Adopting Sustainability as an Overarching Environmental Policy:

a Review of section 5 of the RMA

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INTRODUCTION

Since its "invention" by the World Commission on Environment and Development 14 years ago (WCED, 1987), the concept of sustainability has rapidly come to dominate environment and development policy discourses in a wide range of government forums around the world. The attractiveness of sustainability as a broad policy objective has not been limited to international, central and local government agencies and NGOs alone. There is also a substantial body of academic literature that debates the validity of the concept of sustainable development as a source of moral and political regeneration and as a new environmental ethic to guide decision-making in public and private spheres of life.

New Zealand has been part of the resurgence of this global environmental movement. Recently, New Zealand policy-makers of all shades of political persuasion have found themselves in agreement in endorsing sustainability as a policy objective. In fact, New Zealand was one of the first countries to enact sustainability into law within the framework of the Resource Management Act 1991 (the RMA). Following the model of the RMA, a number of other more recent statutes for managing natural resources such as fisheries and indigenous forests are also

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based on the sustainability principle. Our objective in this paper is to reflect on the experience of adopting and applying the concept of sustainability as the basis for an environmental statute designed to help resolve conflicts over allocation and management of natural resources and the built environment.

The purpose of the RMA is to promote the sustainable management of natural and physical resources as set out in section 5. This section occupies a pivotal place in the structure of the Act. However, as discussed below, its interpretation has proved to be highly contestable. Sustainability means different things to different people. Arguably, lack of clarity about the underlying objectives of a newly enacted environmental statute is not a desirable situation. One would have expected the purpose to be clarified by making an appropriate amendment to section 5. However, even though there have been periodic amendments to clarify other aspects of the Act, successive governments have lacked the political will to initiate any legislative changes to this section. This has created a policy lacuna during the last ten years and consequently it has been left to the Courts to provide clearer policy direction based on the development of case law.

While the recent impasse about the meaning of section 5 highlights the difficulties that have been encountered in implementing the RMA, it is instructive to reflect also on the genesis of the section. The differences in interpretation encountered during its implementation were also articulated during the policy development phase of the Act between 1988 and 1991. As we argue here, the fundamental tensions that underpin the section arise from the challenge of crafting a definition of sustainable management that can enable decision-makers (elected councils, the Environment Court, the Minister for the Environment) to reconcile the spectrum of values different groups accord to the environment in a plural social setting. Such a definition needs to be sufficiently clear, procedurally fair and focussed on the substantive goal of protecting and improving environmental quality. The development of case law relating to section 5 is no doubt very helpful in fostering a common understanding of what sustainable management means. However, in our view an understanding of sustainable management as the central purpose of an environmental conflict-resolving statute, will always be contested in the context of a resurgent private property owning political economy.

The Genesis of Section 5

In hindsight, conflicting views on interpreting section 5 should not have come as a surprise. Conflicting stances about politically acceptable meanings of sustainable management were manifested even more strongly during the policy development phase of the RMA.

The RMLR team of officials was the first to address the task of defining the concept of sustainability and assessing practical implications for guiding the environmental legislation review. The public consultation exercises undertaken by the MfE then provide insights into public perceptions of the tensions inherent within the sustainability concept (Ministry for the Environment, 1988a; Ministry for the Environment, 1988b). The sustainability concept was seen by many as a very important objective. Some respondents were concerned about the anthropocentric orientation behind the idea. In the past, insufficient attention had been paid to sustaining the natural world itself, independent of any benefit for people. Others questioned our lack of attention to future generations, supporting the traditional Maori perspective that we must look to the past in order to go on into the future. This was challenged by those who believe current generations do take into account the needs and desires of themselves and future generations (Ministry for the Environment, 1988b, pp. 10-11).

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Likewise, public comment on the Cabinet proposals for the new Act followed the same pattern but with

an overwhelming majority wanting sustainable development to be the overriding objective (Gray, 1989, p. 14). The concepts of sustainability, stewardship, the recognition of future generations, ecosystem preservation and special values were all raised. But the submissions also identified the need for economic development, increased employment and the continued viability of communities. It was suggested that these should be the principles of any new legislation. Of particular note is the concern expressed over how the proposed objectives would operate in practice. While accepting the principle of sustainability, its implementation was seen to be difficult. For some resources, for example petroleum, the industry argued such a policy was largely irrelevant due to the lack of information on the extent of the resource in New Zealand.

