SUSTAINABLE MANAGEMENT AS AN EXPRESS PURPOSE OF ENVIRONMENTAL LEGISLATION: THE NEW ZEALAND ATTEMPT

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1 INTRODUCTION

In keeping with the laudable calls of the world community for sustainable development,[1] the New Zealand parliament, through the enactment of the Resource Management Act 1991,[2] has rewritten and integrated the bulk of the country's environmental law around the express purpose of "promot[ing] the sustainable management of natural and physical resources". The full text of the purpose provision, section 5, provides:

> **Purpose** – (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
> (2) In this Act, "sustainable management" means 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 –
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The intention of this article is to offer a critical analysis of s5: its origins; its wording; its purported role, and its confusions.[3] The theme will be developed that although sustainable management is a necessary ideal, the present definition in the Resource Management Act 1991 is fraught with difficulties.

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1 See the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972 (International Legal Materials, Vol XI, 1972 at p1416); Experts Group on Environmental Law of the World Commission on Environment and Development, *Environmental Protection and Sustainable Development* (1986); World Commission on Environment and Development, *Our Common Future* (1987) (known as "Brundtland Report"); The Rio Declaration on Environment and Development adopted at the United Nations Conference on Environment and Development, held at Rio de Janeiro from 3 to 14 June 1992.

2 The Act came into force on October 1, 1991. A substantial amendment to the Act came into force on 7 July 1993: Resource Management Amendment Act 1993. Copies of the Resource Management Act 1991 and amendments may be purchased from Legislation Services, P O Box 12418, Wellington, NZ. For other commentaries on the Act see D E Fisher, "The Resource Management Legislation of 1991: A Juridical Analysis of its Objectives" in *Resource Management* (Brooker & Friend Ltd., Wellington, 1991) Intro-1; Janet McLean, "New Zealand's Resource Management Act 1991: Process with Purpose" (1992) 7 Otago LR 538; and Sarah Kerkin, "Sustainability and the Resource Management Act 1991" (1993) 7 Auck ULR 290.

3 S5 has not yet been subject to any significant judicial analysis.

The fact that New Zealand is a small unitary state makes law reform comparatively easy. The fourth New Zealand Labour government initiated the major resource management law reform exercise in January 1988 mainly because of growing concern about the inefficiencies and inconvenience caused by having a disparate body of environmental law contained in a wide range of different statutes.[4] The government made unprecedented efforts to involve the community in the law reform exercise. It was out of this consultation process that commitment to the purpose of sustainable management developed.[5] Such a commitment was inevitable. The community has realised that natural and physical resources have to be sustained for use by future generations. It is easy to state this principle, and even expressly include it as the purpose for legislation, but what does it mean as defined in s5(2) of the Resource Management Act 1991, and what does it mean when applied to real life situations? It is with these questions that this article must grapple.

The final wording of s5(2) was the product of much tinkering as the Resource Management Law Reform Bill made its way through the legislative process. The evolution of the wording of s5(2) is instructive in itself and is included as an appendix to this article.

Section 5 is supported by the remaining sections in Part II of the Act:

> **6. Matters of national importance** – In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
> (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
> (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu,[6] and other taonga.[7]

4 The Resource Management Act 1991 repealed over 59 statutes and 19 regulations, and amended more than 55 other statutes and regulations.

5 The importance of sustainability had been recognised in earlier New Zealand environmental legislation: see preamble to the Environment Act 1986 and s6 of the Conservation Act 1987.

6 "Waahi tapu" is not defined in the Act, but means a place that is particularly sacred to Maori.

7 "Taonga" is not defined in the Act, but means "treasures" and includes physical and metaphysical possessions of Maori. The term is used in Article II of the Maori version of the Treaty of Waitangi. English and Maori versions of the Treaty are printed in the First Schedule to the Treaty of Waitangi Act 1975.

7. Other matters – In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to –

(a) Kaitiakitanga:[8]
(b) The efficient use and development of natural and physical resources:
(c) The maintenance and enhancement of amenity values:
(d) Intrinsic values of ecosystems:
(e) Recognition and protection of the heritage values of sites, buildings, places, or areas:
(f) Maintenance and enhancement of the quality of the environment:
(g) Any finite characteristics of natural and physical resources:
(h) The protection of the habitat of trout and salmon.

8. Treaty of Waitangi – In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

These sections give a greater substance to particularly those aspects of s5 concerned with conserving the natural environment and maintaining the interests of the indigenous people of New Zealand, the Maori. In addition to imposing specific duties on persons exercising functions and powers under the Act, ss6 to 8 amplify s5 by stating more fully some of the objectives which fall within the purpose of the Act. Sections 6 to 8 are arguably structured in a hierarchical way ranging from s6 imposing an obligation to "recognise and provide for", to s8 imposing an obligation merely to "take into account".

Each of sections 6, 7 and 8 is directly linked to s5 through the same opening wording: "In achieving the purpose of this Act . . . ." This wording implies that persons charged with the responsibility of "exercising functions and powers under [the Act], in relation to managing the use, development, and protection of natural and physical resources" have a broad obligation to achieve the purpose of the Act. Some rule-making and decision-making under the Act is tied back expressly to the purpose of the Act, or more often Part II of the Act, which is arguably the same thing.[9] However, on other occasions the link to the purpose of the Act is left to implication. For example, there are two examples in the rule-making context: s43 which is authority for making regulations prescribing national environmental standards, and s360 which is authority for the making of a wider range of regulations.

The enactment of the Resource Management Act 1991 took place at the height of government enthusiasm for an unregulated market driven national economy. The government wanted to get away from the inefficient direct and control interventionist philosophy of the previous environmental legislation. A philosophy of the new Act is therefore that constraints on

8 "Kaitiakitanga" is defined in s2 of the Act as meaning "the exercise of guardianship; and, in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself".

9 See eg ss66(1) and 74(1) in respect of rules in regional plans and district plans respectively, and s104(1) in respect of resource consent decision-making. There is one section which expressly denies the relevance of Part II: see s199(1) which states the purpose of water conservation orders "[n]otwithstanding anything to the contrary in Part II".

entrepreneurial development initiatives should only exist where the effects of the development on the environment warrant constraints. Otherwise, developers should be free to use the environment in as enterprising a way as the market allows.

The Resource Management Act 1991 is a massive piece of legislation covering 382 pages of the statute book.[10] The Act establishes rule-making and decision-making structures and processes in respect of New Zealand's "natural and physical resources". Natural and physical resources are defined in the Act to include "land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures".[11] The odd category in this definition is "structures", not being a creation of nature. Structure is defined in the Act as including "any building, equipment, device, or other facility made by people and which is fixed to land".[12]

The rule-making structure operates at both national and local levels. At a national level the central government is authorised by the Act to promulgate national policy statements,[13] New Zealand coastal policy statements,[14] national environmental standards[15] and statutory regulations.[16] At the level of local government,[17] regional councils promulgate policy statements[18] and plans,[19] the latter containing rules,[20] whereas the district councils are confined to plans[21] which, like their regional counterparts, may contain rules.[22] Parliament has provided that the rules in regional and district plans have the legal status of statutory regulations.[23] Policy statements and rules made under the authority of the Act, at both national level and local level, are either expressly or impliedly tied to achieving the purpose of the Act.

