

# Environmental Law in New Zealand



GENERAL EDITORS  
Peter Salmon  
David Grinlinton



THOMSON REUTERS

# CONTENTS

<i>Foreword</i> .....	v
<i>General Editors and Authors</i> .....	vii
<i>Preface</i> .....	xiii
1 Defining the Nature and Boundaries of Environmental Law <i>David Grinlinton</i> .....	1
2 The Context of Environmental Law <i>David Grinlinton</i> .....	25
3 Sustainability and the Law <i>Klaus Bosselmann</i> .....	73
4 Sustainability in New Zealand Environmental Law and Policy <i>David Grinlinton</i> .....	105
5 The Role of the Common Law <i>David Grinlinton</i> .....	137
6 The Role of Administrative Law <i>Trevor Daya-Winterbottom</i> .....	203
7 The Relevance of International Environmental Law for Domestic Law <i>Prue Taylor</i> .....	269
8 Treaty of Waitangi and Māori Issues in Environmental Law <i>Briar Gordon</i> .....	319
9 Institutional and Governance Structures of Environmental Law <i>Marilyn Bramley</i> .....	391
10 Regulatory and Instrumental Structure of Environmental Law <i>Kathryn Edmonds</i> .....	433
11 The Resource Management Act 1991 <i>Grant Hewison</i> .....	533
12 Land Use <i>Matt Casey</i> .....	595
13 Water Management <i>Trevor Daya-Winterbottom</i> .....	641
14 Protection of the Coastal and Marine Environment <i>Trevor Daya-Winterbottom</i> .....	701
15 Global Atmospheric Pollution: Climate Change and Ozone <i>Ceri Warnock</i> .....	789
16 Air Pollution in New Zealand <i>Ceri Warnock</i> .....	831
17 The Protection and Conservation of Ecosystems and Species <i>Nicola R W'been</i> .....	855
18 Heritage Protection <i>Briar Gordon</i> .....	921
19 Compliance and Enforcement <i>Ceri Warnock and Karenza de Silva</i> .....	977
<i>Table of Statutes and Regulations</i> .....	1039
<i>Table of Cases</i> .....	1075
<i>Index</i> .....	1095

## FOREWORD

A text about environmental law cannot simply be a snapshot of the substantive rules of positive law to be found in statutes, regulations, planning instruments or the authoritative decisions of courts. This is a topic of fluid boundaries. It is positioned within the wider world of knowledge of the physical sciences, political and ethical philosophy, and economics. Since its emergence as an object of distinct legal study in the 1970s, environmental law has been a subject in constant motion as social priorities and experiences change.

Environmental justice must address how natural resources which are not inexhaustible are allocated, and how their use is to be managed not only to avoid damage in our own times but for the benefit of future generations. More prosaically, it must also provide the framework within which men and women can order their use of land and other resources and get on with their lives with some certainty.

It is a topic in which top-down regulation starts with international obligations, themselves developing fast under the insight that in our joined-up world no state can be an island — even a remote island state like ours. It is also, however, concerned with local values and human aspirations. The principles and themes which lie behind the rules later enacted are critical to the system of environmental law we have adopted. Explaining the principles and how they have developed is essential to any text dealing with environmental law in New Zealand.

Ultimately, the principles of environmental regulation find concrete expression in rules adopted in processes that have generally been highly participatory. Explaining the processes of rule-making and administration by central government agencies and local government is therefore a significant part of an adequate description of environmental law.

In addition, environmental law is also concerned with bedrock values. Environmental justice is increasingly being positioned within the law of human rights. It may touch on the rights to life, to self-determination of peoples, and to family life and culture. In New Zealand, the human rights dimension is seen especially in the treatment in environmental law of Māori connections and values in relation to land and waters. This domestic revolution since the 1980s now has international support in the United Nations Declaration on the Rights of Indigenous Peoples.

Quite apart from its connections with other disciplines, environmental law is part of the wider system of law. In particular, it requires understanding of the methods and remedies of administrative law. A text on environmental justice must explain how administrative law methods and remedies work. But it would be dangerous to pigeon-hole environmental law entirely in a “public law” box. Environmental law intersects with property law and the private law remedies of nuisance and negligence (which may yet be galvanised by the challenges of environmental protection). So any comprehensive guide to environmental law needs to deal with these topics too.

