by consent before the Court could make a decision on the appeals. From the decisions granting leave, interim decisions and hearing transcripts it is clear that the Supreme Court favours a discretionary approach to the substantive merits decision on freshwater allocation. But there appears to be no enthusiasm from either commercial interests or the Labour or National Governments to depart from procedural advantage provided by the first in, first served approach.

[127] Smith, N *Agenda for Fresh Water Reform*, Speech, Environmental Defence Society Conference, 8 June 2009. The inclusion of effective involvement of Maori in the policy debate regarding freshwater resources is a significant development. See: Ruru, J *Indigenous People's and freshwater: rights to govern?* November 2009 RMJ 10 at 13 where she notes the National-led coalition government's acknowledgement that Maori present both a challenge and an opportunity, but observes that the key point is the need for dialogue between Maori and all segments of New Zealand society. This aspect of the policy debate regarding fresh water resources will be dynamic as a result of Treaty settlements. For example, the Waikato-Tainui settlement provides for co-management of the Waikato River based on a vision and strategy that has been included by statute in the regional policy statement and referenced in the *Proposed Waikato Regional Plan: Proposed Variation 6 – Water Allocation*. See: Te Aho, L *Negotiating co-management of the Waikato River* November 2009 RMJ 14 at 18 where she notes "Though the settlement is a negotiated compromise … co-management provides an opportunity to bring to an end a 'paradigm of exclusion' through the development of a spirit of co-operation and mutual regard towards a single purpose, to restore and protect the health and well-being of the Waikato River for future generations": November 2009 RMJ 14 at 18. However, providing for more effective Maori involvement in the fresh water policy debate remains the one aspect of the current National Government's reform agenda that has not gained any traction. See for example: Ruru, J

Water Programme of Action (**SWPA**) launched by the previous Labour Government in 2003 that had proved to be ineffective in promulgating operative national guidance, and formed part of a broader agenda for environmental reform going beyond the *Resource Management (Simplifying and Streamlining) Amendment Act* 2009. To progess matters, the Land and Water Forum, a non-governmental mulit-party stakeholder group, was asked to report on the challenges facing New Zealand and make recommendations for future national policy direction.

Land and Water Forum

The first report of the Land and Water Forum was published in September 2010. The report included specific recommendations on improving allocation, including, setting "clear limits" to "establish instream flows" in rivers and streams, ground water levels, and the amount of water available for allocation.[128] The report was clear about the "first in, first served" method of allocating resources under the RMA, and considered that a more efficient allocation method is required by setting a "threshold" to prevent the total amount of water

Maori legal rights to water: Ownership, management, or just consultation? [2011] RM Theory & Practice 119 which draws attention to the Crown's ability to side step ownership claims regarding rivers, citing the Whanganui River claim where the Waitangi Tribunal recommended that consideration should be given to two possible options: vesting ownership of the river in Maori and requiring written approval from Maori before any water permits could be granted, or providing for Maori membership of the consent authority responible for determining water permit applications. These recommendations were dismissed by the government. Like Sheppard, Ruru also commented on the strength of ss 6-8 of the RMA and observed that they "provide a strong base for Maori to voice their concerns relating to the use of fresh water": [2011] RM Theory & Practice 119 at 125. Ruru also commented on the Waikato-Tainui settlement, including the statutory effect given to the vision and strategy, but noted that "While the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 sets a significant standard for co-management between Maori and local authorities, there is much uncertainty as to whether a similar commitment to co-management will be negotiated over any other river": [2011] RM Theory & Practice 119 at 128.

