**BACKGROUND PAPER ON ENVIRONMENTAL SUSTAINABILITY IN NEW ZEALAND.**

**Topic: Sustainable Development in General – Institutional and Legislative Frameworks**

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## Section 1. Introduction

In New Zealand, the Resource Management Act 1991 ("RMA") and the Local Government Act 2002 ("LGA") provide the primary legal and institutional framework for sustainable development ("SD"). This is supplemented by around seven other pieces of resource/conservation specific legislation, which use the principle of sustainability, to varying degrees. [1] This law is, to some degree, framed by two broader government policy documents: the Environment 2010 Strategy and the Sustainable Development Programme of Action.[2] Beyond this body of 'conservation and environmental law' large sectors of law, affecting social, economic and cultural matters, remain untouched by the concept of SD.[3] This situation reinforces the conceptual view that SD is primarily 'about the environment'. This view is commonly depicted by the use of overlapping or interlocking circles, demonstrating limited integration between economic, social and environmental sectors ('weak sustainability').[4]

From a legal perspective, there is currently one potential (and important) exception to this legislative framework. In 2002, it became the statutory purpose of local government to promote the SD of communities. This new statutory mandate requires

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[1] Environment Act 1986, Fisheries Act 1996, Hazardous Substances and New Organisms Act 1996, Forests Amendment Act 1993, Energy Efficiency and Conservation Act 2000, Land Transport Management Act 2003 and the Building Act 2004.
[2] Environment 2010 Strategy (MfE, 1995) and *Sustainable Development for New Zealand: Programme of Action*, Department of the Prime Minister and Cabinet (2003) (referred to in this paper as *Programme of Action*). These documents are of a general nature although the *Programme of Action* is limited to the areas of water, energy, sustainable cities and children and youth.. There is also a range of specific strategy documents relevant to selected sectors, for example, the Biodiversity Strategy (no legal status) and the National Energy Efficiency and Conservation Strategy. The RMA provides for the creation of national policy statements but with the exception of the NZ National Coastal Policy Statement, none yet exist.
[3] This point was noted in *Creating our Future; Sustainable Development for New Zealand* (PCE, 2002), pg 93 (referred to in this paper as *Creating our Future*).
[4] *Creating our Future*, pg 34. See also, K Bosselmann "The Concept of Sustainable Development" in Bosselmann & Grinlinton (eds) *Environmental Law for a Sustainable Society* (NZCEL, Monograph Series: Vol 1, 2002) pg 81 at pg 91. Referred to in this paper as Bosselmann, 2002.

local government to promote the social, economic, environmental and cultural well-being of communities in the present and for the future.[5] This statement of SD does not explicitly require local government to pursue the four human well-beings in a manner that recognises and respects ecological constraints as a priority ('strong sustainability').[6] Nor does it explicitly require local government to move beyond their traditional primary focus on economic prosperity. However, it is suggested in this paper that the *potential* for this interpretation and application of SD exists under the LGA. If this potential was realised, New Zealand would have the opportunity to make real progress toward SD. This is particularly significant given the acknowledged SD role of local government (Agenda 21)[7] and central government's continued reluctance to make a significant commitment (in policy and law) to pursuing SD.[8]

This paper scopes selected issues relevant to the Review's objectives of; evaluating progress toward SD and exploring opportunities for enhancing progress. **Section 2** of this paper considers issues that arise out of the confused interface or relationship between the LGA and the RMA. The first set of issues are conceptual and process orientated. A fundamental problem that emerges is that SD risks being interpreted the same as (or synonymous with) the narrower concept of 'sustainable management' ("SM"). The result will be 'business as usual' i.e., a narrow environmental focus, with mitigation of the worst environmental effects, and no attempt to address the broader causes of unsustainable behaviour in society. The second set of issues relate to emerging governance tensions between local government and their communities (on one side) and central government (on the other). The problem here is that central government is at risk of frustrating legitimate community expressions of SD.

**Section 3** of this paper explores, at a preliminary level, a move from conservation and environmental law to SD law. This section is premised upon the view that for progress toward 'strong' SD to occur, then major legal transformations will be required.[9] NZ has, for example, made progress in developing its body of traditional environmental and conservation law,[10] but little to no progress in incorporating SD into non-traditional areas such as commercial, company and tax law.

This paper does not pretend to be an exhaustive analysis of the issues raised, nor to be more than a legal analysis. In particular, it is beyond the scope of this paper to evaluate the role of the RMA, explore debate about 'strong' *vs* 'weak' SD, and comment upon central government's lack of commitment to SD. Accordingly, it is suggested that this paper be read in association with: more comprehensive critiques of

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[5] LGA section 10.
[6] *Creating our Future*, pg 35 and Bosselmann, 2002, pg 91.
[7] Agenda 21, Chapter 28.
[8] Beyond the limited scope of the *Programme of Action*, central government has not made a clear commitment in policy or law to implement the state's international legal obligations to promote SD. Note however, that some legislation relating to SD does bind the Crown.
[9] *Creating our Future*, pg 34.
[10] With a few notable exceptions, such as the current failure to develop a National Oceans Policy together with implementing legislation. Other gaps include the absence of a liability and clean-up regime for contaminated sites pre 1991.

the RMA,[11] and the background paper on a National Sustainable Development Strategy.[12] The author of this paper is in agreement with the Parliamentary Commissioner's analysis of strong SD, contained in the 2002 report *Creating our Future*.[13]

**Section 2: The LGA and the RMA: Interface and Governance Issues**

**2.1 Interface:**

Sustainable management, as defined in the RMA, and SD are very different concepts. SM was always intended to be a narrow subset of SD, dealing only with the environmental effects of activities via performance standards. Decisions on social and economic issues were to be dealt with under different legislation.[14] When the LGA was introduced in 2002, the drafters of this Act would have been well aware of the distinction. Nevertheless, they went to considerable effort to weave SD (and not SM) into that Act. The purpose of the Act is to provide for "local authorities to play a broad role in promoting the social, economic, environmental, and cultural wellbeing of communities, taking a sustainable development approach."[15] To achieve this, a main purpose of local government is to: "promote the social, economic, environmental, and cultural wellbeing of communities, in the present and for the future."[16] This broad purpose is further emphasized by one of the Act's principles: [17]

"in taking a sustainable development approach, a local authority should take into account –

(i) social, economic, and cultural wellbeing of people and communities; and
(ii) the need to maintain and enhance the quality of the environment; and
(iii) the reasonably foreseeable needs of future generations."

These provisions attempt to ensure that SD is applied in management strategies, long term council community plans ("LTCCPs"), annual plans, and the various funding and financial policies required by the Act.[18]

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[11] An emerging legal literature on the RMA can be found in the New Zealand Journal for Environmental Law. See for example U Klein "Assessment of New Zealand's Environmental Planning Model" [2005] NZJEL Vol 9, pg 287. Many of the comments made in the PCE report: "Towards sustainable development, the role of the Resource Management Act 1991", (PCE environment management review No. 1)", remain valid.
[12] "Why Does New Zealand Need a National Sustainable Development Strategy"?, prepared for this Review by K Bosselmann.
[13] *Creating our Future*, 2002, pgs 34-36.
[14] See Nolan (ed) *Environmental and Resource Management Law* (3rd ed, LexisNexis, 2005), pg 93-94 (referred to in this paper as *Nolan*).
[15] LGA section 3(d).
[16] LGA section 10(b).
[17] LGA section 14(1)(h).
[18] LGA sections 93-107. See also Nolan, pg 45.