The plurality of values that underpin divergent public perceptions of the meaning of sustainability and the tensions amongst these were subsequently reflected in negotiations during the law drafting stage. The early drafts of Part II Purpose and Principles (clauses 4 and 5) of the Bill proved contentious and were seen by most reviewers as critical to making the legislation work. They were amended at various stages of the law reform process but nevertheless continued to be the subject of substantial criticism by some government officials and a range of interest groups until the enactment of the new statute. The criticism related to both the form and substance of the purpose and principles clause. The most articulate and enduring critic was the Treasury, but its views were shared by the Business Roundtable, a number of Labour and National Cabinet ministers and some MfE officials.

In Treasury's view, the notion of sustainability was not appropriate as the overriding framework for the proposed Act. It argued that the purpose should be limited to providing a legal framework to enable people to deal with impacts of resource use on those other than the owners of the resource in question. In other words, the proposed Act should be an environmental effects management statute which enabled local authorities to prescribe minimum bio-physical standards (the "bio-physical bottom line" model). It should not be an environmental planning statute that provided a forum for resolving diverse values disputes in a community as part of the wider local government democratic process (the integrative or the "triple bottom line" model). Concepts of sustainability and intergenerational equity were deemed unworkable concepts since they are vague and difficult to define.

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The Treasury stance was that social objectives such as meeting the needs of current and future generations, embedded in the definition of sustainable development, were better achieved directly through separate social policy. Attempting to achieve social objectives through environmental policy not only compromises other objectives of environmental policy but is unlikely to be the best way of achieving social goals. Furthermore, it argued that it is not possible to know whether future generations would prefer preservation of a resource or the stronger economy that could follow from developing that resource now.

The Treasury was also opposed to the notion of a set of values or objectives such as sustainability, the interests of future generations, and economic growth being included in the overall purpose of an Act and expecting elected local government members, with the aid of officials, to arbitrate between them. Treasury reservations about democratic governance as a forum for conflict resolution were as follows:

- It creates policy uncertainty and is a major disincentive to new investment.

- It is structured by officials (planners and other policy analysts) and not by the economic interests of participants. The notion of a "managed encounter" implies that officials should play a major role in determining the most appropriate forms of development. Implicitly the structure of the "encounter" would reflect officials' views as to the desirable outcome. However, officials who are not accountable to either the market place or the electorate are not in an appropriate position to determine outcomes, that is "to pick winners".

- It is undemocratic. Participants would be those with the interest, incentives, financial resources, education, spare time etc., and their views could not necessarily be assumed to be congruent with the interests of the wider community.

Instead, the Treasury argued that the scope for private negotiation (economic instruments) be increased in the proposed Act as a means of minimising the role of local government.

The stamp of the neo-liberal rhetoric is reflected to some degree in the final wording of section 5. Thus, the purpose of the Act is the sustainable management (not *development*) of *natural and physical resources* (instead of *environment*). It has been argued by some that sustainable management is a less embracing concept, exclusive of economic and social objectives. Pursuit of socio-economic well being is deemed primarily an individual responsibility. For similar reasons, the scope of the Act is limited to management of natural and physical resources instead of the environment which is seen as all encompassing. Also, mineral resources are excluded from the purview of section 5(2)(a) relating to the needs of future generation. As argued by the Treasury, it is not logical, to apply, by definition, the sustainability concept to non-renewable resources such as coal.

The sole purpose of planning and resource management in New Zealand has been *"[to] promote the sustainable management of natural and physical resources."*

Nevertheless, the wording of section 5 clearly signals that the purpose of the Act is wider than effects management. In fact, we would argue that the definition of sustainable management encapsulates the fundamental underpinnings of the concept of sustainable development in the sense that it requires decision-makers to adopt an integrated perspective for managing natural and physical resources. Sustainable development has been defined, based on the Brundtland report, as a decision-making process that should take account of ecological, economic and social and cultural values. The attraction of sustainability defined in this way is that rather than elevating bio-physical objectives above everything, it ensures the proper consideration of development in its environmental context. As discussed in the next section, this is also the view that the Courts have reached through evolving case law.

During the policy development phase of the Act, the integrated perspective on the purpose of the Act prevailed through the reign of the Labour government despite pressure from the Treasury to adopt the bio-physical bottom line perspective. As stated by Geoffrey Palmer, who was the Labour government Minister responsible for the Bill:

"...sustainable management allows development that integrates environmental, social and economic objectives. It means looking after the environment so that it can continue to support us and provide us with economic and social benefits..." (Palmer, 1990, p. 93).

The bio-physical perspective only came to the fore with the incoming National government's Committee on the Resource Management Bill. This was articulated most clearly by Simon Upton during the third

reading of the Bill when he said this: *...the Government has moved to underscore the shift in focus from planning for activities to regulating their effects...We run a much more liberal market economy these days. Economic and social outcomes are in the hands of citizens to a much greater extent than they previously have been. The Government's focus is now on externalities- the effects of those activities on the receiving environments...* (Upton, 1991, p.3019).

