

SNAILS, MINING & CLIMATE CHANGE: THE POLITICS OF BIODIVERSITY IN NEW ZEALAND

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ABSTRACT

New Zealand is rich in endemic flora and fauna, it has also established a unique suite of environmental institutions and legislative arrangements designed to protect the natural environment. The response to climate change has also emphasised the utility of native forests as sinks in the suite of measures designed to address New Zealand's greenhouse gas emissions. Successive reports from the OECD however record continued failure to address habitat and biodiversity loss. These issues have been brought sharply into focus by recent cases involving coal mining proposals and destruction of habitat in which communities of rare giant carnivorous land snails reside. Most recently government proposals to release protected conservation land for mining has added to the controversy. This paper will critically analyse the current debate and the dichotomy between environmental aspirations and the reality of practice.

INTRODUCTION

New Zealand is rich in endemic fauna and flora and provides a home for 70,000 native land based species with insects and fungi being the

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predominant species groups. Approximately 1,000 species are considered to be threatened, with terrestrial invertebrates such as large land snails (*Powelliphanta*) being listed as "nationally critical" or "nationally endangered".¹

Human settlement has had a radical impact on biodiversity as a result of habitat destruction with native forest cover being reduced from 85% to 23% of the total land area. Whole ecosystems have been destroyed by conversion to pastoral farmland, exotic plantation forests and rural and urban settlements. In other cases, partial ecosystem removal has created "islands" of native forest surrounded by other land uses. Halting biodiversity loss has been identified as a persistent "challenge" since the release of New Zealand's first state of the environment report *The State of New Zealand's Environment* (1997). A decade later *Environment New Zealand* (2007) reported that New Zealand's biodiversity faced the same challenges. In particular, lowland forests remained "among New Zealand's most threatened habitats and ecosystems".

The "key" to the conservation of biodiversity is "the protection of habitat upon which species of fauna and flora depend".² A unique feature of environmental regulation in New Zealand is the relatively high proportion of the total land area (32% or 8.43 million ha) that is set aside for conservation purposes, either as public conservation land administered by the Department of Conservation or by covenants on private land. This paper will therefore focus on habitat protection. In particular, it will focus on habitat protection on private land.

The Minister for the Environment publicly notified a proposed national policy statement on indigenous biodiversity (NPS) on 29 January 2011, over 19 years after enactment of the RMA. The period for submissions will close on 2 May 2011. The NPS gives effect to s 6(c) of the RMA.

¹ Department of Conservation *New Zealand Threat Classification lists* (2005), pp35 and 41.

² Wooley, D et al *Environmental Law* (2000), p496.

But the geographical effect of the NPS is limited as it does not apply to the coastal marine area or public conservation land.

ENVIRONMENTAL REGULATION

The primary statute governing the protection of biodiversity on private land is the *Resource Management Act* 1991 (**RMA**). The RMA came into force on 1 October 1991 and restated and reformed the law relating to the use of land, air and water. The overarching statutory purpose of the RMA is to promote the sustainable management of natural and physical resources. The RMA purpose in s 5 is supported by a series of principles in ss 6, 7 and 8 designed to provide non-exclusive examples of sustainable management. A key component of these provisions 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".

Similar to modern environmental statutes in other jurisdictions the RMA provides for a hierarchy of planning instruments to be prepared to guide the development and use of natural and physical resources, provisions governing resource consent applications and appeals, and civil and criminal enforcement provisions. These provisions are designed to give effect to the purpose and principles in Part 2 of the statute: promoting the sustainable management of natural and physical resources.

The hierarchy of planning instruments include national policy statements (**NPS**) and national environmental standards (**NES**) prepared by central government, and regional policy statements, regional plans and district plans prepared by local authorities. Both regional councils and territorial authorities play a role in protecting biodiversity. Regional councils are responsible for establishing, implementing and reviewing objectives, policies and methods (including rules) for maintaining biodiversity under s 30(1)(ga) of the RMA. Similarly, territorial authorities are responsible for controlling the effects of land use to maintain native biodiversity under s 31(b)(iii) of

the RMA. The primary method for maintaining native biodiversity is the inclusion of rules in district plans. To date there is no statutory central government guidance in the form of NPS or NES.

