INTRINSIC VALUES OF ECOSYSTEMS AND THE RESOURCE MANAGEMENT ACT 1991: APPROACHING SECTION 7(D) WITH MORE IMAGINATION

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Introduction

> "I used to think that the top environmental problems were biodiversity loss, ecosystem collapse and climate change. I thought that with 30 years of good science we could address those problems. But I was wrong. The top environmental problems are selfishness, greed and apathy...and to deal with those we need spiritual and cultural transformation – and we scientists don't know how to do that."
>
> - Gus Speth[1]

Selfishness, greed and apathy, none of these words inspire a particularly pretty picture of humankind, but few could blame Speth for describing people in this way. The state of the global environment reflects as much. Closer to home, New Zealand still trades on its clean and green image, but we have our own mounting environmental concerns: loss of biodiversity, rising emissions and freshwater pollution. We too confront selfishness, greed and apathy.

In 1991 New Zealand took a bold step in enacting the Resource Management Act 1991 ('RMA'). The international community described it as innovative and revolutionary. It was among the first pieces of legislation to properly embrace the concept of sustainability as a core legislative objective. The Act is crafted around the central directive to achieve sustainable management. It was also one of the first pieces of legislation to recognise and make reference to the 'intrinsic values of ecosystems' ('IVOE'). IVOE is one of numerous considerations included in s 7, which alongside ss 6 and 8 supply further context for the overarching purpose of sustainable management as articulated in s 5 of the Act. It is the only explicitly ecocentric consideration to be included in Part 2 of the Act.[2] IVOE, and its

[1] Gus Speth to a BBC radio audience in 2014 as cited in Rod Oram *Three Cities* (Bridget Williams Books, 2016) at 40.

[2] However, it should be acknowledged that s 7 also includes subsections (a) kaitiakitanga and (aa) the ethic of stewardship, which arguably also import some sense of ecological duty to our environment, as well as a more holistic understanding of humankind's relationship with nature. This is particularly true for s 7(a) kaitiakitanga. Kaitiakitanga is a tenet of tikanga Māori, a tradition firmly rooted in an understanding of people belonging to the land. It is perhaps less true for s 7(aa) ethic of stewardship, which according to some is a concept still deeply rooted in an understanding of the environment purely as a resource. See Emily Barritt, "Conceptualising Stewardship in Environmental Law" (2014) 26 JEL 1 at 3.

application under the RMA framework, is the central focus of this dissertation. The recognition of intrinsic values more generally requires acknowledgement that nature possesses value independent of that which is attributed to it instrumentally by humankind. That nature possesses intrinsic value is a central claim of the ecocentric tradition. IVOE is a fascinating but nonetheless complex concept and has not found easy use as a consideration in resource management decision-making.

Ultimately this dissertation asserts that under the RMA, IVOE has not yet realised its full potential, and has not translated well from a philosophical concept to a legislative tool. The application of IVOE indicates that it has been allowed to drift from its ecocentric foundations, and little effort has been made by the courts or litigants to thoughtfully and meaningfully consider what recognising IVOE could mean for resource management decision-making. Nonetheless, this dissertation remains optimistic about the future use of IVOE. It will be argued that we should not yet give up on IVOE. The manner in which it is currently applied is not all it has to offer. It is not my intention to offer a comprehensive or exhaustive definition for IVOE. Rather, I intend to advocate for the concept's untapped possibilities, and to highlight the necessity for mechanisms that support finding ways to be more articulate about IVOE.

Engaging meaningfully with IVOE's ethical foundations could mean regularly expressing notions of care, compassion and humility in environmental decision-making. It could mean slowly enlarging our understanding of who we are on this planet, and confronting ingrained assumptions surrounding resource use. If IVOE can be employed in the manner I suggest it can, then we might go some way towards confronting our selfishness, greed and apathy. As it stands IVOE will likely never achieve this level of understanding without extra assistance. Presently both the courts and litigants have failed to address its ambit. Moreover, it faces an uphill battle within Part 2 of the RMA. Thus this dissertation concludes by proposing a number of mechanisms for the purpose of 'consciousness-raising', with the hope that IVOE could be given more of a spotlight, room for exploration and ultimately the chance to have a proper impact on decision-making under the RMA.

Chapter I, will introduce the ethical foundations from which IVOE has emerged. It considers different approaches to environmental decision-making as offered by anthropocentrism and ecocentrism. It further evaluates the expression of these paradigms in important documents

and legislation that preceded the enactment of the RMA. This chapter is critical for establishing the philosophical and historical context for the enactment of the RMA, and by extension the use of IVOE in a resource management scheme.

Chapter II, will analyse the working papers and review documents produced in the course of the Resource Management Law Reform ('RMLR'). These publications provide valuable insight into the manner in which IVOE was understood by reform participants, and the reasoning providing for its inclusion in the sustainable management framework that was adopted by the RMA.

Chapter III, will consider the application of IVOE by the courts of New Zealand. The case law reveals the central claim of this dissertation: that our current use of IVOE is impoverished and it appears to have had no great effect on environmental decision-making. IVOE tends to be wrongly conflated with scientific factors, or disregarded completely. No effort is made to engage with its ethical foundations. Chapter III also considers the 2013 reform package that proposed to delete IVOE from the RMA.

Chapter IV, is the heart of this dissertation. It identifies that the use of IVOE in New Zealand's case law stands in juxtaposition to its ecocentric origins, and the manner in which RMLR contributors hoped it would be applied. This chapter expresses the central claim that IVOE as a legal objective and tool has been allowed to atrophy. Moreover, this chapter briefly considers why it might be that New Zealand has, after 27 years, made so little use of IVOE. Responding to these explanations, I suggest that we could choose to be ambitious and imaginative in our use of IVOE. Rather than settling for its current application we could reach for an approach that makes reference to care and compassion, and how we might engage with the environment when we acknowledge the ways that we 'feel' are not only reflective of nature's utility. Finally, this chapter recognises the inherent messiness of environmental law. It argues that the polycentric problems faced by environmental law are not amenable to being worked out like mathematical equations. Environmental law is discursive and requires the consideration of a diverse range of factors that don't just 'add up' neatly. Likewise, Part 2 is built upon values that are inherently conflicted and often appear incommensurable. The challenge is to find ways to give expression to all of these values and factors. The nature of environmental law and the design of Part 2 are disregarded where we choose to subjugate objectives such as IVOE.

Chapter V, will consider mechanisms by which reference to, and use of IVOE can be encouraged. If the potential of IVOE is to be recognised it would appear that extra assistance is needed. The mechanisms proposed touch upon Māori participation, changes to standing and rights of appeal, expansion of the Environmental Legal Assistance Fund ('ELA Fund') and changes in awards of cost, and the establishment of an Environmental Defenders Office ('EDO') and a Guardian ad Litem for the Environment ('Guardian').

I. The Philosophical and Historical Context

The Resource Management Act 1991 resulted in a radical reform process. Like many other examples of groundbreaking legislation, it emerged from a particular context and is the product of more than a decade of intellectual thought, environmental pressures and legal developments. The RMA reflects trending normative theories, and in order to properly understand IVOE and its implications as a legal tool it is necessary to first identify the origins of 'intrinsic value' as a philosophical concept within the ecocentric tradition. This tradition emerged in earnest as a response to the perceived failings of the dominant anthropocentric worldview. Thus, this chapter begins by tracing the historic supremacy of anthropocentrism as a normative theory for dealing with the environment. It suggests the anthropocentric approach has failed to preserve the environment, and as such ecocentrism is raised as an alternative normative theory. It is within the context of the ecocentric worldview that I consider the philosophical aspirations of IVOE. In addition, this chapter addresses the response of the international community to this growing philosophical tension. It highlights the impact of the Brundtland Report in particular, but also of the World Conservation Strategy, the World Charter for Nature and the Convention on the Conservation of European Wildlife and Natural Habitats. These documents reflect the manner in which the international community adopted both anthropocentrism and ecocentrism, and were significant precursors to New Zealand's domestic reform. Finally, I will briefly address domestic statutes that were of significance to New Zealand's resource management reform.

A. Competing Theories in Environmental Legal Discourse

The law generally is a powerful tool for affirming or marginalising different ways of thinking. It is not value free and it does not emerge from, or exist in a vacuum. Environmental law is deeply reflective of societal value systems and humankind's perception of the 'place' of people on this planet. It is informed by complex assumptions about what it means to be human and the privileges and rights that lie therein. While environmental discourse is crowded with innumerable voices there are two arguments that represent the two ends of the discourse spectrum: two opposing visions of the environment, and the relationship of humans to it. These two visions can be most plainly summarised in the following manner: the Earth as sacred (ecocentrism) and the Earth as a resource

(anthropocentrism).[3] Part 2, the "engine room"[4] of the RMA, the driving purpose and principles that the Act is built on, was formulated against the backdrop of a great deal of philosophical discussion surrounding how we should feel about, and deal with, the environment. It is pertinent then to begin my analysis of s 7(d) with reference to these competing normative theories.

1. The historical dominance of anthropocentrism

Anthropocentrism understands the environment purely in terms of its benefit to humans; it is a resource to be exploited at the will of humankind.[5] Put bluntly anthropocentrism amounts to "human chauvinism", whereby humans are placed at the absolute and objective centre of the universe.[6] Anthropocentrism is marked by its belief only in nature's instrumental value: historically many theorists and scholars have understood the natural world as devoid of any intrinsic value. In the abstract, but also in practice, anthropocentrism provides that the human race be privileged over all other beings on the basis that it is superior.[7] While this perspective finds a great deal of support in secular philosophy (as detailed below) it is also distinctly reflective and reminiscent of the biblical dominion attributed to man. A great number of history's most revered and influential thinkers have championed this view. Aristotle (384-322 BCE) believed that human rationality made us fundamentally different to animals. Thomas Aquinas (1225-1274) maintained that animals and plants moved only by natural impulse, without sense of reason. Francis Bacon perhaps put it most explicitly when he expressed the hope that humanity would subdue nature and "bind her to service and to make her a slave".[8] The scientific community likewise contributed to the dominance of this view when physicists such as Isaac Newton (1643 – 1727) explained planetary movements with mathematical equations. He championed sure and solid facts, cementing an atomistic and compartmentalized understanding of the natural world. Abstracted individualism was to become the hallmark of the Enlightenment period and any number of later thinkers from Rousseau to Smith can be attributed with some variance of the assertion that humans stand

[3] Mark Sagoff *The economy of the earth* (2nd ed. ed, Cambridge University Press, Cambridge ; New York, 2008) at 1.
[4] *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC) at [47]
[5] Sam Adelman "Epistemologies of mastery" in A Grear and L.J. Kotzé (ed) *Research Handbook on human rights and the environment* (Edward Elgar Publishing, Cheltenham, 2015) 9 at 18.
[6] Alexander Gillespie *International environmental law, policy and ethics* (second edition ed, Oxford University Press, Oxford, 2014) at 4.
[7] At 4.
[8] At 6.

apart from, and rightfully have dominion over, nature.[9] In a more general, contemporary context, anthropocentrism is also plainly compatible with, and deeply embedded in, the neoliberal paradigm that currently dominates global politics. Tragically, the effect of this paradigm has been the successful promotion of individualism, consumption and the commodification of nature.[10] Economic growth has been embraced as the primary marker for progress and ultimately this kind of thinking has resulted in the conception of humans *outside of* nature.[11]

The letter of Western law has long been a site for the expression of epistemic assumptions, often obscured by a veil of presumed objectivity.[12] Undoubtedly the anthropocentric worldview and the notion of the environment as a resource has left a lasting (a hard to shake) mark on our legal instruments and institutions. Traditionally, the law has engaged in what Bosselmann identifies as 'environmental reductionism' whereby the environment is compartmentalized and fragmented.[13] Modern environmental legislation tends to be "economically-charged", and reflects the understanding that the economy and individual wellbeing should be the first priority.[14] The law then, has been a key player in the "domination and 'othering' of nature".[15] This should come as no surprise considering the law's historical (and ongoing) role in the othering of certain groups of people (most notably African Americans, indigenous peoples, and women). The apparent global proliferation of this approach to nature is largely due to the dominance of Western legal thought which has habitually marginalised other ways of "seeing and knowing".[16] This is quite apparent in New Zealand's own treatment of indigenous knowledge. New Zealand's environmental law is a clear reflection of our own colonial history,[17] and has, in the main, eschewed tikanga Māori.