The rule-making structures and processes in the Act sit alongside structures and processes for making decisions in respect of site-specific resource uses. A major example is the "resource consent".[24] A resource consent may be necessary, for example, to use land in a way which is contrary to a rule in a district plan,[25] or to take water from a stream.[26] Again, the

10 Sixty pages, namely ss364 to 433, are devoted to transitional provisions which will eventually be deleted from the Act.
11 S2.
12 Ibid.
13 See ss45 to 55.
14 See ss56 to 58.
15 S43.
16 S360.
17 See Local Government Act 1974. Note that this Act has been substantially amended from time to time. See particularly the Local Government Amendment Act (No 2) 1989.
18 S60 of the Resource Management Act 1991.
19 Ss64 and 65.
20 Ss68 to 71.
21 S73.
22 Ss76 and 77.
23 Ss68(2) and 76(2).
24 S87 sets out the meaning of resource consent.
25 S9(1)(a).
26 S14(1) and (3)(a).

function is exercised at both national and local level. Some individual resource consent decisions, because of their national importance, may be "called-in" and made by the Minister for the Environment.[27] However, most resource consent decision-making is the responsibility of regional and district councils.[28]

The Resource Management Amendment Act 1993 has clarified the priority to be given to Part II considerations by resource consent decision-makers when considering effects on the environment of allowing a proposed activity.[29] Rather than just being, as provided in the Act as first enacted, one consideration, along with others, which the consent authority "shall have regard to", the 1993 Amendment Act requires that the resource consent decision-making shall be "subject to Part II". Thus Part II considerations now have a controlling effect on resource consent decision-making. In addition, resource consent decision-makers are required to have regard, inter alia, to policy statements, objectives, policies and rules, all of which are obliged to be formulated in accordance with the purpose of the Act.[30]

There is one notable exception to the tying of rule-making and decision-making under the Act to its stated purpose. Water conservation orders, which are provided for in Part IX, are given their own purpose in the Act "[n]otwithstanding anything to the contrary in Part II".[31] The purpose of such orders is to "recognise and sustain" the "outstanding" amenity and intrinsic values of water. However, a close look at the two sections which provide the criteria for the issuing of water conservation orders reveals that these criteria are not significantly different from those provided by s5 and the remainder of Part II of the Act.[32]

Also in specifically providing for emergencies, parliament has conceded that the stated purpose of the Act and the so-called "environmental bottom lines" may be compromised in justifiable circumstances. Section 330 authorises local authorities and other persons to take emergency action which may involve the use of resources in ways that are not strictly compatible with the environmental parameters in s5(2). Further s341(2) provides emergency related defences to prosecutions for offences under the Act.

Emergencies can be provided for by special parliamentary enactment. Recently parliament showed little hesitation when enacting the Lake Pukaki Water Level Empowering Act 1992. This statute was a response to an extremely serious shortage of water in the hydro reservoirs of the Electricity Corporation of New Zealand Limited, the state-owned enterprise with

27 S140.
28 S88.
29 See now s104(1) of the principal Act as provided by s54 of the Resource Management Amendment Act 1993.
30 S104(1).
31 S199(1).
32 See ss199 and 207.

responsibility for most of the country's electricity generation.[33] In order to generate more electricity "Electricorp" wanted authority to override the restriction on the minimum water level of Lake Pukaki. The restriction had been imposed by the company's resource consent. Normally such a change to the conditions of a resource consent would be dealt with under the procedures provided in the Resource Management Act 1991. However, Electricorp was not confident that the local regional council would grant the application, or that the process of dealing with the application, and the inevitable appeals, would be completed with sufficient expedition to meet the electricity shortage. A specific environmental concern with any lowering of the minimum level of the lake was the detriment to the habitat of the endangered black stilt and other threatened bird species. The 1992 statute suspended, so far as Lake Pukaki was concerned, the operation of the Resource Management Act 1991 and its environmental protections. Parliament decided that economic and social interests should prevail in the circumstances and that the lake should be able to be lowered below the levels set in the resource consent. Fortunately rain came and the authority conferred by the Act did not need to be used. The statute had a sunset provision and has now expired.[34]

In a system of government where parliament has a continuing supremacy, and the executive dominates the legislature, all existing legislative protection of the environment has the potential to be overridden at the will of the incumbent government. Whether or not this is good is as much a question of constitutional law as environmental law. A change to the grundnorm would be necessary for environmental rights to be put beyond the reach of a simple majority in the legislature.

However, one must have doubts about the quality of this sort of ad hoc decision-making by the legislature. Environmental legislation, like the Resource Management Act 1991, is only put in place after much research, consultation and careful consideration. Hasty legislative decision-making, like that surrounding the enactment of the Lake Pukaki Water Level Empowering Act 1992, is likely to be of a quality inferior to that accompanying the enactment of the principal environmental statute.

2 Express Purpose Provisions in Statutes

The New Zealand parliament is making increasing use of express "purpose" or "object" sections in statutes.[35] Since the courts adopt a purpo-

33 See the State-Owned Enterprises Act 1986.

34 S8 of the Lake Pukaki Water Level Empowering Act 1992.

35 See eg s4 of the Children, Young Persons and their Families Act 1989; s4 of the Ozone Protection Act 1990; ss4 and 21 of the Smoke-free Environments Act 1990; and ss5, 9, 26, 43, 60 and 76 of the Employment Contracts Act 1991. See also Sir William Dale, "Principles, Purposes, and Rules" [1988] Statute LR 15 at 16.
It is common to state the purpose of a statute in its long title: see eg the Environment Act 1986; the Commerce Act 1986; the Driftnet Prohibition Act 1990 and the Accident Rehabilitation and Compensation Insurance Act 1992. Notwithstanding the fact that the long title appears before the enacting formula in the Act, the courts are willing to accept as authoritative statements of purpose which it may contain: *Northland Milk Vendors Association Inc* v *Northern Milk Ltd* [1988] 1 NZLR 530 at 537, 540 and 542 per Cooke P.

sive approach to statutory interpretation,[36] it is not surprising that parliament should expressly assist them to determine the purpose of particular legislation.[37]

The role of purpose provisions appears to vary from statute to statute. In some statutes the primary role of the purpose provision is as an aid to interpreting the statute, whereas in other statutes, like the Resource Management Act 1991, it also provides important criteria for discretionary rule-making and decision-making under the authority of the Act. Section 5 of the Resource Management Act 1991 is intended to play a dominant and pervasive role.

In *Ashburton Acclimatisation Society* v *Federated Farmers of New Zealand*[38] the Court of Appeal did not hesitate to give effect to an express purpose provision in earlier environmental legislation. Section 2 of the Water and Soil Conservation Amendment Act 1981 provided: "The object of this Act is to recognise and sustain the amenity afforded by waters in their natural state." The 1981 Amendment Act provided a code for the granting of national and local water conservation orders. A group of acclimatisation societies, representing fishing interests, sought a national water conservation order in respect of the Rakaia River, which flows from its headwaters in the Southern Alps, across the Canterbury Plains, into the Pacific Ocean. Under the 1981 Amendment Act the Planning Tribunal was authorised to report on draft national water conservation orders. In its report and recommendations to the minister, the Planning Tribunal gave primary importance to the protection of the Rakaia River. Federated Farmers, representing irrigation interests, successfully challenged in the High Court the Planning Tribunal's decision that primary importance should be given to the conservation interests. The acclimatisation societies in turn appealed this decision to the Court of Appeal.

