

# THE FUTURE OF ENVIRONMENTAL LAW

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I have very little to say regarding [the mountain kiwi], as I have only seen two of them, and being pushed with hunger, I ate the pair of them, [as] under the circumstances I would have eaten the last of the dodos. It is all very well for science, lifting up its hands in horror at what I once heard called gluttony, but let science tramp through the Westland bush or swamps, for two or three days without food, and find out what hunger is.<sup>1</sup>

## I. INTRODUCTION

For the last two decades environmental law courses have been popular choices for law students. The enactment of New Zealand's Resource Management Act (henceforward the RMA) in 1991 established not just an easily recognisable core of subject matter<sup>2</sup> but also, seemingly, a firm legislative and social commitment to environmental sustainability, as well as further reliable and credible evidence, if that were needed, that the subject would be useful and profitable in practice. Since then, of course, more specialised environmental law courses have come to cover many areas beyond the RMA's scope. At the University of Canterbury, for example, the core environmental law course, Natural Resource Law,<sup>3</sup> had as many as sixty or seventy students in earlier years, many of them local body personnel, public servants and even practising lawyers wanting to learn about the new legislation. Numbers later settled down to somewhere around forty or fifty, a little less than half the numbers enrolled in the most popular optional subjects such as Administrative Law, Evidence, Family Law and Company Law, but considerably more than the numbers in some specialised subjects. Following later reorganisation, Canterbury, in 2011, offered courses on the Resource Management Act, Crown environmental and conservation administration and the public interest, international environmental law and an introductory course on environmental law's

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1 Charles (Mr Explorer) Douglas, in John Pascoe (ed) *Mr Explorer Douglas* (AH and AW Reed, Wellington, 1957); Part II, Selections from the Douglas Papers at 228.

2 Drawing together, as it did, the disparate laws previously contained in many statutes, of which the most notable were the Town and Country Planning Act 1977 and the Water and Soil Conservation Act 1967.

3 The name is something of an historical accident, and should not be considered as an indication that the course took a fragmented resource-based approach and was useful chiefly as a guide to resource exploitation. "Environmental Law" was unavailable as a name because it had already been used as the name of an earlier course before the RMA's time. The earliest planning law course, "Planning Law", had covered the Town and Country Planning Act, and a later "Environmental Law" course had covered everything else. The University requires every new course to have a new name, and "Environmental Law" being therefore unavailable for the new year-long core course, the name "Natural Resource Law" was chosen. The course as taught since then, however, always covered much more than the RMA.

historical, philosophical, political and social context, as well as courses on the law of the sea and Antarctic legal studies.

Environmental law courses, as well as offering good prospects for income and career, also appeal to the nobility of heart and altruism of the young. Environmental law seems to provide a rare opportunity for lawyers to become involved in making things better. Instead of merely picking up the pieces and cleaning up other people's messes, instead of merely keeping the humdrum world turning, environmental lawyers, in the youthful imagination and sometimes even in reality, seem to be involved in the greater cause of protecting, nurturing and defending life, beauty, sanity, wise living and wild nature.

## II. THE REMARKABLE PARADOX

It is this article's thesis that neither of these reasons for studying environmental law, neither the career prospects nor the appeal to idealism, will be prominent for much longer. This is certainly a great paradox. Our age is one of great and ever increasing environmental problems. It seems all too possible that appalling environmental catastrophes may soon fall upon the world. The picture theatres show blockbusters such as *The Day After Tomorrow* and *2012* which, although they may certainly exaggerate the immediacy, rate and extent of catastrophe, nevertheless play on a very real sense of impending crisis. Global climate change, in particular, and its implications for humankind are discussed almost daily in newspapers.<sup>4</sup> More certain, more immediate and perhaps even more catastrophic will be peak oil and the gradual dwindling of the fuel on which all our civilisation now depends. Yet these dire forecasts have not yet been followed by widespread citizen action. Indeed, the proportion of citizens who still do not accept that anthropogenic climate change is occurring has actually been increasing recently. According to a report in *The Guardian* of 7 February 2010, entitled "Public Loses Faith in Climate Change After Leaked E-mail Scandal", a recent BBC poll showed that the number of climate change sceptics in the United Kingdom had risen: 25 per cent of those polled did not believe that it was occurring, an increase of eight per cent since November, and of the 75 per cent who did accept that it was occurring, one in three felt that the case had been exaggerated. Only 26 per cent of those polled thought that climate change was "established as largely manmade". Another British poll quoted showed a drop in the last year from 44 per cent to 31 per cent of public belief in anthropogenic climate change. Other polls have revealed similar trends in the United States of America.<sup>5</sup> *The Guardian* attributed this decline to recent controversy over procedures at the University of East Anglia, headquarters of climate

4 It is of the nature of global problems, of course, that national solutions to these problems are not possible. We could not suggest that New Zealand's problems, for all their seriousness and accelerating tendencies, are as bad as those in many other parts of the world, where New Zealand's present conditions would be looked upon as a vast improvement. New Zealand, acting by itself, would never be able to do anything which would make a difference (except perhaps as an example, good or bad as the case may be). Without international cooperation all is lost; yet the very scale of the problems and necessary solutions renders such cooperation very difficult to achieve.

5 "Three and a half decades ago, when the nation's key environmental laws were approved, politicians were responding to the mood of the country. Today, the situation is largely reversed. Polls show that voters regard the environment in general, and climate change in particular, as, at best, middling concerns. In a recent survey...about their priorities for Congress and the new President, "[d]ealing with global warming" ranked at the bottom of a list of twenty choices, far below "strengthening the nation's economy" and "reducing health-care costs", and even below dealing with unspecified "global trade issues"...Last month, when Gallup asked Americans whether "protection of the environment should be given priority, even at the risk of curbing economic growth", only 42 per cent said yes. This was the lowest proportion in twenty-five years..." Elizabeth Colbert "In the Air" *The New Yorker* (New York, 27 April 2009) at 18.

change research, and over several details of the 2007 “fourth assessment” report of the Intergovernmental Panel on Climate Change (the IPCC), in particular assertions regarding the melting of Himalayan glaciers, increase in disasters such as hurricanes and floods, and decline in agricultural yields in Africa. It is not impossible that a particularly cold European and American winter may also have fed scepticism, even though climate change does forecast greater extremes of climate, both hot and cold, and even though other parts of the northern hemisphere have enjoyed a milder winter than usual.<sup>6</sup> The causes of scepticism may well lie deeper, however. They lie in part in boredom; the human mind is impatient, and rapidly tires of a tragedy which may well take twenty, thirty or fifty years to manifest itself significantly.<sup>7</sup> Humanity also has a great capacity for wishful thinking and wilful blindness, especially in the face of a possibility both remote and incomprehensible, where remedial action would interfere with one’s own comforts and way of life and would also (unless that action were part of a co-ordinated comprehensive international strategy) place the actors at a self-imposed disadvantage in relation to other nations who chose to do less. Garrett Hardin’s tragedy of the commons<sup>8</sup> applies (as he observed) as much to the unregulated putting of pollutants into public resources (such as air) as it does to the taking of public resources.

Whatever the precise combination of stupidity, ignorance and wishful thinking, our breathtaking failure to face increasingly obvious facts displays a perversity almost admirable in its boldness. There is a mythic quality in our refusal even to recognise the fate prepared for us by our own hands. We are the Trojans scorning Cassandra’s warnings; the Atlanteans blind to the doom undermining the seemingly solid earth. We will perish in horror, perhaps, but magnificently.

Here is the paradox, then, that in an age of increasing environmental crisis the environment is yesterday’s issue. Climate change, which is only the most prominent of numerous current environmental issues, threatens our civilisation, perhaps even the survival of our species. At the very least we would expect to find universal concern and anxiety. We would expect a precautionary approach to be universally embraced. Even if climate change be not absolutely certain, the abundant evidence of the possibility should call forth the application of Pascal’s wager. We should live as if it were certain, for by doing so we have nothing to lose and everything to gain, or at least retain. Yet this is not the public reaction; the widespread response, even if not actually one of scepticism, is certainly very laid back. A few protestors demonstrate at Copenhagen; Greenpeace unfurls an occasional banner from a smokestack somewhere; when the survival of our civilisation, if not our whole species is at stake, we would expect rather more.

### III. NEW ZEALAND: SELF-IMAGE AND REALITY

Turn to our own country. In the late 1960s New Zealand was much exercised by the possibility that the level of Lake Manapouri, a large and beautiful lake in Fiordland National Park, might be raised as part of a scheme to generate hydro-electric power for an aluminium smelter at Tiwai Point, near Bluff. In 1970 a petition to Parliament against raising the level of the lake at-

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6 Even though any natural trend is usually marked by occasional deviations. At the time of writing much of Europe is experiencing record summer heat waves.