[9] At 8.
[10] Adelman, above n 5, at 10.
[11] At 12.
[12] At 13.
[13] Klaus Bosselmann "A vulnerable environment: Contextualising law with sustainability" (2011) 2 Journal of Human Rights and the Environment 45 at 48.
[14] Klaus Bosselmann "Losing the Forest for the Trees: Environmental Reductionism in the Law" (2010) 2 Sustainability 2424 at 2431.
[15] Vito De Lucia "Beyond anthropocentrism and ecocentrism: A biopolitical reading of environmental law" (2017) 8 Journal of Human Rights and the Environment 181 at 183.
[16] Adelman, above n 5, at 18.
[17] Andrea Tunks "One Indigenous Vision for Sustainable Development Law" in Klaus Bosselmann, David Grinlinton and Prue Taylor (eds) *Environmental law for a sustainable society* (2nd ed, New Zealand Centre for Environmental Law, Auckland, New Zealand, 2013) 109 at 114.

Tikanga Māori has a long and rich understanding of human relationships with the land. As explained by Mead: [18]

> "The relationship is not about owning the land and being master of it, to dispose as the owner sees fit. The land has been handed down the whakapapa line from generation to generation and the descendent fortunate enough to own the land does not really 'own it."

Instead "[o]ne [belongs] to the land",[19] and land forms an integral part of Māori identity.[20] Where Western environmental philosophers have only much more recently begun to re-litigate the place of humankind in the hierarchy of Earth,[21] indigenous communities have long abided by an environmental ethic of equality and guardianship. 'Rāhui' (the effect of which is to "prohibit a specific human activity from occurring or from continuing")[22] is an apt example of the manner in which tikanga Māori might have offered a more protective manner of dealing with the environment, had it not been displaced by the English system of law.[23] Sadly, these kinds of approaches to land use have, in the main, been pushed aside and usurped by Western epistemologies,[24] minimising the ways and spaces in which they can operate.

2. The emergence of an alternative ethic: ecocentrism

The Western manner of thinking detailed above, and the activities permitted in light of that approach have produced ways of dealing with the environmental that are unsustainable in the long-term.[25] It is undeniable, given the wealth of scientific proof available, that the environmental crises we are currently facing are the result of human activity.[26] Nonetheless, despite our possession of this knowledge, we have continued, "on the basis of dangerous and

[18] Sidney M Mead *Tikanga Maori* (revised edition ed, Huia Publishers, Wellington, New Zealand, 2016) at 208.
[19] At 209.
[20] At 216.
[21] Mathew Humphrey *Preservation versus the people?* (Oxford University Press, Oxford, 2002) at 17.
[22] Sidney M Mead *Tikanga Māori* (Huia, Wellington, NZ, 2003) at 193.
[23] Nicola Wheen and Jacinta Ruru "Providing for rāhui in the law of Aotearoa New Zealand" (2011) 120 The Journal of the Polynesian Society 169 at 170.
[24] Tunks, above n 17, at 114.
[25] Klaus Bosselmann *Earth governance* (Edward Elgar Publishing, Cheltenham, UK, 2015) at 34.
[26] IPCC "Climate Change 2013: The Physical Scientific Basis" in Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2014); Ministry for the Environment "Environment Aotearoa 2015" (2015); and IUCN Red List "IUCN Red List of Threatened Species" <https://newredlist.iucnredlist.org>

archaic assumptions about resource use, stubbornly committed to 'business as usual'".[27] The human activity that has produced such effects is in part an outcome of the law itself. Critics of the status quo suggest that environmental crises are the logical result of our current legal order and constructed natural hierarchy,[28] given that anthropocentrism contains no capacity to "erect moral or behavioural barriers to the complete destruction of non-human life forms and habitats".[29]

The potential of an alternate approach first gained traction in mainstream discourse with the publication of Aldo Leopold's 1949 classic *'A Sand County Almanac'* and his proposal for a 'land ethic'.[30] Increasingly, legal academics and scholars are now embracing an alternative vision for our environment, calling for a radical reimagining of environmental legislation.[31] In the most general terms this opposing paradigm for dealing with the environment is referred to as ecocentrism. Ecocentrism is defined (broadly, in the dictionary) as "a philosophy or perspective that places intrinsic value on all living organisms and their natural environment, regardless of their perceived usefulness or importance to human beings".[32] The notion of the intrinsic value of nature is at the very core of the ecocentric perspective. Ecocentrism can additionally be described as a pushback against the belief that the world can be broken down into discrete parts, that humankind is capable of managing nature through technological developments, and the practice of placing human interests before all others.[33] In its purest form, ecocentrism demands that humankind redefine the 'natural' hierarchy that we have created for ourselves, and acknowledge the responsibilities that come with humanity's power.[34] Nobel-prize winning philosopher and economist Amartya Sen poignantly captures this sentiment when he muses that perhaps the fullest realisation of what it means to be human arises when one allows other life forms to claim their fair share of environmental resources, not because they are of value to us, but because they have a right to exist in and of

[27] Nicholas A Robinson "Beyond sustainability: Environmental management for the Anthropocene Epoch" (2012) 12 Journal of Public Affairs 181 at 181.
[28] Anna Grear "The closures of legal subjectivity: why examining the law's person is critical to an understanding of injustice in the age of climate change" in A Grear and L.J. Kotzé (ed) *Research Handbook on human rights and the environment* (Edward Elgar Publishing, Cheltenham, 2015) 80 at 80.
[29] Humphrey, above n 21, at 19.
[30] Aldo Leopold *A Sand County almanac, and sketches here and there* (Oxford University Press, New York, 1987).
[31] An interesting (and completely anecdotal) example of the widespread recognition of ecocentrism is that almost every environmental textbook or student guide that I initially consulted spent at least a little time outlining the existence of ecocentrism as a potential alternative for our current status quo.
[32] Dictionary.com "Ecocentrism" <http://www.dictionary.com/browse/ecocentrism>
[33] Humphrey, above n 21, at 19.
[34] Claire Browning *Finding ecological justice in New Zealand* (Produced and published by Claire Browning, with the support of the New Zealand Law Foundation, Woodville, 2017) at 48.

themselves.[35] This conception of the environment invites a much more holistic understanding of the planet whereby the whole, rather than the individual, is important, and all species are "no more than small dots within a huge matrix".[36] The individualistic, competitive and profit-driven mindset is vehemently rejected by the ecocentric worldview.[37]

B. International and Domestic Developments and Pressures

While academia had for some time been concerned with the ethical dimensions of environmental law, it was not until the early 1970s that international and domestic policy-makers attempted to fully construct a more explicit normative framework for environmental law.[38] At that time the increasingly contentious philosophical debate surrounding environmental law, coupled with mounting evidence of actual and impending environmental destruction, led to an explosion of international agreements dealing with humankind's use of the environment. Thus, international agreements and documents produced in the decade prior to the enactment of the RMA began to echo the changing tone of intellectual debate. These documents ultimately formed the foundations from which the RMA was constructed and created important precedents for embodying both anthropocentric and ecocentric conceptions of the environment. The following section is split into two parts: the first details the critical role played by the Brundtland Report and its promotion of sustainability as the preeminent theory for managing the environment, the second addresses the importance of additional documents that recognise intrinsic values.

1. Our Common Future ('the Brundtland Report') - the source of 'sustainable development' and the precursor for 'sustainable management'

Arguably the most important catalyst for resource management reform in New Zealand was the Brundtland Report, published by the World Commission on the Environment and Development ('WCED') in 1987. The WCED was established by the United Nations General Assembly to formulate innovative, but nevertheless realistic, proposals to address critical

[35] Amartya Sen "Why We Should Preserve the Spotted Owl" *London Review of Books* (5 February 2004) 10 at 10.
[36] Gillespie, above n 6, at 137.
[37] Bosselmann, above n 25, at 117.
[38] Benjamin J. Richardson "Trends in North America and Europe" Klaus Bosselmann and David P Grinlinton (eds) *Environmental law for a sustainable society* (New Zealand Centre for Environmental Law, Auckland, NZ, 2002) 47 at 47.

environmental issues.[39] Ultimately the Report was a landmark document for environmental management and introduced 'sustainable development' into mainstream discourse.[40] It is significant in that it united needs and limitations, development and the environment,[41] acknowledging that "ecology and economy [were] becoming ever more interwoven...into a seamless net of cause and effect".[42] The Report took the view that economics and environmental decision-making needed to be integrated, and that decision-makers needed to recognise that humankind's economic needs and desires were *always* subject to environmental limitations.[43]

The Commission addressed the need to change legal frameworks in order to encompass the concept of sustainable development. It proposed that the "necessary changes in the legal framework start from the proposition that an environment adequate for health and wellbeing is essential for all human beings – including future generations".[44] Such a view "places the right to use public and private resources in its proper social context and provides for more specific measures".[45] Despite the clear need for the principle of sustainability to be transformed into legally binding measures the Commission itself did not formally recommend the manner in which this should be done. Rather a group of legal experts articulated a number of legal principles that were annexed to the Report.[46] For the purposes of this discussion Article 3 and Article 7 are perhaps of most note given their strong, and specific, commitment to advancing sustainability.[47]

> Article 3: Conservation and Sustainable Use – States shall maintain ecosystems and ecological processes essential for the functioning of the biosphere, shall preserve

[39] World Commission on Environment and Development "Report of the World Commission on Environment and Development: Our Common Future" (1987) <http://www.un-documents.net/wced-ocf.htm> at 27.
[40] Geoffrey Palmer "Setting the scene for the 'new thinking on sustainability' conference (Special Conference Issue: New Thinking on Sustainability)" (2015) 13 The New Zealand Journal of Public and International Law 17 at 19.
[41] At 19.
[42] World Commission on Environment and Development, above n 39, at 15.
[43] Palmer, above n 40, at 19.
[44] World Commission on Environment and Development, above n 39, at 63.
[45] At 63.
[46] Hans Christian Bugge "1987-2007: "Our Common Future" Revisited" in Hans Christian Bugge and Christina Voigt (eds) *Sustainable development in international and national law: what did the Brundtland report do to legal thinking and legal development, and where can we go from here?* (Europa Law Publishing, Groningen, 2008) at 18.
[47] Geoffrey Palmer "The Making of the Resource Management Act" in *Environment –the International Challenge* (Victoria University Press, Wellington, 1995) 145 at 149.

> biological diversity, and shall observe the principle of optimum sustainable yield in the use of natural living resources and ecosystems.
>
> Article 7: Sustainable Development and Assistance – States shall ensure that conservation is treated as an integral part of the planning and implementation of development activities and provide assistance to other States, especially developing countries, in support of environmental protection and sustainable development.

The language used in the Brundtland Report is still irrefutably anthropocentric: it is largely concerned with the satisfaction of human needs.[48] Nonetheless, it marked a significant shift in the global community's thinking around resource use and exploitation. Inherent in the concept of sustainable development is the acknowledgment that the way in which humanity relates to the environment needs to change.[49] This implication is the connective thread running throughout the Report, with the Commission making clear that "in the broadest sense, the strategy for sustainable development [aimed] to promote harmony...between human beings and nature".[50] Fostering "harmony" meant that development patterns would need to be made compatible with the preservation of Earth's biodiversity.[51] The Report was accepted by the UNGA and this was marked in Resolution 42/187. In accepting the contents and recommendations of the Report the UN also recognized that the benchmark of sustainable development was not to be taken as a compromise, as simply a 'greening' of the exploitation of natural resources. It was a new standard around which governments were expected to craft domestic legislation where it regarded development and the environment.[52] As explained by Gro Harlem Brundtland herself, the task of environmental management was no longer to rest solely on the shoulders of the relevant environmental minister.[53] Sustainable development in practice meant that across the board government agencies and departments

[48] John Kirby "Sustainable Development: An Introduction" in John Kirby, Phil O'Keefe and Lloyd Timberlake (eds) *The Earthscan Reader in Sustainable Development* (Earthscan Publications Ltd, London, 1995) 1 at 2
[49] Karen Morrow "Perspective on environmental law and the law relating to sustainability" in A Philippopoulos-Mihalopoulos (ed) *Law and Ecology New Environmental Foundations* (Taylor and Francis, New York, 2011) 126 at 127
[50] World Commission on Environment and Development, above n 39, at 58.
[51] At 132.
[52] Marie-Claire Cordonier Segger "Sustainable Development in International Law" in Hans Christian Bugge and Christina Voigt (eds) *Sustainable development in international and national law: what did the Brundtland report do to legal thinking and legal development, and where can we go from here?* (Europa Law Publishing, Groningen, 2008), 87 at 97.
[53] Bugge, above n 46, at 17.

were to tailor their activities to the restrictions of the environment, and were to always pursue ecological, in addition to economic, stability.[54]

