

TRISTAN MEO

PROTECTING BIODIVERSITY ON PRIVATE
LAND AND PROPERTY RIGHTS
IN NEW ZEALAND

LLM RESEARCH PAPER
ENVIRONMENTAL LAW (LAWS 536)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

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New Zealand has been blessed with an ecological evolution completely distinct from that experienced anywhere else in the world. The 80 million years of isolation from other land masses has gifted us an almost entirely endemic variety of ecosystems, wildlife and vegetation. Yet, in only 800 years humans and their accompanying introduced organisms have eliminated a valuable proportion of our endemic bird life, invertebrates and fauna. Today the loss of biodiversity continues. Though land owned and managed by the Department of Conservation has proved a comparative success in redressing the depletion of biodiversity in these areas, the same cannot be said of biodiversity on privately owned land. New Zealand's current legal framework has been ineffective in addressing the protection of biodiversity on private land. The ensuing article seeks to find out reasons as to why this is the case. An in depth analysis of many of the regulatory mechanisms capable of protecting biodiversity on private land is undertaken. Similarly, the concept of private property as understood in New Zealand is also examined. The results of those discussions lead the author to believe the nature of private property in New Zealand is not conducive to effective biodiversity protection on private land, even with regulatory restrictions. If biodiversity is ever to thrive on private land, the fundamental nature of private property rights must be changed.

The text of this paper (excluding contents page and footnotes) comprises of approximately 13, 500 words.

I INTRODUCTION

New Zealand has been blessed with an ecological evolution completely distinct from that experienced anywhere else in the world. The 80 million years of isolation from other land masses has gifted us an almost entirely endemic variety of ecosystems, wildlife and vegetation.¹ Yet, in only 800 years humans and their accompanying introduced organisms have eliminated 32 per cent of indigenous land and freshwater birds, 18 per cent of sea birds, 3 frogs, 12 invertebrates, 3 reptiles and 11 plants.² With these losses in mind, it is not surprising that the Minister for the Environment has stated that the depletion of biodiversity is *the* environmental issue for New Zealand.³

In attempting to halt and reverse such a trend of biodiversity degradation, in the last 25 years various governmental entities have enacted legislation, regulation and other policy which have sought to address the various causes of biodiversity loss.⁴ These measures have tended to focus on threatened species and vegetation via the creation of protected areas, in particular on Crown owned and supervised land. Much of New Zealand's biodiversity and distinctive habitats are not included in these protected areas. Many of our ecologically rich habitats are found on privately owned land and which run the risk of being damaged, due to the possibility of intentional and unintentional harm.⁵

¹ Department of Conservation *In Ecological Restoration of New Zealand Islands* (Diamond Jared, Wellington, 1990) 3-8.

² I Smith (ed) *The State of New Zealand's Environment* (Ministry for the Environment, Wellington, 1998) 5 ["*State of the Environment*"].

³ Minister for the Environment: Right Honorary Simon Upton, Key note Address at Pest Summit 1999, Convention Centre, Palmerston North, 8 April 1999.

⁴ Examples include the Forests Act 1949, Wildlife Act 1953, Native Plants Protection Act 1934, National Parks Act 1980, Reserves Act 1977, and Marine Mammals Act Protection Act 1978. Other developments include the creation of the Department of Conservation and the Ministry for the Environment, under the Conservation Act 1987 and the Environment Act 1986, respectively.

⁵ The author is aware of the reality that biodiversity, itself, does not recognise the human

Policy makers have only recently begun to understand that to protect our nation's biodiversity effectively, policy and measures which address biodiversity on private land are necessary.⁶ Yet a lack of understanding and knowledge on the part of policy makers as to how to approach the protection of biodiversity has led to disparate and piecemeal legislation - legislation which does not holistically address the true scope and issues of protecting biodiversity on privately owned land. Examples of such attempts which concern biodiversity protection and touch the domain of private property include the Resource Management Act 1991, the Forests Amendment Act 1993, the Wildlife Act 1953 and the Hazardous Substances and New Organisms Act 1996. This year, possibly in acknowledgment of the failing of this piecemeal legislation, the Department of Conservation and Ministry for the Environment has published a Proposed National Draft Strategy for Biodiversity.⁷ One of six primary strategic goals listed in the Draft Strategy is focused solely on sustaining biodiversity on private land.⁸

Given this factual background, biodiversity protection on private land is a key area of environmental concern for New Zealand. This research paper specifically aims to address the following matters in relation to the legal framework for the protection of biodiversity on private land:

parameters of private versus Crown owned land. There is significant force in the proposition that biodiversity need be addressed on its own terms. However this paper initially must approach biodiversity protection from within New Zealand's current conceptions of legal ownership and private property.

⁶ Private land refers to land not owned or under the management of the Crown. The Crown is the proprietor of all land to which no subject can show title - see also Conservation Act 1987 s 2. Also excluded in the concept of private land is land owned by local authorities, or land managed by the Department of Conservation. The vast majority of New Zealand's land holdings are privately owned.

⁷ Ministry for the Environment and Department of Conservation *A Draft Strategy for New Zealand's Biodiversity* (Wellington, 1999).

⁸ *A Draft Strategy for New Zealand's Biodiversity*, above n 7, 103-4.

- To clarify what policy makers are exactly talking about when they try to protect biodiversity (Section II);
- To identify and examine New Zealand's current legislative framework for conserving biodiversity on private land (Section III);
- To assess to what extent this framework provides an adequate protection of biodiversity on private owned land (Section IV);
- To discuss to what extent this framework limits the property rights of private landowners (Section V);
- To discuss whether the current understanding of private property provides a justifiable basis for such limitations of property rights (Section VI);
- To assess whether the nature of our current conceptions of property, even if restricted by regulatory means, are capable providing successful protection of biodiversity loss on private land (Section VII).

This last issue serves as the primary concern of the research paper. In particular this paper argues that the current understanding of private property rights in New Zealand is inherently inconsistent with the protection of biodiversity on private land.⁹ Furthermore, it is the author's belief that this inconsistency is sufficiently extensive so as to be the major reason why existing regulatory attempts to protect biodiversity have proved practically ineffective in New Zealand.

In summary, the thesis of this paper can be encapsulated in the following two sentences. The nature of private property in New Zealand is not conducive to effective biodiversity protection on private land, even with

⁹ It may be possible to correlate the author's conclusions regarding private property in New Zealand to other common and civil law jurisdictions. This could be due to New Zealand's strong hereditary relationship with the Common law and the generally similar concepts of private property under civil legal systems. However the conclusions of this paper are only proposed by the author in relation to New Zealand legislation and property rights.

regulatory restrictions on those rights in the land. If biodiversity is ever to thrive on private land, the fundamental nature of private property rights must be changed to intrinsically incorporate ecological values.

II WHAT IS BIODIVERSITY?

This section attempts to provide those reading the paper with an understanding of the concept of biodiversity, so as to permit informed discussion of the legislative mechanisms which attempt to protect it later in the paper. Furthermore, this section intends to point out not only the fundamental threads of biodiversity but also the many problems in actually deriving any practical meaning from such an encompassing concept.

A A Definition?

Biodiversity has become a term that enjoys common currency in both scientific and legal literature on ecology, and yet it is concept which is very difficult to define simply or inclusively.¹⁰ In the *State of New Zealand's Environment Report*, "biodiversity" is summarily described as the variety of life.¹¹ But it is a multi-dimensional concept, and can mean different things to people in different settings.¹² Generally, biodiversity is accepted as

¹⁰ Note "biodiversity" is derived from the formal term "biological diversity", which was first formally adopted in the Convention on Biological Diversity, June 1992, Rio de Janeiro, Brazil.

¹¹ *State of the Environment*, above n 2, 5.

¹² This point is often made by various ecological commentators - for a New Zealand example see: I Atkinson "Biodiversity: What is it, and Why is it Important?" in B McFadgen and P Simpson (eds) *Biodiversity: Papers from a Seminar Series on Biodiversity* (Wellington, Department of Conservation, 1996) ["Biodiversity: What is it?"]. However, biodiversity at the least does provides biologists with a key indicator of the ecological health or stress a species or ecosystem is under. To this extent, genetic diversity contributes to the population dynamics of a species, thus providing biologists with an indicator of the variety and interdependence of a species or ecosystem. Significant diversity amongst living communities, or diversity which varies over time is seen as

including the diversity within species, between species and of ecosystems and the processes that maintain them.¹³ These three measures of biodiversity have been identified to include:¹⁴

- (a) Species diversity - the number of different species of plants and animals, including micro-organisms, in a given area;
- (b) Genetic diversity - the genetic differences between and within species and their constituent populations;
- (c) Ecological (or "communities") diversity - the number of different ecosystems, biotic communities or ecological processes in an area (including communities and their habitats).

However, this predominantly scientific focused definition does not, on its face, provide participants of the legal system with a workable and easily understood definition of biodiversity. Moreover it is very difficult, if not impossible, to finitely state the scientific meaning of the concept of biodiversity. When one examines the question how does one protect biodiversity on private land, a necessary prerequisite in achieving that protection is knowing in fact are we trying to protect. It is possible to interpret biodiversity as many things when applying such an embracing concept to the practicalities of protecting individual incidents of habitat or wildlife on private land. For example are policy makers trying to protect the variety of the ecosystems present in an area? Or is it the survival of the ecosystems themselves? Or is it merely a roundabout term to describe the protection of the environment generally? Similarly when determining what biodiversity to protect, do policy makers have to make value judgments as to which species or ecosystems we wish to secure? Or do policy makers assume all biodiversity is equally valuable regardless of its origins or setting?

strong evidence of the stability and longevity of a species or ecosystem.

¹³ Convention on Biological Diversity, June 1992, Rio de Janeiro, Brazil.

¹⁴ *A Draft Strategy for New Zealand's Biodiversity*, above n 7, 131. See also Convention on

Questions such as these are critically important for the protection of biodiversity on private land, particularly when one considers the necessary standard of certainty required for the effective application of legal rules.¹⁵ The law must be sufficiently certain in its application, so that private landowners know and understand the nature of the obligations and rights conferred via their legal interest in an area of land. If legislators cannot define "biodiversity" to a sufficiently precise standard, then any attempts to holistically approach biodiversity in legislation may be unclear as to what, practically, is being addressed. If this is the case, the effectiveness of any attempts to protect biodiversity via a legal framework will be inhibited.

B *Introduced and Indigenous Biodiversity: Is There a Distinction?*

The ambiguity inherent in the concept of biodiversity is especially obvious when one considers the tension between the notions of indigenous wildlife and habitat and introduced wildlife and habitat. It is generally accepted by biologists that ecosystems are dynamic, in a perpetual state of change, whether it be growth, recession or a cyclic process.¹⁶ Similarly all organisms and ecosystems migrate or disperse to some extent. The nature, distribution and diversity of species has fluctuated throughout the earth's history. Since the arrival of humans these movements have been amplified. Currently, the world is in a period of its history where human activities such as the mingling of many organisms from different parts of the world, the creation of genetically engineered organisms, hunting, habitat depletion and pollution are altering the nature of the ecological life

Biological Diversity, June 1992, Rio de Janeiro, Brazil.

¹⁵ It is a truism that legal rules in a legal system must be sufficiently certain to be understood to be rules at all – see H L A Hart *The Concept of Law* (Oxford University Press, Oxford, 1994) 124-33.