Resource consent is not required for land use activities unless the proposed activity is contrary to a rule in an operative or proposed district plan.³ As a result district plan rules have a critical role in defining the activities for which resource consent is required, the status of the activity,⁴ and operation of the civil and criminal enforcement provisions in the RMA.

Enforcing the provisions of multilateral environmental treaties

The *Convention on Biological Diversity* 1992 (**CBD**) was ratified by New Zealand on 16 September 1993 aims to conserve biological diversity (**biodiversity**). The CBD has been given effect to in New Zealand law through a range of existing statutes including the RMA,⁵ and by preparation of the non-statutory *New Zealand Biodiversity Strategy* 2000. Significant issues regarding the conservation of biodiversity in New Zealand include access and ownership of flora and fauna, and halting the decline of indigenous biodiversity.

Under the New Zealand constitution a dualist approach is adopted for the transposition of international obligations into domestic law.

³ Resource Management Act 1991, s 9.

⁴ The RMA provides for various types of activity, namely: permitted activities for which resource consent is not required, controlled activities for which resource consent must be granted but where consent authorities have discretion regarding the imposition of conditions regarding the matters reserved for control, restricted discretionary activities where the discretion of consent authorities to grant or refuse consent or impose conditions is restricted to the matters reserved for discretion, discretionary activities where consent authorities retain full discretion under the RMA to grant or refuse consent or impose conditions, non-complying activities where consent authorities can only decide applications where certain gateway tests (regarding compliance with objectives and policies in the plan or the absence of significant adverse effects) are met, and prohibited activities for which no application can be made.

⁵ Resource Management Act 1991, Conservation Act 1987, National Parks Act 1980, Reserves Act 1977.

Notwithstanding the formal requirement for transposition of international obligations into domestic law the New Zealand courts have adopted a purposive approach to statutory interpretation and have generally interpreted domestic law in a way that is consistent with New Zealand's international obligations.⁶

Application of the CBD in the context of domestic resource management law was considered by the Environment Court in *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General*.⁷ The case involved the culling of wild horses by the Department of Conservation (**DOC**) in the Kaimanawa ranges, an area of public conservation land in the central North Island. DOC contended that culling was required to protect natural values of the land. The parties opposed to culling argued that the general duty to avoid adverse environmental effects in s 17 of the RMA applied. The declaratory proceedings failed because the Court held that the proposed activity was not a land use activity. Therefore the duties and restrictions in Part 3 of the RMA which trigger the need to acquire resource consent did not apply.⁸ As a result the proposed activity could not be controlled by s 17 of the RMA. The Society had relied in part on the provisions of the CBD. The Court held as follows:

I have also to consider the society's submissions based on the *Convention on Biological Diversity*. The relevant authority of the Environment Court to make declarations is confined to declarations about functions, powers, rights, duties under the Resource Management Act, and about contraventions of that Act (s 310(a) and (c)). The Court has not been given any authority to make declarations about New Zealand's obligations at public international law, or about the application or interpretation of international instruments. Even a superior Court of general jurisdiction does not enforce provisions of international

⁶ See: *Tavita v Minister of Immigration* [1994] 2 NZLR 257; *St Columba's Environmental House Group v Hawkes Bay Regional Council* [1994] 560; Hopkins, J *Pick and Mix* (2010) Australasian Law Teachers Association Conference.

⁷ [1997] NZRMA 356.

⁸ Sections 9, 11, 12, 13, 14 and 15 of the RMA.

instruments (see *R v Home Secretary ex parte Brind* [1991] 1 AC 696; [1991] 1 All ER 720, and *Tavita v Minister of Immigration* [1994] 2 NZLR 257).