2. Other agreements and legislation of significance

The RMA was New Zealand's national response to the new standard forcefully set by the Brundtland Report. The RMA embraced the cultural, moral and ethical shift that the Report embodied and the Report was pivotal for New Zealand's adoption the overarching objective of 'sustainable management.' Notwithstanding the Report's obvious significance (and its status as a zeitgeist for environmental thinking during that period) there are however other international and domestic documents that warrant mention. The focus of this scholarship is upon IVOE as it is included in New Zealand's resource management scheme. The Brundtland Report does not use such language, nor does it reference this concept in alternative terms. The Report took an important step in integrating the environment, the economy and society, but it did not explicitly make a case for interspecies justice as a component of sustainable development.[55]

As has been touched upon, ecocentric ideas such as 'intrinsic value' were increasingly referenced in philosophical debate during the period preceding the RMA's enactment. Mainstream discourse began to consider ecocentrism a viable alternative to traditional ways of thinking about the environment. However, it would appear that the language of 'intrinsic values' was very rarely incorporated in international agreements at that time. Neither the World Conservation Strategy 1980 nor the World Charter for Nature 1982, which were significant documents in the advancement of environmental protection, contain explicit reference to 'intrinsic value'. The World Conservation Strategy recognised "[a] new ethic, embracing plants and animals as well as people, is required from human societies to live in harmony with the natural world on which they depend for survival and well-being".[56] Similarly the World Charter for Nature accepted that "every form of life is unique, warranting respect regardless of its worth to man, and to accord other organisms such

[54] At 17.
[55] Klaus Bosselmann "The Concept of Sustainable Development" in Klaus Bosselmann and David P Grinlinton (eds) *Environmental law for a sustainable society* (New Zealand Centre for Environmental Law, Auckland, NZ, 2002) 81 at 85.
[56] IUCN "World Conservation Strategy" (1980) <https://portals.iucn.org/docs/library/html/WCS-004/section20.html> at ch 13, para 1.

recognition, man must be guided by a moral code of action".[57] However, while these statements certainly represent a serious and significant shift towards embracing ecocentrism in environmental thinking, they are not that dissimilar from the Brundtland Report's own recognition that conservation efforts should not only reflect development goals, but also the moral obligation humans owe to nature.[58] The only explicit reference to 'intrinsic value' found was the 1979 Convention on the Conservation of European Wildlife and Natural Habitats. The Convention recognised, in its Preamble, that wild flora and fauna possessed intrinsic value.[59]

Interestingly then, it would appear that while New Zealand's adoption of 'sustainable management' was based on the firm foundations laid by the Brundtland Report, its reference to IVOE as an objective within the sustainable management framework was less well informed by international predecessors. However, despite an apparent lacuna with regard to international society's use of 'intrinsic values', the RMA was not the first piece of New Zealand legislation to incorporate the concept. A similar concept was first included in the National Parks Act 1980.[60] The Act referred to the need to preserve the 'intrinsic worth' of New Zealand's national parks. The term 'intrinsic value of ecosystems' was later included in 1986 in the Environment Act[61] and 'intrinsic value' was then used again shortly after in the Conservation Act 1987.[62] Neither Act defines the term 'intrinsic values of ecosystems' or 'intrinsic values'.

The inclusion of IVOE in the RMA achieved something of a synergy between these three central pieces of environmental law. Gillespie acknowledges this, suggesting that it was with "excellent guidance" that Geoffrey Palmer sought to include intrinsic value as a central consideration in achieving sound environmental management in the three examples of domestic environmental legislation that emerged in the 1980s and1990s.[63] However, at the time that the RMA was enacted is not clear that either the Environment Act or the Conservation Act had provided any meaningful insight as to how intrinsic values would

[57] *World Charter for Nature* GA Res 37/7 A/37/51 (1982) at Preamble
[58] World Commission on Environment and Development, above n 39, at 57.
[59] Council of Europe "Convention on the Conservation of European Wildlife and Natural Habitats" (1979) <https://www.coe.int/en/web/conventions/full-list> at Preamble.
[60] National Parks Act 1980, s 4(1)
[61] Environment Act 1986
[62] Conservation Act 1987, s 2
[63] Gillespie, above n 6, at 128.

operate as a legislative objective. What is clear is that New Zealand was well ahead of the rest of the developed world in its inclusion of new and untested ecocentric approaches to resource management.[64] In doing so it took something of a leap of faith.

[64] Shortly after the enactment of the RMA, international society did recognise and incorporate 'intrinsic values' at the Earth Summit 1992 in Agenda 21.

II. The Advent of the Resource Management Act 1991

The previous chapter provided an analysis of the backdrop against which New Zealand's resource management reform was launched. This chapter now focuses on the RMLR process. The RMLR was a massive undertaking – the Resource Management Bill was subject to intense scrutiny, and was the product of a great deal of consultation, and the efforts of a number of working and review groups. The publications produced have proved invaluable in assessing both the understanding of IVOE that informed its inclusion in the final text of the RMA, and the justifications for its incorporation in the sustainable management framework. The contributions are varied but nonetheless the overall insights offered in the working papers, and by the Review Group provide great substance to the argument that IVOE has become distorted, untethered from its ecocentric origins and has not yet realised its potential as a legislative tool. These RMLR considerations will become particularly relevant in Chapter III in light of the manner in which IVOE has been applied in environmental litigation.

A. The Resource Management Law Reform and the Inclusion of IVOE

1. Working papers

At the beginning of the RMLR the Government established a series of guidelines in which to anchor the reform process. Among these was the requirement that resource management legislation have regard to the need "to ensure good environmental management...which includes considering issues related to the needs of future generations, the intrinsic value of ecosystems, and sustainability".[65] It was proposed, even at this early stage, that the 'purpose' section of the legislation should include an objective that directed decision-makers "to ensure that in the management of natural and physical resources, full and balanced account is taken of all the relevant factors, including: the intrinsic value of ecosystems".[66]

A number of contributors sought to give expression to these guidelines, and much of what was canvassed in Chapter I's discussion of ecocentrism is reflected in the working papers devoted to sustainability and IVOE. Various contributors explain that the ecocentric view requires that humankind regard nature as possessing inherent value that informs a right to

[65] Ministry for the Environment *People, environment and decision making* (Wellington, 1988) at 12.
[66] At 20.

exist independent of any human-given valuation.[67] Cronin suggests that recognition of IVOE represents an extension of moral responsibility beyond the relationships between people, to the relationships between people and the natural world.[68] Cronin clarifies that this is not to say that the natural world should be positioned before humans. Instead, the inclusion of IVOE imports a holistic understanding of environmental management, as well a more long-term vision for human activity.[69] Thus, IVOE should be considered a basis for moral action. In addition, Cronin confronts how we might justify protecting IVOE. A spectrum of reasons is presented; beginning with the acknowledgement that environmental protection undoubtedly has benefits for humans given that "humans need the services of ecosystems to provide their basic needs".[70] At the other end of the spectrum the author recognises the ecocentric reason for the protection of IVOE: that other life processes and life forms deserve respect, that humankind is just one part of Earth's "family", and that we destroy some part of ourselves when we destroy other life forms.[71] Considering the limits of our scientific knowledge, it is further noted that it simply makes sense to facilitate a presumption in favour of environmental protection.[72]

Cronin concludes there is a valid argument in favour of the use of IVOE. She further seeks to nullify any argument that IVOE cannot be reconciled with human interests in resource management decision-making. Re-iterating that intrinsic values do not trump human interests and citing Taylor's 'priority principles', Cronin proposes that IVOE can be recognised and respected where we abide by the principle of self defence, the principle of proportionality, the principle of minimum wrong, and the principles of distributive and restitutive justice.[73] The first of those principles requires that we only use force to protect ourselves. The second directs us to consider and weigh competing values. The third - that of the principle of minimum harm - requires that where the non-basic interests of humans overrides the interest of non-humans there is a general requirement to do the least harm possible. Distributive justice requires that where the basic interests of non-human and human interests are in conflict each party must be provided an equal share. Finally, restitutive justice necessitates

[67] Karen Cronin "The Intrinsic Value of Ecosystems" in *Resource Management Law Reform: Sustainability, Intrinsic Values and the Needs of Future Generations* (January, 1989) at 3.
[68] At 6.
[69] At 6.
[70] At 7.
[71] At 7.
[72] At 8.
[73] At 8.

that where a moral subject is wronged a duty of compensation is owed.[74] Cronin's analysis ultimately concludes that IVOE is worthy of being included as an objective in resource management law, for both scientific (i.e. integrity of the biosphere) and moral reasons (i.e. duty to non-humans). She acknowledges that there are bound to be instances where IVOE conflicts with other chosen objectives, however she suggests abiding by Taylor's principles should help ameliorate this issue.[75]

Other contributors similarly champion the relevance of IVOE. Writing at the request of the Department of Conservation ('DOC'), Caldwell considers the role the concept played in furthering sustainability. DOC expressed a preference that the resource management scheme give effect to two objectives: sustainability in the development of natural resources and guardianship of cultural heritage; and the recognition and protection of the intrinsic values of ecosystems, landscape and biota.[76] Caldwell explains that in giving effect to these objectives, sustainability should have the highest priority, providing a "yardstick" by which to measure proposals for activities, but should also encompass an ethic "which includes protection of ecological processes and life support systems".[77] Caldwell expands this idea suggesting that as a legal philosophy sustainability denotes the right of humans to depend upon and use a healthy environment. However this right also gives rise to reciprocal obligations, which include recognising IVOE.[78] Massen's companion paper to Caldwell's contribution similarly recognises man as the most "destructive predator in his environment", and suggests that the preferred approach to IVOE is to frame it in terms of humankind's responsibility to refrain from activities that threaten ecosystems.[79] Echoing this same sentiment, Meurk argues that we must combat our traditional anthropocentric-exploitative attitudes. He strongly criticises human arrogance and describes the outrage that one species can undo billions of years of evolution.[80] Concluding his contribution, Meurk remains hopeful that legislation can

[74] At 8.
[75] At 12.
[76] Jennifer Caldwell "Intrinsic value: thoughts from a legal perspective" in *Implementing the Sustainability Objective in Resource Management Law* (Ministry for the Environment, November 1988) at 4.
[77] At 4-5.
[78] At 6.
[79] John Massen "Suggestion for the introduction of the concept of sustainability and intrinsic worth into New Zealand's resource management statues from a legal perspective" in *Implementing the Sustainability Objective in Resource Management Law* (Ministry for the Environment, November 1988) at 22.
[80] Colin D. Meurk "Intrinsic Values of Ecosystems: Some Thoughts on the Historical and Philosophical Aspects" in *Resource Values: Working Paper No.10* (Ministry for the Environment, 1988) at 4.

facilitate identification with, and protection of, the natural world by adopting an attitude of humility and care.[81]

IVOE is acknowledged to cause some issue given its "soft" or "fuzzy" nature; it is less easily quantified and is often a victim of the balancing methods that tend to be used in legal decision-making.[82] Caldwell also expresses the belief that the concept of IVOE is corrupted the moment that humans attempt to give it a quantifiable value.[83] All this considered, it must be recognised that it is difficult to require a judicial body to give IVOE a legal meaning and effect. Nevertheless, Caldwell suggests that the judiciary can still recognise the mere existence of IVOE. In doing so she predicts that IVOE can be significantly hardened into a form of "affirmative action," forcing decision-makers to take into account something they might have otherwise ignored completely. Additionally, Caldwell suggests the inclusion of IVOE may provide the foundations from which an ecological ethic of respect and compassion for non-humans may materialise.[84]

2. The Resource Management Bill and the Review Group

Despite strong support from contributors to the RMLR process, IVOE was not included in the proposed purpose and principles of the original Resource Management Bill 1989.[85] After the 1989 Bill was reviewed by a Select Committee the Bill was altered to include "the maintenance and enhancement of the quality of the environment, including the life-supporting capacity of the environment and its intrinsic values".[86] The concept was later subject to further discussion by a review group (formed at the direction of Simon Upton, under the Fourth National government) given both that the Bill and the Labour government were defeated.

The recommendations of the Review Group are particularly important despite their brevity. Speaking to their changes to the format of the principles and purpose section, the Group explained that they had opted for a more precisely stated definition of sustainable management (as is exhibited in the current s 5) with further sections to address in detail the

[81] At 4.
[82] Caldwell, above n 76, at 2.
[83] At 6.
[84] At 8.
[85] Resource Management Bill 1989 (224-1), cl 4 and 5.
[86] Resource Management Bill 1990 (224-2), cl 4(a).

other dimensions (namely the biophysical dimension) of sustainable management. Of greatest note is the Group's assertion that, "while clause 4 as reported by the Select Committee contained an unweighted balancing of socio-economic and biophysical aspects, the recommendation of the review group conceives of the biophysical characteristics of resources as a constraint on resource use".[87] This is an incredibly strong indication of kind of framework within which IVOE was intended to operate, one that was seemingly much more environmentally minded.