The Court of Appeal had to decide the relevance of s2 to the weighing of competing criteria and values recognised in the Act. The President of the Court of Appeal, Sir Robin Cooke, commented that parliament had reduced the difficulty of deciding between competing values "by taking

36 In New Zealand not only the common law, but also s5(j) of the Acts Interpretation Act 1924 requires the courts to adopt a purposive approach to the interpretation of statutes. See generally J F Burrows, *Statute Law in New Zealand* (1992), Ch 8.

37 For expression of the courts' appreciation of such assistance see *Northland Milk Vendors Association Inc* v *Northern Milk Ltd,* supra, n35.

38 [1988] 1 NZLR 78.

the unusual step of declaring a special object for the 1981 Amendment Act . . .".[39] He commented further:[40]

> A statutory guideline is thus provided; and I think that the code enacted by the Amendment Act is to be administered in its light. With all respect to the contrary arguments, to treat s2 as surplusage or irrelevant or mere window-dressing would be, in my opinion, as cynical and as unacceptable a mode of statutory interpretation as that which was rejected in *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641. The duty of the Court must be to attach significance to and obtain help from this prominent and unusual feature of the Parliamentary enactment.

Section 2 was construed as giving conservation, that is "sustaining the natural state", a "kind of primacy under the 1981 Amendment Act".[41] However, Cooke P did not construe s2 as requiring conservation at all costs. He did concede that[42] "[i]n particular cases the needs of industry or other community needs or planning schemes may demonstrably outweigh the goal of conservation". The purpose provision had a primacy, but could be overridden by "clear and clearly sufficient reason . . . to the contrary", that is "[a] strong, really compelling case".[43] Cooke P reserved for the courts the ultimate decision as to whether the purpose provision should prevail in any particular decision-making: "[t]he ultimate criterion must be the public interest".[44]

Section 5 is a far more comprehensive statutory provision than s2 of the Water and Soil Conservation Amendment Act 1981, and it operates in a far more complex statutory context. That context often provides quite explicit guidance as to the relative importance of s5, or more usually Part II. Further, unlike the purpose provision in the Water and Soil Conservation Amendment Act 1981, the real difficulties with s5 are not going to be its relationship with apparently competing provisions elsewhere in the Act, but rather the relationship between the competing interests contained in the subsection 5(2) definition of sustainable management.

3 Analysis of the Wording of Section 5

When the Minister for the Environment, the Hon. Simon Upton, moved that the Resource Management Bill be read a third time, he delivered a speech which he obviously intended should be taken into account by the courts when called upon to interpret s5.[45] The minister said:[46]

39 Ibid at p87.

40 Ibid at pages 87 to 88. See also *McDonald* v *Australian Guarantee Corporation (NZ) Ltd* [1990] 1 NZLR 227 at 237 per Wallace J.

41 Ibid.

42 Ibid at p88. The other judges in the Court of Appeal, Bisson J and Chilwell J took approaches to s2 which were similar to that of Cooke P.

43 Ibid.

44 Ibid.

45 1991 NZ Parliamentary Debates 3018-3021 (4 July 1991). For a recent statement of the NZ Court of Appeal's attitude to the taking into account of relevant speeches in parliament when interpreting statutes see *McKenzie* v *Attorney-General* [1992] 2 NZLR 14 at 19 per Cooke P. Cf *Southern Service Station (1968) Ltd* v *Invercargill City Council* [1991] 1 NZLR 86 at 90 per Cooke P.

46 Ibid at 3019.

> . . . those who exercise powers under the legislation are referred to a purposes clause that is about sustaining, safeguarding, avoiding, remedying and mitigating the effects of activities on the environment. It is not a question of trading off those responsibilities against the pursuit of well-being . . . . The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised . . . . Clause 4 [section 5] sets out the biophysical bottom line. Clauses 5 and 6 [sections 6 and 7] set out further specific matters that expand on the issue.

Rather than balancing, and "trading off" environmental and developmental interests, the minister stated clearly his intention that cl 4 [s5] should impose environmental limits which cannot be compromised in the interests of development. Why, if this were parliament's intention, was it not made clearer in the wording of s5?

Section 5(1) states quite succinctly that: "[t]he purpose of this Act is to promote the sustainable management of natural and physical resources". The most important word in the subsection is "promote". Readers of s5 tend to become mesmerized by the concept of "sustainable management" and fail to acknowledge that the purpose is to *promote,* which does not necessarily mean to *achieve,* "sustainable management". "Promote", according to the *Shorter Oxford Dictionary,* means "to further the growth, development, progress or establishment of (anything); to further, advance, encourage". Arguably "promote" suggests that sustainable management is an ideal, or goal, that the Act aspires to, but that its achievement is not mandatory at all costs. If parliament had intended that the achieving of sustainable management should be obligatory, it would have used a word like "ensure" rather than "promote".

"Sustainable management" is, of course, defined in s5(2). The other important words in s5(1) are "natural and physical resources", the statutory definition of which was discussed earlier in the article.[47]

Section 5(2) opens with the words: "In this Act, sustainable management means managing . . .". "Managing" implies an element of control. It is "the use, development and protection of natural and physical resources" which is required to be managed or controlled.

The management has to be "in a way, or at a rate". The latter means suggests depletion of resources is contemplated. This raises the issue of the distinction between renewable and non-renewable resources. There is a direct link with s5(2)(a) which requires that resources be maintained for the use of future generations. This means that renewable resources have to be managed in such a way that the harvest rate does not exceed the regeneration rate. With non-renewable resources, the aim of management should be to substitute renewable resources for non-renewable resources.

The management "enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety". This first part of s5(2) is concerned with the provision of current human needs. It is very anthropocentric. Possibly the words "and communities" are otiose, since enabling "people" would arguably include enabling communities. Similarly, it could be argued that the words "and for their health

47 See p 54.

and safety" are superfluous since the interests they describe are subsumed within the concept of "social . . . wellbeing".

The express inclusion of "cultural wellbeing" provides a direct link into the Resource Management Act's patent concern for consultation with New Zealand's indigenous people, the Maori, and the taking into account of Maori interests when rules and decisions are made in respect of the environment. The Maori culture includes metaphysical interests associated with the environment. These same metaphysical interests have been recognised as part of the "taonga" preserved to Maori under Article 2 of the Treaty of Waitangi.[48] Section 8 of the Resource Management Act 1991 requires the taking into account of the principles of the Treaty of Waitangi in rule-making and decision-making under the Act.[49] However, notwithstanding the obvious lead into Maori interests that the wording of s5(2) provides, management of natural and physical resources under the Act should also be concerned with enabling the provision of cultural wellbeing for New Zealand's non-Maori peoples.

One final comment should be made about the first half of s5(2). The comment is in respect of the word "protection" which sits a little uncomfortably with the words "use" and "development". The management leading to the "protection" contemplated by this part of s5(2) appears to be directed towards ultimately providing for human wellbeing, rather than any concern for protection of nature for its own sake, that is for any ecocentric objective.