This stance was adopted by the MfE in its submissions to the first generation of policies and plans prepared under the Act and in its evidence to the Environment Court.

The Approach of the Courts in Clarifying the Meaning of Section 5

As we said earlier, since 1 October 1991 the sole purpose of planning and resource management in New Zealand has been *"[to] promote the sustainable management of natural and physical resources"*. What does this mean? The short answer is contained in section 5 (2) of the RMA itself. This subsection contains a definition, or arguably more correctly, a description of the term "sustainable management" at least for the purposes of this Act. This reads as follows:

"... 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 Board's advice to the Minister of Conservation is not wholly supported by subsequent decisions of the Courts.

This was the final product of all the earlier debates just referred to but the debates continue to this day notwithstanding the guidance given by the Courts to which we will shortly turn our attention.

Before doing that, however, it is worth pointing out that in New Zealand, it is for the Courts to decide what the law is. This is not a function of the Executive. The constitutional model is that Parliament makes the law, the Executive government applies and enforces the law and the Courts decide what the law is when determining disputes between parties to litigation including the Crown.

One of the difficulties that has arisen with the implementation of the RMA, and in particular with section 5, is that practitioners including lawyers, planners and other environmental professionals as well as elected councillors have been pressured by the former Minister for the Environment and his departmental officials to take a particular view about the meaning of sustainable management that (as we will demonstrate) does not accord with the generally accepted view of the Courts.

This, as again we said earlier, was based on a misconception that section 5 (2) is predominantly about prescribing bio-physical environmental bottom-lines. A reading of the sub-section shows this is not so. All the words down to (a) emphasise anthropocentric values and so does (a) itself. Consequently in 1991, even if Parliament thought it was moving away from what was perceived to be an anthropocentric approach to planning and resource management it is plain from the very wording of section 5 (2) itself that this was not so.

In a Memorandum re the Inquiry into the New Zealand Coastal Policy Statement NZCPS 3NZPTD 109 the Board of Inquiry chaired by former Judge A. R. Turner, advised the Minister of Conservation that the true interpretation of section 5 did not allow the definition of sustainable management to be broken up into a number of separate principles. The definition of the term had to be taken as a whole. That Board went on to say that the constraints found in sub-clauses (a), (b) and (c) are refined and given further meaning by ss 6, 7 and 8 but

after the commencing words the wording of each section differs. This lays down the relative weight to be given to each of those sections.

While the Board's advice to the Minister of Conservation is not wholly supported by subsequent decisions of the Courts it was a timely reminder that if section 5(2) is to be regarded as a definition, it is inappropriate to read it in any other way than as a whole.

Two approaches to section 5 (2) have been identified in Williams (1997). In summary, these are the "balancing" approach and the "environmental bottom line" approach. The former appears to have been equated to what we regard as a third approach namely the "over all judgment" approach that we will submit is the one now generally accepted by the Courts.

The leading case on this topic is *NZ Rail v Marlborough District Council* [1994] NZRMA 70. This was a decision of the High Court on appeal from the former Planning Tribunal. The case arose out of a proposal by Port Marlborough Ltd to develop deep-water port facilities in Shakespeare Bay adjacent to Picton in the Marlborough Sound.

Among the many considerations for the Tribunal was the application of section 6(a) of the Act relating to the preservation of the natural character of the coastal environment and, of course, the application of section 5(2) itself. The Tribunal's approach had been to apply section 6(a) in the same way as the matters of national importance had been applied under the Town and Country Planning Act 1977, except to the extent that the Tribunal held that the word "inappropriate" was less restrictive than the word "unnecessary" in a similar form of words in section 3 of the Town and Country Planning Act. The Tribunal had also held that section 5(2) had to be applied as a whole.

In upholding the Tribunal's approach Justice Greig said this of Part II of the Act:

"This Part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings, and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and policies and the principles under the Act...."

In the same year there were two decisions of the Planning Tribunal that have often been cited as authority for the "environmental bottom line" approach. These were *Foxley Engineering Ltd v Wellington City Council,* Decision W12/94 and *Campbell v Southland District Council,* Decision W114/94. The first preceded the judgment of the High Court in *NZ Rail* but the latter post-dated and referred to it although in another context.

Foxley Engineering Ltd was an appeal from a decision of the Wellington City Council granting resource consent to establish a service station and car park on the corner of Bunny and Featherston Streets in Wellington. Basically this was a trade competition case between Shell and Mobil but there were also quite important issues about inner city amenities and the heritage values of existing buildings.