Ultimately the Group also recommended that reference to 'intrinsic values of ecosystems' (as opposed to 'the environment and its intrinsic value') be included, in line with the Environment Act 1986 and the Conservation Act 1987.[88] The Group also recommended a definition of IVOE to be included in the new Bill:[89]

> Intrinsic values of natural ecosystems means ecosystems and their constituent parts that are of substantially natural origin having value in their own right and includes:
>
> (a) their biological and genetic diversity; and
>
> (b) the essential characteristics that determine an ecosystem's integrity, form, functional and regenerative ability; and
>
> (c) mauri

This definition is nearly identical to the one that is currently included in the RMA, the key difference being that 'mauri' was omitted from the final version of the Act. Mauri is a tenet of tikanga Māori. It can be rudimentarily defined as 'life force, life principle or vital essence.'[90] The Review Group noted that the High Court and the Court of Appeal, with the assistance of the Waitangi Tribunal's special expertise, had previously confirmed the importance of tikanga Māori and its cultural and spiritual values, when confronting resource management issues.[91] The Group included mauri in support for the continuation of that practice.[92] Whether or not they were cognizant of it at the time, in incorporating 'mauri' the Review Group made a significant contribution to the discourse surrounding intrinsic values.

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[87] Review Group on the Resource Management Bill *Report of the Review Group on the Resource Management Bill* (Ministry for the Environment, Wellington, 1991) at 8.
[88] At 12.
[89] At 143–144.
[90] Māori Dictionary "Mauri" <http://maoridictionary.co.nz/word/3960>
[91] Review Group on the Resource Management Bill, above n 87, at 12.
[92] At 12.

They implicitly confirm its multi-faceted nature (i.e. both scientific and metaphysical), and reach beyond the limited and narrow confines of Western legal thought, embracing the teachings of a civilisation whose understanding of the environment are not so atomistic and formulaic.

B. Implications of the Resource Management Law Reform

It seems apparent that the decision to include IVOE in the RMA was not one made lightly. The concept was certainly approached with skepticism, and contributors were weary that the concept would prove too fuzzy to properly exert any real influence on decision-making. Nonetheless the RMLR also highlights a commitment to at least try and engage with the ecocentric worldview, to move beyond a purely human metric for decision-making. There appears to have been a sincerely held belief that if IVOE could harden into an environmental ethic then maybe we might more readily achieve sustainable management.

III. Application of Section 7(d)

Thus far this dissertation has sought to canvas the philosophical origins of IVOE, the precedents set by international agreements and domestic legislation, and the hopes of RMLR participants. That analysis suggests IVOE was intended to import something of an alternative environmental ethic into our resource management scheme, and carried moral implications. It is now necessary to consider how these aspirations have borne out in practice, in the 27 years that the RMA has been in force. This consideration involves an exploration of the relevant case law and, in addition, reflection on National's 2013 reform package. The application of s 7(d) in environmental litigation indicates that IVOE seems to have had little impact as a consideration in resource management decision-making. It has not (yet) lived up to its potential, and has arguably not been applied in a manner consistent with the ecocentric tradition, or as was envisaged by the RMLR participants who advocated for its inclusion in the RMA.

A. A Brief Overview of Part 2 and Section 7

Before beginning any analysis of the relevant case law I would briefly acknowledge the nature of Part 2 within which s 7(d) is located. The RMA is an enactment built on competing values, principles and guidelines; so much so that it was once described as a candidate for classification as a statute with multiple personality disorder.[93] It is both protective and exploitative, both reactive and proactive,[94] and, both anthropocentric and ecocentric. Part 2, which articulates the purposes and key principles of the Act, is the bedrock upon which the entirety of the Act rests. Part 2 is both the source of these many contradictions, as well as the Act's attempt to reconcile competing values. While s 5 denotes the core purpose of the Act, and creates the objective towards which all decision-making under the Act must be directed,[95] it is given further elaboration in s 6 ('Matters of national importance') and s 7 ('Other matters'), while s 8 incorporates an obligation for decision-makers to take into account the principles of Te Tiriti o Waitangi. Sections 6 and 7 are possibly best understood

[93] John Fogarty, "Giving Effect to Values Used in Statute" in *Law, Liberty, Legislation: Essays in honour of John Burrows QC* (LexisNexis NZ Limited, Wellington, 2008) at 22.
[94] Ceri Warnock and Maree Baker-Galloway *Focus on resource management law* (LexisNexis NZ Ltd, Wellington, 2015) at 18.
[95] At 59.

as environmental priorities.[96] They are however ancillary to s 5 and subordinate to the purpose set out therein.[97] There is no hierarchy between ss 6 to 8.[98] It should hopefully be clear, even from such a succinct description, that Part 2 constitutes a "complex compromise, which offers something to conservationists, neighbours interested in amenities, and developers".[99] It is a "delicate equilibrium,"[100] and it is within this context (chaos?) that IVOE is expected to operate.

B. Case Law

At present, the case law dealing with s 7(d) suggests an attitude towards IVOE that is both impoverished and ambivalent. The manner in which the concept has been referenced has also been highly inconsistent.[101] Cases citing s 7(d) can be loosely grouped together in terms of general themes in application. Cases in the first group treat s 7(d) as something of a box to tick when considering the relevance of s 7 its entirety – some judges would note the particular significance of s 7(d) without ever returning to explain what about the provision was significant, or how it had informed the decision reached.[102] A subset of this first group are those cases in which judges assumed IVOE was satisfied provided that expert evidence had outlined the ecological effects of proposed activities. *Royal Forest and Bird Protection Society NZ v Manawatu-Wanganui Regional Council* provides an apt example. In addressing the need to have regard to IVOE the Planning Tribunal noted that: [103]

> "[W]e have endeavoured to have particular regard to the evidence that was presented about the potential effects of the proposed logging on the forest ecosystem and all its values. Any further consideration of that matter would only be repetitive."

This application of IVOE reaches for scientific and technical evaluation but goes no further. Other cases seem to completely misunderstand the meaning of IVOE, conflating it with

[96] Dr. Jan Wright -Parliamentary Commissioner for the Environment, "Submission to the Minister for the Environment – Improving our resource management system: a discussion document" (2 April 2013), at 6
[97] *New Zealand Rail Limited v Marlborough District Council* (1994) NZRMA 70, at [85]
[98] *Genesis Power Ltd v Franklin District Council* (2005) 12 ELRNZ 71, [2005] NZRMA 541 at [55]
[99] Fogarty, above n 93, at 11.
[100] At 11.
[101] Warnock and Baker-Galloway, above n 94, at 97.
[102] *Royal Forest and Bird Protection Society of NZ v Waitaki District Council* [2012] NZEnvC 252 at [13]
[103] *Royal Forest and Bird Protection Society NZ v Manawatu-Wanganui Regional Council* [1996] NZRMA 241 at 49. See also *Land Air Water Association v Waikato Regional Council* NZEnvC A110/01, 23 October 2001, *Robinson v Waitakare City Council* NZEnvC A02/2009, 16 January 2009, and *Parata v Northland Regional Council* NZEnvC A53/99, 7 May 1999

visual or scenic qualities. The most obvious instance of this conflation is found in *Gill v Rotorua District Council,* in which the Court, remarking on the council's apparent intentions in a zoning decision, noted that the council sought to "give [the site] protection for its intrinsic values which appear to be scenic".[104] The third group of cases applied IVOE only where it was raised by iwi/hapu participants; largely dealing with the concept in relation to s 6(e)[105] and spiritual values possessed by tangata whenua.[106] In such cases IVOE were not given distinct expression and rather were subsumed by cultural and spiritual values.

Nonetheless, a few cases, though cursory in their use of s 7(d), did exhibit a slightly more informed understanding of IVOE. In something of a side note to the issues at hand the Environment Court, in *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*, acknowledged that the matters contained in s 5(2)(a)-(c) and most of the matters contained in ss 6 to 8 were completely anthropocentric. The Court singled out s 7(d) as the only provision that was not directed at the wellbeing of humans.[107] Two further cases also indicate an understanding of the ecocentric nature of s 7(d) as opposed to the anthropocentric nature of the majority of Part 2. In considering resource consents granted in relation for a wind farm on the coast of Wellington, the Environment Court in *Meridian Energy v Wellington City Council* acknowledged that "[w]hether or not the ecosystems at Makura are outstanding, they do of course...have intrinsic worth and must not be wantonly harmed or placed in peril".[108] In *Auckland Council v Gilinsky* Judge Harland, sitting in the District Court, made a series of interesting observations when sentencing Mr Gilinsky for constructing a tree house in native bush without the necessary consents. She noted (whilst considering Mr Gilinsky's motivations and the deliberateness of his actions) that Mr Gilinsky had expressed a desire to live amongst the trees, but that this "anthropocentric view did not take into account the intrinsic value of the indigenous vegetation, or the concept that this value might not be advanced by more intensified human activity". She further explained that his motivation was his own gratification, absent any real understanding of intrinsic value.[109] Unfortunately, though these cases hint at a more accurate understanding of the philosophical

[104] *Gill v Rotorua District Council* [1993] 2 NZRMA 604 at 16
[105] Resource Management Act, s 6(e) – 'the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga'
[106] *Kemp v Queenstown Lakes District Council* NZEnvC C229/99 [1999] at [15]; *Beadle v Minister of Corrections* NZEnvC Paihia W18/2002, 8 April 2002 at [665]
[107] *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* NZEnvC A078/2008, 16 July 2008, at [281]-[284]
[108] *Meridian Energy v Wellington City Council* [2012] NZEnvC 148 at [383]
[109] *Auckland Council v Gilinsky* [2017] NZDC 24573 at [42]

underpinnings of s 7(d), they are superficial at best and are akin to throwaway observations of interest, rather than IVOE being articulated further, or carrying any substantial weight.

Three other cases warrant stand-alone discussion. The first and second cases are related; *Maniototo Environmental Society v Central Otago District Council* outlines the original Environment Court decision, and *Meridian Energy v Central Otago District Council* details the High Court appeal. Together these two cases provide an excellent example of the courts' general difficulty in attributing weight to intangible considerations. The third case, *Kuku Mara Partnership v Marlborough District Council*, offers the only apparent example of IVOE being used as determinative factor in decision-making. In *Meridian Energy Ltd v Central Otago District Council* the High Court reviewed an Environment Court decision to decline resource consents for a wind farm in Central Otago on the Lammermoor Range. The Environment Court's judgment was expansive, spanning 350 pages, concluding that the project was inappropriate and did not achieve the s 5 objectives.[110] The judgment was somewhat inconsistent in its reference to IVOE and there appears to be some double handling of s 7(d). In Chapter 3 the Court considered the relevant law, and in particular Part 2. It expressed concern that on the matter of s 7(d) they had received "no evidence on the *economic* values" [emphasis added] of the intrinsic value of the land in question. For this they admonished the parties but made no further attempt to remedy the situation. Later in the judgment the Court returned to s 7(d), suggesting that their overall predictions of the effects of the proposal had determined a medium likelihood of relatively slight harm to the Lammermoor ecosystem. As a result, they considered that s 7(d) was rendered a "neutral" consideration.[111] Although the Court's categorisation of intrinsic values as neutral is interesting in of itself,[112] more significant is the cost-benefit analysis undertaken by the Court. In concluding the cost-benefit analysis the Court acknowledged some shortcomings of the exercise; recognising that there were values (such as IVOE) that they were unable to accommodate given they were not easily amenable to quantitative assessment, and not traded on markets.[113] As a result the Environment Court concluded that the cost-benefit analysis could only ever be partial. Other avenues of assessment, beyond the cost-benefit analysis, were not explored despite the Court's acknowledgment of its flaws. The decision-making

[110] *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482, [2010] NZRMA 477
[111] *Maniototo Environmental Society Incorporated v Central Otago District Council* [2009] NZEnvC 293 at [719]
[112] I would seriously question that nature's inherent right to existence could ever be truly described as 'neutral' in any given situation.
[113] At [697]

process undertaken in the Environment Court usefully highlights the Court's preference for solid economic values that can be neatly incorporated into cost-benefit analyses. This much is acknowledged in the High Court appeal. The High Court noted that strict economic theory is not the only factor relevant to decision-making under the RMA framework: in certain instances it will simply prove impossible to express some benefits or costs in economic terms[114] (the Court uses the loss of an ecosystem hosting a particular bird population as an example).[115] It is further suggested that similarly it would be near impossible to ascribe a quantitative value to many of the criteria included in Part 2. The High Court specifically cites s 7(d) and suggests that decision-makers 'shall have particular regard to' such factors regardless of whether they are only capable of expression in qualitative terms.[116] This fits broadly with the position expressed in the Supreme Court judgment in *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd.* In evaluating the form and function of Part 2, the Supreme Court acknowledged that s 7 matters tend to be far more abstract and evaluative than those matters set out in s 6.[117] In addition, the High Court in *Meridian Energy* offers a final observation: decision-making under the RMA inevitably results in a degree of inherent subjectivity.[118] Quantifiable scientific and economic values cannot always provide a clear objective answer. In most instances decisions are reached by number of people acting together in spite of these subjectivities to form a final evaluation.[119] The Environment Court's analysis reveals the Court's reluctance to engage with intangible values in an imaginative and radical way. The High Court's observations, though they do not engage in substantive evaluation, promises a (potentially) richer brand of decision-making.