7 “New Zealanders are suffering from ‘green fatigue’ through constant warnings of an environmental catastrophe, a survey has found....Reader’s Digest, which commissioned the survey, spoke to an advertising executive who said ‘green’ was a ‘damaged brand’ and media saturation had led to ‘green fatigue’...” *Christchurch Press* (30 October 2009).

8 “The Tragedy of the Commons” (1968) *Science* 162 at 1243-1248.

tracted 264,907 signatures. At the time this was the largest petition ever presented to Parliament, and remained so until overtaken by another environmental petition, the Maruia Declaration, with 341,159 signatures, presented to Parliament in 1977.<sup>9</sup> After widespread agitation, a Commission of Inquiry and sundry political manoeuvres, both main political parties agreed that the lake level should not be raised.

On 26 August 2009, however, in a speech in Queenstown to the annual conference of the Australasian Institute of Mining and Metallurgy, the Hon Gerry Brownlee, the Minister of Economic Development, announced his commitment “to unlocking New Zealand’s mineral potential”, and his awareness “that one of the fundamental barriers to mineral exploration and development is access to prospective land, particularly to land administered by the Department of Conservation”. He was concerned that the Department administered land which “hosted” about 70 per cent of the country’s mineral potential. Forty per cent of that land was listed in Schedule IV of the Crown Minerals Act 1991, which includes national parks, the more precious reserves and various other areas. Section 61 (1A) of the Act requires that:

[t]he Minister of Conservation must not accept any application for...or enter into any access arrangement relating to any Crown owned mineral...in any Crown owned land...described in the Fourth Schedule.

excepting only certain activities of minimal effect. Although the Minister insisted that all that was being ordered was a “stocktake” of mineral deposits on conservation land, with public consultation scheduled to follow in 2010, and although he dismissed as “alarming nonsense” claims by the Green Party that mining was about to be allowed in national parks,<sup>10</sup> Ministry of Economic Development officials particularly requested that areas of land in Fiordland, Paparoa and Kahurangi National Parks be included in the review,<sup>11</sup> and the Prime Minister, in his speech at the opening of Parliament<sup>12</sup> in 2010, spoke of the “extraordinary economic potential in the mineral estate residing in Crown-owned land”, and predicted that “notwithstanding the public consultation process”, he expected that the Government would act on at least some of the recommendations of a discussion document which recommended changes to Schedule IV of the Crown Minerals Act. Even in March 2010 Mr Brownlee was refusing to rule out the possibility of opencast mining in national parks.<sup>13</sup>

Now if New Zealand is, as constant rhetoric assures us, a more environmentally conscious and responsible society than it was in the 1960s, before the modern environmental movement had emerged,<sup>14</sup> then it would have to be the case that public objection to a proposal, not just to raise one lake in one national park, but to consider mining in several national parks, would be far more furious and vehement now than then. Yet opinion polls in the period after Mr Brownlee’s 2009 speech showed that the Government’s popularity had actually increased. The reasons for that in-

9 Details can be found in Roger Wilson *From Manapouri to Aramoana, The Battle For New Zealand’s Environment* (Earthworks Press, Auckland, 1982) and in David Young *Our Islands Ourselves, A History of Conservation in New Zealand* (University of Otago Press, 2004). Only one petition to Parliament has attracted more signatures than the Maruia declaration; that was the petition against the Homosexual Law Reform Bill, eventually enacted in 1987. The number of signatures in that petition was hotly disputed: there were allegations of fictitious names, individuals signing more than once, the signatures of infants and so on, but even making allowances for that, the figure was somewhere around 800,000.

10 *The Press* (1 December 2009).

11 *Ecolink* Newsletter of the Environment and Conservation Organisations of New Zealand (ECO), October 2009.

12 9 February 2010.

13 Geoff Cumming “Brownlee Refuses To Rule Out Pit Mining” *New Zealand Herald* (New Zealand, 6 March 2010).

14 Many consider the Save Manapouri campaign to be the beginning of the modern New Zealand environmental movement; some argue that it was instead the last expression of an older, staid style of environmentalism, but certainly, no-one suggests that the modern environmental movement, however defined, had existed before then.

crease were not stated, and might be unrelated to the mining announcement, but it is at least clear that the announcement did the Government's popularity no immediate harm. There was some protest against the proposals, most notably in central Auckland, where on 1 May 2010 about 40,000 people marched down Queen Street in protest. After they got into their cars and drove home, however, little further sign of a campaign was seen.

Despite this somewhat underwhelming opposition, the Government's eventual decision, on 20 July 2010, was not to remove areas from Schedule IV. I suggest, however, that the general public response suggested that attitudes have changed since 1970. In a Stuff opinion poll<sup>15</sup> asking the question "Should conservation land be open to mining?", to which four replies were possible, the voting was:

Yes, we have resources, let's use them	19.5 per cent
Yes, within strict environmental criteria	34.1 per cent
No, too damaging to New Zealand's green image	7.0 per cent
No, national parks are treasures	39.3 per cent

One fifth of those answering, then, had no objections of any significance to mining on the conservation estate. Even with reservations, 53.6 per cent of those answering had no objection in principle to mining. Another seven per cent objected to mining on the self-interested ground that it would damage the country's image. Well less than half the population, 39.3 per cent, objected to mining on conservation lands, including national parks, in principle. These are hardly the results one would expect of an environmentally minded, conservation oriented country. They lead us to conclude that the country's environmental awareness has actually regressed since the Manapouri controversy.

Recent proposals to alter rivers significantly have not attracted more than local opposition and have not been the focus of national campaigns. Meridian Energy's Project Aqua, planned for the lower Waitaki, drew opposition from fishermen and locals but never became a national issue. Meridian eventually withdrew its proposal, but not because of environmentalists' opposition. In Marlborough a proposal by TrustPower to alter the Wairau River significantly is, at the time of writing, before the Environment Court, but again has never caught fire nationally. On the West Coast, Meridian Energy's plans to build an 85 metre high dam across the Mokihinui River, a wild river beloved of trampers, kayakers and fishermen, have been approved by the consent authorities (and are now the subject of an appeal to the Environment Court) but again, the public campaign against the dam has simply failed to excite public concern and is (at the time of writing) quite invisible.

Membership of the Royal Forest and Bird Protection Society (hereafter "Forest and Bird") could surely be considered a reasonably accurate measure of New Zealanders' environmental concern. Forest and Bird is New Zealand's oldest, largest and most reputable conservation organisation. It was founded in 1923 (originally as the Native Bird Protection Society); it enjoys royal patronage; and although it has had its doldrums, it has nevertheless always had a respectable and often excellent record of defending wild nature. A table in the Appendix shows membership of Forest and Bird since 1973. 1973 was just after the success of the campaign to save

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15 10 February 2010.

Lake Manapouri, so is about the time of the great conservation awakening.<sup>16</sup> Forest and Bird has long had numerous classes of membership, single, family, senior single, senior family, student, life, school, business and corporate. The categories have recently been altered, but still include adult, adult overseas, senior, student, group, two classes of corporate membership and the “Kiwi Conservation Club” for children. Given this variety of membership classes it is impossible to put a precise figure on exactly how many members Forest and Bird has, but a notional number of members can be obtained by taking the annual income from subscriptions, given in the annual report, and dividing it by the single adult subscription for that year. This gives a notional number of single adult member equivalents, which is the figure given in the Appendix table’s right hand column. The figures show that from 9,151 notional members in 1973 membership gradually rose to 20,632 in 1991 (whether coincidentally or not, the year the RMA was passed, and it was widely assumed that all environmental problems were over) and then declined, sometimes by two or three thousand a year, to the present day, where, despite all membership drives, the figure persistently hovers around early to mid-1970s levels. Not surprisingly, this unexpected decline had severe financial repercussions for the Society. If Forest and Bird membership may be taken as a gauge of New Zealanders’ environmental awareness and concern, then that awareness and concern has certainly declined since 1991. In those same years, 1973 to 2009, New Zealand’s population also increased by about a third. As a proportion of the country’s population, then, Forest and Bird’s decline is even greater.

#### IV. A DIFFERENT NATION

Further anecdotal evidence could be produced, and doubtless argued over, but it would surely be very surprising if environmental awareness and concern were not declining. New Zealand is a very different country from what it was in 1973. We are another generation and more away from the land. The baby-boom generation to which the author belongs may have grown up in New Zealand’s cities, but many or most of those babies still enjoyed grandparents and aunts and uncles who farmed or lived in small towns. Those babies grew up knowing holidays in the countryside and adventure in the back blocks. Tramping was a widely enjoyed recreation. The last decade’s enthusiasm for the bach has been fuelled not just by fashion and readily available credit but also by nostalgia for the once common experience of holidays by the beach or beside a river or in the bush. (The modern “bach” is of course no such thing. The building laws see to that. They must be more accurately described as “holiday houses”, and are only available to the better-off, but that is not the point here). New Zealand is now one of the most highly urbanised nations in the world, with 86 per cent of our population living in urban situations<sup>17</sup> and about one third of the entire population living in the one conglomeration of Auckland. Almost one in every five New Zealanders and New Zealand residents was not born in this country, one of the highest proportions in the world. It would be surprising indeed if people with less and less knowledge or experience of our country were to be more concerned than earlier generations that it should retain its beauty and purity. It is surely far likelier that they should be increasingly concerned about the maintenance

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16 The year is chosen, however, because it is also the year the author, his own environmental consciousness awakening, joined Forest and Bird; he has all journals and annual reports from that time onwards, but even the Macmillan Brown collection of the University of Canterbury Library lacks earlier annual reports.