In addition to introducing the SD purpose, the LGA creates many opportunities and processes for public participation. These include the principles of consultation, special consultation procedures for LTCCPs, annual plans and decisions on significant matters.[19] Of particular note are the sections dealing with identification of 'community outcomes'. Section 91 states that this process provides communities with opportunities to discuss *their desired SD objectives and the relative importance and priorities for the achievement of those outcomes.*[20] Taken together, the SD purpose, coupled with the public participation processes, could be viewed as being consistent with the SD role of local authorities under Agenda 21.[21] Other LGA provisions are aimed at recognizing the status and role of strong democratic local government.[22]

As noted above, the LGA drafters would have been well aware that they were incorporating a concept much broader than SM. However, there is little evidence of an effort to reconcile the use of SD in the LGA with the use of SM in the RMA.[23] As will be seen below, this may have been because the Acts were considered to operate in separate spheres. Even if this was the view, SM is a subset of SD, and both Acts deal with the responsibilities of local government and public participation. A detailed explanation would have been logical and helpful.

SD is used liberally in the LGA, however it is only very generally defined as comprising the four well-beings, together with concern for present and future generations. It does not express a preference for strong or weak SD. It does not, for example, require local government to move beyond their traditional focus on economic prosperity. Nor does it explicitly require local government to pursue the four well-beings within ecological limits. This lack of preference means that the *potential* exists for local communities to make decisions about sustainability that are consistent with strong SD; i.e., to interpret SD in the LGA as facilitating strong SD planning. Thus the *potential* exists, for NZ to move beyond the limits of SM (as defined in the RMA) and make real progress toward SD. There are however, a number of impediments that block this *potential*. They are considered below.

**(i) A new purpose?:** When the LGA was enacted there was no real discussion of the significance of SD, as used in the Act. In particular, seminars and publications

[19] See generally LGA, Part 6.
[20] Section 91(2)(a) and (b). See also section 91(2) (c)-(e).
[21] Chapter 28.
[22] LGA section 3 provides that a purpose of the Act is to provide for democratic and effective local government. Section 10 (a) provides that a purpose of local government is: " to enable democratic local decision-making and action by, and on behalf of, communities." Section 12 confers on the local authority the status and powers of a body corporate with perpetual succession and full capacity to act for the benefit of its district or region.
[23] According to Professor Palmer, the LGA purpose was clarified, by the addition of SD, following representations after the 2002 World Summit on Sustainable Development. K Palmer, "Local Government Act 2002 - some preliminary observations" (2003) 5 BRMB, 1.

generally overlooked the new SD purpose of local government.[24] As a result, a very important opportunity to change the culture of local government was missed. Providing for economic prosperity remains 'core business' and the broad SD purpose is viewed with some suspicion. It potentially raises the expectations of communities and presents a funding problem.

This lack of appreciation concerning the new SD purpose is important at all levels of local government; political, bureaucratic, and community. Community boards, for example, are advocates for their communities.[25] They will not operate effectively in this role if they do not understand the SD purpose. They will not be able to respond appropriately to community submissions, nor educate their communities. As pointed out in a comprehensive report on SD in NZ, the education and knowledge of local communities is critical to achievement of SD.[26]

The extent of disengagement with SD under the Act is perhaps epitomized by a comment made this year at a conference on Local Government Law.[27] An experienced local government lawyer commented that from her clients point of view, SD was the same as SM. The implication here is that SD becomes tainted with all the limitations of SM, and 'business as usual' continues unabated.[28] Alternatively, local government may consider that all necessary environmental matters are to be dealt with under its RMA plans leaving LTCCPs to primarily focus on other matters. Either way, a valuable opportunity to progress SD is seriously compromised.

These problems of lack of appreciation for the new SD purpose and/or equating it with SM mean that the chances of communities using LTCCPs to express a view of strong SD are impeded. This situation is compounded by at least three further factors. First, the emphasis given by councils to Agenda 21 appears to be diminishing.[29] Second, the LGA's weak public participation provisions,[30] including the non-

[24] See for example V Wilson & J Slater *A Guide to the Local Government Act 2002* (2003) pg 7.
[25] LGA section 52.
[26] S Knight and PRISM *Sustainable development in New Zealand: here today, where tomorrow?* (PRISM, 2000). This point is also made in the PCE's report on education: *See change: learning and education for sustainability* (PCE, 2004).
[27] LexisNexis Local Government Conference, Auckland, April 2006.
[28] Mike Reid, of Local Government New Zealand, commented at the same local government conference that there was no noticeable change in the functions and activities of local government, under the LGA.
[29] It is difficult at present to identify the number of councils expressly pursuing Agenda 21. It seems that both the Ministry for the Environment and Local Government New Zealand have lost their leadership on Agenda 21. One comment is that more focus is now placed on the *Programme of Action*. Nine NZ councils are currently members of ICLEI – Local Governments for Sustainability. A further nineteen councils are members of ICLEI's CCP-NZ (Climate Change Programme – NZ). Membership numbers provided by Ms D Shand, Director, CCP-NZ (September 2006).
[30] Local government can, for example, respond to LTCCP submissions in a generic manner, and not give specific and full reasons for their decisions. Under the RMA, councils are required to give full reasons for their decisions and deliver a reasonable

mandatory nature of community outcomes[31] and the lack of appeal opportunities.[32] Third, the audit provisions only provide for a financial audit with no requirement for an independent SD audit.[33] As a result of all these factors, it is not difficult to draw the inference that the LGA is legislation for council officers and politicians, rather than for communities. Further, that LTCCPs represent a local authorities view of what it wants to deliver and at what cost, with very little focus on SD.[34] Verification of this would, however, require analysis of a broad selection of LTCCPs prepared by both regional councils and territorial authorities.[35]

**(ii) Separate Acts?:** The lack of effort to reconcile SD with SM at the time of enactment has lead to a number of 'after the fact' attempts to explain or rationalize the interface between the LGA and the RMA. Thus far the efforts have been rather confused and piecemeal.[36] They have the appearance of a 'retrofit' perhaps reflecting a failure to conceptualize the interface during drafting. It is no surprise then that agreement on the relationship between the two Acts (and their various statutory documents) does not exist.

The official view is that environmental outcomes identified in an LTCCP cannot be taken into account in making plan changes, plan reviews or resource consent decisions.[37] This should be contrasted with the view, expressed by Ass. Professor Ken

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decision. There are rights of appeal to the Environment Court and High Court. See *Nolan*, pg 196.

[31] LGA section 96 and section 92.

[32] Appeal is only available by way of judicial review before the High Court.

[33] Auditors are prohibited to comment on policy content of LTCCPs, LGA section 94. There is precedent internationally for independent and specialist SD/Environmental Audit Agencies.