The Environment Court's reference to intrinsic values in *Kuku Mara Partnership v Marlborough District Council* comes the closest of any judgment to applying intrinsic values in the manner envisioned by the ecocentric tradition. In that case the Court evaluated a coastal permit for the development of a marine farm in the Marlborough Sounds. The marine

[114] *Meridian Energy Ltd v Central Otago District Council* at [108] – *Meridian* is not the only case to acknowledge this point; See *Canterbury Regional Council v Christchurch City Council* NZEnvC C127/2001 [2001] 6 December 2001: The Court observed that s 7(d) was the one place that the economic thread of the RMA became entangled. They suggested that economics faces difficulty with intrinsic values because in the "anthropocentric discipline all costs are costs to someone" at fn 301
[115] Interestingly, this is reminiscent of Mary Warnock's assertion that the loss of the lark is incalculable and there is no way to compensate for such a loss: see Mary Warnock *Critical reflections on ownership* (Edward Elgar, Cheltenham, UK, 2015) at 138
[116] At [108]
[117] *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [26]
[118] *Meridian Energy v Central Otago District Council* at [109]
[119] At [110]

farm was to be located near a rocky reef known as Bird Island. The island was an important visual feature in the bay and was also an important habitat for a number of birds, including the King Shag. Despite the island's visual qualities, it possessed few other direct benefits for people. Interestingly, s 7(d) was not specifically mentioned, rather the intrinsic value of Bird Island was considered in regards to s 6 directives to preserve the natural character of the coastline, and to protect outstanding natural features/landscapes.[120] Importantly, the Court acknowledged that the need to protect the island was not diminished by the fact that the island was not enjoyed by many people.[121] It is also significant that the permit was declined despite the strength of scientific evidence suggesting that the marine farm would not harm the functioning of the marine ecosystem, or the birds and mammals in the area.[122] Instead the Court suggested that the bay had "special intrinsic values - because of the mammal species it supports, the island, the reefs, the bird life, the islands and water surrounding it".[123]

However, for the most part, the jurisprudence on IVOE is deficient. The selection of cases analysed indicates that where courts have referenced IVOE they have been incredibly hesitant to place any significant weight on the concept. In addition few litigants appear to have forcefully advanced it in argument, contributing to its marginalisation. Most importantly, the case law highlights that no court has properly attempted to tackle the complex metaphysical, philosophical or ethical considerations that the concept should bring into play. The definition of IVOE included in s 2 of the RMA explicitly recognises that ecosystems have "value in their own right."[124] The courts however have failed to engage with what 'value in its own right' could mean for resource management decisions. Properly considered the concept of IVOE captures notions of duties and respect for nature, a rejection of human superiority, and an ethic of care and caution, none of which has sufficiently been acknowledged by the courts or litigants.

C. 2013 Amendment Proposals

In 2013 the Fifth National government issued a discussion document proposing a myriad of reforms for the RMA. The proposals were ostensibly aimed at reducing the costs,

[120] *Kuku Mara Partnership (Forsyth Bay) v Marlborough District Council* NZEnvC W25/2002 16 July 2002, at [597]
[121] At [285]
[122] At [578]
[123] At [580]
[124] Resource Management Act, s 2

uncertainties and delays that National considered characteristic of the RMA, in order to produce sound environmental and development outcomes.[125] The document expressed the Government's concern that the RMA had become too focused on the environment, to the detriment of development, impeding the use of planning to effect positive outcomes.[126] The document suggests that ss 6 and 7 are largely responsible for this predicament.[127] As a result, one of the core proposals contained in the reform package was the merging of ss 6 and 7, and the deletion of a number of s 7 matters, among them s 7(d). The Government expected that actioning these changes would better balance the factors that decision-makers were required to have regard to in the planning process.[128] Little explanation was given as to why specific s 7 matters had been marked for deletion. The Government simply rationalised that those matters were "already effectively encompassed in section 5."[129] Elsewhere in the document the Government also acknowledged problems with the ambiguity of ss 6 and 7 matters had resulted in difficulties in application and legal expense.

It is not necessary to spend much time discussing the proposed reform package. In any event the recommendations for ss 6 and 7 were not pursued. It is however another useful example, in addition to the case law, of the total lack of both understanding and imagination possessed by our policymakers and decision-makers in regard to s 7(d). The proposal to delete s 7(d) again emphasises that, even after 27 years of the RMA being in force, the courts and litigants have made very little use of it as a tool to further environmental protection and as such it seems to be considered irrelevant. The brief explanation given for its deletion suggests that the National government completely misunderstood the potential implications of IVOE. As has already been noted, the deletion was justified by way of suggestion that s 5 already gave expression to those concerns. With respect that is completely incorrect in regards to s 7(d). The provision for IVOE is the only true example of ecocentrism in Part 2 of the RMA. It is a unique consideration that is not captured by the language of s 5.

[125] Ministry for the Environment *Improving our resource management system. A discussion document.* (Wellington, 2013) at 5.
[126] At 12.
[127] At 35.
[128] At 37.
[129] At 37.

IV. What now? – The Path Forward for IVOE and the RMA

A. Has IVOE Failed? Or Have We Failed? Some Potential Explanations for the Non-use of IVOE

The crux of the matter (as it is apparent to me) is that we have allowed IVOE as a legal tool, to atrophy. There was, at the time that the RMA was enacted, widespread concern that the dominant values present in legal frameworks had not, and would not, deliver a solution to mounting environmental crises.[130] The emergence of ecocentrism as a response to this has been already been documented in Chapter I. There was awareness that in order to properly preserve and protect the environment, we had to restrain human activity, and for this we required a moral theory unlike the anthropocentric models that had already failed us.[131] IVOE held great promise as a "theoretical holy grail" for our environmental woes.[132] In 1989, in the midst of New Zealand's environmental reform, Caldwell surveyed the emergence of this promising ecological ethic with regard to philosophical debate and New Zealand's domestic legislation. She acknowledged the inclusion of intrinsic values in both the Environment Act and the Conservation Act. Caldwell noted that we appeared to be undergoing a paradigm shift in environmental law towards a holistic and ecocentric understanding of our environment.[133] Nonetheless she expressed skepticism at the full extent of this shift. Caldwell suggested that only time would tell if the reference to intrinsic values in New Zealand legislation was more than a merely symbolic, token gesture to the rising ecological movement.[134] Examination of the working papers produced during the RMLR process indicates that the contributors who sought to explain and advocate for IVOE had a hopeful and rich understanding of what outcomes it could produce as an objective in a resource management scheme. The case law, and the 2013 proposal to delete s 7(d) from the RMA starkly reveal that these aspirations have not been realised. Despite opposition to the deletion of s 7(d), I would suggest that the loss of IVOE (as it is presently applied) would have likely had a minor impact on resource management decision-making. IVOE has not, after all been a holy grail for New Zealand's

[130] Jennifer Caldwell *An ecological approach to environmental law* (Legal Research Foundation, Auckland, NZ, 1988) at 19.
[131] At 17.
[132] Katie McShane " Why Environmental Ethics Shouldn't Give Up on Intrinsic Values" in Robin Attfield (ed) *The Ethics of the Environment* (Ashgate, Farnham, England; Burlington, USA, 2008) at 63
[133] Caldwell, above n 130, at 35.
[134] At 39.

environmental problems. Caldwell's concern that the use of intrinsic values would prove merely symbolic thus seems to have been borne out.

Why is it that we have been so incapable of harnessing the potential of IVOE? Perhaps the non-use of IVOE should come as no surprise and can often be the case when philosophically contentious concepts are distilled in legislation. Many commentators have acknowledged what they perceive to be inherent difficulties in applying 'intrinsic values.'[135] New Zealand case law appears to confirm as much; *Maniototo* and *Meridian Energy* both express the commonly held belief that IVOE is simply too hard to *quantify*.[136] Various proposed remedies in regards to IVOE's scant use in environmental decision-making reinforce the Western legal tradition's discomfort with using ethical considerations as evaluative tools. Criticising the problems caused by New Zealand's use of IVOE, Curran suggests that we would do better to adopt an ecosystemic approach, and that IVOE should be interpreted as 'the intrinsic *characteristics* of ecosystems.'[137] In its "pure" philosophical meaning, Curran argues that IVOE is "ethereal", "subjective" and "not justiciable".[138] It is a concept that cannot be defined, measured or verified and as such it has created a great deal of confusion and uncertainty.[139] Curran instead advocates for scientific emphasis (the ecosystemic approach) when applying IVOE. It is her contention that this will ameliorate the metaphysical difficulties otherwise posed by IVOE.[140] Indeed this is actually similar to one of the ways that the courts already treat IVOE.[141] The case law surveyed in Chapter III highlights that a number of judges have considered s 7(d) satisfied where expert scientific evidence had been offered. Curran's position is indicative of the general primacy afforded to science[142] and other quantitative data, and the fear of the 'subjective'.[143] In the pursuit of 'sound' and

[135] Laurence H Tribe "Ways Not to Think about Plastic Trees: New Foundations for Environmental Law" (1974) 83 The Yale Law Journal 1315 at 1317.
[136] I have italicised *quantify* to emphasise a point I make explicitly later in the body of this dissertation. IVOE may indeed be too hard to quantify but we do not ask our courts solely to engage in quantification, we ask them to provide *judgment*. The law cannot and should not be reduced simply to economic reasoning.
[137] Stephanie E Curran "The Preservation of the Intrinsic: Ecosystem Valuation in New Zealand" (2005) 9 New Zealand Journal of Environmental Law 51 at 69.
[138] At 62–64.
[139] At 64.
[140] At 69.
[141] Refer back to Chapter III for discussion/examples, and see: *Royal Forest and Bird Protection Society NZ v Manawatu-Wanganui Regional Council* [1996] NZRMA 241; *Re Auckland City Council* [2011] NZEnvC 129; *Pierau v Auckland City Council* [2017] NZEnvC 90; *Land Air Water Association v Waikato Regional Council* NZEnvC A110/01, 23 October 2001.
[142] John S Dryzek *The politics of the earth* (2nd ed. ed, Oxford University Press, Oxford, 2005) at 77.
[143] Feminist legal theory and the ecofeminist tradition offer fascinating insight on this subject matter. It is beyond the scope of this dissertation but for discussion surrounding our deeply ingrained preference for reason

'justifiable' environmental management we reach for science and economic values because they are presumed to provide an objective frame of reference.[144] Jamieson explains:[145]

> "Environmentalists have long been concerned to establish their agenda, not just as a matter of mere subjective preference-satisfaction, but as a matter of realising objective goods. This is part of why environmentalists have long been attracted to science. Science is our great cultural legitimator; it warrants some reasons, desires and dispositions as objective and others as subjective."

The primacy of science and market values is also reflected in observations made by Black, and by Wheen. Black and Wheen both emphasis the barriers created by the context in which IVOE is expected to operate as an objective for environmental management. IVOE, as well as other intangible environmental factors, is considered alongside tangible values. In such a situation the deck is arguably stacked against IVOE; "the tangible wins every time."[146] These observations speak to what some have identified as a 'systemic flaw' in the RMA. At its enactment there was an assumption made that the principle of sustainability and its ecological implications were understood.[147] However, "administrators and judges, trained in the old anthropocentric environmental paradigm, were unwilling to make the shift towards ecological thinking",[148] retaining their preference for quantifiable values. Although the intention of the Act was clearly to accommodate both ecocentric and anthropocentric values, the actual result has been a distortion and subjugation of the 'sustainable' element of sustainable management.[149] In a not dissimilar vein, Gillespie suggests that beyond the "philosophical niceties" of recognising intrinsic values in nature there is no practical change in decision-making. All things being equal, he contends some preference will always need to be expressed, and that preference will be for humankind.[150]

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over emotion see Val Plumwood "Nature, Self, and Gender: Feminism, Environmental Philosophy, and the Critique of Rationalism" (1991) 6 Hypatia 3.