A text on environmental law is therefore inevitably a work of great variety. The variety is not only in relation to the number of areas into which it is convenient to subdivide the topic, but also in the mix of technical explanation and exposition of the general philosophical underpinnings, without which the wood might be lost in the trees.

Although it is important to understand the architecture of the topic and to draw on the different disciplines which touch upon it, it is also essential to get to grips with the detail. This is an area of law where the statutory and regulatory setting is highly complex. The central domestic environmental statute in New Zealand, the Resource Management Act 1991, runs to 433 sections and 12 schedules. Its frequent amendment has added to its complexity. Help in navigating such a statute is not an optional luxury for those who have occasion to use it. Providing such help is an indispensable task for any text on environmental law.

*Environmental Law in New Zealand* brings together practitioners and academics who are leaders in their fields and provides a thoroughgoing review of all facets of environmental law. The complexity of the topic is not underestimated. And close attention is paid to its margins and the ways in which environmental law fits into a wider framework of law and its enforcement. The technicalities of the topic are not neglected but neither do they overwhelm the bigger picture. The book is a work of imagination and scholarship as well as one of demystification and explanation. It will be a standard reference for practitioners and others working in the field. It is also readable and thought-provoking.

The Rt Hon Sian Elias GNZM

Chief Justice

March 2015

incorporating as it does the principle of sustainability as the central and overarching purpose of the legislation.

### 4.3 The sustainability principle in policy-making, planning and decision-making under the RMA<sup>37</sup>

The RMA will be discussed in more detail in ch 11 and subsequent chapters below. This part will briefly outline the genesis, nature and effect of the sustainability principle as incorporated in s 5 of the Act.

#### 4.3.1 The sustainability purpose in s 5 of the RMA

The central purpose of the RMA is “to promote the sustainable management of natural and physical resources”.<sup>38</sup> All persons exercising powers or functions under the Act are required to further this central purpose.<sup>39</sup> The use of the word “promote” suggests that s 5(1) does not impose an absolute requirement to achieve the purpose in every case. Nevertheless, the courts have consistently held that there is a clear and positive duty to comply with the statutory objective.<sup>40</sup> The statutory purpose in s 5 may also override, where appropriate, property rights,<sup>41</sup> other common law rights,<sup>42</sup> and even certain freedoms and civil liberties.<sup>43</sup> The legislature quite deliberately adopted the concept of “sustainable

37 See also David Grinlinton “Integrating Sustainability into Environmental Law and Policy in New Zealand” in Klaus Bosselmann, David Grinlinton and Prue Taylor (eds) *Environmental Law for a Sustainable Society* (2nd ed, New Zealand Centre for Environmental Law, Auckland, 2013) 21 at 26–32.

38 Resource Management Act 1991 [RMA], s 5(1). “Natural and physical resources” are defined in s 2(1) of the Act as *including* “land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures”.

39 For academic commentary on s 5 of the RMA, see: Inga Carlman “The Resource Management Act 1991 Through External Eyes” (2007) 11 NZJEL 181; Peter Fuller “The Resource Management Act 1991: ‘An Overall Broad Judgment’” (2003) 7 NZJEL 243; Peter Skelton and P Ali Memon “Adopting Sustainability as an Overarching Environmental Policy: A Review of section 5 of the RMA” (2002) 10(1) *Resource Management Journal* 1; Ian H Williams “The Resource Management Act 1991: Well Meant But Hardly Done” (2000) 9 *Otago LR* 673 at 678; Geoffrey Palmer “The Making of the Resource Management Act” in Geoffrey WR Palmer *Environment – The International Challenge* (Victoria University Press, Wellington, 1995) ch 5 at 145–174; Malcolm Grant “Sustainable Management: A Sustainable Ethic?” (1995) *Resource Management News* (address to the RMLA Conference, 1995); Bruce Parry “Sustainability: An ecological definition for the Resource Management Act 1991” (1993) 15 *NZULR* 351; Bruce V Harris “Sustainable Management as an Express Purpose of Environmental Legislation: The New Zealand Attempt” (1993) 8 *Otago LR* 51, especially at 58–65; Sarah Kerkin “Sustainability and the Resource Management Act 1991” (1993) 7 *Auckland U L Rev* 290; Janet McLean “New Zealand’s Resource Management Act: Process with Purpose?” (1992) 7 *Otago LR* 538; JR Milligan “Pondering the ‘While’” (1992) 4 *Terra Nova* 50; and Klaus Bosselmann “Sustainability: An International Objective” (December 1991) *Planning Quarterly* 6.