[128] Land and Water Forum (2010) *Report of the Land and Water Forum: A Fresh Start for Freshwater*, para 124, p34.

available for allocation being exceeded.[129] It recommended that such thresholds should be set using "a nationally consistent formula" that recognises "spatial variation" and has the sophistication to derive different numerical thresholds for different catchments.[130]

The Land and Water Forum published its second report in April 2012 outlining the need to set "bottom lines" based on "the geophysical characteristics of each catchment" and community expectations via national environmental standards, and the introduction of objectives and rules in regional plans setting limits for "takes and discharges". The report also proposes that a collaborative approach should be used for plan preparation and that to streamline process, merits appeals to the Environment Court should be replaced by appeals on questions of law only to the High Court.[131] Not unsurprisingly, the proposed procedural reforms have been the subject of particular criticism from a natural justice perspective.[132]

Gazetting the NPS on Freshwater Management

Notwithstanding the Land and Water Forum process, the Minister gazetted the NPS on Freshwater Management, originally prepared under the SWPA, in May 2011. The NPS took effect on 1 July 2011, and specifies an implementation period expiring on 31 December 2030. It adopts a mixed approach to implementation by expressly referring in certain instances to the need for regional councils to prepare or change

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[129] Land and Water Forum (2010) *Report of the Land and Water Forum: A Fresh Start for Freshwater*, para 128, p34.

[130] Land and Water Forum (2010) *Report of the Land and Water Forum: A Fresh Start for Freshwater*, para 129, p35.

[131] Land and Water Forum, *Second Report of the Land and Water Forum: Setting Limits for Water Quality and Quantity Freshwater Policy and Plan Making through Collaboration* (April 2012).

[132] See: Daya-Winterbottom, T *Editorial* August 2012 RMJ 3; Nolan, D et al *Faster, Higher, Stronger … or just Wrong? – Flaws in the framework recommended by the Land and Water Forum's Second Report* August 2012 RMJ 4-12; Newhook, L *Current and Recent-Past Practice of the Environment Court concerning appeals on proposed plans and policy statements* August 2012 RMJ 13-17; and Daya-Winterbottom, T *Blue Horizons 2* August 2012 RMJ 18-23.

regional water allocation plans in order to give effect to the NPS, while in other instances having direct effect on local authority decision making.[133] Two specific policies are required to be included in regional plans with immediate effect in order to provide interim guidance regarding water quality and quantity until regional councils prepare or change regional water allocation plans in order to give effect to the NPS.[134]

In relation to water quantity, the objectives and policies require regional councils to avoid over-allocation and phase out any existing over-allocation, set environmental flows or levels, provide for the efficient allocation of water within such limits, and encourage efficient allocation and use of water by setting out assessment criteria for the transfer of water permits.[135] From a critical perspective, the NPS is unlikely to be effective in the short term while regional water allocation plans remain optional, and the date for compliance with the NPS remains fixed in the distant future. For example, taking account of both the NPS compliance period which expires in December 2030 and the period currently required for preparing regional plans under the RMA, it is unlikely that rules would be operative in all regions before 2040, some 49 years after the RMA came into force.[136]

Nitrogen offsetting

Agricultultural trends show an increase in the intensity of farming in New Zealand. For example, the conversion of dry stock farms to dairy

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[133] National Policy Statement for Freshwater Management 2011, see for example: Policies B1-B3 contrasted with Policies B5-B6, pp8-9.

[134] National Policy Statement for Freshwater Management 2011, Policies A4 and B7, pp7 and 9.

[135] National Policy Statement for Freshwater Management 2011, see for example: Objectives B2-B3 and Policies B1-B3.

[136] For further critical analysis, see: Milne, P and Severinsen, G *The NPS on Freshwater Management: What will it mean in practice?* April 2012 RMJ, pp13-17. In particular, they note at p17, that Policies A4 and B7 will merely part of a range of considerations that decision-makers will need to have regard to when deciding water permit applications, and that they will not necessarily be determinative in all cases.

pasture in Canterbury, the conversion of plantation forests to pastoral farming in the Waikato, increased irrigation, higher stocking rates, and increased fertilzer use. Scientific monitoring also shows an increase in nutrient concentrations in water bodies as a result of nitrogen and phosphorus discharges from pastoral farming. Approximately 90% of nitrogen discharges arise from "urine leaching or runoff".[137]

Williamson, however, noted that improving water quality is unlikely to be resolved by "decreased intensification" and that objective standards are required in NPS and regional plans to provide the right selection of regulatory tools for use regarding specific catchments:[138]

> The spatial and seasonal distribution of nitrate leaching may be such that specific management strategies could be implemented on a specific farm-by-farm or specific catchment basis to address the problem at a particular time of the year (autumn, spring), or specific locations where it predominantly occurs.