17 Statistics New Zealand Urban and Rural Migration figures. “Urban areas” include main, secondary and minor urban areas.

of their own lifestyle and comforts, and be increasingly prepared to sacrifice natural treasures and assets of which they have little or no personal experience to that end.

Our forests and mountains are often likened to cathedrals and temples. It is well worn rhetoric, and New Zealand has never been a particularly spiritual nation, but the argument is that these wild places are, if anywhere is, the places where we can stand in the presence of the numinous, where we can meet God and be at one with the Universe. There is, though, another way in which these wild places resemble Europe's ancient sanctuaries. Both cathedrals and wildernesses, both types of sanctuary, are places where, out of unthinking inherited ingrained habit, we go through the motions of doing homage to past values that are increasingly incomprehensible and irrelevant. Most visitors to the Sistine Chapel and to Milford Sound, I suggest, do not do so in order to have a religious or even aesthetic experience; they go because everyone takes holidays and goes overseas to do so, because these are the places one visits, and the purpose of visiting is mostly to have one's photograph taken and to say one has been there.<sup>18</sup>

To be fair, also, there is another great difference between the New Zealand of forty years ago and our own time. The 1970s and 80s, the years of great environmental battles, when the environmental movement was truly a force with which to be reckoned, were an age when resources were still abundant. The good environmental decisions which were, eventually, reached came at no cost. Lake Manapouri was not raised, but New Zealand did not need the extra electricity which would be generated by its raising; that electricity was merely intended to feed a foreign-owned aluminium smelter. Native forests on the South Island's West Coast and in the central North Island were set aside from logging, but New Zealand did not need the timber from those forests. Indeed, the Forest Service's native logging operations ran at a loss to the taxpayer. Stopping logging actually saved the taxpayer money as well as enhancing tourism and holiday opportunities. The only people who were to suffer from a cessation of logging were officials of the New Zealand Forest Service (the Government department which then administered nearly all state-owned native forests) who cherished ambitious dreams of solving the riddles of sustainable native forest management, and a comparative handful of people in small logging towns, whom the environmental movement was probably prepared to write off for the greater good but who, it was also argued, would in the long run be better off with long term sustainable and less dangerous and unpleasant jobs in the tourism industry. The environmental activists who collected the 341,159 signatures on the Maruia Declaration did not have a difficult job. As this author knows, for he was one of those activists, ordinary New Zealanders queued to sign. The regular "Which Party Will Save the Forests?" meetings before general elections were regularly attended by hundreds of people.

Things are different now. Native forest logging is no longer an issue, but the new matters which are issues do not attract nearly as much public concern as logging did. In part that must be because every citizen asked to join in opposition to a wind farm or hydro-electric dam, for example, will have the thought at the back of his or her mind that the consequence of such opposition, if successful, may well be personal inconvenience or discomfort for him or herself. If we do not mine national parks, governments may not be able to afford to do all the things we expect them to do. The environmental movement has hitherto taken the attitude that ordinary people are likelier than politicians to be environmentally aware and concerned. By and large that has, hitherto, been the case. Most environmental movements have been movements of ordinary people fighting political apathy or opposition. I suggest, however, that that may be in the process of changing. In the

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18 The author's observation is that this is most certainly true of the Sistine Chapel.

future there is likely to be more political mileage and votes in exploiting the environment than in protecting it. The battles of the 1970s and 1980s were hard fought, but the environmental battles of the future will be much harder fought. It cannot be considered certain that the environmentalists will win. The persistent assumption of some in the movement that they will inevitably triumph may well be a fatal hubris.

Before the 2008 general election the Green Party predicted that it would just about double its vote.<sup>19</sup> Its reasoning was that the approaching and now obvious environmental and resource crises beginning to affect us would be understood by voters as proof that the Greens were indeed correct in their warnings and therefore in their solutions. Leaving aside the issues of the coherence of the Greens' programme and whether its proposed solutions would indeed be successful, such reasoning surely also suffers from a failure of logic; or perhaps it might be better put as a failure to understand human nature. In times of resource shortages and straitened circumstances many people will become less generous and concerned with the public good than they were before. They will be more determined than ever to ensure that they obtain their fair share, indeed, more than their fair share, of what resources remain. The Greens did not double their vote; their final share of the party vote was 6.72 per cent, up from just over five per cent in 2005. It must be admitted that at the time of writing their popularity hovers somewhere around eight or nine per cent, but there could well be many reasons for that besides awareness of environmental crisis, and it remains to be seen how they will do in the 2011 general election.

Recent legislation passed by the present Government can therefore be explained differently from the way in which it tends to be explained by an often socialistically inclined environmental movement. Legislation to amend the Resource Management Act,<sup>20</sup> to allow greater exploitation of Canterbury's water<sup>21</sup> and to allow mining on the conservation estate and even in national parks, is usually considered by the environmental movement to be anti-democratic and intended to assist in the aggrandisement of a few friends of the ruling political party. Just as easily, however, can we describe these laws in another way? We can say that they are the expressions of a greater more general popular will. Whereas the Resource Management Act's provisions might have enabled locals and enthusiasts to participate in public processes and perhaps, if they were wealthy and well represented enough, to thwart a proposed development, these recent changes manifest the desire of by far a greater number of people; all uninformed and ignorant inhabitants of distant cities, perhaps, but nevertheless still adult citizens with voting rights, who are simply not concerned with

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19 Jeanette Fitzsimons, campaign launch speech "Through the Eyes of a Child" (Green Party of ANZ notes, New Zealand, 6 October 2008).

20 Most recently the Resource Management (Simplifying and Streamlining) Amendment Act 2009, itself only the precursor to further changes planned for 2010 and 2011.

21 The Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 authorised the replacement of the Canterbury Regional Council by appointed commissioners. Special rules now apply in Canterbury concerning, *inter alia*, water conservation orders. Applications for water conservation orders will not be determined by the same tests as elsewhere in New Zealand. Section 50(2) of the new statute prevents the Commissioners, and any future elected regional council, from considering the purpose of orders as set out in s 199 of the main 1991 statute. Instead, more emphasis is placed on the needs of primary and secondary industry and of the community. The test which would apply to the revoking or amending of an existing water conservation order in Canterbury is also relaxed, and indeed if an application to amend an order is made then the Minister himself, without any reference to the Regional Council, may now amend it if the effect would be minor and therefore "it is unnecessary [for the regional council] to consider the application".



any possible environmental destruction, and whose determination is to see that their own way of life, prosperity and comfort are to be disturbed as little as possible.

## V. EATING THE KIWI

If it is indeed the case that the general public is becoming less interested in environmental issues and less concerned in stopping environmental abuse, then several consequences follow. As suggested above, environmental battles will be much more hard-fought and more difficult for environmentalists to win. It may well also be the case that environmentalists review their present assumption that public participation in environmental issues is always without question a good thing. Environmentalists' current love of public participation is a marriage of convenience only. If in the future a poorer public eager to have access to resources would be more inclined to argue in favour of exploitation at public hearings, the environmental movement might be more inclined to favour decision-making by wise autocrats at a distance from the demands of the mob.

Perhaps a straw in the wind is to be found in the attitude of the New Zealand Green Party to public consultation on the matter of marine reserves. On 17 May 2006 the Greens were the only party in Parliament to vote against the Marine Reserves (Consultation with Stakeholders) Amendment Bill at the time of its first reading.<sup>22</sup> Jeanette Fitzsimons, speaking on the Greens' behalf, said that she did "not believe we should put an amendment bill through the House that deals only with the question of consulting people who want to fish". She preferred that public participation be dealt with as part of the entire revision of marine reserves under the Marine Reserves Bill. A preference for systematic and thorough revision over piecemeal tinkering is not unreasonable, but in fact the purpose of the Consultation with Stakeholders Bill is, by Clause 4, not just to consult fishermen, but "to ensure early consultation in the preparation of any application for the declaration of a marine reserve, for the purpose of promoting wide community support for such an application", and the stakeholders to be consulted include sailing, tourism and recreational interests, tangata whenua, neighbouring landowners and persons associated with the area as well as fishermen. In any case, fishermen are people too. It is difficult to avoid the suspicion, at least, that the Greens' opposition is really based on their fear that any wider public consultation would be dominated by those opposed to marine reserves, in this particular place at least.