¹⁶ A R E Sinclair *Dynamics of an Ecosystem* (University of Chicago Press, 1979) 20-35.

cycle prior to human influence.¹⁷ The result is a cumulative modification of biodiversity as a global consequence of human activity.¹⁸ These influences have contributed to world wide trend of an increase in introduced diversity, while indigenous diversity has decreased.¹⁹ Very few areas of unmodified natural habitat remain,²⁰ and furthermore in many areas it may be difficult to distinguish between indigenous and introduced ecosystems, so great is the influence of human activity on biodiversity.²¹ The modern world is not a primordial paradise, but is comprised of a multitude of humanly modified habitats, continually affected by the activities of human populations.

Then should policy makers be primarily concerned with protecting indigenous biodiversity? The Minister for the Environment has stated this is the primary focus of *A Draft Strategy for New Zealand's Biodiversity*, but not at the expense of introduced biodiversity.²² Introduced biodiversity provides New Zealand with a significant portion of our export wealth and it would make utilitarian sense to attempt to protect introduced biodiversity similarly. The complex interaction between these two categories of diversity provide policy makers and legislators with

¹⁷ There is an argument against protecting biodiversity inherent in the dynamic nature of ecosystems – namely how can you protect something which is forever in a state of constant change. It may be fruitless to try and attempt to keep biodiversity in its current (or previous) balance, for biodiversity is always in a process of change. Furthermore, it is not clear why one should try and remove the influence human activity has on biodiversity if it assumed that humans form a natural constituent part of the world's ecosystems.

¹⁸ A J Challis "The Human Parameters of Biodiversity" in B McFadgen and P Simpson *Biodiversity: Papers from a Seminar Series on Biodiversity* (Wellington, Department of Conservation, 1996)

¹⁹ R Halloy *Native and Managed Diversity* (Cambridge University Press, Cambridge, 1996).

²⁰ Even areas such as Antarctica and unpopulated parts of Africa and the Russian republic bear the influence of human activity. Influences such as ozone depletion, atmospheric pollution and other residual human waste products can have just as significant effect on biodiversity as can more direct and obvious human influences such as habitat depletion.

²¹ Halloy, above n 19, 13.

²² Minister for the Environment: Right Honorary Simon Upton, Key note Address at Pest Summit 1999, Convention Centre, Palmerston North, 8 April 1999 above n 3. See also *A Draft Strategy for New Zealand's Biodiversity* above n 7, 22.

significant unresolved issues as to how to formulate measures which adequately cater for both categories of biodiversity.

What then is an acceptable and legally workable meaning of biodiversity for the purposes of this research paper? Having considered the uncertainties of the many attempts to quantify the real elements of biodiversity, the author considers a general definition accepted in *A Draft Strategy for New Zealand's Biodiversity* as best suited for this paper.²³ The description encompasses all forms of biological life, but places priority on the protection and rehabilitation of indigenous biodiversity. Admittedly, this definition does not in itself resolve the practical problems of formulating rules of legal consequence which clarify what particular incidents of biodiversity need protection and it may be impossible to finitely state the limits of biodiversity. And though conflicts over assessments, priorities and programmes can develop between those approaching biodiversity from different perspectives, it is submitted the general thrust of the biodiversity concept is sufficiently distinct for it to be understood as a term of legal consequence. Biodiversity can only ever be a general precept, but this does not prevent it from being broken down into smaller principles and categories by law makers in order to provide for meaningful effect to be given to the overarching precept.

C Key Characteristics Distinguishing Biodiversity from other Environmental Conservation Concerns

The encompassing nature of the concept of "biodiversity" has led to the

²³ The author acknowledges that such a definition does not add much to the understanding of the practical application of biodiversity. However it is not the purpose of this research paper to address and identify a complete and comprehensive definition of biodiversity. Save to say, that an explanation of the concept merely aims to provide readers with an understanding of the uncertainties involved in the broad concept of biodiversity.

criticism that it is simply passing itself off as another description of the environment.²⁴ However the author submits that the focus of biodiversity is at least theoretically distinct, in that it is predominantly referring to the natural world or living organisms within their ecological habitat - as opposed to the physical and man-made surrounds generally included in the definition of environment.²⁵ In practice, though, it is arguable that the distinction is meaningless. Protection of the environment necessarily includes the protection of biological life, and protection of biodiversity must include the protection of habitat - including perhaps even the human created habitat. It is submitted by the author that even in practical terms there are several distinct characteristics of biodiversity which make it necessary for a holistic biodiversity legal framework. These are traits which make biodiversity distinct from more conventional resource management or environmental issues, and which must be taken into account in policy and legislative design. Young has espoused several of these characteristics, six of which the Ministry for the Environment has adopted in formulating their biodiversity strategy.²⁶

First, in many circumstances biodiversity loss is irreversible.²⁷ Even under current technology, once lost, a species or an ecosystem is lost forever. Second, many species - especially the invertebrates, microbes and viruses - remain undiscovered. It is estimated that there are between five and thirty

²⁴ Some definitions of biodiversity are broad enough to include landforms and landscapes, thereby also referring to the man-made physical world - see M Rojas *The Species Problem and Conservation: What are we Protecting?* (1992) 6 *Conservation Biology* 170, 177.

²⁵ There is not one accepted definition of the word "environment" - however it connotes at the very least some elements of the human created physical world which biodiversity does not primarily address. For a New Zealand example of the definition of "environment" see s 2 of the Resource Management Act 1991.

²⁶ M D Young and N Gunningham "Toward Optimal Environmental Policy: The Case of Biodiversity Conservation" (1997) 24(2) *Eco L Q* 243, 251-2. See also *A Draft Strategy for New Zealand's Biodiversity*, above n 7.

²⁷ E B Barbier *Paradise Lost?: The Ecological Economics of Biodiversity* (Earthscan, London, 1994) 18.

million species on the Earth, and of which only about one and a half million have ever been described.²⁸ As a consequence, biodiversity can be lost before we know it is even there, leaving its ecological role and its potential contribution unknown. Third, ecosystem diversity exhibits threshold effects. Contemporary scientific evidence suggests that there are limits to the ability of ecosystems to withstand the stress imposed by environmental degradation.²⁹ Hence, if stressed beyond these limits the ecosystem will cease to function. As a consequence, any policy that compromises the resilience of ecosystems may have uncontrollable effects, and even small policy changes can have dramatic but unforeseen results. Fourth, the threshold effect is exacerbated by the fact that information about species' responses to biodiversity loss is extremely limited. Often obvious causes of loss such as habitat loss or hunting have little to do with biodiversity loss. The causes of genetic, species and ecosystem losses are extremely diffuse and involve many different sectors and forms of economic activity. Biodiversity is pervasive to social and economic systems, and is affected by land and water use decisions, by pollution and by human activity generally. Fifth, some biodiversity problems cannot be solved merely by proscribing certain behaviour. Preserving the integrity of some instances of biodiversity may require positive ongoing management, emphasises a custodianship ethic.³⁰ Sixth, substantial tensions between public and private interests can arise because much of biodiversity has no

²⁸ W L Filho, C Dykes, Z Murphy *Raising Awareness of Biodiversity: Commonwealth Examples* (Commonwealth of Learning, Bradford, 1996) 17.

²⁹ I A E Atkinson "Ecological Measures for Conserving Terrestrial Biodiversity: a New Zealand perspective" in P L Forey, C J Humphries and R I Vane-Wright (eds) *Systematics and Conservation Evaluation* (Clarendon Press, Oxford, 1994) 65.

³⁰ This point is debatable however depending on your philosophical perspective regarding protection of the environment. Some authors argue that management of biodiversity results in human generated nature ie the nature of the future will be the nature we make. Hence it is more desirable to leave ecosystems to adjust and adapt via their own natural processes - see Halloy, above n 19, 45. Others, however, argue that biodiversity protection is not merely about identifying a single instance or problem and dealing with that specific problem at that time - it must be about an on-going monitoring and management of an identified collection of ecosystems. For example consider the need for pest management programmes for feral weeds, possums and stoats.

economic value.³¹ While the protection of an instance of biodiversity may be desirable to policy makers and the public, it may not be for the private landowner especially if the individual must bear the cost.

Consequently such distinct issues in the nature of biodiversity must be adequately addressed if the current New Zealand legal framework which endeavours to protect biodiversity on private land is to be effective and successful.

III ANALYSIS OF NEW ZEALAND'S LEGAL FRAMEWORK

This section of the research paper seeks to identify the key legislative mechanisms in New Zealand which address the issue of protecting biodiversity on private land. The following analysis will only concern biodiversity protection measures which relate to the legal framework.

The starting point for the protection of biodiversity on private land is the imperial Statute of Marlborough (UK) 1227.³² Chapter 23 of that statute requires a farmer not to make waste, sale, nor exile of house, woods, men, nor of anything belonging to the tenements that they have to farm, without special licence had by writing of covenant from the Crown. It is clear that even from this early time, the Crown was concerned with restricting the use of private property for the public good of protecting forest on private land. In New Zealand today, the major mechanism for protecting biodiversity on private land is the Resource Management Act 1991 (hereinafter the "RMA"), and hence this forms the majority of the following discussion – but several other statutes are also canvassed.

³¹ T Swanson "Regulating Endangered Species" (1993) 16 *Economic Policy* 184, 189-199.

³² Chapter 23 of the Statute of Marlborough is still in force in New Zealand domestic law still by virtue of s 3(1) of the Imperial Laws Application Act 1988.

The author intends to identify the relevant provisions which aim to address the conservation of biodiversity on private land, and then specify any obvious limitations in the relevant statute. Other policy measures, while crucial in combination with legal controls for effective biodiversity protection, will not be the subject of analysis in this paper.³³ Admittedly these legislative controls and rules only form a small part of the various policy measures that individuals and the state are involved in which aim to protect biodiversity on private land. Accordingly any discussion of the legal framework does not purport to provide universal conclusions applicable to the other policy type measures available. It simply is an analysis of the appropriateness of the mechanisms within the current legal framework which attempt to protect biodiversity on private land.

A Biodiversity Protection under the Resource Management Act 1991

The RMA sets out a regulatory framework and some broad national goals, in relation to the environment. The RMA's purpose is "to promote the sustainable management of natural and physical resources".³⁴ While biodiversity is not specifically expressly stated as one of the RMA's objectives, it is probable that the protection of biodiversity is, in fact, included in the concept of sustainable management. Sustainable management means managing the use, development and *protection* of natural and physical resources.³⁵ Hence a key component of sustainable management under section 5(2) is protection. Also the ambit of the concept of "natural resources" would appear on its natural meaning to include biodiversity, and hence the protection of biodiversity forms an

³³ Other types of mechanisms which can be combined to achieve an integrated biodiversity protection policy, and are not discussed in this paper include: information, education and motivation programmes; creating financial incentives to promote conservation of biodiversity; and voluntary agreements between landowners or landowners and the state.

³⁴ RMA, s 5(1).

integral part of the concept of sustainable management under the RMA.

The term "protection" is not defined in the RMA, but it is defined in section 2 of the Conservation Act 1987.

"Protection" in relation to a resource, means its maintenance, so far as is practicable, in its current state; but includes -

- (a) its restoration to some former state; and
- (b) its augmentation, enhancement or expansion.