He identified a number of management techniques that could be used to reduce nitrate leaching or runoff from pastoral farming. The techniques included restricting grazing in certain areas, irrigation during the summer, limits on the rate and timing of fertilizer application, catchment-wide cap and trade regimes, and farm-wide nutrient budgets. Lock and Kerr also devised a catchment-wide nutrient trading system for use under the RMA. They concluded that:[139]

> Trading allows sources with high costs of achieving nutrient loss reduction to pay the sources with a low cost of achieving nutrient loss reductions to undertake the necessary reductions, ensuring that nutrient reductions take place in the most cost effective locations.

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[137] Williamson, J *Balancing environmental and economic outcomes for agricultural sustainability* RMLA 14th Annual Conference 2006, pp2-3.

[138] Williamson, J *Balancing environmental and economic outcomes for agricultural sustainability* RMLA 14th Annual Conference 2006, p3.

[139] Lock, K and Kerr, S *A prototype nutrient trading system for managing water quality* [2009] RM Theory & Practice, p75.

Scientific modelling in the Waikato region shows that adopting best practice in farm management could reverse deterioration in water quality and produce improvements in water quality along the Waikato River of up to 33% at the River mouth.[140] Evidence from the dairy sector also provides similar conclusions regarding best practice. For example, Fonterra developed the *Clean Streams Accord* with the Ministry for the Environment in 2003 with the objective of excluding dairy cattle from water bodies, providing bridges and culverts at cattle crossings, encouraging the treatment of dairy farm effluent, undertaking nutrient budgets, and fencing off wetlands. By 2006 the dairy sector had met the targets regarding stock exclusion and the provision of bridges and culverts at cattle crossings.[141]

Overall, Williamson considered that providing a selction of regulatory tools will ensure sustainable outcomes, and preferred this approach to direct regulation of land use activities (e.g. restricting the conversion of land from forestry to pastoral farming). Both Williamson and Lodge noted the significance of the dairy sector to the New Zealand economy, and the value of sustainable farming practices (e.g. improving water quality) for export sales.

The discharge of contaminants into the environment is governed by s 15(1) of the RMA which resticts the discharge of any contaminant or water into water, and the discharge of any contaminant onto or into land in circumstances that may result in the contaminant entering water.[142] Unless the discharge is expressly allowed as a permitted

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[140] Williamson, J *Balancing environmental and economic outcomes for agricultural sustainability* RMLA 14th Annual Conference 2006, p4.

[141] Lodge, S *Rural sustainablity* RMLA 14th Annual Conference 2006, pp2-3.

[142] The meaning of "discharge" under the RMA has been clarified by the courts. In *McKinight v NZ Biogas Industries Ltd* [1994] NZRMA 258 at 265 the New Zealand Court of Appeal held that: "In the ordinary and natural use of language, a person discharges something when he causes it to be discharged. In the context of an environmental protection statute there is everything to be said for adopting that meaning. As already mentioned the extension of the meaning in the definition to include emit points in the same direction. Similarly the extension of the defined meaning to allow to escape appears to encompass passive lack of interference." In reaching this conclusion, the Court of Appeal relied on the House of Lords decision in

activity by the rules in the relevant regional plan, resource consent will be required in order to lawfully carry out the proposed activity.