144 William Godfrey-Smith, "The Value of Wilderness" (1979) 1 *Environmental Ethics* 309 at 312; Also see Meurk, above n 80, at 2 – "The task [of applying a coherent environment ethic or philosophy] has not been easy because...(2) economic analysis has a facade objectivity in which the established institutions have a vested interest; (3) many more resources are available for defending economics an attacking ecology than vice versa"

145 Dale Jamieson "Ecosystem health: Some preventive medicine" (1995) 4 Environmental values 333 at 335.

146 Tony Black, "Defending the Environment" 8 NZLJ 1978 153, 153; See also Nicola Wheen, "The Resource Management Act 1991: A "Greener" Law for Water?" (1997) 1 NZJEL 165, at 170-171.

147 Bosselmann, above n 13, at 57.

148 At 57.

149 At 50.

150 Gillespie, above n 6, at 130.

Dryzek offers a more institutional explanation for our inability to properly implement ecocentric policy, citing the impact of capitalism and the neoliberal world order. Speaking about sustainability more generally he suggests:[151]

> "The success or failure of sustainable development rests on dissemination and acceptance of the discourse at a variety of levels, followed by action on and experimentation with its tenets. Yet the twenty years that have seen sustainable development establish itself as the leading transnational discourse of environmental concern have seen much less in the way of wholesale movements in policies, practices and institutions at global, regional, national and local levels. Those same twenty years have seen a more effective global movement in a very different direction about which sustainable development is sometimes silent, sometimes (in its business-friendly variant) accepting. That direction involves following the transnationalization of capitalism...Free trade, capital mobility and governments all over the world committed to market liberalization and ordinary (unsustainable) economic growth as their first imperative threaten to override sustainable development."

Dryzek's observations highlight the vulnerability of sustainable development/management as a legislative concept. It suggests we face a choice between stronger and weaker versions of sustainability[152] and where we are not clear in these choices it is a term susceptible to being co-opted by powerful interests. Unfortunately, the seemingly ambiguous language of ecosystems remains embedded in a legal (and world) order still stubbornly committed to resource exploitation and growth.[153] As such, within the sustainability framework ecocentric concepts tend to be diminished and ignored.

B. All Hope Is Not Lost: The Case for Embracing IVOE

The explanations raised by Black, Wheen, Gillespie and Dryzek appear structural and systemic. Such arguments provide support for my principal claim that we have allowed IVOE to drift from its philosophical and ethical foundations and this is in part due to the framework

[151] Dryzek, above n 142, at 161.
[152] Klaus Bosselmann "A Legal Framework for Sustainable Development" 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) 167 at 167.
[153] Vito De Lucia "Towards an ecological philosophy of law: A comparative discussion" (2013) 4 Journal of Human Rights and the Environment 167 at 170.

within which it must operate. Curran's response on the other hand requires a more expansive response. Her argument provides an excellent basis from which to launch my final arguments in regards to the possibilities of IVOE. It is my view that though it has not yet been realised, we stand to lose something potentially powerful if we give up on IVOE as a legislative tool. While the importance of scientific evidence and market values in resource management decisions should not be understated, reliance on these factors alone fails to capture the full spectrum of considerations that should be at play in environmental management. People 'feel' certain ways about the environment that are not in any way reflected in scientific analysis or monetary valuation. In a telling study of the 'value' of Rangitoto Island participants were asked about how they valued Rangitoto, and what they might be willing to pay to preserve its natural state. As a general rule participants responded with reference to Rangitoto's status as a treasure, as something that belonged to everyone and no one at the same time, and as an environmental feature that was inappropriate to value in terms of money.[154] Ultimately the study concluded that people exhibited a desire to find something transcendent in their environment, something beyond choice or value.[155] Warnock expresses a similar sentiment in her work *Critical Reflections on Ownership*. Warnock suggests that human beings strongly feel a value in the natural world that stands apart from any self-interested utility nature might offer, or any notion as simple or reductive as loss of biodiversity. Warnock poignantly explains, "It is the sound of the lark ascending, a sound my grandchildren have never heard, that one loves and that used to lift one's heart, not an ecological concept".[156] Moreover, Warnock adds that there is nothing that can compensate for such a loss; such a loss is an "absolute loss".[157] She cites Scruton, who suggests this is an example of moral reasoning, and that it must be acknowledged, "[m]oral reasoning is not economic reasoning. In moral reasoning we are not trading preferences, but safeguarding the things that cannot be traded".[158] The point being that intervention in nature is not a purely scientific or economic question; it is also a moral one.[159]

[154] Dan Vadnjal and Martin O'Connor "What is the Value of Rangitoto Island?" (1994) 3 Environmental Values 369 at 374.
[155] At 378.
[156] Mary Warnock *Critical reflections on ownership* (Edward Elgar, Cheltenham, UK, 2015) at 138.
[157] At 139.
[158] Roger Scruton, *Green Philosophy: How to Think Seriously about the Planet* (Atlantic Books, London, 2012) at 201, as cited in Warnock, above n 156, at 139.
[159] Maria Ojala and Rolf Lidskog "What Lies Beneath the Surface? A Case Study of Citizens' Moral Reasoning with Regard to Biodiversity" (2011) 20 Environmental Values 217 at 233.

Though it has not been the project of this dissertation to provide a concrete definition for IVOE I would like to emphasise the above argument by advancing a possible formulation for IVOE as offered by McShane. McShane urges us not to give up on IVOE. She suggests that the concept holds great promise as part of the claim for the way we feel about our world.[160] If IVOE is properly accepted, then the concept brings into play serious questions about who we are and why we treat the environment the way we do. McShane argues that:[161]

> "We can, do and should take some of the same intrinsically valuing attitudes towards things in the nonhuman natural world that we do toward things in the human world. We, can, do and should...think of...parts of the natural world as appropriate objects of awe, reverence, respect and love. We should not reserve this role in our emotional lives for humans alone."

McShane's use of IVOE requires us to critically re-examine some of the assumptions we hold about the environment and our right to use it. Her approach also potentially responds to a growing concern commentators express with regards to environmental decision-making. Jamieson perhaps puts it best when he suggests, "[t]he environmental problems we face today are not fundamentally scientific problems. In large part the environmental crisis is a crisis of the human heart".[162] Arguably it is this crisis of the human heart that ecocentrism sought to address where anthropocentrism could not. It begs the question, what could resource management look like if we meaningfully engaged with IVOE, creating the potential to shift the axis around which we orient ourselves in environmental decision-making?

The judiciary are used to reaching for scientific evidence and market values. They are comfortable with these 'hard' factors.[163] We could however try to reach for something more (as tentatively suggested above), and we have already provided the space within the RMA to do so. As the Environmental Defence Society ('EDS') has observed, we need to be realistic, but we should not shy away from being ambitious.[164] It is not insurmountable that IVOE is a

[160] McShane, above n 132, at 59.
[161] At 70.
[162] Jamieson, above n 145, at 342.
[163] Chief Justice Preston makes a relevant point about the deficiency of environmental decision-making where courts faced with polycentric issues only draw on cost-benefit analysis: see *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48 at 483
[164] Greg Severinsen and Raewyn Peart, *Reform of the Resource Management System: The Next Generation – Working Paper 1* (Environmental Defence Society Incorporated, 2018) at 41.

contestable concept without hard-edged boundaries or a concrete definition. In support of this proposition I would emphasise that the law generally is a site of argumentation;[165] a place to generate, challenge and strengthen ideas. This is perhaps even more true of environmental law.[166] The issues that environmental law must tackle are inherently messy.[167] The law must traverse the non-linear processes of ecosystems and confront a great deal of scientific uncertainty, as well as consider various social and economic imperatives.[168] There is very rarely a clear solution. We are looking to strike a balance between the "social floor" and "environmental ceiling".[169] Dryzek raises a similar argument when he suggests that sustainability is a discourse rather than a scientific concept.[170] At the 2018 annual RMLA Salmon Lecture, Associate Professor Warnock observed that the indeterminacy characteristic of environmental law sits uncomfortably with the legal system's preference for predictability and certainty. Where possible the law pursues the formulation of clear rules that set out what individuals can and cannot do.[171] Nonetheless, the reality is that environmental issues do not fit in neat and tidy boxes, nor are they amenable to being worked out like mathematical equations.[172] Following a mechanical algorithm is also not what we ask of our courts: we ask for judgment.

Crafting adequate solutions to environmental issues requires proper discussion and debate, engaging with quantitative, qualitative and ethical considerations. Dryzek suggests that properly embracing sustainability requires experimenting with its tenets, and should inspire exploration of all of the multifaceted concepts at play in environmental law (one of those being IVOE).[173] Through this process of exploration Dryzek argues that we will unmask and counter the influence of power, money, and the extent to which human communities have lost a "sense of their ecological foundations".[174] Such an approach is arguably in keeping with

[165] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (OUP 2005), 13: 'no less ancient than the recognition of the rule of law as a political idea is the recognition of laws domanin as a locus of argumentation...a nursery of rhetoric in all its elegant and persuasive but sometimes dubious arts'
[166] Ceri Warnock "Environment and the Law: the Normative Force of Context" (paper presented at the Resource Management Law Association Salmon Lecture, 2018)
[167] Elizabeth Fisher "Environmental Law as 'Hot' Law" (2013) 25 Journal of Environmental Law 347 at 349.
[168] Elizabeth Fisher 'Unpacking the toolbox: or why the public/private divide is important in EC environmental law' in J B Auby and M Freedland (eds) *The Public Law/Private Law Divide: Une Entente Assez Cordiale* (Paris: LGDJ Diffuseur 2004), at 240, as cited in as cited in Ceri Warnock "Reconceptualising specialist environment courts and tribunals" (2017) 37 Legal Studies 391, at 412.
[169] Severinsen and Peart, above n 164, at 33.
[170] Dryzek, above n 142, at 145.
[171] Warnock, above n 166.
[172] Fisher, above n 167, at 240.
[173] Dryzek, above n 142, at 158.
[174] At 234.

Part 2 and the overall configuration of the RMA. The RMA was designed with a permissive structure in mind. It was never intended to operate as a rigid blueprint.[175] Some will undoubtedly argue that properly applied s 7(d) can only mean that development should never proceed. With respect to those critics, that argument does not capture the nuances of environmental decision-making, and also is not consistent with Part 2. According to McShane, not even the strongest supporters of intrinsic value think of it as the only kind of value there is.[176] Sections 6 to 8 are not automatic vetoes.[177] They are however "strong directions, to be borne in mind at every stage of the planning process".[178] The drafters of the RMA acknowledged and accepted that the Act was fundamentally based on objectives that would almost certainly pull decision-makers in different directions. Acknowledgement of this is also clear from the discussion of IVOE in the RMLR Working Papers. Crafting solutions under the RMA should reflect as much. Robust discussion should be had, and IVOE and all its ethical implications should feature in that process.

The environmental reality for New Zealand is as follows: as a nation we are facing continually rising greenhouse gas emissions, worsening freshwater pollution and threatened biodiversity.[179] Despite the National government's suggestion that the RMA is too heavily skewed in favour of environmental protection, New Zealand's environmental record would suggest otherwise. The OECD's 2017 environmental performance review for New Zealand, confirms as much, warning that our growth model, which is largely based on exploiting our natural resources, is approaching its environmental limits.[180] New Zealand has halfheartedly embraced an ecocentric worldview by including the language of intrinsic values in s 7 of the RMA. There has been little effort to properly engage with the concept's ethical foundations. It has been largely disregarded and overshadowed by the Act's human-centric and economic imperatives, diluting its ability to function effectively. Responding to National's 2013 proposal Dr. Jan Wright, then-Parliamentary Commissioner for the Environment, submitted that the RMA's primary purpose was to protect the environment and this led to inevitable

[175] David Grinlinton "Contemporary Environmental Law in New Zealand" in Klaus Bosselmann and David Grinlinton (eds) Environmental Law for a Sustainable Society (New Zealand Centre for Environmental Law, Auckland) 2002, 19 at 38.
[176] McShane, above n 132, at 58.
[177] *New Zealand Rail Ltd v Marlborough District Council* (1993) 2 NZRMA 449, at 86
[178] *McGuire v Hasting District Council* [2001] NZRMA 557 at [21]
[179] OECD "Environmental Performance Reviews: New Zealand 2017 Highlights" (2017) at 3
[180] OECD "Environmental pressures rising in New Zealand" (21 March 2017) <http://www.oecd.org/environment/environmental-pressures-rising-in-new-zealand.htm>

restrictions on activity.[181] She further commented that while we should avoid unnecessarily costly and complex legislation, the RMA was not and should never become an enactment about economic development.[182] Section 7(d) has the potential to be a critical tool in securing environmentally sound outcomes under the RMA. The next step, justified by philosophical scholarship, the historical context from which the RMA was borne, and the factual context of environmental degradation, is a rebalancing of the scales, requiring the creation of mechanisms to ensure the proper application of IVOE.