This definition includes the concept of restoration and enhancement as being part of protection. While the Conservation Act 1987 definition is not definitive, it is submitted that this interpretation is sufficient for a meaningful understanding of the "protection" purpose of the RMA. This is particularly so when one considers that both the relevant Acts address similar subject matter and the dearth of any judicial discussion conveying a differing meaning. The term "protection" is also used in section 6 of the RMA – but only in relation to significant areas of indigenous vegetation and habitats.³⁶

Section 6 requires those exercising functions in relation to the RMA to recognize and provide for certain matters of national importance. These include the protection of outstanding natural features and areas of significant indigenous vegetation and also the preservation of the natural character of the marine and fresh water environment.³⁷ To date, judicial application of this section in relation to the protection of biodiversity has

³⁵ RMA, s 5(2).

³⁶ RMA, s 6(c). Note also the term "preservation" is also used in s 6 in relation to the coastal and freshwater environment. It too is not defined in the RMA, but is defined in s 2 of the Conservation Act 1987 as follows:

"Preservation" in relation to a resource means the maintenance, so far as is practicable, of its intrinsic values.

³⁷ RMA, s 6(a)–(c).

been limited. In *Gill v Rotorua District Council*,³⁸ Judge Kenderdine stated that "...implicit in section 6(a) is the protection of ecosystems and ecological processes and the extent to which these are modified by any development". This is so even though explicit protection is given to the intrinsic values of ecosystems under section 7(d) of the RMA. The scope of natural character in section 6(a) was discussed in *Trio Holdings and Treble Tree v Marlborough District Council*.³⁹ Natural character was considered to be a complex integration and interaction of several components relating to aspects of the vegetation, land form, and aesthetic aspects of adjoining land, as well as beaches, coastal marine waters and benthic environment. It is suggested the preservation and active protection of the natural character of waterbodies and their margins includes the protection of key elements of biodiversity, namely natural ecosystems and ecological processes.⁴⁰

Section 7 of the RMA is also relevant in terms of biodiversity protection. That section requires those exercising functions under the RMA to have particular regard to the intrinsic values of ecosystems.⁴¹ "Intrinsic values" in relation to ecosystems is defined in section 2 as meaning those "aspects of ecosystems and their constituent parts which have value in their own right, including their biological and genetic diversity and the essential characteristics that determine an ecosystem's integrity, form, functioning and resilience." This is the only part of the RMA which makes explicit mention of biodiversity, though several other parts of the RMA make provision for specific aspects of biodiversity to be protected or preserved.⁴² Apart from the Part II provisions of the RMA, other specific mechanisms

³⁸ *Gill v Rotorua District Council* (1993) 2 NZRMA 604 (PT).

³⁹ *Trio Holdings and Treble Tree v Marlborough District Council* (24 May 1996) unreported, Planning Tribunal, Wellington, W103/96, Judge Kenderdine.

⁴⁰ New Zealand's Coastal Policy Statement follows this assumption - see chapter 1 and appendix 3.

⁴¹ RMA, s 7.

are present to protect natural features, including water conservation orders, heritage orders, designations, esplanade reserves and strips.⁴³ But many of these mechanisms predominantly address other issues and values, and are not solely or even primarily focused on biodiversity protection. For example, section 6(c) of the RMA aims to protect areas of significant indigenous vegetation. This protection may be motivated by cultural reasons as much as any intrinsic biodiversity concerns.⁴⁴

B Biodiversity Protection via Other Legislation

Apart from the Resource Management Act 1991, many of the current rights and duties relating to biodiversity on privately owned land are also contained in legislation such as Wildlife Act 1953, Forests Act 1949, Native Plants Protection Act 1934, Conservation Act 1987, The Reserves Act 1977, National Parks Act 1980 and the Hazardous Substances and New Organisms Act 1996. The relevance of these statutes will be addressed in the following section.

1 Forests Act 1949

Provisions in this Act attempt to address the protection of indigenous forest, clearly a constituent part of biodiversity. The Forests Amendment Act 1993 established new controls on the export of indigenous timber. It inserted a new Part IIIA into the Forests Acts 1949, the purpose of which was to promote sustainable management of indigenous forest land.⁴⁵

⁴² RMA, s 6, s 13.

⁴³ RMA, ss 199-217 water conservation orders, ss 187-98 heritage orders, ss 229-237H esplanade reserves and ss 168-198 designations.

⁴⁴ The author wonders why s 6(c) only refers to *significant* areas of indigenous vegetation and not to *all* indigenous vegetation. It is possible that such a specific focus is due to the financial benefits derived from some indigenous vegetation, which would be reduced if *all* indigenous vegetation was referred to.

⁴⁵ Forests Act 1949, s 67B.

Sustainable forest management is defined as meaning "the management of an area of indigenous forest land in a way that maintains the ability of the forest growing on that land to continue to provide a full range of products and amenities in perpetuity while retaining the forest's natural values."⁴⁶ The Forests Amendment Act 1993 established prohibitions on the export of indigenous timber and on the milling of indigenous timber except in certain circumstances. These circumstances include operations that occur in accordance with a registered sustainable forest management plan.⁴⁷ The requirements for these plans are set out in the Second Schedule of the Forests Act 1949, and take effect for a period not less than 50 years. Similarly the Forests Amendment Act 1993 does not apply to indigenous forests being cleared, but not being milled.⁴⁸ The Act does not address logging for purposes other than sawn timber production, and does not apply to land clearance and fire wood cutting. Forgetting whether these provisions are practically effective in giving protection to biodiversity, the concept of sustainable forest management can only provide protection in anthropocentric terms. The Act does not address the entire forest ecosystem, but merely the trees capable of providing a full range of products and amenities.

2 *Wildlife Act 1953*

The Wildlife Act 1953 vests all wildlife in the Crown, and hence the Act is applicable to all wildlife residing on all land, including privately owned land.⁴⁹ The Act operates on the initial premise that all wildlife in New

⁴⁶ Forests Act 1949, s 2(1).

⁴⁷ Forests Act 1949, s 67C and s 67D. However the Crown's West Coast indigenous production which are managed by Timberland West Coast Limited and Southland are exempted from the requirements of the Act.

⁴⁸ Forests Act 1949, s 67A. Note also that the Act applies in conjunction with the provisions and controls available under the RMA. The interaction between these two acts continues to confuse a number of territorial authorities.

⁴⁹ Wildlife Act 1953, s 57. But does not include wildlife listed in the Fifth Schedule, such as

Zealand is absolutely protected.⁵⁰ Only the categories of wildlife listed in the several schedules of the Act are not absolutely protected. Individual species are categorised into those which are partially protected, those which receive no protection and those which are noxious.⁵¹ All the remaining species not mentioned are absolutely protected. It is an offence to take protected wildlife. This includes the hunting, killing, robbing, disturbing or destroying of protected wildlife.⁵² The Act is enforced by Department of Conservation rangers, who have the power to enter private land at any time to further the purposes of the Act.⁵³ The Act also provides for the creation of wildlife refuges and wildlife management reserves, which requires the consent of the occupier on private land.⁵⁴ Though the creation of wildlife sanctuaries via a Crown proclamation is permitted without the consent of the occupier, the landowner is entitled to due compensation.⁵⁵ All of these reserves are to be managed by the Department of Conservation.⁵⁶ There is, however, no regulation in the Act of activities which might remove habitat. The Act is solely directed at the prohibition of individual intentional acts to harm wildlife.⁵⁷

3 *Native Plants Protection Act 1934*

The Native Plants Protection Act 1934 came into operation accompanied by a warrant issued from the Governor-General declaring that all plants

domesticated and farm animals.

⁵⁰ Wildlife Act 1953, s 4. "Wildlife" is defined in s 2 of the Act as including any animal that is living in a wild state. "Animal" is also defined to include any mammal (not being a domestic animal or a rabbit or a hare or a seal or other marine mammal), any bird (not being a domestic bird), any reptile, or any amphibian and includes any terrestrial or freshwater invertebrate declared to be an animal under section 7B of this Act and any marine species declared to be an animal under section 7BA of this Act.

⁵¹ Wildlife Act 1953, ss 3-7 and the First, Second, Third, Fourth, Fifth and Sixth Schedules.

⁵² Wildlife Act 1953, s 63.

⁵³ Wildlife Act 1953, s 59 and s 60.

⁵⁴ Wildlife Act 1953, s 14 and 14A.

⁵⁵ Wildlife Act 1953, s 9.

⁵⁶ Wildlife Act 1953, s 14B.

⁵⁷ Wildlife Act 1953, s 62 and s 63.

indigenous to New Zealand, with the exception of those specified, are protected under the Act.⁵⁸ All specified plants were therefore consequentially excluded from protection.⁵⁹ The Act provides that an offence is committed by every person who takes any protected native plant that is growing on Crown land or from private land without the consent of the owner or occupier.⁶⁰ Hence the Act provides no restraint on private landowners using or taking native plants on their own land. In this respect, the Act is effectively a worthless mechanism for the protection of biodiversity on private land. A landowner can do what ever she wishes to indigenous plant on her land. Furthermore, if an offender is caught under the Act the maximum penalty which can be imposed under the Act is \$40 – less than your average New Zealand parking ticket.

4 *The Hazardous Substances and New Organisms Act 1996*

The Hazardous Substances and New Organisms Act 1996 (hereinafter the HSNO) affects all individuals businesses, and organisations that deals with hazardous substances and new organisms. Under the HSNO, no person may import or manufacture any hazardous substance, or import, develop, field test or release any new organism – unless that person is granted an approval under Part V of the Act.⁶¹ The mere storing of hazardous substances must also comply with any restrictions and controls on that substance under the Act. In section 2, “hazardous substance” is defined as a substance that possesses the intrinsic properties of

⁵⁸ Native Plants Protection Act 1934, s 3(1).

⁵⁹ Native Plants Protection Act 1934 lists 10 separate plants and all species of algae (sea weeds and fresh water weeds), fungi, lichens, liverworts and mosses, all of which do not receive protection.

⁶⁰ Native Plants Protection Act 1934, s 4. “To take” is defined in s 2 as including gathering, plucking, cutting, pulling up, destroying, digging up, removing, or injuring the native plant.

⁶¹ HSNO, s 25. The HSNO has set up an Environmental Risk Management Authority which implements and administers the Act. Its primary function is to determine applications under Part V of the Act to import or manufacture any hazardous substance,

explosiveness, flammability, a capacity to oxidise, corrosiveness, toxicity, or ecotoxicity. Potentially almost any substances could be caught in this definition.⁶² "New organism" is defined as a species of any organism that was not present in New Zealand at the date of the commencement of the HSNO, and includes genetically modified organisms.

In relation to biodiversity protection, the purpose of the HSNO includes the safeguarding of the life-supporting capacity of air, water, soil, and ecosystems.⁶³ In achieving this purpose, those exercising functions under the Act must take into account to the sustainability of all native and valued introduced flora and fauna and the intrinsic value of ecosystems.⁶⁴ All decisions under the Act must be consistent with these principles. Hence the HSNO aims to protect biodiversity on private land through the regulation of the types of substances and organisms which landowners may use, release or store on their property.

5 *Conservation Act 1987*

The Conservation Act 1987 is primarily concerned with the protection of natural resources on land owned by the Crown.⁶⁵ It is generally accepted that biodiversity is a natural resource.⁶⁶ In relation to the protection of biodiversity on private land, section 6(a) provides that where a private landowner consents, the Department of Conservation may manage that land for the purposes of conservation. The Act also contains provisions

or import, develop, field test or release any new organism.