[34] "The danger is that planners will write plans for the auditors rather than plans for communities." M Reid, C Scott, J Mc Neill " Strategic Planning under the Local Government Act 2002: Towards Collaboration or Compliance?" (2006) 2 Policy Quarterly,18 pg 24.

[35] Preliminary research of a selection of LTCCPs shows that they make reference to SD but the descriptions of how SD was to be implemented indicated a very limited understanding of SD and/or pursuit of weak SD. The Auckland Regional Council consultation paper on the Draft LTCCP has a heading 'SD for Auckland.' However it reads: "Promoting the SM of the Auckland Region's natural and physical resources is a key ARC role." (pg 3). Further: "Planning for the Future. Plans and policy statements are developed with all interested groups to promote the SM of the Auckland region's natural and physical resources."(pg 9) Region Wide, Special Edition, Your Region, Your Future Draft Long Term Council Community Plan 2006 - 16, April 2006.

[36] **http://www.qp.org.nz/related-laws/faq-rma-lga.php.**

[37] **http://www.qp.org.nz/related-laws/faq-rma-lga.php.** This view was reinforced by LGA Amendment Act 2004 section 9 which arose as a result of Ass. Professor Ken Palmer's view that certain resource consent applications should first be the subject of special consultative procedures under section 76 of the LGA: K Palmer "Decision Making Under the LGA-Impact on RMA Procedures "(2003) 5 BRMB, pg 16 at 17. The 2004 amendment attempts to clarify that this is NOT required.

Palmer, that the LGA overlays the RMA.[38] In his opinion, SD (as articulated in LGA documents) "will directly influence the content of regional policy statements, and regional and district plans under the RMA."[39] Professor Palmer is of the same opinion in respect of certain resource consent applications, even taking into account recent LGA amendments.[40] Palmer cites implementation of the Auckland Regional Growth Strategy, via RMA plan amendments, as an example of integration that can, and is, occurring.[41]

Most commentary on the relationship between the two Acts focus on the possibility of the LGA influencing RMA instruments. *This is logical given that the broader concept of SD could lend RMA plans much needed strategic direction.* RMA processes for monitoring, reporting and compliance could also lend SD greater efficiency than currently available under the LGA. However there is no reason in theory why this could not also operate in reverse; i.e.; RMA plans could inform the content of the LTCCP and this would make sense given the extent to which RMA plans are the product of extensive public participation and reflect community views on environmental matters.

The failure to allow for integration between LTCCPs and RMA plans also has some very practical implications for communities. Even if communities do manage to get some appropriate SD provisions into LTCCPs there is no flow on to RMA plans. When RMA plans come up for review (for example), communities are *again* faced with the task of attempting to get appropriate recognition of SD.[42] This time via RMA processes.

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[38] K Palmer "Decision Making Under the LGA-Impact on RMA Procedures "(2003) 5 BRMB. See also S Curran "Sustainable Development v Sustainable Management: The Interface Between the Local Government Act and the RMA " (2004) 8 NZJEL, pg 267 at 282-289 and pg 293-4. Curran thinks that both policy and procedure will be affected by the LGA, but also considers that the ability of an SD approach (under the LGA) to effect change to 'business as usual' is uncertain as " a cultural change and a swift environmental education within the country's local governments" will also be required; (pg 288).

[39] *Nolan*, pg 45. Note also the view expressed on the Ministry for the Environment website: "All council activities including those required under other Acts, are expected to contribute to the achievement of community outcomes. This sort of alignment may take time. For example, district plans may not become aligned until they get reviewed 10 years after they become operative." www.mfe.govt.nz/withyou/envwellbeing/index.html (accessed October 2006).

[40] Palmer indicated, in a conversation with the author, that he did not think the 2004 amendment had changed the situation.

[41] *Nolan*, pg 45. LGA 1974, section 37SE-37SH, and Local Government (Auckland) Amendment Act 2004. The example is analogous only. The Auckland Regional Growth Strategy was not developed within the framework of either the RMA or the LGA.

[42] This seems to be happening in the case of the current review of the Hauraki Gulf Islands District Plan. Some community members are preparing submissions to

Preliminary research (and much more is needed to verify this) indicates that the default position adopted regarding the interface between the Acts is that they are treated as separate, and no integration is attempted in either direction. This situation has created a vicious circle; LTCCP processes are overlooked or ignored because they are not perceived as a useful vehicle for facilitating change and progress toward SD. Because they are perceived in this way, their potential is not realized or judicially tested.

As noted above, separation between the two Acts is also important at the level of resource consent processing.[43] The lack of integration raises the prospect of key development decisions being categorized as RMA decisions only. As a consequence they will be dealt with using RMA public participation processes. This effectively bypasses the more extensive 'special consultation' procedures for significant decisions, under the LGA.[44] A number of issues arise here. First, questions of 'need' and 'equity' are not relevant under the RMA, but they could be taken into account under the LGA[45] (see below comment). Second, the RMA only enables very limited consideration of economic and social matters, due to the definition of environment.[46] These matters could be given considerably more attention under the LGA. Third, communities are left fighting development in a very adversarial forum. The result is often only incremental changes to development proposals.[47] Developments are not subject to a comprehensive SD audit under the RMA.[48]

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enhance the limited extent to which the proposed plan currently deals with SD matters.

[43] K Palmer, "Decision Making Under the LGA-Impact on RMA Procedures" (2003) 5 BRMB, 18.

[44] LGA sections 82 and 83. The dispute over removal of trees in Queens Street was almost a case in point. An injunction was sought on the basis that Auckland City Council should have used LGA special consultation procedures. However, the point was never decided as the dispute was settled by negotiation. See also D Grinlinton, Editorial, "Consultation, ethics, and the exercise of council discretion-getting the balance right." (2006) 9 RMB pg 96. While there was no blanket protection for the trees in the Central Area Plan, Grinlinton argued that a major project costing over $30 million constituted " special circumstances" justifying public notification under s 94 (5) RMA, and would also trigger the LGA special consultation principles under LGA sections 76-78. Also see Report, New Zealand Herald 02.01.06 , Citizens go to court to save Queen St trees by Bernard Orsman " Lesley Max [applicant] said the Council did not seek or heed the views of Aucklanders when it sought resource consent to remove the exotic trees and replace them with natives as part of the $30 million Queen St upgrade."
http://www.nzherald.co.nz/section/story.cfm?c_id=1&ObjectID=10362175

[45] See comment below in para (a).

[46] Section 2.

[47] Described by one experienced practitioner as getting to 'YES'.

[48] This raises the complex issues regarding the adequacy of assessments of environmental effects, under the RMA.

This section has argued that the strong SD *potential* of the LGA is, and looks set to remain, largely unrealized.[49] In terms of NZ's progress toward SD this is disappointing. However, the situation moves from disappointing to alarming when the various limitations of the RMA are taken into account. It is beyond the scope of this paper to review the RMA. The comment below highlights some historical features and recent trends which demonstrate how difficult it is to use the RMA to effect change. The purpose is to demonstrate that, when taken together, they compound the limitations of the LGA described above.