I accept that an international instrument might assist a Court in interpreting an ambiguous statutory provision. Mr Reeves submitted that the Resource Management Act being an Act of Parliament dedicated to the sustainable management of New Zealand's natural and physical resources, the concept of sustainability must be understood by reference to the Convention. Yet the Convention is dated 5 June 1992, while the Resource Management Act was enacted in 1991. Mr Reeves asserted that "the Crown promoted, drafted and/or negotiated both at the same time", and that the Convention had been drafted by a process which began on 22 December 1989, a period which coincided with the progress of the Resource Management Bill. However, to whatever extent this country may have been involved in the drafting of the Convention, that would have involved the Crown, and its officials, not Parliament. I am not willing to infer from the part coincidence of the processes, that in passing the Resource Management Act Parliament intended that the meaning of sustainable management given so fully in s 5 should take colour from an international instrument which was not before it, and which did not then exist other than as an incomplete draft.

This contrasts with the judgement of a differently constituted court in *Environmental Defence Society Inc v Auckland Regional Council*,⁹ where EDS appealed against the decision of the consent authority to grant resource consent for a combined cycle gas fired power station without imposing consent conditions requiring Contact Energy Ltd to plant trees as "carbon sinks" to offset the adverse environmental effects of carbon dioxide emissions. While the Environment Court recognised that treaties do not form part of New Zealand domestic law, it found no difficulty in finding that New Zealand was required to refrain from activities that would defeat the object and purpose of the *Kyoto Protocol* before it came into effect. The EDS appeal was not upheld, however, because the Court found that the economic consequences of imposing consent conditions required

⁹ [2002] NZRMA 492.

gouvernement direction, and because imposing the consent conditions sought by EDS would not achieve the RMA purpose notwithstanding the significance of the cumulative effects of the discharge:¹⁰

[88] We accept that the present scientific consensus is that the cumulative anthropogenic emissions of carbon dioxide on a global basis contribute to climate change. While it is not possible to definitively quantify, the prognosis is sufficiently serious for us to find that the proposed emissions from Otahuhu C will result, in a cumulative way, in an adverse effect of some consequence. However, we are required to exercise a broad judgment after considering a range of considerations in order to give effect to the single purpose of the Act as expressed in s 5 and further elaborated on in Part II. After a careful consideration of the evidence we are left with a considerable disquiet about the efficacy, appropriateness and reasonableness of a condition as proposed. This disquiet is engendered by a range of considerations including:

- (i) our inability on the evidence to assess adequately the national and international consequences of such a condition;
- (ii) our inability on the evidence to assess adequately the social and economic consequences of such a condition;
- (iii) the clear preferred policy of the New Zealand Government to address greenhouse gas emissions as an international issue, and that sectional emissions should be considered at national level to ensure a consistency of approach to guarantee an efficiency compatible with achieving the best social, environmental and economic outcome;
- (iv) the endorsement of the preferred government policy by the regional policy statement and the proposed regional plan;
- (v) the doubtful efficacy of such a condition in the global context.

The consent authority also raised a jurisdictional issue regarding imposition of the conditions sought by EDS. While the Court found that it did not need to determine the issue in the context of this case, it observed that even if there was jurisdiction to impose such a condition it may be difficult for the consent authority to enforce such conditions outside its administrative area.

¹⁰ [2002] NZRMA 492 at 511.

Subsequently, the government's preferred policy package was given legal effect by the Resource Management (Energy and Climate Change) Amendment Act 2004 which inserted ss 7(i) and (j), 70A and 104E into the RMA. Effectively, these provisions now preclude consent authorities from having regard to the adverse effects arising from the discharge of greenhouse gases when deciding resource consent applications.¹¹ This position was confirmed by the Court of Appeal in *Genesis Power Ltd v Greenpeace New Zealand Inc.*¹²

District plan rules

The primary method used under the RMA to maintain native biodiversity on private land is the inclusion of rules in district plans. Policy statements and plans under the RMA are prepared by elected local authorities and are therefore subject to the political and philosophical aspirations of the electorate. Schedule 1 of the RMA provides for public participation in the plan preparation process by making submissions, exercising rights to be heard at any local authority hearing, and exercising rights of appeal to the Environment Court. The expression of political and philosophical aspirations via the ballot box in local elections every three years provides the ultimate check on the acceptance of any proposed rules.