The second part of s5(2) relates specifically to sustaining the environment. Before analysing the environmental parameters (a), (b) and (c), it is important to address the word "while" which joins the developmental and environmental parts of section 5(2). The word was introduced in the restructured cl 4 presented by the second supplementary order paper. "While" has already attracted considerable commentary with opinion divided as to whether it should be interpreted as a co-ordinating conjunction or a subordinating conjunction.[50] If "while" is interpreted as a co-ordinating conjunction, then a balancing between the interests in the first and second parts of s5(2) must take place. This interpretation would mean that the developmental interests in the first part may in some circumstances override the sustainability interests in the second part. Alternatively, if "while" is interpreted as a subordinating conjunction, the use, develop-

48 See eg *Huakina Development Trust* v *Waikato Valley Authority* [1987] 2 NZLR 188 (HC). For general discussion of the Treaty of Waitangi see *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641.

49 The Waitangi Tribunal considers the relatively low priority given to the principles of the Treaty of Waitangi by s8 to be inconsistent itself with the principles: "[t]he tribunal recommends that an appropriate amendment be made to the Resource Management Act providing that in achieving the purpose of the Act all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall act in a manner that is consistent with the principles of the Treaty of Waitangi." See *Ngawha Geothermal Resource Report* (1993) at p147.

50 Eg contrast Douglas Fisher, "Clarity in a Little "While", *Terra Nova,* Nov 1991, 50 with John R Milligan, "Pondering the 'While' ", *Terra Nova,* May 1992, 50.

ment and protection provided for in the first part of s5(2) may only take place if the environmental parameters (a), (b) and (c) are satisfied. The latter interpretation would arguably be consistent with the minister's third reading speech and the apparent policy thrust of the resource management law reform exercise.

The former regime in respect of use of land and water, under the Town and Country Planning Act 1977 and the Water and Soil Conservation Act 1967 respectively, was one where developmental and environmental benefits were directly weighed against each other with no clear overall preference normally being given to either criterion.[51] In contrast the resource management law reform exercise has been motivated, not only by a desire to integrate New Zealand's formerly disparate environmental laws, but also by a desire to sustain the environment for the benefit of future generations. The sustaining of the environment for the benefit of future generations means that there must be environmental limits beyond which development cannot be permitted to proceed. The subordinating conjunction interpretation, and the belief that parliament intended to put definite environmental bottom lines in place, could be further supported by reference to the already discussed[52] freedom which parliament has to enact legislation providing for particular use of the environment. Parliament always has the potential through such legislation to compromise the environmental values provided for in s5(2).

In contrast, those supporting the co-ordinating conjunction interpretation will argue that all development decisions affecting the environment involve a balancing of development benefits against environmental costs, and that absolute rules are inappropriate. It is possible that current developmental benefits may outweigh irreversible environmental costs. They will argue that s5(2) was drafted so as to allow such unconstrained balancing to take place.

I believe that the importance of the interpretation of "while" has been overstated. Irrespective of whether "while" is interpreted as a co-ordinating or a subordinating conjunction, rule-makers and decision-makers under the Act will have ample room to trade off environmental interests for development benefits, and vice versa. The flexibility is provided by the loose wording of the environmental parameters (a), (b) and (c).

Section 5(2)(a)

The three environmental parameters in s5(2) are joined by the word "and", and therefore are conjunctive. The first, s5(2)(a), provides for: "sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations".[53] This

51 As already discussed (pp 57-58), such a clear preference did exist in respect of water conservation orders under the Water and Soil Conservation Amendment Act 1981.

52 Supra pp 55-56.

53 The management of Crown owned minerals is provided for in a separate legislative regime, namely the Crown Minerals Act 1991. However, where any activity in respect of minerals involves the use of the resources to which the Resource Management Act 1991 applies, consent under that Act also has to be obtained.

consideration provides the primary protection of nature for the benefit of future people. The policy issue is one of intergenerational equity and the concern is driven by anthropocentic considerations.

Three words stand out in s5(2)(a): "reasonably foreseeable needs". First, the word "needs" is used rather than "wants". There is much room for differing opinions as to what will constitute a "need" of future generations. For example, can future generations be regarded as needing a view of a particular unspoilt coastline? Undoubtedly, the continuing unspoilt appearance of a particular stretch of coastline will enhance the lives of some of the future generation, but is it needed? "Needs" equates with "necessities" and it could be argued that a view is not a necessity of human life. Needs could be construed as confined to the provision of the minimum resources which are necessary to keep humans alive. Alternatively, it could be argued that the potential for aesthetic appreciation has to be available to future generations if they are to have the potential of full human enjoyment.

The range of interpretations which may be given to the word "needs" illustrates the flexibility provided by the first parameter. Surely in deciding how "needs" should be interpreted, the court will take into account the worth of the current developmental interests which would be sacrificed should the needs of future generations be recognised and provided for. In this way, even if "while" were construed as a subordinating conjunction, an inevitable balancing process will take place before the so-called environmental bottom line is settled and invoked.

Section 5(2)(a) provides another major opportunity for discretionary decision-making, and the balancing of developmental and environmental interests, through the words which qualify "needs", namely "reasonably foreseeable". These words have their origins with the review group[54] which was concerned that decision-makers be given a practical standard to achieve in their consideration of the needs of future generations. The review group commented:[55]

> It is intended to place some limit on the extent to which consideration of the needs of future generations will be required. That limit will be based on a reasonable assessment of the anticipated needs of future generations for natural and physical resources having regard to the current state of knowledge and projected future requirements. There is no reason why this should not include prudent provision for unforeseen factors and the importance of retaining options for future generations.

The last sentence makes one wonder whether "reasonably foreseeable" does impose any real limit on the rule-makers' and decision-makers' foresight obligations. Surely the best way to make "prudent provision for unforeseen factors" would be to leave nature unmodified. Nature should not be modified at all in case options are foreclosed. However, such an approach is unrealistic, because the survival of the current generation is

54 See Appendix at pp 75-76.
55 Supra n49 at section 2, para 5.2.

dependent upon at least some modification of nature. In each case a discretionary decision will have to be made as to the extent of the provision which is made for the meeting of the unforeseen needs of future generations, and this decision will inevitably be influenced by the value placed upon the competing current developmental needs.

Further, competing current developmental needs will inevitably influence that which is considered reasonably foreseeable and that which is not. The consideration of the needs of future generations is obviously prospective and dependent upon the availability of information; not only about the likely needs of future generations, but also about the consequences for the environment of the proposed development. This vagueness may provide room for the more tangible value of the proposed development subtly to influence the assessment of the reasonably foreseeable needs of future generations.

An interesting problem would arise if "while" were to be interpreted as a subordinating conjunction causing the satisfaction of s5(2)(a) to be a prerequisite to a development being permitted under the Act, and the particular proposed development, if permitted, would obviously not permit the needs of future generations to be met. In these circumstances the proposed development could not go ahead. The resource capital of future generations would be preserved. However, what if the decision would cause the needs of the present generation not to be met? Rather than the legislation having an absolute preference for the interests of future generations, it is more likely in these circumstances that the courts would strain somehow to balance fairly the competing interests of different generations. The not unlikely potential of this situation arising provides an argument for "while" being interpreted as a co-ordinating rather than a subordinating conjunction.