40 See, for example, *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [21] and *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360 (HC) at 364–365 per Hammond J.

management” rather than “sustainable development”. It was considered that the latter was too wide in scope for domestic environmental legislation, embracing as it did “social inequities and redistribution of wealth”.<sup>44</sup>

Section 5 has been interpreted as providing “a guiding principle” to be applied by those exercising powers and functions under the Act, “rather than a specifically worded purpose intended more as an aid to interpretation”.<sup>45</sup> The courts generally apply a “purposive approach” to s 5 of the RMA, as constituting a fundamental statement of the public policy and reform objectives underlying the legislation.<sup>46</sup> In *TV3 Network Services Ltd v Waikato District Council*, Hammond J stated:<sup>47</sup>

“From the outset the RMA was considered to be a true reform measure; and, one designed to introduce a new, overarching, environmental ethic.

“ ...

“The importance of [ss 5–8 of the RMA] should not be underestimated, or read down. For, they contain the spirit of the new legislation. ...

“The legislation also rests on a quite changed conception of what ‘planning’ is all about. In terms of actual function, land use planners were conventionally problem solvers within the perimeters of set policies and traditions. But now, planning theory has come to recognise that ‘goal formation is not only the most important, but also the most neglected part of the planning process ...’ (Chadwick, *A Systems View of Planning* (1978) p 124).

“ ...

---

41 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [45]–[47] per McGrath J for the Court; *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (HC) at 631–632 per Barker J. See also: *Bay of Plenty Regional Council v Western Bay of Plenty District Council* (2002) 8 ELRNZ 97 (EnvC); *Coleman v Kingston* HC Auckland AP103-SW00, 3 April 2001 at [25]–[28] and [47] per Hammond J; *New Zealand Suncorn Construction Ltd v Auckland City Council* [1997] NZRMA 419 (HC); and *Haddon v Auckland Regional Council* [1994] NZRMA 49 (PT).

42 *Gebbie v Banks Peninsula District Council* (1999) 5 ELRNZ 362 (EnvC) at [21], upheld in *Gebbie v Banks Peninsula District Council* [2000] NZRMA 553 (HC) at [27] per Panckhurst J; *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (HC) at 631–632 per Barker J; *Attorney-General v Cunningham* [1974] 1 NZLR 737 (SC) at 741 per Cooke J.

43 See, for example, *Zdrahal v Wellington City Council* [1995] 1 NZLR 700 (HC).

44 *Report of the Review Group on the Resource Management Bill* (Ministry for the Environment, Wellington, 1991) at [3.3], referring inter alia to the *Brundtland Report*.

45 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [24(a)]. See also [25], [130] and [151].

46 *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360 (HC) at 364–365.

47 *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360 (HC) at 364–365.

“In my view Part II of the RMA is critical to the new statute. It requires Courts and practitioners to approach the new machinery provisions, and the resolution of cases, with the hortatory statutory objectives firmly in view.”

“Sustainable management” is defined in s 5(2) of the RMA as follows (emphasis added):

- “(2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety *while*—
- “(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; *and*
  - “(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; *and*
  - “(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.”

This definition contains two main elements. First, a “management” function, which anticipates both utilisation and protection of resources qualified by the overall objective of enabling people and communities to provide for their social and economic needs, and for their health, safety and cultural values. Clearly a balancing exercise encompassing ecological, social, cultural and economic factors is required of authorities and decision-makers in exercising policy-making, planning or consent granting powers. This management focus is qualified by a strong “ecological” function in s 5(2)(a)–(c), requiring policy-makers and decision-makers to ensure matters such as intergenerational equity, ecological integrity, and avoidance, remedy or mitigation of the adverse effects of activities, are addressed.