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 activities. 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 were concerned about a change in

¹¹ These provisions came into force on 2 March 2004.

¹² [2008] NZRMA 125.

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 ultimately 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”. These insights reveal deep entrenched views about property rights. For example, the final report of the Ministerial advisory committee on *Biodiversity on Private Land* observed that:¹³

Most land holdings are unlikely to be subject to conservation controversy. The burden falls on the unfortunate few, and if early resolution is not achieved then entrenched positions rapidly develop, from which retreat becomes difficult and negative attitudes multiply. Property rights and the sanctity of a Crown grant are eroded where society decides that certain attributes on a property are of sufficient significance to warrant directing the owner on how that attribute should be managed. This is in total contradiction to most people’s concept of the spirit and intent of freehold title. Private property is so named to reinforce the practice as well as the concept of privacy, security and – above all – surety. ... There is a special responsibility and burden on those administering the RMA process, at all stages, to recognise and be aware of these sensitivities, which are deeply entrenched and go to the very soul and origins of security, community and democracy. We ignore such sensitivities at our peril. They should not, and need not, be compromised in the drive to halt the decline in indigenous biodiversity.

Ericksen also noted that the prescriptive approach to maintain biodiversity adopted in the proposed plan “relied on certainty when mapping the SNAs”.¹⁴ He concluded that where “data is uncertain

¹³ Ministry for the Environment, *Biodiversity on Private Land* (2000), p6.

¹⁴ Ericksen et al *Planning for Sustainability: New Zealand under the RMA* (2003) International Global Change Institute, University of Waikato.

and/or unreliable, the best option is a general clearance rule".¹⁵ On a wider scale it is also for note that uncertain data is likely to result in loss of public confidence in the policy and plan preparation process and reliance on unempirical property rights discourse,¹⁶ and failure to secure conviction when rules are enforced which publicizes the sometimes low "tariff" placed on environmental offending.¹⁷ Despite the certainty provided by general clearance rules, a survey of territorial authorities in the Waikato region indicates that only 6 out of 11 authorities have included general clearance rules in their district plans as a method for maintaining native biodiversity.

General clearance rules, however, were criticised during the debate on the *Resource Management (Simplifying and Streamlining) Amendment Bill 2009*. This resulted in amendment of the RMA by preventing territorial authorities from including general clearance rules in district plans in relation to the "urban environment". Section 76(4B) of the RMA (as amended) defines the urban environment by reference to allotments under 4,000m² developed for commercial or industrial or residential land use, and connected to reticulated sewerage and water supply systems.

Consent conditions

Consent authorities have general discretion under s 108(10) of the RMA as to what consent conditions should be imposed on the grant of resource consent. In particular, the power to impose consent conditions includes the power to impose conditions that will provide a positive environmental benefit in order to offset adverse environmental effects.

¹⁵ Ericksen et al *Planning for Sustainability: New Zealand under the RMA* (2003) International Global Change Institute, University of Waikato.

¹⁶ See: Ratnapala, S *Vegetation Management in Queensland: a case of constitutional vandalism* Institute of Public Affairs 10-11 December 2004.

¹⁷ See: Manning, L *Vegetation clearance in Queensland is a lottery* QELA 2007 Conference.