[181] Dr. Jan Wright -Parliamentary Commissioner for the Environment, above n 96, at 2.
[182] At 8.

V. The Next Step – Mechanisms for Promoting the Application of IVOE

The task now is to attempt to translate IVOE, as an idea, into action and tangible change. We must meaningfully tackle the challenge of consciousness-raising, of making IVOE intelligible. IVOE holds much potential in the abstract, but after 27 years we still do not know how it operates in real life decision-making. At present IVOE is something of an empty platitude. We would likely be better off removing it from the RMA than applying it in the rather hollow sense that it is currently employed. Instead we must explore, discriminate, balance, and engage in both "imaginative perception" and "imaginative action" in order to mete out responses as to what IVOE looks in practice.[183]

In order to achieve this extra assistance is required. According to Tribe:[184]

> "One might think of the evolving framework as a multidimensional spiral along which the society moves by successive stages, according to laws of motion which themselves undergo gradual transformation as the society's position on the spiral, and hence its character, changes. To avoid the spiral's premature closure upon any necessarily tentative set of ideals and expectations, the framework for choice must incorporate procedures for its own evolution."

We must incorporate mechanisms into our resource management scheme that allow for the expression and evolution of IVOE, that enable it to be raised forcefully and considered meaningfully. The remainder of this dissertation endeavours to suggest some mechanisms that could be implemented. It is certainly not an exhaustive list. Moreover, I readily admit to the to the obvious political difficulties of many of these mechanisms. The need to secure significant funding is the most apparent barrier to the following proposals. Nonetheless these suggestions are a starting point for remedying the imbalance that currently exists in Part 2 of the RMA.

A. Inclusion of Māori Voices

[183] Roger JH King "Narrative, Imagination, and the Search for Intelligibility in Environmental Ethics" (1999) 4 Ethics & the Environment 23 at 28.
[184] Tribe, above n 135, at 1345.

Before addressing other more specific mechanisms it is necessary to begin with a general appeal that Māori voices and values be more meaningfully included in resource management decision-making. Of course the issue of Māori participation in environmental law (and indeed many other areas of the law) is a complex topic. The scope and length of this discussion does not allow for extensive exploration here. However, we should acknowledge that indigenous environmental paradigms have long been marginalised by the Western world: their knowledge considered religion or subjective.[185] As a Pakeha person it is outside my authority to express how Māori values are to be interpreted and applied within the RMA framework. It is clear however, that the ethical implications of IVOE for which I have advocated, and the ecocentric worldview more generally share an affinity with tikanga Māori.

Watene suggests that reference to intrinsic values, instead of purely instrumental values, is a significant shift in terms of inclusivity (of alternative worldviews), and opens up the conversation around 'how sustainability ought to be conceived and how the environment ought to be valued.'[186] In attempting to apply IVOE, we should celebrate and spotlight the fact that "[i]ndigenous peoples have special relationships with their land which they see as imbued with spirituality and sacredness not generally comprehensible to others".[187] By comparison ecocentrism and IVOE are ideas that thus far much of the Western world has seemed to struggle to fully grasp, or put into practice. It is therefore my opinion that any effort to engage with IVOE will be much improved if greater attention and development is simultaneously given to the operation of s 7(a) kaitiakitanga.

The RMA's use of kaitiakitanga has been briefly mentioned elsewhere in this dissertation. It is defined in the Act as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship".[188] A more expansive definition is offered in the literature: kaitiakitanga is explained as an inherent obligation to tūpuna and mokopuna to care for the environment. It is not a voluntary obligation but rather an inherited commitment. It embodies the understanding that in order to achieve harmony we must respect and protect the

[185] Tunks, above n 17, at 115.
[186] Krushil Watene "Indigenous Visions of Sustainable Development Law? Continuing the Conversation..." in Klaus Bosselmann, David Grinlinton and Prue Taylor (eds) *Environmental law for a sustainable society* (2nd ed, New Zealand Centre for Environmental Law, Auckland, New Zealand, 2013) 131 at 132.
[187] At 112.
[188] Resource Management Act, s 2

environment.[189] In her moving work *Finding Ecological Justice in New Zealand*, Browning has suggested that at present the law's treatment of 'kaitiakitanga' has "defined and paraphrased [it] almost out of existence".[190] However, properly applied she argues "[k]aitiakitanga embodies ecological justice, in a way that legal ideas so far have struggled to reach. Through kaitiakitanga we might find a place of deference and care for the creatures themselves, not out of a sense of duty, but reverence for them as our kaitiaki, as well as taonga: them as our guardians and vice versa".[191] Accordingly, as we make attempts to solidify IVOE in practical terms we must be cognizant of whose voices we are promoting, and must recognise the knowledge tangata whenua possessed far before the rest of the Western world.

B. Rights of Appeal and Standing

Rights of appeal and standing are both significant procedural matters that can create barriers to engaging in litigation. It is important that they are conceived broadly so as to allow access for those who would advocate for IVOE.

Provided an individual has made a submission, that individual may lodge an appeal with the Environment Court, in regards to resource consents, change of conditions on a resource consent, a proposed plan or policy statement, a plan change or a variation to a proposed plan.[192] However the appeal must be on the basis of a matter raised in that person's submission.[193] Alternatively, a person who has made a submission or possesses an interest in the proceedings greater than the interest of the general public is also permitted under s 274 to join the proceedings of another party.[194] Given that not-for-profits generally seek to advance cases that are in the general public interest this clearly creates a limitation.[195]

It would be my suggestion that ss 120, 274 and cl 14, Schedule 1 be amended to include automatic rights of appeal for not-for-profit groups. 'Not-for-profit' can be defined in the same way that it is for the purposes of the Environmental Legal Assistance Fund: iwi and

[189] Rachael Selby and others *Māori and the environment: kaitiaki* (Huia, Wellington, NZ, 2010) at 1.
[190] Browning, above n 34, at 142.
[191] At 142.
[192] Resource Management Act, s 120(1)(a) and cl 14, sch 1
[193] Resource Management Act, s 120(1B)
[194] Resource Management Act, s 274 (1)(d), (da), (e) and (f)
[195] *Westfiled (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17; *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 137

hapū groups, incorporated societies and community groups. Under s 274(1)(c) the Attorney-General can currently become a party to proceedings for the purpose of representing a relevant aspect of the public interest. A similar provision could be inserted with regard to not-for-profits. Enacting such a provision would actually return s 274 to its form prior to the passing of the Resource Management (Simplifying and Streamlining) Amendment Act 2009. The 2008 version of the Act allowed for any person representing a relevant aspect of the public interest to become a party to proceedings.[196]

Standing refers to the ability of a party to initiate or participate in proceedings under the RMA. Standing is somewhat of a more minor issue under the RMA however it is still worth considering how it could be improved in an effort to encourage the use of IVOE. It becomes relevant in the context of judicial review for non-notification decisions. There are no "hard and fast" rules for establishing standing in the RMA context.[197] There is a trend of taking a liberal approach to standing as was exemplified recently in *Aro Community Council Inc v Wellington City Council*. In that case the High Court acknowledged that the Court's general approach was to recognise standing where a person was shown to have "a honest interest in and bona fide and tenable claim concerning a public issue".[198] Nonetheless, I would again suggest that there should always be a presumption of standing for not-for-profits.[199]

C. Addressing Financial Limitations - Legal Aid and Award of Costs

Addressing and mitigating the financial realities of engaging in environmental litigation will likely go a long way in advancing the ability of environmental and community groups to advocate for the environment and make use of IVOE. As such it will be necessary to expand existing legal aid available for environmental disputes, and to reconsider current practices surrounding award of costs.

[196] Resource Management Act 1991 as at 01 October 2008, s 274 (1)(d)
[197] *Society for the Protection of Auckland City and Waterfront Inc v Auckland City Council* [2001] NZRMA 209 (HC) at [217]
[198] *Aro Community Council Inc v Wellington City Council* [2015] NZHC 532 at [16]
[199] As has been suggested above in the body of this dissertation, not-for-profit could be defined as the same manner as for the purposes of the ELA Fund.

The ELA Fund currently provides a degree of financial support for not-for-profit groups[200] that wish to advance environmental matters that are in the public interest.[201] The ELA Fund is administered by the Ministry for the Environment.[202] The maximum grant from the ELA Fund is set at $50,000 per group per application, and its total annual budget is $600,000.[203] In addition, the ELA Fund is also limited to appearances before the Environment Court and cannot be used in relation to council hearings or higher court appeals.[204] Clearly the existence of any funding for environmental litigation is appreciated, but this is meager when one considers the costs involved in litigation. Grinlinton argues that access to justice is a "system failure" of the RMA.[205] He makes the case that the high costs of litigation and the risk of award of costs have a "chilling effect" on achieving environmental justice.[206] Boer also advocates that the public interest nature of environmental disputes mandates provision of legal aid "which must transcend the boundaries of usual assistance mechanisms."[207] Such provision will enable environmental disputes to be a "fair fight."[208] Preston echoes these sentiments, advocating for the provision of adequate financial resources. He suggests that in keeping with the United Nations Environment Programme Guidelines we must strive to reduce the financial barriers to access to environmental justice.[209] Kos also speaks plainly and openly about the obvious deficiency of the ELA Fund, highlighting that:[210]

> "[S]ums of less than NZD50,000 will have limited effect in achieving any sort of equality of arms in a major infrastructure project where applicant legal and expert witness hearing costs can easily reach NZD2-3 million."

[200] Not-for-profit groups for the purposes of the ELA Fund include iwi and hapū groups, incorporated societies and community groups; see Ministry for the Environment, "Environmental Legal Assistance Fund: Guide for Applicants" (Wellington, June 2017) at 5.
[201] Ministry for the Environment, "Environmental Legal Assistance Fund: Guide for Applicants" (Wellington, June 2017) at 4.
[202] At 4: see p. 7-8 for the criteria that is applied by the Advisory Panel.
[203] At 4.
[204] At 5.
[205] 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, New Zealand, 2013) 21 at 39
[206] At 39.
[207] Ben Boer "Legal Aid in Environmental Disputes" (1986) 1 EPLJ 22, as cited in Caldwell, above n 130, at 76
[208] Caldwell, above n 130, at 76.
[209] Brian Preston, "The effectiveness of the law in providing access to environmental justice: an introduction" (paper presented to the 11th IUCN Academy of Environmental Law Colloquium, Hamilton. New Zealand, 28 June 2013) at 39
[210] Stephen Kos, "Public participation in environmental adjudication: some reflections" (2017) 29 ELM 60 at 61.

Thus, it would be my recommendation that the ELA Fund be expanded. It would also be my recommendation that the fund be made available for council hearings and appeals to higher courts.

In addition, it is necessary to consider the impact of the risk of an award of costs in an unsuccessful case. An award of costs is at the discretion of the Environment Court on a case-by-case basis.[211] That a group is advocating for a matter in the public interest will not provide that group immunity from an award of costs.[212] However, where such a group is unsuccessful, and the Court finds that they conducted their case responsibly and has contributed in a positive manner to the decision-making process of the court, the Court has tended to refrain from making an award for costs.[213] While the Court has recognised the significant contributions of public interest groups, in the past the Court has stressed that it would be unsuitable to restrict its discretion by disabling its ability to make an award of costs against such groups.[214] The Court argues their discretion creates an incentive for potential litigants to be rigorous in considering whether they have an arguable case.[215] With respect to the Court, and in acknowledgement of the importance of their discretion, it is nevertheless likely that the risk of an award of costs presently acts as a barrier to public interest groups who wish to initiate RMA proceedings.[216] I would suggest that it would be prudent to enact a presumption against the award of costs for unsuccessful public interest groups. That presumption however, would be reversible where the group is shown to be vexatious or where the case was not conducted sensibly and responsibly.