A subject of considerable judicial and academic debate is the effect of the word “while” where it appears in s 5(2) between the management elements and ecological protection elements.<sup>48</sup> Does it act as a “subordinating conjunction” so that the matters in s 5(2)(a)–(c) constitute an ecological “bottom line” which overrides the other “management” matters in s 5(2), or is it simply a semantic nullity? The former interpretation was preferred in a number of earlier decisions by the Planning Tribunal (later to be renamed the Environment Court),<sup>49</sup> and indeed favoured by the Hon Simon Upton who was the Minister for the Environment at the time the RMA was brought into force and had considerable

---

48 See references at n 39.

input into the drafting of s 5 of the RMA, as enacted.<sup>50</sup> In later cases, however, the courts have preferred a more neutral approach incorporating a consideration of both main elements in s 5 in making an “overall broad judgment” in the exercise of policy-making, planning and consent granting functions.<sup>51</sup>

More recently, the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*<sup>52</sup> (*King Salmon*) has examined s 5 of the RMA, and (what it calls) the “overall judgment” approach in some detail. It is worth analysing this case in detail as it is the most recent and authoritative judicial statement on the meaning and application of “sustainable management” under the RMA.

The *King Salmon* case concerned the effect of provisions in the New Zealand Coastal Policy Statement 2010 (NZCPS)<sup>53</sup> in relation to aquaculture development in an area designated as being of outstanding natural character and having an

---

49 For example: *New Zealand Rail Ltd v Marlborough District Council* (1993) 2 NZRMA 449 (PT) at 470; *Shell Oil New Zealand Ltd v Auckland City Council* (1993) 2 NZRMA 363 (PT) at 10; *Foxley Engineering Ltd v Wellington City Council* PT Wellington W012/94, 16 March 1994 at 40; *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 (PT) at 227; *Campbell v Southland District Council* PT Wellington W114/94, 14 December 1994 at 66; and *Plastic and Leathersgoods Co Ltd v Horowhenua District* PT Wellington W26/94, 19 April 1994 at 8. See also *Hall v Rodney District Council* PT Auckland A78/95, 15 August 1995 at 32, adopting the comments of the Memorandum of the Board of Inquiry into the first proposed New Zealand Coastal Policy (6 October 1993), which expressed the view that the management elements in the s 5(2) definition of sustainable management were subordinated to the objectives in s 5(2)(a)–(c). The case was reported in [1995] NZRMA 537, but detailed consideration of the statutory purpose of s 5 of the RMA was omitted in that report.

50 See Simon D Upton “Purpose and Principle in the Resource Management Act” (1995) 3 *Wai L Rev* 17 at 40, where Mr Upton states: “whatever section 5(2) has to say about economic or social activities, the matters set out in sub-paragraphs (a), (b) and (c) must be secured. They cannot be traded off. They constitute a non-negotiable bottom line. Unless it is a bottom line, sustainable management ceases to be a fixed point or pre-eminent principle and sinks back into being a mealy-mouthed manifesto whose meaning is whatever decision-makers on the day want it to be. I hope that my description of the gestation of section 5 reinforces my contention that this all-important purpose clause does in fact set up a principle to guide the entire Act.”

51 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) at 86; *Royal Forest and Bird Protection Society of New Zealand Inc v Manuwatu-Wanganui Regional Council* [1996] NZRMA 241 (PT) at 269; *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (EnvC) at 93–94 (the Environment Court uses the words “overall broad judgment” at 194); *Man O’War Station Ltd v Auckland Council* [2013] NZEnvC 233 at [35]–[47]. See also: *Mangakahia Maori Komiti v Northland Region* [1996] NZRMA 193 (PT) at 215; *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541 (EnvC) at [228]; and *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development* [2007] NZCA 473, [2008] 1 NZLR 562 at [50].