Biodiversity offsets were considered in an RMA context in the Environment Court decision in *JF Investments Ltd v Queenstown Lakes District Council* concerning location of a house in an outstanding natural landscape in return for a covenant to remove wilding pines. The Court considered that biodiversity offsets could be appropriate in certain cases:¹⁸

We conclude that off-site works or services or a covenant, if offered as environmental compensation or a biodiversity offset, will often be relevant and reasonably necessary under section 104(1)(i) if it meets most of the following desiderata:

- 1) It should preferably be of the same kind and scale as work on-site or should remedy effects caused at least in part by activities on-site;
- 2) It should be as close as possible to the site (with a principle of benefit diminishing with distance) so that it is in the same area, landscape or environment as the proposed activity;
- 3) It must be effective; usually there should be conditions (a condition precedent or a bond) to ensure that it is completed or supplied;
- 4) There should have been public consultation or at least the opportunity for public participation in the process by which the environmental compensation is set;
- 5) It should be transparent in that it is assessed under a standard methodology, preferably one that is specified under a regional or district plan or other public document.

The Court also noted the complexity inherent in determining whether biodiversity offsets will be appropriate, but it was careful to stress that

¹⁸ *JF Investments Ltd v Queenstown Lakes District Council* (C48/2006), paragraph [42].

this should not deter decision makers from considering environmental compensation. It stated:¹⁹

The practical answer is usually that if the proposed remedial or mitigatory action is the repair of damage of the same kind as the adverse effects of the activity, it is easier to accept as not only relevant, but reasonably necessary as well. Similarly, if the proposed remedy is also in the same area, landscape, or environment then its benefits, compared with the costs of the proposed activity, are more easily seen. Conversely, if the offered environmental compensation is too far in distance, kind or quality from the adverse effects caused by the proposed activity then it may be no longer reasonably necessary, but merely expedient for the developer to offer.

The decision in *JF Investments* highlights three specific issues regarding biodiversity offsets. First, measuring whether environmental compensation will be effective in any given case. Second, the need to provide for public consultation or public participation. Third, the need for standard methodology to be applied when assessing applications. These matters were considered from a scientific perspective by Walker in a critique of biodiversity offsets. She emphasised the importance of type, space, and time when considering whether the restrictions imposed (e.g. conditions or covenants) will be “adequate to ensure against biodiversity loss”. Walker concluded:²⁰

Viable biodiversity barter and meaningful biodiversity protection seem mutually exclusive. We can achieve one or the other, but not both. Although compensation and no net loss are laudable ideals, ecological and political problems appear intractable, and mean that bartering is likely to accomplish more harm than good for biodiversity.

In contrast, Christensen has adopted a more pragmatic approach to biodiversity offsets but has exposed the policy vacuum under the RMA

¹⁹ *JF Investments Ltd v Queenstown Lakes District Council* (C48/2006), paragraph [8].

²⁰ Walker, *S Why bartering biodiversity fails* RMLA Conference 2008.

that has been left to fester since 1991.²¹ Despite provision for an elaborate hierarchy of planning instruments there has been a failure by central government to prepare national guidance (NPS or NES) on critical topics such as maintaining native biodiversity. In the interim local authorities have been left largely unsupervised to experiment with policy formulation and plan preparation.

Enforcement

Despite these set backs there have been relative advances in enforcement of native vegetation clearance rules. For example, in *Waitakere City Council v Hertzke* the Court of Appeal refused to grant special leave to appeal a High Court decision to reduce the sentence imposed by the District Court for breach of consent conditions and clearance of native bush from \$80,000 to \$5,000. Justice Barker observed that:²²

When the facts are examined, we cannot see that this offending is as serious for this kind of offence as indicated by the District Court Judge's penalty. Having said that, there was no doubt considerable culpability on the part of the respondents, particularly in relation to the second offence in proceeding to clear the bush after having been told by the council not to do so and after they had already infringed their subdivisional consent conditions. For what it is worth, the members of this Court consider aggregate fines of around \$20,000 could have been appropriate.