In 1998 Phil Hughes commented: "[t]he Act focuses on managing the effects of any activity instead of prescribing what activities should or should not be allowed to take place in specific areas."[50] There are many reasons for this including lack of political will, pre-existing property rights (and lack of agreement in how to deal with these), lack of national guidance and the definition and application of SM. All in all, as many have noted, the RMA does not challenge the status quo but results in mitigation of the worst environmental effects of activities. Paragraphs (a) to (j) below highlight some specific problems with the RMA.

a. Section 5(2) "need": ever since the 1995 Board of Inquiry decision on the Stratford Power Station application, the issue of need has been ignored. The Board argued that the applicant was required to show the "need" for the proposed power station in terms of demand and choice of technology. The issue of need, coupled with an obligation to "avoid" adverse effects, enabled the Board to suggest that consideration be given to; whether electricity demand could be provided for by an alternative means that did not result in carbon dioxide discharge.[51] The Minister for the Environment rejected this interpretation: "[t]he Act's purpose is to allow people and communities to provide for their well-being however they may view that, while ensuring that certain environmental bottom lines … are observed."[52] It is suggested that this treatment of "need" has created a gap that is hard to bridge via strategic plans and resource consent provisions.[53] In contrast, the LGA could provide the opportunity for communities to consider "need".[54]

b. environmental compensation: is negotiated between developer and council or developer and potentially affected person, to offset adverse environmental effects

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[49] Note however that large ethical and cultural changes rarely occur in response to legislative change. They are much more effective it they occur in tandem with major ethical and societal change.
[50] P Hughes "The Contribution of the RMA 1991 to Sustainability – A Report Card After Eight Years.", in (2000) 3 BRMB pg 147.
[51] Quoted in the Ministers consent decision Paras 24-26.
[52] Ibid, paras 66 and 68.
[53] The issue of " reasonable necessity" is relevant to designations, RMA section 171(1)(c).
[54] Equity is not considered under the RMA, and only limited use is made of future generational equity under section 5(2) (a). J Milligan "Equity in the RMA: Section 5 and a 'Capability" Approach to Justice" (2000) 4 NZJEL 245 at pg 250, states that an equitable redistribution of resources has never been a feature of statutory planning or resource management, and that "the Act cannot ensure a sweeping victory for equity and social justice even in the 'capability' sense." (pg 255).

which the developer can not or does not wish to avoid, remedy or mitigate. Commentary has identified a range of problems with this practice, both in relation to notification and the substantive decision.[55] A new aspect of environmental compensation potentially enables the offsetting measures to occur in areas that are geographically and ecologically remote. These “deals” could have significant implications for plan integrity, public confidence and environmental outcomes.

c. avoid, remedy and mitigate: since the Stratford Decision in 1995 these words have NOT been treated as a hierarchy although this is by no means clear applying rules of statutory interpretation.[56] The implication of not treating them as a hierarchy is that the consideration of alternatives, which might occur if there was a requirement to “avoid”, does not occur. The emphasis is almost always of what mitigation measures can be or are offered. This aspect of the Act epitomizes the limitations of SM, in contrast with strong SD. Mitigation for ecological harm is, in many instances, a contradiction and tantamount to paying for an acceptable level of degradation. It also fails to promote the important SD directives of “prevention” and “restoration”. Further, the problems with mitigation are now compounded by changes to the law regarding cancellation of consent conditions.[57]

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[55] Examples include: purchase of consent, lack of compensation for long-term amenity loss, location of dirty industry in poor communities, and the problem of application of cash payments, since there is no mechanism to prevent cash payments being used for private enrichment or to benefit the users of developments. See B Gleeson, “Where Gold Speaks: Ethical Dilemmas Arise” (1994) PQ, 12. See also Ass. Professor Palmer’s comments on *Royal Forest and Bird Protection Society v Buller District Council* (High Court, Christchurch, CIV 2005 – 485- 1240) in (2006) 6 RMB, 136. The Judge accepted the Environment Court’s comment that the term mitigation could be used to cover minimization, mitigation and compensatory measures. See also Contact Energy Annual Report 2006, pg 21; the Wairakei Environmental Mitigation Charitable Trust administers $1 million from Contact Energy as part of its resource consent conditions for geothermal energy generation. One trust project is the poisoning of wilding pines to protect ferns and orchids. Serious adverse effects on nearby small shopping centres were identified in the Sylvia Park shopping complex application. The developer offered $1,000,000 in mitigation, to be spent on those centers (in addition to roads, a train station and other works on or near the site.) In *JF Investments Ltd v Queenstown Lakes District Council* (Envt Ct, Chch, Decision No C48/2006, 27 April 2006, Judge Jackson) the Court attempted to set out criteria for environmental compensation to address public participation, transparency and off-site offers.
A similar problem arises with bonus provisions in district plans that encourage private provision of public amenities in return for additional floor area. Such provisions often result in more gain to the developer than to the public.

[56] P Taylor, “The Stratford Power Decision”, PQ June (1996) pg 3.

[57] Applicants can agree to conditions on the basis of which submitters may consent to a development. Section 127 (1), as amended by section 53 RMA Amendment Act 2003, now makes it easier for developers to apply for a cancellation or change to conditions. They do not have to show that a change in circumstances has caused the condition to become inappropriate or unnecessary. This was a requirement of the previous section 127 (1) (b)). The rights of submitters are limited (section 53 (3)).

d. ‘first come first serve’: the weaknesses of the ‘first come first serve’ approach to planning, that operates in the absence of adequate management plans, were recently recognized with respect to aquaculture and the Waitaki River. Both instances lead to significant amendments because of their national significance.[58] More often resource consent applications must be processed on a ‘first come first served’ basis that prevents full consideration of most beneficial, efficient or equitable use of a resource. Difficulties can arise with new technologies enabling activities and projects not envisaged in the initial planning for the area. RMA procedures do not allow local authorities to make a quick response. Further, section 77C states that activities not provided for in plans will be treated as discretionary, rather that the more restricted category of non-complying.[59]

e. Ministry for the Environment (MfE) Reporting: it is acknowledged that creation of SD performance indicators, and reporting against such indicators, is still in its infancy.[60] However, the primary focus of reporting, encouraged and required by MfE, is on process performance.[61] Too much emphasis on process risks a loss of focus on the importance of environmental outcomes.[62]

f. “overall broad judgment approach”: The Environment Court interprets SM (section 5) as involving a “overall broad judgment” of whether a proposal would promote the SM of natural and physical resources. Such a judgment allows for a comparison of conflicting considerations in the scale or degree of them, and their relative significance or proportion in the final outcome.[63] However, the significance of adverse effects alters according to the local, national, or international perspective. In the absence of statutory documents such as national policy statements and national environmental standards, it is very difficult for local decision makers to draw upon international SD commitments and developments.[64] Other comments in relation to the “overall broad judgment approach” and international commitments are made below.[65]

g. SM a sword or shield?: it is possible to use SM as a sword for development. Applicants can, and do, argue that the economic benefits (e.g. revenue, employment, profit) mean that once mitigation is taken into account, SM is achieved. The problem here is that the economic benefits accruing to a few cannot always compensate for