52 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

53 New Zealand Coastal Policy Statement 2010 (Department of Conservation, November 2010) [NZCPS].

outstanding natural landscape. The New Zealand King Salmon Co Ltd had applied for a plan change to the Marlborough Sounds Resource Management Plan (2003) to reclassify salmon farming from a “prohibited activity” to a “discretionary activity” under the RMA in a number of locations in the Marlborough Sounds. The Minister of Conservation, acting on the advice of the Environmental Protection Agency (pursuant to s 147(1) of the RMA), had directed that a Board of Inquiry determine the application.<sup>54</sup> The Board found that the proposed salmon farm would have significant adverse effects on the natural character and landscape of that area and that, as a consequence, policies 13(1)(a) and 15(a) of the NZCPS (which were concerned with preserving and protecting the coastal environment)<sup>55</sup> would not be complied with if the plan change were granted. Nevertheless, the Board considered that those policies, while carrying considerable weight, were not determinative. It decided that it was required to give effect to the NZCPS “as a whole”, and applied the overall judgment approach relating to pt 2 of the RMA to grant the plan change.<sup>56</sup> This was upheld in the High Court, which dismissed appeals by the Environmental Defence Society Inc and Sustain Our Sounds Inc.<sup>57</sup> Leave to appeal directly to the Supreme Court was granted pursuant to s 149V of the RMA and ss 12 and 13 of the Supreme Court Act 2003. The Supreme Court considered that it was necessary in the interests of justice to hear the appeal as the case raised matters of public importance, and exceptional circumstances existed that required that the appeal be heard directly by the Supreme Court.<sup>58</sup>

54 For the background to the case, see *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [1]–[4].

55 NZCPS, policy 13 (preservation of natural character) is expressed as: “To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development: ... (a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character.” Policy 15 (natural features and natural landscapes) is expressed as: “To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development: ... (a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment ...”.

56 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [5].

57 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZHC 1992, [2013] NZRM 371.

58 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2013] NZSC 101 and *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd [Procedure]* [2014] NZSC 41, [2014] 1 NZLR 717 (reasons for granting leave). The “exceptional circumstances” were that the appeals concerned a major aquaculture development, which involved matters of national significance, involved questions of law that had the potential to affect all decisions under the RMA, and the Supreme Court had not yet considered those questions: *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd [Procedure]* [2014] NZSC 41, [2014] 1 NZLR 717 at [5]–[11].

The Supreme Court undertook a detailed analysis of the RMA, in particular pt 2 (purpose and principles).<sup>59</sup> It confirmed that the correct interpretation of “while” in s 5(2) of the RMA, is that it means “at the same time as”.<sup>60</sup> The Court further stated that the various elements of the s 5(2) definition of sustainable management should be read as an “integrated whole”, and that the elements in s 5(2)(a)–(c) do not constitute a strict “environmental bottom line” in themselves.<sup>61</sup> In considering the overall judgment approach, the Court accepted that s 5 sets out the RMA’s overall objective, but noted that it “was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made”.<sup>62</sup> The Court noted that s 5 and the overall judgment approach may inform both those responsible for the preparation of policy and planning instruments, and decision-makers, as to the effect of relevant provisions of the Act, policies, and planning instruments when making decisions under the Act.<sup>63</sup> It would also be relevant in determining the validity of a policy or planning instrument or parts thereof, in cases where a policy or planning instrument does not “cover the field” of matters a decision-maker must address, or where there is uncertainty as to the meaning of policies or planning instruments under the RMA.<sup>64</sup> However, it could not be used to undermine or veto clear directive requirements of policies, plans and rules that have been prepared in accordance with the RMA.<sup>65</sup>

In the context of the NZCPS, the Supreme Court considered that that instrument sits at the top of the planning hierarchy in relation to coastal management<sup>66</sup> and plays a “central role” in the statutory framework.<sup>67</sup> The purpose of the NZCPS is “to achieve the purpose of [the RMA] in relation to the Coastal environment of New Zealand”,<sup>68</sup> and other subordinate policy and

---

59 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [8]–[30].

60 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [24(c)].

61 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

62 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [151].

63 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [10]–[16], [21] and [30].

64 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [88].

65 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [106]–[149] for full discussion.

66 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [152].

67 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [33].