More recently in *R v Borrett* the Court of Appeal in an appeal against sentence regarding illegal bush clearance in the Waitakere Ranges west of Auckland, the Court upheld a sentence of imprisonment but

²¹ See: Christensen, M *Biodiversity offsets – a suggested way forward* April 2010 RMJ 8, and Christensen, M and Burge, O *Biodiversity offsets – update* August 2010 RMJ 27.

²² [1997] NZRMA 222.

reduced the term from 20 weeks to 12 weeks. The offender and his wife had also been fined \$16,500. Justice Salmon held:²³

[20] There is no doubt that the history of activity on this site is one of contempt both for the provisions of the Resource Management Act and for orders of the Environment Court. It is appropriate in those circumstances that a significant penalty be imposed. We consider that the District Court Judge was entirely correct in determining that imprisonment was the appropriate response to the contempt shown by the appellant.

[21] We take the view, however, that what was required by the nature of the offending was a short prison sentence sufficient to make it clear to the appellant that the Courts would not countenance behaviour such as his, but no more than was required for that purpose. We consider that 20 weeks was excessive and we concluded that the appropriate term was one of 12 weeks' imprisonment.

Bartel has observed that the "function of the criminal law is to declare standards of moral conduct and mete out punishment for violations", and that where sentences are inadequate this "indicates that violation of land clearance laws is acceptable".²⁴ Low fines provide little deterrent, reflect views that fail to appreciate the relative seriousness of offending; and provide justification, resistance and rebellion which "poses a significant problem for achieving legislative aims of reducing environmental harm". The New Zealand courts have been cognizant of these sentiments when exercising appellate sentencing jurisdiction. For example, in *R v Conway* the Court of Appeal held:²⁵

[65] In our view, the Judge was right to choose the sentencing option that best met the goals of accountability, denunciation and deterrence. There is a world of difference, in the minds of most members of the community, between a sentence of imprisonment and a sentence of

²³ [2004] NZRMA 248.

²⁴ Bartel, *R Sentencing for environmental offences: an Australian exploration* Sentencing Conference 2008.

²⁵ [2005] NZRMA 274 at 286.

community work ... A short sentence of imprisonment may well deter Mr Conway from behaving in this way again. He will realise that further offending of this type is likely to result in a longer period of imprisonment. Equally, it may well deter other members of the community, of similar mind to Mr Conway, from ignoring or deliberately flouting the provisions of the Act or orders of the Environment Court.

[66] If a sentence of imprisonment were not imposed potential offenders might well regard the economic risk of a fine, or the possible sanction of community work, as a risk worth taking to gain profit from illegal activities. A short sentence of imprisonment (as evidenced by Mr Conway's appeal to us to impose community work) is much more likely to be regarded as a deterrent by the community than a sentence of community work.

Snails and mining

Coal mining is vitally important for the economy of the West Coast communities of the South Island. The Stockton Mine near Westport is operated by Solid Energy New Zealand Ltd. The mining activities are authorised by two licences granted under the *Coal Mines Act* 1979 for a period of 40 years. The licences are preserved as existing privileges by the transitional provisions in the *Crown Minerals Act* 1991. As a result land use consent is not required under the RMA to exercise these privileges.²⁶

The Stockton coal plateau also provides home to *Powelliphanta Augustus*, discovered in 1996 by the Nelson Botanical Society. Following morphological analysis and DNA testing *Powelliphanta Augustus* was confirmed as a separate species of large land snail in 2003. The snails are threatened species classified as "nationally critical". The population was estimated to be 3,000 snails with a

²⁶ Environmental performance at the mine has been the subject of inquiry by the Parliamentary Commissioner for the Environment (**PCE**) on three separate occasions, see: PCE *Stockton revisited: The mine and the regulatory minefield* (October 2009), PCE *Solid Energy's environmental management systems and performance* (November 2006), and PCE *Environmental management of coal mining* (1992).

habitat range of 7 ha, most of which was adversely affected by opencast mining activities.