Referring to section 5 the Tribunal said this:

The adverse effects of the marine farming could not be avoided but they could be mitigated.

" The provisions of s. (5)(2)(a)(b)(c) may be considered cumulative safeguards which exist in order to ensure that land resource is managed in such a way, or at such a rate which enables the people of the community to provide for the various aspects of their social wellbeing and for their health and safety. They are safeguards which must be met before the Act's purpose is fulfilled. The promotion of sustainable management has to be determined therefore in the context of these qualifications which may be accorded the same legal weight."

The Tribunal allowed the appeal and cancelled the resource consent for Mobil's service station because of the

potential adverse effects on the inner city amenities and heritage values.

Campbell was an appeal against the granting of a resource consent by the Southland District Council to allow the establishment of an international airport at Castlerock near Lumsden in Southland. Again referring to section 5, the Tribunal said that it was not about achieving a balance between benefits accruing from the activity and its adverse effect. It then repeated the view expressed in *Foxley Engineering Ltd*, quoted above, and in the result allowed the appeal and cancelled the resource consent. This was because the Tribunal concluded that neither of the threshold tests for a non-complying activity in (now) section 105(2)A were met. The adverse effects of the activity were more than minor and the granting of consent was contrary to the objectives and policies of the district plan.

Some two years later the Tribunal's, (now the Environment Court's), approach to section 5 began to change. This came about largely through a better understanding of Justice Greig's observations in *NZ Rail*. Three decisions of the Environment Court illustrate this change that has become known as the "overall broad judgment" approach.

In *Trio Holdings Ltd* v *Marlborough District Council* [1997] NZRMA 97 the Court presided over by Judge Kenderdine who, interestingly enough was the presiding Judge in both *Foxley Engineering Ltd* and *Campbell*, began to apply this broad overall judgment approach in a case relating to a proposal for marine farming in a highly sensitive, almost pristine, part of the Marlborough Sounds. The proposals, for which resource consents had been refused by the Marlborough District Council, included an experiment to produce metabolites from sponges which target anti-tumour active compounds in humans. The adverse effects of the marine farming could not be avoided but they could be mitigated to some extent by refusing parts of the application while allowing the sponge growing proposal.

In allowing the appeals in part the Court said this:

"We have concluded that the national (and international) significance of the development of the sponge and algal species in the proposal, if successful, is such that we should ensure that the adverse effects we identified earlier in the decision, if not avoided altogether, could be mitigated sufficiently to still enable the promotion of the concept of sustainable management of the site's natural resources to occur. The idea of 'mitigation' is to lessen the rigour or severity of effect. We have concluded that the inclusion of the word in s.5(2) of the Act, contemplates that some adverse effects from developments such as those we have now ascertained may be considered acceptable, no matter what attributes the site might have. To what extent the adverse effects are acceptable, is, however, a question of fact and degree. In this respect, the further aspect of the proposal is one which we consider has substantial merit - that sponge culture has far less adverse effects than mussel farms and there is potential for even less as the lantern structures in which they are grown are perfected.

In conclusion we consider that if the proposal is restricted in the way proposed, the adverse effects are not so major as to refuse the proposal. In so concluding we have recognised and provided for the other matters of national importance, namely s.6(b) and (c) of the Act and have in our overall assessment, had particular regard to the various provisions of s.7 of the Act."

This was followed by the Court's substantive decision in *North Shore City Council and others v Auckland Regional Council (Okura)* [1997] NZRMA 59. We say "substantive" because this decision followed on from an earlier declaratory judgment case about the validity of specific regional policies for the

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control of urban limits in the Auckland Region.

In the substantive decision, which related to a proposal to place certain parts of the North Shore outside the limit of urban development including an important tidal estuary (the Okura Basin), the Court said this about section 5:

"A way of managing of natural and physical resources which fails to sustain, to safeguard, and to avoid, mitigate, or remedy the matters in paragraphs (a), (b) and (c) thereby also restricts the extent to which that way of managing the resources enables a community to provide for its wellbeing. Where (as in this case) there are a number of issues to be considered in deciding whether a proposal would promote the sustainable management of natural and physical resources as defined, it is our understanding that the duty entrusted to those making decisions under the Act cannot be performed by simply deciding that on a single issue one or more of the goals in paragraphs (a), (b) and (c) is not attained."

Then, after referring to the passage from the judgment of Justice Greig quoted earlier the Court went on to say:

"We have considered in the light of those remarks the method to be used in applying section 5 to a case where on some issues a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or to fully attain, one or more of the aspects described in paragraphs (a), (b) and (c). To conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject section 5 (2) to the strict rules and proposal (sic) of statutory construction which are not applicable to the broad description of the statutory purpose. To do so would not allow room for exercise of the kind of judgment by decision-makers (including this Court -formerly the Planning Tribunal) alluded to in the NZ Rail case."