68 RMA, s 56. See also *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [31].

planning documents “must give effect to” the NZCPS.<sup>69</sup> It appeared to the Court that the Board had treated the objectives and provisions in the NZCPS as simply “a listing of potentially relevant considerations, which will have varying weight in different fact situations”.<sup>70</sup> Further, the Board had applied the overall judgment approach to determine the plan change applications “not by reference to the NZCPS but by reference to pt 2 of the RMA”.<sup>71</sup> In rejecting that approach, the Supreme Court held:<sup>72</sup>

“[T]he NZCPS gives substance to pt 2’s provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting ‘in accordance with’ pt 2 and there is no need to refer back to the part when determining a plan change.”

The Supreme Court noted that the NZCPS was a “carefully expressed document whose contents are the result of a rigorous process of formulation and evaluation”.<sup>73</sup> In this case, it considered it was “[n]either necessary or helpful” for decision-makers to resort to pt 2 of the RMA to interpret the NZCPS, or the policies therein,<sup>74</sup> in the context of determining the proposed plan change.

The Supreme Court also held that policies 13(1)(a) and 15(1)(a) and (b) of the NZCPS “provide something in the nature of a bottom line”, and this was consistent with the definition of sustainable management in s 5(2) of the RMA.<sup>75</sup> It was also consistent with the classification of activities such as “prohibited”, “non-complying”, “discretionary”, “restricted discretionary” or “permitted” in s 87A of the Act.<sup>76</sup> The Court noted that as a territorial authority may “prohibit” certain activities in its district plan:<sup>77</sup>

69 RMA, ss 62(3) (regional policy statements), 67(3)(b) (regional plans) and 75(3)(b) (district plans). See also *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [31], [75]–[80] and [85].

70 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [81]–[83].

71 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [84].

72 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [85], and see also at [90].

73 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [90].

74 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [90].

75 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [132].

76 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [132].

77 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [132].

“... there is no obvious reason why a planning document which is higher in the hierarchy of planning documents should not contain policies that contemplate the prohibition of particular activities in certain localities.”

In addition to the requirements of lower level policies and plans to “give effect to” higher level policies such as the NZCPS,<sup>78</sup> the Court noted there were other reasons why the “overall judgment” approach should be rejected in relation to implementation of the NZCPS. These included the elaborate process of preparation and implementation of a NZCPS, the uncertainty if an “overall judgment” approach was accepted, and the potential for undermining the strategic region-wide approach to coastal resource management that the NZCPS was intended to provide.<sup>79</sup>

In summarising its reasons for rejecting the overall judgment approach in the application of directive policies in the NZCPS, the Supreme Court stated:<sup>80</sup>

“[151] ... Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt 2 remains relevant. It does not follow from the statutory scheme that because pt 2 is open-textured, all or some of the planning documents that sit under it must be interpreted as being open-textured ...

“[152] ... Those objectives and policies [in the NZCPS] reflect considered choices that have been made on a variety of topics. ... Given that environmental protection is an element of the concept of sustainable management, we consider that the Minister was fully entitled to require in the NZCPS that particular parts of the coastal environment be protected from adverse effects of development. ...

“[153] ... The NZCPS requires a ‘whole of region’ approach and recognises that, because the proportion of the coastal marine area under formal protection is small, management under the RMA is an important means by which the natural resources of the coastal marine area can be protected. *The policies give effect to the protective element of sustainable management.*”

---

78 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [127]–[129].

79 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [136]–[140].

80 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [151]–[153] (emphasis added).

The decision in *King Salmon* has much wider application than simply in relation to interpreting the NZCPS. The judgment provides useful clarification of the meaning of “sustainable management” as contained in s 5 of the RMA, and its implementation through the hierarchy of policies and plans put in place by central and local government. It also confirms that such instruments may indeed include “environmental bottom lines”, which may be enforced through directive policies in policy statements, and rules in plans.