"Contaminants" are defined as any substance or energy or heat, or any combination of them that when discharged into water "changes or is likely to change the physical, chemical, or biological condition of water". Contaminative substances include "gases, odorous compounds, liquids, solids, and micro-organisms".[143]

In the Waikato region diffuse discharges from nitrogen leaching in the Lake Taupo catchment have been addressed by Variation 5 to the Waikato Regional Plan. The regional council introduced a mix of regulatory and non-regulatory methods designed to improve water clarity in the lake. Scientific monitoring had indicated that water clarity was declining due to increased nitrogen levels from farming and forestry activities entering the lake since the 1950's. The objective is to restore the lake to 2001 water clarity levels by 2080. As a result, the variation introduced new rules that imposed a cap and trade system in relation to nitrogen discharges. The rules provide for low "nitrogen-leaching" from existing farming activities (i.e. up to 8kg/N/ha/year) as a permitted activity. Nitrogen-leaching that

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Alphacell Ltd v Woodward [1972] 2 All ER 475 at 479 per Lord Wilberforce where the Court held that: "In my opinion, "causing" here must be given a common sense meaning and I deprecate the introduction of refinements, such as causa causans, effective cause or novus actus. There may be difficulties where acts of third persons or natural forces are concerned but I find the present case comparatively simple. The appellants extract water, pass it through their works where it becomes polluted, conduct it to a settling tank communicating directly with the stream, into which the polluted water will inevitably overflow if the level rises over the overflow point. They plan, however, to recycle the water by pumping it back from the settling tank into their works; if the pumps work properly this will happen and the level in the tank will remain below the overflow point. It did not happen on the relevant occasion due to some failure in the pumps. In my opinion, this is a clear case of causing the polluted water to enter the stream. The whole complex operation which might lead to this result was an operation deliberately conducted by the appellants and I fail to see how a defect in one stage of it, even if we must assume that this happened without their negligence, can enable them to say they did not cause the pollution. In my opinion, complication of this case by infusion of mens rea, and its exceptions, is unnecessary and undesirable."

[143] RMA, s 2(1).

exceeds the permitted maximum is provided for as a controlled activity, subject to the farmer obtaining the necessary resource consent from the regional council. Under the controlled activity rule, farmers are given a nitrogen discharge allowance (NDA) based on the highest discharge recorded from the farm during the period 2001-2005. The NDA is benchmarked by computer modeling that:[144]

> … uses information from farm records and other information such as rainfall, soil type, clover content of soil, etc, to derive the historical nitrogen-leaching amount for the farm in terms of kg/N/ha/year and total nitrogen per year.

To ensure compliance with the resource consent, the farmer is required to prepare a nutrient management plan "that describes farm practices that will ensure that the NDA is complied with".[145] For existing farmers who wish to exceed their NDA or new farmers who wish to commence farming in the catchment, non-complying activity resource consent is required under the variation unless they are able to purchase NDA's from another farmer who does not wish to use his or her full NDA allocation. Transfers between existing farmers with NDA allocations are effected by simultaneous applications under s 127 of the RMA to change their consent conditions and vary the NDA's held by them to reflect the transaction. Similarly, transfers from existing farmers to new farmers are also effected by simultaneous applications, with the new farmer seeking controlled activity resource consent to use a portion of the existing farmers NDA's and the existing farmer seeking consent to change conditions under s 127 of the RMA to document a corresponding reduction in the NDA's held by the transferor. The nitrogen trading market appears to be working, and Berry and Malone have noted "anecdotal evidence" that NDA's are currently trading at

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[144] Berry, S and Malone, C *Dealing with nitrogen leaching into Lake Taupo: Waikato Regional Council Variation 5*, April 2012 RMJ, p24.

[145] Berry, S and Malone, C *Dealing with nitrogen leaching into Lake Taupo: Waikato Regional Council Variation 5*, April 2012 RMJ, p24.

"$400 - $500 per tonne".[146] The complementary non-regulatory method introduced by the regional council in partnership with Government and the relevant territorial authority is an $81 million public fund administered by the Lake Taupo Protection Trust designed to reduce overall nitrogen-leaching into the lake by purchasing and retiring NDA's. The objective for the fund is to reduce nitrogen-leaching by up to 20% by 2020. Berry and Malone note that to date the Trust has "purchased 102 tonnes of nitrogen and therefore achieved 70% of the 20% reduction target".[147]