Indeed, the attitude of New Zealanders to marine reserves has always been something of a disappointment to the conservation movement. After the establishment of the Department of Conservation in 1987 and the eventual protection of most remaining native forests, the Royal Forest and Bird Protection Society adopted the establishment of marine conservation and marine reserves as a major focus. The Forest and Bird magazine, *Forest and Bird*, more than occasionally featured fish on its cover, but members actually complained.<sup>23</sup> Marine reserves have never "taken off" as a subject of concern, despite every attempt to stir members' concerns. The usual reason offered by conservation leaders for this mysterious apathy is that the sea and fish are not "sexy",<sup>24</sup> as opposed

22 At the time of writing this Bill has still not yet been passed, but is, like the new Marine Reserves Bill itself, progressing slowly through the legislative process.

23 In the February 2003 issue of *Forest and Bird*, for example, long-time member Pat Menzies wrote to the Editor to say that she is "beginning to wonder what I belong to and where the 'forest' and 'bird' segments are disappearing to. As an example, take the November magazine, Sea-Snakes and Turtles at 14-17, Sea Slugs at 24-27 and Ocean Life Crisis at 28-31".

24 A word used more than once in personal communications.

to forests and little fluffy birds of the bush, which are. It is difficult to believe this. The beach, the surf and the sand-dunes are surely charged with sex if anywhere is. They are frequently visited by many of us, are far more accessible to most than is bush, and are the setting of many memorable and important aspects of our lives. Childish play, adolescent discovery and the quieter contemplations of maturity all occur there.<sup>25</sup> Many people visit the sea regularly in order to gather food, shellfish, crayfish, sea-urchins and fish. The sea coast is at least as close to our hearts as even the bush. Far likelier explanations, surely, for New Zealanders' reluctance to embrace marine reserves would involve the lack of any perception that any marine species are actually seriously endangered, the belief that where stocks are reduced in size the reason lies not with recreational fishermen and gatherers but with commercial interests, and the simple fact that the establishment of any reserve will unquestionably come at a cost to local people, who will thenceforward be unable to use that resource at their doorstep. Locals may well agree that marine reserves are excellent in principle, if only as sources of seed stock for the rest of the coast, but nevertheless they will also firmly maintain that no marine reserve should be established just here.

However leaving aside marine matters, there is a simpler and likelier immediate future. It is simply that issues of public participation may become irrelevant as our laws develop more and more in the direction increasingly indicated by present changes. Laws reflect the interests and desires of their makers. They are seldom any better than the people who make them. Our present environmental laws have only been possible because of widespread popular environmental sympathy. As that sympathy evaporates it is inevitable that so too will the laws which could only develop in that atmosphere.

In short, environmental law itself may not be a subject with much future. Going by present indications, there will be considerably less of it around in the years to come. When times are tough we will all eat the last two mountain kiwis.

## VI. THE DISAPPOINTMENTS OF THE RESOURCEMENT MANAGEMENT ACT

Honesty must compel us to admit at this point that the Resource Management Act itself has not lived up to the high expectations which were initially held for it. The most accurate prophet of how the Act would turn out was probably John Milligan, who, just nine months after its appearance wrote that:<sup>26</sup>

...if the task of law reform in this area is seen as being that of producing some kind of reconciliation [between different and conflicting value systems], success was always going to be very difficult to achieve.

He went on to say that:

[a]lthough the new Act *appears* to differ radically from previous legislation, a close examination of the language used leads to conclusions which bear a striking similarity to those previously reached.

The pattern or scheme of the new Act was familiar; former lines of arguments and conclusions remained available, and what in the end was to count as sustainable management was a matter for people and communities. Mr Milligan thought that the new Act presented an ideal opportunity to rethink our attitudes to resources and the environment, which might (or might not) in the

25 James K Baxter is said to have remarked that the introduced tree lupin (*Lupinus arboreus*, a common plant of the sandhills behind many lovely and popular beaches) should be our national flower, because most of us were conceived under them.

26 John Milligan "The Resource Management Act - Nine Months On" [1992] NZLJ at 351.

end lead to significant changes in management, but that in the short term, at any rate, not much would change; “the system will be seen as delivering the same sorts of results as it did under the old [Town and Country Planning] Act, but with greater complexity and at greater expense”.<sup>27</sup> If the new Act did change things, then, it would be not so much because of the Act’s words, patterns and structures as simply because the making of a new statute with so much fanfare presented an opportunity, which might or might not be taken up, for people to change their way of thinking.

Many took this article to be evidence of a deplorable cynicism on Mr Milligan’s part, but readers now may consider him uncannily prophetic. Even before the 2009 Simplifying and Streamlining Amendment Act the RMA had failed to live up to its promise. Ian Williams, of the University of Otago, has written<sup>28</sup> of how s 5 (which states the Act’s sole purpose to be sustainable management) has become “fertile ground for pleaders”, and how the four sections, including s 5, of Part II of the Act, “Purpose and Principles”, are a “source of bottomless justification and conflict” which “makes the potential for conflict endemic to the other major features of the legislation”.

Sustainable management becomes a sequence of single instances, all distinguishable. The legislature might almost as well have said that sustainable management means sugar and spice and all things nice. Had that been done then at least those attempting to deal with the definition would have known that it was not to be taken seriously.

He concluded:<sup>29</sup>

[w]ithin the statutory elements practically any decision on a resource consent application will be defensible - though no doubt some or one will be more defensible than others. The consents legislation seems to bear out the claim that resource consents are decided (even in the Environment Court) through a mixture of art, science, justice and democracy.

The Act has merely moved political struggles into a judicial setting. These realistic words are no more than the natural consequence and amplification of those words of Greig J in *New Zealand Rail v Marlborough District Council*<sup>30</sup> which dismayed so many environmentalists only three years after the Act’s creation:

[Part II] 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.

Part of this is not true, for much thought and discussion went into the drafting of the legislation, and many people were under the impression that in fact it did have meanings of some precision. The definition of sustainable management, in particular, was believed to speak of the famous but elusive “environmental bottom line”, the point beyond which human activity would not be allowed. To be told that the definition had an “openness” which allowed “the application of policy in a broad and general way”, essentially, that it was a platitude meaning nothing in particular, seemed to undercut and destroy the whole idea of the Act, as something which would actually put the environment first and allow human activity only if it did not breach the bottom line. Greig J could be said to have delivered the death blow to the RMA as a truly environmentally responsible statute, and yet, in retrospect, his conclusions were inevitable. The definition of sustainable man-

27 Ibid.

28 Ian Williams “The Resource Management Act – Well Meant but Hardly Done” (2000) 9 Otago LR at 673.

29 Ibid, at 692.

30 *New Zealand Rail v Marlborough District Council* (1994) 3 NZRMA 70 (HC).

agement is a platitude, a list of all good things with no guidance as to which should prevail. The word “while”, linking the first part of the definition with the three later paragraphs of longer term considerations, can be interpreted as “if” just as it can be interpreted as “at the same time” but if the Act really did intend a serious bottom line, thereby rendering impossible much current human activity, clearer guidance was needed than just one possible interpretation of a single word.

The New Zealand Parliament, however, cannot be blamed for this. Sustainability was the buzz word of the time, and, as Professor Freyfogle points out,<sup>31</sup> it is at the best of times an exceptionally vague concept, long on aspiration and short on solid meaning. How can sustainable management tell us whether it is appropriate, for example, to alter or demolish an historic nineteenth century building? The old building, if restored and cared for, would endure and serve the community, so, presumably, will its replacement. The question is a philosophical one about the preservation of historic heritage; “sustainability” only confuses the issue. How can “sustainability” tell us if a river ought to be dammed for electricity and irrigation, or a greenfield subdivision be allowed? Electricity and food must come from somewhere, and houses must be put somewhere. If not these methods of generation and agriculture, then what? There will still be life after the dam and the houses are built. Unless sustainability is to be interpreted to mean that henceforward human beings have no right at all to intrude further on natural processes, thereby forcing modern life to grind to a halt, human activity must be allowed, and then inevitably, “sustainability” becomes a mere matter of balancing good and ill, with the inevitable result, in turn, that the RMA, like its predecessor legislation, is just a procedure which, under a “balancing” approach, merely supervises the orderly degradation of natural resources.

A widely reported and undisputed study of indicators of success and failure in the Environment Court<sup>32</sup> has concluded that “difference in the number of experts was a strong influence in the outcome of a case”. Experts are expensive, and the conclusion must therefore be that if the party with the more experts wins then the party with the more money thereby has improved chances of eventually winning. The 2009 amendments have been understood by some environmentalists as marking a profound change in the RMA’s direction, and an erosion of democratic involvement in decision-making; they do not. They manifest one of the attitudes which has been inherent in the RMA since its beginning, and in their further limitation, for there were limitations before, of public involvement in RMA resource consent proposals. They serve a wider and increasingly assertive public desire for economic development and resource use. If the 2009 amendments, and further ones expected in the term of this Government, mark anything at all, it is only the point (also marked by current mining proposals) at which our official ideology of environmental concern begins to crumble visibly.