⁶² In practice, regulations have set thresholds for each of these intrinsic properties beneath which a substance is not deemed to be "hazardous" for the purposes of the Act.

⁶³ HSNO, s 5.

⁶⁴ HSNO, s 6(a) and (b).

⁶⁵ Conservation Act 1987, s 6(a), (ab) and (b).

⁶⁶ Certainly this is the very basis under which the Department of Conservation operates on. See also V Froude *Implementing the Biodiversity Protection Provisions in the Resource Management Act: A Review of Council Progress to Date* (Pacific Rim Ecological Resource Management Association, Wellington, 1997) 4.

which provide for the use of covenants or land management agreements between the Department of Conservation and the landowner to further the conservation of the natural resources on that land.⁶⁷ There are no mandatory provisions in relation to biodiversity protection for private land holders under this Act, but there is the option for the protection of biodiversity through the implementation of the mechanisms and management procedures of the Department of Conservation to be implemented.

Also relevant under the Conservation Act 1987 is the protection of freshwater species of fish. Under section 6(ab) it is a function of the Department of Conservation to preserve so far as is practicable all indigenous freshwater fisheries, and protect recreational freshwater fisheries and freshwater fish habitats.⁶⁸ Freshwater fisheries are subject to the jurisdiction of the Act due to the fact that the beds of all navigable waterways and lakes are held to be vested in the Crown.⁶⁹ It makes no difference to the ownership of these waterways whether they pass through privately owned land or Crown land. Hence the aquatic fisheries present in water ways are subject to the management of the Department of Conservation.

6 *The Reserves Act 1977 and National Parks Act 1980*

These Acts are only relevant to the protection of biodiversity on private land to the extent that the Crown can compulsorily acquire land it considers worthy of preservation and Department of Conservation

⁶⁷ Conservation Act 1987, s 27 and s 29.

⁶⁸ Conservation Act 1987, ss 17J-17M provide for fresh water fisheries management. See also s 48A which allows for the provision of special regulations for freshwater fisheries by the Department of Conservation, such as maximum quotas.

⁶⁹ Originally derived from s 261 of the Coal Mines Act 1979 and s 21 of the Water Soils and Conservation Act 1967 – both now repealed. These rights, however, continue under s

management.⁷⁰ Both Acts are only mentioned to show that for more effective protection of biodiversity on private land, one solution is to convert that land to Crown owned and Department of Conservation managed land. Under both Acts the landowner receives due compensation via the Public Works Act 1981.⁷¹ Similarly, both Acts state the purpose for the creation of protected areas is to providing for the preservation and management of areas possessing wildlife, indigenous flora or fauna, environmental and landscape amenity or interest.⁷² Furthermore the creation of these protected areas aims to ensure, as far as possible, the survival of all indigenous species of flora and fauna, in their natural communities and habitats.⁷³

C The Framework in Context

The preceding mentioned statutes make up New Zealand's legislative framework for addressing biodiversity protection on private land. If one considers this framework as a crazy patchwork, these statutes make up the patches in the crazy patchwork of biodiversity protection. In this patchwork, the RMA is the biggest patch as the mechanism with the most potential to address biodiversity conservation. The other biodiversity statutes mentioned variously address different specific aspects of biodiversity, thereby forming other individual patches of the patchwork. Of course the patchwork could not hold together without the other essential non-legal policy measures which address biodiversity conservation such as voluntary agreements and education.⁷⁴ These non-legal mechanisms provide the seams of the patchwork, tying together the

354 of the RMA.

⁷⁰ Reserves Act 1977, s 12; National Parks Act 1980, s 9.

⁷¹ Reserves Act 1977, s 12; National Parks Act 1980, s 9.

⁷² Reserves Act 1977, s 3(1)(a); National Parks Act 1980, s 4.

⁷³ Reserves Act 1977, s 3(1)(b); National Parks Act 1980, s 5.

⁷⁴ See those discussed above n 33.

various legislative mechanisms. However the question must be asked whether this crazy patchwork as it stands is successfully conserving biodiversity on private land. In other words, are these legislative mechanisms in the biodiversity framework proving effective?

IV ASSESSING THE EFFECTIVENESS OF THE LEGAL FRAMEWORK

In examining New Zealand's legislative framework for protecting biodiversity on privately owned land, in practical terms, it must be conceded that the current framework is not working.⁷⁵ While the loss of biodiversity in New Zealand is declining at a slower rate, policy makers are not yet able to actually maintain the current levels of biodiversity indicators, let alone enable the growth of biodiversity.⁷⁶ There is a lack of scientific empirical evidence quantifying the degree of biodiversity loss on private land. However, there are various statistical models and many anecdotal accounts which detail significant loss of wildlife and vegetation, particularly indigenous, on private land.⁷⁷ When this continuing loss on private land is considered against the achievements made on Crown owned land by institutions such as the Department of Conservation, it becomes obvious that the current legislative framework for biodiversity protection on private land has severe flaws.⁷⁸ This is a point readily

⁷⁵ *A Draft Strategy for New Zealand's Biodiversity* above n 7, 4.

⁷⁶ Froude, above n 66, 4.

⁷⁷ See P M Blascke and K Green (eds) *Biodiversity Now* (Department of Conservation, Wellington, 1997). Such scientific indicators for biodiversity include species and genetic diversity within particular sample areas i.e. the number of species and the genetic diversity amongst a species.

⁷⁸ The Department of Conservation is responsible for the administration and management of New Zealand's reserves, national parks, endangered species havens and other various protected areas. The successes of these protected areas have been well documented. See D A Towns, C H Daughterty and I A E Atkinson (eds) *Ecological Restoration of New Zealand Islands* (Department of Conservation, Wellington, 1990); P Lawless and T Stephens "The Task of Conserving Biodiversity in New Zealand" in B McFadgen and P Simpson (eds) *Biodiversity: Papers from a Seminar Series on Biodiversity* (Wellington, Department of Conservation, 1996).

conceded by both the Department of Conservation and the Ministry for the Environment, and hence the protection of biodiversity on private land has been identified as the first requirement in the proposed agenda for action in New Zealand's Proposed Draft Strategy. The following discussion intends to identify and discuss the major reasons why the current legislative mechanisms are not able to provide effective protection of biodiversity on private land.

A Problems with Biodiversity Protection under the RMA

Firstly, the use of the RMA biodiversity provisions, as the primary legislative mechanism to protect biodiversity on private land, by territorial authorities has been extremely variable. Recent research into the implementation of the biodiversity provisions in the RMA suggests territorial authorities have been slow to realise the focus and potential of the RMA in relation to biodiversity protection.⁷⁹ While most Regional Policy Statements did contain some criteria for identifying significant indigenous vegetation and wildlife habitats, there was considerable variation and also varying omissions and inconsistencies. Only some territorial authorities had prepared and notified regional coastal and freshwater plans. Many territorial authority officers reported that they did not have the training or expertise to adequately address the biodiversity protection provisions in the RMA.⁸⁰ Furthermore, many territorial authorities reported that biodiversity protection was seen as a minor optional function. This is exemplified by the lack of biodiversity monitoring in all forms by territorial authorities and other protection bodies, and the fact that most territorial authorities have not finalised the various plans required under the RMA. It is submitted that this lack of implementation of the biodiversity protection mechanisms in the RMA by

⁷⁹ Froude, above n 66, 7.

territorial authorities is a key reason why the protection of biodiversity is not as effective as it could be.

Secondly, it is possible that the RMA's lack of potency is due to a more fundamental reason than pure deficient implementation. It is submitted that the continued loss of biodiversity is also due to the lack of focus on the needs of biodiversity in the legislation itself. Apart from the section 7(d) reference to the intrinsic value of ecosystems, the RMA makes no direct mention of the need to protect biodiversity, or more particularly biodiversity on private land. This lack of explicit focus may well have led to the low priority being given to the protection of biodiversity by territorial authorities and private landowners. Territorial authorities have an almost unfettered discretion in relation to biodiversity to decide what the contents of their regional and district plans may address.⁸¹ Therefore if a territorial authority, for political reasons, does not wish to impose potentially unpopular or expensive biodiversity land use restrictions, then it is within its rights not to do so.

Thirdly, even where there are structured and considered biodiversity protection provisions in territorial authority plans, the use of regulation to impose land-use restrictions faces often insurmountable enforcement problems. The areas to be policed are large and often remote, and the problems of proof are daunting.⁸² Many landowners will only cooperate with regulation if it is accompanied by realistic threats of vigorous enforcement. We cannot expect landowners of private property to comply purely out of commitment to the values that the law embodies.

Fourthly, simple restrictions on land use under the RMA will not suffice.

⁸⁰ Froude, above n 66, 4.

⁸¹ Within the parameters allowed under the RMA purpose provisions, s 32 and the hierarchy of national and regional policy statements and plans.

As illustrated above, even where land use regulations are only concerned with the imposition of restrictions, there are significant problems standing in the way of converting legal commands into effective controls. These problems are amplified where the aim is to make land holders take positive action. Many commentators believe a crucial requirement in an effective strategy for biodiversity conservation is the active management and restoration of ecosystems.⁸³ It is one thing to prohibit someone from performing an act, but it is another thing to compel someone to perform an act. If the community expects landowners to actively manage their land in order to protect biodiversity in a context where the market offers few incentives, common sense suggests it is going to have to pay for it. Once this is recognised, it becomes clear that biodiversity conservation on private land cannot be achieved by legislation and regulation alone.

B Problems with Biodiversity Protection under Other Legislation

The rest of the legislative framework is problematic as well.⁸⁴ Each piece of legislation addresses only one particular element or incident of biodiversity on privately owned land. The Native Plants Protection Act 1934 addresses only particular native plants species. The Forests Act 1949 only deals with the logging of indigenous forests, but not the clearing of indigenous forests. The Wildlife Act 1953 has a broader application, but still only refers to species of wildlife – and not the habitats or ecosystems within which the species exist.

⁸² Froude, above n 66, 16.

⁸³ See further discussion of this point in Section II and also above n 30.

⁸⁴ The Conservation Act 1987, the Reserves Act 1977 and the National Parks Act 1980 will not be discussed in this section, due the nature of those Acts being directed at the conversion of privately owned and run land to Crown owned and run land. They do not actually address the methods by which the protection of biodiversity diversity can be achieved, without the acquisition of the land by the Crown itself. Similarly, there is no discussion regarding the HSNO. This is due to the fact this Act only came fully into effect

The strength of these specialised pieces of legislation is their specific focus, which provides those using the statutes with clear rules and guidelines allowing easy implementation of their provisions. These Acts clearly identify which species are to be protected and the consequences of non-compliance with those rules. However the specific nature of these statutes is also their fundamental weakness. This formulation has led to a disjointed and piecemeal formula for the protection of biodiversity. Biodiversity is a broad and encompassing concept, yet these statutes only address particular facets of biodiversity. It is possible that the lack of legislation which addresses biodiversity holistically is due to the inherently difficult process of defining biodiversity holistically, as discussed in Section II. The legislation only been able to focus on specific facets of biodiversity and this has led to the haphazard fragmentary nature of the biodiversity legislative framework.

These Acts primarily attempt to protect biodiversity via a "species by species" approach. This approach requires the identification and listing of all known threatened and endangered species in order to regulate their taking, destruction or harm.⁸⁵ This is the approach clearly adopted in the Native Plants Protection Act 1934, and the Wildlife Act 1953. The use of this approach alone has been shown by commentators as insufficient if policy makers wish to protect biodiversity holistically.⁸⁶ For example, although the North Island brown kiwi is protected by the Wildlife Act 1953, its habitat on private land is not always protected. Many kiwi are

on 30 April 1999, and there is little available information as to its success or otherwise.