It is unclear whether a similar cap and trade system could successfully be introduced in relation to other catchments in the Waikato region or in other regions of the country, or whether there are discrete geographical characteristics that make the system particularly suited to the Lake Taupo catchment. For example, in the Manawatu-Wanganui region, the regional council has included new rules in the second generation regional plan that adopt an entirely different approach by requiring existing farmers to adopt and implement "reasonably practicable" methods of farm management, and by requiring new farmers to apply for resource consent based on the land use capability of the proposed farm that includes a "sinking lid" to reduce nitrogen-leaching over time.[148]

Interestingly, it is for note that the Environment Court when deciding the Variation 5 appeals neatly side stepped the issue of whether non-point farm discharges from livestock are regulated by s 15(2A) of the RMA, and therefore require resource consent unless expressly allowed by a permitted activity rule in the relevant regional plan. The debate

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[146] Berry, S and Malone, C *Dealing with nitrogen leaching into Lake Taupo: Waikato Regional Council Variation 5*, April 2012 RMJ, p25.

[147] Berry, S and Malone, C *Dealing with nitrogen leaching into Lake Taupo: Waikato Regional Council Variation 5*, April 2012 RMJ, p25.

[148] See: Berry, S and Malone, C *Dealing with nitrogen leaching into Lake Taupo: Waikato Regional Council Variation 5*, April 2012 RMJ, pp22-25; and McArthur, K *Setting water quality limits: Lessons learned from regional planning in the Manawatu-Wanganui region* [2012] RM Theory & Practice, pp137-161.

before the Court focused on whether the proposed rules were land use rules based on s 9 of the RMA or discharge rules based on s 15 of the RMA, and having found that the rules were land use rules the Court did not consider it necessary to determine whether s 15 of the RMA could also provide a jurisdictional basis for the rules, despite being invited by the regional council to adopt a "belt and braces" approach.[149]

Maori cultural values and new governance mechanisms

Maori cultural values intersect with resource management in two ways. First, under the principles in Part 2 of the RMA that consent authorities and the courts on appeal are required to have regard to when making decisions.[150] Second, as a result of the Treaty settlement process that impacts on resource management by providing additional protection to Maori cultural values through the use of new governance mechanisms.

The suspension of the common law by the *Water and Soil Conservation Act* 1967 and the vesting in the Crown of the "sole right to take, use, dam, divert or discharge into natural water", does not affect the assertion of aboriginal title or customary rights to freshwater by Maori. For example, in *Te Runanga o Te Ika Whenua Inc Society v Attorney-General*,[151] the Court of Appeal recognised the continued extistence of aboriginal title:

> Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession, or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title

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[149] See: *Carter Holt Harvey Ltd v Waikato Regional Council* EnvC Auckland A123/08, 6 November 2008; and *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 163.

[150] RMA, ss 6(e), 7(a), and 8.

[151] [1994] 2 NZLR 20 at 23-24 (CA) per Cooke P. The *Water and Soil Conservation Act* 1967 was repealed by the RMA, and access to freshwater is now governed by s 14 of the RMA.

> vests in the Crown. But at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights.

However, whether aboriginal title will exist in any particular case will depend on the specific facts of the case. For example:[152]

> Where it has not been extinguished, aboriginal title will continue to exist provided that the relevant group continues to maintain its traditions. Although common law thus recognises aboriginal title, the particular attributes or incidents of that aboriginal title depend not on the common law but on the traditions of the indigenous group in question. The type and extent of traditional activities and uses are matters of fact to be determined in each case. The fact that the common law does not recognise "ownership" in flowing water does not, therefore, prevent acknowledgement of the attributes or incidents of customary title which may be similar to ownership.

Aboriginal title to freshwater remains relevant due Maori concerns regarding possible privatisation of water and its transfer to overseas interests.[153] But co-management in relation to freshwater may provide a mechanism to resolve an impasse between the Crown and Maori regarding ownership of these resources.[154]

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[152] Gibbs, M and Bennett, A *Maori claims to ownership of freshwater* (2007) RMLA Occasional Papers, p6.