Section 5(2)(b)

The second environmental parameter provides for: "Safeguarding the life-supporting capacity of air, water, soil, and ecosystems." It is likely that "life-supporting" will be construed as not confined to human life-supporting, but will be read broadly to include the supporting of all life. The life-supporting capacity of ecosystems may not be quite so easily appreciated. The term "ecosystem" is not defined in the Resource Management Act 1991, although in s2 of the Environment Act 1986 it is defined for the purpose of that Act to mean "any system of interacting terrestrial or aquatic organisms within their natural and physical environment". The express recognition of the importance of ecosystems to the maintenance of life is an acknowledgement of the need for humans to avoid interfering with nature's order and balance.

There is a hint of deep ecology in s5(2)(b), a suggestion that the natural world has intrinsic value, value independent of instrumental value to humans. Indeed s7(d) provides that those persons exercising functions and powers under the Act are to "have particular regard to . . . intrinsic values of ecosystems". "Intrinsic values," in relation to ecosystems, is defined in s2 to mean

those aspects of ecosystems and their constituent parts which have value in their own right, including –
(a) Their biological and genetic diversity; and
(b) The essential characteristics that determine an ecosystem's integrity, form, functioning, and resilience.

If "while" were to be construed as a subordinating conjunction, and the requirements of s5(2)(b) were to be construed strictly, little in the way of human activity, or development, could take place. Arguably, draining a puddle would not be safeguarding the life-supporting capacity of the water in that puddle. A squirt of fly-spray would not be safeguarding the life-supporting capacity of the air in a particular room. Thus it follows that either "while" is going to have to be construed as co-ordinating, or the expression "life-supporting capacity" is going to have to be given a flexible interpretation. Either way, the rule-makers and decision-makers under the Act, are going to have considerable discretion to act irrespective of the fact that their actions strictly may be threatening the life-supporting capacity of air, water, soil or a particular ecosystem. The likely flexible approach to the expression "life-supporting capacity" further supports the thesis, that irrespective of how "while" is interpreted, the application of the purpose section to rule-making and decision-making under the Act will involve a balancing or weighing of the relevant competing developmental and environmental interests. It is inevitable that the nature and value of the developmental interest being advanced will influence the decision-maker's, and ultimately the court's, approach to whether a particular life-supporting capacity has been threatened.

Section 5(2)(c)

The final environmental parameter provides for: "Avoiding, remedying, or mitigating any adverse effects of activities on the environment." This is the only time that the word "environment" appears in s5. Section 2 defines "environment" as including

(a) Ecosystems and their constituent parts, including people and communities; and
(b) All natural and physical resources; and
(c) Amenity values; and
(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

The definition is extremely broad and comprehensive. Two of the concepts mentioned are themselves defined in s2. "Natural and physical resources" has already been discussed. "Amenity values" is an anthropocentric concept: "those natural and physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes."

Section 5(2)(c) manifests an implicit conservation ethic. It is also implicit, since the provision contemplates the mitigation of any adverse effects of activities on the environment, that, notwithstanding the Act, the en-

vironment will have to sustain some adverse effects.[56] Adverse effects on the environment may not necessarily be inconsistent with the satisfaction of s5(2)(a), but they are likely to conflict with a strict interpretation of s5(2)(b). This again supports a relatively loose interpretation of s5(2)(b).

4 Hypothetical Fact Situation

Probably the best way to appreciate the operation of s5 is in the context of its application to a factual problem. Take the following hypothetical scenario:

> Assume that an electricity supply company wishes to construct a dam on a river to meet the ever increasing domestic and industrial demand for electricity. The stretch of river that will be affected is particularly valued for its unspoiled beauty, and it provides the only habitat for a rare native duck. Ornithologists confidently believe the duck's relocation impossible, and the likely result of the dam's construction will be its extinction. Also, local Maori regard this part of the river as having great spiritual significance which they believe will be destroyed by the construction of the dam.

Regional and district councils will have to apply s5 to this situation, along with other criteria specified in section 104(1), when resource consents are sought for the damming of the river.[57] In order to use the problem to better reveal the likely operation of s5, I propose, quite artificially, to ignore the possible application of criteria provided in section 104(1) other than s5, which, of course, is the pivotal section in Part II of the Act. Criteria in the other sections in Part II, that is ss 6, 7 and 8, may be relevant,[58] but again, artificially, the analysis will focus on the application of s5.

The first question to ask is whether the dam development will fall within the first part of s5(2). There is no doubt that the natural resource will be used and developed in a way which enables the community to provide for its social and economic wellbeing. However, will the resource be used in a way which enables people to provide for their cultural wellbeing? Local Maori will argue that destruction of the spiritual significance of that stretch of river will not be providing for their cultural wellbeing. There will thus be a conflict between two of the aspects of human wellbeing provided for in the first part of s5(2). Does the fact that the provision of one type of wellbeing will deny the provision of another prohibit the use and development from taking place? Will any likely detriment to Maori cultural wellbeing thwart development? Surely the answer must be that the decision-makers will, in the course of their s5 decision-making, have to weigh the detriment to cultural wellbeing against the benefit to social and economic wellbeing.[59]

Any balancing or weighing involves putting values on different interests which allows the worth of those interests to be compared. It may be rela-

56 See also s17.

57 See s14.

58 See eg ss6(a), (b), (c), (e); 7(a), (b), (c), (d), (f), (g) and 8.

59 However note the protection given to "[t]he relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" by s6(e).

tively easy for economists to put a monetary value on the economic well-being created, but considerably more difficult to put a monetary value on the detriment to the cultural wellbeing of Maori. No markets exist to give monetary value to cultural wellbeing.

Applying s5(2)(a) to the problem is relatively straightforward. Damming the river will not necessarily be irreversible, although restoration of the natural state of the river would no doubt be difficult. The reasonably foreseeable needs of future generations which the stretch of river and surrounds may meet, will be capable of ascertainment. However, the fact that the damming of this part of the river may prevent its meeting those demands does not necessarily mean that the requirements of s5(2)(a) will not be satisfied. There may be ample river resources elsewhere in the country which will be available to meet the reasonably foreseeable needs. Section 5(2)(a) will have to be construed as recognising that needs may be met from natural and physical resources located elsewhere, or otherwise it will be impossible to make irreversible use of any natural and physical resources.

The application of s5(2)(b) raises interesting issues. The construction of the dam will inevitably cause that part of the river-bed located under the dam largely to cease to be life-supporting. It will no longer support the normal plant and animal life of the river-bed.

As discussed earlier,[60] there are two ways that such environmental degradation may be permitted under s5(2), notwithstanding s5(2)(b). First, if "while" were to be interpreted as a co-ordinating conjunction, the destruction of the life-supporting capacity of that part of the river-bed may be outweighed by the value of the contribution the development may make to the provision of social and economic wellbeing under the first part of s5(2). Second, if "while" were to be interpreted as a subordinating conjunction, the requirements of s5(2)(b) may be construed liberally, so that no threat to the life-supporting capacity of the river-bed would be recognised if there were adequate river-bed available elsewhere to support the same species of plants and animals.