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[58] Aquaculture Reform (Repeals and Transitional Provisions) Act 2004 and the Resource Management (Waitaki Catchment) Amendment Act 2004.
[59] Introduced by the RMA Amendment Act 2003, section 34.
[60] Statistics NZ are currently attempting to develop SD indicators for NZ, see www.stats.govt.nz/environment/sustainable-development/default.htm
[61] This emphasis is compounded by use of performance payments by some NZ councils.
[62] See Key Facts About Local Authorities and Resource Consents 2003/2004 www.mfe.govt.nz. Recent figures suggest that state of the environment monitoring by territorial authorities is very limited. This is despite the statutory obligation under RMA section 35.
[63] *North Shore City Council v Auckland Regional Council (Okura)* [1997] NZRMA 59.
[64] See *St Columba’s Environmental House Group v Hawkes Bay Regional Council* [1994] NZRMA 575.
[65] See Section 3.

environmental degradation that affects all. This also raises some important equity issues about fairness to present and future generations. In respect of the former, Sharon Beder points out that: "[p]oorer people tend to suffer the burden of environmental problems more that others do."[66] Again, these are issues that should be addressed by SD, but seemingly not under the RMA.

h. lack of national guidance: the absence of national guidance has been commented upon many times.[67] The common view is that it has deprived local communities and their local authorities of much needed guidance that would have enabled them to consider broader issues than arise via a resource consent application. The policy confusion that can result is well illustrated by Environment Court decisions attempting to deal with climate change issues both pre and post 2004.[68]

j. 2005 RMA Reforms: A number of reforms were introduced which, together with earlier legislation on specific environmental issues, increase the opportunity for central government intervention[69] and potentially limit public participation.[70] Other amendments tighten up integration between plans by requiring statutory documents above them (in the hierarchy) be "given effect to".[71] These amendments, taken together with new resource specific legislation,[72] indicate a tightening of central government control, the potential reduction of integrated resource management. Both can militate against diversity in communities. In 2001 Justice Randerson warned of this trend. He looked at the highly fragmented approach of pre RMA legislation and

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[66] See S Beder, "Costing the Earth: Equity, Sustainable Development and Environmental Economics" (2000) 4 NZJEL, 227-228.

[67] See for example, D Grinlinton "Contemporary Environmental Law in New Zealand" in Bosselmann & Grinlinton (eds) *Environmental Law for a Sustainable Society*, NZCEL, Monograph Series: Vol.1, pg 19, 37.

**[68]** *Environmental Defence Society (Inc) v Auckland Regional Council* [2002] NZRMA 492; *Environmental Defence Society (Inc) v Taranaki Regional Council* (A/84/2002); *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541, 543.

[69] See for example, Resource Management Amendment Act 2005, section 79 which introduced new Ministerial powers to intervene under section 141A. More generally, central government intervention may be direct through legislation which restricts the ambit of a local authority power (as in climate change) or indirect by appointing another body to deal with the issue, such as the Environmental Risk Management Authority. The SD purpose is affected by the splitting of responsibilities for the administration of environmental statues among a number of government departments which have different objectives. This reduces the integration that is necessary for SD.

**[70]** For example, the NPS process section 46A(1) (a) and (b): the Minister may decide not to use the Board of Inquiry process, so that a policy statement may be created by a faster process, (section 46A (2)). The public must still be given time to make a submissions, but this may not include an opportunity to be heard. RMA Amendment 2005 enables an NPS to direct that plans are changed through the First Schedule process or a non-notified hearing (RMA Amendment Act, section 35). This avoids the public process of the RMA plan change procedures**.** Public participation is also reduced if the Ministerial call-in powers are exercised and matters are referred directly to the Environment Court under section 141B.

[71] See for example, RM Amendment Act 2005, section 46**.**

[72] Climate Change Response Act 2002.

emphasized the need to ensure: "…that fragmentation does not re-occur by splitting off some aspects of resource management from the RMA. That would have the effect of destroying the ability to consider the effects of development in a holistic way and would be plainly undesirable."[73] He pointed out that the: "RMA represented a deliberate stepping back by central government in its involvement with the implementation and administration of the legislation. In particular, Ministerial control over the contents of regional schemes under the 1977 Act was abandoned."[74] The removal of critical cross-cutting issues such as climate change from the RMA is particularly regrettable.[75]

To conclude, the purpose of this short review of RMA limitations was not to comprehensively critique the RMA, but to demonstrate how selected limitations compound the problems with the LGA. Taken together they raise serious concern about the ability of the legislative framework to progress SD in NZ.

**2.2 Governance:**

The fundamental governance issue is that the LGA power of general competence[76] has largely freed local government from the straight jacket of the Local Government

[73] Randerson, AP, Hon. Justice, Address to RMLA Seminar 2001, pg 4.; www.rmla.org.nz accessed in April 2006.
[74] Ibid, pg 5.

[75] Under the Resource Management (Energy and Climate Change) Amendment Act 2004, three new matters were inserted into section 7, Part II of the RMA:"(ba) – The efficiency of the end use of energy;…
(i) – The effects of climate change; and
(j) – The benefits to be derived from the use and development of renewable energy". However pursuant to S 70A, when making a rule to control the discharge into air of greenhouse gases under its functions under section 30(1)(d)(iv) or (f), a regional council must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either— a) in absolute terms; or (b) relative to the use and development of non-renewable energy. The same constraint applies under section 104E when considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B relating to the discharge into air of greenhouse gases. Removal of resources from the RMA can also create strange inconsistencies. For example, there is no SD purpose to the Climate Change Response Act, but section 51 enables any principles or matters relating to the Convention or the Protocol to be incorporated by reference, which gives an opportunity for SD. There is also an inconsistency with the provisions in the Energy Efficiency and Conservation Act 2000. This Act requires consideration of: human well-being, maintenance and enhancement of the quality of the environment, and the reasonably foreseeable needs of future generations; section 6.

[76] LGA section 12.

Act 1974.[77] Subject to statutory safeguards,[78] it is no longer necessary to attain Parliament's sanction for every action not expressly provided for in law. On the face of it, this new power of general competence is consistent with Agenda 21 and recognition of strong local self government. It is also consistent with the principle of subsidiarity and theories on multi-level environmental governance. The latter requires a sharing of competence between central and local government to achieve SD.[79] Taken together with the broad definition of SD, local government and their communities have huge scope to decide what SD means to them and how they will recognize, implement and promote it.[80] There is evidence that this is happening to some degree. The Far North District Council received some 170 anti-GMO land use submissions, indicating that it is an important SD issue in that community.[81] The potential problem arises from the lack of constitutional protection for the competence of local authorities.[82] As a consequence, local government is still very vulnerable to central government intervention. This lack of legal protection, coupled with the traditional 'superior' attitude of central government, creates the prospect for unhelpful tension and potential frustration of local community aspirations.

There is already some evidence of this occurring in three areas.

First, there is a long running disagreement between central government and some local authorities concerning competence to regulate GMOs. It is central government's position that they have exclusive competence under the Hazardous Substances and New Organisms Act.[83] Local authorities dispute this and argue that they can use land use provisions in district plans to regulate.[84] This dispute is still to be resolved. However, it is interesting to note recent legal interpretation of, and statutory amendment to, RMA provisions classifying activities as 'prohibited'.[85]

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[77] LGA 2002 gives local authorities a different role and status and so more discretion in activities and procedures than the LGA 1974( and its many amendments) which prescribed in detail the mandatory local government functions.