⁸⁵ For a fuller explanation of the species approach see: J Bradsen "Biodiversity Legislation: Species, Vegetation and Habitat" (1992) 9 *Env & Plan LJ* 175.

⁸⁶ The focus on protecting individual species runs into trouble when the legislation, though it may protect the identified wildlife species from direct harm, it cannot protect the wildlife species from more indirect forms of harm such as habitat loss, ecosystem variance or pollution. The impact on species tends to be death by a thousand cuts as development nibbles away at habitat. For further discussion see: G D Meyers and S Temby "Biodiversity and the Law: A Review of the Commonwealth Endangered Species Protection Act 1992 (1994) 3 *Grif L Rev* 39; Bradsen, above n 85, 178.

killed each year by vegetation clearance on private land.⁸⁷ Recent scholarship has recommended the integration of a "systems" type approach for effective biodiversity protection.⁸⁸ A "systems" approach is concerned with the identification and protection of the habitats in which species exist in. This approach aims to protect the interconnected ecosystems within a specific area and not just a particular species. Such an approach has proved effective in other jurisdictions in its ability to protect biodiversity from habitat destruction, habitat fragmentation and other more indirect forms of harm.⁸⁹

In relation to private land, only the RMA purports to take a "systems" type approach to prevent biodiversity loss. Yet, as we have seen, the RMA's potential to assist biodiversity protection is being severely neglected by territorial authorities. It may be possible to view the Forests Act 1949 as an example of a "systems" approach, in that it seeks the protection of indigenous forests. Even if it possible to view the Forests Act 1949 in this manner, the Act is not an effective example of the "systems" approach. That Act still allows milling of indigenous forests if it can be shown that that milling is sustainable, and furthermore it does not prevent clearing of indigenous forest (only the milling of indigenous forest for sale). No other piece of New Zealand legislation has as yet adopted a systems approach to biodiversity conservation. It is submitted the effectiveness of the biodiversity legislative framework has been limited by the lack of integration of a "systems" approach. It may well be that the RMA is able to reduce this problem if its potential to protect biodiversity on private land is recognised and utilised by territorial authorities. But as illustrated earlier this is not the case at present.

⁸⁷ Ministry for the Environment *Property Rights Regimes and Indigenous Biodiversity* at <<http://www.biodiv.govt.nz/papers.htm>> (last accessed 24 September 1999).

⁸⁸ J Sax "The Ecosystem Approach: New Departures for Land and Water" (1997) 24 *Eco L Q* 883.

⁸⁹ Bradsen, above n 85, 175-180.

C *An Overall Problem with Biodiversity Protection*

Lastly, the author submits the ineffectiveness of the current legal setting is chiefly due to the inconsistency which arises in trying to merge two conflicting political goals. In attempting to achieve the public good of biodiversity protection, there is a tension between the private property rights of those with interests in the land and the mechanisms and methodology required to achieve this protection. Under the current framework, the protection of biodiversity on private land involves the restriction of the private property rights of a landowner. A landowner is not free to do as she chooses with her land. The RMA is based on an initial premise that landowners can do anything they wish with their land, so long as this activity does not have adverse effects on the environment.⁹⁰ But in reality this premise does not hold, given the excessive regulation by territorial authorities under regional and district plans.⁹¹

Property rights generally have a value in the market place, and any restriction on these rights accordingly leads to a reduction of the value of those rights. Therefore forays by regulation into the scope of a landowner's rights in that land can obviously cause bitterness and acrimony from that landowner. Such attitudes are, of course, not conducive to the protection of biodiversity on land. The effectiveness of the regulation will be greatly diminished if those in the most influential position to assist biodiversity protection do not agree with mechanisms utilised. The enormous scope of private land in New Zealand makes effective monitoring and enforcement of biodiversity protection impracticable, both financially and in terms of remoteness. This

⁹⁰ RMA, s 9.

⁹¹ O McShane *Land Use Control under the RMA: A Think Piece* (Ministry for the Environment, Wellington, 1998).

enforcement issue means that any biodiversity legislation which is unpopular amongst private landowners faces an uphill battle if it is to be effective.

The effect the inherent conflict between biodiversity regulation and individual property rights plays in the success of the biodiversity regulation is evident from the difference in the nature of biodiversity protection between Crown owned or managed land and privately owned and managed land. On private land, it is far more difficult for the Crown to gain access to information about levels of biodiversity than it is on their own land. Where a private landowner wishes to utilise her land in a particular fashion, ignorance may lead to the unknowing destruction of biodiversity. On Crown land, the availability and use of monitoring and information mechanisms makes this possibility far more unlikely. Even where the private landowner has knowledge of the biodiversity on her property, it is possible she may continue to utilise that land in a manner which harms the local plant and animal life. The probable lack of Crown information and enforcement resources will often mean that Crown organisations will have no knowledge of the harm incurred. Again compare this to the situation on Crown land, where identified biodiversity is protected from land uses which may harm it and where policy and programmes are often employed to promote biodiversity growth.

Another evidentiary example of the role the conflict between biodiversity regulation and private property rights plays in biodiversity conservation can be inferred from the fact that the loss of biodiversity is a global phenomenon. It is not solely a New Zealand problem.⁹² The loss of biodiversity in New Zealand cannot be solely blamed on the ineffectiveness of our legislation and its implementation, unless the rest of

⁹² Meyers and Temby, above n 86, 49.

the civilised world's legislation is also ineffective and poorly implemented. Admittedly there may be a variety of reasons why this situation exists. It may even be possible that other jurisdictions have made a political choice not to aim to protect biodiversity or that they are insufficiently resourced to address the problem. However, even in other developed Western nations, with systems of recognition of individual property rights, which have made several attempts to address biodiversity depletion through the legislative restriction of land use and property rights, the same losses have continued.⁹³ The universal existence of this situation makes it clear that there must be some other reason for the continued loss of biodiversity on private land rather than just than poor implementation or enforcement of policy. It is suggested that the perceived unfairness of imposing obligations by the state, which are implemented for the public good, onto a private individual is at least partly responsible for the universal situation of continued biodiversity loss.

V HOW DOES THE LEGAL FRAMEWORK AFFECT THE PRIVATE PROPERTY RIGHTS OF LANDOWNERS?

This section seeks to examine how biodiversity legislation in New Zealand affects the private property rights of landowners and then asks why these legislative incursions into property rights may not have been embraced and supported by landowners.

A *Restriction of Property Rights under the RMA*

⁹³ This is evident from many national reports on the status of an individual country's state of biodiversity. Those examined include: O T Sandlund *Biodiversity in Norway* (Ministry for the Environment, Trondheim, 1992); Department of the Environment *Biodiversity in the United Kingdom* (London, 1994); Federal Territorial Biodiversity Working Group *Biodiversity in Canada* (Hull, 1994); Federal Department of the Environment, Sport and Territories *Biodiversity in Australia* (Canberra, 1994).

Having earlier discussed how the RMA addresses biodiversity protection on private land in general, this section intends to address to what extent the Act affects the private property rights of landowners in addressing biodiversity conservation – both in terms of impairment and protection.

1 Mechanisms in the RMA for interference with private property rights

The RMA applies to all activities on land, including privately owned land. In particular, section 9 provides that land uses which contravene rules in a district or regional plan are prohibited unless specifically allowed by the granting of a resource consent or existing use rights.⁹⁴ Hence these provisions lay down certain environmental and biodiversity protection mechanisms, which constrain existing and any future property rights. Note however that under sections 10 and 10A certain existing uses are allowed to continue, even though they may be inconsistent with a district plan.⁹⁵ This means that existing uses which at present may harm biodiversity on private land cannot be interfered with by territorial authorities under the RMA, unless the effect of that existing use becomes different.⁹⁶ In summary, existing rights in property remain uncircumscribed under the RMA in terms of biodiversity protection on private land, but for future or intended uses of property the RMA limits the scope of the property rights available in relation to those uses of the land.

⁹⁴ RMA, s 9(1)–(3)

⁹⁵ RMA, s 20, s 10(1) and s 10A(1). Note however that existing uses of land which affect the key regional council concerns listed under s 30(1)(c) are not free to continue – see s 10(4).

⁹⁶ RMA, s 20(1)(c) which allows an existing land use to continue, in contravention of a plan rule without the need for a resource consent, provided “the effects of the activity are the same or similar in character, intensity, and scale to those which existed before the proposed plan was notified”.

To what extent, then, does the RMA allow regional and district plans to limit private property rights in relation to biodiversity? It appears that the content of district and regional plans may limit the rights inherent in property to the extent that the restrictions further the purpose of the Act – so long as expressly justified by reasoning and evaluation.⁹⁷ It is therefore entirely legitimate for territorial authorities to create rule in plans which may completely circumscribe a landowners private property right to use her land in any manner she thinks fit. Only during the submission process for a notified district plan may a landowner voice her objections to any proposed plan provisions which may adversely affect her property rights. Assuming a territorial authority ignores these objections, the landowner may pursue the matter and challenge the provision in the Environment Court.⁹⁸ Close scrutiny as to whether the plan provisions are necessary to promote the purposes of the RMA, in particular regard to Part II and section 32 of the Act, will be undertaken by the Court.⁹⁹ If the territorial authority can show that the provision protects biodiversity, then it is likely that will be sufficient for the provision to stand due to section 7(d). In summary, any restriction of property rights will be seen as legitimate if they further the purposes of the RMA.

Furthermore, section 85(1) of the RMA provides:

An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.

The section creates a statutory fiction in that interests in land which are circumscribed by the mechanisms of the Act are deemed in law not to be circumscribed. The section means that in the absence of any deeming

⁹⁷ As required under s 31, and more particularly s 32 of the RMA.

⁹⁸ RMA, First Schedule.

⁹⁹ RMA, s 32(1)(a). Also *Nicholls v District Council of Papakura* [1998] NZRMA 233 (HC) [*Nicholls*].

provision, an interest in land may be taken by a rule in a plan. The immediate practical consequence of section 85(1) is that the otherwise generally applicable compensation provisions of the Public Works Act 1981 do not apply. Thus property owners have no right to money in lieu of their interests in property if those interests are in effect taken away or otherwise adversely affected under the RMA.

2 *Protection for the interference with property rights in the RMA?*

Only subsections (2) and (3) of section 85 in the RMA offer some protection for the institution of private property to landowners. Section 85(2) provides that any person, having an interest in land to which a plan provision or proposed provision applies, considers that a provision would render that interest in land incapable of reasonable use, he or she may challenge that provision in the Environment Court.¹⁰⁰ Note however that no compensation can be issued to an affected landowner.¹⁰¹ Section 85 only empowers the Environment Court to order or recommend that the provision be modified, deleted or replaced.¹⁰² The Court must only exercise this power if it is satisfied that the provision places an unfair and unreasonable burden on the applicant.¹⁰³ Section 85 is designed to limit the

¹⁰⁰ The meaning of "incapable of reasonable use" is defined in s 85 as excluding any activity that would have a significant adverse effect on the environment or any person including the Crown. However the section itself remains silent as to how the assessment of reasonable use of land is to be made, thereby providing for the application of judicial discretion in this regard. This has resulted in some uncertainty for landowners and territorial authorities in determining when rights in land will be rendered incapable of reasonable use.