The facts of the hypothetical problem, however, cause s5(2)(b) to be subject to more poignant analysis. This stretch of river is the only habitat of a rare native duck. Ornithologists believe that it cannot be successfully relocated, and the likely result of the dam's construction will be the extinction of the duck. If "while" were interpreted as a co-ordinating conjunction, the decision-maker would have to be satisfied that the value of the provision of social and economic wellbeing outweighed the continuing existence of the species of native duck. This comparison would raise again the difficulty of putting money values on aspects of the natural environment.

If "while" were interpreted as a subordinating conjunction, even with the most liberal interpretation of s5(2)(b), it would be difficult to argue that the life-supporting capacity of the water in the river was being

60 Supra p 64.

safeguarded when the result of the development is the irreversible death of a species. On this construction of "while" the regional council will not be able to permit the development to go ahead. Such a result is certainly consistent with the policy that the legislation should put in place environmental bottom lines that cannot be crossed.

Those who argue that these decisions must always be a matter of weighing and balancing will immediately respond to this interpretation with the hypothetical situation of where, if the dam is not built, thousands of jobs will not be able to be created and families will starve. The constitutional response to this challenge is that parliament can always, as already discussed, intervene with special legislation determining how the dilemma should be resolved.[61] The result may be legislation which is unnecessarily destructive of the environment if the parliamentary law-making process is not of the best possible quality.

Section 5(2)(c) will require the developers to avoid, remedy and mitigate any adverse effects on the environment of the dam building and its operation. Many practical examples of what should be done pursuant to s5(2)(c) spring to mind. If possible, successful relocation of the rare native duck to another habitat would be an example of mitigation.

5 The Problems with Section 5 and Possible Solutions

The application of s5 to the hypothetical problem exposes the three main difficulties with the section. First, the s5(2) definition of sustainable management is complex, and is likely to prove difficult to understand and apply for those lay decision-makers, who constitute consent committees of local authorities, and others, charged with rule-making and decision-making responsibilities under the Act. Second, the criteria for environmental rule-making and decision-making are inevitably loose, rule-makers and decision-makers being left with relatively unrestrained discretion when applying s5. The third difficulty is the age-old problem of weighing and balancing competing considerations when it is difficult to accurately attribute to them a quantum of worth on a common value scale.

The complexity of section 5

Each of these problems requires further comment. First, the complexity of section 5, can it be avoided? A reader's likely first reaction to s5 is to exclaim "what a jumble of words!" The "sustainable management" definition in s5(2) attempts to compress a multitude of diverse decision-making criteria into one formula. It is only after long and careful analysis, of the kind attempted in this article, that some understanding is approached of what the expressed purpose of the Act requires. Surely such analysis is too much to ask of those elected lay persons who will be required to give effect to the purpose of the Act in practical day to day decision-making.

Even the most thorough analysis of s5 is unlikely to lead to a confident clarity of understanding. Parliament has deliberately left the wording in-

61 Supra pp 55-56.

determinate. The courts, more particularly the Court of Appeal, is being left to give a more definite content to the purpose of the Act. Parliament should not have abdicated its law-making responsibility in this way. The principles determining the priorities between development and maintenance of the natural environment are based on matters of high policy for which the elected government and parliament should be politically accountable. These principles should not be settled by the executive appointed and considerably less accountable judiciary.

More specifically, the courts should not be left in the position of having to decide whether "while" should be construed as a co-ordinating conjunction or a subordinating conjunction. If parliament intended that all rule-making and decision-making required a balancing of competing developmental and environmental interests then this should have been made clear. Similarly, if the parliamentary intention was that the potential to meet the needs of future generations never be compromised, and the life-supporting capacity of air, water, soil and ecosystems, never be destroyed, such intention to create absolute bottom lines should have been unquestionably clear on the face of the statute.

I believe absolute bottom lines are inappropriate, and will not work. Situations will inevitably arise where rational assessment of competing interests will overwhelmingly support a compromise of the so-called environmental bottom lines. The pressing needs of the current generation in some circumstances will loom larger than the distant needs of future generations. The life-supporting capacity of a stretch of water will have to be sacrificed in order to generate electricity needed to maintain current social and economic wellbeing. On the present wording of s5(2) these compromises will be accommodated by interpreting "while" as a co-ordinating conjunction, or by making use of the room which s5(2)(a) and (b) leave for liberal interpretation.

If parliament were to support the policy stance advocated above, a less complex expression of s5(2) which makes priorities clearer could be as follows:

> In this Act, 'sustainable management' means managing natural and physical resources so as to enable people to provide for their wellbeing without unjustifiably –
> (a) Reducing the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; or
> (b) Reducing the life-supporting capacity of air, water, soil and ecosystems:
> Provided that every reasonable effort is made to avoid, remedy or mitigate any adverse effects of activities on the environment.

Such a wording would make clear to rule-makers and decision-makers that their function was one of evaluating the specified considerations and weighing them against each other. The requirement that trespasses on the specified future generational and environmental interests be *justifiable* would compel the rule-makers and decision-makers to be satisfied that the provision of current human wellbeing was more important and should prevail.

The words "social, economic and cultural" have been deleted from before "wellbeing", as have the words "health and safety". All are arguably

otiose, the unqualified expression "their wellbeing" being sufficient. The conflict between economic and cultural aspects of wellbeing, raised by the hypothetical problem, would still have to be resolved under the suggested wording in deciding what was provision for the overall wellbeing of people.

The vagueness of criteria

The second problem related to the discretionary freedom given to rule-makers and decision-makers is the vagueness of the criteria (eg "wellbeing", "reasonably foreseeable needs", "life-supporting capacity") that they are obliged to take into account under s5 and the remaining sections in Part II of the Act. The suggested rewording of s5(2) does little to meet this difficulty. The problem is not capable of resolution. The range of considerations which must inevitably be relevant to the exercise of environmental rule-making and decision-making functions is such that, without great masses of detailed criteria, it would not be possible to be more precise.

The fact that broad discretion is inevitable means that the rule-makers and the decision-makers, and the rule-making and decision-making processses, have to be of the highest possible quality. Under the Act rule-making and decision-making will take place in three distinct forums:

- regional or district council
- Planning Tribunal, High Court or Court of Appeal
- Minister of the Crown.

Regional and local councils consist of elected representatives of the people living in the geographical areas for which the respective councils are responsible.[62] These people require no formal qualifications, other than being of voting age, and come from all walks of life. Local authorities do, however, employ professional staff to assist in their functioning. The Resource Management Act 1991 authorises local authorities to transfer their decision-making functions to another public authority, including any iwi (Maori tribal) authority, in specified circumstances.[63]

The obvious advantage of local authority rule-making or decision-making is that local people are making decisions about their own environment, and they are democratically responsible for such decisions. Where national issues are raised by the required decision-making, such as, for example, the irreversibility of the possible extinction of a species, the decision-making may be removed from the local level to the national level.[64] However, the real reservation about local authority rule-making and decision-making must be in respect of maintenance of its quality.

The quality is vulnerable for two reasons. First, elected lay persons are having to give effect to a complex piece of legislation which requires the exercise of wide discretions, the wise exercise of which is dependent upon skilful assessment of illusive competing values. Second, local authorities

62 See Parts IV and IVA of the Local Government Act 1974 as amended and the Local Elections and Polls Act 1976.

63 S33.

64 See s140.

may not bring a sufficient impartiality to the decision-making. For example, a local authority may be tempted to decide a resource consent application in such a way as to favour developmental interests which will please its electors, at the expense of sustaining resources to meet the needs of future generations.