[78] The powers must be exercised subject to other provisions in the LGA 2002 (e.g., section 14 principles), other Acts and the general law. They must also be exercised for the benefit of the district (section 12 (4)). Governance must be open, transparent and democratically accountable, take account of diversity and the interests of future as well as current communities, use sound business practice, and take a SD approach.

[79] P Taylor "Who has the Power? Challenging traditional state authority to regulate GMOs in New Zealand" (2006) 8 Environmental Law Review 175.

[80] P Taylor "The Local Government Act 2002: Creating the Potential for a New Constitutional Relationship between Local and Central Government?" (2004) BRMB pg 4.

[81] In contrast, central government seems to treat GMOs more as a national economic issue; P Taylor "Who has the Power? Challenging traditional state authority to regulate GMOs in New Zealand" (2006) 8 Environmental Law Review 175.

[82] Ibid pg 179-182. Nor is the LGA 2002 entrenched legislation.

[83] Ibid pg 182.

[84] Ibid pg 184.

[85] RMA section 77C(3). See for the standard of proof required for an activity to be prohibited: *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development* [2005] NZRMA 497.

Second, some of the RMA 2005 amendments, enabling central government intervention, resulted in strong critical submissions from Local Government New Zealand.[86] Recent research has suggested that most territorial authorities do not favour central government policy direction. Further, the LGA is perceived as having given the opportunity for local approaches to SD.[87]

Finally there is the example of climate change amendments. The Resource Management (Climate Change Amendment) 2004 removed consideration of emissions from the air discharge consent process.[88] This has left authorities in the contradictory position of planning for the *effects* of climate change but with no control over discharges. Further, the lack of a National Policy Statement still potentially limits land use planning aimed at minimizing activities contributing to climate change.

**SECTION 3: From environmental and conservation law to sustainable development law**

This section is premised upon the view that if NZ is to make real progress toward strong SD, then a set of *inter-related legal transformations* (together with other changes) will need to occur. This legal transformation is outlined below, under a series of headings. It forms a small part of a much broader debate about the role of law in securing an ecologically and socially sustainable relationship between humanity and nature. As the authors of a recent book point out, the relationship between environmental law and sustainability operates in at least two directions. First, it may have an impact on sustainability, in terms of whether it helps to move societies toward ecologically sustainable patterns of production and consumption. Second, it may have an impact on the substance of the law leading to preferences for some legal doctrines, institutions or instruments.[89] This section addresses the second of these directions, and complements (but does not repeat) existing conceptual work which attempts to develop a jurisprudence of SD and a set of guiding ethical and legal principles.[90]

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[86] LGNZ Briefing Paper to incoming Minister of Local Government; "Empowering Local Roles: Key policies sought from the incoming government of New Zealand" LGNZ (July 2005).

[87] A Memon and T Gavin, " Potential of LGA2002 as a Vehicle to Promote Sustainable Settlements" **http://.lgnz.co.nz/projects/Sustainable Settlements/Ali_Memon. pdf** , accessed on 18 August 2006.

[88] See above n 75. There are, however,s many good reasons for local authorities to be involved in the permitting of discharges; see Bosselmann, Fuller and Salinger "Climate Change in New Zealand: Scientific and Legal Assessments" NZCEL, Monograph, Series: Vol 2. J Fitzsimons is promoting a private members bill to return competence to local government authorities; Resource Management (Climate Protection) Amendment Bill.

[89] Richardson & Wood (eds) *Environmental Law for Sustainability* (Hart Publishing, 2006) pg 13.

[90] K Bosselmann "A Legal Framework for Sustainable Development" in Bosselmann & Grinlinton (eds) *Environmental Law for a Sustainable Society*, pg 145-16 (NZCEL, Monograph Series: Vol 1, 2002) and K Bosselmann "Ecological Justice and Law" in B Richardson & S Wood (eds) *Environmental Law for Sustainability* (Hart

(i) *transforming existing conservation/environmental law*: as noted above, in addition to the RMA and LGA, NZ has around seven other pieces of resource/conservation specific legislation which use the principle of sustainability.[91] However, much of this legislation is modelled upon the narrow concept of SM rather than the much broader concept of SD (see Section 2 above). As a consequence, *many of the limitations of using SM under the RMA may well emerge under other legislation*. In particular, it is concerning that the 'overall broad judgement approach' adopted by the Environment Court is coming dangerously close to re-introducing trade-offs between economic and environmental costs and benefits. This can result in ecological constraints (or bottom lines) only being a limit to 'development' in the most obvious circumstances, (e.g, where large and sensitive ecosystems are clearly threatened).[92] A related problem is the inability of land use planning instruments to ensure that activities, collectively and individually, are consistent with ecological integrity.[93] More specifically there are emerging issues regarding the lack of consistent interpretation of legal principles such as the precautionary principle[94] and the emergence of private property rights in common resources.[95]

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Publishing, 2006) pg 129-163. See also Cordonier Segger & Khalfan (eds) *Sustainable Development Law* (Oxford University Press, 2004).

[91] Above n 1.

[92] Compare, for example, the outcomes in the *North Shore City Council v ARC* case (above n 63) and in *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* (High Court, Chch, CIV 2005 – 485-1240, 21 December 2005, Panckhurst J). The 'overall broad judgement approach' is largely consistent with weak SD as it treats each sphere (environmental, social, economic) as of equal importance. Trade-offs can be made between spheres, enabling improvement in one atone for degradation of another.

[93] In the case of land use, consider the growing environmental effects of the dairying industry which are primarily dealt with on a case by case basis. Incremental development of the Waitakere Ranges has lead to efforts to protect the Ranges by the introduction of new legislation; Waitakere Ranges Heritage Area Bill. In the case of water resources, prior to the creation of water management plans, permits have been issued on a first come first serve basis.

[94] The RMA and the Hazardous Substances and New Organisms Act 1996 ("HASNO") both incorporate the precautionary principle. However, they are formulated differently and are therefore open to differing interpretations. For a recent comment on the statement of the precautionary principle within HASNO, see A Hayward "The Hazardous Substances and New Organisms Act, Precaution, and the Regulation of GMOs in New Zealand" [2005] NZJEL Vol 9, 123.

[95] See for example, the *Aoraki Water Trust and Ors v Meridian Energy* CIV 2003 476 000733, High Court, 30 November 2004. See also RM Amendment Act, section 59 to the effect that decision makers, under section 104, must have regard to "the value of the investment of the existing consent holder." For a discussion of the emergence of property rights over water, see P Milne; "Allocation of Public Resources under the RMA: Implications of *Aoraki Water Trust v Meridian*" [2005] RM Theory and Practice, 146. Note also that the quota system for commercial fisheries has been

While we are familiar with many of these issues under the RMA and in the context of terrestrial systems, their impacts may be much less obvious (but no less damaging) if repeated in respect of marine ecosystems under the aquaculture law reform and any new legislation to implement the final National Oceans Policy.