¹⁰¹ The current legislative position on compensation differs to that used under the previous Town and Country Planning Act 1977 – see s 44 and s 126. Under that Act compensation was payable for certain restrictions to land use including land subdivision controls, bulk and location provisions. Where a landowner was deprived of the right to change from the existing use, compensation could be payable as long as the new use was "suitable" for the relevant land or building.

¹⁰² RMA, s 85(3).

¹⁰³ RMA, s 85(3). This is a question of fact and degree and must be considered in the context of the Act – see *Steven v Christchurch City Council* (16 December 1997) unreported, Environment Court, Christchurch C38/98, Judge Jackson, 16-17 [*Steven*].

controls on land which prevent reasonable use of that land, however it been held as only applying to district and regional plan rules, and not to designations, heritage orders or local authorities refusal to grant consent.¹⁰⁴

Situations have arisen in New Zealand, though rare to date, where in order to further the purpose of the RMA on a private land holding, district plans have in fact restricted the use of that land so significantly that the landowner has challenged the relevant plan provision, due to her perception that the land has been rendered incapable of reasonable use.¹⁰⁵ Similarly, it is not difficult to envisage a scenario where in order to protect an incident of valued biodiversity on private land, the same considerations will arise. For example if an extremely rare and valuable ecosystem of native vegetation and habitat existed on the entirety of an individual's land, and that specific type of habitat was not found anywhere else in that part of New Zealand. If that landowner wished to develop that land, but a district plan or proposed district plan provision exists which identifies that particular habitat for special protection thereby prohibiting any development of that land, the owner's rights in that land may have been rendered incapable of reasonable use. Such affected landowners may feel quite justified in wondering why they must bear the burden of the Crown's and public's need to protect biodiversity – a situation which has been rectified only in rare circumstances.¹⁰⁶

B Other Biodiversity Legislation's Effect on Property Rights

¹⁰⁴ *Frieswick v Auckland City Council* (26 April 1995) unreported, Planning Tribunal, Auckland A 40/95, Judge Sheppard [*Frieswick*].

¹⁰⁵ See *Frieswick* above n 104, 6; *Nicholls* above n 99, 239; *Mullins et Ors v Auckland City Council* (17 April 1996) unreported, Planning Tribunal, Auckland A35/96, Judge Sheppard.

¹⁰⁶ To the author's knowledge, since the RMA came into force in October 1991, there has only been a single instance where the Environment Court has required a territorial authority to modify and delete a provision in a district plan which rendered the land

Generally, most of the other legislation relating to the protection of biodiversity on private land provides only minor limitations on the property rights of landowners. Possibly the most economically significant constraint originates from the Forests Act 1949 which means that landowners with tracts of indigenous forest on their land are not allowed to mill that forest. This limitation of such rights has meant some landowners cannot access the considerable value inherent in their land. The Crown is not liable to pay any compensation for any loss such a restriction has or may cause landowners.¹⁰⁷

The HSNO is also a potentially invasive on the rights of landowners, for it can restrict many possible uses of the land due to its controls on the storage and manufacture of any hazardous substance and its prohibition on the release of new organisms. The broad nature of the definitions of "hazardous substance" and "new organism" only enhances the Act's potency. These provisions are capable of preventing a landowner growing a new species of crops or of making a landowner modify the way she manufactures a product. In all of these cases the individual land owner must bear the burden of meeting the requirements of the Environmental Risk Management Authority.¹⁰⁸

The Wildlife Act 1953 vests all wildlife in the Crown. This Act reformed the common law rule of all wildlife residing on the owner's land as property of the owner.¹⁰⁹ This restriction on the property rights of the landowner was not accompanied with any compensation. The Native Plants Protection Act 1934 does not prevent in any way a landowner from

incapable of reasonable use – see *Steven* above n 103.

¹⁰⁷ Forests Amendment Act 1993, s 8. However the Crown can offer compensation if it wishes under that section. See also *Bell Block Lumber Ltd v Attorney-General* (18 March 1998) unreported, High Court, Invercargill Registry, CP21/94 & CP22/94.

¹⁰⁸ HSNO, Part V. See also above n 61.

¹⁰⁹ J Waldon *A Right to Private Property* (Oxford, Clarendon Press, 1986) 390-98.

her right to use the land in any manner she sees fit. That Act only prevents others from taking certain native plants from another's land. The Conservation Act 1987, the Reserves Act 1977 and the National Parks Act 1980, in fact only have a very limited relationship to private property. These Acts only allow restrictions where the landowner has consented to the Crown's management of that land, or where the Crown has in fact compulsorily acquired that land. Similarly, the Conservation Act 1987 makes cannot affect private property rights in relation to freshwater fish for there is no property as such in wild freshwater fish, and their habitat is vested in the Crown.¹¹⁰

It is clear from the preceding discussion that these items of legislation do not provide overarching incursions into the realm of private property. However, in some instances and to some landowners, these incursions can be individually very significant. For example, companies which own land bought with the intention for native forest logging or where a landowner wishes run a commercial business for the hunting of certain wildlife on her land are situations where landowners have had the potential value of their property to them notably reduced. Again in such instances these landowners will not be supportive on the restraints on their freedom, and this is a scenario which will hinder the preservation of biodiversity.

C Resulting Issues from Private Property Right Restraints

On the whole, most of the activities which property rights enable landowners to execute appear to be affected primarily by the RMA plan

¹¹⁰ At least until they are caught or dead: see C Richmond "The Commons becoming Uncommon: Integration or Disintegration in the Protection of Aquatic Biodiversity" in P M Blascke and K Green (eds) *Biodiversity Now* (Department of Conservation, Wellington, 1997) 5. Also see n 69. Note the Fisheries Act 1996 s 301 is also relevant here to the extent that it does not allow landowners to farm freshwater fish, unless the Governor-General by order in Council consents to it - thereby restricting a landowners right to do use his

regime and consent process, and only secondarily influenced by this other biodiversity legislation. From the foregoing analysis, it is clear that only in rare situations can the RMA provide landowners with redress for limitations of their property rights. None of the other biodiversity statutes even contemplate any redress for the restriction of the property rights by their legislative provisions. This situation means there is no incentive for landowners to cooperate with restrictions on their property rights. Landowners receive no compensation for any limitations of their property rights under the RMA. Only when the restriction is significant enough to render the land incapable of reasonable use does the landowner can the landowner have any redress. In terms of the conservation of biodiversity, this leaves the private landowner as the sole individual who must bear the costs of the restriction on their property rights, in order to comply with the public's need for biodiversity conservation. The existence of such an unfair regime places private landowners in an adversarial position with biodiversity protection. This is not a position which is conducive with effective biodiversity protection on private land.

VI JUSTIFICATION OF THE INCURSIONS INTO PROPERTY RIGHTS

How then are these restrictions on the private property rights of individuals justified, in terms of traditional legal concepts? To answer this question, it is necessary to first provide some clarification as to what the concept of private property entails under New Zealand law. The following section seeks to provide some enlightenment in this area.

In New Zealand, along with most other Western and common law jurisdictions, there is a initial presumption that a private landowner

property freely.

possesses a bundle of rights which enables her to do anything she wishes to on that piece of land. Title to land has provided the title-holder with virtually all rights in the land: exclusive, undisturbed possession for an indeterminate duration, and the right to encumber it, or sell it in perpetuity. The full concept of ownership is said to include:¹¹¹

- a) The right to possession of a thing;
- b) The right to use a thing;
- c) The right to manage a thing;
- d) The right to income derived from others' use of a thing;
- e) The right to the capital value of a thing;
- f) The right to security against expropriation of a thing;
- g) The power to sell, give or bequeath a thing;
- h) The lack of any term on the possession of those rights in respect of a thing;
- i) The duty to refrain from using the thing in a way that harms others;
- j) The potential liability that judgments may be executed against the thing.

However, property rights have never been defined absolutely, but rather have evolved over the centuries through common law developments and modifications by parliamentary statute.¹¹² Certain basic property rights have remained,¹¹³ but many others have been circumscribed in various ways. In the common law in particular, the ability of the state to restrict landowners rights is particularly evident from the overarching doctrine of

¹¹¹ Waldon, above n 109, 49. Waldon notes these are not conditions of ownership, but simply assist in identifying the elements which make it up.

¹¹² Common law restrictions on private property rights include private nuisance and negligence. Early examples of statutory abrogation of private property rights include: the Magna Carta 1297 c 29, which made it clear that freemen can still lose their property if that occurs according to the law; the Petition of Right Statute 1627 c 4, which stated that no man should lose his land or tenements without due process of law.

¹¹³ For example the right of a private property owner to exclude others from using her property, enforceable via the tort of trespass.

tenure, in that the fee simple title to land is only ever held of the Crown's superior interest in the land.¹¹⁴

The basis of the justification for private property right incursions lies in New Zealand and common law makers' implicit acceptance of the positivist conceptions of property asserted by Bentham. He asserted that society defines property by reference to community standards.¹¹⁵ If an individual's community generally supports and enforces her reasonable expectations about what she can do with the resources in her possession, then her rights to do those things are part of her property in that resource. If the community views the individual's expectations as being unreasonable and unsupportable, then she may not claim the right to do those things as part of her property.¹¹⁶ The concept of property is the mechanism the community uses to protect certain reasonable expectations in an object. Community standards that distinguish between reasonable and unreasonable expectations become property rules. Under such an analysis, the legislature believes it appropriate to restrict property rights in relation to the natural environment and biodiversity, due to it being the elected representation of community standards. This role of community expectations is particularly evident in the operation of the RMA in New Zealand. The community's expectations are expressed via public participation in the formulation of plans and policy statements. The resulting plans are said to being representative of the community's expectations on the restriction of private property rights.¹¹⁷

¹¹⁴ *Rural Banking and Finance Corporation of New Zealand Ltd v Official Assignee* [1991] 2 NZLR 351, 355 (HC).

¹¹⁵ J Bentham *A Commentary on the Commentaries and A Fragment on Government* (University of London Athlone Press, London, 1977) 109.

¹¹⁶ Bentham, above n 115, 115-119; see also F I Michelan "Property, Federalism and Jurisprudence" (1993) 35 *Wm & Mary L Rev* 301.

¹¹⁷ Speech by Minister for the Environment: Right Honorary Simon Upton - "Property rights / Resource Management" at

On the other side, those against restrictions on property rights for biodiversity conservation support a greater emphasis on Lockean natural law as the foundation for the concept of property. Rather than viewing property as creations of our legal system, Lockean influenced scholars assert that property exists naturally, without law, and is understandable through the exercise of human reason.¹¹⁸ Hence the legal system was developed to protect pre-existing property rights. Under nature's law, Locke explained, each person had the right to mix his labour with the land, thereby adding value to it and becoming its lawful owner.¹¹⁹ Accordingly, property was an individual right, something that arose out of the natural order of the world, independently of any community action, Lockean scholars see property rights as reflecting the relative importance of individual autonomy and the relative unimportance of community interests.¹²⁰

Locke's natural law argument for private property has not fared well from late 20th century legal criticism, and perhaps hence New Zealand's adherence to the positivist foundation of property promoted by Bentham. Schlatter and others have shown that Locke's labour theory only made sense in a world where land and raw materials were abundant.¹²¹ In the real world of scarcity, the labour theory justified only a more modest property claim. At the most the labourer owned the value added by her efforts: she owned the crops that she planted and tended, not the farm land itself. To justify such rights, one must turn to an entirely different philosophic base, that of social utility.