Not surprisingly, the quality of rule-making and decision-making under the Act is protected by some in-built safeguards. The safeguards are necessary to maintain the quality of not only local government decision-making, but also that of central government.

The Act provides generous rights to participate in the rule-making and decision-making processes.[65] Any person may make a submission in respect of a proposed policy statement or plan.[66] Any person may request a change to a regional or district plan.[67] Any person may make a submission about a resource consent application.[68] The participation opportunities are similar in respect of designations[69] and heritage orders.[70]

At a national level, any person may make submissions to the board of inquiry in respect of proposed national policy statements[71] and proposed New Zealand coastal policy statements.[72] Also, where the Minister for the Environment exercises his or her call-in powers in respect of a resource consent application, any person may make a submission to the minister in respect of the application.[73] Where the minister is contemplating recommending to the Governor-General the promulgation of national environmental standards as statutory regulations, he or she is required to establish a process which gives the public adequate time and opportunity to comment on the proposed subject-matter of the regulations.[74]

The Act also imposes obligations upon central government and local authorities to consult widely.[75] Those obliged to be consulted include: the Minister for the Environment; other ministers who may be affected by policy statements or plans; any local authorities which may be affected and the tangata whenua of the area which may be affected. "Tangata whenua" means the iwi (Maori tribe), or other authority, which has customary authority over the area.[76]

65 See eg in respect of policy-making and rule-making ss49, 60, 64, 65, 73 and the First Schedule, and in respect of resource consents, s96.
66 Ss64(1), 65(1), 73(1) and cl 6 of the First Schedule.
67 Ss65(4) and 73(2).
68 S96(1).
69 S169.
70 S190.
71 S49(1).
72 S57(1).
73 S145(1).
74 S44.
75 See eg in the policy-making and rule-making context ss60, 64, 65, 73 and cl 3 of the First Schedule. The obligation to consult should be viewed alongside the extensive range of information applicants for resource consents are obliged to put before consent authorities (ss8 and the Fourth Schedule), and the express obligations which rule-makers have to consider alternatives, and assess benefits and costs (s32).
76 See s2.

Wide participation rights and consultation obligations alone will not guarantee the quality of the rule-making and decision-making process. Recourse to second consideration by the Planning Tribunal and possibly third consideration by the courts is also necessary. Policy statements and plans made by local authorities,[77] together with the resource consent decisions of both local authorities[78] and the minister,[79] may be subject to appeal to the Planning Tribunal. The Planning Tribunal also has a wide general jurisdiction to grant declarations.[80] A further right of appeal from decisions of the Planning Tribunal to the High Court on points of law is provided.[81] The general judicial review jurisdiction of the High Court is also available in respect of any decision purported to be made under the Act, with the proviso that where a right of recourse to the Planning Tribunal is provided, that avenue must first be exhausted before the High Court's judicial review jurisdiction is invoked.[82]

The Planning Tribunal normally sits with a legally qualified person, who is a warranted district court judge,[83] presiding,[84] together with usually two planning commissioners. Planning commissioners are appointed by the Governor-General on the recommendation of the Minister of Justice after consultation with the Minister for the Environment and the Minister of Maori Affairs.[85] In considering the suitability of prospective appointees, the Minister of Justice is obliged to have "regard to the need to ensure that the Tribunal possesses a mix of knowledge and experience in matters coming before the Tribunal" and the Act specifies a large number of fields of relevant expertise.[86]

My observation is that the conduct of hearings before the Planning Tribunal, and its eventual decisions, tend to be dominated by the presiding Planning Judge. As a practitioner, I often found myself marvelling at the power of the unelected executive appointed members of the Planning Tribunal. They could stop or allow, for example, the building of supermarkets, hydro-electric dams, skifields – all decisions which had huge social, economic and environmental consequences. The response to these doubts may be that, ultimately, some person or persons have to make decisions and planning judges and commissioners, with their backgrounds in matters related to environmental decision-making, are probably some of the persons in society best equipped to perform this task.

Legal aid is potentially available to assist individuals with applications, submissions and appeals under the Resource Management Act 1991.[87] This

77 See s293, cls 14 to 16 of Part I, and cls 26 to 27 of Part II of the First Schedule.
78 S120.
79 S149(3).
80 Ss310-313.
81 S299.
82 S296.
83 S250.
84 S265.
85 S254.
86 S253.
87 See s19(1)(k) and (l) of the Legal Services Act 1991.

includes not only proceedings before the Planning Tribunal, High Court and Court of Appeal, but also applications and submissions to district and regional councils. However, two major restrictions in the legal aid scheme prevent the full potential for participation under the Resource Management Act 1991 being realised.

First, corporate or unincorporated bodies representing environmental interests are not entitled to legal aid.[88] Such highly motivated and well informed groups are often able to cause the rule-makers and decision-makers to appreciate more fully the environmental perspective. These groups, however, may attempt to present their contribution to formal proceedings through any member, who individually qualifies for legal aid, appearing in his or her own right.

The second restriction flows from the low income and capital levels at which legal aid ceases to be available.[89] The bulk of the New Zealand population, and correspondingly the bulk of those with an active concern for the environment, are caught in the frustrating position of not qualifying for legal aid and yet not having enough discretionary money of their own with which to participate in proceedings. Both legal aid restrictions operate at a cost to the quality of the environmental rule-making and decision-making process.

The difficulty of establishing comparative values

The third difficulty with section s5(2) is illustrated by the problem of weighing the economic value of the hydro-electric station against the upset to local Maori if a sacred stretch of river is desecrated, or against the extinction of a species of native duck. Theoretically, these comparisons could be made more accurately if considerations of such radically different natures were able to be attributed a quantum of worth on a common value scale. Economists are currently attempting to develop systems for attributing money value to environmental interests for which there are no markets.[90] A variety of different approaches is being explored and, no doubt before long, valuations derived from the application of some of these methods will be put before those charged with the responsibility of making decisions under the Resource Management Act 1991.

No method of valuation will ever produce definitive results. Rather, any valuation will always only be one factor, along with many others, to be taken into consideration when weighing competing diverse interests. With an interest like the retention of a species, a sceptic would suggest that any valuation in monetary terms must be an attempt to quantify the unquantifiable. How can a quantifiable value be put on the intrinsic value of an aspect of nature? Is it not impossible for humans to value something without being influenced by an anthropocentric perspective?

88 Ibid at s27(1).

89 Ibid at ss28 and 29 and regulations 35, 36 and 37 of the Legal Services Regulations 1991.

90 See generally David W Pearce and R Kerry Turner, *Economics of Natural Resources and the Environment* (1990), Chap 10, and Frank B. Cross "Natural Resource Damage Valuation" (1989) 42 Vanderbilt LR 269.