D. Establishing an Environmental Defenders Office and a Guardian ad Litem for the Environment

My final suggestion is for the establishment of an EDO and, a Guardian for the Environment. Of all the mechanisms proposed, the establishment of an EDO, and a Guardian are certainly the most important ambitious.

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[211] Resource Management Act, s 285
[212] *Atkinson v Auckland Council* [2011] NZEnvC 301
[213] *Dragljane Properties Ltd v Whangerei District Council* NZEnvC Auckland A 18/97, 18 February 1997
[214] *Peninsula Watchdog Group Inc v Coeur Gold New Zealand Ltd* [1997] NZRMA 501 (HC), at p.15; *Coromandel Hauraki Advocates Inc v Waikato Regional Council* NZEnvC Auckland A 59/99, 28 May 1999, at p.4
[215] *Peninsula Watchdog Group Inc v Coeur Gold New Zealand Ltd*, at p.16
[216] Grinlinton, above n 175, at 39.

I begin with the proposal for an EDO. In the same manner that we have specialist courts for environmental matters we could accept the need for a specialist community law centre dealing principally with environmental issues. Prior to the enactment of the RMA, the government actually contemplated the establishment of a similar organisation. In 1985 the government engaged the help of the EDS and a pilot 'Environmental Advice and Legal Aid Scheme' was launched. The pilot was surveyed in Te Whainga i Te Tika, a report focused more generally on community needs for access to justice and legal services. The pilot study had recommended that a "Public Defenders Office type operation" be established. It was suggested the Office have salaried staff and operate independently from any ministry or department. The aims of that Office would be to assess suitable projects for self-initiated intervention, provide advice to community groups and individuals, assess requests for grants to help community-based environmental intervention, provide advocacy, engage lawyers to assist salaried staff, and ensure that some staff had specialist knowledge of Māori values. The Te Whainga i Te Tika report emphatically supported this proposal and added the strong directive that the Office be "truly community controlled".[217] Unfortunately, the government did not take up this recommendation.

Australia provides a valuable example of the use of EDOs. Currently Australia has nine EDOs in operation. Australian EDOs are accredited members of Australia's National Association of Community Legal Centres. Their core objectives are:[218]

- To protect the environment through law;
- To actively engage in policy and law reform processes to improve environmental laws;
- To ensure that the community receives expert legal advice and representation in public interest environmental matters;
- To build community skills and knowledge to facilitate public participation in environmental decision-making.

In achieving these objectives Australian EDOs employ a team of lawyers, who aid clients through advice and assistance in litigation. The EDO also encompasses a network of scientists and other professionals with the aim to provide guidance on the more technical/scientific aspect of environmental issues. EDOs also tend to run community

[217] Department of Justice *Te Whainga i Te Tika: In search of justice* (1986) at 86–87.
[218] EDOs of Australia "What We Do" <https://www.edo.org.au/what_we_do>

workshops, and publish legal guides in order to enable the general public to properly engage in often complex environmental issues. In pursuing their objectives EDOs also regularly write submissions on key environmental developments and are also often engaged by the government to provide expertise on certain matters.

The case of *Warworth Mining Limited v Bulga Milbrodale Progress Association Inc*. is a particularly pertinent example of the potential for success of Australian EDOs. In that case EDO New South Wales ('EDO NSW') representing the residents of Bulga, challenged the government's decision to allow Rio Tinto to expand an existing mine located near Bulga. Ultimately the case reached the Court of Appeal, and the NSW Land and Environment Court's ruling to overturn the government's decision was upheld. With the help of the EDO NSW a "tiny town" fought back against "one of the world's biggest coal-mining companies", and won.[219]

It is therefore my recommendation that New Zealand pursue the establishment of an EDO under the wider umbrella of Community Law Centres o Aotearoa. It would appear that the recommendations contained in the Te Whainga i Te Tika report are still fit-for-purpose. That advice should be heeded. In addition, such an organisation should adopt similar objectives and practices to the Australian EDOs as outlined above.

I turn now to the proposal for a Guardian. Such a concept is not new, and in fact has been a topic of interest in the academic literature for the last few decades. It has been most famously discussed by Stone in his seminal 1972 article "Should Trees Have Standing: Towards Legal Rights for Natural Objects". Stone suggests that we might enable an individual or group to request that the court grant them guardianship over a natural object. That individual or group would then be able to initiate proceedings in the name of that natural object where it was threatened.[220] Stone emphasises the need for a guardian outside of "the institution",[221] and claims that there will be no shortage of environmental interest groups eager to have guardianship status conferred upon them. He adds that there would of course need to be

219 Bernard Lagan "The Town That Wouldn't Disappear" The Global Mail <http://tgm-archive.github.io/bulga/>
[220] Christopher Stone "Should Trees Have Standing? - Towards Legal Rights for Natural Objects" (1972) 45 Southern California Law Review 450 at 464.
[221] At 472.

mechanisms for revoking guardianship in the case of misconduct. Ultimately Stone claims that the use of a guardian secures a voice for the environment otherwise unheard, and that:[222]

> "The guardian would urge before the court injuries not presently cognizable – the death of eagles and inedible grabs, the suffering of sea lions, the loss from the face of the earth of species of commercially valueless birds, the disappearance of a wilderness area."

Others have taken up Stone's mantle in the passing years. Some like Caldwell advocate for an institutional role. She suggests that we should look to establish an official body to function as a "Guardian-General for the Environment". Preston is also a strong champion for the prospects of human agency on behalf of non-human nature. He criticises our tendency to exclude non-human nature from our community of justice, and emphasises the need to expand our conception of who can participate in environmental decision-making processes. Preston acknowledges Stone's argument for a legal spokesperson for nature and likewise proposes that proxy representation could be run through an EDO. Space could also be made for Guardians to participate in environmental reporting and monitoring, and also act as an advocate in plan-making processes.

New Zealand has already shown itself capable of fashioning imaginative means of engaging with the environment. Recently the Crown has recognised legal personality for both Te Urewera and the Whanganui River as part of the process of Te Tiriti settlement.[223] Ruru describes this approach as a "disruptive union" of Western legal personality (as has been used for corporations), and the practice of Te Ao Māori, which understands the environment as an ancestor and a living entity.[224] Trustees are appointed as the human face[225] of both Te Urewera and Te Awa Tupua (the legal entity that is the Whanganui River). Trustees act on behalf of these natural objects, bringing a Māori environmental lens to decision-making. Given however that legal personality has been created in the context of a restitutionary settlement process it is "incorrect to assume that [Māori] will always favour non-

[222] At 475.
[223] Te Urewera Act 2014; Te Awa Tupua (Whanganui River Claims Settlement) Act 2017
[224] Simon Day "If the hills could sue: Jacinta Ruru on legal personality and a Māori worldview" (November 26 2017) The Spinoff <https://thespinoff.co.nz/atea/atea-otago/27-11-2017/if-the-hills-could-sue-jacinta-ruru-on-legal-personality-and-a-maori-worldview/>
[225] This term is borrowed from s 18(2) of the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

development."[226] This version of guardianship is not solely focused on environmental interests: trustees will also represent the interests of iwi. Nonetheless, it is also a primary task for trustees to promote and protect the health and wellbeing of Whanganui River and Te Urewera. Trustees under the Te Awa Tupua Act are required to uphold the Tupue te Kawa – this denotes both physical and spiritual aspects of the environment.[227] Likewise the Te Urewera Act 2014 recognises that Te Urewera is a place of great spiritual value, with its own mana and mauri[228] and this must be given expression by the Board.[229] The national-scale model I propose for a Guardian should likewise seek to uphold intangible values in the environment. However, without the context of Te Tiriti settlement, my Guardian is created for the sole benefit of the environment.

In addition, it is worth briefly noting that New Zealand legislation already enables the appointment of "guardians".[230] In 1990 the Conservation Act 1987 was amended to enable the appointment of guardians for Lakes Manapōuri, Monowai and Te Anau.[231] The role of these guardians is very limited and mostly advisory. Guardians for Lakes Manapōuri and Te Anau are required to make recommendations on any matters arising from the effects of the Manapōuri-Te Anau hydroelectric power scheme. Guardians for Lake Monowai are similarly required to make recommendations in relation to the effects of the Monowai Power Scheme.[232] Nonetheless, the existence of these guardians recognises the value of advocates for natural objects, and implicitly involves a degree of accountability to the environment.

I recommend that Stone's guardian be adopted in an institutional form. Such a Guardian could be run through an EDO or adopted as a stand-alone body. A Guardian would be both capable of initiating proceedings and participating in higher-level resource management decision-making. The core function of the Guardian would be to act as an advocate solely for the environment, and it could be a stated objective for a Guardian to give expression to, and

[226] James D K Morris and Jacinta Ruru "Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationship to Water?" (2010) 14 AILR 49 at 58, as cited in Tom Barraclough "How Far Can the Te Awa Tupua (Whanganui River) Proposal Be Said To Reflect the Rights of Nature in New Zealand?" (LLB (Hons) Dissertation, University of Otago, 2013) at 56
[227] Te Awa Tupua (Whanganui River Claims Settlement Act), s 13
[228] Te Urewera Act, s 3
[229] Te Urewera Act, s 18(2)(iii)
[230] Quotation marks are used to indicate that the form of guardian already recognised is not the same as the Guardian I am advocating for.
[231] Christopher Rodgers "A new approach to protecting ecosystems: The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017" (2017) 19 Environmental Law Review 266 at 271.
[232] Conservation Act, Part 2B s 6X(2)(a) and (b)

pursue the recognition of IVOE. Critically, the Guardian would be a strong conduit for advancing arguments about the relevance and requirements of recognising IVOE. Elsewhere, advocates for marginalised and underrepresented groups have shown themselves to be resourceful and innovative by bringing philosophical arguments into the context of litigation. *Romer v Evans* is an apt, though slightly offbeat, example. In that case a group of plaintiffs challenged homophobic laws enacted by the State of Colorado, with both sides calling on expert witnesses to discuss philosophical matters. Martha Nussbaum, a celebrated philosopher, was one such witness. Nussbuam wrote of her experience, suggesting that in the context of that case, the philosophical matters she had discussed were a radical and valuable way to confront our presumed "natural" practices, and to acknowledge their "local and nonuniversal" nature.[233] She further argued that bringing such information into court helps to "get our own arguments right – by removing a false sense of inevitability about our own judgments and practices and by showing us moral arguments of great rational power."[234] I am hopeful that where traditional environmental litigants have failed to do so, a Guardian would be more likely to forcefully introduce philosophical evidence relevant to advancing IVOE.

[233] Martha Craven Nussbaum *Sex & social justice* (Oxford University Press, New York, 1999) at 301.
[234] At 303.

Conclusion

Underlying the core claims of this dissertation is the belief that we should expect more and reach for more in our environmental decision-making. Environmental problems are complicated and multi-faceted, and the impacts of our use and development of the environment are often not fully known. Part 2 attempts to address these problems by adopting a framework of sustainable management as a guiding purpose. Within this framework, IVOE is supposed to provide further insight as to how sustainable management can be achieved. Thus far IVOE has arguably led to greater confusion than it has to clarity. It has largely been misunderstood by the judiciary or simply disregarded, and no one has tried meaningfully to advance a fuller understanding. Based on the case law there is a strong suggestion that IVOE could be deleted from the RMA with few consequences.

This dissertation however, has attempted to make the case for IVOE as a potentially powerful legislative tool. I have argued that the manner in which IVOE is currently applied does little to recognise its potential, or its ability to guide decision-making under the RMA. Within Part 2 of the RMA IVOE is just one consideration, it must necessarily be applied alongside a host of other factors: it is not a veto. In this sense we must realise the inherent limitations of the concept. Nevertheless, properly engaging with IVOE could unsettle our existing epistemologies and challenge our assumptions about humankind's right to exist on this planet. It could force us to reflect more deeply, in the process of resource management decision-making, on the space we take up on Earth and the consequences of our decisions. It is not a silver bullet, but it does invite discussion, deliberation and a narrative around that ways in which humans have assumed superiority and proceeded as such in their treatment of the environment.

The last National government made it clear that they believed the RMA had failed New Zealand in its ability to properly manage the environment. It is unclear what the present Labour government will do with regards to the RMA. Whatever happens, it would be my strong contention that IVOE, and the necessary mechanisms to ensure its application, should be retained in any piece of environmental legislation that seeks to properly manage the environment in a manner that provides both humankind and the planet a hope of a future.

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