Sustainability and Indigeneity

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In the lead up to the Rio Conference on Environment and Development 1992, New Zealand enshrined the concept of the sustainable management of natural and physical resources in statute law by enacting the Resource Management Act 1991. Implementing the concept of sustainable management in domestic law gave rise to a tension between anthropocentric and ecological approaches for implementing the statute that were not resolved by the Courts until 2014. However, the adoption of an ecological approach to implementing the statute did not assuage the desire for statutory reform unlocked by the previous debate. Most recently, the reform trajectory has resulted in Parliamentary scrutiny of an exposure draft Bill that replaces the concept of sustainable management with a new concept of the welfare and wellbeing of the environment rooted firmly in indigenous perspectives on earth governance, guardianship, and intergenerational equity. My paper will critically interrogate the implications of adopting the concept of the welfare and wellbeing of the environment for the future of sustainability, and what implications this approach could have for environmental law generally in the Anthropocene both comparatively and internationally.

The High Court (NZHC) decision in *Tauranga Environmental Protection Society Inc v Tauranga City Council and Bay of Plenty Regional Council* (Palmer J)[1] concerned an appeal under s 299 of the Resource Management Act 1991 (RMA) against the decision of the Environment Court (NZEnvC) upholding the grant resource consent to Transpower New Zealand Ltd (by Tauranga City Council and Bay of Plenty Regional

[1] *Tauranga Environmental Protection Society Inc v Tauranga City Council and Bay of Plenty Regional Council* [2021] NZHC 1201.

Council) for the realignment of transmission lines across (inter alia) Rangataua Bay in Tauranga Harbour.[2]

Underpinning this conclusion were the environmental and cultural bottom lines in the RMA, namely:

- The Supreme Court (NZSC) decision in *King Salmon* that found that preventing adverse effects is consistent with promoting sustainable management, that "avoid" means "not allowing" activities to occur, and that adverse effects should only be remedied or mitigated where avoiding such effects is not an option.[3]

- The Privy Council decision in *McGuire v Hastings District Council* that described the provisions in s 6(e), s 7(a), and s 8 of the RMA as "strong directions, to be borne in mind at every stage of the planning process", that should result in activities being refused consent where Maori interests and values are adversely affected and alternative ways for carrying out the activity are "reasonably available".[4]

- The NZSC decision in *King Salmon* that also confirmed that s 58 of the RMA and the New Zealand Coastal Policy Statement 2010 "contemplate" that certain natural or physical resources (e.g. Rangataua Bay) could be absolutely protected "from the adverse effects of development" under the hierarchy of RMA subsidiary instruments.[5]

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[2] *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2020] NZEnvC 43.

[3] *Tauranga Environmental Protection Society Inc v Tauranga City Council and Bay of Plenty Regional Council* [2021] NZHC 1201 at [92].

[4] *McGuire v Hastings District Council* [2002] 2 NZLR 577 at [21]; *Tauranga Environmental Protection Society Inc v Tauranga City Council and Bay of Plenty Regional Council* [2021] NZHC 1201 at [95].

[5] *Tauranga Environmental Protection Society Inc v Tauranga City Council and Bay of Plenty Regional Council* [2021] NZHC 1201 at [96].

- The Court of Appeal (NZCA) decision in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* that decision-makers err in law where they fail give "explicit consideration" to environmental bottom lines or fail to consider whether proposed activities are consistent with environmental bottom lines, or where they fail to address any adverse effects on "the cultural and spiritual elements of kaitiakitanga".[6]

- The NZHC decision in *Ngati Maru Trust v Ngati Whatua Orakei Whaia Maia Ltd* that in relation to the obligation under 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 – any adverse effects on that relationship should be determined by "seeking input from affected iwi"; and that where iwi claim that a particular resource management outcome is required in order to meet the obligations to Maori (under s 6, s 7, or s 8 of the RMA), "decision-makers must meaningfully respond to that claim".[7]

Combined, the RMA provisions relied on in these decisions from the Senior Courts provide comprehensive procedural and substantive protection to Maori interests.

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[6] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZRMA 248 at [12] and [21]; *Tauranga Environmental Protection Society Inc v Tauranga City Council and Bay of Plenty Regional Council* [2021] NZHC 1201 at [98].

[7] *Ngati Maru Trust v Ngati Whatua Orakei Whaia Maia Ltd* [2020] NZHC 2768 at [73] and [102]; *Tauranga Environmental Protection Society Inc v Tauranga City Council and Bay of Plenty Regional Council* [2021] NZHC 1201 at [100].