Finally, after referring to the passage in *Trio Holdings Ltd* again quoted earlier, the Court said this:

"Application of section 5 in the way described in that passage from the Trio Holdings decision involves consideration of both main elements of section 5. The method calls for consideration of the aspects in which a proposal would represent management of natural and physical resources in a way or at a rate which enables people and communities to provide for their social, economic and cultural well being, health and safety. It also requires consideration of the respects in which it would or would not meet the goals described in paragraphs (a), (b) and (c).

The method of applying section 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the Act has a single purpose. Such a judgment allows for comparison of conflicting considerations in the scale or degree of them, and their relative significance or proportion in the final outcome."

In the third case *Aquamarine Ltd* v *Southland Regional Council*, Decision C126/97, the Court again adopted the overall broad judgment approach in reliance on both the earlier decisions. This was a case about a proposal to export fresh water from Deep Cove using large ocean-going tankers and again an assessment of several of the matters in Part II of the Act were critical to the outcome, which was to dismiss the appeal against the Southland Regional Council's decision and thus refuse the necessary resource consents for the proposal.

We think it is important to emphasise here that the broad overall judgment approach, particularly as it was articulated in the *North Shore City* case is not one involving a balancing of competing elements of section 5(2). It is a weighing rather than a balancing exercise. It is a matter of the weight that is to be given to the various elements of sustainable management in the context of the particular case. Obviously, in *Trio Holdings Ltd* for example the Court gave most weight to enabling experimentation with the growing of a particular type of sponge that was potentially very important for human

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health. In the *North Shore City* case in upholding in part the contested provisions of the regional policy most weight was given to the retention of the Okura Basin for future generations.

It is for these reasons too, that it is inappropriate to single out in advance, any particular element or elements of the meaning of sustainable management and give them some kind of primacy over others.

The broad overall judgment approach is the one now generally applied by the Environment Court. It is worth noting too that although the *North Shore City* case went to the High Court on appeal, Justice Salmon in that Court, can be taken, at least by strong inference, as approving this approach. The precise issue was not before him but of the Environment Court's approach to the application of section 5 (2) Justice Salmon said this: " *As to s.5 of the Act, the Court considered the relationship between the various elements of subsection(2) in the light of the decision of this Court in* ***New Zealand Rail Ltd v Marlborough District Council*** *[Then follows the quote earlier mentioned in this paper].Justice Salmon continued;*

"The Court (being the Environment Court) concluded that application of s.5 involves an overall broad judgment of whether a proposal will promote the sustainable management of natural and physical resources. That approach recognises that the Act has a single purpose. Such a judgment allows for comparison of conflicting considerations and the scale or degree of them and their relative significance or proportion in the final outcome."

To complete this discussion, we should refer to *Wakatipu Environmental Society v Queenstown Lakes District Council* (Decision C180/99) a more recent decision of the Environment Court concerning outstanding landscape values in the Wakatipu Basin. In this decision the Court expressed the view that the first part of section 5(2) is passive because the word *"enabling"* is used. To the extent that this may appear to be a departure from the broad overall judgment approach earlier discussed, it needs to be treated with caution. As well as the implied acceptance of that approach by Justice Salmon there is another High Court judgment that seems to acknowledge an active role for the whole of section 5(2). *Falkner v Gisborne District Council* [1995] 3 NZLR 622, was a case about common law rights to protect private property from the threat of coastal erosion and whether these are now subject to the regime of the Resource Management Act. In holding that they were Justice Barker said this; *"The Act prescribes a comprehensive, interrelated system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources. The whole thrust of the regime is the regulation and control of the use of land sea and air."*

CONCLUSION

The Courts are not required to take into account expressed views of legislators, the executive or their officials when interpreting a statute. It is interesting that the Courts have placed a different meaning on the import of section 5 from that expressed by the former Minister for the Environment. The decisions of the Courts endorse the role of the RMA as a conflict resolving statute, in the same vein as the preceding environmental statutes, in particular the Town and Country Planning Act 1977. This puts an onus on decision-makers (elected councillors, the Environment Court and the Minister for the Environment) to take into account, in an holistic integrated fashion, diverse values different groups place on the environment as a basis for decision-making about allocation and management of resources. Nevertheless, the views of the former Minister and his officials have been influential in shaping perceptions of district and regional council elected members and staff about the purpose of the Act. This may have had some bearing on the quality of the first generation of district and regional plans.

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