[153] See: Gibbs, M and Bennett, A *Maori claims to ownership of freshwater* (2007) RMLA Occasional Papers, pp1-2 and 12; and Frame, A "Property and the Treaty of Waitangi: A Tragedy of the Commodities?" in McLean, J et al *Property and the Constitution* (1999), p234. For example, Frame observed "Claims to water flows … have followed the tendency to treat these resources, previously viewed as common property, as commodites for sale to private purchasers. Not surprisingly, the Maori reaction has been: if it *is* property, then it is *our* property!".

[154] For example, clause 11.2 of the Waikato-Tainui Deed of Settlement (22 August 2008) p49 acknowledges that the Crown and Maori have different concepts regarding "ownership" of freshwater. But this matter was neatly side-stepped in clause 15.2.1 of the Deed (p62) where the parties acknowledged "nothing in this deed or the settlement legislation (a) extinguishes or limits any aboriginal title, or customary rights, that Waikato-Tainui may have; (b) is, or implies, an acknowledgement by the Crown that any aboriginal title, or customary right, exists …".

The *Treaty of Waitangi Act* 1975 (**TWA**) provides a mechanism for Maori grievances to be resolved. Claims made under the TWA are heard by the Waitangi Tribunal. Recommendations are made to the Crown regarding any action required to resolve the claim. Implementing recommendations usually entails detailed negotiations between Maori and the Crown resulting in a Deed of Settlement. Increasingly, Treaty settlements have resource management implications and require special legislation to give effect to the settlement. Recent examples of this approach include the *Ngai Tahu Claims Settlement Act* 1998 regarding settlement of claims made by Maori pertaining to the South Island, which added Schedule 11 to the RMA and amended the provisions relating to notification of resource consent applications and third party intervention in Environment Court proceedings.[155] These provisions require decisions makers to have regard to the statutory acknowledgements included in the Act. The statutory acknowledgements follow a general formula:

> They locate the natural feature – river, lake, mountain – by reference to offical maps, using the Maori name. They then declare that the Crown acknowledges the attached statement by Ngai Tahu of their "cultural, spiritual, historic, and traditional association" with that feature; and those associations are narrated, in a blend of creation stories, genealogical connections and descriptions of specific events in the history of the tribe. The sites of settlements are recounted and food gathering practices and areas of traditional knowledge are described.[156]

Making provision for statutory acknowledgements to be made under Treaty settlement legislation provides a mechanism for protecting

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[155] RMA, Schedule 11 was added by s 226 of the Ngai Tahu Claims Settlement Act 1998. Came into force on 22 October 1998. RMA, s 94B provides that consent authorities must have regard to relevant statutory acknowledgements made under the provisions of the statutes listed in Schedule 11 when forming an opinion as to who may adversely affected by a proposed activity. RMA, s 274(6) provides that the Court must have regard to any relevant statutory acknowledgements when deciding "whether a person has an interest in proceedings greater than the public generally".

[156] Dawson, J "The Ngai Tahu Property Settlement" in McLean, J et al *Property and the Consititution* (1999) p216.

specific resources and sites of cultural significance to Maori, beyond the general requirement in s 6(e) of the RMA to recognise and provide for:

> the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

Since 1998 nine other Treaty settlement have been given effect to in this way. Each settlement has been reflected in an amendment to Schedule 11 of the RMA referring to the specific Treaty settlement legislation that includes statutory acknowledgements. Settlement of the Waikato River claim, however, departs from this pattern.

The *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act* 2010 adopted an entirely different approach by including a Vision and Strategy for the Waikato River catchment that is deemed to form part of the regional policy statement without the need to use the policy statement and plan preparation process in Schedule 1 of the RMA. The primacy of the Vision and Strategy in resource management decision-making is further entrenched by providing that it will prevail over any NPS pertaining to the Waikato River, and that any provisions in the Vision and Strategy that are more stringent than NES national environmental standards or water conservation orders will also prevail. The purpose of the Vision and Strategy is to protect the health and wellbeing of the Waikato River for future generations. The Settlement Act also provided for the establishment of the Waikato River Authority, with members appointed by Maori and the Minister for the Environment, that is responsible for advising on implementation and review of the Vision and Strategy, monitoring and reporting, and appointing Maori commissioners for resource consent hearings related to the River (e.g. water takes and discharges). In addition to the Waikato River Authority, the Settlement Act also established the Waikato River Clean Up Trust to administer a contestable fund for projects and initiatives that will contribute to the restoration and protection of the health and wellbeing of the Waikato River. The Trust may prepare an environmental plan to assist in giving effect to its functions, and the plan must be considered by local authorities when