6 Conclusion

The attempt of the New Zealand parliament to place the principle of sustainability at the heart of environmental rule-making and decision-making is commendable. This article has endeavoured to explain and assess that attempt as manifest in s5 of the Resource Management Act 1991. Regrettably, the principle has proved difficult to transform into workable legislative reality. The shortcomings of the statutory attempt have been exposed: the baffling complexity of s5; the loosely guided discretion left with rule-makers and decision-makers, and the problem of weighing diverse competing interests where it is difficult to attribute to them comparative worth on a common value scale. Parliament has been criticised for leaving s5 indeterminate, and therefore abdicating its law-making responsibilities in favour of the courts.

A rewording of s5(2), clarifying the requirement of the inevitable balancing between current developmental interests and long-term environmental interests, is suggested. It is also recognised that the design of the rule-making and decision-making structures, together with the process of accountability, is of increased importance in these circumstances where the criteria for sustainable management inevitably are so vague.

The imperfections are no reason for abandoning the attempt. The statute has started the environmental rule-maker and decision-maker on the only path into the future that can be taken by a rational human community. Difficulties are inevitable, but not necessarily insurmountable. Hopefully, the domestic legislation of other countries will follow, and attempt to improve on, the New Zealand example. Every country has to work towards achieving the crucial ideal of a sustainable future.

Appendix — The Evolution of the Wording of Section 5

Section 5 went through the enactment process as clause 4 of the Resource Management Bill. Clause 4(1) in providing that: "The purpose of this Act is to promote the sustainable management of natural and physical resources" remained unchanged throughout the law-making process and ultimately appeared as s5(1) in the Act. However, the pivotal definition of "sustainable management" evolved as the Bill passed through the legislative process.

When introduced into the House of Representatives for first reading, cl 4(2) provided:

> In this Act, 'sustainable management' means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people to meet their needs now without compromising the ability of future generations to meet their own needs, and includes the following considerations:
>
> (a) The efficient management of natural and physical resources:
>
> (b) The maintenance and enhancement of the life-supporting capacity of the environment:
>
> (c) The use, development, or protection of natural and physical resources in a way which provides for the social, economic, and cultural needs and opportunities of the present and future inhabitants of a community:
>
> (d) Where the environment is modified by human action, the adverse effects of irreversible change are fully recognised and avoided or mitigated to the extent practicable:

(e) The use, development, or protection of renewable natural and physical resources so that their ability to yield long term benefits is not endangered:
(f) The use or development of non-renewable natural and physical resources in a way that sees an orderly and practical transition to adequate substitutes including renewable resources:
(g) The exercise of kaitiakitanga which includes an ethic of stewardship.

The first reading of the Bill was followed by its reference to a select committee of the House of Representatives specially appointed to consider this particular piece of proposed legislation. After receiving public submissions and deliberating upon the Bill, the select committee reported cl 4(2) back to the House in the following form:[91]

In this Act, 'sustainable management' means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people to meet their needs *(now without)* without unduly compromising the ability of future generations to meet their own needs, and includes the following considerations:

Struck Out

(a) The efficient management of natural and physical resources:
(b) The maintenance and enhancement of the life-supporting capacity of the environment:

New

(a) The maintenance and enhancement of the quality of the environment, including the life-supporting capacity of the environment and its intrinsic values:
(c) The use, development, or protection of natural and physical resources in a way which provides for the social, economic, and cultural needs and *(opportunities of the present and future inhabitants of a community)* opportunities of people and communities:
(d) Where the environment is modified by human action, the adverse effects of irreversible change are fully recognised and avoided or mitigated to the extent practicable:
(e) The use, development, or protection of renewable natural and physical resources so that their ability to yield long term benefits is not endangered:
(f) The use or development of non-renewable natural and physical resources in a way that sees an orderly and practical transition to adequate substitutes including renewable resources:
(g) The exercise of kaitiakitanga[92] which includes an ethic of stewardship.

On 27 October 1990, after the second reading, there was a general election and change of government: the Labour government was replaced by a National government. Since both the major parties were committed to supporting the resource management law reform exercise, the push towards

91 "Words struck out are shown in italics within bold round brackets, or with black rule at beginning and after last line; words inserted are shown in roman underlined with a single rule, or with single rule before first line and after last line." – quoted from the printed copy of the Bill as reported back from the select committee.
92 See supra n8.

the enactment of the new legislation lost little momentum.[93] The new Minister for the Environment, the Hon Simon Upton, did, however, establish an *ad hoc* review group, independent of parliament, to review the Bill. The minister specifically requested that the group look at cl 4 and other aspects of Part II of the Bill. The group published a discussion paper in December 1990,[94] received submissions on this document, and then reported to the minister on 11 February 1991.[95]

Submissions were received by the review group advocating the use of the internationally well known expression "sustainable development" rather than "sustainable management". However, the review group rejected the suggestion, one reason being the broad meaning the expression had gained following the *Brundtland Report*[96] where it had been used to include matters such as "social inequities and global distribution of wealth".[97]

The review group noted the competition between different interest groups for inclusion in cl 4(2) of factors sympathetic to their particular interests. The review group was concerned that the proposed legislation did not give clear priority to any of these factors.[98] Consequently it proposed that cl 4 provide as follows:

> In this Act, 'sustainable management' means 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 health and safety, and their social, economic and cultural wellbeing while –
>
> (a) Safeguarding, to the extent reasonably foreseeable, the ability of future generations to meet their needs in relation to natural and physical resources; and
>
> (b) Avoiding, remedying or mitigating any adverse effects of activities on the environment.

The report commented that:[99] "While cl 4 as reported by the Select Committee contained an unweighted balancing of socio-economic and biophysical aspects, the recommendation of the review group conceives of the biophysical characteristics of resources as a constraint on resource use."

The government responded to these recommendations with amendments to cl 4 through two supplementary order papers. In the first supplementary order paper (No 22)[1] cl 4 was amended in keeping with the review group's suggestions, except that "enables" became "ensures", the word "while" was not included, minerals were excluded from natural and physical resources in sub-clause (a), and an additional biophysical parameter was inserted:

93 S20 of the Constitution Act 1986 provides that, where the House of Representatives resolves, any Bill before it or any of its committees shall be carried over to the next session, whether or not it is the same parliament.

94 *Discussion Paper on the Resource Management Bill,* December 1990.

95 *Report of the Review Group on the Resource Management Bill,* 11 February 1991.

96 Supra n1.

97 Supra n49 at section 2, para 3.3.

98 Ibid at para 2.2.

99 Ibid at para 4.3.

1 Supplementary Order Paper, No 22, 7 May 1991.

> In this Act, 'sustainable management' means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which ensures that, in providing for the social, economic, and cultural wellbeing of people and communities, and their health and safety, –
>
> (a) The potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations is sustained; and
>
> (b) The life-supporting capacity of air, water, soil, and ecosystems is safeguarded; and
>
> (c) Any adverse effects of activities on the environment are avoided, remedied, or mitigated.

This version of cl 4 gave a clear priority in any decision-making to biophysical factors over developmental factors. Nearly two months later, in another supplementary order paper (No 40), cl 4 was further amended to restore what appeared to be more of a balance between the biophysical and developmental considerations:[2]

> 'In this Act, 'sustainable management' means 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 –
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

"Enables" was restored, "while" inserted, and the structure of the expression of the biophysical parameters correspondingly adjusted. It was in this form that the sub-clause went forward to the third reading and was eventually enacted as section 5(2).

2 This followed the report of the select committee which considered Supplementary Order Paper No 22: see para 44.