<http://www.arcadia.co.nz/speeches/171298_2.htm> (last accessed 29 September 1999).

¹¹⁸ J Locke *Two Treatises of Government* (Cambridge, Cambridge University Press, 1988) 303-320.

¹¹⁹ Locke, above n 118, 305.

¹²⁰ R Epstein *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, Cambridge, 1985) 231-9. See also C M Rose "Enough and as Good of What?" (1987) 81 NW L Rev 417.

¹²¹ R Schlatter *Private Property: The History of an Idea* (Russell & Russell, New Brunswick,

Locke having been marginalised, private property in New Zealand society is chiefly based on utilitarian arguments. It is justified only to the extent that its overall consequences are good. What has become clear to modern scholars is that, far from transcending the human community, private property is very much a product of it. From earliest known times, human communities found it useful to develop norms authorising the private control of land and other things. These rights were created by the community, and were enforced only when and so long as the community stood behind them. Property norms at any time reflect the circumstances and values of their creators. Today, the simple fact is that there is no unfettered right to use property in any way that an owner chooses. New Zealand society relies on respecting property rights, but acknowledges that this requires accepting limitations on private property rights. Every privately owned property in New Zealand carries with it a bundle of rights that are constrained by community created rules restricting use in some way or another.

VII IT IS POSSIBLE TO EFFECTIVELY ADDRESS THE PROBLEM OF BIODIVERSITY LOSS ON PRIVATE LAND UNDER CURRENT CONCEPTIONS OF PRIVATE PROPERTY?

This section of the paper attempts to establish whether it is at all possible, under New Zealand society's current conceptions of private property, to achieve the effective protection of biodiversity on private land. The first issue addressed considers whether the use of compensation can provide assistance in the problem of encouraging landowners to comply with the restriction of property rights in the name of preserving biodiversity. Having answered the first issue in the negative, the second issue discussed

intends to examine the nature of private property, and in particular its failure to take into account the ecological values associated with human existence. It is submitted that our current conceptions of private property do not recognise the interests of biotic communities. Hence this non-recognition, despite the endeavours of remedy by regulation, will forever hinder any attempts at successful protection of biodiversity on private land.

A Is Compensation for Property Rights Restrictions the Solution for Biodiversity Conservation?

Many biologists and ecological commentators have suggested that the unavailability of a compensation regime for restrictions on property rights is an important reason why biodiversity protection on New Zealand land has not been effective.¹²² Admittedly the lack of any compensation for any property right restrictions does negate the cooperative nature of relationship between the Crown and landowner necessary for effective biodiversity protection. However jurisdictions which have adopted a compensation for taking regime, such as the United States, have fared no better in their success in biodiversity conservation.¹²³ While such a regime may address the unfairness a particular individual may have undergone if her land was so significantly restricted to be eligible for compensation, there is no evidence to show that biodiversity protection as a whole has benefited from the implementation of a compensation for taking regime. It is possible that this lack of success is due to the threshold for being eligible for a takings regime being so high.¹²⁴ In the United States, only in

¹²² K Ryan "Should the RMA Include a Taking Regime?" (1998) 2 NZJEL 63.

¹²³ K A Scanna "The National Biological Survey: A Step Along the Path to Ecosystem Conservation" (1995) 4 NYU Env'tl LJ 134, 135-6.

¹²⁴ In the US, the Fifth Amendment of the Constitution states "nor shall private property be taken for public use without just compensation". The application of this clause to situations where the state has restricted use of private property has been muddled. In

uncommon situations has the Supreme Court granted such compensation.¹²⁵

It may be that if compensation was more readily available, for example if compensation was payable for any significant restriction on a landowners rights, then landowners would be more willing to make the effort for biodiversity.¹²⁶ However it is submitted that this is a naïve and overly simplistic assessment of the situation. Firstly not all landowners will be motivated to assist the protection of biodiversity on their land just because they may be compensated for having to forego certain rights associated with their land. Some may still resist the restriction of their rights even though compensation is available, especially if the landowner values the use of the property right greater than the compensation. This possible of continued non-compliance is potentially very damaging to plant and animal life because, as discussed in Section II, biodiversity loss is irreversible. Secondly, it is very difficult to design a system that allows for compensation when landowners genuinely wish to use their land for a use without effectively inviting everyone to allege they wish to do the same thing.¹²⁷ Under this "floodgates" argument, it is difficult to formulate a logical and appropriate threshold differentiating those who should receive compensation and those who should not. At what point and under what criteria will a landowner be eligible for compensation? It is the actual loss

Armstrong v United States (1960) 364 US 40 the Supreme Court described the purpose of the takings clause as "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". But it is still not clear what circumstances constitute a regulatory taking and what are compensable and no-compensable regulatory takings.

¹²⁵ E Elliot "How Takings Legislation Could Improve Environmental Regulation" (1997) 38 Wm & Mary L Rev 1177, 1188.

¹²⁶ For example in 1995, the United States Congress passed a Bill which provided compensation for property owners in the event that a specified government action devalued their property by 33% or more. This Bill has not yet been ratified.

¹²⁷ In that the public should not be required to compensate landowners for not taking action they never intended taking. See speech by Minister for the Environment: Right Honorary Simon Upton - "Property rights / Resource Management" at <http://www.arcadia.co.nz/speeches/171298_2.htm> (last accessed 29 September 1999).

of value in the property, or the potential loss of value for the restrictions on future uses, and is this to be measured in market value terms or on the subjective value to the landowner? Issues such as these can be integral in enticing of landowners to cooperate with the biodiversity protection regulation under a compensation regime.¹²⁸ And lastly, common sense suggests that merely throwing money at a landowner will not promote the conservation of biodiversity. Compensation alone will not encourage proactive steps for conservation by landowners. It is the opinion of the author that the creation of a compensation regime for restrictions on the rights of a private landowner, while potentially capable of providing some assistance and addressing individual unfairness, is not the solution to effective biodiversity conservation in New Zealand.

B The Primary Problems with Private Property Law and Biodiversity Protection

The guiding norms of private property rights in New Zealand incorporate very little of society's knowledge of ecological values, and this is particularly evident in the case of biodiversity. The shortcomings lie not in the details of property law, but rather in the shortcomings that cut deep into the central ideas of what private property entails. The following section aims to identify the key reasons why private property law has proved so ineffectual in biodiversity protection.

¹²⁸ Another often proposed solution to encourage voluntary support for biodiversity protection by landowners is the use of financial incentives such as tax breaks. These incentives are not discussed in depth in the paper, due to its focus on the legal mechanisms to protect biodiversity and not policy type mechanisms. However for the sake of completeness, the argument for financial incentives is that, because they establish an entitlement, people are encouraged to pursue such opportunities. Admittedly such incentive may assist biodiversity conservation, but the author submits that for the very same reasons discussed under compensation, such incentives are not the solution for biodiversity depletion. Incentives can only ever be motivational mechanisms to encourage biodiversity conservation. They are not able to *ensure* the protection of

Firstly, property law assumes that people are distinct from the land – that humans are subjects of the law and the land is merely an object. Harm to humans is redressed under property, but harm to the land, its habitat or non-human inhabitants is not. Harm to biodiversity which has no direct effect on an individual cannot be redressed. Humans abuse habitat and biodiversity because we regard land as a commodity belonging to us, and not as a necessary constituent element of the ecosystems we live in.

Secondly, property law assumes that people can draw lines on the land and thereby divide it meaningfully into discrete pieces. For many economic purposes, lines between landowners do make sense. But in other, more overlooked, ways these lines are detrimental. Nature does not recognise human boundaries. Wildlife and plant life do not define their habitat by property lines. Property law has not learned that ecology is entirely interconnected. This fact has led to the operation of separate management regimes by landowners. Land holding A is managed by one owner, land holding B by another. Different landowners employ different programmes and priorities for biodiversity, and some employ none. Uncoordinated management by landowners makes the promotion of biodiversity conservation as a whole very difficult.¹²⁹

Thirdly, property law places too much weight on market value. When harm does not cost a landowner money in the market, property law is powerless to redress this harm.¹³⁰ Common law remedies such as nuisance and trespass only take account of damage to the landowner which has a

biodiversity, which is vital as once biodiversity is gone it cannot be recovered.

¹²⁹ Obviously in New Zealand, national, regional and district policy statements and plans have attempted to remedy the segmented nature of ecological management. But as illustrated in Section IV of the paper, this legislation has yet to prove effective.

¹³⁰ Regulation has tried to redress this failure – for example the RMA and Wildlife Protection Act 1953. But as shown the various enforcement problems of the legislation have hindered its success.

value in the market.¹³¹ Biodiversity is particularly affected by this flaw, because a significant proportion of biodiversity actually has no value in the market. Therefore biodiversity which does not have a value is generally outside the scope of property law protection.

Lastly, property law is flawed in its ecological ignorance. Property is incapable of defining the differences in parcels of land. The entitlements of private ownership are determined by reference only to a hypothetical featureless land parcel, and not by reference to vegetation, wildlife and ecosystems. Property law deals with the relative rights among people and rights the owner has against the rest of the world. It is only natural for subjects of the legal system to overlook biodiversity. The private property system for land takes no account of the property inherent in biodiversity. The rights of one landowner are the same rights enjoyed by all other land owners – independent of the parcel of land's location, resources or wildlife.¹³²

Many of the failures mentioned are well known to law and policy makers in New Zealand. The Crown has attempted to redress the more evident ecological failures by the use of regulation and legislation, which aims to give the environment and biodiversity some form of priority in the use of the rights inherent in property. However, these legislative measures have not proved effective. The measures aim to restrict the traditional rights inherent in the "property" of that land in favour of the protection of biodiversity. Yet the basic premise of property in New Zealand promotes and protects individual liberty, something which can be in direct conflict

¹³¹ See discussion in Section II regarding this point.

¹³² Admittedly, property law does permit the use of covenants and easements to restrict rights relating a specific parcel of land – thus enabling some differentiation between the different characters of individual land parcels. However, in New Zealand, the use of those mechanisms is relatively uncommon for the protection of ecology, and extremely rare for the protection of biodiversity. See G W Hinde and D H McMorland *Land Law in*

with the protection of biodiversity. The mere restraining of the boundaries of individual liberty by legislation is not sufficient to alter the inherent lack of focus on ecological values in private property rights. It is submitted that only when there is an fundamental redefinition of private property rights by society, which accounts for the value of ecology in human interaction, will biodiversity actually be truly protected on private land.

C *The Microeconomic Critique: Market Failure and Biodiversity*

The notion that property ownership promotes and protects individual liberty is strong in the common law's and New Zealand's history.¹³³ Today the major relevance of the principle of individual liberty in property relates to its apparent necessity for the successful and efficient operation of society as a micro-economic "market". However, it is the author's belief that such a justification for the principle of liberty is flawed in the context of ecology and biodiversity. The following analysis intends to show why this micro-economic justification might be defective.

Many free market influenced policy makers and economists object to the concept of restraints on the individual's freedom to choose, on the basis that the use of unrestricted property rights is perceived as able to attain both maximum individual and social welfare.¹³⁴ They argue that if a landowner can use that land and its resources as she wishes, then she may achieve the greatest utility to herself. If all landowners use their resources or exchange them in the free market for the maximum possible personal

New Zealand (Butterworths, Wellington, 1997) 309.