To mitigate the adverse effects of the opencast mining activities on the snail habitat Solid Energy proposed the translocation of snails to similar habitat nearby, and transfer of part of the existing snail habitat to the nearby site. These mitigation methods were challenged by the Royal Forest and Bird Protection Society, who sought a declaration from the High Court that Solid Energy also required consent from the Minister of Conservation under the *Wildlife Act* 1953.

Section 53 of the *Wildlife Act* provides that it is an offence to catch or kill absolutely protected wildlife. All large land snail species are absolutely protected. Section 71 of the Act provides that nothing in the statute shall derogate from the provisions of other statutes, including the *Coal Mines Act* 1971, but also provides that prior consent of the Minister of Conservation is required where protected wildlife are concerned in addition to any other authority that has been granted for the proposed activity. Counsel for Solid Energy contended that the existing privileges under the *Coal Mines Act* provided lawful authority for the mitigation methods. Justice MacKenzie disagreed and held that:²⁷

[27] ... The licence itself recognises that activities under the licence may have an effect on wildlife, and contains specific conditions directed towards minimising those effects. But I do not consider that the licence is to be construed as a code, replacing provisions of the *Wildlife Act* and any other relevant legislation, so far as the protection of wildlife, flora and the environment are concerned. ...

Commentary on the decision by Crossen notes the continuing decline in biodiversity since 1997 and the government's policy objective in the *New Zealand Biodiversity Strategy* to halt the decline in indigenous biodiversity, and argues that there was no evidence that the Minister

²⁷ *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2006] NZAR 265 at 274.

considered this objective when granting consent under s 71 of the *Wildlife Act* for translocation of the snails and habitat destruction. She stated:²⁸

Arguably, achieving this goal would have reduced the amount of coal available to Soild Energy and risked economic losses. Under the *Wildlife Act* the Ministers were required in law to undertake a balancing exercise weighing up the benefits from mining against detriments to the snails.

Crossen concluded that the statutory framework governing the Stockton Mine provided no “legislative direction for protecting biodiversity”. She also criticised the consent process under the *Wildlife Act* due to the lack of public process which denied Forest and Bird the opportunity “to be consulted on the application”. Crossen stated:²⁹

To be fair, the *Wildlife Act* does not expressly provide any right for the public to make submissions on wildlife permit applications, but neither does it preclude the possibility. In contrast, under the RMA there are wide rights of public participation to ensure robust decisions are made about the use, development and protection of New Zealand’s natural resources. In my view, the public should have a legal right to participate in decisions about absolutely protected species and right of substantive appeal to test the robustness of such decisions.

Mining on conservation estate

The Minister for Economic Development released a discussion paper in March 2010, *Maximising our mineral potential: Stocktake of Schedule 4 of the Crown Minerals Act and beyond*, which proposed that land in certain national parks should be made available for mining by Order in Council. Currently, mining is prohibited in these areas.

Based on experience in monitoring environmental performance at the Stockton Mine, the Parliamentary Commissioner for the Environment

²⁸ Crossen, T RMJ at 17.

²⁹ Crossen, T RMJ at 16.

(PCE) filed a strong submission opposing the release of any national park land for mining. The PCE concluded that information provided by the discussion paper “falls well short of establishing that the value of the minerals to New Zealand justifies the risk to the conservation of the land”. The New Zealand Law Society also filed a submission opposing the release of national park land for mining based on the constitutional principle that:

... Parliament in 1997 enacted that Schedule 4 land was worthy of a level of protection over and above that offered by the requirements to obtain mineral permits, resource consents or other authorisations. If the list is to be increased, or reduced, it is Parliament that should make that determination.

After careful consideration of the submissions received the Minister announced a complete u-turn on 20 July 2010. As a result none of the areas of public conservation land identified by the stocktake will be removed from protection under Schedule 4, and an additional 14 areas identified by submitters will be included in Schedule 4.