preparing RMA policy statements and plans or deciding resource consent applications. The Trust is also responsible for negotiating joint management agreements with local authorities to detail how the Vision and Strategy will be implemented, and preparing integrated river management plans to manage aquatic life, habitats and natural resources in the Waikato River catchment.

Most recently, the Crown entered into the Whanganui River Agreement on 30 August 2012 that recognises the Whanganui River catchment as a legal entity, which will enable the River to have legal standing and an independent voice. Two guardians will be appointed by the Crown and Maori to act on behalf of the River. The settlement agreement also provides for the preparation of a set of values to recognise the intrinsic values and characeristics of the River and provide guidance for decision-makers, and for a multi-stakeholder collaborative process that will develop a strategy to ensure the long-term environmental, social, cultural and economic health and wellbeing of the River.[157] Like previous Treaty settlements, the Whanganui River Agreement will require special enabling legislation to give effect to the provisions of the Agreement. The distinguishing factor between this Treaty settlement and previous settlements is the proposal to recognise the Whanganui River as a legal entity, similar to the legal fiction of the company under the *Companies Act* 1993. While novel, this concept may have strong roots in "kaitiakitanga", the Maori guardianship ethic that is given recognition in s 7(a) of the RMA as a statement of national policy regarding the relationship of Maori with their ancestral lands and water, and other treasures. But the proposed vision and strategy also appears to have strong parallels with the statutory planning documents provided for by the *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act* 2010.

[157] Office of Treaty Settlements: www.ots.govt.nz.

The one question that has been left unresolved by these models is whether Maori have retained aboriginal title in relation to rivers.[158] It is likely that this question will now be litigated by the Maori Council in the context of the Government's proposal to divest part of its shareholding interest in certain State-owned Enterprises that rely on resource consents granted under the RMA for the take and use of water.[159] While the grant of consent does not confer property rights in the water on the consent holder, Sax has observed that water permits need to be treated "like" property rights in terms of providing certainty,[160] and jurisprudence under the RMA has established a line of authority that defines property like interests in freshwater and other natural resources.[161] Kenderdine also noted that allocation of resources under the RMA can have a critical effect on ownership rights, particularly for Maori;[162] and Frame has observed that defining the statutory authorisation to take and use water in property like terms has reignited Maori interest in pursuing claims to aboriginal title to freshwater and other natural resources.[163]

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[158] For example, clause 11.2 of the Waikato-Tainui Deed of Settlement (22 August 2008) p49 acknowledges that the Crown and Maori have different concepts regarding "ownership" of freshwater. But this matter was neatly side-stepped in clause 15.2.1 of the Deed (p62) where the parties acknowledged "nothing in this deed or the settlement legislation (a) extinguishes or limits any aboriginal title, or customary rights, that Waikato-Tainui may have; (b) is, or implies, an acknowledgement by the Crown that any aboriginal title, or customary right, exists …".

[159] For example, the operation of the Waikato hydro scheme, a series of eight dams and associated power stations along a 200km reach of the Waikato River, by Mighty River Power Ltd.

[160] Sax, J *Our precious water resources: learning from the past, securing the future* [2009] RM Theory & Practice, p31.

[161] See: Daya-Winterbottom, T "Property and sustainability: Recurrent themes in NZ resource management law" in Carruthers et al (ed) *Property and Sustainability: Selected Essays* (2011), pp69-92.