### 4.3.2 Ancillary matters in pt 2 — ss 6–8 of the RMA

Ancillary to the s 5 statement of purpose, pt 2 of the Act contains a number of other principles that help define and elaborate the sustainable management purpose.<sup>81</sup> Section 6 sets out a number of “Matters of national importance” that must be recognise[d] and provide[d] for by persons exercising functions and powers under the Act.<sup>82</sup> Section 7 lists a number of other matters to which “particular regard” must be had.<sup>83</sup> The principles of the Treaty of Waitangi (Te Tiriti o Waitangi) are also given a position of primacy within the legislation with a requirement in s 8 for decision-makers to “take into account” those principles in achieving the purpose of the Act.<sup>84</sup> The different wording used in each section to describe the obligations on those exercising powers and functions indicates a prima facie hierarchy of relative weight to be accorded to the matters therein. In *Genesis Power Ltd v Franklin District Council* the Environment Court stated:<sup>85</sup>

81 For a fuller discussion of the principles set out in ss 6–8 of the RMA, see [11.4]. For useful discussions of the significance of pt 2 matters see: *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 (PT) at 227–228; *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (HC) at 632; *Meridian Energy Ltd v Wellington City Council* EnvC W031/07, 14 May 2007, especially at [366] and [453]–[459]; *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC) at [47]; *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development* [2007] NZCA 473, [2008] 1 NZLR 562; *Butterworth v Auckland City Council* [2010] NZRMA 229 (EnvC); and *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [21]–[30].

82 RMA, s 6. These matters include: the preservation of the natural character of the coastal environment; the protection of outstanding natural features from inappropriate development; and the protection of areas of significant indigenous vegetation and habitats.

83 RMA, s 7. These matters include: the efficient use and development of resources; the efficiency of the end use of energy; the intrinsic values of ecosystems; and the maintenance and enhancement of the quality of the environment; the effects of climate change; and the benefits from renewable energy.

84 RMA, s 8. In *Haddon v Auckland Regional Council* [1994] NZRMA 49 (PT) the Court interpreted “to take into account” as meaning that a decision-maker must weigh up the matter with other considerations when they are making a decision, and be able to show that they have done so.

85 *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541 (EnvC) at [55]. See also the general discussion on pt 2 of the RMA at [50]–[59]; noted in (2005) 6(7) BRMB 81. See also *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 at [54] and *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [25]–[26].

“Where Part II matters compete amongst themselves, we must have regard to the statutory hierarchy as between sections 6, 7 and 8 as part of the balancing exercise. However, notwithstanding their importance, all of those sections are subordinate to the primary purpose of the Act.”

Section 6 places the strongest duty on persons exercising powers and functions, and contains “matters of national importance” which are aimed at preserving and protecting certain areas of the natural environment either absolutely, or in some measure, from inappropriate use and development.<sup>86</sup> The matters set out in s 7 are more abstract and evaluative than those in s 6, and this is reflected in the lesser obligation to “have particular regard” to those matters.<sup>87</sup> The courts have interpreted this obligation as importing a “duty to be on enquiry”<sup>88</sup> that is greater than simply “have regard to” but a lesser obligation than that contained in s 6 of the RMA.<sup>89</sup> It has been suggested that s 8, although containing a relatively weak formulation of obligation (“take into account”) is of a different character and probably has a wider scope than ss 6 and 7.<sup>90</sup> The Supreme Court in *King Salmon*, noting that more specific matters relating to Māori interests were included in those earlier sections, considered the obligation in s 8 “may have an additional relevance to decision-makers”, for example, “to matters of process, such as the nature of consultations that a local body must carry out when performing its functions under the RMA”.<sup>91</sup>

---

86 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [25(a)], [26] and [28]–[29].

87 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [26].

88 See, for example, *Gill v Rotorua District Council* (1993) 2 NZRMA 604 (PT) at 616; *Quarantine Waste (NZ) Ltd v Waste Resources Ltd* [1994] NZRMA 529 (HC) at 542. In *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 (PT) at 228, Willy J interpreted the requirement “to have regard to” as meaning “to take the matter into account, recognising it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion”. In the context of s 104 of the RMA, in *Foodstuffs (South Island) Ltd v Christchurch City Council* [1999] NZRMA 481 (HC) Hansen J considered that “have regard to” required the decision-maker to “give genuine attention and thought” to the specified matters (at 487), and that “shall have particular regard to” is stronger than “have regard to” (at 484).

89 See the discussion in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [25]–[26].

90 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [27].

91 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [27].