The question whether the RMA has achieved, or even promoted, sustainable management in New Zealand is not one for a lawyer to answer. The most a lawyer can do is repeat the case law on the meaning of sustainability, which is no help at all. Even assuming that some satisfactory precise definition of sustainability could be found and agreed on, to say that whether in fact, on the ground, New Zealand’s practices are sustainable is a matter on which lawyers have no expertise. That question is one of fact, not of law. To answer the question would require an examination of

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31 Eric T Freyfogle *Why Conservation Is Failing and How It Can Regain Ground* (Yale University Press, 2006) at 113-114.

32 Ong Su-Wuen “I’ve Got More Experts Than You – Experts and the Environment Court” (2001) 5 NZJEL at 261.

absolutely all RMA decisions and a thorough and detailed knowledge of their practical consequences. Such a survey has never been done and never will be.

Nevertheless, it is not difficult to find indicators suggesting that our country's lands and waters are not as healthy as they were in 1991, and continue to decline, nor is it difficult to think of RMA decisions which seem to lack farsighted wisdom. Numerous reports tell us of the declining quantity and quality of waters in lakes, rivers, streams and aquifers. The RMA seems powerless to halt the decline, and resource consents continue to be issued. Cities continue to sprawl, as do the motorways and roads which peak oil will soon render as obsolete as the suburbs they serve. Also sprawling still are dairy farms, which consume considerable and increasing quantities not only of water, artificial fertiliser and electricity, but also of fossil fuels and even of imported cattle feed. New Zealand cannot even feed its current dairy herd without importing, inter alia, about one fifth of the world's palm kernel production. In an age of increasing world population and increasing oil prices it is impossible to believe that this can be "sustained" for very long. Although s 6(a) of the RMA declares that the "preservation of the natural character of the coastal environment" and its protection from "inappropriate subdivision, use and development" is a matter of national importance, which everyone involved in the Act's administration "shall recognise and provide for", the last two decades would have seen more coastal development, subdivision and building than at any other time in New Zealand's history.

At the same time that the RMA seems powerless to stop these bad things, its expense and strangling bureaucracy seem to be successful in frustrating any number of small and imaginative projects, tiny power generation projects, local gardens, new communities and such like, which might enable us to live more lightly on the earth. In the United States of America, at any rate, it has often been remarked that food safety regulations are expensive and complicated with which to comply and often supported by big agribusiness, because they have the effect of eliminating small modest competitors. One sometimes wonders if the complexity and expense of RMA procedures and compliance have something of the same effect.

## VII. GOING AGAINST THE GRAIN

The law's gradual return to an attitude of allowing, and even encouraging, resource use would be a weakening or abandonment of what we loosely call environmental law. The more freedom there is for landowners, developers, exploiters, and those whom we might generally call by the less pejorative term resource users, the more freedom they have, it must be the case that hard won, environmentally enlightened laws are thereby weakened or removed, and as there is less environmental law there is, obviously, less scope for lawyers to act in defence of the environment or of the rights of objectors. As a field of practice, the long term prognosis for environmental law is not good.

By the same token, of course, the prognosis for an environmentally healthy and sustainable society is not good either. One can only eat one's last two mountain kiwis or one's seed corn for so long. Our future seems to be one of accelerating and increasingly desperate worldwide resource exploitation and destruction, followed, needless to say, by very hard times for society and civilisation.

It may well already be too late to change this fatal trajectory.<sup>33</sup> While there is life there is hope, however, so let us ask ourselves: what should we do? Simply making good or well meaning environmental laws is obviously not enough. In New Zealand, anyway, that method has been tried. The laws may not have been good enough, perhaps, but that is a foolish argument; the RMA was believed at the beginning, anyway, to be good, if not totally amazing, and in any case it was as good as it could be made at the time. Better laws than the ones actually achieved were impossible. The RMA has failed, in part, perhaps, because of cunning legal argument (which has done no more than to spin out the implications hidden in the Act itself); it failed in part, perhaps, because later amendments altered the Act (but again, those amendments were the will of the people); it failed in part because of the colossal and absurd bureaucracy and expense which was never foreseen by the Act's architects;<sup>34</sup> and it has failed chiefly because it runs against the entire grain of our society. The Act's requirements defy every instinct and law of private property. For all that legal philosophy may have moved on from Austin's time, our concept of property is still his very absolute one: "a right, indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration, over a determinate thing".<sup>35</sup>

The chief business of our politics is now the health and proper functioning of economic activity. Economic growth is necessary not only for our livelihoods but also for our very contentment. In lives which are for most an unthinking empty round of work, television, sex and sleep, where a vapid and shallow public has no sense of purpose or spiritual meaning, what is there to do but acquire, consume and discard?

Laws which run against the grain of a society's organisation and culture are likely to fail. Laws alone are not enough. When the RMA was being framed, its general approach was criticised by some advocates of economic instruments because it perpetuated a culture of litigation and confrontation. It was occasionally suggested that with proper pricing and internalisation of environmental costs it might even be possible largely to do away with legislation, and therefore litigation, and achieve sound environmental outcomes purely by the operation of market forces in a market so carefully constructed as to put a price on absolutely everything. That was an impossible dream, and one obviously open to abuse, but at least it proposed a model of environmental management which was in harmony with the way the world was actually working. In that sense those proposals were actually more realistic than proposals to bind unwilling subjects down by laws with which they were not in harmony.

## VIII. THE DEMOCRATIC CONUNDRUM

If our woes, however, spring from the present nature of our civilisation, then we have to change the way we live. That it is difficult to do, for nearly all of us are, in a very real sense, trapped in our present lifestyles. Life without a job or any other equivalent source of income, for example, is very miserable. We have to live somewhere; even buying a modest house, even regularly paying

33 As well as a spate of books on the hard times attendant on peak oil, books have begun to appear recently, such as Clive Hamilton *Requiem For A Species* (Allen and Unwin, 2010) and Bill McKibben *Eaarth* [sic]: *Making A Life On A Tough New Planet* (Times Books, 2010) arguing that humanity's chances of avoiding catastrophic global warming and climate change are now minimal, the necessary changes by now having to be so enormous and the time we have left to make those changes being so short. Mr McKibben still feels obliged to conclude with a message of hope, but it is only after the horse has bolted.

34 One does not hear very much of the "principle of freedom", so proudly enshrined in s 9.

35 John Austin *Lectures In Jurisprudence* (3rd ed, Weidenfeld and Nicolson, London, 1869) at 208 (reprinted 1955).

rent, is expensive. It is no longer possible to disappear into remote wilds and carve out one's own life. We need firewood and wine, we need a car to get to work or school or the beach. Could we live off the land, even if we could afford to buy any? Almost certainly not. It would be possible only for the young, fit and single, well informed and well equipped. Attempts to bring up children in such a situation might well lead to their parents being scrutinised by the authorities. To be made redundant would be for many of us a major financial unpleasantness. It is very hard, therefore, to offer any immediate practical alternative. Any alternatives will arise, slowly and painfully, only when many begin to seek them, but until they arise they cannot advertise themselves, nor can they be imposed on an unwilling people. Almost by definition, environmentally sound laws end up, in one way or another, as restrictions of our pleasures. Things become more expensive or impossible. As long as they are so perceived, as restrictions on pleasure, comfort, ease and expense, they will be accepted by a population in only two circumstances: if they are accepted as necessary, and much wilful blindness is possible here, or if they are imposed by brute force, a term which we will use to cover any exercise of legally regarded authority which does not accept the public will as its necessary superior. There may not be much difference between these two options. A measure may well become necessary long before it is widely regarded as necessary, and even when so widely regarded may still face significant pockets of opposition. Measures may well have to be imposed for the common good.

Before, though, we leap to abase ourselves before the brute god of force in the service of good, let us remember that power tends to corrupt, and that once one accepts the principle of brute force acting badly for the greater good, as the force chooses to see it, one inevitably justifies the reign of tyrants and brutes.

It would be best, then, if the necessary changes were welcomed by the people, but to do this the changes must not be shunned, but embraced; perceived not as the imposition of pain, however necessary it might be, but as a liberation, an invitation to live in a joy of courage and community, a determination to do as best we all can in the future because now, as much as ever, is the time when ideals are necessary. Unless we all do our very best we shall all perish. Our only possible futures are this, a grumblingly accepted tolerable autocracy, and chaos.

In *Post-Scarcity Anarchism*, published in 1971,<sup>36</sup> Murray Bookchin was prepared to accept, at least for the sake of argument, that hierarchy and laborious institutions might perhaps have been necessary in earlier ages of scarcity. Nevertheless the new and eternal age of abundance which was then appearing under our very eyes would make all hierarchy and imposed order completely unnecessary:

The great historic splits that destroyed early organic societies, dividing man from nature and man from man, had their origins in the problems of survival, in problems that involved the mere maintenance of human existence. Material scarcity provided the historic rationale for the development of the patriarchal family, private property, class domination and the state...[O]ur position in that historic drama differs fundamentally from that of anyone in the past. We of the twentieth century are literally the heirs of human history, the legatees of man's age-old effort to free himself from drudgery and material insecurity. For the first time in the long succession of centuries, this century, and this one alone, has elevated mankind to an entirely new level of technological achievement and to an entirely new vision of the human experience.