[162] Kenderdine, S "RMA, the best practicable option !$? – accentuate the positive, eliminate the negative" in Daya-Winterbottom, T (ed) *Frontiers of Resource Management Law* (2012), pp236-292.

[163] Frame, A "Property and the Treaty of Waitangi: A Tragedy of the Commodities?" in McLean, J et al *Property and the Constitution* (1999), p234. For example, Frame observed "Claims to water flows … have followed the tendency to treat these resources, previously viewed as common property, as commodites for sale to private purchasers. Not

Ruru highlighted the unresolved issue of Maori ownership of natural and physical resources. She identified the sequential steps that Maori would need to satisfy to persuade a court to recognise "native title" in relation to a specific resource such as freshwater, including the absence of "any statute law that has clearly and plainly extinguished that native title property right". Ruru drew attention to the provision made in Part 2 of the RMA for Maori to become "actively involved" in environmental decision-making, but she noted that while the RMA provides "a platform for Maori to air their concerns" these rights "remain vulnerable" when decision-makers exercise their judgment in a balanced way having regard to a range of other factors that may be ascribed more weight in the decision process when the local authority or the court arrives at an overall broad judgment on behalf of New Zealand society as a whole. While she recognised the important steps made in relation to the governance of natural and physical resources by the *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act* 2010 in providing for co-management of the river catchment, Ruru questioned whether the general trend is merely towards consultation rather than a real attempt to resolve the unresolved ownership issue in a more substantive way.[164]

New and emerging strategies

Nitrogen offsetting and co-management of freshwater resources in the Waikato region clearly demonstrate that new strategies can be devised to resolve apparently intractable problems, but they also illustrate the fragmented state of environmental governance under the RMA. Despite the gazetting of an operative national policy statement on freshwater management it is unlikely that complete regional plan coverage will be achieved quickly. Overall, the policy preparation process under the RMA has been slow to respond to emerging issues relating to water quantity and quality. The SWPA failed to deliver the

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surprisingly, the Maori reaction has been: if it *is* property, then it is *our* property!".

[164] Ruru, J *Maori legal rights to water: Ownership, management, or just consultation?* [2011] RM Theory & Practice, pp119-135.

promised suite of national policy statements and national environmental standards, and it is currently unclear whether the Land and Water Forum reports will have any real impact. In the interim, resource users are content to rely on the procedural certainty provided by the first in, first served approach to the allocation of scare resources in relation to the allocation of freshwater and the assimilative capacity of water bodies to absorb contaminants. From a Maori perspective the Treaty settlement process has to date failed to provide a substantive response to recognising Maori interests in resource management, with the exception of the Waikato River settlement.

CONCLUSION

The current resource management reform programme provides an opportunity to lay some ghosts to rest, but the history of ongoing legislative reform since 1998 indicates that major structural reform is unlikely. As a result, protecting indigenous biodiversity on private land is likely to remain problematic due to the focus on voluntary approaches currently embedded in policy statement and plan preparation, and the property rights debate will continue to put a significant brake on policy development via the local authority hearing process notwithstanding the position taken by the courts on the credibility of these arguments. In contrast, despite the failure to provide real national leadership in relation to freshwater management local authorities have begun to fill the vacuum by preparing regional plans, but the process is slow and plagued by litigation as illustrated by the Canterbury experience.

Overall, experience under the RMA has exposed the paradox that sustainable management operates as a guiding ethic at a strategic level, while policy framework has failed to provide leadership via the preparation of policy statements and plans. Palmer observed that this issue could be "cured" without statutory amendment, but Young concluded that as the RMA "depends on them to produce sustainability" either swift action is required to remedy this omission

or "the Act needs changing".[165] Currently, the jury is out on this issue and there is no clear indication whether the ongoing RMA reform programme will finally address substantive issues or merely continue the preoccupation with process.[166]

[165] Palmer, G *Environment: The International Challenge* (1995), p171; Young, D *Values as Law: The history and efficacy of the Resource Management Act* (2001), p89.

[166] Minister for the Environment, *Media Release* (29 October 2012). The Minister announced a package of procedural measures designed to further streamline project planning.