¹³³ When feudalism was a recent memory, many subjects of the common law system saw ownership of private property as a means to sustenance and political independence, without having to depend on an overlord who would demand political allegiance in return for providing a place to live and other essentials: see B Yandle "Escaping Environmental Feudalism" (1992) 15 Harv J L & Pub Pol'y 517, 518.

¹³⁴ For an more in depth analysis of the following microeconomic approach see: Swanson, above n 31, 189-199.

utility, and this utility is then totalled, by definition the maximum aggregate total social utility should be achieved. By allowing landowners the freedom to exchange their property for other property, this allows all property eventually to reach the person who will value it more than anyone else does, thereby putting the property to its most efficient use. This microeconomic approach to the bond between property ownership and economic freedom emphasises maximum individual control over the incidents of property ownership in order to maximise overall social utility. Hence microeconomic influenced policy makers argue that the concept of private property law can promote both individual and social welfare. In terms of the protection of biodiversity, they argue that the provision of individual freedom to maximise one's own utility will therefore maximise overall social utility, thereby protecting biodiversity.

However in terms of biodiversity this has not been achieved. If individual and social welfare includes the welfare of biodiversity, the market has failed. As suggested in the preceding section, it is proffered that this is due to the ecological ignorance of our current private property law. In acknowledgment of the market's failure to protect biodiversity, legislators have created regulation which has restricted private property rights to try and rectify the situation. However, as illustrated in Section IV, the regulation of property rights to rectify market failure has not been effective for biodiversity protection. Biodiversity is so pervasive and all encompassing in the lives we, as humans, live that regulation will never be sufficient to cover and enforce restrictions on private property. Where enforcement by some form of authority is not possible or adequate, then history has shown us that restrictions on property rights will often not be complied with. Compensation or incentives to comply with the regulation may assist the protection of biodiversity but it in itself cannot solve the enforcement issue.

And yet the New Zealand paradigm for government responses is built around remediating failures of the free market to protect biodiversity. Policy makers try to fit a problem into one of the standard categories of market failure – negative externalities or inadequate information to make rational choices – in order to collectively rectify the problem. While air and water pollution problems may fit neatly into the externalities category, habitat destruction and loss of biodiversity do not fit so well into the standard categories of market failure. When policy makers try to deal with habitat destruction and the loss of biodiversity as externalities and subject them to legislative regulation, many of the parties subject to that regulation conclude that such regulation does not make sense. Landowners are not accustomed to recognising the protection of biodiversity as an important community interest to be harmonised with other values of property law. Property laws do not reflect principles of biology, ecology and other natural sciences to any where the extent that property laws reflect principles of philosophy, sociology and economics.

In summary, it is submitted that that the microeconomic analysis of achieving market equilibrium does not hold true in terms of the conservation of biodiversity. The simple fact is that our present understanding of the rights entailed in private property does not account for the protection of biodiversity. As illustrated, the operation of a market is based on clearly defined property rights. If these property rights do not take account of the ecological basis for their existence, then how can the market ever reach an equilibrium for biodiversity.¹³⁵ When property rights exclude the values of ecology, then the market must also exclude the values of ecology in it reaching its equilibrium (or non-equilibrium).¹³⁶ No

¹³⁵ Market equilibrium for biodiversity, in the author's perception, is to be seen as a situation where there is no continued loss due to human activity, and where the majority of ecosystems and the variety of life inherent in them are able to sustain themselves without the need for human management and recovery programmes.

¹³⁶ A good example of the failure of the market due to the lack of ecological values in

amount of regulation which tries to merely limit private property rights will be successful in this respect. Regulation geared to protect biodiversity has not altered the fundamentals or true nature of society's current perceptions of private property rights. It merely aims modify the edges of private property rights, and not the central core. Even where these incursions are substantial, the basic values underlying private ownership still reign supreme. The principle that a landowner can do what she wants with her land is still the dominant premise of our present private property law. This means that the value to the individual landowner of utilising her rights will almost always be greater than the value of protecting biodiversity, and hence biodiversity will suffer. For an effective biodiversity protection framework that presumption must be turned on its head. Only when biodiversity conservation is required as a given, before the need for individual liberty will biodiversity's mediocre situation improve.

D A Better Form of Property?

Historically, property definitions have continuously adjusted to reflect new economic and social structures. Property law has always been functional, encouraging behaviour compatible with contemporary goals of the community.¹³⁷ Examples of property law's adaptation to social changes are many. As the status of women changed, laws abolished a husband's property rights in their wives estates.¹³⁸ In response to urbanisation, legislative zoning has reduced the rights of landowners. A landowner's previous right to minerals found on their land are now almost completely

private property rights is evident in *The Tragedy of the Commons* – see G Hardin *The Tragedy of the Commons* (1968) Science 1243.

¹³⁷ "Social needs are the essential life that give vitality to all legal institutes As for the property law, to say that social life it creates it is a very great understatement of the intimacy of their relation": F S Philbrick "Changing Conceptions of Property In Law (1938) 86 U Pa L Rev 691, 694-95.

abrogated and most immediately vest in the Crown when discovered.¹³⁹

In the tradition of the continuing transformation of property rights, an alternative ecological view of property has been proposed by jurists such as Sax. The land is conceived as part of "the economy of nature" as well as the transformative economy.¹⁴⁰ This new perspective acknowledges that land is not merely a passive entity waiting to be developed by its landowner, but is already delivering ecosystem services to human beings and performing public functions in its natural state. In these circumstances, compensation ought not to be paid, even where the regulated landowner is left with no economically viable use of land. Sax recognises some of the problems with this approach and envisages an obligation on the part of government to alleviate the pain of the innocent. Viewing the world through the lens of nature's economy reduces the significance of property lines. A forest would be a habitat for birds and wildlife, rather than simply a discrete tract of land containing the commodity timber. Under such a view the landowner cannot justify development simply by internalising the effect of such a development on other properties. Rather the landowner's desire to do anything at all creates a problem, because any development affects the delicate ecosystem which the untouched land supports. In an economy of nature the landowner's role is custodial from the outset, before the owner ever

¹³⁸ Matrimonial Property Act 1963, s 5.

¹³⁹ Crown Minerals Act 1991: s 10 states all petroleum, gold, silver, and uranium existing in its natural condition in land shall be the property of the Crown; s 11 states every alienation of land from the Crown shall be deemed to be made subject to a reservation in favour of the Crown of every mineral existing in its natural condition in the land.

¹⁴⁰ J Sax "Property Rights and the Economy of Nature: Understanding Lucas" (1993) 45 *Stan L Rev* 1433 ["Understanding Lucas"]. The transformative economy is our current type of economy where undeveloped land is perceived as essentially inert until it is put to use - a discrete entity that can be made one's own by working it and transforming it into a human artefact. This approach gives individuals broad discretion to choose what to do with their property. See also R E Ricklefs *The Economy of Nature: A Textbook in Basic Ecology* (W H Freeman, New York, 1997); D Worster *Nature's Economy: A History of Ecological Ideas* (Cambridge University Press, Cambridge, 1994).

transforms the land. Moreover, the object of the custody generally extends beyond the owner's legally defined dominion. The notion that the land is solely the owner's property, to develop as the owner pleases, is unacceptable.

Such system of private property rights is not unknown to New Zealand society. In fact, many indigenous peoples actually perceive themselves as merely a constitutional element of the ecosystem they live in.¹⁴¹ Under customary Maori law, no one individual or kinship could ever own the land.¹⁴² Rather different levels of the hapu social order exercised different rights in the same area of land. These rights were ordered and prioritised accordingly to well recognised cultural and ecological principles but with a marked emphasis on context so that the solution chosen best suited the demands on the moment. The concept of *kiatiakitanga* inherent in the exercise of those rights meant *tangata whenua* could only exercise those rights in the land with the stewardship of the resources as the primary concern.¹⁴³ Hence it is possible that a system of private property rights can operate with the inclusion of environmental values.

Accordingly the next question is what property rights could be designed to meet the demands of both perceptions of the land rights and meet the demands of biodiversity protection and private property rights? Unfortunately, the scope of this paper does not allow for detailed consideration of the possibilities. Sax has argued that the most compatible existing model is that of usufructuary rights.¹⁴⁴ Other commentators such

¹⁴¹ See generally: C L Wickliffe *Indigenous Polities, Self-government, Law, Citizenship and Property Rights: A Comparative Study of the United States of America, Canada, and New Zealand* (Victoria University, Wellington, 1997).

¹⁴² R Boast and others *Maori Land Law* (Butterworths, Wellington, 1999) 25-30.

¹⁴³ Boast and others, above n 142,

¹⁴⁴ "Understanding Lucas" above n 140, 1452. In that the owner of a usufruct does not have exclusive dominion of her land; rather, she only has a right to uses compatible with the community's pre-established requirements. A current example of such a right is the

as Stroup and Goodman have preferred redefinition of the concept of ownership so as to incorporate the concept of ecological stewardship.¹⁴⁵ In future many more ecologically sound property regimes will be proposed as property scholars and jurists grapple with the concept of reconceiving property rights from an ecological perspective. Time will be the only judge as to which approach society will take, if any, to redress the issue of biodiversity conservation.

VIII CONCLUSION

This paper has considered the different strands of meaning which form the concept biodiversity, illustrating some of the problems entailed in using such encompassing concept as a legislative guideline. The many different patches which make up the crazy patchwork of legislative biodiversity protection mechanisms for private land are also examined. Statutes such as the RMA, the Wildlife Act 1953 and the Forests Act 1949 all serve their part in providing some protection to aspects of biodiversity on private land. However, as a whole, the current legislative crazy patchwork adopted in New Zealand to protect our biodiversity resources on private land has proved ineffective. The author has identified several problems in the legislation which may be responsible for this ineffectiveness. Those discussed include the poor implementation and enforcement of legislative provisions, the lack of a holistic approach to protecting biodiversity in the legislation and the lack of compensation for the abrogation of property rights.

However the key reason cited by the author for the ineffectiveness of the

right to use navigable bodies of water for transport and fishing, but only to that the extent – no right to take water or pollute.

¹⁴⁵ R Stroup and S Goodman "Property Rights, Environmental Resources, and the Future" (1992) 15 Harv J L & Pub Pol'y 427.

legal framework is the inherent conflict between private property rights and the public need for biodiversity protection. New Zealand, as a society in which private property rights are well recognised and enforced, must begin to question the use of property right limiting regulation as a policy instrument to address the problem of biodiversity conservation on private land. Overall, private landowners have not embraced vast regulatory incursions into the historically privileged realm of private property, even though these incursions have been justified by the public good of biodiversity conservation.

The paper has argued that the current understanding of private property rights in New Zealand, which excludes the ecological principles intrinsic in human existence, is inherently inconsistent with the protection of biodiversity on private land. It is the author's belief that this inconsistency is sufficiently extensive so as to be the major reason why existing regulatory attempts to protect biodiversity have proved practically ineffective in New Zealand. Even with regulatory restrictions which attempt to address the failure of property rights to account for biodiversity protection, the fundamental individual libertarian basis of private property impairs the ability of the regulation to be effective. If biodiversity is to ever thrive on private land, the fundamental nature of private property rights must be altered to include to ecological values inherent in the very existence of society. Property rights must change to accept, as primary basis for their existence, that the principle of individual liberty cannot ever ride roughshod over the needs of biodiversity and the ecological environment.

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