Forty years on, how sadly the great anarchist sounds like a salesman for the next new leap forward of the American dream.

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36 Murray Bookchin *Post-Scarcity Anarchism* (Ramparts Press, Palo Alto, California, 1971) at 9.

More accurate than Murray Bookchin's easy forecast of pleasure was William J Ophuls' 1977 *Ecology and the Politics of Scarcity, The Unravelling of the American Dream*. He observed that:<sup>37</sup>

the theory of the social contract is fundamentally cornucopian: nature's abundance being endless and inexhaustible, one has only to solve the problem of achieving social harmony through a just division of the spoils. Nature is thus external to politics.

Since the age of Locke and Adam Smith, such an assumption of abundance, or at the very least of a sufficient adequacy of resources to satisfy everyone's reasonable needs, has underlain all democratic political thought.<sup>38</sup>

Locke justifies the institution of property by saying that it derives from the mixture of a man's labour with the original commons of nature. But he continually emphasises that for one man to make part of what is the common heritage of mankind his own property does not work to the disadvantage of other men. Why? Because there was still enough and as good left; and more than the yet unprovided could use.

Enough is always assumed. There can be no acceptable reason, therefore, for misery and poverty. There are enough resources for everybody, and the only issue is one of how best to share everything out so that everyone gets enough, at least.

When scarcity returns, then, it comes as a surprise to citizens accustomed to possessing an inalienable right to plenty as well as the pursuit of happiness. The consequence of exercising that liberty in a basically laissez-faire system will inevitably be the ruin of the commons. Democracy, as we understand it, cannot conceivably survive.

If our future is to be one of Scarcity rather than Post-Scarcity, misery and poverty for some, at least, must be inevitable. How is this to be justified? In the past, hierarchy and her twin sister privilege were (when not simply unthinkingly and grumblingly accepted as the inevitable nature of things) usually justified on some legitimating compound of the natural order, heavenly decree and ancient valour, but we have abolished all those as valid reasons. There is now no acceptable excuse for hierarchy. Our liberation from the reign of priests and puritans, the West's official intellectual programme since even before the French Revolution, will not accept any claim that it is God's will that some should be miserable. Nor does our natural reason tell us so. Our natural reason tells us that we are as good as the next man and just as entitled as he is to anything he wants. We believe that not just the pursuit but the capture of happiness is one of our immutable rights.

The democratic principle, then, based as it inevitably must be on an assumption of equal humanity and the right to equal treatment, was as much a necessary prerequisite for our fatal impact on the earth as the machines of greater and greater power we have been fashioning since the Industrial Revolution began. It will in the future be a severe impediment to any attempts to limit hu-

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37 William J Ophuls *Ecology and the Politics of Scarcity Revisited: The Unraveling of the American Dream* (2nd ed, W H Freeman & Co, New York, 1992) at 144.

38 Chapter 4, at 165. Locke's state of nature, as described in Chapter II, Of the State of Nature, of his *Second Treatise on Civil Government*, is a leisured and gentlemanly state where neither hunger nor want intrude, nor the ugly emotions they engender. As in Marvell's Garden:

The luscious clusters of the vine  
Upon my Mouth do crush their wine;  
The nectaren, and curious peach  
Into my hands themselves do reach;  
Stumbling on melons, as I pass,  
Insnared with Flowers, I fall on grass.



man appetites. The democratic principle has been as necessary as the destruction of the religious principle which Theodore J Roszak lamented:<sup>39</sup>

The repression of the religious sensibilities in our culture over the past few centuries have been as much an adjunct of social and economic necessity as any act of class oppression or physical exploitation; it has been as mandatory for urban-industrial development as the accumulation of capital or the inculcation of factory discipline upon the working millions...Moreover [this] secularisation of our culture has been attended by a high idealism...; it has been seen by many of our finest thinkers not only as inevitable, but as a prerequisite of freedom. The major movements for social justice...drawing on a legitimate anti-clericalism and a healthy cynicism for promises of pie-in-the-sky...have been fiercely and proudly secular in their politics. The loss of the transcendent energies in our society has been taken by few radical leaders to be a privation as great as any due to physical hardship or the violation of personal dignity. For the most part, it has not been experienced as a loss at all, but as an historical necessity to which enlightened people adapt without protest, perhaps even welcome as a positive gain in maturity.

If, as suggested above, the marriage between the environmental movement and the democratic principle is merely one of convenience, than the hard-headed earth lover might be tempted, not necessarily with cynicism, to make that terrible bargain with brute force, and justify the brute as being for the common good, as being, indeed, the will of heaven and the voice of nature as well as the triumph of the stronger in combat and cunning.

This is a dreadful choice. It may seem necessary, yet what if the brute, having achieved power, does not act with the environmental responsibility we expected? By its very definition it is in the nature of the brute to become a tyrant. The people might well desire the tyrant's overthrow, and then what a glorious reassertion of ancient squandering there would be. The Forest Laws of the Conqueror and his successors, guarding the vert and the venison, were one of the last formal repositories of an ancient and at times harsh understanding of land, animal and greenwood, but the popular tradition to this day is of them as an oppression and burden. To this day, William Rufus is remembered as he was remembered by the monks, as the king slain by an arrow in the New Forest, a punishment sent on him by God for his father's great crime in establishing that as a new royal forest. The Forest Laws go, and where are the forests now, through the branches of which a squirrel could leap from the German Ocean to the Irish Sea without its feet once touching the ground? Liberty and environmental restraint very often pull in opposite directions. That is the problem. Is there any answer to it but the resignation of desire?

## IX. THE CONTRADICTIONS OF THE EARTH CHARTER

Few readers who have got this far would disagree that we must replace our patently unsustainable ways with a new way of living. Our nations and civilisations stand in as great a peril as at any other moment in human history. In its material and psychic effects the cataclysm which threatens us will be the greatest since the fall of Rome plunged the whole world our ancestors knew into centuries of darkness. As much as in any war of the heroic past, our survival will depend on our readiness to co-operate, to undergo hardships and to sacrifice our own narrow self interests and comfort

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39 Theodore Roszak *Where the Wasteland Ends, Politics and Transcendence in Post-Industrial Society* (Doubleday & Co, New York, 1972) at xxi.

for the common good. The Earth Charter<sup>40</sup> is quite correct when it begins by declaring that “[w]e stand at a critical moment in Earth’s history, a time when humanity must choose its future...”.

Nonetheless, however correct the authors of the Earth Charter might be in proposing that we must find a new way of living, and in considering all aspects of our lives to be related, I suggest they manifest two fundamental errors. As well as “Respect and Care for the Community of Life” and “Ecological Integrity”, the Charter also calls for “Social and Economic Justice” and “Democracy, Non-Violence and Peace”. “Social and economic justice” is described as requiring, inter alia, the elimination of poverty, rights to potable water, clean air, food security, uncontaminated soil, shelter, safe sanitation, the education and resources to secure a sustainable livelihood, social security for those unable to provide for themselves, the equitable distribution of wealth, gender equality and the elimination of absolutely all forms of discrimination. “Democracy, Non-Violence and Peace” has an equally ambitious list of objectives.

The first error is to suppose that these things are remotely possible. Many more human beings, those presently poor, and indeed many of those presently rich, would indeed be happier and healthier if the world’s goods were distributed in a more equitable way. Nevertheless such redistribution is at the best of times a major political challenge, and in times of shrinking resources, as explained above, those challenges become insuperable. We live also under the shadow of world-wide economic catastrophe, and a still growing human population which is expected, at present rates of growth, to increase by about 50 per cent over the next thirty or forty years, perhaps levelling out at about nine billion humans by the middle of this century. Even if the best redistribution in the world were actually possible, it still might well not be enough to provide everyone with everything to which their human rights allegedly entitle them. The Earth Charter’s agenda is still based on the belief in at least the adequacy of the earth’s resources for all human demands. It still holds that where God sends mouths He also sends food; that somehow, the laws of nature will guarantee that morally unpalatable events just will not occur. This is nonsense. There is a fundamental contradiction between the desire for generous “social justice” and the realities of life on our increasingly crowded and ruined planet. One simply cannot have both a healthy planet and even a modestly comfortable way of life for nine billion *Homo Sapiens*. One or the other must give. To put it bluntly, the survival of the planet and of pockets of civilisation within it will only be possible at the cost of appalling human misery.