Transformation of existing conservation/environmental law would also need to consider the *limitations of resource conservation legislation dealing with specific resources* and taking a 'sustainable yield' approach. The fisheries quota system, for example, has focused on controlling extraction rates of specific stock in designated areas but has ignored the broader ecological impacts of this 'sustainable yield' approach. The recently introduced Strategy for Managing the Environmental Effects of Fishing[96] is a move in the right direction, but serious consideration needs to be given to providing binding legal protection to the maintenance of ecosystem carrying capacity and resilience (i.e., ecological integrity), as a priority.[97]

Another aspect of transformation would be consideration of how to better integrate resource use *with issues of quality of life, and unsustainable patterns of production and consumption (in particular the problem of waste) into law*.[98] An objective here would be to move beyond the perception that conservation/environmental law is about nature protection and limiting the environmental impact of development, to a new understanding that law must also address the fundamental interconnected social and economic causes of ecological degradation.[99]

*(ii)* *transforming non-environmental areas of law:* SD requires integration across diverse sectors, that are potentially conflicting. If this is to be more than a limited exercise in making our political, economic and social

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treated by the industry as creating property rights. Government regulation of quota is being treated as an abrogation of property rights.

[96] The Strategy for Managing the Environmental Effects of Fishing was created in 2005 but much of the implementation detail for this Strategy has yet to be finalised. Most commercial fish are currently being extracted at close to their maximum sustainable yield, based on information about the stock rather than broader ecosystem impacts. The Ministry of Fisheries has also taken recent action on bottom trawling by closing some areas to this fishing technique.

[97] This is an attempt to move away from the utilitarian notion of resource conservation; the use of natural resources for the greatest number for the longest time.

[98] The Waste Minimisation (Solids) Bill is a partial attempt to rectify this gap.

[99] In this respect, Principle 7 of the Earth Charter is helpful: "Adopt patterns of production[and] consumption … that safeguard Earth's regenerative capacities, human rights, and community well-being." Sub-principles include: (i) reduce, reuse and recycle materials ensuring the assimilation of waste by ecological systems; (ii) act with efficiency and restraint in using energy; (iii) promote environmentally sound technologies; (iv) internalise full environmental and social costs; (v) adopt lifestyles that emphasise the quality of life and material sufficiency in a finite world.

systems more ‘environmentally sensitive’, *then a much greater range of legal instruments, will be required. Tax, energy, banking, company, transport, public health and safety, housing,*[100] *fiscal investment, trade, constitutional and social justice law are all areas of law that need to be carefully examined.*[101] This much more comprehensive approach to integrating SD into law is consistent with strong SD; i.e., fundamental institutional and policy change, across all sectors, to maintain the ecological basis of well-being.[102]

The following paragraphs touch on a few examples from tax, company and public health law.

Much work has been done internationally, concerning the advantages and disadvantages of ecological tax reform. It is beyond the scope of this paper to traverse this literature, beyond mentioning a few examples and noting that much more work needs to be done to investigate ecological tax reform in NZ.[103] First, there are suggestions, that tax reform can make significant contributions to reducing *consumption* of resources and energy. The objective here is to prevent improvements in energy/resource efficiency (and associated environmental and social effects) constantly being out-weighted by increases in overall consumption. Second, tax credits and funding programmes can have a positive influence on encouraging the development of and a shift toward, new technologies. Third, direct and indirect subsidies can assist transitions in behaviour when adequate and appropriate alternatives exist. One specific suggestion is to amend the Local Government (Rating) Act 2002 to lower the rates burden for land-owners using sustainable land management techniques.

Moving from tax law to company law, suggestions for transformation include making State Owned Enterprises, other Crown companies, and the range of local government trading organisations[104], responsible for making a positive contribution to SD, via their corporate intents. This could be done by providing that economic prosperity may be pursued, but not in priority to ecological and social well-being. This reform merits particular attention in NZ given the role of State Owned Enterprises and their

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[100] This is not an exhaustive list, but indicative only. The New Zealand Housing Strategy 2005 contains various recommendations that may see social and environment health responsibilities given legislative recognition via the Housing Act and the Tenancy Act. The Building Act 2004 enables the Building Code to be used for issues such as energy efficiency.

[101] A range of government fiscal initiatives should also be considered such as investment in research via CRIs etc. Of note is the NZ Superannuation Act 2001 which includes reference to ethical investment in terms of “avoiding prejudice to New Zealand’s reputation as a responsible member of the world community” (section 61(d)).

[102] See Agenda 21, Chapter 8.14.

[103] The New Zealand Centre for Ecological Economics is helpful in this respect, including the work on constructing a GPI for New Zealand.

[104] Council organizations and council-controlled trading organizations.

recently expanded 'economic' mandate. A related issue would be a legal framework for corporate environmental/social responsibility, which attempts to overcome many of the current limitations of this practice.[105] A range of more radical changes to company law, are considered in paragraph (iii) below.

Another area of law that needs to be examined is that relating to public health including linkages with occupational health and safety, and housing. The RMA is central to public environmental health, but its role is relatively under-developed. This is partly due to the traditional divisions in law between environmental law and public health and employment law. A recent article commented that the Health Act 1956 is outdated for addressing current environmental health issues and that a contemporary public Health Act could be a valuable tool for addressing future environmental and health issues. It was suggested that a new Health Act adopt principles of sustainability.[106]

(iii) *audit and amend "anti-SD law":* this task is closely related to the two areas of transformation discussed above. The challenge is to recognise and address law (and policy) *that encourages unsustainable development*. These have been described as laws that give individuals and companies, fewer and/or less sustainable choices of action, than they might otherwise have.[107] An obvious specific example would be direct and indirect subsidies for road transport and fossil fuels such as coal. However, a much broader inquiry than this is needed, some examples of which can be drawn from company law.

At present, company law provides that the sole function of corporations is to make a profit for shareholders. This is commonly done by the externalisation of as many costs (e.g., social and environmental) as possible. A number of changes to company law have been suggested, the most fundamental of which is that corporate articles/charters provide that corporations are entitled to pursue profit, but not at the expense of the environment and social well-being. While this suggestion may sound radical and politically untenable, it is a suggestion that has been around of

[105] Inadequacies include their voluntary nature, lack of consistency in criteria and reporting, and the lack of independent audit. The PCE's report: *Electricity, energy, and the environment: Environmental Performance Assessment 1 July 2004-30 June 2005* (PCE, 2006) notes some of the limitations of environmental/sustainability reporting within the electricity sector, pg 77-82.

[106] D Sinclair "The Resource Management Act (1991) in Public Health" (2003) NZJEL Vol 7 pg 275 – 311. The Health and Safety Employment Act 1992 would also merit amendment or reform. With respect to the RMA and public health, see also B Reeve "Sustainable management and public health in New Zealand" (2005) 6 RMB 73.