VOLUNTARY METHODS FOR PROTECTING SIGNIFICANT INDIGENOUS VEGETATION

New Zealand has a total land area of 26.9 million ha. In 2002, native forest covered 6.4 million ha, of which 5.1 million ha (79.6%) was legally protected in 2006. While lowland forests have received “greater conservation attention” in recent years “they remain under-represented in legally protected areas”.

Open space covenants

Biodiversity on private land is protected via open space covenants under s 22 of the *Queen Elizabeth the Second National Trust Act 1977*. 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. There has been a significant increase in the number of QEII open space covenants registered since 1982, and the number of covenants registered has doubled since 1997. Registered covenants are now responsible for net increase in the extent of land subject to legal protection (including public conservation land).

Climate change

The Permanent Forest Sink Initiative (**PFSI**) provides an opportunity to facilitate natural regeneration of native forest on land exceeding 1 ha in area that was not in forest cover before 1 January 1990. Frame notes that native forest regeneration, although slow to mature, can “retain high levels of carbon biomass under a wide range of environmental conditions” for periods up to 300-400 years. In particular, the Emissions/Biodiversity Exchange Project (**EBEX21**) has the potential to deliver significant benefits to business and private land owners. Frame notes:

The amount of land available for preservation and the potential cost of active restoration have, to date, prohibited large-scale programmes to reverse the decline in biodiversity and national heritage (DOC 2000). However, pilot projects (Wilson 1994) demonstrated that regeneration of farmland over 20 or more years could take place, including encroachment of woody species from existing gullies into ungrazed pasture. Hall (2001) proposed this as a means of mitigating corporate carbon emissions. Although very slow-growing (typically upwards of 150 years to maturity and 200–300 years to reach target biomass), indigenous forests contain a range of species and retain high levels of carbon biomass under a wide range of environmental conditions. This is preferable to plantations of fast-growing introduced monospecies such as *Pinus radiata*, which covers 90% of the 1.8 million hectares of planted production forest. These plantations make rapid carbon gains, but potentially achieve a lower biomass per unit area owing to clear-

falling every 25 years or so. In addition, land suitable for large-scale new plantation forests is limited, partly because of economics and partly because of public resistance from an environmental perspective.

He identifies three specific advantages of targeting native bush regeneration as part of the New Zealand climate change response:

- Low-cost, low-intensity regeneration of threatened indigenous biodiversity, especially on marginal hill land and scrub, lost from lowland New Zealand through agriculture;
- Appropriate minimum-intensity management regimes for protected areas;
- An economic mechanism for mitigation of corporate carbon emissions.

Similar analysis by Kerr also indicates that the PFSI and initiatives such as the EBEX21 could provide returns for marginal land on the East Cape and in the Northland and Taranaki regions. For Maori land owners in particular these initiatives could provide significant financial returns. However, Kerr notes that covenants may complicate the situation. For example, pre-1990 covenants will not be rewarded despite the long term advantages of native forest sinks, and it is unclear how temporary covenants will contribute to long term carbon sequestration by regenerating native forest.

CONCLUSIONS

Voluntary mechanisms have served New Zealand well by increasing the land area subject to legal protection regarding indigenous forest areas. In contrast, regulatory approaches by district plan rules have suffered from a multiplicity of different approaches adopted by territorial authorities. This outcome is not surprising as a result of the policy vacuum at national level and the absence of national policy instruments. Where territorial authorities have chosen to adopt innovative methods, a combination of the political process inherent in local government and political decision making at plan hearings has provided fruitful ground for astute submitters to pursue "property rights" arguments not based on empirical evidence.

The links between halting the decline in indigenous biodiversity and climate change mitigation are obvious. Regeneration of native forest on marginal land has the potential, if legally protected by conservation covenants, to provide net increase in lowland forest cover and the long-term sequestration potential of native species has the ability to provide a sustained response to climate.

The challenge for New Zealand as it enters the second decade of the millenium is how to harness these methods and provide incentives for greater change in land owner and public perceptions.