However the Earth Charter goes too far not only in its expectations of resources but also in its social vision of the future. As mentioned above, that social vision calls for social welfare, and for activist states which “recognise the ignored, protect the vulnerable, [and] serve those who suffer”, which “promote the equitable distribution of wealth”, and which strictly regulate multinational corporations and international financial organisations. There must be gender equity and the elimination of discrimination; there must be freedom of expression, opinion, peaceful assembly, association and dissent,<sup>41</sup> comprehensive strategies to prevent violent conflict and the demilitarisation of national security systems. There must be many other things, all of which we could fairly categorise as the reasonably standard mainstream liberal agenda. All of these policies are, it

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40 <[www.earthcharterinaction.org](http://www.earthcharterinaction.org)>. The mission of the Earth Charter Initiative is “to promote the transition to sustainable ways of living and a global society founded on a shared ethical frame work that includes respect and care for the community of life, ecological integrity, universal human rights, respect for diversity, economic justice, democracy and a culture of peace”.

41 However freedom of religion is, for whatever reason, nowhere mentioned.

seems, just as important to humanity's rescue as are ecological integrity and respect and care for the community of life.

Besides the practical objection that struggling humanity will have its hands full dealing with the environmental crisis, and will not have much time to spare to work on gender equity,<sup>42</sup> for example, there are other reasons why we might consider the Earth Charter's social prescriptions to be ill advised.

For the last generation the environmental movement in New Zealand has, by and large, taken the attitude that the environment is an issue above and beyond politics. All people, whatever their politics, need fresh air and clean water, healthy food, serenity and refreshment for the spirit. It could well be argued that this political neutrality has been a necessary precondition for the movement's success.<sup>43</sup> The movement has always been alive to the widespread (and, if not entirely accurate, yet not entirely baseless) suspicion that environmentalists are of their nature likely to be left of centre in their politics, and that therefore there is no point in parties of the right having wise environmental policies, because those parties will not be rewarded by environmentalists' votes. The establishment of the Green Party was therefore viewed with mixed feelings by many environmentalists, because that party by its very name announced that it was the environmental party, and yet many of its other policies were distinctly of the left. It had the effect, in fact, of undoing the environmental position of political neutrality; its very name proclaimed that if a voter were green then that voter should properly be supporting left-leaning political positions on non-environmental issues.

This same criticism may be made of the Earth Charter. Gender equity, and many other social policies listed in the Earth Charter, are not environmental issues. Indeed, even to describe those policies as ones of "social justice" might be argued to be begging the question. Certainly, if we were to identify cultures and societies which in the past have lived sustainably upon the earth, and the list we compile might well be a very long one, we would have to conclude that many of those environmentally sustainable societies did not display gender equity, the complete elimination of all forms of discrimination, cultures of tolerance, non-violence and peace, and so on. Indeed, it could be argued that very often, anyway, the societies which least display these liberal characteristics are the "indigenous" societies run along very traditional lines, but which nevertheless receive special mention and respect in the Earth Charter.<sup>44</sup> The environmental degradation of the last couple of centuries, and of the last century in particular, has occurred at precisely the same time as the development of "social justice". If anything, the two have gone hand in hand; they are certainly not natural enemies.

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42 James Howard Kunstler *World Made By Hand* (Atlantic Monthly Press, 2008) is not alone in envisaging a poorer environmentally impoverished future where old social and sexual hierarchies effortlessly reappear and re-establish themselves, virtually without anyone noticing, or at least protesting.

43 The first notable victory of the new forest conservation movement, spearheaded by NFAC (the Native Forests Action Council) arose out of the promise by the National Party that if it were successful in the 1981 election it would add South Okarito and Waikukupa State Forests to Westland National Park. It is unlikely that this promise would have been made if NFAC had joined the "Citizens for Rowling" campaign, a political coalition which was more accurately described as "Citizens Against Muldoon" (the National leader and Prime Minister).

44 Principle 12 (b) of the Charter "[a]ffirm[s] the right of indigenous peoples to their spirituality, knowledge, lands and resources and...their related practice of sustainable livelihoods". For an examination of the inherent contradictions within the worship of the indigenous, see DJ Round "UN Declaration on the Rights of Indigenous Peoples" (2009) NZLJ 392.

The Earth Charter, then, goes too far. Like the Green Party's choice of name, it attempts to hijack the environmental movement and put it to the service of an unrelated political agenda. It would be just as fair to say, though, that it does not go far enough. The Charter, in fact, fails to recognise the first rule of ecology, that everything is connected. One can never do only one thing. The Charter does not aim at any fundamental restructuring of society. It contemplates the continued existence of multinational corporations and international financial institutions; it just demands that they be regulated for the public good. There will still be nation states, which merely have to be more democratic than at present, and which must be more active than they are now in promoting human rights, community well-being and the rest. There will still be "patterns of production [and] consumption", it is just that these must operate in harmony with a world of limited resources. The Charter cannot imagine a world much different from our own, but if our world in its basic late twentieth century liberal outlines is to continue, then (everything being connected) we must continue on our present path to destruction.

## X. THE LIVING OF ETHICS

To live at peace with the earth and in harmony with all creation certainly requires or presupposes an "environmental ethic". Many theologians and scholars are drawing on ancient wisdom and the riches of philosophy in order to compose ethical rules appropriate to our time for our relationship with the physical world.

Without a doubt most of these ethical rules will be excellent. It will not be enough, however, to have ideal codes of conduct spelt out in books; ethics must be lived, and here problems arise. One problem is the defensible foundation of those ethics; our society is aggressively secular.<sup>45</sup> As Theodore Roszak was noted above as maintaining, the repression of the religious sensibilities in our culture has been as necessary as any technology or invention in enabling us to use the world as we please, because we are able so to use it only after we have come to see it as mere inert material. For two centuries and more we have been constructing a world and world view utterly physical and material, with less and less room for God, the sacredness of the natural world, the human soul and any purpose or meaning. Nearly every reformer has seen it as part of his or her aim to assist in the great project of strangling the last king with the entrails of the last priest, and now that that has been at least metaphorically achieved, we profess to be surprised and horrified to discover that our society is aggressively materialistic. We should not be surprised. Our materialism is the logical and inevitable consequence of our secularism. If life has no higher purpose, what is there left to do but to accumulate as many possessions as possible? If life has no meaning or purpose, if the universe is not a wonderful creation but a mere chance, then on what ground can we object to its destruction? The only reasons we can offer are ones of self-interest, but they may not go very far.

Moreover we live in ways which make it difficult for us to behave in an environmentally virtuous manner. It can be difficult, indeed, even to identify the virtuous path. Even the optimistic Francis Fukuyama,<sup>46</sup> seeing history come to an end as the long wagon train of mankind begins to pull into town, admitted that capitalist prosperity and democracy were best promoted by "ir-

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45 In February 2002 the then Prime Minister, Helen Clark, justified her refusal to allow grace to be said even at a state banquet where Her Majesty was present because "[t]he practice of saying grace is of little relevance in our increasingly secular society...".

46 Francis Fukuyama *The End of History and the Last Man* (Free Press, New York, 1992).

rational” beliefs from earlier stages of society. Our present global economic troubles<sup>47</sup> have come about because we have been “living beyond our means”, to use a phrase which, although once common, now has a certain old-fashioned ring to it, yet a distinct school of economic thought maintains that such living, far from being imprudent, has actually been economically necessary, and that further borrowing and consumption are needful if the economy is to be restored to health. In our industrial capitalist society we are led to believe that the satisfaction of wants by continuing consumption is not only legitimate, but positively virtuous. Where ordinary citizens receive such advice it is indeed difficult to identify the environmentally virtuous path.

Third, even if the path were clear it is difficult to follow. Unless we happen to be on holiday, most of us, generally behaving as modern people do, have little direct contact with the natural world. We live in cities. We drive cars; when do we meet nature? In the food we purchase and eat we make choices which will eventually affect agricultural practices,<sup>48</sup> we will encourage or discourage organic farming or battery hens as we buy or do not buy the products of those operations, but it may be difficult to make even that choice in an age of prepared and packaged foods. That being so, it is impossible for us to live any environmental ethic. We may approve of these ethics, but how can we apply them? They seem to be designed for other people, for farmers and foresters, miners and manufacturers, not for mere citizens in towns. As long as we continue to live in the way we do, sadly and desperately, with an emptiness that must be assuaged by material things and with the natural world out of sight beyond the horizon, we shall not even think about those fine ethical duties for long.<sup>49</sup>

Environmental sustainability, then, can only be practised in compatible cultural settings. It is only possible in societies sufficiently simple and close to the earth that humans can see and feel the consequences of their actions. It must be at one with a society’s attitudes and way of life, its values and expectations, its conceptions of life’s purpose and human duty, of the will of the gods and humanity’s place in the universe, its social structures and its land laws. In the same way we have already argued that the Resource Management Act has failed to fulfil its purpose because that purpose runs against the grain of the society in which it is set.