[107] J C Dernbach "Why Lawyers Should Care?" *The Environmental Forum*, July/August 2002, pg 38.

a considerable period of time.[108] Also, it needs to be viewed in light of the history of corporations and corporate law. Relative to other periods of history, they currently enjoy unprecedented regulatory freedom.[109] Given the current economic dominance of the corporate sector and its capacity for regulatory capture, it is important to consider to what extent corporations are now acting to the detriment of ecological systems and society. A small but important step in this direction was recently signalled in the United Kingdom. Law-makers are considering some significant changes to director liability law to provide a range of environmental and social responsibilities.[110] A parallel development is the draft United Nations Norms on Human Rights which proposes placing human rights obligations upon transnational corporations.[111]

**(iv)** *legislation for the attainment of positive objectives*: much of our legislation is currently geared more toward preventing 'bad' things than to promoting the achievement of 'good' things. As understanding and commitment toward SD progresses, thinking is likely to change from a focus upon the negative consequences of human development and causes of harm, to the associated needs of *making room for nature and rehabilitating and restoring degraded ecosystems* (in addition to species recovery). Examples include the creation (and expansion) of biosphere/marine reserves,[112] and setting specific national goals and

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[108] P Drucker *Concept of the Corporation* (1946), quoted in E Assadourian "When Good Corporations Go Bad", exert from May/June 2005 *World Watch Magazine*, pg 17. Ducker argues that the right of corporations to pursue profit does not mean that they should be free from social obligations. Rather, they should be organised so as to fulfil automatically their social obligations in the very act of seeking their own best self-interest.

[109] E Assadourian "When Good Corporations Go Bad", exert from May/June 2005 *World Watch Magazine*, pg 17-18.

[110] Reported in The New Zealand Herald, The Business, 24 April 2006, pg 19. Other developments include mandatory corporate social and environmental responsibility reporting with accountability attached for failure to meet obligations.

[111] Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N.Doc.E/CN.4/Sub.2/2003/12/Rev.2 (2003). A range of other non-binding international instruments exist which attempt to achieve sustainability goals. Examples include the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the Declaration on Fundamental Principles and Rights at Work, of the ILO. A recent UN effort is the voluntary Global Compact Initiative that sets out nine Principles on human and labour rights and the environment. All of these examples are directed at businesses.

[112] The European Union, United Nations, World Conservation Union and others have been actively pursuing increases in the size of marine protected areas. The NZ Marine Reserves Bill (if enacted) could make a contribution to the increase in the number of marine reserves in NZ. Government is in the process of setting up a network of marine protected areas, within the twelve nautical mile limit.

timetables for biodiversity, oceans, estuaries, wetlands, public access,[113] and social/cultural well-being. In the case of terrestrial ecosystems this will be difficult given the dominance of private property rights. This makes it all the more important to be clear about objectives and priorities for areas and ecosystems that are still relatively unexploited, e.g., marine ecosystems beyond the territorial seas, sea mounts etc.

*(v)* *convergence of domestic and international law:* a final area of transformation is the need to better facilitate the integration of domestic and international law. NZ applies the theory of dualism. This means that international obligations can only operate in the domestic legal system if incorporated, ideally by Act of Parliament. This situation creates a number of barriers or impediments to the implementation of international environmental law. First, there are some deficits in the processes available to Parliament (and the public) to contribute to the content and scrutiny of international obligations, prior to the obligations being accepted. This is sometimes referred to as the democratic deficit. The risk is that the Executive assumes obligations in relation to international trade, foreign investment and multi-lateral environmental agreements, without sufficient debate, and public participation and oversight. The second barrier to implementation of international environmental law is the time it takes for Parliament to pass legislation that incorporates international law into domestic law. This can slow the uptake of new obligations/principles (creating gaps in domestic law) and hold up implementation and compliance processes.[114] As international obligations become an increasingly important source of SD law for New Zealand, it will be important to review how Parliamentary processes[115] and legislation (such as the RMA), can best give effect to this law.[116]

[113] The OECD's environmental performance review of New Zealand noted that the *Environment 2010 Strategy* sets few qualitative targets for environmental protection; OECD *Environmental Performance Review: New Zealand* (1996) 92.
[114] See P Taylor "The Global Perspective: Convergence of International and Municipal Law" in Bosselmann & Grinlinton (eds) *Environmental Law for a Sustainable Society* (NZCEL, Monograph Series: Vol 1, 2002), pg 123-143, and P Taylor "International Law and the New Zealand Environment" in R Harris (ed) *Handbook of Environmental Law* (Royal Forest & Bird Soc, 2004). See also "Meeting International Obligations", Report of the Controller and Auditor-General (2001), pg 15. National Policy Statements and National Environmental Standards can both be used to implement international obligations (section 45), and standards, requirements and recommended practices (section 43C (1)(a). This latter section provides opportunity for setting compliance standards consistent with international obligations and could be used to suggest criteria against which SD progress could be measured.
[115] As local government authorities become more directly involved in implementing international obligations and in representing local expressions of SD, central government may need to consider sharing competence to decide the content of international agreements.
[116] NZ has a Biodiversity Strategy, but it has no legal status. The main tool for implementing the UN Convention of Biodiversity would be a national policy statement ('NPS') under the RMA. In the absence an NPS, biodiversity concerns may

**SECTION 4: Conclusion**

This background paper has considered some aspects of the laws contribution to the promotion of SD. The law has an important contributing role. A present environmental, conservation law and local government law are still trying to find their place in the SD debate. This paper has suggested that, for various reasons, the existing legal and institutional framework tends to reinforce a weak SD approach, preventing the concept of SD from moving much beyond being 'about the environment'.

In New Zealand, many commentators have suggested that this is largely attributable to the unresolved debate about the relative priority between economic growth and environmental and social objectives. This became evident during the drafting of the RMA when Treasury and the Ministry of Commerce were seen to be: "…opposed to the notion that economic activity should be constrained in order to promote sustainable development."[117] More recently, the government's continuing prioritisation of the economic growth was evident in the *Programme of Action*: "The programme of action outlined here aims to ensure that the quality and durability of economic growth improves the wellbeing of all New Zealanders and the environment, now and for the future."[118] This point was also well identified in the PCE's report; *Creating our Future*.[119] This report noted that the RMA was a compromise position and went on to comment that there was some value in the RMA as a learning curve. It was also noted in this report that it was not possible, in the absence of a comprehensive outcome evaluation, to judge whether the RMA has been an asset or an impediment. It is suggested here that this is still the situation that we face in NZ. However, for NZ to move beyond the learning curve (i.e., first stage understanding of SD in terms of environmental management) society as a whole needs to confront the extent to which economic growth must be constrained by ecological systems and the necessary changes in law and in social and economic planning, needed to reflect this. Only then will it be possible to use the potential identified within the LGA, and move from environmental and conservation law to SD law.

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not be adequately integrated into land use and other resource management planning; P Taylor "The Global Perspective: Convergence of International and Municipal Law" in Bosselmann & Grinlinton (eds) *Environmental Law for a Sustainable Society*, (NZCEL, Monograph Series: Vol 1, 2002) pg 128.

[117] Quoted in R Stanhope "A Vision for the Future? The Concept of Sustainable Development in the Netherlands and New Zealand" (2000) 4 NZJEL 147, pg 163.

[118] *Programme of Action*, pg 6.

[119] *Creating our Future*, pg 16 and 93-96.