Our thoughts are all of a piece. A conservative or radical attitude is likely to colour all our thinking and action. Very rarely are we truly conservative in some things and truly radical in others. Conservatism must be properly understood. It is not blind opposition to all change, neither has it anything to do with aggressive individualistic free market capitalism, which is in fact almost its antithesis. Conservatism is, rather, a caution about change. It is cautious because it has a realistic understanding of human nature and its weaknesses, and of how long and slow and painful has been the growth of civilisation’s thin and fragile veneer. Civilisation, order, law, good customs: these are precious and very easily lost. The radical temperament, by contrast, is more hopeful, and

47 A “correction”, some would say; others speak of a depression; others might describe it as a consequence.

48 In one of Wendell Berry’s most famous sayings, (found, for example, in his 1989 essay “The Pleasures of Eating”) “Eating is an agricultural act”.

49 Wendell Berry, writing of traditional agriculture in the highlands of Peru in “An Agricultural Journey in Peru”, in *The Gift of Good Land* (North Point Press, San Francisco, 1981) at 27, says that “this is probably the only kind of culture that works: thought sufficiently complex, but submerged or embodied in traditional acts. It is at least as unconscious as it is conscious, and so is available to all levels of intelligence. Two people, one highly intelligent, the other unintelligent, will work fields on the same slope, and both will farm well, keeping the ways that keep the land. You can look at a whole mountainside covered with these little farms and not see anything egregiously wasteful or stupid. Not so with us. With us, it grows harder and harder even for intelligent people to behave intelligently, and the unintelligent are condemned to a stupidity probably unknown in traditional cultures”.

less realistic, about the ability of human nature to change and build heaven on earth. The radical is therefore much readier to jettison the past. The perfect can be the enemy of the good; the solid good in the past is, to the radical, the enemy of the perfect in his imagination.

The precautionary principle is a truly conservative idea. It declares that one should hold on to the good things of the present, inherited from the past, until it is absolutely clear that replacements or alleged “improvements” will in fact be better. It is unlikely that we will embrace such a conservative principle if in most other respects our attitudes are the opposite, that we should be free to experiment with life and new ways of living. Not just radicals of the left, but most of us, have some commitment to ideas of freedom and individualism which are incompatible with proper caution. The challenge of the future is to establish societies which have caution and long abiding patterns in their very bones. Such societies must be much slower than our own. That will be a good thing, in the balance; our own present frantic pace is as bad for our own minds and bodies as it is for the earth. The future must be based on land, on families, the inheritance of the generations, and on a human scale. In one way this is an immensely difficult task, for it will mean the loss of much of a freedom we greatly treasure, but all it is, is a return to humankind’s immemorial patterns, to ways of life for which, even in our own history and civilisation, we need look no further, there are abundant precedents.

## XI. THE INTEGRATION OF ENVIRONMENTAL LAW

Here lies the true future of environmental law. It must indeed be integrated. It must be not an irritating exceptional intervention, but a natural part of things, however it is not enough that it merely be integrated with other legal processes dealing with the development of land and particular projects. It must be integrated with the whole ordering of the community; it must be so embedded in a way of life that once more, as in much of the common law’s history, it disappears completely. Sound environmentalism in the future will arise out of the work of the constitutional lawyer, the Lord of the Manor or his future equivalent, the drafter of family settlements and entails, and from the leader, the prophet and the saint.<sup>50</sup> This must be so. As long as “environmental law” is a distinct field, it will inevitably be an unwelcome interference, yet another collection of hurdles to be overcome, and what is unwelcome will sooner or later be turned out.

The Greens can be blamed for implying that environmental issues are naturally the property of the left. In fact the opposite is true: sustainable life is only possible in societies that are conservative, in the truest sense of that word. The environmental slogan that ‘we have not inherited the earth from our ancestors, we have borrowed it from our children’ is no more than the environmental aspect of Edmund Burke’s claim that we hold the whole great accomplishment of civilisation as a patrimony in moral entail, which we are obliged to pass on to our children, enriched if possible, and certainly not diminished.

We do not need more environmental laws, nor even better ones. We have tried that path. Our laws are undoubtedly better written than they were ten, twenty, thirty years ago, yet that has not made any difference. We must try another way. We need to reshape the way we live. It is we who are the problem. We are to blame, not big business, not law, not politicians. In the last resort, they do what we want. They may certainly try to persuade us to one course of action or another, as they

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50 Another necessary role may well be played by the service men and women of the Air Force and Navy and territorial forces guarding our coasts against uninvited mass immigration, if not actual armed invasion, by desperate and overwhelming humanity elsewhere.

are entitled to do, it being a free country, but at the end of the day the decisions are ours.<sup>51</sup> Some people may protest against cowardly governments who do not implement sufficient measures to combat climate change; but any Western government that did fully implement its nation's fair share of the burden of changing to prevent climate change would be overthrown by popular revolt that afternoon.

We must change the way we live, and to do that we need to reshape our minds. We already know how to live sustainably; we are just afraid to do so. It will be difficult. We are afraid we may fail; one little part of us is afraid that our sincere beliefs and warnings might not be true; we still lust after material things, and are afraid to be without them. If we were wrong, and had renounced modern comforts for nothing, we would have missed out on so much, and everyone would laugh at us...the author knows these feelings. We are afraid that we might not be happy. We lack the courage of our convictions.

However if we are not brave enough to do these things ourselves, how can we blame others for not doing them? If we are trapped in demanding social arrangements, so surely is everybody else. If we do not lead the way, who else will?

## XII. APPENDIX

### A Table showing Forest and Bird membership Figures 1973 – 2010.<sup>52</sup>

The figure in the right-hand column, the number of “notional members”, is obtained by dividing the total subscription income from the year (a figure which appears separately in the Annual Report) by the single adult subscription of that year. Slight blips occur when subscriptions are increased, but general trends are clear.

Year	Subscription Income	Single Adult Subscription	Notional number of single Adult equivalent members
1974	\$25,722	\$2.50	10,288
1975	\$39,019	\$5.00	7,803
1976	\$52,107	\$5.00	10,421
1977	\$58,743	\$5.00	11,748
1978	\$77,715	\$7.00	11,102
1979	\$94,678	\$7.00	13,525
1980	\$95,935	\$7.00	13,705
1981	\$131,267	\$10.00	13,127
1982	\$182,131	\$15.00	12,142
1983	\$210,754	\$15.00	14,050
1984	\$235,530	\$15.00	15,702
1985	\$345,968	\$20.00	17,298
1986	\$368,182	\$22.00	16,735
1987	\$389,678	\$22.00	17,712
1988	\$556,042	\$33.00	17,152

51 Somewhere in Eric Schlosser's *Fast Food Nation* (Houghton Mifflin, New York, 2001) the author admits freely that, in the last resort, no-one holds a gun to your head and forces you to go into a McDonald's.

52 The 2008 figures quoted here are from the 2008 Annual Report. The 2009 Annual Report gives different subscription figures for 2008; lower, in the case of general subscriptions, higher in the case of the Kiwi Conservation Club. The total difference is however only \$1,211.

At this time the Kiwi Conservation Club (KCC) was established, with its own subscription. Henceforward the dollar figure in brackets indicates additional income from KCC subscriptions, and the membership figure in brackets is the notional membership if KCC subscriptions are added in, but the figure is still divided by the single adult subscription.

<b>Year</b>	<b>Subscription Income</b>	<b>Single Adult Subscription</b>	<b>Adult equivalent members</b>
1989	\$623,619 (\$27,031)	\$38.00	16,411 (17,122)
1990	\$684,681 (\$33,286)	\$38.00	18,018 (18,893)
1991	\$825,307 (\$48,943)	\$40.00	20,632 (21,856)
1992	\$773,344 (\$44,316)	\$40.00	19,333 (20,441)
1993	\$688,079 (\$34,649)	\$40.00	17,201 (18,068)
1994	\$634,590 (\$33,115)	\$45.00	14,102 (14,838)
1995	\$715,525 (\$54,772)	\$47.00	15,224 (16,389)
1996	\$778,859 (\$57,719)	\$47.00	16,571 (17,799)
1997	\$629,032 (\$48,616)	\$47.00	13,383 (14,418)
1998	\$585,493 (\$54,137)	\$47.00	12,457 (13,609)
1999	\$614,971 (\$49,092)	\$47.00	13,084 (14,129)
2000	\$599,076 (\$58,055)	\$49.00	12,226 (13,411)
2001	\$612,666 (\$60,710)	\$49.00	12,503 (13,742)
2002	\$564,111 (\$71,190)	\$52.00	10,848 (12,217)
2003	\$587,709 (\$76,950)	\$52.00	11,303 (12,782)
2004	\$599,736 (\$75,019)	\$52.00	11,533 (12,976)
2005	\$566,759 (\$79,960)	\$52.00	10,899 (12,436)
2006	\$507,136 (\$81,438)	\$52.00	9,756 (11,318)
2007	\$581,481 (\$89,139)	\$52.00	11,182 (12,897)
2008	\$561,850 (\$64,071)	\$52.00	10,805 (12,037)
2009	\$540,358 (\$75,149)	\$57.00	9,480 (10,798)
2010	\$584,304 (\$93,785)	\$57.00	10,250 (11,896)